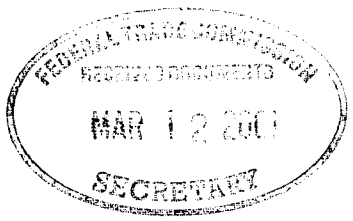
UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of	)	
	)	
	)	**Docket No. 9294**
NATURAL ORGANICS, INC.	)	
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 LIMIT EXPERT WITNESSES

INTRODUCTION

On February 27, 2001, Complaint Counsel filed another Motion that, if granted, will seriously undercut Respondents' new counsels' ability to prepare for the upcoming Hearing. They seek an Order to limit to no more than six (a number Complaint Counsel admit is "somewhat arbitrary") experts who Respondents may call at the Hearing. As shown below, the Motion is not ripe. Moreover, there is no factual or legal basis for the unprecedented relief sought by Complaint Counsel.

As Your Honor knows, Respondents' new counsel were retained just over three months ago. We agreed to an amended Discovery and Trial Schedule, drafted by Complaint Counsel. One provision required Respondents to identify their expert

witnesses by February 16, 2001. The parties were obligated to identify "all potential witnesses whom counsel reasonably expect to be called in their case-in-chief." Respondents timely complied by identifying fourteen potential expert witnesses. By March 14, 2001, Respondents must provide expert reports. On March 23, 2001, the parties are to exchange revised witness lists.

When Complaint Counsel filed this Motion they (1) did not know about what Respondents' experts were prepared to testify (see Complaint Counsels' Motion to Limit Expert Witnesses (hereinafter "Motion") at 2 n.4 –"we do not have specific information regarding what each witness will testify about"); or (2) whether Respondents might delete any of the designated experts when the revised witness lists are exchanged later this month. It is also noteworthy that Complaint Counsel filed this Motion without any prior consultation with Respondents.

THE MOTION IS NOT RIPE

Two essential facts are undisputed: (1) Respondents are not yet required to file the necessary expert witness reports; and (2) The Discovery Order deadline for submitting revised witness lists is March 23, 2001.[1] Regarding the first point, it is remarkable that Complaint Counsel devote much of the Motion arguing that Respondents' experts will provide cumulative testimony. Motion at 1, 6-8. Because Respondents have not filed the experts' reports, Complaint Counsel have no way of knowing if any of the testimony to be provided by these experts will be cumulative. As to the second point, Complaint

[1] Curiously, Complaint Counsel's Motion makes no mention of this deadline.

Counsel acknowledge that Respondents "may decide to call only a portion of their designated experts at" the Hearing. Motion at 5. Indeed, it is conceivable that once Respondents have reviewed their experts' reports and other discovery, we may well choose not to call all the experts we have designated.

However, the well known unique facts of this case demonstrate that Complaint Counsel are seeking to force Respondents to arbitrarily and prematurely select which experts to use at the Hearing. Were this the normal case where Respondents' counsel were involved from the start of an investigation, we would have had plenty of time to locate expert witnesses, prepare their testimony, and seek to eliminate unnecessary duplication. In this case, Respondents' new counsel had no such luxury.

We have diligently sought to meet (and have succeeded) all deadlines established in the revised Discovery Order. It was a tedious process locating competent witnesses who would testify in this matter. Nevertheless, we succeeded in putting together a distinguished panel of experts prepared to refute the central allegation presented in the Complaint, i.e., that Respondents lacked substantiation for the claims made in their advertising. What we could not do in the short period of time available was determine if any witness might be unnecessary. We will assuredly do so before the Hearing. However it is not appropriate for Respondents to be required to make that choice now.

We find authoritative support for this position in Your Honor's decision in In Re R.J. Reynolds Tobacco Company, 1998 FTC Lexis 182 (1998). There, Your Honor denied Complaint Counsel's Motion to strike five expert witnesses, thereby overruling

their contention that the witnesses' testimony would be cumulative, and that Complaint Counsel would be unduly burdened by having to take their depositions.

Complaint Counsel argue that Respondents' "final witness list in that case contained only ten experts." Motion at 3. Complaint counsel conveniently ignore the distinction that R. J. Reynolds' designation of ten experts was in their "final witness list" (emphasis added). As noted above, Respondents have not yet filed a final witness list. If Your Honor would not limit the number of expert witnesses contained in a final witness list, surely it is inappropriate to do so at this stage of the proceeding. Moreover, as shown in Exhibit B to the Motion, R. J. Reynolds' final witness list contained forty- two witnesses. In contrast, Respondents in the case at bar have identified twenty-six fact and expert witnesses.

COMPLAINT COUNSEL'S DISCOVERY ARGUMENT IS MERITLESS

Complaint Counsel complain that unless the Motion is granted, they will be unduly burdened with depositions. Motion at 3-6. They even make the remarkable argument that they are "duty-bound to take the deposition of all designated experts." Motion at 5. Complaint Counsel are clearly confused. While the Discovery Order gives them the "right" to depose expert witnesses ("Each party is permitted to depose experts identified as witnesses by an opposing party"), Complaint Counsel cite no authority, and we are aware of none, that imposes a duty to depose each of Respondents' experts. Nor have Complaint Counsel shown why they could not have awaited Respondents' March 23rd revised witness list before assessing their deposition needs.

Complaint Counsel present another meritless argument, arguing that "deposing respondents' fourteen experts during this period would entail trips to at least eight metropolitan areas." Motion at 4. However, this argument conveniently avoids the fact that even if Complaint Counsel desire to depose each of these experts, they could do by telephone deposition, thus entailing no travel at all. Indeed, the parties have agreed that Complaint Counsel could depose by telephone many of the fact witnesses identified by Respondents.[2] Yet, the Motion makes no mention of telephone depositions.

Despite filing this Motion, Complaint Counsel had no difficulty making the inconsistent argument that, while the Motion is pending, they wanted to begin work to arrange for scheduling to depose each of Respondents' experts. See attached letter from Matthew Gold dated February 27, 2001. Respondents' counsel responded that same day, saying Complaint Counsel cannot have it both ways. See attached letter from A. Wes Siegner, Jr. dated February 27, 2001. Respondents will happily agree to a schedule for deposing both sides' experts as soon as this Motion is decided by Your Honor. Until that time, we believe it is unreasonable to waste our clients' money, or the time of the experts, arranging for the depositions of persons who may not testify. Complaint Counsel may have endless funds, but Natural Organics, which is not a large corporation, must carefully guard against unnecessary expenses.

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[2] Respondents have not yet agreed to the timing of these depositions, as we have been unable to convince Complaint Counsel that they should agree to a deposition schedule of all parties' witnesses.

Complaint Counsel present the conclusory allegation that the Discovery Order signed by Your Honor in September 2000, contemplated a fewer number of experts than Respondents have designated. Motion at 4. However, Complaint Counsel do not suggest that this subject ever came up with Your Honor or that Complaint Counsel had any basis as to the number of experts Respondents would call.

Moreover, Complaint Counsel ignore the possibility that the parties may well be able to stipulate to the admissibility of much of the expert witness' testimony, thereby minimizing the need for live testimony from many of the experts Respondents put on their final witness list. Yet again, this shows that Complaint Counsel are simply putting the cart before the horse. There are many steps yet to be taken before Your Honor need truly address the number of experts to be called in this case.

EXPERT TESTIMONY WILL NOT BE NEEDLESSLY CUMULATIVE

Even though Complaint Counsel acknowledge they have not seen Respondents' export reports, and thus to what the experts will testify, Complaint Counsel make the unsupported claim that the experts' testimony will be needlessly cumulative. Motion at 6. Just as Your Honor rejected this argument in R.J. Reynolds Tobacco Company, 1998 FTC Lexis 182, the argument is meritless here.

Complaint Counsel have offered no stipulations regarding Respondents' experts' testimony. Thus, for instance, we are left to guess whether Complaint Counsel will agree that if a certain number of experts conclude that Respondents' advertisements were substantiated, Respondents will have thereby established their defense to the Complaint. Indeed, we suspect that no matter how many experts Respondents proffer, Complaint

Counsel will contend that we have not shown that the advertisements were substantiated. Thus, it is quite conceivable that there will be some necessary overlap between the testimony of some of Respondents' experts.

Respondents will endeavor to establish to Your Honor, the Commission, and, if necessary, the Court of Appeals, that Respondents did have adequate substantiation for the claims made in Respondents' advertisements. This is certainly an important case to Respondents. They must have a fair opportunity to present their defense. It would be unfair, and indeed highly prejudicial, for Your Honor to limit the number of experts we may call, by placing what Complaint Counsel would refer to as an arbitrary limit. As noted above, we have put together a highly-qualified panel of experts who, collectively will be prepared to stick a fatal dagger in the underpinnings of the Complaint. Until Your Honor has any notion of what these witnesses will say, there is no basis for limiting their testimony.

Complaint Counsel challenge the ethics of Respondents' counsel, claiming we designated fourteen experts to gain "an unfair tactical advantage." Motion at 8. However, we designated that number of experts for one reason only. After rejecting some potential experts, we concluded that each of the experts we designated had a specific area of expertise and was highly qualified and willing to testify to refute the Complaint.

It is particularly inappropriate that Complaint Counsel would now complain about the burden placed on them to speak with Respondents' expert witnesses. Before the Complaint was filed, Complaint Counsel repeatedly rejected Respondents' prior

counsel's suggestion that the parties' experts would informally meet to attempt to resolve the case. Although we recognize that most of our experts were not retained until after the Complaint was filed, Complaint Counsel should have availed themselves of this informal discovery during the long investigation that preceded the Complaint.

Complaint Counsel raise the curious specter that Respondents would welcome an extension of the close of discovery and the setting of a new trial date. Motion at 8. Respondents have never made either suggestion to Your Honor or to Complaint Counsel. Indeed, it is Complaint Counsel that are complaining about their inability to take the discovery they seek, not Respondents. This fact is quite remarkable in that Respondents' counsel are new to the case, not Complaint Counsel.

CONCLUSION

For the foregoing reasons, Complaint Counsel's Motion to Limit Expert Witnesses should be denied.

Dated: March 12, 2001

Respectfully Submitted,

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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 Limit Expert Witnesses 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

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Matthew D. Gold
Attorney

February 27, 2001

VIA FACSIMILE

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Washington, D.C. 20005-5929

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

Dear Mr. Siegner:

As you know, complaint counsel recently filed a motion requesting that Judge Timony limit respondents' experts to no more than six. We must, however, prepare for the possibility that we will need to depose all fourteen designated experts. Accordingly, please provide to me, as soon as possible, a list of the dates on which each of your designated experts would be available for deposition between the dates of March 21, 2001, and April 13, 2001.

I will phone you later this week to follow up on this letter.

Very truly yours,

Matthew D. Gold

Matthew D. Gold

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February 27, 2001

BY FACSIMILE/CONFIRMATION COPY BY MAIL

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

Dear Mr. Gold:

This responds to your letter dated February 27, 2001 concerning depositions of experts. I am confused by the simultaneous receipt of your motion to limit our experts to six, a number you describe in your motion as "admittedly somewhat arbitrary," and your February 27 letter requesting that I "provide [you], as soon as possible, [with] a list of the dates on which each of your designated experts would be available for deposition between the dates of March 21, 2001, and April 13, 2001." It would be a considerable and possibly wasted undertaking to establish a schedule for depositions when you have moved to strike eight of our experts and have not designated which eight you want us to do without. In addition, it is my understanding that the date for submitting revised witness lists is March 23, 2001. It is premature to establish a schedule prior to the submission of a final list or a decision on your motion, whichever occurs later. Finally, your motion and letter come at a time when we are preparing expert reports, which is a considerable task. I will undertake to advise you promptly if we decide not to call any of

our witnesses, and would be happy to discuss any other ideas for simplifying the scheduling process.

Sincerely,

A. Wes Siegner, Jr.

AWS/HMB/sas
Enclosures