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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD CLARK, TODD HALL, and ANGELA PIRRONE, individually, on behalf of all others similarly situated, and the general public,

Plaintiffs,

vs.

THE HERSHEY COMPANY, a Delaware corporation

Defendant.

CASE NO.: **'19CV0356 LAB MDD**

CLASS ACTION

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF NON-PARTY LAW OFFICES OF RONALD A. MARRON'S MOTION TO QUASH SUBPOENA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Non-Party Law Offices of Ronald A. Marron, APLC (the "Marron Firm") respectfully submits this Memorandum of Points and Authorities in Support of its Motion to Quash the Subpoena that was issued to it on January 23, 2019 by Defendant The Hershey Company ("Hershey" or "Defendant") in the matter of *Clark v. The Hershey Co.*, Case No. 3:18-cv-06113-WHA (N.D. Cal.). For the reasons set forth below, the Marron Firm's Motion to Quash should be granted in its entirety.

I. INTRODUCTION

The Marron Firm's documents are not the primary aim of Defendant's subpoena. The primary aim is to harass, burden, and smear active litigation counsel for Plaintiffs Howard Clark, Todd Hall, and Angela Pirrone ("Plaintiffs") who are locked into a class action lawsuit with Defendant. The instant subpoena is a strategic ploy designed to strike a blow against a class action litigation firm that has been a thorn in Defendant's side.

Drawing opposing counsel into discovery is antithetical to our adversarial system precisely because it lends itself to harassment and gamesmanship like this. *See, e.g.*, *Kirzhner v. Silverstein*, 870 F. Supp. 2d 1145, 1151 (D. Colo. 2012), *on reconsideration in part*, No. 09-CV-02858-RBJ-BNB, 2012 WL 1222368 (D. Colo. Apr. 10, 2012) (quashing subpoena where "Defendant not only requested production of documents in the files of plaintiff's trial counsel but demanded that … counsel prepare a privilege log detailing the documents withheld" and recognizing "the ugliness of that type of discovery."). Defendant have made no secret of the fact that their main goal is to taint a law firm that has had the temerity to stand up for the Plaintiffs and proposed class members. Defendant's subpoena crosses a line. It should therefore be quashed in its entirety.

II. FACTUAL BACKGROUND

This action commenced on October 4, 2018 when Plaintiff Howard Clark filed a class action complaint against Defendant in the United States District Court for the Northern District of California. *See Clark v. The Hershey Co.*, Case No. 3:18-cv-06113-WHA (ECF No. 1). Plaintiffs Howard Clark, Todd Hall, and Angela Pirrone then filed a

First Amended Complaint on November 21, 2018 (*Id*. at ECF No. 16). The gravamen of Plaintiffs' claims is that Defendant made false and misleading representations regarding the use of artificial flavoring ingredients in its Brookside Dark Chocolate Products ("Products" or "Brookside Products"). (*Id.*) Defendant advertises its Brookside Products as containing "no artificial flavors," deliberately intending to give consumers the impression that the Products are composed only of natural flavors. (*Id*. ¶ 25). Plaintiff alleges that Defendant's representations regarding the non-use of artificial flavoring ingredients are false and misleading because "[t]he Products contain a synthetic chemical flavoring compound identified as 'malic acid.'" (*Id*. ¶ 27). Plaintiffs brought several claims against Defendant, including violations of the California Consumer Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750 *et seq.*; violations of California's False Advertising Law ("FAL"), Cal. Bus. & Prof. Code. §§ 17500 *et seq.*, and violations of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq*; violations of New York's Claim for Unfair Trade Practices, N.Y. Bus. Law § 349; violations of New York's Claim for False Advertising, N.Y. Bus. Law § 350. (*See generally*, *id*.)

On December 5, 2018, Defendant filed a Motion to Dismiss Plaintiffs' First Amended Complaint (*Id*. at ECF No. 18). Plaintiffs opposed Defendant's Motion on January 9, 2019 (*Id*. at ECF No. 28) and Defendant filed a reply brief on January 30, 2019 (*Id*. at ECF No. 33). On February 14, 2019, the parties attended a hearing before the Honorable William Alsup regarding Defendant's Motion to Dismiss. The matter was taken under submission and the parties are awaiting a written order.

A. The Instant Subpoena that Was Issued to Plaintiffs' Counsel

The subpoena subject to this dispute was issued by Defendant on January 23, 2019. *See* Declaration of Ronald A. Marron in Support of Motion to Quash Subpoena ("Marron Decl."), ¶ 2 & Ex. 1. The instant subpoena was not served in accordance with Federal Rule of Civil Procedure 45(a)(4), which requires that a Notice of Intent to Serve

Subpoena be served on each party before serving the Subpoena on the person to whom it is directed. Instead, Defendant served the subpoena without serving Plaintiffs' counsel with any Notice of Intent to serve the subpoena. *See* Marron Decl., ¶ 2. The subpoena requests the following categories of documents: (a) documents and communications relating to Defendant or *any* of its products (Request Numbers 1, 2, and 12); (b) documents relating to independent matters concerning Non-Party the Law Office of Ronald A. Marron (Request Numbers 10, 13, 14, 15, 16, and 19); (c) documents and communications relating to Non-Party the Law Office of Ronald A. Marron and Non-Party www.ClassActionRebates.com (Request Numbers 3, 4, 5, 6, 11, and 17); (d) documents and communications relating to Non-Party the Law Office of Ronald A. Marron and Non-Party Classaura, LLC (Request Numbers 7, 8, 9, and 18); and (e) documents relating to communications between Plaintiffs and their counsel (Request Numbers 20, 21, and 22). Marron Decl., ¶ 2 & Ex. 1. The Marron Firm served objections to the subpoena on February 20, 2019. *See* Marron Decl., ¶ 3 & Ex. 2.

III. LEGAL STANDARD

The Federal Rules of Civil Procedure allow parties to obtain discovery regarding "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). A subpoena, however, must be quashed if it requires disclosure of privileged information or subjects a person to an undue burden. Fed. R. Civ. P. 45(d)(3)(A)(iii)(iv). Courts must weigh the burden imposed on a subpoenaed party against the value of the information the subpoena seeks. *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637 (C.D. Cal. 2005). A nonparty's failure to act timely will not bar consideration of objections to a Rule 45 subpoena if "the subpoena is overbroad on its face and exceeds the bounds of fair discovery and the subpoenaed witness is a non-party acting in good faith." *Id*. at 636.

With respect to a subpoena directed to opposing counsel, such as the present subpoena, courts within this District have adopted the test set forth by the Eighth Circuit Court of Appeals in *Shelton v. Am. Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986). *See,*

e.g., *Erhart v. Bofi Fed. Bank*, No. 15CV2287 BAS (NLS), 2017 WL 840648, at *3 (S.D. Cal. Mar. 2, 2017) (applying the *Shelton* Test and collecting authority). "A party moving to quash a subpoena normally has the burden of persuasion." *Erhart*, 2017 WL 840648, at *3 (citing *Moon*, 232 F.R.D. at 637). "But under *Shelton* the burden shifts, as the party seeking [discovery from opposing counsel] must show it needs the [discovery] by demonstrating these factors:

> (1) no other means exist to obtain the information other than to [seek discovery from] opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case."

Erhart, 2017 WL 840648, at *4 (quoting *Shelton*, 805 F.2d at 1327) (alterations in original). Courts have found the *Shelton* Test to be applicable to both deposition subpoenas and to subpoenas to produce documents. *See, e.g.*, *Rygg v. Hulbert*, No. C11-1827JLR, 2013 WL 264762, at *1 (W.D. Wash. Jan. 23, 2013), *aff'd*, 611 F. App'x 900 (9th Cir. 2015) (holding that *Shelton* "extends not only to subpoenas requesting depositions, but also to subpoenas duces tecum requesting documents from Defendant's lawyers."); *Flotsam of Cal., Inc. v. Huntington Beach Conference & Visitors Bureau*, No. C06-7028 MMC MEJ, 2007 WL 4171136 (N.D. Cal. Nov. 26, 2007); *Valencia v. Colo. Cas. Ins. Co.*, 2007 WL 5685360, at *4 (D.N.M. Dec. 8, 2007) (quashing subpoenas duces tecum addressed to the defendant's attorney, because the plaintiff's discovery request imposed an undue burden, and noting that the plaintiff could not meet all three of the *Shelton* test's criteria); *XTO Energy, Inc. v. ATD, LLC*, No. CIV 14-1021 JB/SCY, 2016 WL 1730171, at *31 (D.N.M. Apr. 1, 2016) ("The use of a subpoena duces tecum to attempt to obtain opposing counsel's documents and files is equally improper and may be more burdensome than merely attempting to obtain testimony.") (quoting *Kirzhner v. Silverstein*, 2011 WL 1321750, *3 (D.Colo. Apr. 5, 2011)).

IV. ARGUMENT

A. Defendant Cannot Satisfy the *Shelton* Test and the Subpoena Should be Quashed

Defendant bears the burden of satisfying all three criteria of the *Shelton* test. *See Erhart*, 2017 WL 840648, at *4. Here, Defendant will be unable to satisfy its burden. First, Defendant has other means of obtaining the requested information. Second, many of the requested documents are protected from disclosure based on the attorney-client privilege and the attorney work product doctrine. Many of requested documents are clearly privileged and none of the requested documents have any relevance to a claim or defense in this action. Third, even if the documents have some relevance to this litigation (they do not), Defendant still cannot prove that the requested documents are crucial to the preparation of its case. For these reasons, the Court should grant the Marron Firm's Motion to Quash.

1. Defendant Has Other Means of Obtaining the Requested Documents

Under the first prong of the *Shelton* Test, a party must demonstrate that the information it seeks through a subpoena to opposing counsel is not obtainable from any other source. *Erhart*, 2017 WL 840648, at *4 (citing *Shelton*, 805 F.2d at 1327). Defendant has demonstrated that it has other avenues of obtaining the requested information that would be less burdensome than subpoenaing opposing counsel. For example, Defendant has already noticed depositions for all three Plaintiffs, where Defendant will be able to seek the same information requested by Request Numbers 20, 21, and 22. In addition, many of the document requests (Request Numbers 3, 4, 5, 6, 7, 8, 9, and 10) relate to documents and communications between the Marron Firm and specific third parties. Therefore, Defendant may obtain the requested information from those third parties, instead of unduly burdening and harassing Plaintiffs' counsel. *See* Fed. R. Civ. P. 26(b)(2) (a court may limit discovery if "the discovery sought … is obtainable from some other source that is more convenient, less burdensome, or less

expensive" or if "the burden or expense of the proposed discovery outweighs its likely benefit.").

Defendant's issuance of a subpoena to opposing counsel is likewise not supported by factual or legal authority. It is simply gamesmanship that is designed to harass opposing counsel. Because Defendant cannot satisfy the first criterion of the *Shelton* Test, the subpoena issued to the Marron Firm should be quashed.

2. The Requested Documents Are Both Privileged and Irrelevant

Under the second prong of the *Shelton* Test, a party must demonstrate that the information it seeks is both relevant and non-privileged. *Erhart*, 2017 WL 840648, at *5; *Shelton*, 805 F.2d at 1327. Many of the documents sought by Defendant are protected from disclosure by the attorney-client privilege and/or the attorney work product doctrine. Moreover, none of the documents requested by the Defendant have any relevance to the claims and defenses in this action.

a. Documents that Are Protected by the Attorney-Client Privilege and the Attorney-Work Product Doctrine

The attorney-client privilege "recognizes that sound legal advice or advocacy… depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981). Similarly, the work product doctrine has its roots in the "orderly prosecution and defense of legal claims." *Hickman v. Taylor*, 329 U.S. 495, 510, 67 S. Ct. 385, 393, 91 L. Ed. 451 (1947). The doctrine is fundamental to our adversarial system:

> [I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews,

> statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways[.]

Hickman, 329 U.S. at 510–11. "Opinion" or "core" work product— which can reveal the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative— is entitled to even greater, "special protection." *In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180, 183 (2d Cir. 2007); *Upjohn*, 449 U.S. 383, 401-02.

Several of Defendant's documents requests fall squarely within the purview of the attorney-client privilege and the attorney work product doctrine. For example, Request Number 20 seeks "All Communications between You and Howard Clark, in the last four years and before he engaged You as counsel," Request Number 21 seeks "All Communications between You and Angela Pirrone, in the last four years and before she engaged You as counsel," and Request Number 22 seeks "All Communications between You and Todd Hall, in the last four years and before he engaged You as counsel." Marron Decl., ¶ 2 & Ex. 1. Defendant's discovery requests would include documents, such as notes and memoranda, relating to communications with clients of the Marron Firm. These documents are fully protected by the attorney-client privilege and the attorney work product doctrine and simply cannot be disclosed to opposing counsel. *Hickman*, 329 U.S. at 510–11; *Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Arizona*, 881 F.2d 1486, 1488 (9th Cir. 1989) (granting a Writ of Mandamus Petition and vacating a discovery order that compelled disclosure of documents protected by the attorney-client privilege); *Hernandez v. Tanninen*, 604 F.3d 1095 (9th Cir. 2010) (same).

As another example, Defendant's Request Number 1 seeks "All Documents regarding Hershey or any of its products, including BROOKSIDE® Dark Chocolate, in the last four years," Request Number 2 seeks "All Communications with any person regarding Hershey or any of its products, including BROOKSIDE® Dark Chocolate, in the last four years," and and Request Number 12 seeks "All Documents regarding Your attorney advertising or solicitations regarding Hershey or any of its products, including

BROOKSIDE® Dark Chocolate, in the last four years." Marron Decl., ¶ 2 & Ex. 1. Defendant's discovery requests lack decorum and accuse Plaintiffs' counsel of improper solicitation. These requests are not grounded in fact and, more importantly, the requested information would include documents, such as notes and memoranda, relating to the current case. These documents are protected by the attorney work product doctrine because they were prepared in anticipation of litigation. *See In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900, 906 (9th Cir. 2004) ("The work product doctrine…. protects 'from discovery documents and tangible things prepared by a party or his representative in anticipation of litigation.'") (quoting *Admiral Ins. Co.*, 881 F.2d at 1494)). Moreover, the requested documents are further protected by the attorney work product doctrine and the attorney client privilege because the requests would trigger privileged communications and work product from prior litigation that the Marron Firm has been involved in. As drafted, Defendant's document requests would encompass attorney work product and attorney-client communications. The subpoena should therefore be quashed.

b. Documents that Are Irrelevant and Not Proportional to the Needs of the Case

The Federal Rules of Civil Procedure allow a party to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). Defendant cannot even satisfy this threshold requirement, let alone the heightened criteria set forth under the *Shelton* Test.

First, none of the requested documents have any relevance to any claims or defenses in this action. This is a straightforward false advertising case and the document requests set forth in Defendant's subpoena are simply not relevant in this action.

Defendant are engaging in a fishing expedition that is designed to harass opposing counsel. However, "District courts need not condone the use of discovery to engage in 'fishing expeditions.'" *Daughtery v. Wilson*, No. 08CV0408-WQH BLM, 2008 WL 4748042, at *1 (S.D. Cal. Oct. 23, 2008), *report and recommendation adopted*, No. 08CV408WQHBLM, 2009 WL 124322 (S.D. Cal. Jan. 16, 2009) (quoting *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1072 (9th Cir. 2004)).

Second, even if the requested documents are relevant, they are still not important to the issues at stake in this action nor are the requested documents important in resolving the issues in this action. For example, Defendant's Request Number 19 seeks "Documents sufficient to identify Your external internet technology service providers, including internet service providers, hosts for email servers, and hosts for internet domains," Request Number 14 seeks "All Documents regarding any agreements You currently have or have had with any entity that is funding the prosecution of any claim in any matter," and Request Number 16 seeks "All Documents related to any complaints (whether formal or informal) related to You and/or Your business activities in the last four years." Marron Decl., ¶ 2 & Ex. 1. These Requests are not even tangentially related to any issues in this action and certainly not any issues that are crucial to the preparation of Defendant's case.

Finally, the burden imposed on opposing counsel in complying with the subpoena greatly outweighs its likely benefit. Numerous courts have quashed subpoenas issued to opposing counsel pursuant to the *Shelton* Test. *See, e.g., Chao v. Aurora Loan Servs.*, LLC, No. C 10-3118 SBA LB, 2012 WL 5988617 (N.D. Cal. Nov. 26, 2012) (granting motion to quash subpoena issued to opposing counsel); *GSI Tech., Inc. v. United Memories, Inc.*, No. 5:13-CV-01081-PSG, 2015 WL 12942202, at *1 (N.D. Cal. Oct. 23, 2015) (same); *Rhodes v. Sutter Gould Med. Found.*, No. CIV. 2:12-13 WBS DAD, 2014 WL 2091767, at *1 (E.D. Cal. May 16, 2014) (same); *M.A. Mobile Ltd. v. Indian Inst. of Tech. Kharagpur*, No. C-08-02658-RMW, 2014 WL 819161, at *1 (N.D. Cal. Feb. 28, 2014) (same); *Graff v. Hunt & Henriques*, No. C08-0908 JF (PVT), 2008 WL 2854517,

at *1 (N.D. Cal. July 23, 2008) (same).This Court should likewise quash the subpoena that was issued to the Marron Firm.

3. The Requested Documents Are Not Crucial to the Preparation of Defendant's Case

Under the final prong of the *Shelton* Test, a party must demonstrate that the requested information is crucial to the preparation of its case. *Erhart*, 2017 WL 840648, at *6 (citing *Shelton*, 805 F.2d at 1327). This is heavy burden that requires extraordinary circumstances. *See Nocal, Inc. v. Sabercat Ventures, Inc.*, No. C 04-0240 PJH(JL), 2004 WL 3174427, at *4 (N.D. Cal. Nov. 15, 2004) (granting motion to quash "because the subpoena subjects counsel to harassment, is unduly burdensome, and seeks irrelevant and privileged information without showing the extraordinary circumstances required by the decision in the *Shelton* case."). Defendant will be unable to show that extraordinary circumstances warrant compliance with the subpoena. The document requests are simply not crucial to the preparation of Defendant's case and are instead are designed to harass opposing counsel. The subpoena should be quashed.

B. Alternatively, this Court Should Issue a Protective Order to Protect the Marron Firm From Undue Burden and Expense

Federal Rule of Civil Procedure 26(c) provides that "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]" Fed. R. Civ. P. 26(c). Here, good cause exists to issue a protective order. Defendant's document requests have no bearing on the underlying issues in this litigation. Complying with Defendant's subpoena would be extremely burdensome to the Marron Firm. Marron Decl., ¶ 4. If the Marron Firm were required to comply with the subpoena, then it would have to review a voluminous number of documents, redact responsive documents for privilege, and then produce a privilege log that would likely contain hundreds of entries. Marron Decl., ¶ 4. The Marron Firm estimates that this process could take up to 40 hours or more to complete. Marron Decl., ¶ 4. Complying with Defendant's subpoena would also be highly disruptive to the Marron

Firm's operations and would detract from time that could be better spent serving its clients. Marron Decl., ¶ 5. Indeed, "[c]ourts have been especially concerned about the burdens imposed on the adversary process when lawyers themselves have been the subject of discovery requests, and have resisted the idea that lawyers should routinely be subject to broad discovery." *In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 70 (2d Cir. 2003). For these reasons, the Court should quash the subpoena or, alternatively, enter a protective order.

C. The Subpoena Should Also be Quashed Because it Was Not Served in Accordance with Federal Rule of Civil Procedure 45(a)(4)

Under Federal Rule of Civil Procedure 45(a)(4), "[i]f the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served on the person to whom it is directed, a notice and a copy of the subpoena must be served on each party." Here, Defendant did not serve the subpoena in accordance with these requirements. Instead, Defendant served the subpoena without serving any notice of intent to the parties in the action. *See* Marron Decl., ¶ 2. Defendant will be unable to prove that it served the required "Notice of Intent" prior to serving the subpoena. The subpoena should therefore be quashed for ineffective service of process.

V. CONCLUSION

For the foregoing reasons, Non-Party Law Offices of Ronald A. Marron respectfully requests that the Court grant its Motion to Quash Subpoena or, alternatively, enter a Protective Order to prevent undue burden and expense to Plaintiffs' counsel.

Dated: February 21, 2019 Respectfully Submitted,

/s/ *Ronald A. Marron*
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