UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FEDERAL TRADE COMMISSION, Plaintiff, v. NATIONAL UROLOGICAL GROUP, INC., et al., Defendants.	CIVIL ACTION NO. 1:04-CV-3294-CAP

ORDER

The court entered an order on May 14, 2014, imposing civil contempt sanctions against Hi-Tech Pharmaceuticals, Inc. ("Hi-Tech"), Jared Wheat, Stephen Smith, and Dr. Terrell Mark Wright [Doc. No. 650] ("Sanctions Order"). In addition to compensatory monetary sanctions, the court ordered Hi-Tech, Wheat, and Smith to recall all Fastin, Lipodrene, Benzedrine, and Stimerex-ES with violative product packaging and labels from retail stores. After reviewing status reports submitted by the parties approximately sixty days following the Sanctions Order, the court ordered the parties to appear before the court on August 13, 2014, for a show cause hearing. The court held that hearing from August 13, 2014, through August 15, 2014, to determine the sufficiency of Hi-Tech, Wheat, and Smith's efforts to perform a complete recall as directed by the court and whether coercive incarceration is

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

I. Introduction

On November 10, 2004, the Federal Trade Commission ("FTC") filed a complaint alleging that several defendants had violated Sections 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 supplements [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 injunctions against the defendants on December 16, 2008, enjoining them from several activities related to their previous violations of the FTC Act. The first final judgment and permanent injunction is against National Urological Group, Inc., Hi-Tech, Wheat, Thomasz Holda, and Smith [Doc. No. 230] ("Hi-Tech Order"). The second final judgment and permanent 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 court is supported by Eleventh Circuit case law. *See Mercer v. Mitchell*, 908 F.2d 763 (11th Cir. 1990); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Olympia Holding Corp.*, 140 F. App'x 860, 864–65 (11th Cir. 2005) (discussing the "flexible" due process requirements for civil contempt proceedings). The

court prescribed this procedure because it anticipated there would be a limited number of facts in dispute and the scope of any eventual contempt hearing could be significantly narrowed by addressing legal questions based on written briefs. Thus, the defendants had notice and a full opportunity to be heard on the question of their contempt of the Hi-Tech Order and the Wright Order. *See FTC v. Leshin*, 719 F.3d 1227, 1235 (11th Cir. 2013) ("*Leshin II*") ("It is by now well-settled law that due process is satisfied when a civil contempt defendant receives notice and an opportunity to be heard . . . .").

The contempt proceedings progressed essentially as prescribed. First, the FTC filed its complaint-like allegations [Doc. No. 394 at 2–17]. Then, the defendants answered. *See* [Doc. No. 405] (Hi-Tech and Wheat's response); [Doc. No. 406] (Wright's response); [Doc. No. 467] (Smith's adoption of Hi-Tech and Wheat's response as his own).[1] On October 22, 2012, the FTC filed a motion for (summary) contempt judgment [Doc. No. 446]. The defendants responded: admitting or denying (though mostly admitting) the FTC's alleged undisputed material facts, adding their own additional material facts, and arguing why summary contempt judgment should not be granted. *See* [Doc.

[1] The court allowed Smith's "adoption" of his co-defendants' response "as if timely made" in its December 11, 2012, order [Doc. No. 470 at 3].

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 be in contempt of the permanent injunctions. But the court reserved judgment on the nature and amount of sanctions for the defendants' contempt of the court's orders.

Beginning on January 21, 2014, and ending on January 24, 2014, the court held an evidentiary hearing to determine the appropriate nature and amount of sanctions. Following the evidentiary hearing, the parties submitted proposed findings of fact and conclusions of law and post-trial briefing [Doc. Nos. 600, 623, 624, 629, 630, 632, 633, 634]. On May 14, 2014, the court ordered compensatory sanctions against the defendants and ordered Hi-Tech, Wheat, and Smith to recall violative products from all retail stores. Sanctions Order [Doc. No. 650]. Hi-Tech, Wheat, and Smith collectively filed a motion for partial reconsideration of the Sanctions Order on June 4, 2014 [Doc. No. 657]. After the conclusion of an expedited briefing schedule, the court denied the motion for partial reconsideration [Doc. No. 672].

In accordance with the Sanctions order, the parties submitted written reports regarding the status of the recall approximately sixty days after the date of the order [Doc. Nos. 680, 683, 693]. On July 18, 2014, the court ordered the parties to appear for a show cause hearing on August 13, 2014 [Doc. No. 694]. The show cause hearing lasted from August 13, 2014, through August 15, 2014. The defendants have had notice and a full opportunity to be heard on the question of their contempt of the Sanctions Order. *See Leshin II*, 719 F.3d at 1235. On August 22, 2014, after the conclusion of the show cause hearing, the defendants filed an updated status report [Doc. No. 725].

II. Motion in Limine

As an initial matter, the court addresses the motion in limine filed by the FTC prior to the show cause hearing. On August 8, 2014, the FTC filed a motion in limine to preclude the expert testimony of Melvin N. Kramer [Doc. No. 702]. The FTC sought to preclude Kramer from testifying on the basis that his testimony is irrelevant to the issues before the court and because the defendants failed to comply with Federal Rule of Civil Procedure 26. During the show cause hearing, the defendants called Kramer as an expert witness. The FTC noted its objection to the testimony. The court took the matter under advisement and allowed the witness to testify. After hearing the witness's testimony, the court finds that Kramer qualifies as an expert with

respect to recalls pursuant the guidelines set forth by the United States Food and Drug Administration. The court has considered Kramer's testimony to the extent that it is relevant to this matter. Accordingly, the court DENIES the FTC's motion in limine [Doc. No. 702].

III. Compliance with the Sanctions Order

On four separate instances, the court stated in the Sanctions Order that Hi-Tech, Wheat, and Smith must perform a recall of all products with violative product packaging and labels from retail stores. Sanctions Order at 28–29, 32, 38 [Doc. No. 650]. In the final paragraph of the Sanctions Order, the court stated, "The court ORDERS Hi-Tech, Wheat, and Smith to recall all Fastin, Lipodrene, Benzedrine, and Stimerex-ES with violative product packaging and labels from retail stores." Sanctions Order at 38 [Doc. No. 650]. Earlier in the Sanctions Order, the court stated that it "will order coercive incarceration if a complete recall is not completed." Sanctions Order at 32 [Doc. No. 650]. This order addresses the defendants' efforts to comply with the Sanctions Order and whether the defendants should be coercively incarcerated.

A. Findings of Fact[2]

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

1. Delay in Initiating 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 draft of the recall notice was completed on July 2, 2014, forty-nine days after the court ordered a recall. And the defendants did not deposit envelopes containing the recall notice with the United States Postal Service 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 until late June 2014, and they did not attempt to contact retailers, 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 defendants mailed 2,402 identical pieces of mail. Defs.' Ex. 13. As an attachment to the status report filed by the defendants prior to

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

the show cause hearing, the defendants included a declaration by Michelle Harris wherein she stated, "The confirmation relates to 2,402 separate pieces of mail which I sent to every customer of Hi-Tech, to include the large distributors down to the smallest retailer." Decl. of Michelle Harris ¶ 6 [Doc. No. 683-2]. During the show cause hearing, the defendants produced a list of all the intended recipients of the recall notice. Defs.' Ex. 11. Michelle Harris testified that the list was derived from the entire customer base of Hi-Tech. For example, the list does not include individual retail outlets if there is a corporate office. Despite not contacting every customer of Hi-Tech, as she stated in her declaration, Michelle Harris testified during the show cause hearing that she is confident that the mailing list includes all retailers and distributors relevant to the products subject to the recall. However, she did not know the age of the customer database used to compile the list and she did not consult shipping records when compiling the list. Neither did the defendants consult invoices to determine to whom they had shipped the violative products. Michelle Harris testified that Wheat had provided her with the list.

The FTC sent a letter to the defendants dated November 3, 2011, requesting a report identifying all retailers and distributors who had sold Fastin, Lipodrene, Benzedrine, and Stimerex-ES since December 16, 2008.

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).

The court finds that the defendants have not established the accuracy of the mailing list used to notify retailers of the recall. And the court finds that the defendants have not contacted all retail outlets relevant to the court-ordered recall of all Fastin, Lipodrene, Benzedrine, and Stimerex-ES with violative product packaging and labels.

3. Recall Notice

The defendants have produced a copy of the recall notice that was used to inform retailers of the recall. Defs.' Ex. 12. The recall notice identifies Michelle Harris as the person to contact regarding the recall, and she testified that the recall notice was drafted by Wheat. During the show cause hearing, the defendants offered expert testimony by Kramer in support of their recall efforts. Kramer agreed with the court that the recall notice more closely resembles a legal brief than a recall notice. Kramer also agreed with the court that several paragraphs of the recall notice were unnecessary. For example, the second longest paragraph of the recall notice begins by noting that Hi-Tech is appealing the court's decision. The defendants even chose to put in bold the words "Eleventh Circuit Court of Appeals in Atlanta."[3]

[3] The court identifies only nine instances where the defendants elected to use bold font in the recall notice. And three of those instances include the header, the word "Contact:", and the words "FOR IMMEDIATE RELEASE."

In addition to including unnecessary information, the recall notice lacks important information to assist retailers with the recall. The recall notice does not identify the products by lot or unit numbers, expiration dates, serial numbers, UPC codes, or other common forms of product identification. The recall notice does not indicate that Hi-Tech will cover any expenses incurred in returning the products to the company. The recall notice does not provide instructions on how to return violative products to the company. The recall notice does not indicate that this matter is urgent through use of the word "urgent" or other means. The recall notice does not clearly inform the reader that it is a recall notice by including the words "recall notice" conspicuously on the document. The court finds that the recall notice used by the defendants to effectuate the court-ordered recall is deficient. The court finds that the recall notice includes unnecessary information and excludes important information that would assist in the recall of Fastin, Lipodrene, Benzedrine, and Stimerex-ES.

4. Envelope

At the beginning of July 2014, the defendants mailed a copy of the recall notice to each of the entities identified in Defs.' Ex. 11. During the show cause hearing, the defendants presented copies of returned envelopes. Defs.' Exs. 17–19. The envelopes used to mail the recall notice do not identify

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 an advertisement for certain products, including one of the products subject to the recall—Lipodrene. The court finds that the envelopes used by the defendants to mail the recall notice do not alert recipients that the contents of the envelope relate to a recall or that they contain important information. The court finds that recipients of the envelopes could have confused the recall notices for an advertisement or general business correspondence, which may have been by design.

5. Company Website

The defendants offered testimony that the recall notice is available on the company website, hitechpharma.com. There is also testimony that staff directed retailers to the company website if they did not receive a copy of the recall notice in the mail. Admitted into evidence are printouts of each of the pages of the company website. Pl.'s Ex. 319. The lower left hand corner of the printouts indicates that they were printed on August 8, 2014. The only reference to a recall is a link on the bottom right hand corner of all but one of the pages of the company website. The link states "Recall" in an inconspicuous manner. Of note, the link to the recall is not present on the page of the website used to order products. In place of the link is the

company's phone number, which the website indicates can be used to order products. The court finds that the defendants did not display the recall notice prominently on the company website.

Clicking on the "Recall" link on the company website brings up the recall notice discussed above. Metadata from the recall notice available on the company website indicates that it was modified on July 15, 2014. The court finds that the recall notice was first available on the company website on July 15, 2014. Therefore, the court finds that the defendants unreasonably delayed in posting the recall notice on the company website.

6. Follow-Up Contact by Sales Department

Olen Harris, who is a manager with the sales department of Hi-Tech, testified that he had directed members of the sales department to contact all sales accounts of the company to notify them of the recall. He estimates that eighty percent of retailers were contacted. However, the defendants have no documentation to support his estimate of the number of retailers that were contacted. Olen Harris testified that members of the sales department made sure retailers received the recall notice, asked if retailers had any questions, and directed retailers to the website if they did not receive a copy of the recall notice. No script was provided to the members of the sales department. As discussed above, the evidence before the court indicates that the recall notice

was not posted on the company website until July 15, 2014, which was after members of the sales department had begun contacting accounts. The court finds that the defendants' follow-up contacts with retailers were deficient.

7. Violative Products Returned by Retailers

The defendants produced a spreadsheet during the show cause hearing that indicates the amount of product returned pursuant to the recall. Defs.' Ex. 14. The chart lists only eight companies that have returned product. One of the companies returned 2,916 bottles of Lipodrene. The other seven companies returned a total of sixty-seven bottles of Fastin, Stimerex-ES, and Lipodrene, plus six bottles of products not subject to the recall. Therefore, the court finds that the defendant's recall efforts have been ineffective.

8. Jared Wheat

Wheat is the sole owner, president, chief executive officer, secretary, and treasurer of Hi-Tech. Wheat is responsible for the labeling, promotion, and advertising of Fastin, Lipodrene, Benzedrine, and Stimerex-ES. The court finds that Wheat has sufficient authority and control over the company to direct a recall.[4]

[4] The court's finding of fact with respect to Wheat'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.

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 obligation 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 sanctions 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 retailers to inform them of the recall is July 15, 2014. Defs.' Ex. 19. The defendants offered into evidence an email dated July 15, 2014, from one of the company's brokers with General Nutrition Centers, 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 product 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 sought to convey to the court that it takes time for products to be returned 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 the date of the show cause hearing. The court finds that the defendants could have recalled the violative products from all retail stores before the commencement of the show cause hearing.

10. Albertsons Stores

Albertsons was not on the list of retailers 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 received a copy of the recall notice. However, the FTC produced a copy of a check from Albertsons to Hi-Tech dated May 14, 2014, that was deposited in Hi-Tech's bank account with Hamilton State Bank. Pl.'s Ex. 328.[7] The FTC also produced printouts of Albertsons' website and a report by Supervalu dated March 21, 2013, that was filed with the United States Securities and Exchange Commission. Pl.'s Exs. 346, 347. These exhibits indicate that Albertsons was not owned by Supervalu at the time of the recall. The company website states the following with respect to its tradition and history:

> Albertson's LLC was formed in 2006, when the assets of Albertson's, Inc. were sold to three separate companies. SUPERVALU, out of Minnesota, bought the majority of the stores, and the free-standing drug stores in the south were sold to CVS. Albertson's LLC acquired stores in Northern California, Colorado, Utah, Nebraska, South Dakota, Arizona, New Mexico, Texas, Louisiana, Arkansas, Oklahoma and Florida. In 2013, Albertson's LLC was able to bring all of the Albertsons stores back together again by purchasing the assets from SUPERVALU

[7] While Michelle Harris denied having the title of vice president of finance for Hi-Tech, a resolution to open bank accounts signed by Wheat identifies her as having that title and authorizes her to open bank accounts on behalf of Hi-Tech. Pl.'s Ex. 327 at 6. And Michelle Harris signed the application to open a bank account with Hamilton State Bank. Pl.'s Ex. 327 at 1.

> that they had acquired in 2006 from 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 provided notice of the recall.

11. Violative Products Still Available 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 investigator 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 Lipodrene with a violative label from Fitness Essentials in Dallas, TX. Pl.'s Exs. 326a, 326b.

Investigators for the FTC were able to also purchase products with violative product packaging and labels in other parts of the country. An investigator purchased Fastin with a violative label and product packaging from a GNC store in the Peachtree Battle Shopping Center in Atlanta, GA, on August 3, 2014. Pl.'s Exs. 321, 322. A different investigator 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 civil contempt must be supported by clear and convincing evidence that the violated order meets specific criteria.

> A finding of civil contempt must be supported by clear and convincing evidence that "the allegedly violated order was valid and lawful; . . . the order was clear and unambiguous; and the . . . alleged violator had the ability to comply with the order." *Riccard*[*v. Prudential Ins. Co.*, 307 F.3d 1277, 1296 (11th Cir. 2002)]. "Once this prima facie showing of a violation is made, the burden then shifts to the alleged contemnor to produce evidence

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

FTC v. Leshin, 618 F.3d 1221, 1232 (11th Cir. 2010) ("*Leshin I*"). The defendants have not challenged the validity or lawfulness of the recall ordered by the court.[8] Regardless, the court finds by clear and convincing evidence that the court's order requiring the defendants to recall violative products from all retail stores is valid and enforceable. The second element is also met. In the Sanctions Order, the court stated the following:

> Hi-Tech, Wheat, and Smith remain in contempt of the court's order as long as product packaging and labels remain in the retail market with violative claims. Therefore, the court orders a recall of Fastin, Lipodrene, Benzedrine, and Stimerex-ES with violative product packaging and labels from all retail outlets. The parties are required to submit written reports to the court within 60 days of this order on the status of the product recall. Any of the parties may include a request for a hearing regarding the status of the recall. The court will order coercive incarceration if the defendants have not taken sufficient action to effect a complete recall.

Sanctions Order at 28–29 [Doc. No. 650]. In the subsequent paragraph, the court stated, "[T]he court ORDERS Hi-Tech, Wheat, and Smith to recall from retail outlets all Fastin, Lipodrene, Benzedrine, and Stimerex-ES with violative product packaging and labels." Sanctions Order at 29 [Doc.

[8] The court is aware that the defendants have appealed the Sanctions Order. But the defendants did not challenge the validity or lawfulness of the recall during the show cause hearing.

No. 650]. Three pages later, the court stated, "Pursuant to this order, the court has ordered compensatory sanctions to make affected consumers whole and will order coercive incarceration if a complete recall is not completed." Sanctions Order at 32 [Doc. No. 650]. In the final paragraph of the Sanctions Order, the court stated, "The court ORDERS Hi-Tech, Wheat, and Smith to recall all Fastin, Lipodrene, Benzedrine, and Stimerex-ES with violative product packaging and labels from retail stores." Sanctions Order at 38 [Doc. No. 650]. While the court provided the defendants with leeway in how to effectuate the recall, the court finds by clear and convincing evidence that the order was clear and unambiguous. The defendants were ordered, clearly and unambiguously, to recall the violative products from all retail stores. And the court clearly and unambiguously stated that it would order coercive incarceration if the defendants did not take sufficient action to effectuate a complete recall.

During the show cause hearing, the defendants argued 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 the defendants raised this argument, they did not offer any documentary evidence that retailers have refused to return violative products despite being notified of the recall. The defendants have the burden 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 confident that even the least cooperative retailers will return the violative products if they receive proper notification of the recall and are provided assistance 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 evidence that the defendants have the ability to comply with the Sanctions Order.

Having established the legitimacy of the Sanctions Order, the court considers the conduct of the defendants. During the sanctions hearing held on January 21, 2014, through January 24, 2014, counsel for the defendants told the court that a recall was unnecessary because the violative products would be sold and off the shelves within six months of being placed into the retail market. Tr. of Sanctions Hr'g, Jan. 24, 2014 at 78:20–79:15 [Doc. No. 621]. The FTC presented evidence during the show cause hearing that its investigators have been able to purchase violative products as recently as

[9] If retailers refuse to return violative products subject to the recall, then the defendants can purchase the products to remove them from the market. In addition, the defendants are to keep a detailed record of all businesses that refuse to comply and provide a copy to the FTC. Upon receipt, the FTC is ORDERED to contact each business to explain the seriousness of this matter.

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 days to file the motion for reconsideration and did not request an expedited briefing schedule. The defendants could have evidenced their desire to perform a recall in good faith by filing the motion for reconsideration at an earlier date or seeking a prompt resolution of the dispute through an expedited briefing schedule. Third, the motion for partial reconsideration concerned only a few of the claims at issue in this case. This is significant because the defendants would have been required to recall violative products even if they had prevailed on the motion for reconsideration. The defendants could have prepared an initial draft of the recall prior to the date the court ruled on the motion. They did not. The manner by which the defendants pursued the motion for partial reconsideration demonstrates the defendants' intent to delay rather than seek partial reconsideration of the Sanctions Order in good faith.

Not only did the defendants delay in instituting the recall, but they failed to carry out the recall in a manner designed to achieve the purpose of the recall—the removal of Fastin, Lipodrene, Benzedrine, and Stimerex-ES with violative product packaging and labels from all retail outlets. The defendants chose to use an argumentative and confusing recall notice rather than a recall notice designed to inform recipients of the purpose of the letter

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 defendants are in contempt of the Sanctions Order. The defendants have not undertaken to recall Fastin, Lipodrene, Benzedrine, and Stimerex-ES from all 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 incarceration is conditioned upon a refusal to comply in good faith with a court order then the purpose is coercive." *Id.* at 981. The Supreme Court of the United States has held, "The paradigmatic coercive, civil contempt sanction . . . involves confining a contemnor indefinitely until he complies with an affirmative command such as an order 'to pay alimony, or to surrender property ordered to be turned over to a receiver, or to make a conveyance.'" *Int'l Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994). "Imprisonment for a fixed term similarly is coercive when the contemnor is given the option of earlier release if he complies." *Id.* The Eleventh Circuit Court of Appeals has held, "Our sole inquiry into the legitimacy of incarceration for contempt, *per se*, is into the purpose of imprisonment. If the court's goal is to coerce, rather than to punish, then incarceration is viewed as civil even though imprisonment has concomitant punitive effects." *Combs*, 785 F.2d at 981.

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 each page of the company website. The links must be located just below the navigation bar on each page of the company website. The text of the links must state the words "RECALL NOTICE" in all caps and bold font. The text of the links must be a color that draws attention and sets them apart from the background of each page of the website. The text of the link on the homepage must be yellow or white to set it apart from the black background. The text of the links on the other pages of the website must be red to set them apart from the white background. The text of the links must be large enough to draw attention and set them apart. The text of the links must be the same size as the word "PRODUCTS" that appears as the title to the webpage about the company's products. *See* Pl.'s Ex. 319 at 4.

Counsel for Wheat and Smith may file a motion seeking their release when the four conditions set forth above have been met. The court will schedule an evidentiary hearing upon receipt of the motion. Wheat and Smith will have the burden to present evidence that all of the conditions have been met. The FTC will be allowed to present evidence that one or more of

[10] The defendants are not required to distribute a copy of the proper recall notice via email to retailers, distributors, and brokers for whom they do not have an email address.

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 Liprodrene with violative labels was manufactured and labeled by the defendants. During the show cause hearing, the FTC produced bottles of Lipodrene purchased from retail outlets with violative labels. For the purposes of this issue, the court focuses on Pl.'s Exs. 323a and 326a. The bottles have an expiration date of 5/19, which signifies May 2019. A footnote to the defendants' status report states, "These products have a five year expiration date so 02-2019 translates to it being manufactured in February 2014." Defs.' Status Report at 8 n.2 [Doc. No. 683]. That means that the exhibits noted above were manufactured in May 2014, which was the same month that the court issued the Sanctions Order. The court ORDERS the defendants to file a report within 15 days identifying the dates that Pl.'s Exs. 323a and 326a were manufactured and

labeled.[11] The numbers that precede the expiration 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 manufactured, labeled, and packaged. After the show cause hearing, the defendants submitted 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 expiration date used in the new recall notice, the defendants are recalling products that were manufactured in June 2014. Therefore, the defendants manufactured Fastin with violative product packaging and labels after the court had issued the Sanctions Order and during the same month the court issued its order denying the defendants' motion for partial reconsideration. The court ORDERS the defendants to file

[11] The report must be supported by a declaration or affidavit.

a report within 15 days identifying the dates it manufactured, labeled, and packaged Fastin with violative product packaging and labels in June 2014.[12]

The final issue stems from the defendants' lack of documentation to substantiate their testimony during the show cause hearing. The court is concerned about the lack of documentation, especially the deletion of emails relevant to the defendants' compliance with the court's orders. Therefore, the court ORDERS the defendants to institute a document retention policy for Hi-Tech and its business operations that will operate in perpetuity. The document retention policy must require that business records be maintained for a minimum of three years. This policy includes physical and electronic documents. This policy must be instituted within 120 days of the date of this order. The court ORDERS the defendants to file a report detailing the document retention policy once it has been instituted.[13]

IV. Conclusion

The court DENIES the FTC's motion in limine to preclude the expert testimony of Melvin N. Kramer [Doc. No. 702]. To coerce compliance with the Sanctions Order, the court ORDERS that Jared Wheat and Stephen Smith be incarcerated until they purge themselves of their contempt. The court

[12] The report must be supported by a declaration or affidavit.
[13] The report must be supported by a declaration or affidavit.

ORDERS that Jared Wheat and Stephen Smith must establish that four conditions have been met to purge themselves of contempt and be released from custody: (1) violative products are not available for purchase from retail stores, (2) a proper recall notice is in use, (3) the proper recall notice has been distributed to all retailers, distributors, and brokers associated with the products subject to the recall, (4) links to the recall notice are prominently displayed on each page of the company website. The court ORDERS Jared Wheat and Stephen Smith to voluntarily surrender to the United States Marshal's Service, sixteenth floor, Richard B. Russell Federal Building and United States Courthouse, 75 Spring Street, 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