

ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDERS TO AID PUBLIC COMMENT

In the Matter of Danaher Corporation and MDS, Inc., File No. 091-0159

I. Introduction

The Federal Trade Commission (“Commission”) has accepted from Danaher Corporation (“Danaher”) and MDS, Inc. (“MDS”), subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”), which is designed to remedy the anticompetitive effects resulting from Danaher’s acquisition of the stock and assets of MDS Analytical Technologies (US) Inc. (“MDS Analytical Technologies”), a subsidiary of MDS.

Under the terms of the Consent Agreement, Danaher will divest the assets of MDS’s Arcturus business segment, which includes assets relating to the manufacture and sale of laser microdissection devices and associated reagent products, to Life Technologies Corp. (“Life Technologies”) within 10 days after the date the Decision and Order (“Order”) becomes final. The proposed Consent Agreement has been placed on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the proposed Consent Agreement and will decide whether it should withdraw from the proposed Consent Agreement, modify it, or make it final.

On September 2, 2009, Danaher entered into an agreement to acquire the stock and assets of MDS Analytical Technologies from MDS. The Commission’s complaint alleges the facts described below and that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by lessening competition in the market for laser microdissection devices.

II. The Parties

Danaher, headquartered in Washington, DC, is a global supplier of professional, medical, industrial, commercial, and consumer products. Danaher’s Leica Microsystems (“Leica”) business operates within its Medical Technologies segment. Leica manufactures and sells laser microdissection devices.

Headquartered in Mississauga, Ontario, MDS is a life sciences company that operates three core businesses, MDS Analytical Technologies, MDS Nordion, and MDS Pharma Services. MDS’s Arcturus business, which assembles and sells laser microdissection devices and chemical reagents, is a part of MDS Analytical Technologies.

III. Laser Microdissection Devices

Laser microdissection devices are used to separate small groups of cells — or even a single cell — from larger tissue samples for specialized tests, such as DNA analysis, RNA analysis, or protein profiling. These devices are fully integrated machines that incorporate a laser, a computer, and a monitor with a microscope. Laser microdissection is a particularly

useful technique in the fields of molecular pathology, cell biology, oncology, and forensic medicine where scientists and researchers must separate small cell samples from heterogeneous tissue in order to analyze disease progression and develop more targeted treatments. For these scientists and researchers, the evidence indicates that laser microdissection devices constitute a relevant market for antitrust inquiry. Although other techniques exist for separating cells or proteins, none are as precise or reliable as laser microdissection. Accordingly, if the price of laser microdissection devices were to increase by five or ten percent, customers would not switch to any other technique or device.

The relevant geographic area in which to evaluate the market for laser microdissection devices is no larger than North America. Customers are unwilling to consider laser microdissection device suppliers that do not have a service and support infrastructure that can provide a timely response to a maintenance call. Additionally, customers in North America strongly prefer laser microdissection suppliers that have an established reputation among their colleagues in the United States and the rest of North America. Whether the geographic market is defined as North America or the United States, however, is unlikely to have any impact on the ultimate antitrust analysis because the same firms compete in each area.

With only four current competitors, the market for laser microdissection devices is highly concentrated. The proposed acquisition would combine Danaher's Leica brand of laser microdissection devices with MDS's Arcturus brand, leaving only three viable competitors. Laser microdissection devices are generally purchased through a competitive evaluation process. The four available products are highly differentiated, which leads to competition in a number of areas, including features, reliability, performance, price, and service. The elimination of the direct competition between the Leica and Arcturus devices could allow Danaher to exercise market power unilaterally by increasing prices or decreasing innovation or service, particularly to those customers who view Leica and Arcturus as their top two choices.

Neither new entry nor repositioning and expansion sufficient to deter or counteract the anticompetitive effects of the proposed acquisition in the laser microdissection market is likely to occur within two years. A *de novo* entrant to the laser microdissection market would face significant impediments to timely and sufficient entry. A firm would have to design, develop, and test a product with at least comparable functionality to the existing devices, which would also require navigating around the patents of the current competitors. Furthermore, a new entrant would have to establish a service and support infrastructure in North America. Perhaps most importantly, a new entrant would have to engage leading researchers and practitioners to develop a reputation for quality and reliability. For existing foreign firms that currently sell laser microdissection devices outside of North America, cultivating the necessary reputation is a major barrier to competitively significant entry into the North American market. It can take several years to acquire a reputation on par with the current laser microdissection device brands in order to make a significant market impact. Accordingly, entry by a foreign firm is unlikely to make a significant market impact sufficient to counteract any anticompetitive effects from the proposed transaction within the next two years.

IV. The Consent Agreement

The proposed Consent Agreement eliminates the competitive concerns raised by Danaher's proposed acquisition of MDS Analytical Technologies by requiring the divestiture of MDS's assets relating to the manufacture and sale of laser microdissection devices. Danaher and MDS have agreed to sell the Arcturus assets, including the laser microdissection device business, as well as a related reagents business, to Life Technologies within 10 days after the date the Order becomes final.

Life Technologies possesses the knowledge, experience, and financial viability to successfully purchase and manage the divestiture assets and replace MDS as an effective competitor in the laser microdissection market. Headquartered in Carlsbad, California, Life Technologies is a life sciences company that manufactures and sells scientific research equipment that it distributes throughout the world. Life Technologies does not currently compete against Danaher and MDS in the sale of laser microdissection devices, but it does manufacture and sell reagents for downstream analysis using tissue samples obtained through laser microdissection. The Arcturus business would be a natural fit into Life Technologies's product portfolio, since both sets of products are marketed to the same customer base.

Pursuant to the Consent Agreement, Life Technologies would receive all the assets necessary to operate MDS's current laser microdissection business, including equipment used to assemble the Arcturus laser microdissection device, Arcturus software, and reagents that are sold as complementary downstream products to Arcturus customers. In addition to key Arcturus employees, who would be made available to Life Technologies, the Consent Agreement requires MDS to provide Life Technologies with access to certain other employees who may be needed to facilitate the transition of the Arcturus laser microdissection assets. The Consent Agreement also requires MDS to transfer all the Arcturus intellectual property, including patent licenses for infrared laser microdissection device technology. Divestiture of all of the Arcturus laser microdissection assets will ensure that Life Technologies has a full line of high-quality laser microdissection devices, enabling it to compete immediately with the merged entity.

The Commission may appoint an interim monitor to oversee the divestiture of the Arcturus laser microdissection business at any time after the Consent Agreement has been signed. In order to ensure that the Commission remains informed about the status of the proposed divestitures, the proposed Consent Agreement requires the parties to file periodic reports with the Commission until the divestiture is accomplished. If the Commission determines that Danaher has not fully complied with its obligations under the Order within 10 days after the date the Order becomes final, the Commission may appoint a divestiture trustee to divest the Arcturus assets to a Commission-approved acquirer.

The purpose of this analysis is to facilitate public comment on the Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Order or the Agreement to Maintain Assets, or to modify their terms in any way.