COVINGTON & BURLING

1201 PENNSYLVANIA AVENUE NW
WASHINGTON, DC 20004-2401
TEL 202.662.6000
FAX 202.662.6291
WWW.COV.COM

WASHINGTON
NEW YORK
SAN FRANCISCO
LONDON
BRUSSELS

ROBERT K. KELNER
TEL 202.662.5503
FAX 202.778.5503
RKELNER@COV.COM

RECEIVED FEDERAL ELECTION COMMISSION SECRETARIAT
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RECEIVED FEDERAL ELECTION COMMISSION OFFICE OF GENERAL COUNSEL

BY HAND AND FACSIMILE

Lawrence Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

AOR 2004-42

Re: Advisory Opinion Request

Dear Mr. Norton:

On behalf of our client, Pharmavite LLC, we request an advisory opinion addressing the following questions:

1. May Pharmavite LLC, a California limited liability company that is a "disregarded entity" under Internal Revenue Service regulations and that is wholly owned by a single, incorporated member, pay the administrative and solicitation costs of a separate segregated fund ("SSF")?

2. May that SSF be named "Pharmavite LLC Political Action Committee" and abbreviated as "Pharmavite PAC"?

I. Background

Pharmavite LLC is a California limited liability company ("LLC"), with its principal place of business in California. Its sole "member" is Otsuka America, Inc. ("OAI"), a California corporation, with its principal place of business in California.[1] OAI, in turn, is a wholly owned

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[1] OAI is a holding company with various United States affiliates engaged in a range of businesses in the United States, including the development, marketing, and sale of dietary supplements and pharmaceutical products; bottling water; and winemaking. OAI owns directly or indirectly entities including (but not limited to) Pharmavite LLC, Otsuka America Pharmaceutical, Inc., Otsuka Maryland Research Institute, Inc., Meretek Diagnostics, Inc., Ridge (continued...)

U.S. subsidiary of Otsuka Pharmaceutical Company, Ltd., a Japanese corporation, with its principal place of business in Japan. Pharmavite LLC desires to pay the administrative and solicitation costs of an SSF, for which OAI would be the connected organization. The SSF would be named "Pharmavite LLC Political Action Committee" (abbreviated as "Pharmavite PAC").

Generally, under IRS regulations, an LLC may elect to be treated as a corporation or as a partnership for tax purposes. *See* 26 C.F.R. § 301.7701-3(a). In the case of an LLC that has only a single member, such as Pharmavite LLC, however, the LLC cannot elect treatment as a partnership. *Id.* An LLC with only one member that does not elect to be treated as a corporation is "disregarded [by the IRS] as an entity separate from its owner." *Id.* § 301.7701-3(b)(ii). As a so-called "disregarded entity," it is considered by the IRS to be the functional equivalent of a branch or division of its single member rather than a separate entity. *See id.* § 301.7701-2(a). Because Pharmavite LLC did not elect to be treated as a corporation, it is treated by the IRS as a disregarded entity; that is, it is treated in the same manner as a division of its corporate parent, OAI.

Pharmavite LLC generates its own revenues in the United States. Pharmavite LLC's primary business is that of manufacturing and selling dietary supplements, which includes vitamins, minerals and herbs. Pharmavite LLC conducts this business under various brand names owned by it, including Nature Made, Nature's Resource, and Nutri-Plus; under brand names licensed by it, such as Olay; and under private label names for retailers. One member of the Board of Directors of OAI is a United States citizen, and one member of the Board of Executive Managers of Pharmavite LLC is a United States citizen. To the extent that these boards render any decisions concerning an SSF, other than the decision whether to form the SSF, the authority to make those decisions will be vested in special committees consisting of the non-

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Vineyards, Inc., Cambridge Isotope Laboratories, Inc., and Crystal Geyser Roxane Water Company LLC.

foreign national members of the boards. Otsuka Pharmaceutical, Ltd. (OAI's Japanese foreign principal parent company) and any foreign national directors, officers, or employees of Otsuka Pharmaceutical, Ltd., OAI, or Pharmavite LLC will all be recused from directly or indirectly participating in the decision-making process of the SSF. They will not direct or control the selection of personnel or the actions or policies of the SSF. Additionally, the proposed SSF will not solicit or accept contributions from any foreign national. *See* 11 C.F.R. § 110.20(g). As a matter of policy, the SSF will not solicit or accept contributions from any Otsuka Pharmaceutical, Ltd. or OAI executive or administrative personnel, stockholders or family members, whether or not they are foreign nationals.

In addition to being the sole source of funds for the administrative and solicitation costs of the SSF, Pharmavite LLC will conduct the day-to-day operations of the SSF through Pharmavite LLC personnel. The principal focus of the SSF will be issues of interest to Pharmavite LLC and its employees.

II. Legal Analysis

A. Payment of Administrative and Solicitation Costs of SSF by Pharmavite LLC

Under the Federal Election Campaign Act of 1971, as amended, and the Commission's regulations, a corporation may use treasury funds to pay the administrative and solicitation costs of an SSF. *See* 2 U.S.C. § 441b(b)(2)(C). Generally, partnerships do not enjoy the same privilege. *See* Advisory Op. No. 2001-7 ("The Act does not extend to a partnership the ability granted to a corporation . . . to conduct itself as a connected organization and avail itself of the contribution and expenditure exemptions."). The Commission has, however, "interpreted the Act and regulations to permit a partnership *or limited liability company* that is owned entirely by corporations and affiliated with one of the corporations to pay the administrative and solicitation costs of the partnership's SSF." *See* Advisory Op. No. 2003-28 (emphasis added). In Advisory Op. No. 2003-28, for example, the Commission allowed an LLC that elected partnership treatment by the IRS and was owned by several corporations to pay the costs of an SSF. One of the member corporations, with which the LLC was affiliated, served as the connected

organization for the SSF. *Id.* This ruling followed naturally from a long line of advisory opinions in which the Commission permitted partnerships owned by corporations through joint ventures to pay the costs of an SSF, based on affiliation of the partnership with one or more of the incorporated owners of the partnership. *See* Advisory Op. Nos. 2001-18, 1997-13, 1996-49, 1994-11, 1992-17. The Commission reasoned that "if the administrative and solicitation costs are paid by the subsidiary partnership or limited liability company, this support is deemed to be from the parent corporation by virtue of its ownership of and affiliation with the partnership or limited liability company." Advisory Op. No. 2003-28. The Commission therefore treated payments by the LLC as materially indistinguishable from payments by one of the affiliated corporations that owned the LLC.

The Commission has long held that affiliates of a corporation may include non-corporate entities, such as partnerships and LLCs. *See* Advisory Op. 2001-18 (citing Advisory Op. Nos. 2001-7, 2000-36, 1997-13, 1996-38, 1994-11, and 1992-17). Partnerships and LLCs that are majority owned by a corporation are considered to be affiliated *per se* with the corporation. *See* Advisory Op. Nos. 2003-28; 2001-18; 1985-27. Because Pharmavite LLC is wholly owned by a single member, OAI, it is therefore affiliated with OAI *per se*.

Unlike in Advisory Op. No. 2003-28, Pharmavite LLC has not elected to be treated as a partnership by the IRS because, as a single member LLC, it is not permitted to do so. Under the Commission's regulations governing contributions by LLCs, a contribution by an LLC that does not elect treatment as either a corporation or a partnership is treated as a contribution by a partnership. *See* 11 C.F.R. § 110.1(g)(2). An exception arises, however, for contributions by an LLC with a "single natural person member;" in that situation, contributions by the LLC are attributed solely to that natural person member, in contrast to partnership contributions, which are attributed to both the partnership and to the individual partners. *Id.* § 110.1(g)(4). The term "natural person" is ordinarily understood to mean a human being. *See* Black's Law Dictionary (7th ed.) at 1162 (defining "natural person" as "[a] human being, as distinguished from an artificial person created by law."). Because OAI is not a natural person, Pharmavite does not fall

within this exception, and the regulations treat Pharmavite LLC as a partnership under 11 C.F.R. § 110.1(g)(2), even though Pharmavite LLC cannot elect to be treated as a partnership by the IRS.[2]

Whether treated under 11 C.F.R. § 110.1(g)(2) as a partnership or, under 11 C.F.R. § 110.1(g)(4), as a pass through entity whose contributions are solely attributed to its incorporated member, Pharmavite LLC's status is materially indistinguishable from that of the LLC in Advisory Op. No. 2003-28. Indeed, in the case of an LLC that is a disregarded entity, such as Pharmavite LLC, the Commission has recognized "the unity of the member and the LLC." 64 F.R. 37392, 37399. Because Pharmavite LLC operates effectively as a division of its corporate parent, OAI, the basis for its exercising the right of its affiliated parent to pay the costs of an SSF is at least as strong, if not stronger, than in Advisory Op. No. 2003-28.

B. Naming the SSF

Pharmavite LLC may not serve as the connected organization for an SSF because the definition of connected organization does not include LLCs. *See* 11 C.F.R. § 100.6(a); Advisory Op. No. 1997-13. As a corporation, however, OAI may serve as a connected organization. The Commission has held that when an LLC pays the administrative and solicitation costs of an SSF for which an affiliated corporation is the connected organization, the SSF may bear the name of

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[2] Although, as promulgated by the Commission, 11 C.F.R. § 110.1(g)(4) excludes only those LLCs that have a single "natural person" member from being treated as a partnership under § 110.1(g)(2), the Explanation and Justification for § 110.1(g)(4) does not distinguish at all between natural persons and incorporated members of single member LLCs. The Commission noted in the Explanation and Justification that "[t]he IRS in its comment [on the proposed rule] pointed out that single member LLCs are not eligible for treatment as partnerships -- that is, they cannot 'check the box' to elect partnership treatment." 64 F.R. 37392, 37399 (Jul. 12, 1999) (Explanation and Justification for Final Rules on Treatment of Limited Liability Companies). Neither the Explanation and Justification nor the IRS comment suggested that the ineligibility of single member LLCs for partnership treatment is unique to those whose single member is a "natural person." It is not clear why the regulations, as promulgated, appear to distinguish between an LLC with a single natural person member and an LLC with a single incorporated member, both of which are precluded by the IRS from electing partnership status.

the LLC and need not bear the name of the connected organization. *See* Advisory Op. No. 1997-13 (emphasis added). "The basis for this interpretation is that the limited liability company is in virtually the same position as a subsidiary . . . , and Commission regulations expressly permit a subsidiary's SSF to omit the corporate parent's name from the name of the SSF." Advisory Op. No. 2003-28 (citing 11 C.F.R. § 102.14(c)). Therefore, even though OAI will be the connected organization, its separate segregated fund may be named "Pharmavite LLC Political Action Committee" and abbreviated as "Pharmavite PAC."

In evaluating proposed names for an SSF "the Commission has examined whether they gave adequate notice to the public of the identity and sponsorship of SSFs." Advisory Op. No. 2002-4. In this case, the name "Pharmavite PAC" appropriately meets the Commission's goal of transparency, for it is Pharmavite LLC that will pay the costs of operating the SSF from its own revenues, it is Pharmavite LLC personnel who will direct the day-to-day operations of the SSF, and it is issues of concern to Pharmavite LLC and its employees that will be the principal focus of the SSF. Moreover, as a matter of policy, the SSF's own funds will be solicited solely from executive and administrative personnel of Pharmavite LLC and their families. In these specific circumstances, including "Otsuka America, Inc." in the SSF's name would tend to obscure rather than to clarify the identity and purpose of the SSF.

C. Absence of Foreign National Control Over SSF

Under the Commission's regulations and advisory opinions, the mere fact that OAI, a California corporation, is a subsidiary of a foreign principal does not preclude OAI from serving as the connected organization of an SSF and Pharmavite LLC from paying the costs of that SSF. The Commission has repeatedly treated U.S. subsidiaries of foreign principal corporations as discrete legal entities that are capable of acting independently of the foreign parent with regard to operation of an SSF. *See, e.g.*, Advisory Op. Nos. 1999-28, 1995-15. So long as the revenue for funding the SSF is generated in the United States and no foreign national directly or indirectly participates in the decision-making of, or directs or controls the selection of personnel or actions or policies of, the SSF, a U.S. subsidiary may establish an SSF. *See* Advisory Op. Nos. 2000-17,

1989-29. The Commission has previously permitted a U.S. subsidiary of a foreign principal corporation, whose board included only a single U.S. national, to establish an SSF, so long as control of the SSF was vested in a special committee that did not include foreign nationals. *See* Advisory Op. No. 2000-17. Because Pharmavite LLC generates revenue in the United States that will be used to pay the administrative and solicitation costs of the SSF and all foreign nationals will be recused from exercising direct or indirect control over the SSF, the mere existence of a Japanese parent company does not bar OAI from serving as a connected organization for an SSF whose costs are paid by Pharmavite LLC.

For the foregoing reasons, we request on behalf of Pharmavite LLC an advisory opinion confirming that Pharmavite LLC may pay the administrative and solicitation costs of an SSF, for which OAI will be the connected organization, and that the SSF may be named "Pharmavite LLC Political Action Committee" and abbreviated as "Pharmavite PAC."

Sincerely,

Robert K. Kelner