necessary to force th e defendants to comply with the Sanctions Order. This order sets forth the court's findings wi th respect to the defendants' recall efforts and its determination on the i ssue of coercive incarceration.

I. Introduction

On November 10, 2004, the Federa l Trade Commission ("FTC") filed a complaint alleging that several defendan ts had violated Sect ions 5 and 12 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(a) and 52, by making false and unsubstantiated claims in connection with their advertising and sale of various dietary supplemen ts [Doc. No. 1]. The court granted summary judgment in favor of the FTC on June 4, 2008. *See FTC v. Nat'l Urological Group, Inc.*, 645 F. Supp. 2d 1167 (N.D. Ga. 2008), *aff'd*, 365 F. App'x 358 (11th Cir. 2009), *cert. denied*, 131 S. Ct. 505 (2010). The court entered two separate final judgments and permanent injunc tions against the defendants on December 16, 2008, enjo ining them from several activities related to their previous violations of the FTC Act. The first final judgment and permanent injunction is against National Urol ogical Group, Inc., Hi-Tech, Wheat, Thomasz Holda, and Smith [Doc. No. 230] ("Hi-Tech Order"). The second final judgment and permanen t injunction is against Wright [Doc. No. 229] ("Wright Order").

Section II of each of the final judgments and permanent injunctions prohibits the defendants from advertising weight-loss products using claims that the products cause rapid or substantial weight loss and fat loss or claims that the products affect metabolism, appetite, or fat unless those claims are substantiated with "competent and reliable scientific evidence." Section VII of the Hi-Tech Order also prohibits Hi-Tech, Wheat, and Smith from making claims concerning the comparative efficacy or benefits of weight-loss supplements that are not substantiated with "competent and reliable scientific evidence." Finally, Section VI of the Hi-Tech Order requires Hi-Tech, Wheat, and Smith to include a specific health-risk warning on any advertisement, product package, and product label that makes efficacy claims relating to yohimbine-containing products.

On November 1, 2011, the FTC filed a motion seeking an order from the court directing Hi-Tech, Wheat, and Smith to show cause why they should not be held in contempt of the permanent injunction [Doc. No. 332]. The FTC contended that the defendants had made revised statements about four Hi-Tech products that are not substantiated by competent or reliable scientific evidence despite such evidence being required by the permanent injunction. On March 21, 2012, the FTC filed a similar motion for an order against Wright based on his endorsements of one product, Fastin [Doc.

No. 377]. On May 11, 2012, the court granted both motions and scheduled a status conference to address scheduling and discovery [Doc. No. 390] ("May 11 Order"). The court held a status conference with the parties on May 31, 2012. Following the status conference, the court ordered Hi-Tech, Wheat, Smith, and Wright to show cause why they should not be held in contempt for failing to comply with the requirements of the final judgment and permanent injunctions against them [Doc. No. 399] ("May 31 Show Cause Order").

The May 11 Order and the May 31 Show Cause Order collectively set out the procedure the court would follow to resolve the question of the defendants' alleged contempt. The court (1) required the FTC to file a specific list of factual allegations and the defendants to admit or deny those allegations (akin to a complaint and answer), (2) permitted limited discovery on relevant issues, and (3) contemplated a "pre-hearing motion" to determine whether there were disputed questions of material fact regarding the defendants' alleged contempt. *See* May 11 Order at 13–14 [Doc. No. 390]; May 31 Show Cause Order [Doc. No. 399]. The procedure set forth by the . 0 19.101 e, a,(u

court prescribed this procedure becaus e it anticipated there would be a limited number of facts in dispute an d the scope of any eventual contempt hearing could be significantly narrowed by addressing lega

Nos. 475, 479, 480, 482]. The FTC replied [Doc. Nos. 485 and 486], and the court allowed Wheat and Hi-Tech to file a surreply [Doc. No. 487-2]. On August 8, 2013, the court entered an order wherein it concluded that Hi-Tech, Wheat, Smith, and Wright had made certain representations without substantiation by competent and reliable scientific evidence, as prohibited by the permanent injunctions in this case [Doc. No. 524]. The court found Hi-Tech, Wheat, Smith, and Wright to

In accordance with the Sanctions order, the pa

A. Findings of Fact [2]

The court makes the following findings of fact based on the clear and convincing evidence presen ted by the parties during the show cause hearing.

1. Delay in Initiati ng the Recall

The defendants did not begin their recall efforts until June 24, 2014, forty-one days after the court ordered a recall. On that day, the defendants began drafting a recall notice. A final dr aft of the recall no tice was completed on July 2, 2014, forty-nine days afte r the court ordered a recall. And the defendants did not deposit envelopes containing the recall notice with the United States Postal Serv ice until July 3, 2014, fifty days after the court ordered a recall. Based on this evidence, the court finds that the defendants did not initiate the recall process unt il late June 2014, and they did not attempt to contact retaile rs, distributors, or wholesalers until July 2014.

2. Scope of the Recall

A certificate of bulk mailing from the United States Postal Service indicates that the defend ants mailed 2,402 identical pieces of mail. Defs.' Ex. 13. As an attachment to the status re port filed by the de fendants prior to

[2] The defendants were unable to produce documentation to support many of their claims with regard to their effo rts to perform a comp lete recall. The court believes that the defendants intent ionally destroyed or failed to retain documentation related to th eir recall efforts. Accordingly, the court discounts witness testimony for which there is a lack of proper documentation.

Pl.'s Ex. 17 [Doc. No. 700-12 at 6]. The defendants responded on December 15, 2011, with a list identifying more than 3,700 retailers and distributors. Pl.'s Ex. 18 [Doc. No. 700-13 at 38–Doc. No. 700-14 at 89]. Pursuant to a letter dated March 31, 2014, the FTC requested a report identifying the recipients of a magazine titled Hi-Tech Health and Fitness from January 1, 2009, to the date of the response. Pl.'s Ex. 317 at 5. As an attachment to a letter dated April 24, 2014, the defendants identified 3,365 retailers who had received Hi-Tech Health & Fitness between January 1, 2009, and March 31, 2014. Pl.'s Ex. 311 at Attach. 39. Hi-Tech Health and Fitness is a magazine sent to retailers who sell Hi-Tech products, including the products subject to the recall. On the "About Us" page of the company website, the following language appears:

> Hi-Tech Pharmaceuticals is an enormously successful company that creates, manufactures and sells high-quality herbal products sold by the large, major retailers across the United States. These retailers include: GNC, Rite Aid, Kroger, Albertson's, CVS, Duane Reade, Hannaford, Cardinal Health, Harmon Stores, Fred Meyer, Osco Drugs, Supervalu, Roundy's, Walgreens, Sav-On Drugs, Meijer, Fruth Pharmacy, Kinney Drug, Kinray, USA Drugs, A&P, Kmart, Walgreens.com, Target.com, Amazon.com, Drugstore.com, over 5,000 health food retailers and adult novelty stores, as well as in more than 80,000 convenience stores throughout the United States.

Pl.'s Ex. 319 at 2 (emphasis added).

In addition to including unnecessa

that they relate to a recall. For example, the envelopes do not contain the words “recall,” “urgent,” or “notice.” However, the front of the envelopes has

company’s phone number, which the webs

was not posted on th

The FTC called Wheat as an adverse witness during the show cause hearing. Because of an ongoing grand jury investigation, Wheat invoked his right under the Fifth Amendment to the United States Constitution against self incrimination for the majority of the questions asked by the FTC.

9. Stephen Smith

Smith is the senior vice-president in charge of sales of Hi-Tech products, including Fastin, Lipodrene, Benzedrine, and Stimerex-ES. He oversees the sales force and has the authority to decide which retailers sell Hi-Tech products. Smith is also the head of the Food, Drug, and Mass division of Hi-Tech. He is responsible for acquiring retail accounts with food stores, drug chains, and mass merchandisers. Smith has helped to place violative advertising for Fastin, Lipodrene, Benzedrine, and Stimerex-ES with various publications and agencies. In addition, Smith was responsible for the day-to-day operations of Hi-Tech while Wheat was incarcerated from March 16, 2009, through September 15, 2010. [5] The court finds that Smith has sufficient authority and control over the company to direct a recall. [6]

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[5] Smith testified during the sanctions hearing that it was his job to "hold down the fort" while Wheat was incarcerated. Tr. of Sanctions Hr'g, Jan. 21, 2014 at 68:1–69:1 [Doc. No. 618].

[6] The court's finding of fact with respect to Smith's authority and control over the company is based on evidence presented during the sanctions hearing held on January 21, 2014, through January 24, 2014.

Smith testified that he did not become aware of his ob ligation to recall all violative products from retail stores until the end of June 2014. However, Smith was a defendant in this matter at the time the court issued its order imposing compensatory sa nctions against Smith and ordering him to recall all Fastin, Lipodrene, Benzedrine, and Stimerex-ES from retail stores. The earliest documented date on which Smith contacted re tailers to inform them of the recall is July 15, 2014. Defs.' Ex. 19. The defend ants offered into evidence an email dated July 15, 2014, from one of the company's brokers with General Nutrition Ce nters, Inc. ("GNC"). Defs.' Ex. 20. The email indicates that Fastin and Lipodrene have been recalled from corporate and franchise GNC stores. The distributor states, "The produc t will go to GNC's reclamation center to be consolidated . GNC will contact you to verify the shipment info and it will be returned. The process usually takes around 10 weeks." Defs.' Ex. 20 at 1. Smith sough t to convey to the co urt that it takes time for products to be re turned to the company. However, by the court's calculation, ten weeks from the date of the Sanctions Order would have been July 23, 2014, well before th e date of the show cause hearing. The court finds that the defendants could ha ve recalled the violativ e products from all retail stores before the commencement of the show cause hearing.

10. Albertsons Stores

Albertsons was not on the list of re tailers who received a copy of the recall notice. Defs.' Ex. 11 . Smith testified that Albertsons was owned by Supervalu at the time of the recall and that Supervalu receiv ed a copy of the recall notice. However, the FTC produced

> that they had acquired in 2006 fr om the former Albertson's, Inc., bringing the company full-circle .

Pl.'s Ex. 346 at 1 (emphasis added). The court finds that Albertsons is a major retailer that the defendants knew or should have known of at the time of the recall but was not provid ed notice of the recall.

11. Violative Products Still Av ailable in Retail Stores

The FTC has presented evidence that violative products subject to the court-ordered recall are available in retail stores. On July 31, 2014, an investigator for the FTC purchased bottles of Lipodrene and Stimerex-ES with violative labels from Ann's Health Food Center & Market in Dallas, TX. Pl.'s Exs. 323a, 323b, 323c. On July 31, 2014, the inve stigator purchased a bottle of Fastin with a violative label and product packaging from Albertsons in Arlington, TX. Pl.'s Exs. 325a, 325b. On August 1, 2014, the investigator purchased a bottle of Lipodr ene with a violative label from Fitness Essentials in Dallas, TX. Pl.'s Exs. 326a, 326b.

Investigators for the FTC were abl e to also purchase products with violative product packaging and labels in other parts of the country. An investigator purchased Fastin with a violative la bel and product packaging from a GNC store in the Peachtree Battl e Shopping Center in Atlanta, GA, on August 3, 2014. Pl.'s Exs. 321, 322. A different inve stigator was able to

make similar purchases in Washington, DC. On July 10, 2014, he purchased Fastin with a violative label and product packaging from a GNC store located in Washington, DC. Pl.'s Exs. 299, 300. On August 1, 2014, the investigator purchased Fastin with a violative label and product packaging from another GNC store in Washington, DC. Pl.'s Exs. 301, 302. On August 11, 2014, the investigator purchased Fastin with a violative label and product packaging from another GNC store in Washington, DC. Pl.'s Exs. 304, 305.

The court finds that products subject to the court-ordered recall are still available in retail stores throughout the country.

B. Conclusions of Law

The issue before the court is whether Hi-Tech, Wheat, and Smith are in contempt of the Sanctions Order, wherein the court ordered the defendants to perform a complete recall of Fastin, Lipodrene, Benzedrine, and Stimerex-ES with violative product packaging and labels. The Eleventh Circuit Court of Appeals has held that a finding of civ

explaining his noncompliance at a 'show cause' hearing." *Chairs v. Burgess*, 143 F.3d 1432, 1436 (11th Cir. 1998).

No. 650]. Three pages late r, the court stated, "Pursu ant to this order, the court has ordered compensa tory sanctions to make affected consumers whole and will order coercive inca rceration if a complete re call is not completed." Sanctions Order at 32 [Doc. No. 650]. In the final pa ragraph of the Sanctions Order, the court stated, "The court OR DERS Hi-Tech, Wheat, and Smith to recall all Fastin, Lipodrene, Benzedri ne, and Stimerex-ES with violative product packaging and labels from reta il stores." Sanctions Order at 38 [Doc. No. 650]. While the court provided the defendants with leeway in how to effectuate the recall, the co urt finds by clear and conv incing evidence that the order was clear and unambiguous. The defendants were ordered, clearly and unambiguously, to recall the violative products from a ll retail stores. And the court clearly and unambiguously stated that it would order coercive incarceration if the defend ants did not take sufficien t action to effectuate a complete recall.

During the show cause hearing, the defendants ar gued that they do not have the ability to comply with the order because they cannot force third party retailers to return the violative products. While th e defendants raised this argument, they did not offer any documentary evidence that retailers have refused to return viol ative products despite being notified of the recall. The defendants have the bu rden of production on their inability to comply

with the court's order. *Commodity Futures Trading Comm'n v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1529 (11th Cir. 1992). They have failed to meet their burden. The court is co nfident that even the least cooperative retailers will return the vi olative products if they re ceive proper notification of the recall and are provided assistanc e in returning the violative products. [9] Rather than a lack of cooperation by retailers, the evidence shows that the defendants have failed to take proper action. Therefore, the court finds by clear and convincing eviden

August 2014. Some of the violative products have packaging and labels produced around the time of the sanctions hearing. But some of the violative products have packaging and labels that were produced before the sanctions hearing. *See* Pl.'s Exs. 302, 305. Products with violative packaging and labels were available for purchase from retail stores more than six months after the sanctions hearing. Either counsel's representation to the court was baseless, or the defendants have continued to put products with violative product packing and labels into the stream of commerce since the sanctions hearing. Despite the assurance of counsel to the contrary, a recall was and is necessary to protect consumers because violative products remain available for purchase from retail stores.

The continued availability of violative products in retail stores is not surprising considering the lack of effort by the defendants to comply with the court's order and effectuate a complete recall. The court ordered Hi-Tech, Wheat, and Smith to perform a recall on May 14, 2014. The defendants did not begin drafting a recall notice until June 24, 2014, and they did not finalize the recall notice until July 2, 2014. While the defendants filed a motion for partial reconsideration of the Sanctions Order, that does not excuse the delay in instituting the recall. First, the defendants have provided the court with no legal basis to find that the motion stayed their court-

ordered duty to perform a recall. Second, the defendants waited twenty-one

and facilitate the return of violative products. To compound the issues with the recall notice, the defendants did not distribute the recall notice in a manner that would reach everyone necessary to effectuate a complete recall of the violative products. While the defendants eventually included a link to the recall notice on the company website, they did not do so in a manner that would allow people to easily locate the link. The defendants tried to hide it. The defendants testified regarding outreach to retailers and distributors, but they maintained very little documentation to substantiate their efforts. And that which was maintained does not show concerted and serious action to effectuate a complete recall.

Rather than being able to present substantiated evidence of their good faith to comply with the Sanctions Order, the defendants spent a significant portion of the show cause hearing attacking the FTC for a lack of assistance with the recall. Considering the FTC's protestation during the sanctions hearing that the violative products must be removed from retail outlets to protect consumers, the FTC should have taken additional action. As of the final day of the show cause hearing, the FTC had not even issued a press release informing the public of the recall. However, the inaction by the FTC does not absolve the defendants. The court ordered Hi-Tech, Wheat, and Smith to perform a recall, not the FTC. Accordingly, the court finds by clear

and convincing evidence that the defend ants are in contempt of the Sanctions Order. The defendants ha ve not undertaken to re call Fastin, Lipodrene, Benzedrine, and Stimerex-ES from al l retail stores in good faith.

District courts may impose incarceration as a coercive sanction in civil contempt proceedings. *Combs v. Ryan's Coal Co., Inc.*, 785 F.2d 970 (11th Cir. 1986). "When an order of incarcer

As discussed above, the defendants have failed to comply in good faith with the court's order to effectuate a complete recall. While the defendants submitted an updated status report on August 22, 2014, notifying the court that they are in the process of issuing a new recall notice, the court does not have any confidence that the defendants will pursue the recall to its fruition without coercion. The defendants' actions, and lack thereof, demonstrate that they look for every possible avenue to avoid complying with the court's orders. Based on the facts of this case, incarceration is the least coercive sanction necessary to encourage the defendants' compliance.

Therefore, the court imposes coercive sanctions against Wheat and Smith, who have the requisite authority and control over the company to effectuate a recall. With the goal of coercing compliance with the court's order, the court ORDERS that Wheat and Smith be incarcerated until they can establish that four conditions have been met. First, violative products are not available for purchase from retail stores. Second, a proper recall notice is in use. A properly drafted recall notice must identify clearly what is being recalled and include sufficient information to assist retailers in returning the products subject to the recall. Third, a proper recall notice has been distributed to all retailers, distributors, and brokers associated with the

products at issue via letter and email. [10] Fourth, links to the recall notice are prominently displayed on ea ch page of the company website. The links must

the conditions have not been met. In the alternative, the FTC may file a response to the motion stipulating that all of the conditions have been met.

C. Additional Issues

Based on the evidence presented during the show cause hearing and the court's review of an amended recall notice, the court addresses three additional issues. The actions ordered by the court with respect to these issues are not conditions precedent to Wheat and Smith's release.

The first issue relates to the date on which Lipodrene with violative labels was manufactured and labeled by the defendants. During the show cause hearing, the FTC produced bottles of Lipodrene purchased from retail

labeled.[11] The numbers that precede the ex piration date on each of the bottles, which the court believes can be used to identify the requested information, are 14121490.

The second issue concerns the date on which Fastin with violative product packaging and labels was manuf actured, labeled, and packaged. After the show cause hear ing, the defendants subm itted an updated status report. The updated status report includes a copy of a new recall notice allegedly being used by the defendants. In relevant part, the new recall notice states, "Fastin is sold in health food, drug stores, supermarkets, mass merchandisers and internet stores nationwide. The product is sold in 20-tablet boxes, 30 and 60-tablet bottles, and 3-tablet blister packs. All versions of this product with an expiration date of 06/2019 or sooner are being recalled." Attach. A to Defs.' Updated Status Report [Doc. No. 725-1 at 2] (emphasis added). Based on the expirati

ORDERS that Jared Wheat and Stephe n Smith must establish that four conditions have been met to purge themselves of co ntempt and be released from custody: (1) violative products are not available for purchase from retail stores, (2) a proper recall no tice is in use, (3) the pr oper recall noti ce has been distributed to all retailers, distributor s, and brokers associated with the products subject to the reca ll, (4) links to the reca ll notice are prominently displayed on each page of the compan y website. The co urt ORDERS Jared Wheat and Stephen Smith to voluntarily surrender to th e United States Marshal's Service, sixteenth floor, Ri chard B. Russell Federal Building and United States Courthouse, 75 Spring St reet, SW, Atlanta, Georgia 30303, no later than noon on September 5, 2014, to be incarcerated.

SO ORDERED this 2nd day of September, 2014.

/s/ Charles A. Pannell, Jr.
CHARLES A. PANNELL, JR.
United States District Judge