IN THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Daniel Human,	)	
	)	
Plaintiff.	)	
	)	
Vs.	)	No. 4:24-cv-01177-MTS
	)	
Fisher Investments, Inc.	)	
	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF MOTION TO QUASH DEFENDANT FISHER'S SUBPOENA DUCES TECUM DIRECTED TO JAMES MARKS AND WILLCRAFT LEGAL SERVICES

Respectfully submitted,

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I. **INTRODUCTION**

This Memorandum is filed with respect to the Court's directive in ECF No. 126 (July 17, 2025), which allowed additional memoranda on matters outside the original motion and indicated a formal order would follow, at which time a Memorandum would be required of Marks. While no such order has yet issued, Marks submits this Memorandum in anticipation of such further court order.

This Memorandum is submitted in support of James Marks' Motion to Quash Defendant Fisher's subpoenas, pursuant to Fed. R. Civ. P. 45(d)(3), and in direct response to Fisher's opposition (ECF Nos. 117 & 118). Marks is a non-party attorney who has never represented Plaintiff Daniel Human regarding Fisher. Marks seeks to quash the duplicative subpoenas directed to him and his trade name, WillCraft Legal Services. The subpoenas demand information outside the scope of this case, which are privileged, irrelevant, and burdensome documents that invade the attorney-client relationship as well as Marks' personal financial information without legal justification.

Fisher's opposition fails to address numerous arguments in Marks' original motion, thereby conceding them. Fisher has ignored over 60 alternative sources—such as opposing counsel in Human's prior TCPA cases—before targeting Marks, violating federal precedents requiring exhaustion of less intrusive avenues.

These subpoenas are not reasonably calculated to lead to the discovery of admissible evidence, and are rather oppressive, unduly burdensome, an irrelevant to the subject case. They also place Marks in a position of divulging improperly divulging information that is plainly confidential and privileged under the Missouri Rules of Professional Responsibility for no reason

other than to oppress Mr. Human. The requests serve no legitimate evidentiary purpose in this matter between Mr. Human and Fisher. Therefore, these subpoenas should be quashed in full.

II. STATEMENT OF FACTS

Marks is a Missouri-licensed attorney operating under the trade name Willcraft Legal Services, with no other attorneys involved. He has never represented Human in this case. On June 14, 2025, Fisher served two identical subpoenas on Marks and WillCraft, demanding documents by June 25, 2025—11 days later. The subpoenas seek:

- All documents evidencing settlement funds or money received on Human's behalf since January 1, 2020, including bank records.
- Documents showing disposition of such funds, including transfers and portions kept.
- Documents evidencing Human's assets.
- All agreements between Marks and Human, including retention agreements and settlement splits.
- All settlement agreements in matters where Marks represented Human.
- All correspondence or demand letters sent on Human's behalf alleging TCPA/Missouri No Call violations.
- All communications received in response, including attachments.
- All documents where a counter-defendant asserted consent to contact Human's numbers.
- All records showing IRS reporting of income from Human's settlements.

Each subpoena included a $60 check and directed compliance to Fisher's Georgia office, with a cover letter allowing mail or email. Marks did not accept earlier email service attempts in

May, as he had no duty to respond to any "pre-service" and lacked Human's consent to disclose. Human has not authorized such release.

In response to these subpoenas, Marks filed a timely motion to quash, arguing: (1) ethical prohibitions under Mo. Sup. Ct. R. 4-1.6; (2) availability from other sources without jeopardizing attorney-client duties; (3) irrelevance and invasiveness of personal/financial records; (4) privilege and work product protection; (5) undue burden; (6) unreasonable time; and (7) failure to meet and confer. He requested quashing or a protective order, plus at least 30 days if any response required. Please see such Motion, which is incorporated herein by reference, but not repeated for the sake of brevity.

Fisher's response To Marks Motion claims that Marks somehow failed to follow the Court's discovery dispute process (ECF No. 112 ¶ 4(e)), asserts that Marks somehow waived his rights by filing a motion rather than objections, flatly denies that there are any ethical bars or privileges at stake, ignores its own lack of effort in obtaining information from third-parties, and invokes the crime-fraud exception (without providing any evidence of actual fraud), and flatly denies that the release of such personal , professional, and financial information is at all burdensome[1].

[1] Fisher also denied that eleven days is not a "reasonable time". At this point in time, that issue appears to be moot, so it is not being further argued here.

III. ARGUMENT

A. Fisher Failed to Exhaust Any Other Avenues Before Invading the Attorney-Client Relationship

The Eighth Circuit applies a stringent test for discovery from attorneys: the party must show (1) no other means exist to obtain the information; (2) relevance and admissibility; and (3) substantial need. *Shelton v. American Motors Corp*., 805 F.2d 1323, 1327 (8th Cir. 1986) (quashing deposition of opposing counsel absent exhaustion). Though Shelton addressed depositions, it extends to subpoenas duces tecum from non-opposing counsel where privilege is implicated. *Pamida, Inc. v. E.S. Originals, Inc*., 281 F.3d 726, 729-30 (8th Cir. 2002) (applying Shelton to former counsel).

Similarly, the 8th Circuit has also recognized, "Rule 45 subpoenas, although not technically precluded by the language of Rule 45 from being served upon parties to litigation, are generally used to obtain documents from non-parties and are 'clearly not meant to provide an end-run around the regular discovery process under Rules 26 and 34."). *Gregg v. B&G Transportations, LLC, 2021 WL 1598969.*

Other circuits agree. *In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 71-72 (2d Cir. 2003) (requiring "tailored" subpoenas after exhaustion, considering privilege risks*); In re Grand Jury Subpoenas*, 906 F.2d 1485, 1492 (10th Cir. 1990) (quash if alternatives available). Supreme Court precedent reinforces protecting attorney-client relations from unnecessary intrusion. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (privilege fosters compliance with law).

This precedent largely follows from the US Supreme Court Case, *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). *Hickman* held that, "[w]hen the desired material can be obtained elsewhere, the burden of showing such special circumstances [that would require disclosure] has not been met." 329 U.S. at 511–13, 67 S.Ct. 385. *Hickman* court also acknowledged that there would be situations in which discovery of **work product** would be justified. *Id.* at 511–12, 67 S.Ct. 385. The Supreme Court stated, however, that "the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order." *Id.* at 512, 67 S.Ct. 385.

The ONLY "effort" Fisher appears to have made here is to get information from Mr. Human directly. That dies not entitle them to get the information from his attorneys. Rather, the case law is clear that they must look "outside" to third parties and other accessible information before the attorney-client privileges can be intruded upon.

Fisher's opposition ignores this essential requirement – that they do their own due diligence. Fisher never sought the information from over 60 available sources, including opposing counsel in Human's TCPA cases, before targeting Marks. They could also have issued a subpoena for Mr. Human's IRS records, or many other imaginable options. They could have simply called opposing counsel in those cases to request information be provided voluntarily, and then followed up with a subpoena. Such attorneys would not have the same level of protection as a party-attorney has in this case.

Fisher's failure to seek alternative sources warrants quashing, as federal courts prohibit subpoenas to attorneys without exhausting less intrusive alternatives. Fisher's failure hardly justifies invading Marks' protected files. See *Shelton*, 805 F.2d at 1329 (failure to pursue alternatives bars discovery). The subpoenas must therefore be quashed.

B. **The Requested Documents Are Irrelevant to Fisher's Alleged Damages**

Furthermore, this Court's Discovery Order in this case is limited to the issue of Fisher's damages; Nothing in my prior dealings with Mr. Human can possibly relate to Fisher's damages. Rather, these subpoenas seek irrelevant information, such as Marks' fees, records, fee agreements, personal financial information, and correspondence with non-Fisher attorneys. None of this relates in any way to Fishers claims or Fisher's damages. Fed. R. Civ. P. 26(b)(1) limits discovery to relevant, proportional matters. Requests for settlement funds, dispositions, assets, agreements, settlements, correspondence, responses, consent documents, and IRS records bear no relation to Fisher's fraud claims or their damages . Marks' financial records (e.g., portions kept) are certainly personal and irrelevant; they bear no relationship at all to any of Fisher's claims.

Courts regularly quash such irrelevant subpoenas to non-parties. *Cornell v. Columbus McKinnon Corp*., 2015 WL 4747092, at *2 (N.D. Cal. Aug. 11, 2015) (quashing where no relevance shown). Fisher's opposition vaguely claims "crucial discovery" but specifies none.. The subpoenas exceed scope and should be quashed.

C. The Subpoenas Violate Attorney-Client Privilege, Work Product Doctrine, and Missouri Rules of Professional Responsibility

The subpoenas demand privileged matter without exception, warranting quashing under Fed. R. Civ. P. 45(d)(3)(A)(iii). Agreements, settlements, correspondence, and financial dispositions involve confidential communications and work product. *Upjohn*, 449 U.S. at 390 (broad privilege protection). Demand letters and responses are work product. *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

Mo. Sup. Ct. R. 4-1.6 also prohibits disclosure absent consent or "court order". Under Missouri Rule 4-1.6, it would be a plain breach to release any of Mr. Human's records without consent or a court order. Human withheld consent, and no "reasonably necessary" disclosure applies. Fisher cites R. 4-1.6(b)(4) and *F.T.C. v. Trudeau*, 2013 WL 842599, at *4 (N.D. Ill. Mar. 6, 2013) (subpoena as "law"), but ignores that a motion to quash is the actual remedy for resolving such ethical conflicts. *SEC v. Sassano*, 274 F.R.D. 495, 497 (S.D.N.Y. 2011) (subpoena compels only non-privileged matter).

Further, 4-1.6 requires that Marks determine for himself if such release is reasonably necessary. Marks has never represented Human with respect to Fisher, and Fisher has never alleged that Marks was in any way involved with Human's suit with Fisher, so it seems highly unlikely that any of Marks files relating could bear anything relating to the elements of Fisher's case. However, this is Fisher's burden. When meeting with Fisher's counsel prior to the discovery hearing, Fisher's counsel did not provide any basis for needing such information, and instead asserted that they had no duty to seek information elsewhere. Nevertheless, it is *Fisher's* duty to this court to show that such discovery is both necessary and alternative sources have exhausted, and they have not done so.

D. **The Subpoenas Impose an Undue Burden on a Non-Party Attorney**

The present subpoenas subject Marks to undue burden, requiring quashing under Fed. R. Civ. P. 45(d)(3)(A)(iv).

Federal Rule of Civil Procedure 45(d)(3)(A)(iv) prohibits the discovery of information *where no need is shown, or compliance would be unduly burdensome, or where harm to the person from whom discovery is sought outweighs the need of the person seeking discovery of the information*." *In re Missouri Department of Corrections*, 839 F.3d 732, 736 (8th Cir. 2016).

Here Fisher has made no showing of any actual need, nor any showing of alternative attempts other than the Plaintiff Himself. But this is their essential requirement. Instead they simply deny the law and the facts.

On the other hand, Marks ethical responsibilities are on the line: As a solo non-party, compliance by Marks necessarily demands extensive review for privilege, redaction, and collection—all of which are unethical to delegate. Courts weigh such relevance, need, breadth, time, burden, and non-party status. *Cornell*, 2015 WL 4747092, at *1.

The facts here are that (1) there is no relationship between Marks files and any alleged damages suffered by Fisher, (2) there are other alternatives available to obtain information about Mr. Human's other cases, and (3) Fisher has not attempted those alternatives. There is simply no articulated need or benefit to overcome the clear burden of forcing Marks to provide privileged records. See, e.g, *In re Ex Parte Petition of JSC BTA Bank*, 2010 WL 4791803, at *2 (S.D.N.Y. Nov. 17, 2010) (undue burden on non-party attorney).

E. Marks Did Not Waive Objections; the Motion to Quash Is Timely and Proper

Fisher claims waiver for no objections, citing *Terraform Labs Pte. Ltd. v. PH Montgomery Props. Inc.*, 2024 WL 21472, at *1 (E.D. Mo. Jan. 2, 2024). But Rule 45(d)(2)(B) objections are optional; a timely motion to quash under 45(d)(3) suffices, especially for privilege. *Terraform* involved no motion; here, Marks filed timely. The Court's discovery process (ECF No. 112) applies to parties; non-parties may move directly. As such, No waiver occurred.

F. Fisher Conceded Multiple Issues by Failing to Respond

Fisher's response to Marks' motion summarily ignores key arguments: irrelevance of personal/financial records, invasiveness of contractual relationships, work product protection, compensation for time, and specific burdens. Failure to address concedes them. *Chay-Velasquez v. Ashcroft*, 367 F.3d 751, 756 (8th Cir. 2004) (waiver if no meaningful brief); *Hopper v. Euclid Manor Nursing Home, Inc*., 867 F.2d 291, 294 (6th Cir. 1989) (concession); *In re Municipal Bond Reporting Antitrust Litig*., 672 F.2d 436, 439 n.6 (5th Cir. 1982). These concessions independently warrant quashing.

G. Fisher Has Produced No Evidence of Fraud and Thus Cannot Invoke the Crime-Fraud Exception or Justify the Subpoenas

Fisher seems to be arging that it is entitled to Marks attorney records because a "TCPA scheme" invokes the "crime-fraud" exception to such disclosure. However to invoke the crime-fraud exception, Fisher must first make a prima facie evidentialy showing of fraud—that Human engaged in or planned a fraudulent scheme when seeking Marks' advice, and that the communications furthered it. *United States v. Zolin*, 491 U.S. 554, 563-64 (1989) (requiring

"evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud"); *State ex rel. Peabody Coal Co. v. Clark*, 863 S.W.2d 604, 607 (Mo. 1993) (prima facie evidence required).

Marks has never been involved with Fisher's case, so there is no way that Marks could have participated in any "fraud" between them. Fisher's counsel has never shown Marks any such evidence, and on information and belief, Fisher has not shown any such prima facie evidence either,

Rather, this is a fishing expedition. Mere speculation or "inexplicable" non-production is unsufficient as a matter of law. *In re Green Grand Jury Proceedings*, 492 F.3d 976, 979-81 (8th Cir. 2007) (exception applies only with "reasonable cause to believe" advice furthered fraud). Fisher cites *Green's* holding but ignores its evidentiary threshold. Without such prima facie proof, the exception to privilege fails, and the subpoenas must be quashed as seeking potentially privileged material without basis. *Zolin*, 491 U.S. at 572.

And the failure to attempt to obtain the information elsewhere is fatal to Fisher's subpoena.

IV. **CONCLUSION**

For the foregoing reasons, James Marks prays this Court to quash these subpoenas in full, or in the alternative, issue a protective order severely limiting the scope of disclosure to matters which are shown to be relevant and necessary for the disposition of Fishers claims for damages, and for such further relief as the court deems just under the circumstances.

Respectfully,

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