

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Jon Leibowitz, Chairman**
 J. Thomas Rosch
 Edith Ramirez
 Julie Brill
 Maureen K. Ohlhausen

In the Matter of)))))
Corning Incorporated,)))))
a corporation.)))))

Docket No. C-4380

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of the proposed acquisition by Respondent Corning Incorporated of certain assets of Becton, Dickinson and Company, 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”), an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said 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 that it had reason to believe that Respondent has violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon issued its complaint and having accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days (and having duly considered the comments received), now in further conformity with the procedure described in § 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following Decision and Order (“Order”):

1. Respondent Corning Incorporated is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of New York, with its office and principal place of business located at One Riverfront Plaza, Corning, New York 14831.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent and the proceeding is in the public interest.

ORDER

I.

IT IS HEREBY ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Corning” means Corning Incorporated, its directors, officers, employees, agents, representatives, successors, and assigns; and the subsidiaries, partnerships, divisions, groups, joint ventures, and affiliates in each case controlled by Corning, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Commission” means the Federal Trade Commission.
- C. “Acquisition” means the proposed acquisition described in the Asset Purchase Agreement by and between Corning Incorporated and Becton, Dickinson and Company, dated as of April 10, 2012.
- D. “Confidential Information” means any competitively sensitive, proprietary and all other business information of any kind disclosed by Sigma to Respondent, except that Confidential Information shall not include information that (i) was, is or becomes generally available to the public other than as a result of a breach of this Order; (ii) was or is developed independently of and without reference to any Confidential Information; or (iii) was available, or becomes available, on a non-confidential basis from a third party not bound by a confidentiality agreement or any legal, fiduciary or other obligation restricting disclosure.
- E. “Direct Cost” means the cost of direct material and labor used to provide the relevant assistance, including any reasonable out-of-pocket expenses.
- F. “Global Agreement” means the Global Supply Agreement between Corning Incorporated and Sigma-Aldrich International GmbH, dated October 16, 2012.
- G. “Intellectual Property” means any and all of the following intellectual property owned or licensed (as licensor or licensee) by Respondent in which Respondent has a proprietary interest: (i) all patents, patent applications and inventions and discoveries that may be patentable; and (ii) all know-how, trade secrets, confidential or proprietary information, software, technical information, data, process technology, plans, drawings, and blue prints.

- H. “Lab Products” means the standard tissue culture treated plastic labware products listed in Schedule 3 of the Supply Agreement.
- I. “Person” means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture or other entity or a governmental body.
- J. “Product Price” has the meaning set forth in the Supply Agreement, as the same may be modified pursuant to Section 3.3(b) of the Supply Agreement.
- K. “Sigma” means Sigma-Aldrich Corporation, a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 3050 Spruce Street, St. Louis, Missouri 63103.
- L. “Supply Agreement” means the Asset Sale and Supply Agreement by and between Corning Incorporated and Sigma-Aldrich Corporation, dated October 16, 2012.
- M. “Technical Assistance” means advice, assistance, and training relating to the manufacture of the Lab Products, as set forth in the Supply Agreement.

II.

IT IS FURTHER ORDERED that:

- A. For a period of up to sixty (60) months from the date this Order is issued, Respondent shall provide to Sigma:
 - 1. Quantities of Lab Products as Sigma may order to supply customers located in the United States and Canada (i) in substantially the same quality as such products are manufactured and sold by Respondent, and (ii) at a cost to Sigma that does not exceed Respondent’s Product Price for the Lab Products; and
 - 2. Technical Assistance as Sigma may request (i) sufficient to enable Sigma to manufacture the Lab Products in substantially the same manner as Respondent, and (ii) at a cost to Sigma that does not exceed Respondent’s Direct Cost to provide such assistance; *provided, however*, that Respondent shall not impede the ability of Sigma to obtain labor and services from any third party.
- B. Respondents shall provide the assistance required by Paragraph II.A. of this Order pursuant to the Supply Agreement:
 - 1. The Supply Agreement shall be incorporated by reference into this Order and made a part hereof. Respondent shall comply with all terms of the Supply Agreement and failure to comply shall constitute a violation of this Order;

2. In the event there is a conflict between the terms of this Order and the Supply Agreement, or any ambiguity in the language used in the Supply Agreement, then to the extent that Respondent cannot fully comply with both terms, the terms of this Order shall govern to resolve such conflict or ambiguity; and
 3. Respondent shall not modify the terms of the Supply Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5).
- C. No later than ten (10) days after the date this Order is issued, Respondent shall grant to Sigma an irrevocable, worldwide, perpetual covenant not to sue conferring immunity from suit by Respondent based on claims of infringement under all of Respondent's Intellectual Property for the developing, making, having made, using, having used, selling, offering for sale, having sold, and importing of any Lab Product; *provided, however*, that such immunity shall not extend to sales made using misappropriated trade secrets of Respondent. Such immunity shall extend to any third-party manufacturer deriving its authority from Sigma with respect to the Lab Products and shall not be assignable to any other Person without prior written consent of Respondent (which consent shall not be unreasonably withheld).
- D. Respondent shall allow Sigma-Aldrich International GmbH the right to terminate the Global Agreement (without penalty of any kind) at the same time Sigma exercises any right to terminate the Supply Agreement.
- E. The purpose of this Order is to establish Sigma as an independent provider of Lab Products and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

III.

IT IS FURTHER ORDERED that:

- A. Respondent shall (i) keep confidential (including as to Respondent's employees) and (ii) not use for any reason or purpose, any Confidential Information pertaining to any assistance that Respondent provides to Sigma pursuant to this Order; *provided, however*, that Respondent may disclose or use such Confidential Information in the course of performing its obligations under this Order or the Supply Agreement, complying with financial reporting requirements, or as required by law.
- B. If disclosure or use of any Confidential Information is permitted to Respondent's employees or to any other Person under Paragraph III.A. of this Order, Respondent shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph III.A., and (iii) only after such employees or Persons have signed an agreement in writing to maintain the confidentiality of such information.

- C. Respondent shall enforce the terms of this Paragraph III. as to its employees or any Person, and take such action as is necessary to cause each of its employees and any other Person to comply with the terms of this Paragraph III., including implementation of access and data controls, training of its employees, and all other actions that Respondent would take to protect its own trade secrets and proprietary information.

IV.

IT IS FURTHER ORDERED that:

- A. At any time after Respondent signs the Consent Agreement, the Commission may appoint a Person (“Monitor”) to monitor Respondent’s compliance with its obligations as required by this Order including implementation of the controls and training required by Paragraph III.C. of this Order:
1. The Commission shall select the 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 any proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Monitor, Respondent shall be deemed to have consented to the selection of the proposed Monitor.
 2. Respondent shall enter into an agreement with the Monitor, subject to the prior approval of the Commission, that (i) shall become effective no later than one (1) day after the date the Commission appoints the Monitor, and (ii) confers upon the Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities on the terms set forth in this Order and in consultation with the Commission.
 3. Respondent shall indemnify the Monitor and hold him or her harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of his duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation 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 the Monitor’s gross negligence or willful misconduct.
- B. The Monitor shall (i) serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set, and (ii) employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor’s duties and responsibilities.
- C. The Monitor shall report in writing to the Commission (i) every sixty (60) days from the date of his or her appointment, (ii) no later than thirty (30) days before the date that Respondent’s obligations set forth in Paragraph II. terminate (“Final Report”), and (iii) at

any other time as requested by the staff of the Commission, concerning Respondent's compliance with this Order.

- D. The Monitor shall act in a fiduciary capacity for the benefit of the Commission. Respondent shall (i) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his duties pursuant to this Order and (ii) insure that the Monitor has full and complete access to all Respondent's personnel, books, records, documents, and facilities relating to compliance with this Order, or to any other relevant information as the Monitor may reasonably request.
- E. The Monitor's power and duties shall terminate three business days after the Monitor has completed his final report pursuant to Paragraph IV.C.(ii) of this Order, or at such other time as directed by the Commission.
- F. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph IV.
- G. The Commission may on its own initiative or at the request of the Monitor issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

V.

IT IS FURTHER ORDERED that Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order:

- A. No later than sixty days (60) from the date this Order is issued, and every sixty (60) days thereafter (measured from the due date of the first report filed under this Order) until one year from the date this Order is issued (for a total of six reports during the first year); and
- B. No later than two (2) years after the date this Order is issued and annually thereafter until this Order terminates, and at such other times as the Commission staff may request.

VI.

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

- A. Dissolution of Respondent;
- B. Acquisition, merger, or consolidation of Respondent; or

- C. Any other change in the 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 Order.

VII.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to Respondent, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of the 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 the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at its expense; and
- B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on December 20, 2022.

By the Commission.

Donald S. Clark
Secretary

SEAL:

ISSUED: December 20, 2012

Confidential Appendix

**Asset Sale and Supply Agreement Between
Corning Incorporated and Sigma-Aldrich Co., LLC**

[Redacted From Public Record Version, But Incorporated By Reference]