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July 2025
MPT-2 Item

In re Gourmet Pro

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In re Gourmet Pro

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Robinson Hernandez LLP
Attorneys at Law
30 South Point Plaza
Milton, Franklin 33705

MEMORANDUM

To: Examinee
From: Anita Hernandez, partner
Date: July 29, 2025
Re: Gourmet Pro response to CPSC

Our client Gourmet Professional Grilling Co. (Gourmet Pro) has been served with a subpoena by the Consumer Product Safety Commission (CPSC), a government agency. The subpoena seeks our client's business records related to the design, manufacture, and safety of certain of its products. Many of the documents within the broad scope of the subpoena involve communications between company employees and the company's lawyers, including its general counsel, Trisha Washington.

I have attached three representative documents (marked Documents One through Three) that are responsive to the subpoena. Please prepare a memorandum to me addressing how attorney-client privilege may apply to all three documents. For each document, indicate whether some or all of it is protected from disclosure by the attorney-client privilege. If the attorney-client privilege applies only to part of the document, be specific as to the paragraphs or individual sentences covered by the privilege protection.

Your memorandum should begin with a description of the legal standard to be applied. Do not repeat that standard as you apply it to the three documents; rather, for each document, focus on the pertinent aspects of that standard and explain how they support your conclusion as to whether the content is protected from disclosure by the attorney-client privilege.

Our client asked that we protect as many documents as possible from disclosure, but we need to take care to honor our professional responsibilities as attorneys and officers of the court. If there are close calls, clearly state your conclusion one way or the other and explain your reasoning.

You should confine your work to the application of the attorney-client privilege. Any other issues related to the subpoena will be handled by another associate.

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Robinson Hernandez LLP
Attorneys at Law

File Memorandum

From: Anita Hernandez, partner
Date: July 15, 2025
Re: Gourmet Pro response to CPSC subpoena

Gourmet Professional Grilling Co. (Gourmet Pro), a leading manufacturer of state-of-the-art gas grills and accessories, has been a client since its founding as a family business 75 years ago. Gourmet Pro operates in all 50 states and in 22 countries. It prides itself on the high quality of its products and its strong safety record.

One of its principal competitors is Main Street Cookers Inc. (Main Street). Main Street has not had a good safety track record—it is in the middle of a class-action lawsuit over injuries caused by gas leaks from its grills. That litigation has led the Consumer Product Safety Commission (CPSC) to open a parallel administrative investigation of Main Street. The CPSC is a federal government agency that develops uniform safety standards and conducts research into product-related injuries; at times, it also conducts investigations to determine if it should order a product recall, impose penalties, or take other government action.

Gourmet Pro has been served with a subpoena from the CPSC seeking all of Gourmet Pro's business records related to the design, manufacture, and safety of its propane tank hoses and fittings, as well as its ignition system. We believe this is related to the investigation of Main Street. The CPSC investigator advised that Gourmet Pro is not a target of the investigation. The CPSC seeks Gourmet Pro's business records to gain information about the propane grill industry and its safety practices, and presumably to contrast the design and manufacture of Gourmet Pro products with those of Main Street.

Despite the CPSC assurances, our client wants to take care as it cooperates with the government investigation. If this investigation results in an enforcement action against Main Street, Main Street may have access to the records we produce to the CPSC. Also, despite Gourmet Pro's fine safety record, it has experienced some issues and has had

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its lawyers involved in assessing its practices. Gourmet Pro wants to cooperate in good faith in producing documents, but in doing so, it needs to make sure that it does not produce documents protected from disclosure by the attorney-client privilege.

We have identified around 20,000 documents potentially responsive to the CPSC subpoena. A significant number of them involve communications with lawyers—both Gourmet Pro's in-house legal team and the outside law firm of WatsonSmith that Gourmet Pro retained to conduct a safety audit, that is, a review of the safety of its products and business practices.

The line between what is a privileged communication with counsel and what is a nonprivileged business communication is complicated by the fact that Gourmet Pro's lead in-house lawyer—its general counsel, Trisha Washington—is a trusted member of the executive team, and she is often involved in high-level business discussions that are not limited to legal issues. Thus, she serves two functions—at times offering privileged legal counsel about business matters, and at times offering business advice without legal implications or privilege.

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Document One: Email from general counsel to CEO of Gourmet Pro

To: Maria Johnson, CEO
From: Trisha Washington, General Counsel
Date: March 25, 2025
Re: Main Street class-action litigation

Good morning, Maria. I'm glad you are back from your vacation. As you requested, I have given some thought as to the implications for Gourmet Pro of the high-profile litigation against our competitor Main Street.

The complaint against Main Street is centered on Main Street's highly publicized problems with its propane tank hoses that are cracking prematurely and leading to potentially dangerous propane leaks. It is a class-action lawsuit. The plaintiff's counsel will be asking the court to certify a class that includes a large number of Main Street customers at risk due to the safety defects. You can expect that the media in Franklin and elsewhere will be reporting on the dangers of the Main Street defects and interviewing concerned customers. We should ask our marketing department to track those media reports.

Legal considerations also suggest that we redouble our efforts to ensure the safety of our products. The WatsonSmith safety audit identifies several concerns that, if made available in litigation, would create sources of liability. That would be especially true if we fail to take steps to implement the safety recommendations in the report. I recommend that I meet with the department heads to make sure they understand the risks.

To help insulate us from legal liability, we should also advertise our commitment to quality. Besides contrasting our practices to those of Main Street at this time for marketing purposes, informing the public about our emphasis on quality will serve us well in the event someone is thinking about Gourmet Pro as a target of a similar class-action lawsuit. It may also help us navigate the regulatory standards on quality set by the Federal Trade Commission. We can't afford any problems given that the spotlight is now on Main Street and the grill industry generally.

Trisha Washington
General Counsel
Gourmet Professional Grilling Co.

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Document Two: Executive summary of report from outside law firm

"Embracing Safety as a Business Priority"
Executive Summary to a Privileged and Confidential Report
Prepared by the Law Firm of WatsonSmith
for the Management and Board of Directors of Gourmet Pro
June 30, 2024

Overview

1. Over the course of the past six months, WatsonSmith has undertaken an extensive review of the safety record and related policies and processes of Gourmet Pro to ensure that it maintains its reputation for safe, high-quality grills and grilling accessories. Our work has been prompted by the high-profile controversy over several accidents and related injuries associated with propane grills manufactured by one of Gourmet Pro's competitors. While our law firm has not been hired in connection with any pending litigation or government investigation, we are always mindful that in the heavily regulated arena of consumer safety, the risk of liability looms large. Accordingly, we deem this report to be "privileged and confidential" and have so marked each page.

2. Our main goal is to learn the company's processes and practices and develop business recommendations to make the company even better when it comes to dealing with safety concerns. What follows is a privileged and confidential assessment of the current state of the safety processes and procedures, including recommendations for operational improvements.

3. Gourmet Pro is the second-leading manufacturer of outdoor cooking products and accessories in the world. Gourmet Pro has sales approaching $1.5 billion per year and over 2,500 employees throughout the United States and in 22 other countries. By our measure, over 250 employees have duties dedicated to the company's safety mission, such as safety inspectors, safety policymakers, engineering staff, assembly line supervisors, and in-house legal counsel.

4. Gourmet Pro's manufacture and sale of propane gas grills finds it subject to the risks of claims due to design defects or faulty manufacturing practices. Our audit of the company's safety record reveals that in the past three years, the company has received 52 reports from grill owners complaining of product defects, and the company has been the subject of seven lawsuits from grill owners seeking compensation for personal injuries. Most of the complaints center around the hoses, fittings, and ignition system for the company's Happy Chef line of gas grills. In every case, the compliance department

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reports confirm that the complained-of incidents involve consumer misuse, incorrect third-party assembly, improper maintenance, or faulty propane tanks. The company has not been found liable in any lawsuit that has gone to trial, and the company's public financial reports confirm that payments for legal settlements have not been substantial.

Business Recommendations

1. The company has much to be proud of with regard to its safety track record and its reputation for high-quality products. That performance should be the foundation for a concerted campaign by Gourmet Pro to develop and promote a culture of ethics and compliance. A Code of Business Conduct and Ethics should be adopted to promote good business practices and require all employees to report any actual or potential violations of law, rules, regulations, or ethics.

2. Training targeted to safety and corporate ethics should be provided to employees around the globe.

3. The company should maintain a hotline, maintained by a third party, which employees could use to anonymously raise concerns or ask questions about safety or business behavior.

4. The risks and liabilities stemming from the consumer safety laws in the United States, the European community, and elsewhere are substantial. Given that, we recommend that you have our firm conduct a survey of the safety laws and regulations of those jurisdictions and report back on their provisions and the steps Gourmet Pro can take to honor its legal responsibilities.

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Document Three: Email from Gourmet Pro's chief auditor to general counsel

To: Trisha Washington, General Counsel
From: Lionel Alexander, Chief Auditor
Date: January 15, 2024
Re: Audit results, etc.

Hi, Trisha. The auditors in my department are running into some questions with regard to our employees in our neighboring State of Olympia. I am hoping you can help.

Issue One: I know you're the general counsel and not an accountant and auditor like me, but because I am new to my Gourmet Pro position, I would like your take on how best to present the five-year summary of our safety audit results in the company's next annual report that, as you know, we publish on our public website. Do you think a narrative summary or a mix of charts and graphs would be a better fit for the style of the company's annual report? I could also see a breakdown by product or by production unit of how many personnel perform safety compliance work. What's your opinion? FYI, if we build in graphics, that will slow down the completion of the report by a week or so. The audit staff would really appreciate your take on this.

Issue Two: Also, we're noticing an uptick in consumer complaints about products manufactured in our facility outside of Olympic City. We've been tracking them for a while now because of the potential exposure resulting from faulty products being shipped from that facility. We want to sit down and talk with a few select employees at the facility and see what we can learn. Since you used to work with some of the managers there, do you have any advice for us? I know that sitting down with employees to talk about this kind of thing can make them uncomfortable. You might also have some other thoughts for us.

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Franklin Dep't of Labor v. ValueMart
Franklin Supreme Court (2019)

The underlying litigation in this case involves an enforcement action instituted by the Franklin Department of Labor (FDOL), alleging that ValueMart has routinely violated the state's workplace safety regulations with regard to fire exits in its stores.

In response to an FDOL media campaign over fire safety and other workplace practices, ValueMart retained outside counsel to conduct an audit of its facilities, documenting all the fire exits in each of the company's stores. After completing the audit, the lawyers provided the company with a 65-page report (the Middleton Report), which included an executive summary of their findings, as well as recommendations to improve compliance performance. The FDOL subsequently commenced the underlying enforcement action against ValueMart.

The FDOL moved the trial court to compel ValueMart to turn over the outside counsel report in discovery. ValueMart opposed the motion, contending that the report is protected by the attorney-client privilege. Finding that the predominant purpose of the report was business advice, not legal advice, the trial court granted the motion to compel and ordered the report to be produced. ValueMart appealed. The court of appeal affirmed, and ValueMart then sought further review from this court.

We conclude that the trial court did not err by finding that the predominant purpose of the report is business advice. Nevertheless, we remand to the trial court for its further consideration of whether certain portions of the report contain legal advice that should not be ordered disclosed.

The Middleton Report

After learning of the FDOL's safety campaign, ValueMart retained the law firm of Middleton & Lewis to conduct a compliance audit. The resulting report is titled "Promoting Workplace Safety." Each page of the report is marked "PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION." Middleton & Lewis was asked to interview key witnesses and review the fire exits in all the company stores. The bulk of the report analyzes the ingress and egress to all of these stores. The report includes recommendations in the areas of fire safety training, building modifications, and

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revisions to instructions to new employees and to supervisors. Additionally, portions of the report address the state's regulatory requirements, including the interpretation of certain FDOL regulations. The report was distributed to senior management and the board of directors.

The Governing Law of Privilege

In Franklin, the attorney-client privilege applies to "communications made between a client and their professional legal adviser, in confidence, for the purpose of seeking, obtaining, or providing legal assistance to the client." *Franklin Mut. Ins. Co. v. DJS Inc*. (Fr. Sup. Ct. 1982). In the corporate context, the privilege typically extends to such communications between the company's lawyers and its board of directors, executives, and managerial employees who seek legal advice on behalf of the company.

The purpose behind the attorney-client privilege is to "promote open and honest discussion between clients and their attorneys." *Moore v. Central Holdings, Inc*. (Fr. Ct. App. 2009). The threshold inquiry in a privilege analysis is determining whether the contested document embodies a communication in which legal advice is sought or rendered. "A document is not cloaked with privilege merely because it bears the label 'privileged' or 'confidential.'" *Id*. Because the attorney-client privilege is a barrier to disclosure and tends to suppress relevant facts, we strictly construe the privilege.

A key question is often whether legal advice is being sought. It is common for company executives to seek the advice of their counsel on matters of public relations, accounting, employee relations, and business policy. That nonlegal work does not become cloaked with the attorney-client privilege just because the communication is with a licensed lawyer. For example, the privilege does not typically extend to accounting work performed by a lawyer, such as preparing tax returns and financial statements and calculating accounts, or to occasions when a lawyer performs a financial audit or is advised of its results. *Peterson v. Xtech, Inc.* (Fr. Ct. App. 2007). However, the privilege typically extends to a lawyer's advice interpreting tax regulations or assessing the legal liabilities arising from the results of a tax audit. *See Franklin Dep't of Revenue v. Hewitt & Ross LLP* (Fr. Ct. App. 2017).

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The advice given by corporate counsel can serve the dual purposes of (1) providing legal advice and (2) providing business information and advice. Here, there is no dispute that the Middleton Report contains both legal advice and business advice. When a report contains both business and legal advice, the protection of the attorney-client privilege "applies to the entire document only if the predominant purpose of the attorney-client consultation is to seek legal advice or assistance." *Federal Ry. v. Rotini* (Fr. Sup. Ct. 1998). If the predominant purpose is business advice, however, a more tailored assessment is required. In such cases, the attorney-client privilege will still protect any portions of the document that contain legal advice. *See Franklin Machine Co. v. Innovative Textiles LLC* (Fr. Sup. Ct. 2003) (legal advice regarding tax implications of business decision protected from disclosure despite being embedded in an otherwise nonprivileged business strategy document from a lawyer). Accordingly, when assessing a document where the predominant purpose is business, care must be taken to identify any distinct portions that are protected by privilege because they concern legal advice or information. *Id*. If such portions of legal advice are easily severable, they should be withheld from disclosure to preserve the protection of the attorney-client privilege.

Application of the Law to the Middleton Report

Determining the predominant purpose of a document is a "highly fact-specific" inquiry, which requires courts to consider the "totality of circumstances" surrounding each document. *See In re Grand Jury*, 116 F.3d 56 (D. Frank. 2016). Relevant factors are (1) the purpose of the communication, (2) the content of the communication, (3) the context of the communication, (4) the recipients of the communication, and (5) whether legal advice permeates the document or whether any privileged matters can be easily separated and removed from any disclosure. *See* J. Proskauer, *Privilege Law Applied to Factual Investigations,* 78 UNIV. OF FRANKLIN L. REV. 16 (Spring 2018). Applying the five-factor test of *In re Grand Jury*, we hold that the predominant purpose of the Middleton Report is business advice.

First, while the report looked into workplace safety practices driven by legal requirements, its stated purpose was to "gather information about ValueMart's facilities" and offer "business recommendations" to upper management to facilitate "provision of appropriate fire exits." By contrast, the report prepared by outside counsel in *Booker v.*

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ChemCo, Inc. (Fr. Sup. Ct. 2002) was primarily intended to assist the company in complying with state tax regulations.

Second, the content of the Middleton Report was largely an analysis of each of ValueMart's facilities and other factual information. Again, this is distinguishable from *Booker,* where the report was predominantly a legal analysis of state tax statutes and regulations.

Third, with regard to the context, the FDOL enforcement action was not yet pending when the Middleton Report was written. While this is not dispositive, it is also significant that the Middleton firm does not represent ValueMart in the enforcement action itself, even though its report is likely relevant to it. A different result might be compelled if the enforcement action were pending when counsel was retained to produce the report and if counsel represented the client in the pending enforcement litigation.

Fourth, we look at the recipients of the communication. Here, even though the report was prepared for management and the company's board—typically the core privilege group for corporate legal advice—the focus of the report is on analysis of the facilities themselves, rather than on the legal implications of the facilities. The identity of the recipient does not determine the predominant purpose of the document.

Fifth, it is also significant that the legal portions of the report, such as those interpreting the applicable fire safety regulations, are not "intimately intertwined" with or "difficult to distinguish" from the nonlegal portions. It is often the case that legal recommendations are based on and mixed with business facts and considerations upon which the legal advice hinges. Indeed, Rule 2.1 of the Franklin Rules of Professional Conduct recognizes that, "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." In that case, courts take care to protect the "intertwined" content from disclosure. On the other hand, in some documents, the legal advice is in discrete sections or separate paragraphs of a lawyer-client communication that also covers business or other nonlegal issues in other parts of the document. In these situations, courts will order disclosure of the nonlegal portions and protect the legal portions from disclosure by allowing them to be redacted, that is, not disclosed.

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Our conclusion from the application of the five-factor test that the Middleton Report is "predominantly business advice" is not the end of the matter, however. The respect for privileged advice requires that a second step be taken. Any paragraph or other portion of the document that carries distinct legal advice (such as identified when applying the fifth factor above) can be withheld from disclosure. Accordingly, on remand, the trial court must take care to identify those distinct portions of the report that provide legal advice and authorize ValueMart to produce the Middleton Report with those sections removed.

In reaching our conclusion, we are mindful that lawyers are often asked by clients for advice that reaches beyond the technicalities of the law. *See* Rule 2.1 of the Franklin Rules of Professional Conduct. Nevertheless, in this case, the Middleton firm's report was primarily focused on business advice to ValueMart, as opposed to gathering information for the primary purpose of providing legal advice in connection with representation in a pending government enforcement action or for purposes of other regulatory advice.

Remanded for further proceedings consistent with this opinion.

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Powell County District Court
State of Franklin

Infusion Technologies Inc.,
Plaintiff,

v.

Order
December 15, 2021

Spinex Therapies LLC,
Defendant.

This order addresses the motion of plaintiff Infusion Technologies Inc. (ITI) to compel production of documents. The plaintiff's complaint alleges that defendant Spinex Therapies LLC (Spinex) breached a contract to supply components for implantable pumps used to deliver pain medication. During discovery, Spinex's internal review identified over 100,000 records that might be subject to ITI's request for document production. On two prior occasions, Spinex refused to disclose certain documents, claiming attorney-client privilege. This Court reviewed 987 documents *in camera* and compelled disclosure of 686 documents not protected by attorney-client privilege.

This third motion concerns a new collection of 132 documents for which Spinex claims privilege. ITI again requested and the Court again performed an *in camera* review. These three motions address barely 1% of the 100,000 documents potentially subject to ITI's motion to produce. Review of these documents places a substantial burden on the Court and court staff. Accordingly, the time has come to provide guidance on how counsel should handle disclosure of potentially privileged documents.

Most of the documents reviewed so far represent so-called "dual purpose" documents, i.e., documents communicating both legal and business advice. The contours of the attorney-client privilege are governed by state law. This Court must apply the "predominant purpose" standard adopted by the Franklin Supreme Court in *Fr. Dep't of Labor v. ValueMart* (2019). In that case, the court applied the "predominant purpose" standard to the blending of business and legal advice in an integrated audit report and concluded that pure legal advice included within such a "predominantly business" report could still be entitled to protection if it could be easily separated.

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Spinex has misinterpreted the *ValueMart* standard by suggesting that it allows an "all-or-nothing" conclusion: Spinex argues that if a document carries *any* legal advice from a lawyer, then Spinex need not disclose any part of that document. Spinex is incorrect. With dual-purpose documents, Spinex must apply the five-factor analysis of *ValueMart* and determine if the "predominant purpose" of the document is to provide legal advice. Only then can the entire document be withheld. On the other hand, if the "predominant purpose" is determined to be "business advice," Spinex should take the second step of examining each paragraph or other distinct portion of the document to determine if it is legal advice. If so, that distinct section of the document can be withheld, but only that distinct portion.

Here, one of the documents at issue (Item 77) contains a summary review by Spinex's corporate counsel of issues related to this litigation. Some issues entail little more than descriptions of Spinex's efforts to find buyers for an unrelated product, while others offer statistics on Spinex's economic performance. The document does contain two distinct paragraphs offering legal advice, but that does not mean that the entire document can be withheld. The document is "predominantly" for a business purpose, allowing only the two paragraphs of legal advice to be withheld.

Another example is Item 43, an email that addresses a mix of topics, each topic covered by a separate paragraph. In cases of pedestrian emails, unlike the formal report in the first example, counsel should address each paragraph separately to determine if it is "predominantly" legal or business. In short, the legal analysis should follow the practical reality that the author of the email wrote each paragraph to cover a separate topic.

ITI has requested that the Court impose sanctions on Spinex for its failure to properly apply these principles. While sympathetic, the Court declines to do so—this time. From now on, counsel for Spinex must tailor what is withheld to only those portions of a document deserving of protection from discovery. To be sure, privilege determinations entail difficult factual assessments. That said, defendant Spinex and its counsel are on notice that this Court will not countenance the misuse of the attorney-client privilege in a way that burdens the Court when judicial resources are thin.

So ordered.

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June Fredrickson,
District Court Judge

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