

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.

have been granted because its discontinuance of advertising of Cope rendered the portions of the complaint concerning the product moot as a matter of law. The motion to dismiss asserts that further proceedings with regard to this product are, in any event, not in the public interest.

We affirm the ALJ's denial of respondent's summary decision motion. The law judge reasonably found that the affidavit offered by respondent did not contain an unqualified assurance that advertising for Cope would not be resumed under appropriate market conditions.⁶ As for the recently announced FDA proceeding, the FDA indicated its intention to begin a "lengthy" process expected to result in the removal from the market of daytime sedatives such as Cope. The eventual outcome and its timing are, of course, uncertain.

Even if there was no possibility that respondent would resume its advertising of Cope,⁷ "we would not be prevented on the ground of mootness from prohibiting closely related violations in the future." *Rubbermaid, Inc.*, 87 F.T.C. 676, 707 (1976), *appeal pending*, No. 76-1830 (6th Cir.). Violations found with regard to the product Cope might well justify order prohibitions against reasonably related practices respecting other Sterling products.⁸

We conclude for the same reasons that the public interest would not be served by the granting of respondent's motion to dismiss.

Respondent's motion to dismiss is accordingly denied and the administrative law judge's ruling denying respondent's motion for partial summary decision is affirmed.

It is so ordered.

⁶ We do not mean to suggest that we would necessarily be bound by an unqualified assurance. See *Fedders Corp.*, 85 F.T.C. 38 (1975), *aff'd.*, 529 F.2d 1398 (1976), *cert. denied*, 429 U.S. 818, 45 U.S.L.W. 3249 (Oct. 4, 1976).

⁷ We do not reach complaint counsel's arguments about the relevance of claims that continue to be disseminated on Cope labels.

⁸ See *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).

Whether evidence concerning Cope might support order provisions that proof concerning other Sterling products might not support would depend on the nature and relative strengths of the evidence concerning the various products.

IN THE MATTER OF
GULF OIL CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING
ACTS

Docket 9044. Complaint, July 15, 1975 — Decision, Sept. 13, 1977

This consent order, among other things, requires a Pittsburgh, Pa. seller of petroleum and other products to cease failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Federal Reserve Board regulations.

Appearances

For the Commission: *Howard F. Daniels, C. Lee Peeler and Hong S. Dea.*

For the respondent: *Frank W. Morgan, Pittsburgh, Pa., John E. Bailey and Catherine C. McCulley, Houston, Texas.*

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Gulf Oil Corporation, a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts and implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Gulf Oil Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office and place of business located at 435 7th Ave., Pittsburgh, Pennsylvania.

PAR. 2. Respondent is now, and for some time in the past has been, engaged in the advertising, offering for sale, and sale of petroleum products and other merchandise to the public.

PAR. 3. In the ordinary course and conduct of its business as aforesaid, respondent regularly engages in credit sales, as "credit sale" is defined in Section 226.2(n) of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to October 28, 1974, respondent has caused to be