

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:      **Jon Leibowitz, Chairman**  
                                 **Pamela Jones Harbour**  
                                 **William E. Kovacic**  
                                 **J. Thomas Rosch**

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<b>In the Matter of</b>	)	
	)	
<b>DANAHER CORPORATION,</b>	)	<b>Docket No. C-4283</b>
<b>a corporation,</b>	)	
	)	
<b>and</b>	)	
	)	
<b>MDS INC.,</b>	)	
<b>a corporation.</b>	)	
_____	)	

**ORDER TO MAINTAIN ASSETS**

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Danaher Corporation (“Danaher”) of certain assets and voting securities of Respondent MDS Inc. (“MDS”), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34,

the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Respondent Danaher is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 2099 Pennsylvania Avenue, N.W., 12<sup>th</sup> Floor, Washington, DC 20006.
2. Respondent MDS Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Canada, with its headquarters address at 2810 Matheson Blvd., Suite 500, Mississauga, Ontario L4W4V9, Canada, and the offices of its United States subsidiary, MDS Analytical Technologies (US) Inc. at 1311 Orleans Drive, Sunnyvale, CA 94089-1136.
3. The Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

## **ORDER**

### **I.**

**IT IS ORDERED** that, as used in this Order to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final, the Decision and Order), which are incorporated herein by reference and made a part hereof, shall apply:

- A. “Danaher” means Danaher Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Danaher and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “MDS” means MDS Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by MDS, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Respondents” mean Danaher and MDS, individually and collectively.
- D. “Commission” means the Federal Trade Commission.
- E. “Decision and Order” means the:
  1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final Decision and Order by the Commission; and

2. Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission in this matter.
- F. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph IV of the Decision and Order.
- G. “Orders” means the Decision and Order and this Order to Maintain Assets.

## II.

**IT IS FURTHER ORDERED** that from the date this Order to Maintain Assets becomes final:

- A. Until the Closing Date, Respondents shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of the Arcturus Life Sciences Business, to minimize any risk of loss of competitive potential for the Arcturus Life Sciences Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Arcturus Life Sciences Business except for ordinary wear and tear. Respondents shall not sell, transfer, encumber or otherwise impair the Arcturus Life Sciences Business Assets (other than in the manner prescribed in the Decision and Order) nor take any action that lessens the full economic viability, marketability or competitiveness of the Arcturus Life Sciences Business.
- B. Until the Closing Date, Respondents shall maintain the operations of the Arcturus Life Sciences Business in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such business) and/or as may be necessary to preserve the marketability, viability, and competitiveness of such Arcturus Life Sciences Business and shall use their best efforts to preserve the existing relationships with the following: suppliers; vendors and distributors; customers; Agencies; employees; and others having business relations with the Arcturus Life Sciences Business. Respondents’ responsibilities shall include, but are not limited to, the following:
1. providing the Arcturus Life Sciences Business with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the Arcturus Life Sciences Business;
  2. continuing, at least at their scheduled pace, any additional expenditures for the Arcturus Life Sciences Business authorized prior to the date the Consent Agreement was signed by Respondents including, but not limited to, all Research and Development, manufacturing, distribution, marketing and sales expenditures;
  3. providing such resources as may be necessary to respond to competition against each of the Laser Microdissection Products and/or to prevent any diminution in sales of each of

the Laser Microdissection Products during and after the Acquisition process and prior to the complete transfer and delivery of the related Arcturus Life Sciences Business Assets to an Acquirer;

4. providing such resources as may be necessary to maintain the competitive strength and positioning of each of the Laser Microdissection Products;
  5. making available for use by the Arcturus Life Sciences Business funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the assets related to such business, including without limitation, the Arcturus Life Sciences Business Assets;
  6. providing the Arcturus Life Sciences Business with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of the Arcturus Life Sciences Business;
  7. providing such support services to the Arcturus Life Sciences Business as were being provided to such business by Respondent(s) as of the date the Consent Agreement was signed by Respondents; and
  8. maintaining a work force at least as equivalent in size, training, and expertise to what has been associated with the Laser Microdissection Products for the relevant Laser Microdissection Product's last fiscal year.
- C. Until Respondents fully and finally transfer and deliver a particular Arcturus Life Sciences Business Asset to the Acquirer, Respondents shall maintain the full economic viability, marketability and competitiveness of such Arcturus Life Sciences Business Asset, shall prevent its destruction, removal, wasting, deterioration, or impairment and shall maintain such Arcturus Life Sciences Business Asset in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance).
- D. Until the Closing Date, Respondents shall provide all the related Laser Microdissection Product Core Employees with reasonable financial incentives to continue in their positions and to Research and Develop, and manufacture the Laser Microdissection Products consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of such Laser Microdissection Products pending divestiture. Such incentives shall include a continuation of all employee benefits offered by Respondent(s) until the Closing Date, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by Law), and additional incentives as may be necessary to prevent any diminution of the relevant Laser Microdissection Product's competitiveness.
- E. Respondents shall:
1. for a period of twelve (12) months from the Closing Date, provide the Acquirer with the opportunity to enter into employment contracts with the Laser Microdissection Product

Core Employees. Each of these periods is hereinafter referred to as the “Laser Microdissection Product Core Employee Access Period(s)”;

2. not later than the earlier of the following dates: (1) ten (10) days after notice by staff of the Commission to Respondents to provide the Employee Information; or (2) ten (10) days after written request by an Acquirer, provide such Acquirer or Proposed Acquirer(s) with the Employee Information related to the Laser Microdissection Product Core Employees. Failure by Respondents to provide the Employee Information for any Laser Microdissection Product Core Employee within the time provided herein shall extend the Laser Microdissection Product Core Employee Access Period(s) with respect to that employee in an amount equal to the delay; and
3. during the Laser Microdissection Product Employee Access Period(s), not interfere with the hiring or employing by the relevant Acquirer of the Laser Microdissection Product Core Employees, and shall remove any impediments within the control of Respondent(s) that may deter these employees from accepting employment with such Acquirer, including, but not limited to, any noncompete provisions of employment or other contracts with Respondent(s) that would affect the ability or incentive of those individuals to be employed by such Acquirer. In addition, Respondents shall not make any counteroffer to a Laser Microdissection Product Core Employee who receives a written offer of employment from the Acquirer;

*provided, however,* that, subject to the conditions of continued employment prescribed in the Orders, this Paragraph II.E.3. shall not prohibit Respondents from continuing to employ any Laser Microdissection Product Core Employee under the terms of such employee’s employment with Respondent(s) prior to the date of the written offer of employment from the Acquirer to such employee.

F. Respondents shall:

1. not use, directly or indirectly, any Confidential Business Information related to the Research and Development, manufacturing, marketing, or sale of the Arcturus Life Sciences Business other than as necessary to comply with the following:
  - a. the requirements of the Orders;
  - b. Respondents’ obligations to the Acquirer under the terms of any Remedial Agreement related to the Arcturus Life Sciences Business; or
  - c. applicable Law;
2. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Entity except the Acquirer or other Entities specifically authorized by the Acquirer to receive such information;

3. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sales of the Laser Microdissection Products to the employees associated with business related to those Retained Products that are used or suitable for use in commerce for the same or similar purposes as the Laser Microdissection Products; and
  4. institute procedures and requirements to ensure that the above-described employees:
    - a. do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of the Orders; and
    - b. do not solicit, access or use any Confidential Business Information that they are prohibited under the Orders from receiving for any reason or purpose.
- G. Not later than thirty (30) days following the Closing Date, Respondents shall provide to all of Respondents' employees and other personnel who may have access to Confidential Business Information related to the Arcturus Life Sciences Business written or electronic notification of the restrictions on the use of such information by Respondents' personnel. At the same time, if not provided earlier, Respondents shall provide a copy of such notification by e-mail with return receipt requested or similar transmission, and keep an electronic file of such receipts for one (1) year after the Closing Date. Respondents shall provide a copy of the form of such notification to the Acquirer, the Interim Monitor, and the Commission. Respondents shall also obtain from each employee covered by this Paragraph II.G. an agreement to abide by the applicable restrictions. Respondents shall maintain complete records of all such agreements at Respondents' registered office within the United States and shall provide an officer's certification to the Commission stating that such acknowledgment program has been implemented and is being complied with. Respondents shall monitor the implementation by its employees and other personnel of all applicable restrictions, and take corrective actions for the failure of such employees and personnel to comply with such restrictions or to furnish the written agreements and acknowledgments required by the Orders. Respondents shall provide the relevant Acquirer with copies of all certifications, notifications and reminders sent to Respondents' employees and other personnel.
- H. Respondents shall adhere to and abide by the Remedial Agreements (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of the Orders, it being understood that nothing in the Orders shall be construed to reduce any obligations of Respondents under such agreement(s)), which are incorporated by reference into this Order to Maintain Assets and made a part hereof.
- I. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Arcturus Life Sciences Business through its full transfer and delivery to an Acquirer, to minimize any risk of loss of competitive potential for the Arcturus Life Sciences Business and to prevent the destruction, removal, wasting,

deterioration, or impairment of any of the Arcturus Life Sciences Business Assets except for ordinary wear and tear.

### III.

**IT IS FURTHER ORDERED** that:

- A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor (“Interim Monitor”) to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders and the Remedial Agreements.
- B. The Commission shall select the Interim Monitor, subject to the consent of Respondent Danaher, which consent shall not be unreasonably withheld. If Respondent Danaher has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent Danaher of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.
- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents’ compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.
- D. If an Interim Monitor is appointed, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
  - 1. the Interim Monitor shall have the power and authority to monitor Respondents’ compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission;
  - 2. the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission; and
  - 3. the Interim Monitor shall serve until, the later of:
    - a. the date of completion by Respondents of the divestiture of all Arcturus Life Sciences Business Assets and the transfer of the Manufacturing Technology, Product Intellectual Property, and Product Licensed Intellectual Property in a manner that fully satisfies the requirements of the Decision and Order; and

- b. with respect to each Laser Microdissection Product, the date the Acquirer (or the Designee(s) of such Acquirer) has obtained all Product Approvals necessary to manufacture, market, import, export, and sell such Laser Microdissection Product and is able to manufacture such Laser Microdissection Product independently of Respondents;

*provided, however,* that the Interim Monitor's service shall not exceed five (5) years from the date on which the Decision and Order becomes final;

*provided further,* that the Commission may shorten or extend this period as may be necessary or appropriate to accomplish the purposes of the Orders.

- E. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with their obligations under the Orders, including, but not limited to, their obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.
- F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.
- G. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
- H. Respondents shall report to the Interim Monitor in accordance with the requirements of the Orders and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by the Acquirer with respect to the performance of each Respondent's obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by each Respondent of its obligations under the Orders; *provided, however,* beginning one hundred twenty (120) days after each Respondent has filed its final report pursuant to Paragraph VII.B. of the Decision



and Order, and every one hundred twenty (120) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by the Acquirer toward:

1. obtaining all of the relevant Product Approvals necessary to manufacture and sell, the Laser Microdissection Products independently of Respondents and;
  2. securing sources of supply of the inputs and components for the Laser Microdissection Products from entities other than Respondents.
- I. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- J. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- K. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.
- L. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.
- M. The Interim Monitor appointed pursuant to this Order to Maintain Assets may be the same Entity appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

#### IV.

**IT IS FURTHER ORDERED** that within thirty (30) days after the date this Order to Maintain Assets becomes final, and every thirty (30) days thereafter until Respondents have fully complied with their obligations to assign, grant, license, divest, transfer, deliver or otherwise convey relevant assets as required by Paragraph II.A. of the Decision and Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order to Maintain Assets and the related Decision and Order; *provided, however*, that, after the Decision and Order in this matter becomes final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission at the same time as, the

reports required to be submitted by Respondents pursuant to Paragraph VII of the Decision and Order.

## V.

**IT IS FURTHER ORDERED** that Respondents shall notify the Commission at least thirty (30) days prior to:

- A. any proposed dissolution of a Respondent;
- B. any proposed acquisition, merger or consolidation of a Respondent; or
- C. any other change in a Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Orders.

## VI.

**IT IS FURTHER ORDERED** that, for purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to any Respondent made to its principal United States offices or headquarter's address, such Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. access, during business office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of such Respondent related to compliance with the Orders, which copying services shall be provided by such Respondent at the request of authorized representative(s) of the Commission and at the expense of the Respondent; and
- B. to interview officers, directors, or employees of such Respondent, who may have counsel present, regarding such matters.

## VII.

**IT IS FURTHER ORDERED** that this Order to Maintain Assets shall terminate on the earlier of:

- A. Three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or

B. The later of:

1. The day after the divestiture of all of the Arcturus Life Sciences Business Assets, as required by and described in the Decision and Order, has been completed and each Interim Monitor (if appointed), in consultation with Commission staff and the Acquirer(s), notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers and other transitions related to such divestitures are complete, or the Commission otherwise directs that this Order to Maintain Assets is terminated; or
2. Three (3) days after the related Decision and Order becomes final.

By the Commission.

Donald S. Clark  
Secretary

SEAL  
ISSUED: January 27, 2010