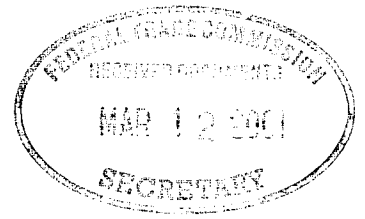


**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**



_____)
In the Matter of)
)
NATURAL ORGANICS, INC.) **Docket No. 9294**
a corporation, and)
)
GERALD A. KESSLER)
individually and as an officer)
of the corporation)
_____)

TO: The Honorable James P. Timony
Chief Administrative Law Judge

**RESPONDENTS' RESPONSE TO
COMPLAINT COUNSEL'S MOTION TO COMPEL DISCOVERY**

On February 26, 2001, Complaint Counsel filed yet another Motion, this time a Motion to Compel Discovery (Motion). Complaint Counsel, in filing this most recent Motion, have fired the latest salvo in their strategy intended to divert Respondents' attention from preparing for the Hearing before Your Honor. In filing the Motion, Complaint Counsel have violated Section 3.22(f) of the Commission's Rules of Practice, as they have not conferred in good faith with Respondents to resolve the issues raised in the Motion. Furthermore, Complaint Counsel have filed a Motion that is internally inconsistent and otherwise without merit.

We readily acknowledge the FTC's long-standing practice of conducting litigation in which the parties vigorously present their legal and factual arguments without

engaging in scorched earth tactics. However, the continuous pattern of unmeritorious Motions filed by Complaint Counsel fits outside the Commission's norm. The result of these Motions is that Respondents, who obviously do not have the monetary resources of large, publicly held corporations, have squandered their resources on legal expenses.

Contrary to the picture painted in Complaint Counsel's Motion, Respondents have voluntarily provided substantial discovery in the short period after their new counsel was retained. Respondents have made key employees, as well as Respondent Gerald Kessler, available for depositions.¹ Respondents have also provided Complaint Counsel with relevant, non-privileged documents in a timely manner, as set by Your Honor's Scheduling Order, notwithstanding that Respondents' current counsel have only been involved in this matter since December 2000. However, Respondents have objected to the Subpoena to the extent the Subpoena Specifications were duplicative, overly broad, unduly burdensome or vague, as provided in Rule 3.31(c)(1) of the Commission's Rules of Practice. Complaint Counsel have filed similar objections to Respondents' document requests.

I. Complaint Counsel Violated Their Duty to Confer with Respondents

Section 3.22(f) of the Commission's Rules of Practice requires the proponent of a Motion to confer in good faith with the opposing party in an effort to resolve the issues.

¹ On March 5, 2001, Complaint Counsel cancelled Mr. Kessler's deposition the day before it was to occur even though Complaint Counsel knew that Respondents' Counsel had traveled from Washington, D.C. to California to attend the deposition.

Complaint Counsel have not complied with this provision, and their Motion should therefore be denied on this basis alone.

On February 12, 2001, Complaint Counsel sent a letter to Respondents asking for certain documents (Exhibit D to Complaint Counsel's Motion). That same week, during the depositions of five of Natural Organics' employees, Complaint Counsel Matthew Gold asked Respondents' Counsel John Fleder for documents discussed in deposition testimony. Mr. Fleder said that he would likely be willing to voluntarily provide those documents, if Mr. Gold specified with greater particularity what documents he wanted. On February 21, 2001, Mr. Gold faxed a letter to Mr. Fleder listing those documents that he wished to see (attached herewith as Exhibit A). Complaint Counsel further supplemented this request by letter sent on February 23, 2001 (attached as Exhibit B). In the letter dated February 21, 2001, Mr. Gold acknowledged the overlap between this Motion and his letters when he stated that "[a]s you know, most of the documents requested in this letter were responsive to complaint counsel's subpoena to Natural Organics." See Exhibit A at 2. On March 2, 2001, Mr. Fleder responded to Mr. Gold's letters and provided documents in response (attached as Exhibit C). Mr. Fleder stated that since the documents requested substantially overlapped with the demands of the Subpoena, and since Mr. Fleder had informed Mr. Gold that Mr. Fleder was going to respond to Complaint Counsel shortly, Mr. Gold should have waited for Mr. Fleder's response prior to filing the instant Motion. Exhibit C at 3. Mr. Fleder's letter makes clear Respondents' willingness to produce responsive documents so long as the request is not vague or overly burdensome.

The fact that Complaint Counsel and Respondents were in continuing negotiations is further supported by Matthew Gold's letter to Your Honor dated March 5, 2001, (attached as Exhibit D), in which Complaint Counsel withdrew part of their Motion because Respondents had provided some of the requested documents. See also March 5, 2001, Letter of Matthew Gold to John Fleder (attached as Exhibit E). The March 5, 2001, letter to Mr. Fleder discusses further documents that Respondents had agreed to provide to Complaint Counsel without necessitating a formal motion. Exhibit E at 1. Since negotiations were ongoing, and Respondents were voluntarily providing requested documents, Complaint Counsel should have waited before filing the Motion.

It was therefore extremely surprising to Respondents that on the same day (February 26, 2001) in which Mr. Gold was informed by Mr. Fleder during a telephone conversation that Mr. Fleder would be notifying Mr. Gold imminently as to what documents Respondents would voluntarily produce, Complaint Counsel filed the instant motion later that day. Rather than continue conferring in good faith, Complaint Counsel filed the latest edition in what is rapidly becoming a catalogue of non-meritorious motions.

The Motion also fails to note that Complaint Counsel seek some sales data that Respondents voluntarily gave during the deposition of Marci Dunnder. See Deposition of Marci Dunnder at 18-21 (Feb. 14, 2001) (Attached as Exhibit F). Moreover, it is likely that Complaint Counsel would have asked Gerald Kessler questions regarding Natural Organics' sales figures, and Mr. Kessler was prepared to answer these questions had the deposition of Gerald Kessler not been cancelled by Complaint Counsel. Further,

Respondents' Counsel provided the listed wholesale price for Pedi-Active A.D.D. by letter dated March 2, 2001. Exhibit D at 2.

Complaint Counsel raise at least one new issue in this Motion that Complaint Counsel never addressed previously with Respondents' Counsel. Respondents earlier objected to the production of communications with consumers regarding Pedi-Active A.D.D. For the first time in this Motion, Complaint Counsel assert a willingness to "accommodate" Respondents by either (1) going to Respondents' Melville, New York facility and inspecting and copying this correspondence there, or (2) giving Respondents more time to respond to this document demand. See Memorandum in Support of Complaint Counsel's Motion to Compel Discovery (Memorandum), at 5. This was never raised as a possibility either orally or in writing, and is something that Complaint Counsel should have earlier raised in discussions with Respondents.

Although Complaint Counsel filed a statement purporting to comply with Section 3.22(f), that statement is not accurate because Complaint Counsel did not make a good faith effort to resolve all of the issues raised in the Motion. The purpose of Section 3.22(f) is to require good faith negotiations, not a rote recitation that discussions had occurred. Complaint Counsel's Motion should therefore be denied for failing to comply with Section 3.22(f). See In the Matter of Intel Corporation, 1999 FTC LEXIS 230 (1999) (Timony, ALJ); In the Matter of Schering Corporation, 1990 FTC LEXIS 323 (1990) (Timony, ALJ).

II. Respondents' Objections to Complaint Counsel's Subpoena Duces Tecum were Timely

According to Complaint Counsel, Respondents' objections to some of the specifications of the Subpoena were untimely because they were served on Complaint Counsel on the date Respondents' reply to the Subpoena was due. Complaint Counsel asserts that Respondents should have moved to quash the Subpoena within ten days after service of the Subpoena on October 3, 2000. Memorandum at 2.

Complaint Counsel "recognizes" that Respondents' "duty" to move to quash was suspended for at least 60 days when Your Honor orally stayed the proceedings on October 16, 2000, although under Complaint Counsel's theory, the ten day period for moving to quash had already expired. *Id.* Alternatively, according to Complaint Counsel, Respondents' current counsel should have filed a notice of appearance and immediately moved to quash the Subpoena in early December during the first few days after new counsel was retained. Memorandum at 3. This is patently absurd. Counsel could not have filed such a motion without first conducting a reasonable inquiry into the facts of the case, something that could not have been done in a few days.²

Furthermore, Respondents did not need to file a motion to quash the Subpoena. Respondents' objections to the Subpoena were properly made during the times set by the Scheduling Order agreed to by Complaint Counsel. Under the Commission's Rules, Section 3.38A(a), "[a]ny person withholding material responsive to a subpoena issued

² Additionally, during initial discussions with Complaint Counsel, Mr. Gold never discussed with Mr. Fleder any obligation to file a motion to quash the Subpoena.

pursuant to § 3.34 . . . shall assert a claim of privilege or any similar claim not later than the date set for production of the material [emphasis added].” See also Subpoena Duces Tecum, Instruction M (same). Not surprisingly, Complaint Counsel do not cite this rule. The Commission’s rule provides that objections to subpoenas need not be made by filing motions, and provides a procedure designed to obviate the need to file numerous motions, a practice clearly abjured by Complaint Counsel.

Further, Your Honor’s Scheduling Order, which was negotiated by Complaint Counsel and Respondents’ Counsel, explicitly states that Respondents’ “[r]eplies to the remaining Specifications shall be due on February 7, 2001.” Scheduling Order at 2 (emphasis added). “Replies” means either the production of documents, or objections to the production of documents. By way of contrast, other parts of the Scheduling Order clearly delineate when documents are to be “provided” by a date certain. E.g., “February 2, 2001 -- Complaint Counsel provides expert witness list.” Id. (emphasis added). Respondents’ objections to the Subpoena were therefore timely according to both the Commission’s Rules of Practice and Your Honor’s Scheduling Order.³

³ There is also a question as to whether a subpoena is the proper vehicle for requesting documents from a party, as opposed to a request for documents (Commission’s Rules of Practice § 3.37). Under the Federal Rules of Civil Procedure, several decisions have held that a subpoena is only appropriately served on a non-party. See Alper v. United States, 190 F.R.D. 281, 283 (D. Mass. 2000); Hasbro, Inc. v. Serafino, 168 F.R.D. 99, 100 (D. Mass. 1996). Other decisions have held that requests for documents are the preferred method of seeking production of documents from parties. Traina v. Blanchard, 1998 U.S. Dist. LEXIS 5634 (E.D. La. 1998). Under Section 3.37(b), the party responding to the request can make objections to the request by the return date of the request.

III. Complaint Counsel's Motion is Internally Inconsistent

In addition to the above-noted deficiencies, Complaint Counsel's Motion and supporting pleadings are internally inconsistent. It is therefore difficult to prepare a substantive response to the Motion, since Respondents cannot know what Complaint Counsel are asking for.

Complaint Counsel's Motion and Proposed Order both ask Your Honor to order Respondents to "respond in full" to Complaint Counsel's First Interrogatories and Subpoena Duces Tecum, respectively. See Motion at 1; Proposed Order at 1. Yet the Motion, Memorandum, and Proposed Order later discuss only a number of specific items, as discussed below.

While the Motion and Proposed Order both seek that Respondents answer in full Complaint Counsel's First Interrogatories, the Memorandum only discusses one interrogatory, Interrogatory No. 4, which requests financial information regarding sales and profits of Pedi-Active A.D.D. If Complaint Counsel seek full answers to all interrogatories, they have failed to specify how, if at all, Respondents' response to the Interrogatories was deficient other than in this one instance. Clearly, Respondents cannot respond to such a Motion without specific issues to address. Similarly, the Motion and Proposed Order seek that Respondents serve full and complete responses to Complaint Counsel's Subpoena, yet the Memorandum addresses only several categories of documents: non-disseminated advertisements and actual or proposed modifications to disseminated or non-disseminated advertisements (Memorandum at 3); communications with consumers (Memorandum at 4); financial information regarding sales and profits of

Respondents' products, pricing information and advertising expenditures (Memorandum at 6); and DSHEA notices (Memorandum at 7). Again, Respondents cannot address Complaint Counsel's broad demand for full compliance with the Subpoena without specific issues to address.

IV. Respondents Correctly Declined to Provide Documents that were Irrelevant or Overly Burdensome to Produce

A. Communications with Consumers

Respondents objected to the Subpoena specification regarding documents relating to communications with consumers about advertisements for Pedi-Active A.D.D. as overly broad and unduly burdensome.⁴ See Exhibit B to Complaint Counsel's Motion at 3 (Specific Objection No. 3). Complaint Counsel's demand should be denied for two reasons: producing these communications is, as Respondents objected, overly burdensome to produce and Complaint Counsel did not exhaust their remedies in seeking this information. Addressing this latter point first, Complaint Counsel asked for some of the information relating to the identity of individuals who had communicated with Respondents in their letter dated February 21, 2001. See Exhibit A at 1. By letter dated March 2, 2001, Respondents' Counsel indicated his willingness to provide the database information. See Exhibit C at 1-2. By letter dated March 5, 2001, Complaint Counsel

⁴ Respondents maintain three types of correspondence: (1) a database containing the names and addresses of consumers responding to print advertisement; (2) consumer testimonials; and (3) general consumer correspondence. The letters responding to print advertisement are not maintained after entry into the database. After Respondents produced numerous testimonials, Complaint Counsel stated that they did not need any more examples of how well Respondents' product worked.

tentatively agreed to accept the database information. See Exhibit E at 1-2. Complaint Counsel did not wait for this process to play out, however, as they filed this Motion on February 26, 2001, in the midst of negotiations for some of the very information they have demanded in the Motion.

Regarding Complaint Counsel's substantive argument, they assert, without any support, that producing these materials would not be overly burdensome. Although Respondents do maintain a database of consumers that responded to print advertisements, Respondents have already agreed to produce the database information if Complaint Counsel agreed not to seek further information regarding consumer communications. Complaint Counsel and Respondents are still in discussions over the production of this information. If the Motion is denied, Respondents will produce the database information forthwith.

Respondents also maintain general consumer correspondence (not responses to print advertisements) in alphabetical order by the correspondent's last name in one location in their Melville, New York facility. However, these communications are not segregated by product. Respondents would have to go through approximately 100,000 - 150,000 files to cull out those documents responsive to the Subpoena. Furthermore, it is unclear what benefit, if any, these communications may have for Complaint Counsel. The communications are maintained only for approximately one year and are then typically disposed. Additionally, the communications often touch on subjects unrelated to the Complaint, such as inquiries as to where products are available. Thus, it is likely that there is, at most, one year's worth of communications regarding PEDI-Active A.D.D.

scattered throughout thousands of files. Sorting through over 100,000 files to locate those that relate to Pedi-Active A.D.D. would be unduly burdensome and are likely to be of little, if any, benefit to Complaint Counsel.

B. Financial information regarding sales and profits of Pedi-Active A.D.D.; sales of Respondents' other products; the suggested retail price of Pedi-Active A.D.D.; and advertising expenditures for Pedi-Active A.D.D.

Respondents preliminarily note that part of the information requested – the suggested retail price – was voluntarily provided to Complaint Counsel prior to the submission of this Response. Moreover, some sales information was provided through the deposition testimony of Marci Dunnder, see Exhibit F at 18-21, and would have been supplemented during Gerald Kessler's deposition testimony, had it occurred without being cancelled by Complaint Counsel. Had Complaint Counsel continued the Section 3.22(f) discussions in good faith, as discussed above, Complaint Counsel would have learned of Respondents' intent to disclose this information prior to filing this Motion.

The rest of the information demanded is irrelevant. Profit figures for Pedi-Active A.D.D. and sales of Respondents' other products are irrelevant to any discussion about substantiation of claims for one particular product or the relief requested by the Commission. Further, the volume of sales of other products besides Pedi-Active A.D.D. do not have relevance to substantiation of ads for the product at issue.

C. Non-disseminated advertisements and actual or proposed modifications to disseminated or non-disseminated advertisements

Respondents correctly declined to provide non-disseminated advertisements as well as any proposed modifications to disseminated or non-disseminated advertisements.

Complaint Counsel, in unsupported, conclusory fashion, state that “[o]btaining such materials is routine in advertising cases for obvious reasons.” Memorandum at 4.

Complaint Counsel fail to mention that before filing the Motion, Complaint Counsel asked for, and received, a consumer letter advertising piece that replaced the consumer letter that is Exhibit C to the Complaint. Deposition of James P. Gibbons at 63 (Feb. 16, 2001) (attached as Exhibit G). Thus, Complaint Counsel have already received implemented modifications to the disseminated advertising pieces relevant to this case. In typical fashion, they fail to mention this point in the Motion, although they seek implemented modifications to advertisements. Memorandum at 3-4.

Complaint Counsel cite no authority for the relevancy of materials that have not been disseminated, or on proposed (but not adopted) modifications to advertisements. Advertising that has not been disseminated to the public is irrelevant and need not be produced in discovery. Similarly, unadopted modifications to advertising are irrelevant to this case.

D. DSHEA notices

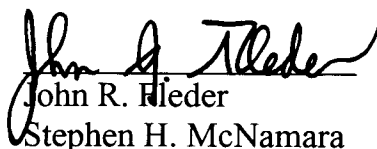
Complaint Counsel in their Motion ask for DSHEA notices filed with FDA. Again, Respondents are hard-pressed to see any relevance of this information. Respondents are not accused of violating the Federal Food, Drug, and Cosmetic Act.

Conclusion

Accordingly, we respectfully request that Your Honor deny Complaint Counsel's Motion to Compel Discovery.

Dated: March 12, 2001

Respectfully Submitted,



John R. Fieder

Stephen H. McNamara

A. Wes Siegner

Holly M. Bayne

HYMAN, PHELPS & MCNAMARA, P.C.

700 13th Street, N.W.

Suite 1200

Washington, D.C. 20005

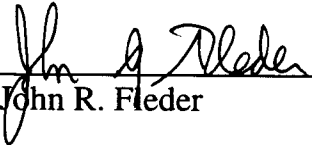
(202) 737-5600

(202) 737-9329 (FAX)

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this twelfth day of March 2001 a copy of the foregoing Respondents' Response to Complaint Counsel's Motion to Compel Discovery was served by first-class mail, postage prepaid, on Matthew D. Gold and Kerry O'Brien, Federal Trade Commission, 901 Market Street, Suite 570, San Francisco, CA 94310.



John R. Fleder



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WESTERN REGION

901 Market Street, Suite 570
San Francisco, CA 94103-1768
Voice: (415) 356-5276
Fax: (415) 356-5242

Matthew D. Gold
Attorney

February 21, 2001

VIA FACSIMILE

John R. Fleder, Esq.
Hyman, Phelps & McNamara, P.C.
700 Thirteen Street, N.W.
Suite 1200
Washington, D.C. 20005-5929

Re: Natural Organics, Inc., *et al.*
Docket No. 9294

Dear Mr. Fleder:

In this letter, I formally request various documents and information that we discussed during last week's depositions of Natural Organics personnel. At the outset, I must mention that the list that Kerry O'Brien and I compiled last week was not in the boxes of documents that we sent back from the hotel at which we conducted the depositions, so Kerry and I attempted to recreate it this morning from memory. During that exercise, we did not have any of the deposition transcripts, which have not arrived yet, and which may have triggered our memories. As such, I believe that we likely have forgotten some items, so it may be necessary to supplement this list in the future.

First, we will need documents related to all individuals who responded, either in writing or by telephone, to any version of the Pedi-Active A.D.D. print ad that is attached to the Commission's complaint as Exhibit A. We learned from Gerard McIntee that information regarding such individuals is maintained in a database administered by Lourdes Degquem in Natural Organics' Southern California facility. Please provide all information in the database regarding such individuals. I prefer to receive the information in electronic format, so long as I am able to read the information with a commercial database or spreadsheet program. If it is easier for you to provide the information in hard copy instead, I will not object.

Second, we will need all documents (as that word is defined in our subpoena to Natural Organics) relating to communications with counsel on subjects about which you authorized last

John R. Fleder, Esq.
Page 2

week's witnesses to respond to questioning. It is my recollection that you authorized testimony on all attorney-client matters that predated the Commission staff's first notification to Natural Organics that an investigation had been opened. For the sake of convenience, during the depositions we set the operative date as May 1, 1997. According to my records, however, the date of the first letter to Natural Organics is May 21, 1997, so please provide any responsive documents based on this later date.

Third, we will need a copy of each Natural Organics product catalog that has included an entry for Pedi-Active A.D.D. Based on last week's testimony, this will mean catalogs for the years 2001 (if it exists yet), 2000, 1999, 1998, 1997, and perhaps 1996.

Fourth, we will need all telephone scripts that Natural Organics employs for the purpose of responding to consumer inquiries about Pedi-Active A.D.D. or any other product.

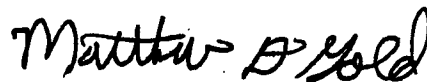
Fifth, we will need the circulation of Energy Times magazine for each of the last five calendar years.

Sixth, we will need the current wholesale price of Pedi-Active A.D.D., as well as any changes in that price since that product has been on the market. Please also provide the same information regarding the suggested retail price of the product.

As you know, most of the documents requested in this letter were responsive to complaint counsel's subpoena to Natural Organics. Such documents, therefore, are long overdue.

Thank you for your prompt attention to these matters. If you have any questions whatsoever regarding what we are asking for, please contact me as soon as possible. In any event, I will follow up on this letter with you next week.

Very truly yours,



Matthew D. Gold



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WESTERN REGION

901 Market Street, Suite 570
San Francisco, CA 94103-1788
Voice: (415) 356-5276
Fax: (415) 356-5242

Matthew D. Gold
Attorney

February 23, 2001

VIA FACSIMILE

John R. Fleder, Esq.
Hyman, Phelps & McNamara, P.C.
700 Thirteen Street, N.W.
Suite 1200
Washington, D.C. 20005-5929

Re: Natural Organics, Inc., *et al.*
Docket No. 9294

Dear Mr. Fleder:

Kerry and I have identified one more document or category of documents to supplement my letter to you dated February 21, 2001. During the Gibbons deposition, you will recall that there was a line of questioning regarding the evolution of Pedi-Active A.D.D.'s label. The original label contained instructions calling for one to two tablets per day. The current label calls for six to eight tablets per day. Exhibit 161 from the deposition is an email that appears to call for label instructions of four to eight tablets per day. Please provide a copy of this interim label or let me know if it was never implemented.

On a different matter, the attached document, which should be included with our expert witness materials, arrived on our fax machine this morning.

Please telephone me if you have any questions.

Very truly yours,

Matthew D. Gold

Enclosure

L. Eugene Arnold, M.D.
479 S. Galena Rd.
Sunbury, Ohio 43074
February 22, 2001

Matthew Gold
Federal Trade Commission Payment Unit
C/O FTC National Business Center
P.O. Box 272040
Denver, CO 80227-2040
Phone 303-969-5871

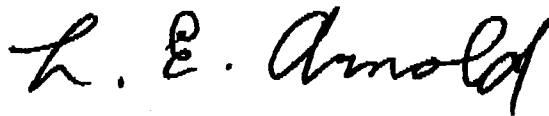
Re: Contract no. 290000-00-L-0027

Mr. Gold:

Here are the costs from 1/1/01 through 2/22/01:

Contractor time: 30.5 hours at \$150/hr.: (Report revision; phone consultations, library work)	\$4,575
Paper, postage, phone; copying:	<u>7</u>
Total:	\$4,582

Sincerely,



L. Eugene Arnold, M.Ed., M.D.
Professor Emeritus of Psychiatry, O.S.U.
740-965-1005; FAX 740-965-4425
E-mail: Arnold.6@osu.edu

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*NOT ADMITTED IN DC

DIRECT DIAL (202) 737-4580

March 2, 2001

BY FACSIMILE/CONFIRMATION COPY BY MAIL

Matthew D. Gold, Esq.
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, CA 94103-1768

M. Hke
Dear Mr. Gold:

This letter responds to your letters dated February 21 and 23, 2001, regarding documents and information that you seek from the Respondents. Respondents are pleased to provide most of the information and documents you requested.

On February 14-16, 2001, Complaint Counsel deposed five employees of Natural Organics. During the depositions, Complaint Counsel informally requested information and documents that you believed had not earlier been provided by Respondents. Respondents' Counsel provided several documents to Complaint Counsel during the depositions. We also invited you to write a letter, setting forth the information you believed you needed as a result of questions posed during the depositions. Your recent letter has provided more specificity that has allowed Respondents to fulfill a promise we made during the depositions of voluntarily providing relevant information. As you will see from our response set forth below, Respondents have fulfilled that promise.

Your February 21, 2001 letter requested six categories of documents and information. We will respond to each individually.

Request #1 - You request documents relating to all individuals who responded to any version of the Pedi-Active A.D.D. print ad attached to the Commission's Complaint as Exhibit A. Respondents are prepared to provide a printout of the names and addresses of all

individuals who meet the description of this request. We will provide this information within a few days after you notify us that this information sufficiently addresses Request #1, and that Complaint Counsel will not seek additional information on this subject. We continue to object that further discovery on this topic would be improper beyond what we are prepared to provide and have already provided.

Request #2 - You request documents relating to communications with Respondents' Counsel prior to May 21, 1997. It is our understanding that Respondents have no documents responsive to this request. However, in light of the witnesses' disclosures on this subject at the recent depositions, Respondents have decided to designate one additional fact witness. Robert Ullman, Milton Bass' former law partner, will testify concerning Mr. Bass' well-established expertise in FTC and FDA matters. He will also testify regarding his knowledge as to how Mr. Bass interacted with clients such as Natural Organics.

Request #3 - You seek each Natural Organics' product catalog for the years 1996 through 2001. We are enclosing with this letter the cover page of each catalog responsive to this request and any pages contained in that catalog that relate to Pedi-Active A.D.D. We trust these documents fully comply with this Request.

Request #4 - Complaint Counsel seeks telephone scripts used by Natural Organics' employees for responding to consumer inquiries about Pedi-Active A.D.D., or any other product. We are enclosing with this letter the one script we are aware of that relates to responding to consumer inquiries about Pedi-Active A.D.D. It is our understanding that Respondents' prior counsel provided this document to you earlier. We are not aware of any scripts concerning other products. In addition, such scripts would not be relevant to this case.

Request #5 - You request the circulation of each Energy Times magazine published during the last five calendar years. Enclosed with this letter is a list that identifies the approximate circulation for each Energy Times magazine published in the last five calendar years that contains a Pedi-Active A.D.D. advertisement. We again trust that this information fully complies with this Request.

Request #6 - Complaint Counsel ask for the current wholesale price of Pedi-Active A.D.D., all changes in that price since the product has been on the market, and the same information regarding the suggested retail price of the product. Your letter does not define what you mean by "current wholesale price." Nevertheless, we interpret this request to seek information about the listed wholesale price Natural Organics charges stores that sell this product. With this understanding, Respondents are pleased to provide the information you have requested, as reflected in an attachment that accompanies this letter.

Your February 23, 2001 letter requests any interim label adopted by Natural Organics that would "call for label instructions of four to eight tablets per day". Although you correctly

Matthew D. Gold, Esq.
March 2, 2001
Page 3

HYMAN, PHELPS & MCNAMARA, P.C.

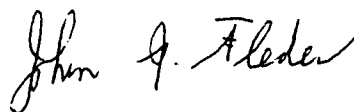
note that Exhibit 161 from the depositions you took several weeks ago does indicate that such a label instruction was considered, that instruction was never implemented by Respondents. Accordingly, we have no responsive documents to provide regarding this request.

Your February 21, 2001, letter states that most of the documents requested by Complaint Counsel "were responsive to complaint counsel's subpoena to Natural Organics". Your argument is self-defeating. To the extent any of the documents and information you requested may have been responsive to Complaint Counsel's subpoena issued to Respondents, you should have waited receipt of this letter before filing your Motion to Compel Discovery. On February 26, 2001, you and I spoke about your February 21 and 23 letters. I told you that Respondents' Counsel had twice conferred with our client about the letters, and that I expected we would inform you shortly as to the documents and information we would provide. It was thus crystal clear to you during that conversation that Respondents did intend to provide documents to Complaint Counsel pursuant to your informal letter requests. Nevertheless, you indicated during the conversation that you intended to file a Motion to Compel Discovery. That Motion was served on Respondents' Counsel later that day and received the following day.

To the extent the information we are providing was responsive to the subpoena duces tecum and interrogatories you served on Respondents, our willingness to provide this information demonstrates that your Motion to Compel discovery was prematurely and improperly filed. Moreover, it proves that our "vagueness" and "unduly burdensome" objections to your earlier discovery request were well founded.

In addition, it is apparent that some of the information you sought in your recent letters, and which we have agreed to provide, was not called for in your early discovery requests. Our willingness to provide this information demonstrates a good faith commitment to provide relevant information, without a formal discovery request or an order from the ALJ.

Sincerely yours,



John R. Fleder

JRF/vam
Enclosures

Nature's Plus[®]

The Energy Supplements[®]



January 2001

Natural Vitamin Handbook

Active Line

Pedi-Active

Phosphatidylserine/DMAE Complex for Active Children Chewables or Spray

Pedi-Active is a precisely calibrated formula designed for the active child. Each incredibly delicious chewable tablet or liposomal spray supplies a profile of the most advanced neuro-nutrients available, with a diversified combination of phosphatidylserine, DMAE, and activated soy phosphatides such as phosphatidylcholine. Pedi-Active is a state-of-the-art nutritional supplement that naturally complements an active child's delicate system.



is a registered trademark of Lucas Meyer Inc.

Vegetarian

Bottles of:

60-#3000 • 120-#3001

2 fl. oz. Spray Bottles-#3002

Supplement Facts

Serving Size 2 Chewable Tablets or 2 Sprays**

Amount Per Serving

DMAE (2-dimethylaminoethanol bicarbonate)	100 mg†
LECI-PS® (phosphatidylserine-rich purified lecithin concentrate) (supplying phosphatidylserine [PS] [20 mg], phosphatidylcholine [PC] [20 mg], cephalin [phosphatidylethanolamine] [12 mg] and phosphoinositides [6 mg])	100 mg†

**Two chewable tablets also supply 5 calories, 2g carbohydrates (<1% DV) (20 sugars). Two sprays supply 2 IU (8% DV) Vitamin E. Percent Daily Values (DV) are based on a 2,000 calorie diet.
†Daily Value not established.

Nature's Plus.
The Energy Supplements.



Natural Vitamin

H · A · N · D · B · O · O · K

Fall 1999

Active Line

Pedi-Active®

Phosphatidylserine/DMAE Complex for Active Children Chewables or Spray

Pedi-Active is a precisely calibrated formula designed for the active child. Each incredibly delicious chewable tablet or liposomal spray supplies a complete profile of the most advanced neuronutrients available, including a diversified combination of phosphatidylserine, DMAE, and activated soy phosphatides such as phosphatidylcholine. Pedi-Active is a state-of-the-art nutritional supplement that naturally complements an active child's delicate system.*



is a registered trademark of L. L. Meyer, Inc.

Vegetarian

Bottles of:

60—#3000 • 120—#3001

2 oz. Spray Bottles—#3002

Supplement Facts

Serving Size 2 Chewable Tablets or 2 Sprays**

Amount Per Serving

DMAE (2-dimethylaminoethanol bitartrate)	100 mg†
LECI-PS® (phosphatidylserine-rich purified lecithin concentrate) (supplying phosphatidylserine [PS] [20 mg], phosphatidylcholine [PC] [20 mg], cephalin [phosphatidylethanolamine] [12 mg] and phosphoinositides [8 mg])	100 mg†

**Two chewable tablets also supply 6 calories, 2g carbohydrate (<1% DV) (2g sugars). Two sprays supply 2 IU (6% DV) Vitamin E. Percent Daily Values (DV) are based on a 2,000 calorie diet.

†Daily Value not established.

Nature's Plus[®]

The Energy Supplements[®]



A Celebration Of Quality

25

NATURAL VITAMIN HANDBOOK

1997

PediActive A.D.D.[™] Chewable Phosphatidylserine/DMAE Complex for Active Children

Pedi-Active A.D.D. is a precisely calibrated formula designed for the active child. Each incredibly delicious chewable tablet and new liposomal spray supplies a complete profile of the most advanced neuro-nutrients available including a diversified combination of phosphatidylserine, DMAE and activated soy phosphatides such as phosphatidylcholine. Pedi-Active A.D.D. is a state-of-the-art nutritional supplement that naturally complements an active child's delicate system.

Supplement Facts

Serving Size 1 Chewable Tablet or Sublingual Spray

	Amount/Serving	% Daily Value
DMAE (2-dimethylaminoethanol bitartrate)	50 mg.	†
LECI-PS [®] (phosphatidylserine-rich purified lecithin concentrate) (supplying phosphatidylserine [10 mg.], phosphatidylcholine [10 mg.], phosphatidylethanolamine [6 mg.] and phosphoinositides [3 mg.])	50 mg.	†

† %Daily Values (DV) have not been established.

 is a registered trademark of Lucas Meyer.

Vegetarian
Sugar and Starch Free
Bottles of 60 #3000
2 oz. Spray Bottles #3002

Pedi-Active A.D.D. is designed as nutritional support for the active child. Each tablet supplies a complete profile of advanced neuro-nutrients including phosphatidylserine, DMAE and activated soy phosphatides. **Pedi-Active A.D.D** is a state-of-the-art nutritional supplement that naturally complements an active child's delicate system.

Dosage: 2 tablets 3 to 4 times daily or as recommended by your health care practitioner. Lower dosages may also be used.

Energy Times Issues That Ran Pedi-Active Ads

These are the approximate circulation figures for the Energy Times issues that ran Pedi-Active ads.

	January	February	March	April	May	June	July/August	September	October	November/December
1997	683,815	662,737	652,894	657,452	651,386		661,308	665,286		
1998	667,843	672,221	672,870	671,246				672,562	674,113	686,366
1999	692,849	688,058	688,027	688,891			690,510	689,831	690,307	
2000			702,501				705,282	702,651	709,170	

Pedi-Active Product Introduction and Price History

	Size	Sugg. Retail	Listed Wholesale
3000 October 1996	60	13.50	6.75
July 1997		13.95	6.98
November 2000		14.20	7.10
3001 February 1999	120	26.50	13.25
November 2000		27.05	13.53



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WESTERN REGION

901 Market Street, Suite 570
San Francisco, CA 94103-1788
Voice: (415) 356-5276
Fax: (415) 356-5242

Matthew D. Gold
Attorney

March 5, 2001

VIA FACSIMILE AND
OVERNIGHT COURIER

Judge James P. Timony
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Re: Natural Organics, Inc., *et al.*
Docket No. 9294

Dear Judge Timony:

On March 2, 2001, respondents provided complaint counsel the suggested retail price for Pedi-Active A.D.D. This information was part of our Motion to Compel Discovery, which is pending before Your Honor. Accordingly, complaint counsel withdraw our pending Motion to the extent that it requested such information.

In addition, on pages 7-8 of the Memorandum in Support of Complaint Counsel's Motion to Compel Discovery, we discuss our need for DSHEA notices that we had requested from respondents in a subpoena duces tecum. It has come to our attention, however, that neither the Motion itself, nor the proposed Order attached to the Motion, mentioned DSHEA notices. We regret this oversight.

Both items described in this letter are reflected in the enclosed proposed Order.

Very truly yours,

A handwritten signature in cursive script that reads "Matthew D. Gold".

Matthew D. Gold
Complaint Counsel

Enclosures

cc: John R. Fleder, Esq.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of
NATURAL ORGANICS, INC.,
a corporation, and
GERALD A. KESSLER,
individually and as an officer
of the corporation.

DOCKET NO. 9294

TO: The Honorable James P. Timony
Administrative Law Judge

ORDER RULING ON COMPLAINT COUNSEL'S
MOTION TO COMPEL DISCOVERY

Upon consideration of Complaint Counsel's Motion to Compel Discovery and Respondents' Objections thereto:

IT IS HEREBY ORDERED that Complaint Counsel's Motion is granted.

It is further ORDERED that Respondents serve on Complaint Counsel full and complete responses to Complaint Counsel's First Interrogatories and Complaint Counsel's Subpoena Duces Tecum within ten (10) days of the date this Order is entered. In their responses, Respondents shall provide to Complaint Counsel information and documents that refer or relate to all:

- A. Non-disseminated Pedi-Active A.D.D. advertisements;
- B. Actual or proposed modifications to any disseminated or non-disseminated advertisement for Pedi-Active A.D.D.;

- C. Sales of Pedi-Active A.D.D.;
- D. Sales of all products sold by Natural Organics;
- E. Amount Respondents spent on advertising for Pedi-Active A.D.D.; and
- F. Total profit from sales of Pedi-Active A.D.D.
- G. Notices regarding any product that Natural Organics has provided to the Food and Drug Administration, since January 1, 1999, pursuant to § 403(r)(6) of the Food, Drug, and Cosmetic Act, 21 U.S.C. § 343(r)(6).

It is further ORDERED that Respondents also shall provide to Complaint Counsel information and documents that refer or relate to any communication between Natural Organics and any consumer regarding Pedi-Active A.D.D. or any disseminated advertisement for Pedi-Active A.D.D., within thirty (30) days of the date this Order is entered or, in the alternative, produce and permit Complaint Counsel, or someone acting on Complaint Counsel's behalf, to inspect and copy those communications at a time and place agreed to by the parties.

James P. Timony
Administrative Law Judge

Dated:



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WESTERN REGION

901 Market Street, Suite 570
San Francisco, CA 94103-1768
Voice: (415) 356-5276
Fax: (415) 356-5242

Matthew D. Gold
Attorney

March 5, 2001

VIA FACSIMILE

John R. Fleder, Esq.
Hyman, Phelps & McNamara, P.C.
700 Thirteen Street, N.W.
Suite 1200
Washington, D.C. 20005-5929

Re: Natural Organics, Inc., *et al.*
Docket No. 9294

Dear Mr. Fleder:

Thank you for your letter of March 2, 2001, with which you provided some information and documents that we had requested in letters dated February 21, 2001, and February 23, 2001. As you know, the purpose of those letters was to identify items that came to our attention during the depositions of Natural Organics personnel that occurred during the week of February 12, 2001.

Although we appreciate the documents and information that you have provided, we believe that the submission is incomplete in several respects, which I will detail below. In addition, we must take issue with some of your comments regarding the connection between our recent requests and our pending Motion to Compel Discovery.

As to Request 1, we would tentatively like to take you up on your offer of a printout of the names and addresses of all individuals who responded, either in writing by telephone, to any version of the Pedi-Active A.D.D. advertisement that is attached to the Commission's complaint as Exhibit A. Before receiving that information, however, we would like to see a list of the fields that are contained in the database. We understand that such information is maintained in a database that Gerard McIntee, Natural Organics' Vice President of Marketing, described in his deposition, and that the printout you describe will include information from that database.

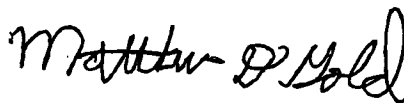
Further, respondents cannot rightfully condition such production on complaint counsel first stating that we "will not seek additional information on this subject." As you know, we requested, in the Natural Organics subpoena, all documents relating to communications with consumers regarding Pedi-Active A.D.D., or any disseminated advertisement for Pedi-Active

John R. Fleder, Esq.
Page 3

Finally, I want to correct the record regarding our telephone conversation of February 26, 2001. I telephoned you as a courtesy to inform you that we had drafted our Motion to Compel Discovery and that we were mentioning the database specifically in that motion. I wanted to see whether you would commit to providing the database information, in which case I was prepared to drop any reference to it from the Motion. When you were unwilling to do so during that conversation, we decided to discuss it in the Motion. Of course, the database information is merely a subset of overall consumer correspondence. We have received no documents or information regarding such correspondence since 1997, and our subpoena, February 12 letter, and Motion requested those materials.

Please telephone me if you have any questions.

Very truly yours,

A handwritten signature in black ink that reads "Matthew D. Gold". The signature is written in a cursive style with a large, looped initial "M".

Matthew D. Gold

1 UNITED STATES OF AMERICA
2 BEFORE FEDERAL TRADE COMMISSION

3 _____

4 In the Matter of:)
5 NATURAL ORGANICS, INC.,) Docket No. 9294
6 a corporation, and)
7 GERALD A. KESSLER,)
8 individually and as an)
9 officer of the corporation.)

10 _____

11

12

13 Wednesday, February 14, 2001
14 Huntington Hilton
15 598 Broadhollow Road
16 Melville, New York

17

18 The above-entitled matter came on for
19 deposition, pursuant to subpoena at 9:16 a.m.

20

21

22

23

24

25

1 P R O C E E D I N G S

2

- - - - -

3 M A R C I D U N N D E R, having first been duly
4 sworn by a Notary Public of the State of New York, was
5 examined and testified as follows:

6 EXAMINATION BY

7 MR. GOLD:

8 Q. Please state your name for the record.

9 A. Marci Dunnder.

10 Q. What is your address?

11 A. 5 Commons, Cold Spring Harbor, New York 11724.

12 MR. GOLD: Let the record reflect that
13 present today are the deponent, Marci Dunnder,
14 and her counsel, John Fleder and Holly Bayne,
15 and also Gerald Kessler with Natural Organics.
16 My name is Matthew Gold. I'm an attorney with
17 the Federal Trade Commission, and with me is
18 Kerry O'Brien who also represents the Federal
19 Trade Commission, the plaintiff in this lawsuit,
20 against Natural Organics and Gerald A. Kessler.
21 This deposition is beginning at approximately
22 9:10 a.m. on February 14, 2001.

23 Before we start, I wanted to make a statement
24 on the record. Complaint counsel are conducting
25 a series of depositions this week of Natural

1 for a moment.

2 (A discussion was held off the record.)

3 BY MR. GOLD:

4 Q. Ms. Dunnder, what are the annual sales of
5 Natural Organics?

6 MR. FLEDER: Objection, irrelevant, and --
7 but I'm not instructing you not to answer this
8 question. If you're going to answer the
9 question, is there anything confidential about
10 the information that you're going to provide?

11 THE WITNESS: Well, I consider that to be
12 confidential.

13 MR. FLEDER: Let's go off the record for a
14 minute.

15 (A discussion was held off the record.)

16 MR. FLEDER: We have not instructed
17 Ms. Dunnder to refuse to answer this question,
18 even though we think it is irrelevant, but if
19 she's going to answer the question by providing
20 any information, that information is highly
21 proprietary, confidential business information
22 which is not made public, and as a result, off
23 the record we had a discussion with counsel for
24 the Commission and agreed that after the
25 depositions this week we will work towards

1 agreeing on the terms of a protective order
2 which should protect against the disclosure
3 outside the needs of this case of the
4 information that is being sought and presumably
5 a few other questions that complaint counsel is
6 likely to ask, so complaint counsel has agreed
7 that pending our -- that until we've worked out
8 the terms of the protective order and we have an
9 opportunity under that protective to designate
10 pages from the transcript that are entitled to
11 protection under the protective order, that
12 complaint counsel will not make public or
13 disclose outside the Federal Trade Commission
14 anything said in this deposition to anyone who
15 is not employed by the Federal Trade
16 Commission. Once we get the transcript back
17 we'll diligently try to designate any pages that
18 we think cover confidential information such as
19 the information sought in the last question by
20 complaint counsel.

21 MS. BAYNE: I would like to go off the
22 record.

23 (A discussion was held off the record.)

24 BY MR. GOLD:

25 Q. Ms. Dunnder, what are the annual sales of

1 Natural Organics for the most recent accounting period?

2 A. 2000 was approximately 80 million.

3 Q. And is that calendar year 2000?

4 A. Yes.

5 Q. Do you recall what they were for 1999?

6 A. No.

7 Q. Do you recall if they were greater than 80
8 million or less than 80?

9 A. Yes, it was less.

10 Q. How about 1998?

11 A. I don't recall.

12 Q. Do you recall whether it was less than or
13 greater than 1999?

14 A. It was less than.

15 Q. And how about 1997, do you recall what the sales
16 were then?

17 A. No.

18 Q. Do you recall whether they were greater than or
19 less than 1998?

20 A. It was less than.

21 Q. Just so we're clear, sales have increased from
22 1997 to 1998 to 1999 to 2000, each year they have
23 increased?

24 A. Correct.

25 Q. And approximate annual sales in 2000 were 80

1 million?

2 A. Correct.

3 Q. Is that net sales or what does that figure
4 represent, the 80 million?

5 A. That's total sales.

6 Q. How about of sales of the Pedi-Active A.D.D.
7 product, do you know what they were in the year 2000?

8 A. No, I don't.

9 Q. Do you know what they have been in any year?

10 A. No, I don't.

11 MR. FLEDER: I haven't said anything, this
12 is a continuing objection to the relevancy of
13 this information.

14 MR. GOLD: That's understood.

15 MR. FLEDER: To speed this along so I don't
16 have to object each time.

17 BY MR. GOLD:

18 Q. Can you tell me who would know what the annual
19 sales of Pedi-Active A.D.D. were in the company?

20 A. I don't know that anybody would know that
21 offhand.

22 Q. It would be something that you would have access
23 to but you would have to look it up?

24 A. Correct.

25 Q. So Mr. Gibbons you don't think would know what

1 UNITED STATES OF AMERICA
2 BEFORE FEDERAL TRADE COMMISSION

3

4 In the Matter of:)
5 NATURAL ORGANICS, INC.,) Docket No. 9294
6 a corporation, and)
7 GERALD A. KESSLER,) Volume 2
8 individually and as an)
9 officer of the corporation.)
10)

11

12

13

14 Friday, February 16, 2001
15 Huntington Hilton
16 598 Broadhollow Road
17 Melville, New York

18

19 The above-entitled matter came on for
20 deposition, pursuant to subpoena at 9:10 a.m.

21

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23

24

25

For The Record, Inc.
Waldorf, Maryland
(301) 870-8025

1 APPEARANCES:

2

3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

4

5 MATTHEW D. GOLD, ESQ.

6 KERRY O'BRIEN, ESQ.

7 901 Market Street, Suite 570

8 San Francisco, California 94103

9

10 ON BEHALF OF THE RESPONDENTS:

11

12 JOHN R. FLEDER, ESQ.

13 HOLLY M. BAYNE, ESQ.

14 Hyman, Phelps & McNamara, P.C.

15 700 Thirteenth Street, N.W., Suite 1200

16 Washington, D.C. 20005

17

18 Also Present:

19 Gerald A. Kessler

20

21

22

23

24

25

1 PROCEEDINGS

2 - - - - -

3 J A M E S P. G I B B O N S, having been previously
4 duly sworn by a Notary Public of the State of New York,
5 was examined and testified as follows:

6 MS. BAYNE: For the record, in yesterday's
7 deposition, it came up that there was a consumer
8 letter that replaced Exhibit-C, and sitting here
9 today, we don't know whether complaint counsel
10 has a copy of the letter. We are providing it
11 to you now, and we will send you a confirmatory
12 letter with a Bates stamp on the document when
13 we get back to the office.

14 MS. O'BRIEN: Thank you.

15 MR. GOLD: These are two copies of the same
16 document?

17 MS. BAYNE: Yes.

18 MR. GOLD: Okay.

19 MS. O'BRIEN: Mr. Gibbons, it's sort of the
20 same game plan as I said yesterday. If I ask
21 you a question, you don't understand it, please
22 let me know, and I'll try and rephrase it.

23 THE WITNESS: Okay.

24 MS. O'BRIEN: Also, if you could let me
25 finish my question before you begin to respond,