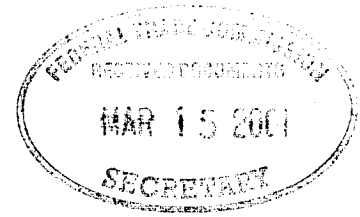


UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION



\_\_\_\_\_)  
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 ON COMPLAINT COUNSEL'S MOTION TO COMPEL DISCOVERY**

On February 27, 2001, Complaint Counsel filed a Motion to Compel Discovery. Respondents filed their Opposition to this motion on March 12, 2001.

The motion seeks Respondents to produce documents responsive to Complaint Counsel's subpoena duces tecum, falling into four categories: (1) non-disseminated advertisements and actual or proposed modifications to disseminated or non-disseminated advertisements; (2) communications with consumers; (3) DSHEA notices; and (4) financial information. In addition, Complaint Counsel seeks to compel a response to Interrogatory No. 4, which relates to financial information.

For the reasons set forth below, Complaint Counsel's motion is GRANTED, as limited herein.

**1. Non-disseminated advertisements and actual or proposed modifications to disseminated or non-disseminated advertisements**

Complaint Counsel asserts that draft or non-disseminated advertisements are relevant because they can reveal: (1) the message that Respondents intended to convey in the actual disseminated advertisements; (2) the company's true target audience; (3) the purposes for which Respondents designed the product; (4) advertising techniques; and (5) good or bad faith of Respondents. Respondents object to producing non-disseminated advertisements and actual or

proposed modifications to disseminated or non-disseminated advertisements on the grounds that advertising that has not been disseminated to the public is not relevant.

In FTC proceedings, respondents typically produce drafts of challenged advertisements. *E.g. In re Jenny Craig, Inc.*, 1994 FTC LEXIS 68 (May 16, 1994) (respondents produced tens of thousands of documents constituting creative files, including drafts); *In re Rentacolor, Inc.*, 103 F.T.C. 400, 1984 FTC LEXIS 66, \*16, 38 (April 16, 1984) (initial decision indicating that drafts of advertisements had been admitted into evidence at the trial). Similarly, under the Federal Rules of Civil Procedure, parties are often required to produce drafts where the message conveyed or the intent of the party is at issue. *E.g., Missouri Portland Cement Co. v. Cargill, Inc.*, 375 F. Supp. 249, 252 (S.D.N.Y. 1974) (In a tender offer battle, where both parties accused the other of making misrepresentations to stockholders, the court required parties to serve proposed drafts of advertisements and communications on each other.); *LGS Natural Gas Co. v. McFarland Energy, Inc.*, 1997 U.S. Dist. LEXIS 2411, \*2-3 (E.D. La. 1997) (ordering production of non-privileged drafts of an Agreement for Purchase and Sale where interpretation of the agreement was squarely at issue); *Saxholm AS v. Dynal, Inc.*, 938 F. Supp. 120, 1996 U.S. Dist. LEXIS 16958, \*2 (E.D.N.Y. 1996) (upholding magistrate's order compelling production of non-privileged draft patent applications).

Because such documents are reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses, any non-privileged non-disseminated advertisements for Pedi-Active A.D.D. and any actual or proposed modifications to any disseminated or non-disseminated advertisements for Pedi-Active A.D.D. must be produced within ten days of the date this Order is entered.

## **2. Communications with consumers**

Complaint Counsel seeks to compel documents referring or relating to communications between Natural Organics and any consumer regarding Pedi-Active A.D.D., or any disseminated advertisement for Pedi-Active A.D.D. Complaint Counsel asserts that communications from customers can help to show the target audience; how consumers perceive the advertisements' messages; whether Respondents acted in good or bad faith when consumer feedback indicated that the advertisements conveyed certain messages; and whether consumers understood claimed disclosures or verbal distinctions in ads.

Respondents object to this request as unduly burdensome. Respondents maintain three types of communications with consumers: (1) a database containing the names and addresses of consumers responding to print advertisements; (2) consumer testimonials; and (3) general consumer correspondence. Respondents have already offered to provide Complaint Counsel with the database. Respondents have represented that Complaint Counsel has stated that it does not need any additional consumer testimonials. The principal dispute is over the general consumer correspondence. Respondents assert that producing these communications is overly burdensome

because the communications are filed by correspondent's last name, and not segregated by product.

Correspondence from consumers is reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or the defenses. *See In re Verrazzano Trading Corp.*, 1976 FTC LEXIS 390, \*3, 6 (April 16, 1976) (ordering production of correspondence between respondents and their customers and warning that failure to produce such documents would justify adoption of complaint counsel's proposed findings that respondents had received frequent complaints about their product). *See also Federal Trade Commission v. Nat'l Inventionservices, Inc.*, 1997 U.S. Dist. LEXIS 16777, \*15 (D.N.J. 1997) (letters from customers used to demonstrate that respondent was aware of customer complaints).

That responding to the subpoena will be burdensome is unquestionable. However, the burden on Respondents in providing this relevant information is not undue or unreasonable. *See In re R.R. Donnelley & Sons Co.*, 1991 FTC LEXIS 272, \*2 (June 12, 1991). *See also In re Exxon Corp.*, 1978 FTC LEXIS 183, \*15-16 (Sept. 8, 1978) ("The defendant may not excuse itself from compliance with discovery by utilizing a system of recordkeeping which . . . makes it unduly difficult to identify or locate [relevant records].").

Respondents are hereby ordered to produce the database within ten days of the date this Order is entered. Although Complaint Counsel seeks to compel production of documents that *refer or relate* to any communication between Natural Organics and any consumer regarding Pedi-Active A.D.D. or any disseminated advertisement for Pedi-Active A.D.D., this request will be limited to any documents that *constitute* any such communication. Respondents are ordered to provide to Complaint Counsel any correspondence between Natural Organics and any consumer regarding Pedi-Active A.D.D. or any disseminated advertisement for Pedi-Active A.D.D., within thirty days of the date this Order is entered. In the alternative, Respondents shall permit Complaint Counsel, or someone acting on Complaint Counsel's behalf, to inspect and copy such correspondence at a time and place agreed to by the parties.

### **3. DSHEA notices**

Complaint Counsel seeks to compel Respondents to produce notices regarding any product that Natural Organics provided to the Food and Drug Administration ("FDA") pursuant to § 403(r)(6) of the Food, Drug, and Cosmetic Act, 21 U.S.C. § 343(r)(6) ("DSHEA notices"). Respondents object on the grounds that DSHEA notices are not relevant.

The DSHEA notices may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or the defenses. Further, production of the DSHEA notices will cause no undue burden on Respondents. Accordingly, any DSHEA notices that Respondents have provided to the FDA since January 1, 1999 must be produced within ten days of the date this Order is entered.

**4. Financial information regarding sales and profits of Pedi-Active A.D.D.; sales of Respondents' other products; and advertising expenditures for Pedi-Active A.D.D.**

Complaint Counsel seeks documents sufficient to show the gross sales, in units and dollars, of Pedi-Active A.D.D.; and documents sufficient to show the gross sales, in units and dollars, of all products sold by Natural Organics during certain years. In addition, Complaint Counsel seeks to compel a response to Interrogatory No. 4 which asks Respondents to state separately, for each calendar year in which they sold Pedi-Active A.D.D., the total number of units sold, the total dollar amount of sales of the product, the amount spent on advertising for the product, and the total profit from sales of the product.<sup>1</sup>

Respondents have represented that they have provided Complaint Counsel with the suggested retail price for Pedi-Active A.D.D. and some sales information. Respondents assert that the remaining requested information is not relevant.

Sales and profits from Pedi-Active A.D.D. may be relevant for numerous reasons. *See, e.g., In re Thompson Medical Co., Inc.*, 104 F.T.C. 648, 1984 FTC LEXIS 6, \*389-90 (Nov. 23, 1984) (sales reviewed in evaluating the benefit of a truthful claim and ease of developing substantiation for claim made); *In re Kraft, Inc.*, 114 F.T.C. 40, 1991 FTC LEXIS 38, \*44 (Jan. 30, 1991) (increased sales resulting from the challenged advertisements used as evidence of materiality of claim); *In re Nat'l Dynamics Corp.*, 82 F.T.C. 488, 1973 FTC LEXIS 126, \*36 (Feb. 16, 1973) (sales figures used to demonstrate consumer demand). Advertising costs for Pedi-Active A.D.D. are also relevant. *E.g., In re Stouffer Foods Corp.*, 1993 FTC LEXIS 196, \*69-70 (Aug. 6, 1993) (advertising costs used as a factor in determining whether a violation is serious and deliberate); *Thompson Medical*, 1984 FTC LEXIS 6 at \*413-14 (advertising costs used as evidence of size and duration of advertising campaign, relevant to respondents' efforts to persuade consumers). *See also In re R.J. Reynolds Tobacco Co.*, 1998 FTC LEXIS 174 (Feb. 25, 1998) (granting motion to compel an answer to interrogatory asking for dollars spent on advertising).

Sales of other products and the company's overall sales may be relevant to fencing-in relief. *See In re Stouffer Foods Corp.*, 1993 FTC LEXIS 196, \*69-70 (Aug. 6, 1993) (Whether a broad fencing-in order bears a reasonable relationship to a violation depends upon, among other things, the degree of transferability of the violation to other products.); *In re Jay Norris Corp.*, 91 F.T.C. 751, 1978 FTC LEXIS 378, \*245 (May 2, 1978) ("Given the variety and seriousness of the misrepresentations which occurred in connection with respondents' sale of used cars, it seems

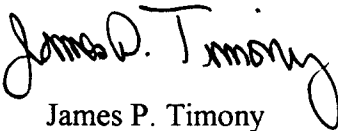
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<sup>1</sup> By letter dated March 5, 2001, Complaint Counsel stated that Respondents had provided Complaint Counsel with the suggested retail price for Pedi-Active A.D.D. Accordingly, Complaint Counsel has withdrawn its request to compel such disclosure.

appropriate to fence in respondents as to further mail order sales of other types of vehicles, such as trucks, motorcycles, campers and the like.”).

Respondents are hereby ordered to produce the following, within ten days of the date this Order is entered: (1) documents sufficient to show the gross sales, in units and dollars, of Pedi-Active A.D.D. in years 1997, 1998, 1999 and 2000; (2) documents sufficient to show the gross sales, in units and dollars, of all products sold by Natural Organics, in years 1997, 1998, 1999 and 2000.

Respondents are further ordered to state separately, for each calendar year in which Respondents have sold Pedi-Active A.D.D., the total number of units of Pedi-Active A.D.D. sold, the total dollar amount of sales of Pedi-Active A.D.D., the amount spent on advertising for Pedi-Active A.D.D., and the total profit from sales of Pedi-Active A.D.D.

  
James P. Timony  
Administrative Law Judge

Dated: March 15, 2001