

counsel do not know what prior counsel knew when the initial disclosures were made on September 25, 2000. Nor does current counsel know whether the initial disclosures were incomplete when submitted.

Rule 3.31(e)(1) requires a party to supplement initial disclosures if it learns that, in some material respect, the information disclosed is incomplete or incorrect and if additional information has not otherwise been made known during discovery, or in writing. The Motion is facially deficient because Complaint Counsel have not made the required showings either that (1) Respondents have learned that the initial disclosures were incomplete in a material respect, or (2) any missing information has not otherwise been made known to Complaint Counsel.

When new counsel was retained, Complaint Counsel Matthew Gold told Respondents' new counsel they need not worry about, or supplement, Respondents' initial disclosures, because Complaint Counsel would get the information they supposedly needed through the Subpoena Duces Tecum issued to Respondents.¹

Indeed, that is exactly what has happened. After reviewing documents produced by Respondents on January 12, 2001, Complaint Counsel noticed that the names of three Natural Organics' employees appeared on documents. Complaint Counsel asked to depose these individuals. Respondents readily agreed to the depositions, without

¹ Complaint Counsel state they earlier indicated they would accept a subpoena response as a substitute for initial disclosure documents. Memo. at 3. In fact, Complaint Counsel stated that a subpoena response would completely eliminate any theoretical need to supplement Respondents' initial disclosures.

requiring subpoenas to be issued. These three persons (and two other Natural Organics' employees) are to be deposed on February 14-16, 2001. Complaint Counsel are free to ask the deponents the identity of any person who may have discoverable information. If other names turn up, Complaint Counsel can seek to depose those persons.

Respondents' new counsel has had a huge task to seek to catch-up to Complaint Counsel. In the slightly more than two months we have been on this case, we have met every deadline set in the Amended Discovery Schedule. We have been obligated to find fact and expert witnesses, respond to a broad Subpoena Duces Tecum, and to two unnecessary Motions. Representing clients that lack the resources of the Commission, we have had little opportunity to discover the facts possessed by our own clients.²

Complaint Counsel allege it would be a simple task to supplement Respondents' initial disclosures, Memo. at 1, asserting, "one or two interviews with Natural Organics personnel will allow [Respondents'] counsel to discover the appropriate names" of persons who may have discoverable information. Memo. at 6. Natural Organics has in excess of 400 employees. To definitively know all persons known that may have discoverable information would require several hundred interviews, not one or two. Complaint Counsel believe it is Respondents' obligation, not their counsel's to supplement the disclosures. Memo. at 7. But, the only way Natural Organics, a

² Complaint Counsel claim their initial disclosures virtually emptied their files of non-privileged documents. Memo. at 2. The paucity of discovery provided in response to Respondents' discovery requests belies this assertion.

corporation, could attest to what its employees collectively know, is for its counsel to interview, or otherwise seek information from, all Natural Organics' employees.

There is no indication in the wording or the spirit of the Commission's Rules that would require such an undertaking. The initial disclosure Rule surely requires counsel to disclose what they know. There is no suggestion that, for purposes of initial disclosures, a corporation must empty its collective knowledge. Indeed, since the disclosures must be made approximately twenty-five days after the Complaint is served, no corporation that employs more than a handful of people could possibly make a full initial disclosure under Complaint Counsel's test. We are confident Complaint Counsel do not make such an inquiry of all FTC employees whenever Complaint Counsel is making initial disclosures. There is no support in the Rules for holding Respondents to a different standard.

If Respondents' current counsel knew of undisclosed persons who have discoverable information, we would be happy to identify them. We are unaware of anyone but potential expert witnesses who possess discoverable information that is not known to Complaint Counsel. While they allege they do not know the "identity of numerous individuals who have relevant information", Memo. at 1, we doubt that is correct. Even if correct, Complaint Counsel and Respondents' counsel will discover any additional names for the first time, and at the same time, during the five depositions of Natural Organics' employees that begin on February 14, 2001.

What we are unwilling to do, and not required to undertake, is to make (1) a definite statement as to who has relevant information, when we have not had a chance to

interview appropriate employees and (2) risk filing a statement that may turn out to be incomplete because of our lack of knowledge.

Complaint Counsel's Motion demonstrates the slippery slope that they seek to place us on. They complain that, as a result of initial disclosures, the FTC does not know, among other things, the names of all medical personnel or experts with whom Respondents "have consulted about the efficacy of the product." Memo. at 5. There is not a word in the Complaint to suggest that the Commission is challenging the efficacy of the products at issue. To the extent Complaint Counsel are adding new theories to their Complaint, there is, by definition, no way that Respondents could ever satisfy Complaint Counsel's hopelessly vague standards for making initial disclosures.

Similarly, on one hand, Complaint Counsel complain that Respondents' initial disclosures did not include outside experts or consultants with whom Respondents may have consulted. Memo. at 6. On the other hand, it is curious they would make this claim when Complaint Counsel's initial disclosures did not identify the two persons recently listed as Complaint Counsel's expert witnesses.

Devoid of legal or factual arguments, Complaint Counsel present unwarranted ad hominem attacks on Respondents' new counsel, calling us "obstructionist". Memo. at 7. Complaint Counsel's Motion does not even acknowledge the five depositions of Natural Organics' employees that begin on February 14, 2001. These are five of the six employees Complaint Counsel have sought to depose. The sixth, Respondent Gerald Kessler, was made available to be deposed that week. However, Complaint Counsel

postponed Mr. Kessler's deposition. Respondents agreed to these six depositions without insisting that the depositions could only occur after Respondents take depositions.

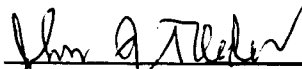
These individuals were employed by Natural Organics during the FTC's three-year investigation. Before filing the Complaint, Complaint Counsel had every opportunity to seek to interview these persons, and learn the identity of any other persons who might have relevant information. It is thus unfair and unwarranted that Complaint Counsel would seek to blame Respondents and charge them with obstructionist tactics.

It is also remarkable that Complaint Counsel candidly admits they "do not know how the company is organized (or even its size)." Memo. at 2. Whose fault is that? During the FTC's three-year investigation, one would have expected Complaint Counsel would have learned these things, independent of the initial disclosure rule.

In sum, discovery is ongoing and Complaint Counsel are making plenary use of the discovery available under the Rules of Practice. Respondents' counsel believe that Complaint Counsel are aware of all fact witnesses who possess relevant information. If this is untrue, the competent counsel employed by the Commission will surely learn any additional names from the depositions and other discovery that will occur soon.

Dated: February 12, 2001

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this twelfth of February 2001, a copy of the foregoing Respondents' Answer to Complaint Counsel's Motion to Compel was served by facsimile and by first-class mail, postage prepaid, on:

Matthew D. Gold
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Dean Graybill
Jeffrey A. Klurfeld
Federal Trade Commission
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and two courtesy copies of the foregoing materials were hand delivered to:

Judge James P. Timony
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c/o Victoria C. Arthaud, Esq.
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