

IN THE MATTER OF
STERLING DRUG INC., ET AL.

Docket 8919. Interlocutory Order, Sept. 3, 1980

ORDER DENYING STERLING'S APPLICATION FOR INTERROGATORIES

Respondent Sterling Drug Inc., ("Sterling") seeks authorization to serve complaint counsel with interrogatories concerning the issuance of a Federal Trade Commission press release dated April 17, 1980. Sterling's application was certified to us by the Administrative Law Judge on May 15, 1980; the law judge has declined to rule on the matter because he believes that Rules 3.31(b)(1) and 3.35 do not authorize him to do so.

The press release involved here announced the Commission's initial acceptance of a consent agreement with Dancer-Fitzgerald-Sample, Inc. ("DFS"), an advertising agency that was named as a respondent in this proceeding due to its former responsibility for handling Sterling's Bayer Aspirin and Cope accounts. The agreement specifically limited the superiority and other types of claims that DFS could make in the future on behalf of Bayer Aspirin, Bayer Children's Aspirin, Cope, and any other over-the-counter analgesic. Sterling claims that the press release on this agreement was deceptive, however, and led to erroneous news reports that Bayer (i.e., Sterling) had agreed not to claim that its aspirin was superior to others. More specifically, Sterling contends that the release should at least have stated that DFS no longer handles advertising for Sterling and that Sterling is "now vigorously defending" against Commission charges at trial. In fact, the company's basic position appears to be that the press release should not have named any of its products at all since DFS is no longer connected with them in any way.

Complaint counsel have stated that they reviewed the press announcement prior to dissemination. Sterling contends that this fact raises the issue of prosecutorial misconduct and that interrogatories are necessary to establish complaint counsel's role in approving the release.

We do not consider lightly the kinds of concerns which Sterling has raised, for we recognize the impact that an agency press release may have on a company's reputation and competitive position. It is essential, therefore, that every effort be made to ensure that press releases are accurate and fair, and are not likely to be misconstrued by the news media. However, it is also clear that the Commission has an important obligation to inform the public of its activities, and

that the Commission's authority to publish announcements on the progress of agency proceedings is not eclipsed by the possibility that a respondent's goodwill might suffer. *Federal Trade Commission v. Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308 (D.C. Cir. 1968). Thus, a respondent who objects to a press release would have no legally enforceable claim for relief unless it can at least show that it was injured by an inaccurate or discriminatory announcement. See *id.* at 1314. Assuming that such a showing would warrant some form of remedy—and we withhold judgment on that issue—the respondent should not be entitled to take the extraordinary step of serving interrogatories on complaint counsel without offering some reason to connect the inaccurate or discriminatory statement to prosecutorial abuse.¹ In this case, we find no inaccuracies in the release and no indications of prosecutorial abuse.²

The company argues that the announcement was inaccurate because it failed to make clear that DFS no longer had a direct stake in the case and that Sterling itself had strongly denied Commission charges. We disagree. The proposed disclosure regarding DFS might have suggested that the agency settled because it no longer had a sufficient interest to continue litigation. However, the accuracy of such an explanation is speculative and its relevance to the consent agreement strikes us as marginal. Sterling may believe that such a disclosure would tend to support its position opposing the charges in the complaint, but staff members should not be required to prepare press releases to achieve that purpose. In any event, the release stated that DFS, in accepting the consent agreement, did not admit that it had violated the law.

Similarly, the release noted that charges against Sterling and another advertising agency were still pending. Perhaps this statement was not so emphatic as Sterling would have wished, but we do not believe that there was an obligation to ensure that the release disclosed the vigor of Sterling's opposition to the charges made against it.

Finally, Sterling argues that the release should not have "emphasized" its products. However, the agreement signed by DFS covers claims for those products. One may thus expect that an accurate summary of this agreement would name Sterling's products. Fur-

¹ However, a respondent or any other party affected by a Commission press release may always seek the publication of corrected press releases by contacting the Office of Public Information (OPI), or by submitting a formal request to the Commission itself.

² It should be noted that OPI has primary responsibility for drafting press announcements, and that the function of other staff members, such as complaint counsel here, is merely to consult with OPI as needed. See FTC Operating Manual Section 17.2.2 (1980); *cf. id.* Section 5.14.6.13. In this and in other respects, complaint counsel are expected to follow Rule 7-107(H) of the Code of Professional Responsibility. See *The Raymond Lee Organization, Inc.*, 89 F.T.C. 208 (1977).

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thermore, since the complaint in this proceeding was directed specifically against advertisements of Sterling analgesics, it is hardly inappropriate that a settlement with one of the respondents should clearly identify the products concerned.

We therefore deny the respondent's application. Accordingly,

It is ordered, That respondent's application to serve interrogatories on complaint counsel be, and hereby is, denied.

Commissioner Pitofsky did not participate.

Complaint

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IN THE MATTER OF
MACMILLAN, INC., ET AL.

FINAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 9110. Complaint May 23, 1978—Decision, Sept. 4, 1980

This order requires a New York City publishing firm and its Chicago, Ill. subsidiary, LaSalle Extension University, among other things, to cease, in connection with the advertising and sale of correspondence courses, misrepresenting the school's admission policy; the need or demand for graduates of their courses; the employment prospects and potential earnings available to them; and the requirements or qualifications necessary to obtain employment in their chosen fields. Advertisements containing any job or earnings claim must include a disclaimer stating that "Graduation from this course does not guarantee you will get a job;" and testimonials which do not reflect the typical student experience must advise that the described experience is atypical. Further, if respondents represent to any prospective student that there is an employment demand for graduates of a relevant course, they must clearly and conspicuously disclose specified information regarding the vocation success rate of previous students. Additionally, respondents are prohibited from misrepresenting or failing to disclose material facts concerning a student's financial obligations upon enrollment, and right to cancellation and refund.

Appearances

For the Commission: *Alice S. Perlin.*

For the respondent: *Bella Linden and Frederick F. Greenman, Linden & Deutsch, New York City and Abe Fortas, Fortas & Koven, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Macmillan, Inc., a corporation, and LaSalle Extension University, a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, 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 Macmillan, Inc. (hereinafter sometimes referred to as Macmillan) is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of