

Interlocutory Order

90 F.T.C.

IN THE MATTER OF
ATLANTIC RICHFIELD COMPANY

Docket 9089. Interlocutory Order, Sept. 9, 1977

Denial of respondent's motion to dismiss complaint on ground that continued prosecution of action is not in the public interest.

ORDER DENYING RESPONDENT'S MOTION TO DISMISS
COMPLAINT

The administrative law judge has certified to the Commission respondent's motion to dismiss the complaint on the ground that, because of changed circumstances, continued prosecution of this action is not in the public interest.

The Commission adheres to its view that this proceeding is in the public interest. The only changed circumstance cited in respondent's motion is the sale one month prior to consummation of the merger of its ownership interest in the Clay West Project, a producer of uranium oxide, to its joint venture partners. According to respondent, as a result of this sale, Atlantic Richfield and The Anaconda Company no longer competed with one another and complaint counsel will therefore be unable to prove the merger resulted in the elimination of actual competition. We do not decide the various legal and factual issues raised by respondent's mootness claim. However, the claim that the merger eliminated actual competition in the uranium oxide market is one of only three theories advanced in the complaint. Assuming, without deciding, that the actual competition theory has been mooted, we believe further proceedings with respect to the other two theories would still be warranted. As for respondent's argument that the two potential competition theories are "extremely weak," we believe that these theories can be assessed only on the basis of a full evidentiary record.

Respondent's motion to dismiss the complaint is accordingly denied.

It is so ordered.

IN THE MATTER OF

STERLING DRUG INC., ET AL.

Docket 8919. Interlocutory Order, Sept. 13, 1977

Denial of respondent Sterling Drug Inc. motion to dismiss portions of complaint concerning the product Cope, and affirmance of ALJ's ruling denying respondent's motion for partial summary decision.

ORDER

Respondent Sterling Drug Inc., ("respondent") (1) applies for interlocutory review of the administrative law judge's denial of its motion for summary decision with respect to the portions of the complaint concerning the product Cope; and (2) moves for dismissal of these portions of the complaint on the ground that further proceedings would not be in the public interest. The administrative law judge, by order dated June 7, 1977, authorized respondent to apply for interlocutory review of his denial of the summary decision motion¹ and certified to the Commission the motion to dismiss.²

Respondent argues that Cope is a minor product with a "miniscule" share of the analgesic market, that advertising of the product terminated more than five years ago and that there is "no possibility" the alleged violations will be repeated and, hence, "no basis for any relief, no matter what the outcome of a trial."³ Respondent relies on an affidavit prepared by Mr. James Alberts, a company official, asserting that Cope advertising has been terminated and that "Sterling has no plans to advertise Cope in the foreseeable future and there is no reasonable expectation or possibility of any such advertising because of the same objective economic factors that led to termination more than five years ago."⁴ Sterling also cites a recent announcement that the Food and Drug Administration has commenced an action that may lead to removal from the market of all daytime sedatives, including Cope, that are sold over-the-counter without prescriptions.⁵

Respondent contends that the summary decision motion should

¹ Rules of Practice, Section 3.23(b).

² Rules of Practice, Section 3.22(a).

³ Motion of Sterling Drug Inc. to Dismiss Issues Related to the Product Cope on Public Interest Grounds; and Application for Interlocutory Appeal from the Denial of Respondent's Motion for Summary Decision 1,2.

⁴ The affidavit accompanies respondent's motion for summary decision.

⁵ Supplemental Memorandum. . . , June 24, 1977. We hereby grant respondent leave to file this memorandum and complaint counsel leave to file their reply.

An FDA advisory panel had found insufficient evidence to support a label claim that one of Cope's primary ingredients is safe and effective for daytime tension relief and allowed three years for the submission of adequate substantiation for tension relief claims. Respondent has also cited this action as supporting dismissal of the complaint.