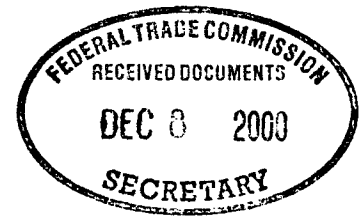


UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION



\_\_\_\_\_)  
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

JOINT MOTION FOR ENTRY OF AMENDED SCHEDULING ORDER

On October 12, 2000, respondents informed the Court that their lead counsel, Milton A. Bass, had been killed in an automobile accident. Due to this tragic event, respondents moved for a sixty-day stay in these proceedings to allow them to find new counsel and to allow such counsel to become familiar with the matter. Your Honor orally granted respondents' motion on October 18, 2000.

Respondents recently retained new counsel. Following the Notice of Appearance filed by respondents' new counsel on December 1, 2000, Your Honor requested that the parties confer and agree on an amended schedule leading up to a hearing on or before June 19, 2001.

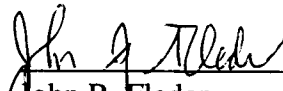
Pursuant to Your Honor's request, the parties have conferred and agreed upon an Amended Scheduling Order. We therefore jointly move, pursuant to Section 3.21(c)(2) of the Rules of Practice, that Your Honor enter the attached Order.

Respectfully submitted,

Matthew G. Gold (by John R. Fleder)

Matthew D. Gold  
Kerry O'Brien  
Linda K. Badger  
Western Region  
Federal Trade Commission  
901 Market Street, Suite 570  
San Francisco, CA. 94103  
(415) 356-5266 (voice)  
(415) 356-5242 (fax)

Counsel Supporting the Complaint



---

John R. Fleder  
Stephen H. McNamara  
A. Wes Siegner, Jr.  
Holly M. Bayne  
Hyman, Phelps & McNamara, P.C.  
700 Thirteenth Street, N.W.  
Washington, D.C. 20005  
(202) 737-5600 (voice)  
(202) 737-9329 (fax)  
Counsel for Respondents

Dated: December 8, 2000

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

ORDER SETTING AMENDED DISCOVERY AND TRIAL SCHEDULE

On October 12, 2000, respondents informed me that their lead counsel, Milton A. Bass, had been killed in an automobile accident. Due to this tragic event, respondents moved for a sixty-day stay in these proceedings to allow them to find new counsel and to allow such counsel to become familiar with the matter. I orally granted respondents' motion on October 18, 2000. Following the Notice of Appearance filed by respondents' new counsel on December 1, 2000, I requested that the parties confer and agree on an amended schedule leading up to a hearing on or before June 19, 2001.

I hereby find that, for good cause shown, the Scheduling Order entered on September 27, 2000, shall be vacated and it is therefore ORDERED that the parties shall adhere to the following Amended Scheduling Order:

- December 22, 2000 - Respondents reply to Complaint Counsel's First Request for Admissions (originally due 10/16/00).
- January 5, 2001 - Complaint Counsel provides witness list (not including experts), with description of proposed testimony.

- January 12, 2001 - Respondents reply to Specifications 5, 6, 7, 8, 21, 22, 23, 24, 25, 29, 31, 32, 33, 38 and 50 of Complaint Counsel's Subpoena Duces Tecum (originally due 11/2/00). Replies to the remaining Specifications shall be due on February 7, 2001.
- January 19, 2001 - Respondents' Counsel provides witness list (not including experts), with description of proposed testimony.
- February 2, 2001 - Complaint Counsel provides expert witness list.
- February 16, 2001 - Respondents' Counsel provides expert witness list.
- February 23, 2001 - Complaint Counsel provides expert reports.
- March 9, 2001 - Deadline for issuing document requests, requests for admission, interrogatories and *subpoenas duces tecum*.
- March 14, 2001 - Respondents' Counsel provides expert reports.
- March 23, 2001 - File status report and statement of the case (1) reporting on compliance with discovery and settlement negotiations; and (2) identifying the legal and factual matters to be decided by the Administrative Law Judge.
- Exchange revised witness lists, including preliminary rebuttal witnesses, with description of proposed testimony.
- March 26, 2001 - Status conference to report on discovery and settlement negotiations. The parties are also directed to meet and discuss contested issues of fact and simplification of the issues and the possibility of obtaining stipulations of facts.
- March 30, 2001 - Parties exchange rebuttal expert reports.
- April 13, 2001 - Close of discovery, other than discovery permitted under Rule 3.24(a)(4).
- Deadline for depositions on rebuttal expert opinions.
- April 20, 2001 - Deadline for filing motions for summary decision.
- May 11, 2001 - Deadline for filing responses to motions for summary decision.

- Exchange final proposed witness and exhibit lists, including designated testimony to be presented by deposition, and a brief summary of the testimony of each witness and copies of exhibits not previously provided. The final proposed witness lists may not include additional witnesses not listed in the preliminary or revised preliminary witness lists previously exchanged unless good cause is shown.
- May 18, 2001
- Deadline for filing motions *in limine* and motions to strike.
  - Exchange responses to any designated deposition testimony.
- May 25, 2001
- Exchange proposed stipulations of law, facts, and authenticity.
  - Deadline for filing responses to motions *in limine* and motions to strike.
- June 1, 2001
- Exchange responses to proposed stipulations of law, facts, and authenticity.
- June 13, 2001
- File pretrial briefs, limited to 15 pages, identifying the legal matters, supported by legal authority, and factual matters to be decided by the Administrative Law Judge.
  - File final stipulations of law, facts, and authenticity. Any subsequent stipulations may be filed as agreed by the parties.
- June 18, 2001
- Final pre-hearing conference to be held at 10:00 a.m. in room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, N.W., Washington, D.C. The parties are to meet and confer prior to the conference regarding trial logistics and proposed stipulations of law, facts, and authenticity and any designated deposition testimony. All trial exhibits will be admitted or excluded. All outstanding evidentiary or other pending motions (except motions for summary decision) and any matter that may aid in the orderly and expeditious disposition of the case will be resolved.
- June 19, 2001
- Commencement of Hearing, to begin at 10:00 a.m. in room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, N.W., Washington, D.C.

#### ADDITIONAL PROVISIONS

1. Responses or objections to document requests, interrogatories, and requests for admission shall be due within 30 days of service.

The parties shall serve all discovery requests on each other in both hard copy (paper) and electronic format (disk or e-mail). Each response and/or objection to each discovery request shall be preceded by the specific discovery request to which the answer pertains.

Except for good cause shown, the parties shall serve all subpoenas and discovery requests sufficiently in advance of the discovery cut-off date so that all responses and objections will be due on or before that date.

Depositions by telephone are permitted by agreement of counsel.

2. (a) The preliminary and final witness lists shall represent counsel's good faith designation of all potential witnesses whom counsel reasonably expect to be called in their case-in-chief. Parties shall notify opposing parties promptly of changes in preliminary witness lists to facilitate completion of discovery within the dates of the scheduling order. Additional witnesses may be added after the submission of final witness lists only by order of the Administrative Law Judge for good cause shown.

(b) The exhibit lists shall represent counsel's good faith designations of all trial exhibits other than demonstrative, illustrative or summary exhibits. Additional exhibits may be added after the submission of the final lists only by order of the Administrative Law Judge for good cause shown.

3. Each expert report shall include the subject matter on which the expert is expected to testify, the substance of the facts and opinion to which the expert is expected to testify, and a summary of the grounds of each opinion. At the time an expert is first listed as a witness by a party, the listing party will provide to the other parties:

- (a) materials fully describing or identifying the background and qualifications of the expert, lists of publications, and all prior cases in which the expert has testified or has been deposed; and
- (b) transcripts of such testimony in the possession, custody or control of the listing party or the expert.

At the time an expert report is produced, the listing party will provide to the other parties:

- (a) all written communications exchanged between counsel and expert (other than drafts of expert reports); and

- (b) all documents and other written materials relied upon or reviewed by the expert in formulating an opinion in this case.

Each party is permitted to depose experts identified as witnesses by an opposing party.

4. In order to expedite the hearing of this matter, the direct testimony of all expert witnesses and fact witnesses who have been identified on the final witness lists shall be set forth in written form (affidavits, Q&A format or deposition testimony) to be filed with the Administrative Law Judge and shall be received into evidence in that form, subject, however, to all objections that would apply to such direct testimony if it had been proffered through a live witness in open court or, in the case of deposition testimony, subject to all objections which are preserved for trial under the applicable rules. Complaint counsel shall file written materials setting forth the direct testimony of its expert and fact witnesses no later than two weeks prior to the first date set for the evidentiary hearing. Respondents' counsel shall file written materials setting forth the direct testimony of its expert and fact witnesses no later than one week prior to the first date set for the evidentiary hearing. All objections to the testimony submitted in written form shall be preserved and counsel may object to and move to strike such written materials or portions thereof at the hearing as if the testimony had been offered live at that time, or, in the case of deposition testimony, subject to all objections which have been preserved for trial under the applicable rules. Each witness whose direct testimony is proffered in written form shall personally appear at the hearing for full cross-examination, and for such re-direct, re-cross or other examination as the Administrative Law Judge may permit, except to the extent the proffered testimony consists of deposition testimony which the proponent thereof would otherwise be entitled to offer under the applicable rules without producing a live witness.

5. In the *in camera* version of any pleading or exhibit thereto, the offering party must clearly indicate which materials have been granted *in camera* status by placing brackets in bold font around such material.

6. All papers filed with the Commission shall comply with Rule 4.4(b) and shall include a certificate of service indicating the date and manner of service. Service of all papers filed with the Commission shall be made on opposing counsel and two courtesy copies to the Administrative Law Judge by overnight courier or by facsimile by 5:00 p.m. on the designated date. Unless the FTC Rules of Practice require filing with the Office of the Secretary a paper (including discovery requests and responses and witness and exhibit lists or reports), the parties shall not serve courtesy copies of such papers with the Administrative Law Judge.

All deliveries by facsimile shall be followed promptly by delivery of an original by overnight courier or by U.S. mail, first class postage prepaid, provided, however, that any documents sent by facsimile in excess of 10 pages shall also be sent by overnight courier. It shall be the obligation of the serving party to ensure that service by facsimile has been effected. Whenever a party is required or permitted to do an act within a prescribed period after service of a paper on it, 1 day shall be added to the prescribed period. Overnight courier deliveries shall be

addressed to complaint counsel Matthew Gold and Kerry O'Brien, Federal Trade Commission, 901 Market Street, Suite 570, San Francisco, CA 94103 and to Respondents' counsel, John R. Fleder, Hyman, Phelps & McNamara, P.C., 700 Thirteenth Street, N.W., Washington, DC 20005.

7. All motions shall contain a draft order containing the proposed relief. The title of the proposed order shall not include the word "proposed" and shall identify the subject matter of the order. (For example, an order granting a party's motion to exclude evidence shall be titled "Order Granting Motion to Exclude Evidence," and not simply "Order" or "[Proposed] Order.")

8. The procedure for marking of exhibits referred to in the adjudicative proceeding shall be as follows: both sides shall number their exhibits with a single series of consecutive numbers. Complaint counsel's exhibits shall bear the designation CX and respondents' counsel exhibits shall bear the designation RX or some other appropriate designation. (For example, the first exhibit shall be marked CX-1 for complaint counsel.) When an exhibit consists of more than one piece of paper and each page of the exhibit bears a consecutive bates number or some other consecutive page number, counsel shall mark only the first page of the exhibit with the appropriate designation (*e.g.*, CX-1).

When an exhibit consists of more than one piece of paper and each page of the exhibit does not bear a consecutive bates number or some other consecutive page number, counsel shall mark each page and each back side of each page containing relevant matter with CX-1-A through CX-1-Z; items thereafter are numbered CX-1-Z-2, Z-3, Z-4, etc., as necessary.

All exhibit numbers must be accounted for, even if a particular number is not actually used at trial. If a party were to select certain, but not all, documents that had been designated as deposition exhibits to be designated as trial exhibits, the party must indicate that certain numbers were not used in the numbering process for trial exhibits. For example, if complaint counsel decided to not introduce at trial documents previously marked at depositions as exhibits CX-2, CX-4, and CX-6, its list of exhibits would begin CX-1, CX-3, and CX-5. This method of numbering exhibits for trial is acceptable, as long as the party also prepares a list of its exhibits indicating that CX-2, CX-4, and CX-6 were never designated as trial exhibits. Using this example, in preparing the set of original exhibits to give to the court reporter, complaint counsel must indicate that CX-2, CX-4, and CX-6 were never designated as trial exhibits by inserting in their place a blank piece of paper, tab, or other method.

9. At the final pre-hearing conference, counsel will be required to introduce all exhibits they intend to introduce at trial. Counsel will further be required to give the originals of exhibits to the court reporter, which the court reporter will keep.

10. In addition to providing the original exhibits to the court reporter at the final pre-hearing conference, counsel must bring to the hearing one copy of their exhibits for each of the following: the court reporter, the Administrative Law Judge, the Administrative Law Judge's attorney advisor, and the witness. Counsel will present the copy to each of the above when using



it, and then take back the copy when finished. Counsel may agree among themselves on the method by which they wish to exchange exhibits with each other.

Dated: \_\_\_\_\_

\_\_\_\_\_  
JAMES P. TIMONY  
Administrative Law Judge