

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION

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FEDERAL TRADE COMMISSION,

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information protected by the attorney-client privilege beyond the categories of communication Judge Pannell deemed waived. Order at 2 (emphasis original).

The FTC respectfully requests reconsideration “to correct a clear error of law or manifest injustice.” *Solutia, Inc. v. McWane, Inc.*, 726 F. Supp. 2d 1316, 1328 (N.D. Ala. 2010). The Local Rules for the Northern District of Alabama do not provide a standard time for the filing of oppositions to motions. The FTC consulted with the Court’s chamber rules, which provide that “ALL briefs, whether on pretrial or post trial motions, must comply with the requirements of “Appendix II” as far as practicable given the nature of the particular motion, including page limitations, unless the court grants specific permission to deviate. Unless the motion is dispositive, parties are not required to comply with Section 50e’ Bowdre Chamber Rules, attached as Plaintiff’s Exhibit A. Appendix II, in turn, provides that oppositions to motions are due 21 days after the filing of the initial motion. See Appendix II, attached as Plaintiff’s Exhibit B. In any event, the FTC intended to file its response today, which is, in fact, the fourteenth day after the filing of the motion to quash. Accordingly, reconsideration is warranted to give

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<sup>1</sup> Pursuant to Fed. R. Civ. P. 6, which governs the computation of time under the Federal Rules, when calculating a period in days, parties are to “exclude the day of the event that triggers the period.” Fed. R. Civ. P. 6(a)(1)(A). Thus, July 3, the date on which the motion was filed, is excluded. Fourteen days from July 4, the first day of any applicable deadline period, is July 17. Moreover, Rule 6 also provides that “[u]nless a different time is set by a statute, local rule, or court order, the last day [of a filing period] ends: (A) for electronic filing, at midnight in the court’s time zone.” Fed. R. Civ. P. 6(a)(4).

the FTC an opportunity to be heard and avoid clear error and/or manifest injustice.

To that end, the FTC includes its substantive response to the motion herein.

## II. Opposition to Motion to Quash

The subpoenas directed to Schilleci, ~~advers~~ of this district, relate to an ongoing contempt action against Hi-Tech, Wheat, Stephen Smith, and Mark Wright, before Judge Charles A. Pannell, the Northern District of Georgia.

Under Federal Rule of Civil Procedure 45, quashing a subpoena is inappropriate where, as here, a waiver applies and when there is no undue burden. See Fed. R. Civ. P. 45. Judge Pannell ruled on January 20, 2012, that Hi-Tech and Wheat waived their attorney-client privilege by alleging as an affirmative defense to the FTC's contempt allegations that they relied in good faith on the advice of counsel that they were in compliance with Judge Pannell's final judgment. Moreover, the information sought by the FTC is not overly broad or unduly burdensome because it seeks only the ~~facto~~ attorney-client communications and other documents that contain or relate to the advice that counsel gave them about the compliance of their advertising with the final judgment and the FTC Act.<sup>2</sup> Defs.' Mot. Exhibit D at 3, the very subject of the waiver. Accordingly, the FTC requests that the Court deny the motion to quash or, to the extent the Court has questions regarding the scope of the waiver found by Judge Pannell, to transfer the

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<sup>2</sup> Schilleci does not represent Smith or Wright, thus, they are not parties to Hi-Tech's and Wheat's motion.

motion to the Northern District of Georgia that he may interpret the subpoena in light of his own ruling<sup>3</sup>.

A. Background

On November 1, 2011, the FTC filed a motion for an order to show cause why Hi-Tech and Wheat should not be held in contempt for violating the final judgment by advertising weight-loss supplements Fastin, Lipodrene, Benzedrine, and Stimerex-ES with claims that were not supported by competent and reliable scientific evidence as required by the final judgment. On May 31, 2012, Judge Pannell ordered Hi-Tech and Wheat to show cause why they should not be held in contempt. In opposition to the show cause motion, Hi-Tech and Wheat asserted the affirmative defense that they relied in good-faith on the advice of counsel, Edmund Novotny ("Novotny"), that their advertising complied with Judge

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<sup>3</sup> Moreover, at a status conference before Judge Pannell, held on May 31, 2012, counsel for Hi-Tech and Wheat stated their intention to file a motion for a protective order in response to any subpoenas directed to Mr. Schilleci, and Judge Pannell clearly contemplated that such a motion would be filed in the Northern District of Georgia for his consideration. See Tr. of 5/31/12 Hearing at 27-29 (attached as Plaintiff's Exhibit C) ("THE COURT: Well, he can file this motion. I can see that no matter what I do today I'm still going to have to redo it in some kind of Order pursuant to some kind of motion."). Subsequently, on June 4, 2012, during a conference call with FTC counsel, Mr. Wenik reiterated that he expected that any discovery disputes in the case would be handled by Judge Pannell. Instead, in an attempt to get a second bite at the apple and obtain a conflicting ruling on the issue of waiver, Hi-Tech, Wheat, and Schilleci filed a motion with this Court.

<sup>4</sup> The FTC also moved for an order to show cause against defendants Stephen Smith and Mark Wright, who are not before this court.



with the final judgment.<sup>6</sup> The FTC served nearly identical subpoenas on Novotny.

The requested discovery is narrowly tailored to the advice Schilleci gave about Hi-Tech and Wheat's compliance with the final judgment. In an attempt to hide unfavorable evidence and disclose favorable evidence, Hi-Tech and Wheat have moved to quash the Schilleci subpoenas, but not the Novotny subpoena<sup>7</sup>. Hi-Tech and Wheat are therefore impermissibly attempting to use the attorney-client privilege as both a sword and a shield.

**B. The Motion To Quash Should Be Denied Because Hi-Tech And Wheat Waived Their Attorney-Client Privilege And The FTC's Subpoenas Are Not Unduly Burdensome.**

Hi-Tech, Wheat, and Schilleci base their motion to quash on Fed. R. Civ. P. 45(c)(3)(iii) and (iv), which provide that "the issuing court must quash or modify a subpoena that . . . (iii) requires disclosure of privileged or other protected matter, no exception or waiver applies or (iv) subjects a person to undue burden." Emphasis added. The motion to quash should be denied because a waiver applies to the documents and testimony requested by the subpoenas, and the subpoenas do

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<sup>6</sup> Ga. Dkt. No. 366 at 11-14 (Plaintiff's Reply In Support Of Its Motion For An Order To Show Cause Why Contempt Defendants Hi-Tech Pharmaceuticals, Jared Wheat And Stephen Smith Should Not Be Held In Contempt For Violating The Final Judgment And Permanent Injunction And Its Motion To Modify The Final Judgment) (attached as Plaintiff's Exhibit D).

<sup>7</sup> On July 16, 2012, John S. Hicks, Assistant General Counsel and Ethics Counsel for Baker, Donelson, informed the FTC that Hi-Tech and Wheat have consented to the disclosure of advice from Novotny in response to subpoenas that are nearly identical to those the FTC served on Schilleci.

not subject Schilleci to undue burden.

1. As The Court Has Recognized, A Waiver Applies To The Documents And Testimony Sought By The FTC's Subpoenas Because Judge Pannell Already Decided that Hi-Tech And Wheat Waived Their Attorney-Client Privilege.

As the Court has recognized, Judge Pannell's determination that Hi-Tech and Wheat have waived attorney-client privilege over "attorney-client communications and other documents that contain or relate to advice that counsel gave them about the compliance of their advertising with the final judgment and the FTC Act" is law of the case. See Order at 2, see also *United States v. Exxon Corp.*, 94 F.R.D. 246, 247-8 (D.D.C. 1981) (court's prior discovery opinion established as the law of the case that defendant had waived its attorney-client privilege and that any documents pertinent to defendant's defense of good faith were therefore discoverable). Judge Pannell's ruling on the waiver and its scope

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<sup>8</sup> Because Judge Pannell has ruled that Hi-Tech and Wheat waived privilege over not only communications with Novotny but "all other communications . . . relating to the same subject matter," Defs.' Mot. Quash, Ex. D, at 3, the Alabama Rules of Professional Conduct do not prohibit Schilleci from disclosing the requested information. See Comments to Alabama Rule of Professional Conduct 1.6 (Disclosures Otherwise Required or Authorized), *Chesnoff v. United States (In re Grand Jury Proceedings)*, 13 F.3d 1293, 1296-97 (9th Cir. 1993) (relying on Comments to Rule 1.6 of the Model Code of Professional Conduct, which is the same as Alabama Rule 1.6, court held that district court did not abuse its discretion in holding attorney in contempt of court for his refusal to testify before a grand jury). Schilleci has not cited to any case prohibiting him from disclosing attorney-client communications when a judge has issued a court order, as Judge Pannell has, finding that the attorney-client privilege has been waived.





with the final judgment and the FTC Act.

Defs.' Mot. to Quash, Ex. D. at 3.

Subpoena Specification 2 seeks information specifically relating to advice concerning the compliance of Hi-TechWheat's advertising with the final judgment exactly as Judge Pannell ruled. Specifically, Specification 2 asks for:

All documents containing or relating to advice that you [Schilleci] gave Contempt Defendants, whether orally or in writing, about the compliance or non-compliance of any print advertisement, direct mailing piece, web page, product packaging or product label, whether in draft or final form, including but not limited to, those identified as FTC 3, Attachments 4-8, 13-16, 18-19, 21-22, 24-26 (attached), with the Hi-Tech Order. The documents produced should include, but not be limited to, drafts of any such advertisements, edits communicated to Contempt Defendants, any communications with Contempt Defendants (whether via email, text message, letter, voicemail or by other written or electronic means), and any notes or memoranda describing, relating to, or memorializing communications with Contempt Defendants, and records of the date and times of such communications.

Defs.' Mot. to Quash, Ex. A at 13-14.

Similarly, Subpoena Specification 3 seeks only documents about the very waiver Judge Pannell found. Specifically, Specification 3 asks for:

All documents containing or relating to advice that you gave Contempt Defendants, whether orally or in writing, about the use of footnotes or disclaimers in connection with any print advertisement, direct mail piece, web page, product package, or product label for Fastin, Lipodrene, Stimerex-ES, and Benzedrine. The documents produced should include, but not be limited to, drafts of any such footnotes or disclaimers, edits communicated to Contempt Defendants, any communications with Contempt Defendants (whether via email, text message, letter, voicemail or

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Thomasz Holda, and Stephen Smith ("Hi-Tech Order") at 4, Definition 2 (attached as Plaintiff's Exhibit E).

by other written or electronic means), notes or memoranda describing, relating to, or memorializing communications with Contempt Defendants, and records of the dates and times of such communications

Defs.' Mot. to Quash, Ex. A at 14.

Similarly, Specification 1 asks for:

All documents containing or relating to advice that you gave Contempt Defendants, whether orally or in wr

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<sup>11</sup> Hi-Tech, Wheat, and Schilleci's argument to this Court that the FTC can obtain the information it seeks from another source, Novotny, boils down to the same argument Judge Pannell rejected. They are again attempting to rely only on advice of counsel favorable to their defense, while hiding advice of counsel that is unfavorable. The specific advice that Schilleci gave is not available from any other source. The evidence already in hand demonstrates that Schilleci and Novotny gave contradictory advice to Hi-Tech and Wheat concerning the advertisements' compliance with the final judgment. See

jurisdiction to rule on objections. *Petersen v. Douglas County Bank & Trust, Co.*, 940 F.2d 1389, 1391-92 (10th Cir. 1991) (a magistrate who transferred a motion to quash from the issuing court to a trial court acted within his authority).

Finally, Schilleci has entered an appearance on behalf of Hi-Tech and Wheat in the Northern District of Georgia and, having done so, is subject to personal jurisdiction of that district court. *CMC Interconnect Techs., Inc. v. Fairchild*

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<sup>12</sup> See Local Rule 83.1, Northern District of Georgia. Indeed, given that the privilege belongs to Hi-Tech and Wheat and not Schilleci, it is odd that Schilleci appears to be asserting the privilege ~~only~~ on behalf of his clients but on his own as well.

motion for a protective order with Judge Pannell. See, e.g., Clausnitzer v. Fed. Express Corp. 2007 U.S. Dist. LEXIS 61699, \*9-13 (N.D. Ga. Aug. 21, 2007) (issuing court transferred motion for protective order to trial court, stayed motion to quash pending trial court's decision, and stated that it would issue a ruling on the motion to quash not inconsistent with the trial court's decision).

Dated: July 17, 2012  
Respectfully submitted,

/s/ Edwin Rodriguez  
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FEDERAL TRADE

CERTIFICATE OF SERVICE

I hereby certify that on this 17<sup>th</sup> day of July, 2012, I caused a copy of Plaintiff's Motion for Reconsideration and Opposition to Motion to Quash Subpoenas Directed to Joseph P. Schilleci to be served via electronic mail and Federal Express to the following counsel of record:

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