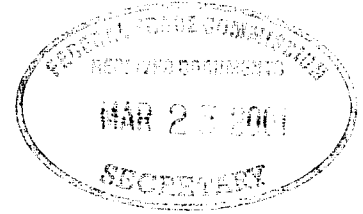


UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



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
Chief Administrative Law Judge

COMPLAINT COUNSEL'S ANSWER TO RESPONDENTS'
MOTION TO QUASH SUBPOENA SERVED ON GERALD A. KESSLER

INTRODUCTION

Complaint counsel have issued a subpoena to depose Gerald Kessler, the owner of Natural Organics and a named respondent. The subpoena requested that he be deposed in the FTC offices in Los Angeles on March 20, 2001, although complaint counsel informed respondents that we were flexible regarding the date. Complaint counsel would pay his expenses to travel to L.A. from his home in Santa Ynez on the Central Coast of California. Respondents, in an extraordinary motion, request that we be denied the right to depose him altogether. Second, Respondents request that Your Honor, in the event that a deposition is allowed to proceed in person, grant the extraordinary relief of requiring Complaint counsel to pay for Respondents' legal fees and attorney travel costs. In support, respondents allege that complaint counsel were responsible for cancellation of a prior agreed-upon deposition and a wasted trip by respondents' attorney.

Needless to say, complaint counsel vigorously dispute respondents' version of these events. However, we oppose the Motion to Quash on more fundamental grounds -- those events are irrelevant. The matter before Your Honor is whether this present subpoena to Mr. Kessler for a deposition in FTC's offices in Los Angeles, or some other agreed-upon site, is somehow improper or unduly burdensome. It is not, and respondents have made no demonstration to the contrary. Nor have respondents pointed to any authority that respondents can be awarded *attorneys fees* and travel costs to attend depositions in such circumstances.

That said, we also dispute the factual premise of respondents' argument -- that it was complaint counsel, rather than respondents, who acted unreasonably in the events leading to the cancellation of Mr. Kessler's voluntary deposition. As will be seen, there were twists and turns inconveniencing both sides. But, in the end, what was complaint counsel's supposed oppression? -- asking Mr. Kessler, without any attendant publicity, to walk into a government building in Santa Barbara and be deposed in a conference room made available by the City Attorney's Office. Respondents refused to attend. They stated that Mr. Kessler would be subject to ridicule and gossip in attending a "public place" -- despite the fact that he lives an hour from Santa Barbara (itself a town of 90,000 people) and that the purpose of his visit would be undisclosed. Instead, respondents insisted that the deposition be at a bank in Solvang, an hour north of Santa Barbara. They suggested that staff either drive directly -- despite our first flight having been cancelled due to torrential rainstorms -- or fly in and then drive a farther distance up the coast. Having accommodated Mr. Kessler numerous times already with respect to sites in Los Angeles and Santa Barbara, we determined "enough is enough" and that a subpoena was necessary.

Respondents' counsel states that "whether or not Complaint Counsel or even Your Honor would react the same way is not the issue."¹ But, in fact, that *is* the issue, given that respondents now are asking others to pay the freight for Mr. Kessler's personal preferences. We respectfully submit that there is no legal or equitable basis on which complaint counsel should be required to do so here.

Mr. Kessler is a hands-on manager whose testimony is likely to shed significant light on the intended meaning of respondents' advertising, the respondents' efforts to substantiate their claims, and other key issues. Respondents' extraordinary motion is without merit and should be denied.

FACTS²

During depositions of Natural Organics personnel in mid-February, complaint counsel learned that Gerald Kessler, the CEO of Natural Organics and a named respondent in this matter, lives in California.³ We suggested that it may be most convenient for his deposition to occur in California. We initially requested our Los Angeles offices, but respondents stated that Mr. Kessler preferred to appear in Santa Barbara, near where he resides. We agreed to this request. The parties also agreed to a March 6, 2001, date, with an understanding that we would be able to

¹ Respondents' Motion, at 5.

² A more detailed account of the relevant facts can be found in the letter attached as Exhibit A.

³ Respondents attempt to make much of our original request that Mr. Kessler be deposed during that week in mid-February. We postponed his deposition – with a full three-weeks notice to Mr. Kessler -- when respondents' initial list of fact witnesses disclosed that they were designating several as-yet unidentified Natural Organics employees as witnesses. That Mr. Kessler ultimately chose to travel to New York in February to observe the depositions of his employees was his right, and purely his decision.

continue through the morning of March 7, 2001, if necessary.

On March 1, 2001, complaint counsel informed respondents that we had procured a conference room at the Santa Barbara County District Attorney's Office.⁴ We chose that location because we had a contact there with whom Commission staff had worked on previous matters. They kindly offered us the use of a conference room, at no charge. This was of some importance to us, since our agreement to go to Santa Barbara already was costing three times as much in airfare as would Los Angeles.

Later that day, respondents' counsel confirmed, by email, that he and Mr. Kessler would appear at that location.⁵ Respondents' counsel added, however, that he believed that the location was an "insult to Mr. Kessler." After accusing us of attempting to embarrass his client, counsel stated: "Surely there were other governmental offices you could have chosen which do not carry the 'criminal' stigma associated with the D.A.'s office."

In our reply, complaint counsel assured respondents we were not attempting to embarrass Mr. Kessler. We informed respondents that we were looking for a location on short notice, and

⁴ Unfortunately, complaint counsel got off to a late start in procuring a site for the deposition. Late during the week of February 19, 2001, respondents requested the names of some Santa Barbara hotels that offered a government rate. Respondents indicated that they would look for a suitable conference room in one such hotel. Respondents had obviously decided to arrange (and pay for) the location of the deposition. As stated in their motion, respondents had done so in February for the depositions of Natural Organics personnel, as an accommodation to complaint counsel for our agreement not to require the deponents to travel into New York City. Although respondents were not required to pay for the location, complaint counsel assumed that they were making a similar accommodation because of our agreement to hold the Kessler deposition near his home. Apparently, however, respondents changed their minds approximately one week later, when they merely selected one hotel and suggested that we pay.

⁵ All of the email correspondence described herein can be found in Exhibit A to Respondents' Motion.

that we had a contact in that office.⁶ Based on respondents' counsel's agreement, we assumed that the deposition would proceed as planned.

Later that day, however, respondents' counsel informed complaint counsel, by email, that Mr. Kessler would not attend the deposition. Counsel stated the "[Mr. Kessler] refuses to be embarrassed in his local community, which is much smaller than San Francisco. He does not want to deal with the possible gossip and speculation that will occur if the deposition is located at the D.A.'s office." Although complaint counsel were surprised at Mr. Kessler's reaction, we did not wish to fight about the location. As a result, we set about finding another location that would not offend Mr. Kessler. On March 2, 2001, the court reporting agency in Santa Barbara with whom we had contracted informed us that it had a room that it could make available for the deposition. The parties confirmed that location, and the matter appeared to be resolved.

On Monday, March 5, 2001, the day before the deposition was scheduled, complaint counsel were informed that the court reporting agency in Santa Barbara had erroneously offered us its conference room. Apparently, someone in that office had previously reserved the room, but had neglected to inform others in the office. This bit of bad luck meant that, less than twenty-four hours before the scheduled deposition, complaint counsel were again in the position of looking for suitable space. Mindful of respondents' suggestion that we locate a government office that did not carry the "criminal" stigma associated with the D.A.'s office," we were able, on this short notice, to reserve a room in the Santa Barbara City Attorney's Office. For obvious reasons, we assumed, yet again, that the matter had been resolved.

⁶ Of course, because the Commission has no criminal jurisdiction, our contact with that office was in relation to civil, not criminal, matters.

At shortly after 3:00 in the afternoon on March 5, 2001, respondents' counsel phoned and stated that Mr. Kessler would not appear at the City Attorney's Office either, as it is a "public place." Rather, he requested that complaint counsel conduct the deposition at a bank in Solvang.

Just minutes before this call, complaint counsel had learned that our flight to Santa Barbara had been cancelled due to the severe winter storm and flooding occurring in the area. Shortly thereafter, complaint counsel phoned back and stated we were booked on a flight scheduled to arrive at approximately 9:00 a.m. the next morning, although we had no idea whether the weather would permit even this flight to occur. We stated that we would make every effort to get to the City Attorney's office as soon as possible thereafter.⁷ We added that if respondents persisted in refusing to attend at that location, complaint counsel would not fly down and we would instead issue a subpoena for Mr. Kessler's appearance at a later date. Respondents then reiterated their refusal to attend the deposition at the City Attorney's Office.⁸

Faced with this situation, we served the subpoena at issue the next day. In our cover letter, which respondents did not attach to their motion, we made it clear that we were flexible regarding the date of the Los Angeles deposition. See Exhibit B. We also emphasized that we were prepared to pay all of Mr. Kessler's reasonable expenses associated with his travel to Los

⁷ Respondents' counsel suggested that complaint counsel drive to Santa Barbara, a trip that they estimated would take approximately five hours. Respondents' counsel can be excused for their lack of knowledge regarding California geography, traffic and roads. Driving from the San Francisco Bay Area to Santa Barbara, even under ideal conditions, is a seven-hour trip. When combined with the San Francisco and San Jose rush hour traffic, and the severe weather we were experiencing, driving was not a viable option.

⁸ Although counsel called back to suggest a telephone deposition of Mr. Kessler, we could not take this suggestion seriously. Telephone depositions are entirely appropriate for lesser fact witnesses, not for the named party in this proceeding.

Angeles.⁹ We would be happy to similarly accommodate Mr. Kessler if he prefers to travel up to San Francisco, or, indeed, if he wishes for us to travel to Santa Barbara. Additionally, because it appears that there may be at least one expert deposition in the Los Angeles area, perhaps the parties can schedule Mr. Kessler's deposition to coincide with respondents' counsel's trip to Los Angeles to defend that deposition.

DISCUSSION

Respondents have chosen to ignore the flexibility displayed in the cover letter to the subpoena at issue and have insisted on filing their Motion to Quash. Their claimed attempts to resolve this issue short of filing the motion were either patently meritless or wholly unacceptable. First, respondents' proposal that Your Honor sanction complaint counsel by requiring us to bear the travel costs of Mr. Kessler's counsel to attend a new deposition is simply not available under the Commission's Rules of Practice. It is therefore not surprising that respondents cite no rule or case law as supporting their request for such a sanction.¹⁰

Second, respondents' offer to accept either interrogatories or a deposition upon written question was facially unacceptable. Putting aside the fact that these options are, in effect, the same thing, those alternatives could not be taken seriously. Mr. Kessler is a named party and central figure in this case. Only the oral deposition setting allows for necessary probing and follow-up questioning. Written questions, no matter how meticulously crafted, simply are no

⁹ Los Angeles is approximately two hours from Santa Barbara by car, and much less by plane.

¹⁰ Rule 3.38(b) contains a list of sanctions that are available when a party violates a subpoena, ALJ order, or Commission order. Respondents do not allege that we have violated any such order.

substitute. We doubt whether respondents' counsel would forego oral, face-to-face depositions of named parties in their own practice.

Respondents argue that quashing the subpoena is necessary to protect Mr. Kessler from "annoyance, embarrassment, oppression [and] undue burden or expense." Yet the subpoena calls for his appearance at the Commission's Los Angeles offices, which, although technically "public," is located in an innocuous, private office building in Los Angeles. In addition, as stated earlier, we offered to pay for all of Mr. Kessler's reasonable travel expenses associated with a Los Angeles deposition.

Further, respondents' unsupported claims that he is so well-known in Santa Barbara that he would confront "gossip and speculation" merely by entering the District Attorney's office or City Attorney's office simply ring hollow.¹¹ Mr. Kessler does not even live in Santa Barbara, but rather resides in Santa Ynez, which is approximately one hour away. Additionally, Santa Barbara is hardly a small town. It has a population of over 90,000. Santa Barbara County, which includes both Santa Ynez and Santa Barbara, has a population of over four hundred thousand. Mr. Kessler may be easily recognizable to those who already know him, but that does not raise a reasonable expectation that he will experience "ridicule and gossip" every time he sets foot in a government building in Santa Barbara.

Mr. Kessler's actions in this matter are inconsistent with Natural Organics' own Web site. Every visitor to that site (www.natplus.com) -- most of whom, presumably, have never heard of this lawsuit -- is immediately greeted by the following flashing message: "TELL THE FTC.

¹¹ Of course, we never even informed either the District Attorney's Office nor the City Attorney's Office of the identity of our intended deponent, or of the name of this matter.

STOP DRUGGING OUR CHILDREN. [click here.](#)” One mouse click brings the visitor to respondents’ press release discussing the suit, including extensive quotations from Mr. Kessler.

Complaint counsel would be remiss if we did not address, at least briefly, two of respondents’ more personal attacks. First, respondents’ continued charge that we have used “scorched-earth tactics” during discovery in this matter is particularly absurd when one looks at the parties’ respective lists of expert witnesses. Respondents’ complaint might be well-taken had we been the party designating fourteen experts.

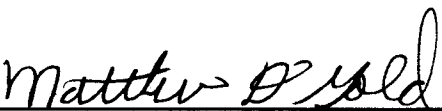
Finally, complaint counsel object to respondents’ insinuation that we have acted unethically regarding this dispute. Such a conclusion is simply not appropriate given the facts of this matter. Perhaps it was necessary for respondents to paint a drastic picture of the relevant events to justify the extraordinary relief they seek.

CONCLUSION

It is obvious from the relevant facts that complaint counsel spent an inordinate amount of time in our efforts to accommodate Mr. Kessler. Respondents have made no constructive

attempt to respond to our offers of flexibility regarding the subpoena. Instead, they have made patently unsupportable or unacceptable offers that we were obligated to deny. Their Motion should be denied, and the parties should get back to the business of litigating this matter.

Respectfully submitted,



Matthew D. Gold (415) 356-5276
Kerry O'Brien (415) 356-5289
Dean Graybill (415) 356-5224

Complaint Counsel
Western Region
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, CA 94103

Dated: March 22, 2001

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of)
)
)
NATURAL ORGANICS, INC.,)
a corporation, and) DOCKET NO. 9294
)
GERALD A. KESSLER,)
individually and as an officer)
of the corporation.)

TO: The Honorable James P. Timony
Administrative Law Judge

ORDER DENYING RESPONDENTS' MOTION TO QUASH

Upon consideration of Respondents' Motion to Quash Subpoena Served on Gerald A. Kessler, and Complaint Counsel's Answer to that Motion:

IT IS HEREBY ORDERED that Respondents' Motion is DENIED.

It is further ORDERED that within five (5) days of the date of this Order, the parties shall meet and schedule the deposition of Mr. Kessler at a mutually agreeable time. That deposition shall take place at the offices of the Federal Trade Commission in Los Angeles, unless the parties mutually agree on another site. Consistent with the Commission's Rules of Practice, complaint counsel shall arrange for the payment of all of Mr. Kessler's reasonable travel costs necessary for his appearance at the deposition.

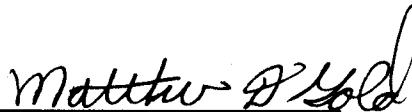
James P. Timony
Administrative Law Judge

Dated:

CERTIFICATE OF SERVICE

This certifies that a copy of Complaint Counsel's Answer to Respondents' Motion to Quash Subpoena Served on Gerald A. Kessler was served by facsimile on March 22, 2001, on the following:

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


Matthew D. Gold
Kerry O'Brien
Dean C. Graybill

Complaint Counsel
Western Region
Federal Trade Commission
901 Market Street, Suite 570
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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 6, 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 the wake of Mr. Kessler's refusal to attend his deposition, which was scheduled to take place today in Santa Barbara, California, I thought I would take this opportunity to recap the events that led up to your client taking this unfortunate course of action.

In a letter dated December 27, 2000, I proposed that we take the depositions of Mr. Kessler, James Gibbons and Marci Dunnder on February 21-23, 2001 at the FTC's Northeast Region in New York City. We requested Mr. Kessler and Mr. Gibbons because they were the only names listed in respondents' initial disclosures. We requested Ms. Dunnder because she is President of the company. At that time, you had not informed us that there were any other Natural Organics employees who possessed relevant information. When you informed me that one week earlier or later would be more convenient given Mr. Gibbons' and Ms. Dunnder's family responsibilities, we rescheduled the depositions for the prior week.

When you provided respondents' initial non-expert witness list on January 19, 2001, we discovered, for the first time, that you intended to call six individuals from Natural Organics as witnesses. In a letter dated January 24, 2001, we informed you that, rather than deposing Mr. Kessler, Mr. Gibbons and Ms. Dunnder, we preferred to take the depositions of Ms. Dunnder, Mr. McIntee, Mr. Avila and Ms. Anderson during the previously agreed-upon week in February in New York City. We informed you that Mr. Gibbons and Mr. Kessler are the most important fact witnesses at Natural Organics because Mr. Gibbons is the Vice President of Research and Development and Mr. Kessler is the owner of Natural Organics and is a named respondent in the matter. For this reason, we wished to depose them last and we proposed taking their depositions two weeks after this initial trip to New York.

Subsequently, you informed me that the company would prefer that the depositions take place near the company's headquarters on Long Island. You stated that a location near the company's headquarters would be more convenient for the company, as potential deponents could report for work and be available at short notice when it was time for their depositions to start. You also offered to pay for a hotel room for the depositions. Despite our preference for our New York City office and the added expense and inconvenience of our taking the depositions on Long Island, we agreed to your request, and we added Mr. Gibbons to the week's list of deponents. We agreed that we would defer Mr. Kessler's deposition until a later date.

When we learned that Mr. Kessler lives in California, we suggested that it may be more convenient for his deposition to occur out here. We initially requested our Los Angeles offices, but you stated that it would be more convenient for Mr. Kessler to appear in Santa Barbara, where he resides. We agreed to this request. The parties also agreed to a March 6, 2001, date, with an understanding that we would be able to continue through the morning of March 7, 2001, if necessary.

Late during the week of February 19, 2001, I phoned you to discuss some of the logistics regarding the March 6 Santa Barbara deposition. I told you that I would be arranging for the court reporter, but that I had not identified a location for the deposition. You suggested that I provide you with the names of some hotels that offered a government rate. The clear implication was that you would arrange (and pay for) the location of the deposition. As it turned out, you merely selected one hotel and said the government should pay.

On March 1, 2001, I informed you that I had procured a conference room at the Santa Barbara County District Attorney's Office. I chose that location because we had a contact there with whom Commission staff had worked on previous matters. They kindly offered us the use of a conference room, at no charge. This was of some importance to us, since our agreement to go to Santa Barbara already was costing three times as much in airfare as would Los Angeles.

Later that day, you confirmed that you and Mr. Kessler would appear at that location. You added, however, that you believed that the location was an "insult to Mr. Kessler." You also stated: "Surely there were other governmental offices you could have chosen which do not carry the 'criminal' stigma associated with the D.A.'s office."

I replied that, contrary to your accusation, we were not attempting to embarrass Mr. Kessler. I informed you that we had a contact in that office. Later that day, you then informed me, by email, that Mr. Kessler would not attend the deposition. You stated the "He refuses to be embarrassed in his local community, which is much smaller than San Francisco. He does not want to deal with the possible gossip and speculation that will occur if the deposition is located at the D.A.'s office." Although I believed (and continue to believe) that you were overreacting, I did not wish to fight about the location. On March 2, 2001, the court reporting agency in Santa

Barbara with whom we had contracted informed me that it had a room that it could make available for the deposition, and you and I confirmed that location.

Yesterday morning, I was informed that the court reporting agency in Santa Barbara had erroneously offered us its conference room. Apparently, someone in that office had previously reserved the room, but had neglected to inform others in the office. The day before the scheduled deposition, therefore, I was again in the position of looking for suitable space. Mindful of your rejection of the D.A.'s office because of its "criminal stigma," we were able, on this short notice, to reserve a room in the Santa Barbara City Attorney's Office. Because you were already in California and I had no way to contact you directly, I left a message with Holly Bayne with the new information. When I did not hear back from her, I called Paul Ferrari to ensure that the message would reach you.

At approximately 3:00 yesterday afternoon, you phoned and told me that Mr. Kessler would not appear at the City Attorney's Office either, as it is a "public place." Rather, you requested that complaint counsel conduct the deposition at a bank in Solvang, which is approximately one hour away from Santa Barbara. Just before you called, I had learned that my flight to Santa Barbara had been cancelled due to the severe winter storm and flooding occurring in the area. Shortly thereafter, I called you and told you that we were booked on a flight scheduled to arrive at approximately 9:00 a.m. this morning. I told you that we would make every effort to get to the City Attorney's office as soon as possible thereafter. I stated that if you persisted in refusing to attend at that location, complaint counsel would not fly down and we would instead issue a subpoena for Mr. Kessler's appearance at a later date. You then reiterated your refusal to attend the deposition at the City Attorney's Office. Although you called back to suggest a telephone deposition of Mr. Kessler today, we could not take this suggestion seriously. Telephone depositions are entirely appropriate for lesser fact witnesses, not for the named party in this proceeding.

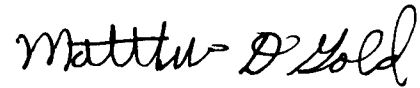
As described above, complaint counsel spent an inordinate amount of time in our efforts to accommodate Mr. Kessler, even though we found his refusal to attend a deposition at the D.A.'s office unreasonable. Santa Barbara is not a small town. It has a population of over 90,000. You have stated that Mr. Kessler does not even live in Santa Barbara, but rather resides in Santa Ynez, which appears to be approximately one hour away. Santa Barbara County has a population of over four hundred thousand.

In addition, we fail to see how any "criminal stigma" could attach to Mr. Kessler for merely walking into the District Attorney's Office. Remarkably, his excuse changed from "criminal stigma" to "public place" when we offered the alternate venue of the City Attorney's Office. You should know that we never even informed either of those offices of the identity of our intended deponent, or of the name of this matter.

John R. Fleder, Esq.
Page 4

You have left us with no reasonable alternative but to send a subpoena to Mr. Kessler.
We have done so under separate cover.

Very truly yours,

A handwritten signature in cursive script that reads "Matthew D. Gold". The signature is written in black ink and is positioned below the typed name.

Matthew D. Gold



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WESTERN REGION

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Voice: (415) 356-5276
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Matthew D. Gold
Attorney

March 6, 2001

VIA OVERNIGHT COURIER
AND CERTIFIED MAIL

John R. Fleder, Esq.
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700 Thirteen Street, N.W.
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Washington, D.C. 20005-5929

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

Dear Mr. Fleder:

As we have discussed, I have enclosed a subpoena that calls for Gerald Kessler to appear for a deposition in Los Angeles on March 20, 2001. If that date is not acceptable to him, however, we will be happy to discuss an alternative date. In addition, please be advised that we will also be happy to discuss Mr. Kessler's reasonable travel expenses, consistent with our regulations, in connection with his appearance in Los Angeles.

Very truly yours,

Matthew D. Gold

Enclosure