

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 \_\_\_\_\_)  
NOVARTIS AG, \_\_\_\_\_) Docket No. C-4364  
a corporation. \_\_\_\_\_)  
\_\_\_\_\_)

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Novartis AG ("Respondent") of the voting securities of Fougera Holdings Inc ("Fougera") and Respondent having thereafter furnished the Bureau of Competition proposed by the Commission for its consideration and which, 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 Order ("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 AG is a corporation organized, existing and doing business under and by virtue of the laws of the Swiss Confederation, with its headquarters address located at Lichtstrasse 35, Basel, Switzerland, V8 CH4056, and the

address of its United States subsidiary, Novartis Corporation, located at 230 Park Avenue, New York, New York 10169.

2. Fougera Holdings Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address located at 60 Baylis Road, Melville, New York, 11747. The ultimate parent entity of Fougera is Fougera S.C.A. SICAR
3. The 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 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 and effective, 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 AG (including, without limitation, Sandoz Inc. f.k.a. Geneva Pharmaceuticals, and Jet Linger Sub Inc.) and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Novartis shall include Fougera.
- B. "Fougera" means Fougera Holdings Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Fougera Holdings Inc. (including, without limitation, Fougera Pharmaceuticals Inc. and Nycomed US Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- 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 d4 (ter)Tj 12.7200

of distributing, marketing, and selling each of the Divestiture Products.

- 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. "New Commercialization Partner" means any Third Party(ies) designated by Tolmar to market, distribute or sell the Divestiture Products.
- H. "Orders" means the Decision and Order and this Order to Maintain Assets.
- I. "Transition Period" means, for each Marketed Divestiture Product, the period beginning on the date this Order to Maintain Assets becomes final and effective and ending, with respect to each Marketed Divestiture Product the earlier of the following dates: (i) the date on which Tolmar directs the Respondent to cease the distribution, marketing and sale of that Marketed Divestiture Product; or (ii) the date on which the New Commercialization Partner commences the distribution, marketing, and sale of that Marketed Divestiture Product; *provided however*, the Transition Period shall end not later than six (6) months from the Order Date.

## II.

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

- A. Until the end of the Transition Period, Respondent shall take such actions as are necessary to maintain the ongoing economic viability, marketability and competitiveness of each of the related Divestiture Product Businesses, to minimize any risk of loss of competitive potential for such Divestiture Product Businesses, and to prevent the deterioration, or impairment of such Divestiture Product Businesses.
- B. Other than in the manner as prescribed in the Orders, Respondent shall not sell, transfer, encumber or otherwise impair the Divestiture Product Assets.
- C. Until the end of the Transition Period, Respondent shall maintain the operations of the Divestiture Product Businesses in the regular and ordinary course of business and in accordance with past practice and/or as may be necessary to preserve the marketability, viability, and competitiveness of such Divestiture Product Businesses and as may be necessary to facilitate the transfer of such businesses to the New Commercialization Partner on behalf of Tolmar. During the Transition Period, Respondent 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 each of the respective Divestiture Product Businesses. Respondent's responsibilities shall include, but are not limited to, the following:

1. providing each of the respecti

D. During the Transition Period, Respondent, in consultation with Tolmar, for the purpose of ensuring an orderly transition

7. allow Tolmar access at reasonable business hours to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Divestiture Products that contain such Confidential Business Information pending the complete delivery of such Confidential Business Information to Tolmar;

8. establish projected time lines for accomplishing all tasks necessary to effect the transition in an efficient and timely manner;

9. provide Tolmar with confidential information (7.)T 0.0000g app. 0.0000 TD (sti)Tj 11.4000 0.0000

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marketing, commercialization, importation, exportation, cost, supply, sales, sales support, or use of each of the Development Divestiture Product to any of Respondent's employees that (i) prior to the Acquisition, were employees or agents of Fougera, or (ii) are responsible for making business decisions related to those Retained Products that are prescription pharmaceutical for the treatment of the same diseases as the Development Divestiture Product;

*p v d d b w v*, that the restrictions contained in this Order to Maintain Assets regarding the Respondent's use, conveyance, provision, or disclosure of "Confidential Business Information" shall not apply to the following: (i) oral antibiotics; (ii) information that subsequently falls within the public domain through no violation of this Order or breach of confidentiality or non-disclosure agreement with respect to such information by the Respondent; (iii) information that is required by Law or rules of an applicable stock exchange to be publicly disclosed (iv) information specifically excluded from the Divestiture Product Assets; and (v) all intellectual property licensed on a non-exclusive basis to Tolmar and/or its New Commercialization Partner.

- F. Not later than thirty (30) days from the date that this Order to Maintain Assets becomes final and effective, Tolmar shall provide written notification to Respondent's employees and other personnel who may have access to Confidential Business Information relating to the Divestiture Products 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 date this Order to Maintain Assets is issued by the Commission to become final and effective. Respondent shall provide a copy of such notification to Tolmar. 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 provide Tolmar with copies of all certifications, notifications and reminders sent to Respondent's personnel.
- G. 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 to Maintain Assets. Respondent shall provide Tolmar with copies of all certifications, notifications and reminders sent to Respondent's employees and other personnel.
- H. 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 Tolmar 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 ongoing economic viability, marketability and competitiveness of the Divestiture Product Businesses within the Geographic Territory through the Transition Period, to minimize any risk of loss of competitive potential for the Divestiture Product Businesses within the Geographic Territory, and to prevent the destruction, deterioration, or impairment of any of the Divestiture Assets.
- J. Territory, and to prevent the destruction, deterioration, or impairment of any of the Divestiture Assets.

that, the Interim Monitor's service shall not exceed one (1) year from the Order Date, *p o d d f i h r* 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 legal 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 Orders, 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 Orders.
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 action, 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 the Orders and 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 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 Respondent of its obligations under the Orders.
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; *p o d d h w e*, 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 Orders.
- 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 issued by the Commission to become final and effective, and every thirty (30) days thereafter until the end of the Transition Period, 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 the Orders. Respondent shall submit at the same time a copy of its report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed. Respondent shall include in its reports, among other things that are required from time to time, a detailed description of the efforts being made to comply with the relevant paragraphs of the Orders, including a detailed description of all substantive contacts, negotiations, or recommendations related to the transitional services being provided by the Respondent to Tolmar and/or the New Commercialization Partner, and a detailed description of the timing for the completion of such obligations.

*provided however*, that, after the Decision and Order in this matter becomes final and effective, 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 VI of the Decision and Order.

V.

**IT IS FURTHER ORDERED** that Respondent shall notify the Commission at least

