NO BREACH OF THE CODE

CASE AUTH/3798/7/23

VOLUNTARY ADMISSION BY BAUSCH & LOMB

Reference to Emerade in an agency LinkedIn post

CASE SUMMARY

This voluntary admission concerned a LinkedIn post by a creative agency that referenced Emerade (adrenaline).

The outcome under the 2021 Code was:

No Breach of Clause 5.1	**Requirement to maintain high standards at all times**
No Breach of Clause 26.1	**Requirement not to advertise prescription only medicines to the public**

This summary is not intended to be read in isolation.
For full details, please see the full case report below.

FULL CASE REPORT

A voluntary admission was received from Bausch & Lomb UK Limited.

As Paragraph 5.6 of the Constitution and Procedure required the Director to treat a voluntary admission as a complaint the matter was taken up with Bausch & Lomb.

VOLUNTARY ADMISSION

The voluntary admission wording is reproduced below:

> "Bausch & Lomb U.K. Ltd are full members of the ABPI and committed to compliance of the Code of Practice within our activities at all times. Under the spirit of the code of self-regulation I wish to bring a matter to your attention.
>
> On the evening of Monday 10th of July at 10pm we discovered a LinkedIn advertisement had been posted on by a previous creative agency ([named]) we had used but whom we not currently under contract with.
>
> In this advert, they had included our intellectual property (IP), Bausch & Lomb Logo and referenced a branded medicine (Emerade) that we distribute on behalf of Bausch Health. This advert linked to an article hosted on [the creative agency's] website outlining how they had developed the Emerade app back in 2018 for Bausch + Lomb.

Upon discovery of this post, an email was sent immediately requesting them to urgently remove this as this was in breach of the code as it was naming a POM.

[The creative agency] did not seek permission from us to post anything related to their work and we have therefore deemed them to be in breach of their original agreement with us as stated below in our standard terms and conditions:

Clause 19*: Seller shall not in any way use the name, trademark, trade name or other designation of Buyer in advertising, publicity or other promotional activity without the prior, express written permission of Buyer.*

The post and article were removed at 8.17am on Wednesday 11th of July and we immediately launched an investigation into this matter.

[The creative agency] advised us that an identical version of this advert had been shared across other social media platforms. We have subsequently requested a full analytical report of both the article and adverts posted on [the agency's] social media accounts.

<u>[The creative agency] have provided with the following information:</u>

- The article (provided) was posted on [the agency's] website on 6th July 2023 at 10:21am.
- Adverts promoting this article were deployed at the following times:
    - Facebook – Monday 10th July 2023 at 11:00am
    - Twitter – Monday 10th July 2023 at 11:00am
    - LinkedIn – Monday 10th July 2023 at 12:00pm
    - Instagram – Monday 10th July 2023 at 16:00pm
- The article and adverts were removed from all platforms including the [agency's] website at 08:17am on Tuesday 11th July
- Access logs show 165 impressions. According to [the creative agency], this is mostly bots or Facebook embed user agents meaning that this could be users seeing the post in their Facebook/LinkedIn feeds but not clicking through to the article
- During this time, [the agency's] analytical data showed the following clicks:
    - Facebook = 0 clicks to article
    - Twitter = 2 clicks to article
    - LinkedIn = 2 clicks to article

We would like to reiterate that we had no prior knowledge or any indication that article or social media adverts were being used by [the creative agency] for marketing purposes. If we had been made aware of this, we would have forbidden any use of our name or reference to product.

As a result of this, we are contacting all of our external marketing agencies to remind them of their obligation to abide by the terms and conditions in their purchase order contract to avoid any unauthorised articles being posted again in future.

From our perspective we had no direct input into this breach and had given clear direction to this agency in our trading relationship that they had no rights to use any of our Intellectual Property without our permission. The agency have apologised but there

is a breakdown of trust in this relationship which we can no longer risk working with them for compliance reasons."

When writing to Bausch & Lomb, the PMCPA asked it to consider the requirements of Clauses 26.1 and 5.1 of the Code.

BAUSCH & LOMB'S RESPONSE

The response from Bausch & Lomb is reproduced below:

"Thank you for your response on the 14th of July to our letter of notification of an incident under the code of self-regulation dated 11th of July.

Bausch & Lomb U.K. Ltd are full members of the ABPI and committed to compliance of the PMCPA Code of Practice within our activities at all times.

As stated in our previous communication, we became aware of an advert placed by [named creative agency] on the evening of Monday 10th of July referencing activity they had carried out for Bausch & Lomb developing a patient App for Emerade (adrenaline autoinjector) back in 2016 to 2019. There was no activity with this company that involved any aspect of social media. [The creative agency] are not currently engaged in any work on Emerade with Bausch & Lomb U.K. Ltd as these activities have ceased on completion of that project.

This was a post generated solely by [the creative agency] with no request for permission or input from Bausch & Lomb U.K. Ltd. Any use of our name, trademark or trade name is prohibited without prior, express written permission by Bausch & Lomb U.K. Ltd. This is stated in the terms and conditions of our PO – Clause 19

> Clause 19*: Seller shall not in any way use the name, trademark, trade name or other designation of Buyer in advertising, publicity or other promotional activity without the prior, express written permission of Buyer.*

Therefore they breached the terms and conditions of our business agreement by including our IP, Bausch & Lomb Logo and referencing a branded medicine (Emerade) that we distribute on behalf of Bausch Health.

Emerade is an adrenaline autoinjector – marketed in 2 variants – 300mcg and 500mcg adrenaline tartrate solution for injection in a pre-filled pen

Upon discovery of this post, an email was sent immediately requesting them to urgently remove this. The post and article were removed at 8.17am on Wednesday 11th of July and we immediately launched an investigation into this matter.

[The creative agency] advised us that an identical version of this advert had been shared across other social media platforms. We have subsequently requested a full analytical report of both the article and adverts posted on [the agency's] social media accounts.

[The creative agency] have provided with [sic] the following information:

- The article was posted on [creative agency's] website on 6th July 2023 at 10:21am.
- Adverts promoting this article were deployed at the following times:
    - Facebook – Monday 10th July 2023 at 11:00am
    - Twitter – Monday 10th July 2023 at 11:00am
    - LinkedIn – Monday 10th July 2023 at 12:00pm
    - Instagram – Monday 10th July 2023 at 16:00pm
- The article and adverts were removed from all platforms including the [agency's] website at 08:17am on Tuesday 11th July
- Access logs show 165 impressions. According to [the creative agency], this is mostly bots or Facebook embed user agents meaning that this could be users seeing the post in their Facebook/LinkedIn feeds but not clicking through to the article
- During this time, [the agency's] analytical data showed the following clicks:
    - Facebook =0 clicks to article
    - Twitter = 2 clicks to article
    - LinkedIn = 2 clicks to article

Regarding Clause 26.1 of the code, this was information shared publicly naming a branded POM, it was not instigated or approved by us. The nature of the advert was not promotional to encourage the use or prescription of the product to patients but instead the use of the app as a tool to facilitate reminders to carry a pen at all time as a safety measure. We believe we acted promptly to limit the circulation of this information once it was picked up under our vigilance of these platforms to ensure there are no breaches. You will see from the data above that there were only 2 clicks to the article on two platforms most likely to be Bausch & Lomb U.K. on discovery of the post and investigating the context. We believe that we have had the guidance in place to avoid these situations so do not think the fault lies with us in this circumstance.

Regarding Clause 5.1 – we had no prior knowledge or input into the decision in where to post this or the content of such posts.

We have contacted all of our external marketing agencies to remind them of their obligation to abide by the terms and conditions in their purchase order contract to avoid any unauthorised articles being posted again in future. It is very clear from our discussions with these agencies that they already clearly understood this and [the creative agency] apologised stating that this was an error due to junior marketing staff just new to their business.

I conclude that this is not a breach we have been actively responsible for and the actions of this agency were against our guidance and unpermitted use of our Intellectual Property. We have taken additional steps reinforcing this with our agencies on the guidance of the use of our IP."

PANEL RULING

The Panel noted Bausch and Lomb's voluntary admission regarding a LinkedIn post made by a creative agency it had previously contracted with, and which referenced a branded medicine, Emerade (adrenaline).

Emerade is supplied as a pre-filled pen (auto-injector) and is indicated for the emergency treatment of severe acute allergic reactions (anaphylaxis) triggered by allergens in foods, medicines, insect stings or bites, and other allergens as well as for exercise-induced or idiopathic anaphylaxis.

The creative agency's post included text that stated that the company was sharing some of its biggest projects over the years as part of a campaign celebrating its 20th anniversary. The post included a graphic, which included, among other things, the Bausch and Lomb logo and the words "HealthTec Innovations – [other company name] and Emerade" The post linked to an article on the agency's website, titled "HealthTec Innovations – [other named company] and Emerade!". It focused on two apps developed by the agency. Under the "Emerade App" section, the article stated, "Bausch and Lomb, the healthcare company behind the Emerade Pen, designed for sufferers of anaphylaxis, approached us at [agency] to create an app to act as a **reminder tool** for people taking their pens out with them." The article went on to describe some aspects of the app's functionality.

The Panel noted the purpose of the proactive LinkedIn post was to celebrate the creative agency's 20th anniversary and showcase some of the projects it had undertaken. The post mentioned the brand name of a medicine at the outset; it did not mention its indication or make any claims. The Panel noted that the linked article, which formed part of the post, mentioned the name and indication of a medicine, however it did not include any claims. The Panel noted the app was designed to assist sufferers of anaphylaxis who had already been prescribed and supplied Emerade.

The Panel noted Bausch and Lomb's submission that the article was posted on the agency's website on 6 July 2023, the LinkedIn post was posted at 12.00 on 10 July 2023, and adverts promoting the article were deployed on Facebook, Twitter and Instagram at various times on 10 July 2023. The Panel noted Bausch and Lomb's submission that the article and adverts were removed from all platforms at 08.17 on 11 July and that analytical data showed two clicks through to the article from both Twitter and LinkedIn.

Clause 1.24 states that pharmaceutical companies are responsible under the Code for the acts and omissions of their third parties which come within the scope of the Code, even if they act contrary to the instructions which they have been given.

The Panel noted Bausch and Lomb's submission that there was no current contract between it and the creative agency and that their engagement had ended once the app project was completed. While the Panel did not have the exact dates of Bausch and Lomb's contracts with the creative agency, it noted Bausch and Lomb's submission that the creative agency had developed a patient app for Emerade between 2016 and 2019. The Panel had before it a purchase order dated 31 May 2016 relating to the Emerade Mobile app and a proposal document from May 2019 concerning updates to the app and indicating a total of 25 days' work to deliver these updates. The Panel determined that it was likely this latter document related to the most recent contract between Bausch and Lomb and the creative agency and that the documents supported Bausch and Lomb's submission that the engagement ended in 2019 on completion of the project.

The Panel noted Bausch and Lomb's submission that the agency did not seek permission to post anything related to its work on the Emerade project and had failed to comply with its

contractual commitments. The Panel noted that clause 19 of the terms and conditions for the purchase order for the app stated, “Seller shall not in any way use the name, trademark, trade name or other designation of Buyer in advertising, publicity or other promotional activity without the prior, express written permission of Buyer.”

The Panel understood that creative agencies and individuals would want to be able to showcase their work and/or refer to the projects in which they had been involved, however, in doing so, they must ensure that prescription only medicines were not advertised to the public.

The Panel considered Clause 1.24 of the Code which defines a third party as a legal person/entity or individual that represents a company, or interacts with other parties on behalf of a company or relating to a company’s medicines and states that companies are responsible for the acts and omissions of their third parties which come within the scope of the Code, even if they act contrary to the instructions which they have been given. The Panel also considered Clause 1.17 which defines promotion as any activity undertaken by a pharmaceutical company or with its authority which promotes, among other things, the use of a medicine and noted that it was well established that the name of a medicine and its indication could constitute promotion.

The Panel considered the contract between Bausch and Lomb and the creative agency ended, in 2019, several years before the agency’s LinkedIn post and article were published, and, noting that the creative agency had not gained consent to use Bausch and Lomb’s logo or to refer to the medicine, therefore that at the time of the post the creative agency could not be considered to be a third party of Bausch and Lomb such that the company was responsible for the creative agency’s actions.

Accordingly, the Panel considered that in the particular circumstances of this case, Bausch and Lomb had not promoted Emerade to the public and **no breach of Clause 26.1** was ruled.

The Panel considered that Bausch and Lomb had acted quickly upon discovery of the LinkedIn post. In light of its ruling of no breach of Clause 26.1, the Panel considered that there was no evidence Bausch and Lomb had failed to maintain high standards and **no breach of Clause 5.1** was ruled.

Complaint received **11 July 2023**

Case completed **5 August 2024**