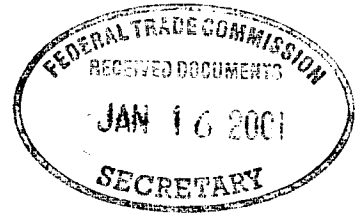


**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**



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

Docket No. 9294

**DECLARATION OF JOHN R. FLEDER OPPOSING COMPLAINT COUNSEL'S
MOTION FOR PARTIAL SUMMARY DECISION**

I, John R. Fleder, declare as follows:

1. I am a partner in the Washington D.C. law firm of Hyman, Phelps & McNamara, P.C. Between 1973 and 1992, I was an attorney with the Office of Consumer Litigation (previously the Consumer Affairs Section), the office in the United States Department of Justice that represents the Federal Trade Commission ("FTC" or "Commission") in enforcement court actions. Between 1985 and 1992, I served as the Director of the Office of Consumer Litigation.

2. In the period from 1973 to 1992, I personally handled or supervised many actions referred to the Justice Department by the FTC's Bureau of Consumer Protection, including numerous cases in which the FTC alleged that a defendant had disseminated false or misleading advertisements.

3. This Declaration is submitted pursuant to FTC Rule of Practice § 3.24(a)(2) in opposition to Complaint Counsel's Motion for Partial Summary Decision ("Motion"). This Declaration is submitted by Respondents' legal counsel of record to show, among other things, why a summary decision is wholly unwarranted. Opposing Declarations of other persons, such as experts, cannot be produced at the time. The Commission recognized the appropriateness of a counsel's declaration to oppose a summary decision in The Hearst Corp., 80 F.T.C. 1011 (1972). In sum, as shown below, Complaint Counsel is seeking the extraordinary remedy of a partial summary decision at an early stage of the case where Respondents have obtained no discovery. Indeed, Complaint Counsel cites no precedent for trying to circumvent Respondents' due process rights to a fair hearing by obtaining a partial summary decision without a supporting Declaration or Respondents getting any discovery from Complaint Counsel. No violation of the Federal Trade Commission Act ("FTC Act") has been proven and Complaint Counsel does not even allege that the sparse record in this case would support a finding that a violation has occurred. Instead, Complaint Counsel is seeking to distract Respondents' counsel from focusing on the issues that will need to be addressed at trial.

4. On or about December 1, 2000, Hyman, Phelps and McNamara, P.C. was retained by Respondents to represent them in the above-captioned matter. We were retained because their prior counsel suddenly died after this case began. Once prior counsel died, Administrative Law Judge James P. Timony ("ALJ") granted a sixty-day stay of proceedings, to allow Respondents to find new counsel and to allow new counsel to become familiar with the matter.

5. One of the first actions I took as counsel for Respondents was to speak with Complaint Counsel, Matthew Gold about the Discovery and Trial Schedule Order entered on September 27, 2000, in this case. Complaint Counsel knew that the undersigned was new to the case and unfamiliar with the facts alleged in the Complaint. Nevertheless, Respondents readily agreed to Complaint Counsel's proposed modified Scheduling Order. The Amended Order was entered on December 11, 2000.

6. Under the Amended Discovery and Trial Schedule Order, discovery closes on April 13, 2001. The Hearing is scheduled to begin on June 19, 2001. To date, Complaint Counsel have identified only one witness pursuant to the Scheduling Order's mandate that Complaint Counsel identify their fact witnesses. Complaint Counsel are not yet obligated to identify their expert witnesses and have provided no discovery to Respondents. Respondents have filed a Request for Production of Documents and have promulgated Interrogatories, seeking to obtain detailed information about the allegations in the Complaint. Complaint Counsel's responses are due later this month. In addition, Respondents will take the deposition of Complaint Counsel's lone fact witness in February and will seek to depose any expert witnesses to be designated by Complaint Counsel.

7. Because the undersigned was recently retained to act as counsel in this case, we have been forced to address a number of critical tasks in an unnaturally compressed period of time. We are attempting to retain expert witnesses and to locate fact witnesses to defend the Complaint. Unfortunately, because of the short period of time my firm has been working on this case, we have not yet retained any expert witnesses, although we

have located a number of qualified individuals who may be able to act as experts on behalf of Respondents. Under the Schedule proposed by Complaint Counsel, and agreed to by the undersigned, Respondents do not need to designate their fact witnesses until January 19, 2001, or their expert witnesses until February 16, 2001. Respondents' strategy in this case will be largely impacted by the discovery we are able to obtain from Complaint Counsel. As noted above, Complaint Counsel have not yet responded to the discovery propounded to them.

8. Respondents submit this Declaration as provided for in Rule 3.24(a)(2). We are not submitting a brief or memorandum of law because the above-mentioned rule provides that a brief or memorandum of law is not filed unless the ALJ calls for it. If the ALJ does not deny the Motion outright, Respondents request an opportunity to submit a Memorandum of Law as to why the instant Motion should be denied.

9. Rule 3.24(a)(4) provides that the ALJ may refuse an application for summary decision or order a continuance to permit discovery to be taken if it appears from the party opposing a summary decision motion that the party cannot present facts essential to justify an opposition. This rule is modeled after Fed. R. Civ. P. 56(f), which applies to motions for summary judgment filed in federal courts. The United States Supreme Court applied this rule in Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986). The Court stated that summary judgment is inappropriate unless the opposing party has the opportunity to take "full discovery." Accord, Kachmar v. Sungard Data Sys., Inc., 109 F.3d 173, 183 (3d Cir. 1997). Regarding advertising cases arising under the FTC Act, in United States v. J.B. Williams Co. Inc., 498 F.2d 414, 430-34 (2d Cir. 1974), the

Court denied summary judgment where the interpretation of a commercial was fairly disputed.

10. Discovery in this case has just begun. The deadline for filing motions for summary decision is April 20, 2001, over three months from now, a deadline that follows the close of discovery by one week. This deadline was suggested by Complaint Counsel, agreed to by Respondents' counsel, and ordered by the ALJ. Complaint Counsel's Motion neither states nor suggests any reason why Complaint Counsel cannot simply refile a summary decision motion once discovery has been completed.

11. Regarding the substance of the Motion, Complaint Counsel seek a summary decision on two issues: (1) whether the four documents attached to the Complaint make certain representations; and (2) whether Respondent Natural Organics' Chief Executive Officer and owner, Gerald A. Kessler, is legally responsible for the acts of Natural Organics. We will briefly address each issue below.

12. Complaint Counsel allege in their Motion that the advertisements that appear as Exhibits A, B, C, and D to the Complaint represent that the Respondents' product will: treat or mitigate Attention Deficit/Hyperactivity Disorder ("ADHD") or its symptoms, improve the attention span of children who suffer from ADHD, improve the scholastic performance of children who suffer from ADHD, improve the attention span of children who have difficulty focusing on school work, and improve the scholastic performance of children who have difficulty focusing on school work.

13. Regarding whether Exhibits A, B, C and D to the Complaint make these representations, Complaint Counsel offer no evidence in the form of a Declaration as to

what the exhibits represent. Instead, Complaint Counsel state that the ALJ can simply read the exhibits and rule, as a matter of law, as to what the documents represent. Motion at 7. The ALJ need not now decide whether it will ever be appropriate for the ALJ to rule, without the benefit of any extrinsic evidence (such as an expert's declaration), as to what the exhibits mean. Surely, it is not appropriate that the ALJ issue such a decision before Respondents can hire their own experts, take appropriate discovery, and make a showing as to what the exhibits mean.

14. Pages 8-16 of the Motion discuss Complaint Counsel's interpretation of the exhibits. As noted above, the Motion is devoid of any claim that any expert, either within or outside the Commission, concurs in Complaint Counsel's reading of the exhibits.

15. Complaint Counsel do not argue that their interpretation of these exhibits is the only possible interpretation or even the only reasonable interpretation of the documents. Complaint Counsel repeatedly assert that their interpretation is "one reasonable interpretation" of Respondents' alleged claims. Motion at 8 (last line); Motion at 9 (fourth to bottom line); Motion at 11 (sixth to bottom line); Motion at 12 (eighth and fifth to bottom lines); Motion at 15 (fifth and second to bottom lines); and Motion at 16 (fifth to bottom line). If even Complaint Counsel are unwilling to state that their interpretation of the exhibits is the only reasonable interpretation, surely a summary decision on this issue is not warranted.

16. Complaint Counsel acknowledge that the representations that they assert appear in Exhibits A, B, C, and D are not explicitly apparent from the face of those

documents. Accompanying the Motion was Complaint Counsel's "Statement of Material Facts As To Which Complaint Counsel Contends There Is No Genuine Issue." This "Statement" does not mention the representations addressed on page 1 of the Motion, which are asserted to be ripe for summary decision. In other words, Complaint Counsel have not claimed that it is an undisputed fact that Respondents have represented that Pedi-Active A.D.D., the product at issue, "will treat or mitigate ADHD or its symptoms," as alleged on the first page of the Motion. Nor have Complaint Counsel asserted that any of the other four alleged representations are undisputed facts. Complaint Counsel thus have conceded that their interpretation of the exhibits is, at best, based on their reading of what is an implicit representation. See, e.g., Motion at 11 (eighth to bottom line and last line); and Motion at 12 (sixth to bottom line). In the absence of clear and unambiguous language in the exhibits that explicitly states what Complaint Counsel assert the exhibits state, a summary decision at this stage of the case is not warranted.

17. The FTC's case is based entirely on a claim that Respondents lacked adequate substantiation for the claims allegedly made in Exhibits A, B, C, and D. See Complaint ¶¶ 8 and 9. The Motion is silent on the issue of whether Respondents had adequate substantiation for the alleged claims contained in these exhibits. Thus, even if the ALJ were to grant the Motion (which we herein oppose), the parties will still proceed with discovery. Granting the Motion will not eliminate the need for a Hearing. Nor has Complaint Counsel alleged, let alone shown, that granting the Motion will expedite or shorten this case.

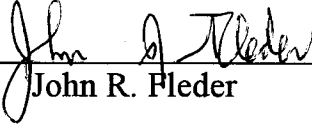
18. Respondents readily have acknowledged the dissemination of Exhibits A, B, C, and D. However, the hearing process provided by the FTC Act, the Commission's implementing regulations and the U.S. Constitution collectively mandate that, at a minimum, Respondents are entitled to take full discovery, including but not limited to having an adequate time to locate expert witnesses.

19. As noted in Paragraph 11 above, Complaint Counsel also seek a summary decision as to whether Mr. Gerald A. Kessler is legally responsible for the acts of Natural Organics. There is no need to address the legal issue of whether Mr. Kessler "would be liable for deceptive representations contained in the company's advertisements." Motion at 1. In our response to Complaint Counsel's Request for Admissions, Respondents readily acknowledged that Mr. Kessler is the sole shareholder of Natural Organics (Admission 52), has veto power over Natural Organics' advertising (Admission 53), and has participated in the development of, and approved the content of, three of the four exhibits (Admissions 54, 55, 57, 58, 59, 61). Respondents also admitted that Mr. Kessler controls the activities of the employees of Natural Organics who participated in the development, preparation or placement of each of the four exhibits (Admissions 66, 67, 68, and 69). In light of these admissions, Mr. Kessler has clearly acknowledged his legal responsibility for the acts of his company. Even so, this issue does not need to be decided now on the basis of a summary decision.

20. The ALJ has not found that either Respondent has made a deceptive representation. Nor does the Motion ask the ALJ to make that finding. Thus, Complaint Counsel have articulated no reason, and we are unaware of any, as to why it is in the

interest of justice for the ALJ to make a ruling as to Mr. Kessler's theoretical liability for violations that have not been proven against anyone. Indeed, Complaint Counsel cite no precedent for granting a partial summary decision on an individual's liability before an ALJ is even asked to find that any respondent in the case has violated the FTC Act.

I declare under penalty of perjury that the foregoing is true and correct.



John R. Fleder

Executed on this 16th day of January 2001.

**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

**STATEMENT OF THE MATERIAL FACTS AS TO WHICH RESPONDENTS
CONTEND THERE IS GENUINE ISSUE**

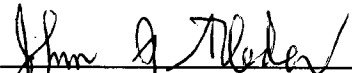
Pursuant to FTC Rules of Practice § 3.24(a)(2), Respondents file a list of material facts as to which there is genuine issue. This list responds to only those facts as to which Complaint Counsel contends there is no genuine issue in Complaint Counsel's Motion for Partial Summary Decision and Statement of Material Facts As To Which Complaint Counsel Contends There Is Not Genuine Issue. This statement thus does not represent a complete list of triable facts in this case.

1. Respondents have represented that Pedi-Active A.D.D. will treat or mitigate ADHD or its symptoms.
2. Respondents have represented that Pedi-Active A.D.D. will improve the attention span of children who suffer from ADHD.

3. Respondents have represented that Pedi-Active A.D.D. will improve the scholastic performance of children who suffer from ADHD.
4. Respondents have represented that Pedi-Active A.D.D. will improve the attention span of children who have difficulty focusing on school work.
5. Respondents have represented that Pedi-Active A.D.D. will improve the scholastic performance of children who have difficulty focusing on school work.
6. The abbreviation or term "A.D.D." is commonly used by the public to refer to ADHD.

Respectfully submitted,

Filed: January 16, 2001



John R. Fleder
Stephen H. McNamara
A. Wes Siegner, Jr.
Holly M. Bayne

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Respondents' Counsel

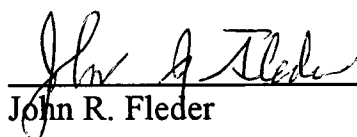
CERTIFICATE OF SERVICE

I hereby certify that on this sixteenth day of January, 2001 a copy of the foregoing Declaration of John R. Fleder Opposing Complaint Counsel's Motion for Partial Summary Decision and Statement of the Material Facts As To Which Respondents Contend There Is Genuine Issue were served by facsimile transmittal and first-class mail, postage prepaid, on the following parties:

Matthew D. Gold, Esq.
Kerry O'Brien, Esq.
Federal Trade Commission
901 Market Street, Suite 570
San Francisco, CA 94103,

and two copies were hand delivered to :

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



John R. Fleder