CASE AUTH/3473/2/21

COMPLAINANT v ALNYLAM

Promotion of Oxlumo on LinkedIn

A contactable complainant alleged that an agency LinkedIn post promoted Oxlumo (lumasiran) to the public; the post referred to the brand name and described Oxlumo as the first and only FDA-approved prescription medicine for infants, children and adults with primary hyperoxaluria type 1 (PH1). Oxlumo was marketed by Alnylam Pharmaceuticals.

The detailed response from Alnylam is given below.

The Panel noted Alnylam's submission that Alnylam Switzerland GmbH had commissioned an agency to assist in the preparation of an Oxlumo digital sales aid, however contrary to the agreement between the parties, the agency had sub-contracted another agency without the prior consent of Alnylam.

The Panel noted that the LinkedIn post referred to the Oxlumo digital sales aid produced for Alnylam; it had been posted by the sub-contracted agency's LinkedIn page and shared by its owner. The LinkedIn post stated 'In collaboration with [agency name], we've provided the design services to help Alnylam create a digital sales aid for their ____ brand (Swipe to find out)' and included a preview to what appeared to be a two page document. It appeared to the Panel, from the screenshot provided, that the preview at the outset would have displayed the statement 'the first and only FDA-approved prescription medication for infants, children and adults with primary hyperoxaluria type 1 (PH1)'. The preview could be clicked to view the full document or swiped to see a preview of another aspect of the detail aid; upon swiping right, it appeared that the preview would have displayed the Oxlumo brand logo, which included its non-proprietary name lumasiran, and its formulation 'for injection 94.5mg/0.5mL'.

The Panel noted that as soon as it was notified of the complaint, Alnylam acted to ensure that the LinkedIn post was taken down forthwith. The sub-contracted agency acknowledged that the post had been published without the consent of either Alnylam or the agency contracted by Alnylam.

The Panel considered that the sub-contracted agency and its owner's network was likely to have included individuals who were not health professionals or other relevant decision makers. The Panel considered that the proactive dissemination of the post, which contained the name and indication of Oxlumo, to those who were not health professionals or other relevant decision makers, constituted promotion of a prescription only medicine to the public. A breach of the Code was ruled as acknowledged by Alnylam.

The Panel noted Alnylam's submission that the contract, which the Panel assumed was between Alnylam Switzerland GmbH and the agency for the development of the digital sales aid, not only forbade sub-contracting but also expressly forbade the use of Alnylam's name or any associated sign, symbol or trademarks in any advertising or sales material, without Alnylam's prior written consent. Based on Alnylam's submission the Panel considered the contract should have prevented the LinkedIn posting and it was thus difficult to see what more Alnylam could have done. The Panel noted that Alnylam had not consented to the sub-contractor agency's involvement and considered that the company had been very badly let down by third parties working on its behalf. The Panel, based on the evidence before it, ruled no breaches of the Code including of Clause 2.

A contactable complainant complained about an agency LinkedIn post which promoted Oxlumo (lumasiran). The complainant provided a link to, and screenshots of, the LinkedIn post which referred to Oxlumo as the first and only FDA-approved prescription medicine for infants, children and adults with primary hyperoxaluria type 1 (PH1). Oxlumo was marketed by Alnylam Pharmaceuticals.

COMPLAINT

The complainant submitted that the LinkedIn post had provided brand and indication information on LinkedIn to the general public.

When writing to Alnylam, the Authority asked it to consider the requirements of Clauses 2, 9.1, and 26.1 of the Code.

RESPONSE

Alnylam stated that the first it knew about the LinkedIn post was when it received notification of the complaint from the Authority. The post referred to the Oxlumo digital sales aid and the agency which had been commissioned to assist in its preparation by Alnylam Switzerland GmbH. The sales aid was for use in the CEMEA region (Canada, Europe, Middle East, Asia) and had not been reviewed or used in the UK to date.

Without Alnylam's consent, the agency has sub-contracted another agency in the preparation of the user experience aspect of the digital sales aid. The LinkedIn post was posted by the founder and owner of the sub-contracted agency. Alnylam submitted it had no role in, or prior knowledge of, the preparation or publication of the post.

Alnylam submitted that the agency contracted by Alnylam was incorporated in the UK and was very familiar with, and trained its staff on, the Code. The contract between Alnylam and the agency for the development of the digital sales aid expressly forbade sub-contracting, as well as the use of Alnylam's name or any associated sign, symbol or trademarks in any advertising or sales material, without Alnylam's prior written consent.

As explained above, Alnylam was not consulted about, or aware of, the post, nor did it grant consent for the agency to sub-contract work. Alnylam noted that it received notification of the complaint on 15 February and later that day it spoke to the owner of the sub-contracted agency who acknowledged that the post (which was posted 10 February) was made without the knowledge of, or permission from, Alnylam. By the end of the call the post had been removed.

Alnylam stated that both agencies had explicitly acknowledged responsibility for, and apologised for, the breach and had both undertaken to ensure that all relevant staff would undertake a compliance e-learning awareness course for agencies.

Alnylam stated that as it took compliance with the Code very seriously, despite the fact that this was an anomalous situation, it would contact all of its relevant contracted agencies to remind them of their legal and contractual obligations, in particular in relation to the use of social media and sub-contracting. Alnylam would also invite the agencies to ensure that all of their relevant staff undertook (or refreshed) training on the Code.

With respect to the requirements of Clause 26.1, Alnylam acknowledged that the LinkedIn post was made by a marketing agency working indirectly for Alnylam and that it included the necessary elements to be considered an advertisement for a prescription only medicine to the public. Alnylam noted the established principle that companies were responsible for acts/omissions of marketing agencies whom they engaged on their behalf.

Alnylam stated that if it had been asked, it would not have approved the Linkedin post and it noted the following:

- The post was prepared and posted without Alnylam's knowledge or consent
- The contract with the contracted agency explicitly prohibited conduct such as the post
- The contracted agency, and its sub-contractor, accepted responsibility for the post
- The post was only available for 6 days
- The LinkedIn page in question only had seven followers
- Alnylam responded immediately and ensured that the post was removed within three hours after Alnylam became aware of its existence
- All sub-contractors and agencies would be reminded of their obligations and invited to undergo training.

With regard to Clauses 9.1 and 2, Alnylam reiterated that:

- The conduct was explicitly prohibited by contract
- Alnylam was unaware of the conduct
- Alnylam acted very promptly to remedy the matter and ensured that the post was removed within three hours of becoming aware of its existence.

While Alnylam regretted the publication of the post, the company submitted that it had maintained high standards at all times. Further, Alnylam did not consider that the matter brought discredit upon the pharmaceutical industry.

PANEL RULING

The Panel noted Alnylam's submission that Alnylam Switzerland GmbH had commissioned an agency to assist in the preparation of an Oxlumo digital sales aid. The agency was described as being familiar with the Code. The sales aid had not been reviewed or used in the UK to date. No copy of the agreement between the parties had been provided but the Panel noted Alnylam's submission that, contrary to that agreement, the agency had sub-contracted another agency to provide some of the services to complete the project without the prior consent of Alnylam.

The Panel noted that the LinkedIn post at issue, provided by the complainant, referred to the Oxlumo digital sales aid produced for Alnylam; it had been posted by the sub-contracted agency's LinkedIn page and shared by its owner. The LinkedIn post stated 'In collaboration with [agency name], we've provided the design services to help Alnylam create a digital sales aid for their ____ brand (Swipe to find out)' and included a preview to what appeared to be a two page document. It appeared to the Panel, from the screenshot provided, that the preview at the outset would have displayed wording that stated 'the first and only FDA-approved prescription medication for infants, children and adults with primary hyperoxaluria type 1 (PH1)'. The preview could be clicked to view the full document or swiped to see a preview of another aspect of the detail aid; upon swiping right, it appeared that the preview would have displayed the Oxlumo brand logo, which included its non-proprietary name lumasiran, and its formulation 'for injection 94.5mg/0.5mL'.

The Panel noted that as soon as it was notified of the complaint by the Authority and thus became aware of the LinkedIn post, Alnylam acted to ensure that it was taken down forthwith. The Panel noted that a letter from the sub-contracted agency acknowledged that the post had been published without the consent of either Alnylam or the agency originally contracted.

The Panel understood that creative agencies and individuals would want to be able to showcase their work and/or refer to the campaigns 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 noted that it was an established principle under the Code that pharmaceutical companies were responsible for third parties even if that third-party failed to follow instructions from the pharmaceutical company.

The Panel considered that the sub-contracted agency and its owner's network was likely to have included individuals who were not health professionals or other relevant decision makers. The Panel considered that the proactive dissemination of the post, which contained the name and indication of Oxlumo, to those who were not health professionals or other relevant decision makers, constituted promotion of a prescription only medicine to the public. A breach of Clause 26.1 was ruled as acknowledged by Alnylam.

The Panel noted Alnylam's submission that the contract, which the Panel assumed was between Alnylam Switzerland GmbH and the agency for the development of the digital sales aid, not only forbade sub-contracting but also expressly forbade the use of Alnylam's name or any associated sign, symbol or trademarks in any advertising or sales material, without Alnylam's prior written consent. Based on Alnylam's submission the Panel considered the contract should have prevented the LinkedIn posting and it was thus difficult to see what more Alnylam could have done. The Panel noted that Alnylam had not consented to the sub-contractor agency's involvement and considered that the company had been very badly let down by third parties working on its behalf. The Panel, based on the evidence before it, ruled no breach of Clauses 9.1 and 2 of the Code.

Complaint received **10 February 2021**

Case completed **12 August 2021**