

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Jon Leibowitz, Chairman
William E. Kovacic
J. Thomas Rosch
Edith Ramirez
Julie Brill

In the Matter of)
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)
 NOVARTIS AG,) Docket No. C-4296
 a corporation.)
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ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Novartis AG (“Novartis” or “Respondent”) of a majority of the outstanding voting shares of Alcon Inc., (“Alcon”), and Respondent 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 Respondent 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

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent 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 Respondent 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 Novartis is a corporation organized, existing and doing business under and by virtue of the laws of the Swiss Confederation, with its principal executive offices located at Lichtstrasse 35, CH-4056 Basel, Switzerland and the address of its United States subsidiary, Novartis Pharmaceuticals Corporation (a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware), located at 59 Route 10, East Hanover, New Jersey 07936.
2. Alcon, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Swiss Confederation, with its principal executive offices located at Bösch 69, P.O. Box 62, Hünenberg, Switzerland, and the principal offices of its United States subsidiary, Alcon Laboratories, Inc. (a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware), located at 6201 South Freeway, Fort Worth, Texas 76134-2099.
3. The Commission has jurisdiction of the subject matter of this proceeding and of Respondent, 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. “Novartis” or “Respondent” means Novartis AG, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Novartis, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition Date, the term “Novartis” shall include Alcon.
- B. “Alcon” means Alcon, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Alcon, Inc.
- C. “Commission” means the Federal Trade Commission.
- D. “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.

- E. “Miotics Product Business(es)” means the business of the Respondent within the Geographic Territory specified in the Decision and Order related to the Miotics Products, including the research, Development, manufacture, distribution, marketing, and sale of the Miotics Products and the assets related to such business, including, without limitation, the Miotics Product Assets.
- F. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph III 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 Respondent fully transfers and delivers each of the respective Miotics Product Assets to an Acquirer, Respondent shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of each of the related Miotics Product Businesses, to minimize any risk of loss of competitive potential for such Miotics Product Businesses, and to prevent the destruction, removal, wasting, deterioration, or impairment of such Miotics Product Businesses except for ordinary wear and tear. Respondent shall not sell, transfer, encumber or otherwise impair such Miotics Product 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 related Miotics Product Businesses.
- B. Until Respondent fully transfers and delivers all of the Miotics Product Assets to an Acquirer, Respondent shall maintain the operations of the Miotics Product Businesses 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 the Miotics Product Businesses and shall use its best efforts to preserve the existing relationships with the following: suppliers; vendors and distributors; the High Volume Accounts; customers; Agencies; employees; and others having business relations with the Miotics Product Businesses. Respondent’s responsibilities shall include, but are not limited to, the following:
 - 1. providing the Miotics Product Businesses 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 Miotics Product Business;

2. continuing, at least at their scheduled pace, any additional expenditures for each of the respective Miotics Product Businesses authorized prior to the date the Consent Agreement was signed by Respondent including, but not limited to, all research, Development, manufacturing, distribution, marketing and sales expenditures;
 3. providing such resources as may be necessary to respond to competition against each of the Miotics Products and/or to prevent any diminution in sales of each of the Miotics Products during and after the Acquisition process and prior to the complete transfer and delivery of the related Miotics Product Assets to an Acquirer;
 4. providing such resources as may be necessary to maintain the competitive strength and positioning of each of the Miotics Products at the related High Volume Accounts;
 5. making available for use by each of the respective Miotics Product Businesses 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 Miotics Product Assets;
 6. providing the Miotics Product Businesses with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of the Miotics Product Business; and
 7. providing such support services to the Miotics Product Businesses as were being provided to such business by Respondent as of the date the Consent Agreement was signed by Respondent.
- C. Until Respondent fully transfers and delivers the Miotics Product Assets to an Acquirer, Respondent shall maintain a work force at least as equivalent in size, training, and expertise to what has been associated with the Miotics Products for the Miotics Product's last fiscal year.
- D. Until the Closing Date, Respondent shall provide all the related Miotics Product Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, and manufacture the Miotics Products consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Miotics Products pending divestiture. Such incentives shall include a continuation of all employee benefits offered by Respondent 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 Miotics Product's competitiveness.

- E. Pending divestiture of the Miotics Product Assets, Respondent shall:
1. not use, directly or indirectly, any Confidential Business Information related to the research, Development, manufacturing, marketing, or sale of the Miotics Product(s) other than as necessary to comply with the following: (1) the requirements of the Orders; (2) Respondent's obligations to an Acquirer under the terms of any Remedial Agreement; or (3) applicable Law;
 2. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except the Acquirer or Persons specifically authorized by the Acquirer or the Commission 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 Miotics Products to the employees associated with businesses related to those Retained Products that are indicated for the same use as the Miotics 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 this Order to Maintain Assets; and
 - b. do not solicit, access or use any Confidential Business Information that they are prohibited under this Order to Maintain Assets from receiving for any reason or purpose.
- F. Not later than thirty (30) days following the Closing Date, Respondent shall provide to all of Respondent's employees and other personnel who may have access to Confidential Business Information related to the Miotics Products written notification of the restrictions on the use of such information by Respondent's personnel. Respondent shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the Closing Date. Respondent shall provide a copy of such notification to the Acquirer. Respondent shall maintain complete records of all such agreements at Respondent's 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. Respondent 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 this Order. Respondent shall provide the Acquirer with copies of all certifications, notifications and reminders sent to Respondent's personnel.

- G. Respondent 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 Respondent to the Acquirer under such agreement(s)), which are incorporated by reference into this Order to Maintain Assets and made a part hereof.
- H. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Miotics Product Businesses within the Geographic Territory through their full transfer and delivery to an Acquirer, to minimize any risk of loss of competitive potential for the Miotics Product Businesses within the Geographic Territory, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Miotics Product Assets wherever located in the World except for ordinary wear and tear.

III.

IT IS FURTHER ORDERED that:

- A. At any time after Respondent signs the Consent Agreement in this matter, the Commission may appoint a monitor (“Interim Monitor”) to assure that Respondent expeditiously complies with all of its obligations and perform all of its responsibilities as required by the Order to Maintain Assets, the Decision and Order, and the Remedial Agreements.
- B. The Commission shall select the Interim Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent 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 of the identity of any proposed Interim Monitor, Respondent 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, Respondent 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 Respondent’s 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, Respondent 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 Respondent’s 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.
3. The Interim Monitor shall serve until the date of completion by Respondent of the divestiture of all Miotics Products and the transfer and delivery of the related Product Manufacturing Technology in a manner that fully satisfies the requirements of the Orders and until the earliest of:
 - a. the date the Acquirer (or the Designee(s) of the Acquirer) is approved by the FDA to manufacture the Miotics Products and able to manufacture the Miotics Products in commercial quantities, in a manner consistent with cGMP, independently of Respondent and Alcon;
 - b. the date the Acquirer notifies the Commission and the Respondent of its intention to abandon its efforts to manufacture the Miotics Products;
 - c. the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer has abandoned its efforts to manufacture the Miotics Products, or
 - d. five (5) years from the Closing Date.

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

4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondent's compliance with its obligations under the Order, including, but not limited to, its obligations related to the relevant assets. Respondent 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 Respondent's compliance with the Order.
5. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent, 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 Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.
6. Respondent 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.

7. Respondent shall report to the Interim Monitor in accordance with the requirements of this Order 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 Respondent, and any reports submitted by the Acquirer with respect to the performance of Respondent's obligations under the Order 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 Respondent of its obligations under the Order;

provided, however, beginning one hundred twenty (120) days after Respondent has filed its final report pursuant to Paragraph VIII.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 obtaining FDA approval to manufacture and market the Miotics Products and obtaining the ability to manufacture and market each Miotics Product in commercial quantities, in a manner consistent with cGMP, independently of Respondent and Alcon.

8. Respondent 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.
- E. 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.
 - F. 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.
 - G. 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 Order.
 - H. The Interim Monitor appointed pursuant to this Order to Maintain Assets may be the same person 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 Respondent has fully complied with its obligations to assign, grant, license, divest, transfer, deliver or otherwise convey the Miotics Products Assets as required by Paragraph II.A. of the related Decision and Order in this matter, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has 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 Respondent pursuant to Paragraph VIII of the Decision and Order.

V.

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

- A. any proposed dissolution of Novartis AG;
- B. any proposed acquisition, merger or consolidation of Novartis AG; 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 Respondent made to its principal United States offices or headquarter's address, 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 Respondent related to compliance with this Order, which copying services shall be provided by Respondent at the request 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 Miotics Product Assets, as required by and described in the Decision and Order, has been completed and the Interim Monitor, 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. the day the related Decision and Order becomes final.

By the Commission, Commissioner Kovacic recused.

Donald S. Clark
Secretary

SEAL
ISSUED: August 16, 2010