UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

In the Matter of	)	
BRISTOL-MYERS SQUIBB COMPANY, **a corporation;**	)	
and	)	**Docket No. C- 4690**
CELGENE CORPORATION, **a corporation.**	)	

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission") initiated an investigation of the proposed acquisition by Respondent Bristol-Myers Squibb Company ("BMS") of all of the voting securities of Respondent Celgene Corporation ("Celgene") collectively "Respondents." The Commission's Bureau of Competition prepared and furnished to Respondents the Draft Complaint, which it proposed to present to the Commission for its consideration. If issued by the Commission, the Draft Complaint 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.

Respondents and the Bureau of Competition executed an agreement ("Agreement Containing Consent Orders" or "Consent Agreement"), containing (1) an admission by Respondents of all the jurisdictional facts set forth in the Draft Complaint; (2) a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in the Draft Complaint; or that the facts as alleged in the Draft Complaint, other than jurisdictional facts, are true, (3) waivers and other provisions as required by the Commission's Rules; and (4) a proposed Decision and Order and this Order to Maintain Assets.

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 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 Bristol-Myers Squibb Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal executive offices located at 430 East 29th Street, 14th Floor, New York, New York 10016.

2. Respondent Celgene Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal executive offices located at 86 Morris Avenue, Summit, New Jersey 07901.

3. The Commission has jurisdiction over the subject matter of this proceeding and over the Respondents, and the proceeding is in the public interest.

ORDER

I.
Definitions

IT IS HEREBY 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. "BMS" means Bristol-Myers Squibb Company, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, controlled by Bristol-Myers Squibb Company (including, but not limited to, Burgundy Merger Sub, Inc.), and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

B. "Celgene" means Celgene Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates, in each case controlled by Celgene Corporation, and the respective directors, officers, general partners, employees, agents, representatives, successors, and assigns of each.

C. "Respondents" means BMS and Celgene.

D. "Monitor" means any monitor appointed pursuant to Paragraph IV of this Order to Maintain Assets or Paragraph IX of the Decision and Order.

E. "Orders" means the Decision and Order and this Order to Maintain Assets.

II.
Asset Maintenance

IT IS FURTHER ORDERED that:

A. Respondents shall take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Otezla Business, to minimize any risk of loss of competitive potential for such Otezla Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Otezla Assets except for ordinary wear and tear. Respondents shall not sell, transfer, encumber, or otherwise impair the Otezla 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 Otezla Business.

B. Respondents shall maintain the operations of the Otezla 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 as consistent with standard operating procedures to ensure professionalism, safety, and quality of any product or service offered by the business, to maintain all related information technology infrastructure and data contained therein, to maintain compliance with all applicable healthcare laws, and to maintain any licenses or approvals with any Government Entity) and/or as may be necessary to preserve the full economic viability, marketability, and competitiveness of such Otezla Business and shall use their best efforts to preserve the existing relationships with the following: clients; patients; suppliers; licensors; licensees; advertisers; vendors and distributors; Customers; physicians and other health care providers; insurers; Government Entities; employees; and others having business relations with the Otezla Business. Respondents' responsibilities shall include, but are not limited to, the following:

1. providing the Otezla 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 Otezla Business;

2. continuing, at least at their scheduled pace, any expenditures for the Otezla Business

authorized prior to the date the Consent Agreement was signed by the Respondents;

3. providing such resources as may be necessary to respond to competition prior to the complete transfer and delivery of the Otezla Assets to an Acquirer;

4. providing such resources as may be necessary to maintain the competitive strength and positioning of the Otezla Business;

5. making available for use by the Otezla Business funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the Otezla Assets; and

6. providing such support services to the Otezla Business as were being provided to such Otezla Business by Respondents as of the date the Consent Agreement was signed by Respondents.

C. Respondents shall maintain a work force that is (i) materially equivalent in size (as measured in full time equivalents) and (ii) comparable in training, professionalism, and expertise to what has been associated with the Otezla Business for the Otezla Business's last fiscal year.

III.
Confidential Business Information

IT IS FURTHER ORDERED that:

A. Respondents shall not use, directly or indirectly, any Otezla Confidential Business Information other than as necessary to comply with the following:

1. the requirements of the Orders;

2. Respondents' obligations to the Acquirer under the terms of the Otezla Divestiture Agreements; or

3. applicable law.

B. Respondents shall not disclose or convey any Otezla Confidential Business Information, directly or indirectly, to any Person *except* (i) the Acquirer, (ii) other Persons specifically authorized by the Acquirer or staff of the Commission to receive such information (*e.g.*, employees of a Respondent providing transition services or Transition Manufacturing for Acquirer), (iii) the

Commission, or (iv) the Monitor (if any has been appointed) and *except* to the extent necessary to comply with applicable law;

C. Respondents shall not provide, disclose or otherwise make available, directly or indirectly, any Otezla Confidential Business Information to the employees associated with the business that is being retained, owned, or controlled by the Respondents, other than those employees providing transition services or Transition Manufacturing to the Acquirer or who are engaged in the transfer and delivery of the Product Manufacturing Technology related to the Otezla Products or the ongoing Clinical Trials related to the Otezla Products to the Acquirer;

D. Respondents shall institute procedures and requirements to ensure that those employees of the Respondents that are authorized by the Acquirer to have access to the Otezla Confidential Business Information:

1. do not provide, disclose, or otherwise make available, directly or indirectly, any Otezla Confidential Business Information in contravention of the Orders; and

2. do not solicit, access, or use any Otezla Confidential Business Information that they are prohibited from receiving for any reason or purpose.

E. Respondents shall take all actions necessary and appropriate to prevent access to, and the disclosure or use of, the Otezla Confidential Business Information by or to any Person(s) not authorized to access, receive, and/or use such information pursuant to the terms of the Orders or the Otezla Divestiture Agreements, including:

1. Establishing and maintaining appropriate firewalls, confidentiality protections, internal practices, training, communications, protocols, and system and network controls and restrictions;

2. To the extent practicable, maintaining Otezla Confidential Business Information separate from other data or information of the Respondents; and

3. Ensuring by other reasonable and appropriate means that Otezla Confidential Business Information is not shared with Respondents' personnel engaged in the business related to the same or substantially the same type of business as the Otezla Business (*e.g.*, commercialization of Products Developed or in Development for the same or similar indications as the Otezla Products).

IV.
Monitor

IT IS FURTHER ORDERED that:

A. Quantic Regulatory Services, LLC shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondents, and attached as Appendix A ("Monitor Agreement") and Non-Public Appendix B ("Monitor Compensation"). The Monitor is appointed to monitor Respondents' compliance with the terms of this Order to Maintain Assets, the Decision and Order, and the Otezla Divestiture Agreements.

B. Not later than one (1) day after the Acquisition Date, Respondents shall confer on the Monitor all rights, powers, and authorities necessary to monitor each Respondent's compliance with the terms of the Orders.

C. Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:

1. The Monitor shall have the power and authority to monitor each 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 Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission;

2. Respondents shall provide access to all information and facilities, and make such arrangements with third parties, as are necessary to allow the Monitor to monitor compliance with the obligations to Transition Manufacture;

3. The Monitor shall act in consultation with the Commission or its staff, and shall serve as an independent third party and not as an employee or agent of the Respondents or of the Commission; and

4. The Monitor shall serve until Respondents complete the Transition Manufacturing for the Acquirer;

provided, however, that the Monitor's service shall not extend more than four (4) years after the Order Date *unless* the Commission decides to extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

D. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to each Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities, and technical information, and such other relevant information as the Monitor may reasonably request, related to that Respondent's compliance with its obligations under the Orders.

E. Each Respondent shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor that Respondent's compliance with the Orders.

F. The 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 Monitor shall have authority to employ, at the expense of Respondents, such consultants (including information technology experts), accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

G. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the 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 Monitor.

H. Respondents shall report to the Monitor in accordance with the requirements of the Orders and as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by a Respondent, and any reports submitted by the Acquirer with respect to the performance of a Respondent's obligations under the Orders. Within thirty (30) days after the date this Order to Maintain Assets is issued and every ninety (90) days thereafter, and at such other times as may be requested by staff of the Commission, the Monitor shall report in writing to the Commission concerning performance by the Respondents of the Respondents' obligations under the Orders. Among other things, the Monitor shall report in writing to the Commission concerning progress by the Acquirer or the Acquirer's Manufacturing Designee toward obtaining FDA approval to manufacture each Otezla Product and obtaining the ability to manufacture each Otezla Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents. After the Decision and Order becomes final, the Monitor shall report to the Commission as described in the Decision and Order.

I. Each Respondent may require the Monitor and each of the 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 Monitor from providing any information to the Commission.

J. The Commission may, among other things, require the Monitor and each of the 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 Monitor's duties.

K. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the following manner:

1. the Commission shall select the substitute Monitor, subject to the consent of Respondent BMS, which consent shall not be unreasonably withheld. If Respondent BMS has not opposed, in writing, including the reasons for opposing, the selection of a substitute Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any substitute Monitor, Respondents shall be deemed to have consented to the selection of the substitute Monitor; and

2. not later than ten (10) days after the Commission's appointment of the substitute Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on that Monitor all the rights, powers, and authorities necessary to permit that Monitor to monitor each Respondent's compliance with the Orders in a manner consistent with the purposes of the Orders.

L. 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 the Orders.

M. The Monitor appointed pursuant to this Order to Maintain Assets may be the same Person appointed as the Monitor pursuant to the Decision and Order.

N. The 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.

V.
Compliance Reports

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the date this Order to Maintain Assets is issued by the Commission,

and every ninety (90) days thereafter until Respondents have fully complied with this Order to Maintain Assets, 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 the Orders ("Compliance Reports").

B. Each Compliance Report shall contain sufficient information and documentation to enable the Commission independently to determine whether Respondents are in compliance with the Orders. Conclusory statements that Respondents have complied with their obligations under the Orders are insufficient. Respondents shall include in their Compliance Reports, among other things that are required from time to time, a full description of the efforts being made to comply with the Orders, including:

1. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the transfer and delivery of all of the Otezla Assets to the Acquirer, (ii) the transfer and delivery of all of the Product Manufacturing Technology related to the Otezla Products and the Clinical Trial(s) related to the Otezla Products to the Acquirer, (iii) the transfer and delivery of all Otezla Confidential Business Information to the Acquirer, and (iv) the provision of transition services to the Acquirer; and

2. a detailed description of the timing for the completion of such obligations.

C. Respondents shall verify each Compliance Report in the manner set forth in 28 U.S.C. § 1746 by the Chief Executive Officer or other officer or employee specifically authorized to perform this function. Respondents shall submit an original and two (2) copies of each Compliance Report as required by Commission Rule 2.41(a), 16 C.F.R. § 2.41(a), including a paper original submitted to the Secretary of the Commission and electronic copies to the Secretary at ElectronicFilings@ftc.gov and to the Compliance Division at bccompliance@ftc.gov. In addition, Respondents shall provide a copy of each Compliance Report to the Monitor.

D. 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 on the same timing as, the Compliance Reports required to be submitted by Respondents pursuant to the Decision and Order.

VI.
Change in Respondents

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

A. any proposed dissolution of: Bristol-Myers Squibb Company or Celgene Corporation;

B. any proposed acquisition, merger, or consolidation of: Bristol-Myers Squibb Company or Celgene Corporation; or

C. any other change in a Respondent including assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Orders.

VII.
Access

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 a Respondent made to its principal place of business as identified in the Orders, registered office of its United States subsidiary, or its headquarters address, the notified Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

A. access, during business office hours of that Respondent and in the presence of counsel, to all facilities and access to inspect and copy all business and other records and all documentary material and electronically stored information as defined in Commission Rules 2.7(a)(1) and (2), 16 C.F.R. § 2.7(a)(1) and (2), in the possession or under the control of that Respondent related to compliance with this Order, which copying services shall be provided by that Respondent at the request of the authorized representative(s) of the Commission and at the expense of that Respondent; and

B. to interview officers, directors, or employees of that Respondent, who may have counsel present, regarding such matters.

VIII.
Purpose

IT IS FURTHER ORDERED that the purpose of this Order to Maintain Assets is to

maintain the full economic viability, marketability and competitiveness of the Otezla Business through its full transfer and delivery to an Acquirer; to minimize any risk of loss of competitive potential for the Otezla Business; and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Otezla Assets except for ordinary wear and tear.

IX.
Term

IT IS FURTHER ORDERED that, unless the Commission directs otherwise, 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 day after all of the Otezla Assets, the Product Manufacturing Technology related to the Otezla Products, and the Clinical Trials related to the Otezla Products have been transferred to and are in the physical possession of the Acquirer, as required by and described in the Decision and Order.

By the Commission, Commissioners Chopra and Slaughter dissenting.

April J. Tabor
Acting Secretary

SEAL

ISSUED: November 15, 2019