Questcor/Synacthen: Retrophin's Suit Potentially Accelerates Timing and Increases Risk of Court-Ordered Divestiture of Synacthen, but Private Suit Faces Key Procedural Obstacles

Conclusion

On January 7, 2014, Retrophin, Inc. filed a complaint in US District Court for the Central District of California, alleging that Questcor's acquisition of the rights to Synacthen violated Sections 1 and 2 of the Sherman Act, Section 7 of the Clayton Act, and California state antitrust and unfair competition statutes. The complaint requests that the court permanently enjoin Questcor from "enforcing or maintaining its Rights to Synacthen under its agreement with Novartis," in addition to treble damages, costs, and attorneys' fees. The case was assigned to Hon. Josephine Staton, a 2010 Obama appointee, as well as Magistrate Judge Jean Rosenbluth. Key points for stakeholders to consider include:

- **Retrophin is asserting the same claims, and requesting the same relief, that the FTC likely would have.** Regardless of whether the complaint was initiated by Retrophin or the FTC, if Questcor loses in federal district court, they will very likely be forced to divest its rights to Synacthen. Retrophin's private suit has therefore accelerated the potential timeline for a court ordering Questcor to divest its rights to Synacthen.

- **However, due to a number of factors, Retrophin's odds of success are lower than would be the FTC's.** Retrophin, as a private litigant, must demonstrate standing/antitrust injury at trial—the FTC need not overcome such a burden. This is a substantial barrier, and for this reason alone, Retrophin's odds of prevailing are significantly lower than would be the FTC's. Retrophin's private suit is unlikely to affect the timing of the FTC's investigation, or the likelihood that the FTC's investigation will result in a complaint seeking to unwind the Questcor/Synacthen deal.

- **Timing.** Antitrust litigation is typically lengthy, and timing is necessarily unpredictable. That said, full judicial resolution on the merits may take two to three years. However, formal judicial proceedings always operate in parallel with settlement talks—especially if Retrophin's suit survives Questcor's initial motion to dismiss, expect settlement talks to seriously heat up.

- **Significant financial downside for Questcor if they lose at trial.** As Retrophin's complaint explains, if a court orders Questcor to divest the rights to Synacthen, Questcor is nonetheless liable to Novartis for the purchase price outlined in the License Agreement—at least $135 million. However, in such a situation, Questcor may divest Synacthen to a third party, a sale that would mitigate at least some of this financial risk.

Key Points

Retrophin's complaint asserts generally same claims, requests same relief as an FTC complaint would have. Without the benefit of extensive discovery, and lacking subpoena power, Retrophin's complaint lacks the damaging "hot" documents or testimony from Questcor executives or third parties that typically appear in FTC complaints. That said, the complaint asserts generally the same factual allegations and causes of action an FTC

complaint likely would have, including the most crucial—the allegation that Questcor's acquisition of the rights to Synacthen lessens competition in the market for ACTH therapeutic (long-acting) drugs, in violation of Clayton Act Section 7.

In antitrust litigation, the FTC enjoys several advantages relative to a private plaintiff such as Retrophin. First, and most importantly, the FTC is not required to demonstrate antitrust injury, as is a private party seeking damages. Second, in general, courts are cognizant that the FTC is an expert agency, tasked with enforcing the nation's antitrust laws. As a result, there is at least moderately increased judicial deference to the FTC, relative to a private plaintiff. And third, the FTC has the option, which private plaintiffs do not, to bring an FTC Act Section 5 unfair competition claim, in addition to traditional Sherman and Clayton Act claims.

Despite the FTC's advantages relative to a private plaintiff, given that the factual allegations and causes of action in Retrophin's complaint are largely similar to what the FTC would have alleged, we would expect, if Retrophin wins on the procedural antitrust injury issue and the case proceeds to a trial on the merits, only slightly lower odds of a Retrophin win, compared to if the FTC had filed a complaint. While Retrophin's complaint seeks disgorgement of profits as well as unspecified damages, it is not clear that Questcor has realized additional profits from Acthar sales as a result of its Synacthen acquisition, or how, and to what extent, Retrophin has suffered damages. As a result, in either a Retrophin or FTC complaint, the most problematic result, from Questcor's perspective, is court-ordered divestiture of the rights to Synacthen.

As we have explained in past reports, even if the FTC proceeds according to an accelerated investigational timeline, a potential FTC complaint is, at earliest, several months away. In the worst case scenario for Questcor, an FTC complaint would lead to a court order that Questcor divest its rights to Synacthen. By proceeding with a private suit, Retrophin has accelerated the potential timeline for court-ordered divestiture. This matter is now in front of a judge, and stakeholders should view this private suit as compounding the risk that a court will ultimately order that Questcor divest the rights to Synacthen.

However, due to procedural issues and lack of pre-complaint discovery, Retrophin's odds of success are lower than would be the FTC's. As a private plaintiff, Retrophin must demonstrate that it has suffered "antitrust injury" from Questcor's conduct, and therefore has standing to challenge Questcor's Synacthen acquisition in court. To demonstrate "antitrust injury," Retrophin must show that it has suffered the type of harm antitrust laws were meant to protect. Courts emphasize that the antitrust laws protect competition, not competitors, and have often dismissed competitor suits for lack of antitrust standing.

Establishing standing is a key procedural barrier for Retrophin, and there is significant risk that the court will dismiss Retrophin's suit on the standing issue, without reaching the substantive merits of the complaint. By contrast, the FTC faces no such standing barriers in challenging anticompetitive acquisitions under FTC Act Section 5 or Section 7 of the Clayton Act. Going forward, we will examine this procedural obstacle in greater depth, and elaborate on the risk that the court will dismiss Retrophin's suit for lack of standing.

Unlike a private plaintiff, the FTC generally files complaint only after extensive pre-complaint discovery, in the form of documentary and testimonial evidence produced in response to FTC subpoenas and CIDs. In the event Questcor documents indicate a strong procompetitive motivation for the deal, or are otherwise problematic for a Section 7 case, the FTC would have the chance to evaluate this evidence and factor it into their decision to either close its investigation or file a complaint seeking to unwind the deal. Likewise, the FTC, prior to filing a

complaint, generally has extensive interactions with respondent executives and counsel, and is well-aware of potential procompetitive justifications or defenses.

Retrophin, however, has not had the benefit of pre-complaint discovery, and likely has a much less developed understanding of what discovery will uncover, or potential defenses Questcor will likely raise. As a final point, Retrophin's complaint does not preclude the FTC from eventually filing its own complaint seeking to unwind Questcor's Synacthen acquisition, and Retrophin's decision to file a complaint is unlikely to significantly affect the FTC's ongoing investigation, in either conduct or timing.

Timing. Litigation, and particularly antitrust litigation, is typically a long, drawn-out process, and predicting the timeline of any given litigation, from complaint to decision on the merits, is a risky proposition. That said, an antitrust case of this level of complexity will, from complaint to final judicial decision, likely take at least two years. Of course, Questcor and Retrophin could conclude this litigation much more quickly, through settlement. Especially if Retrophin's suit survives Questcor's initial motion to dismiss, Questcor may be strongly inclined to settle, as permitting Retrophin access to Questcor's internal documents through protracted pre-trial discovery is something Questcor would presumably strongly prefer to avoid.

In the short term, Retrophin's counsel (Katten Muchin Rosenman LLP) will reach out to Questcor's counsel, and reach an agreement on timing for Questcor's filing of an answer—typically, an answer would come one to two months after complaint. Questcor's answer will very likely take the form of a motion to dismiss, which will assert, amongst other things, that Retrophin has not suffered "antitrust injury," does not have standing, and that the complaint should be thrown out.

Significant downside for Questcor if they lose. Of the various requests for relief in Retrophin's complaint, by far the most problematic for Questcor is Retrophin's request that the court order Questcor to divest its rights to Synacthen. In addition to the competitive risk that Synacthen would fall into the hands of a motivated new entrant, count 8 of Retrophin's complaint explains that "Questcor has accepted the entire economic risk – an amount in excess of $135 million – that the agreement with Novartis would be deemed illegal under the antitrust laws."

This allegation is a reference to Clause 12.4 of the Questcor/Novartis Synacthen License Agreement, which states: "In the event that any assets, businesses or licenses are required to be divested…by order of any Governmental Entity or *court of competent jurisdiction*, Purchaser may assign its rights under this License Agreement to a Third Party, provided that in connection with any such Assignment, the Questcor Parties shall simultaneously enter into an agreement with Novartis…providing for the payment by the Questcor Parties of any amounts that would otherwise be payable pursuant to…this License Agreement." [emphasis ours]

Count 55 of Retrophin's complaint notes that the License Agreement "provides that Novartis receives the full consideration it is entitled to from Questcor even if the US antitrust enforcement agencies (The Federal Trade Commission or the Department of Justice) force Questcor to divest its rights in Synacthen." Left unsaid is that Clause 12.4 of the License Agreement provides that Questcor is similarly liable for the full purchase price if divestiture is required by a "court of competent jurisdiction." So, regardless of whether the FTC, or a private party such as Retrophin, initiates a complaint, if a court orders Questcor to divest the rights to Synacthen, Questcor is nonetheless liable to Novartis for Synacthen's full purchase price.

Retrophin's complaint alleges that "the acquisition of the rights to Synacthen was so important to Questcor that it put at least $135 million at risk to keep Synacthen out of Retrophin's hands." However, the Synacthen License Agreement provides that, in the event a court orders divestiture, Questcor may divest or assign the rights to Synacthen to a third party. So, while Questcor would nonetheless be liable to Novartis for Synacthen's agreed-to purchase price, Questcor may mitigate this risk at least somewhat by divesting Synacthen's rights to a third party, and realizing the economic benefit therefrom. As a result, stakeholders should view the potential downside for Questcor of divestiture as at least $135 million, but minus the price for which Questcor would be able to divest the rights to Synacthen to a third party purchaser.