IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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08-4249

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FEDERAL TRADE COMMISSION,
Plaintiff - Appellee,
v.

KEVIN TRUDEAU,
Defendant - Appellant.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
ROBERT W. GETTLEMAN, JUDGE

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# BRIEF OF APPELLEE FEDERAL TRADE COMMISSION

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## JURISDICTION

The jurisdictional statement of defendant-appellant Kevin Trudeau ("Trudeau") is correct, but is not complete.

### A. The district court's jurisdiction

The Federal Trade Commission ("Commission" or "FTC"), an agency of the United States government, initiated this action in the United States District Court for the Northern District of Illinois, seeking relief under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), for deceptive acts or practices that violated Sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45, 52. The district court's jurisdiction over this matter derived from 28 U.S.C. §§ 1331, 1337(a), and 1345; and from 15 U.S.C. § 53(b). Because the district court had jurisdiction over the Commission's complaint, it also had jurisdiction to enforce compliance with its 2004 Stipulated Final Order for Permanent Injunction ("2004 Order") through civil contempt. *Autotech Technologies LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 744 (7th Cir. 2007). Similarly, because the district court retained jurisdiction over the 2004 Order, it had jurisdiction over the Commission's motion seeking a modification of the 2004 Order.

### B. This Court's jurisdiction

Defendant Kevin Trudeau ("Trudeau") has challenged two decisions of the district court. First, he appeals the decision of the district court holding him in civil

contempt. In its Memorandum Opinion and Order dated November 16, 2007 (D.93),[1] the court indicated it would hold Trudeau in contempt, but it did not enter any sanction. The court imposed the monetary sanction on August 7, 2008 (D.157, 158), but, in response to the Commission's motion filed pursuant to Fed. R. Civ. P. 59(e),[2] the court amended the monetary sanction on November 4, 2008 (D.220). This decision was final and it became ripe for appeal, pursuant to 28 U.S.C. § 1291, on December 11, 2008, when the court rejected Trudeau's motion, filed pursuant to Fed. R. Civ. P. 59(e), to alter or amend. *Autotech*, 499 F.3d at 745-46 (a post-judgment order of civil contempt is appealable as a final decision "if it includes both a finding of contempt and the imposition of a sanction" (internal quotation marks omitted)).[3]

Trudeau has also challenged the district court's grant of the Commission's motion to modify the 2004 Order. That decision followed the same route as the

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[1] Items in the dockets of the district court cases against Trudeau are referred to as "D.xx." All such items were entered in *FTC v. Trudeau*, No. 03-cv-3904 (N.D. Ill.), unless otherwise indicated.

[2] On October 6, 2008, while the Commission's Rule 59(e) motion was outstanding, Trudeau filed his notice of appeal of the Memorandum Opinion and Order dated November 16, 2007 (D.93), and the Memorandum Opinion and Order dated August 7, 2008 (D.157, 158). That appeal was assigned Docket No. 08-3548 by this Court. On October 14, Trudeau moved to dismiss that appeal, and this Court entered an order of dismissal on October 17.

[3] On February 20, 2009, this Court requested that the parties include in their briefs a discussion of this Court's jurisdiction to review the order holding Trudeau in civil contempt. The above discussion responds to that Order.

court's decision on the motion for contempt. The court first granted the Commission's motion to modify on August 7, 2008, but, in response to the Commission's Rule 59(e) motion, it issued a more detailed order on November 4, 2008. The November 4 order became ripe for appeal on December 11, 2008, when the court rejected Trudeau's Rule 59(e) motion. The Commission's motion to modify the 2004 Order initiated a post-judgment proceeding, and final orders in such proceedings are appealable pursuant to 28 U.S.C. § 1291. *Trustees of the Pension, Welfare, and Vacation Fringe Benefit Funds of IBEW Local 701 v. Pyramid Electric*, 223 F.3d 459, 463-64 (7th Cir. 2000).

Trudeau filed his notice of appeal on December 16, and that notice was timely, pursuant to Fed. R. App. P. 4(a)(1)(B) and 4(a)(4)(A).

## STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court erred when it held that, because Trudeau had misrepresented the content of a book he was selling, Trudeau was in contempt of the court's 2004 Order.

2. Whether the district court abused its discretion when it required that, as a result of his contumacious conduct, Trudeau pay compensatory damages of $37.6 million, the amount paid by the consumers who purchased, via Trudeau's infomercials, the book whose content Trudeau had misrepresented.

3. Whether the district court abused its discretion when, in response to a motion

filed by the Commission, it amended its 2004 Order to prohibit Trudeau, for a three-year period, from participating in infomercials for any book or other publication in which he had an interest.

## STATEMENT OF THE CASE

### A. Nature of the case, the course of proceedings, and the disposition below

In September 2007, the Commission initiated contempt proceedings against Trudeau because he had engaged in highly deceptive television advertising that violated the district court's Stipulated Order for Permanent Injunction, which was entered on September 2, 2004 ("2004 Order").[4] The 2004 Order banned Trudeau from participating in any infomercials,[5] but allowed one exception -- Trudeau could participate in an infomercial for a book or other informational publication, so long as, *inter alia*, he did not misrepresent the content of the publication that the infomercial was selling. Tru. App. at A145. By December 2006, Trudeau was taking advantage of that exception with infomercials that touted a diet book he had written: *The Weight*

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[4] The 2004 Order is reprinted at page A137 of the Appendix that Trudeau filed in this Court in conjunction with his brief. Items in that Appendix are cited as "Tru. App. at xx."

[5] The 2004 Order defined "infomercial" as "any written or verbal statement, illustration or depiction that is 120 seconds or longer in duration that is designed to effect a sale or create interest in the purchasing of goods or services, which appears in radio, television (including network and cable television), video news release, or the Internet." Tru. App. at A143.

*Loss Cure "They" Don't Want You to Know About* ("*Weight Loss Cure*" or "*WLC*"). These infomercials grossly misrepresented the content of the book. In the infomercials, Trudeau disclosed none of the details of the diet, but instead claimed that the *Weight Loss Cure* diet was "easy," and that, after the diet ended, dieters could eat anything they wanted. However, when consumers purchased the book, they discovered that it described a grueling dietary regimen requiring daily injections in the buttocks, virtually starvation dieting, and a complex web of lifetime food and other restrictions. The Commission alleged, and on November 16, 2007, the district court held, that, as a result of the infomercials for *Weight Loss Cure*, Trudeau was in contempt of the 2004 Order. Tru. App. at A23. On November 4, 2008, the court entered its Supplemental Order and Judgment (Tru. App. at A3), and ordered that Trudeau pay $37.6 million to compensate injured consumers. This was a civil, compensatory contempt sanction, not a "punitive fine," as Trudeau repeatedly contends. Brief for Defendant-Appellant Kevin Trudeau ("Br.") at 1, 2, 18-22. Further, in response to a separate Fed. R. Civ. P. 60(b) motion filed by the Commission seeking an amendment of the 2004 Order, the court also ordered that, for three years, Trudeau was banned from participating in any infomercials for any publication in which he had an interest. Trudeau has appealed both the court's order holding him in contempt, and its decision to modify the 2004 Order.

### B. Facts and proceedings below

#### 1. The first enforcement proceeding

The Commission filed its first complaint against Trudeau in January 1998, alleging that he violated Sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45, 52,[6] by deceptively marketing six products, primarily through infomercials. *FTC v. Trudeau*, No. 98-0168 (N.D. Ill.) The complaint claimed that Trudeau had made the following false advertising claims: "Eden's Secret Nature's Purifying Product" is a cure for depression, immune suppression, and other serious conditions; "Sable Hair Farming System" reverses hair loss, and has been scientifically proven to do so; "Jeanie Eller's Action Reading" is a program that is 100% successful in teaching reading; "Dr. Callahan's Addiction Breaking Technique" is a cure for addictions to smoking, over-eating, alcohol, and heroin; "Kevin Trudeau's Mega Memory System" enables users to achieve a photographic memory; and "Howard Berg's Mega Reading" program teaches anyone, including individuals with disabilities, to significantly increase reading speed. D.1, No. 98-0168.

Trudeau settled the 1998 charges by entering into a Stipulated Order for Permanent Injunction and Final Judgment. D.2, No. 98-0168 ("1998 Order"). The

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[6] Section 5 prohibits, *inter alia*, unfair or deceptive acts or practices in or affecting commerce. Section 12 prohibits, *inter alia*, the dissemination or the causing to be disseminated of any false advertisement in order to induce the purchase of food, drugs, devices, or cosmetics.

1998 Order prohibited Trudeau from making the claims concerning the products identified in the complaint. It also prohibited him from making any representation "about the benefits, performance, or efficacy" of any product "unless, at the time the representation is made, [Trudeau] possesses and relies upon competent and reliable evidence * * * that substantiates the representation." *Id.* at B35. The 1998 Order required Trudeau to pay $500,000 to redress purchasers of the six products, and prohibited him from using infomercials to promote any product until he had first posted a $500,000 bond. *Id.* at B39, B42.

**2. The second enforcement proceeding**

By 2003, Trudeau was back in business, this time using infomercials to sell two new products, "Coral Calcium Supreme," and "Biotape."[7] In June 2003, the Commission filed a motion in the Illinois district court seeking to have Trudeau held in contempt of the 1998 Order. D.12, No. 98-0168. According to the motion, Trudeau lacked substantiation for his claims that "Coral Calcium Supreme," which was supposedly a calcium product derived from marine coral, was an effective treatment for all forms of cancer, for multiple sclerosis, for lupus, for other

[7] In the intervening years, the Commission has brought law enforcement actions challenging two other infomercials in which Trudeau participated. *See FTC v. Enforma Natural Products, Inc.*, No. CV 00-04376-JSL (CWx) (C.D. Cal.) (FTC contempt action against claims made in infomercials for a weight loss product hosted by Trudeau); *In re Tru-Vantage Int'l, LLC*, FTC Docket No. C-4034 (Feb. 5, 2002) (snoring cessation product infomercial featuring Trudeau). Trudeau himself, however, was not charged in connection with these infomercials.

autoimmune diseases, for heart disease, and for high blood pressure. The motion also alleged that Trudeau lacked substantiation for his claim that "Biotape," a black adhesive tape that resembled electrical tape, permanently cured severe pain because it contained "a space age conductive mylar that connects the broken circuits that cause pain." *Id.* at 6. In addition to seeking to have Trudeau held in contempt, the Commission brought a new action alleging that his marketing of Coral Calcium Supreme violated Sections 5 and 12 of the FTC Act. *FTC v. Trudeau, et al.*, No. 03-3904 (N.D. Ill.).

The district court consolidated both actions (D.4), and on June 13, 2003, it entered a Stipulated Preliminary Injunction prohibiting Trudeau from making any of the challenged claims concerning Coral Calcium Supreme and Biotape, (D.9). Despite having stipulated to the preliminary injunction, Trudeau continued to market Coral Calcium Supreme as an effective treatment for cancer. In June 2004, the court granted the Commission's motion to hold Trudeau in contempt, and ordered him to cease all marketing of Coral Calcium Supreme. D.55.

In September 2004, the Commission and Trudeau entered into the 2004 Order. Tru. App. at A137. This resolved both the Commission's motion to have Trudeau held in contempt for violating the 1998 Order, and the Commission's 2003 complaint. Among other things, Part I of the 2004 Order restrained Trudeau from "producing, disseminating, making or assisting others in making any representation in an

infomercial" concerning any "product, program or service." *Id.* at A144. The same part of the 2004 Order contained a limited exception, allowing Trudeau to participate in infomercials for "any book, newsletter or other informational publication," provided the publication does not refer to any product Trudeau is marketing, is not an ad for any product or service, and is not sold in conjunction with a product or service that is related to the content of the publication. *Id.* at A145. In addition, the exception provided that Trudeau "must not misrepresent the content of the book." *Id.*[8]

**3. Trudeau's book, *Weight Loss Cure***

Beginning no later than December 2006, Trudeau was on television with infomercials touting his *Weight Loss Cure* book. These infomercials were widely disseminated. (D.64, Ex. 13 at ¶ 6). Trudeau appeared in each infomercial, and he stated that he had lost weight as a result of following the diet described in the book. He also claimed that "it is very easy to do," "it was the easiest, simplest, most effective thing I've ever done," and that it is "the easiest method known on planet earth." (D.64, Ex. 14a, 14b, 14d). In addition, Trudeau claimed that, once consumers had completed the regimen described in the book, they would not regain the weight

[8] Trudeau notes that the 2004 Order states that "nothing in this Order shall constitute a waiver of the Defendant's right to engage in speech protected by the First Amendment." Br. at 4. But he omits the preceding phrase: "with the exception of any waiver in connection with Parts I-X herein." *See* 2004 Order at 14 (Tru. App. at A151). The Commission's contempt action is based upon violations of Part I of the 2004 Order.

they had lost, and they would be able to eat an unrestricted diet: "85 percent of the people that have gone through the protocol, a year later don't gain the weight back. Even though they're eating everything they want, any time they want and they're not on a diet." (D.64, Ex. 14b, at 20). Trudeau also stated that he had followed the diet described in the book, and he claimed that, the night before appearing on the infomercial, "I had mashed potatoes and gravy, the mashed potatoes were real mashed potatoes loaded with cream and butter, gravy loaded with fat. I had a big prime rib marbled with fat. For dessert, I had a big hot fudge sundae with real ice cream and real hot fudge and real nuts and real whipped cream." D.64, Ex. 14a at 25-26.

In fact, the diet, which is described in great detail in *Weight Loss Cure* (but which was *not* described in the infomercials) is not simple, but is incredibly arduous.[9] The diet comprises four phases. During the "highly recommended" 60-step Phase 1 of the program, dieters are to obtain 15 colonics over a 30-day period.[10] They must also, *inter alia*, walk outside one hour per day, take 20-minute infrared saunas as often as possible, eat six times per day, consuming only organic meat and dairy, and

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[9] Substantial portions of *Weight Loss Cure* were entered into the record as Exhibit 12 in support of the Commission's Motion for Contempt (D.62). The two chapters of *Weight Loss Cure* that describe the diet, chapters 5 and 9, are reprinted in the Commission's Supplemental Appendix ("FTC App.").

[10] A colonic infuses water through the rectum to cleanse the entire length of the colon. Unlike an enema, it cannot be done at home, but must be performed by a licensed hydrotherapist using professional equipment. (D.64, Ex. 14f).

consume 100 grams of organic meat immediately before bed. Phase 1 also has a long list of forbidden items: no fast foods, no high fructose corn syrup, no food cooked in a microwave, no skin creams or lotions, no prescription or non-prescription drugs. *WLC* at 76-91 (FTC App. at A6 - A21).

Phase 2 is a mandatory phase and it lasts from three to six weeks. The book states (in all capital letters, in bold-face type) that this second phase must be done under the supervision of a "licensed health care practitioner." *WLC* at 93 (FTC App. at A23). It also cautions that the dieter must do everything exactly as described in the book, without any variation. *WLC* at 96 (FTC App. at A26). During this phase, the dieter must obtain daily injections of a hormone derived from the urine of pregnant women, human chorionic gonadotropin (hCG), and each of these injections must be given in the buttocks first thing in the morning, under the supervision of a doctor. *WLC* at 129. Because hCG is a prescription medication that has not been approved by the FDA for weight loss, the dieter must find a doctor willing to write a prescription, and administer this drug, for an unapproved use. (Trudeau went to Europe to get the hCG that he used.) On the first two days of Phase 2, dieters are advised to gorge themselves on as much food as possible. *WLC* at 93 (FTC App. at A23). But this changes abruptly after the second day, and from the third day until the end of Phase 2 (*i.e.*, either until the dieter has lost all the weight desired, or 45 days, whichever comes first), the dieter is restricted to 500 calories per day, eating only

certain specified foods.[11] Breakfast consists of unsweetened coffee or tea, nothing more. Lunch consists of 100 grams of beef, chicken, or fish, grilled without any oil; a handful of one from among a list of 12 vegetables (such as spinach, chard, beet greens, or lettuce -- dieters are advised not to mix the vegetables), seasoned only with salt, pepper, lemon juice, vinegar, or herbs; and one small apple, grapefruit, or a handful of strawberries. All food must be organic. Dinner is the same as lunch. The dieter is instructed not to take any medications, and is not to use most cosmetics. *WLC* at 95 (FTC App. at A25). The dieter is required to drink at least a half gallon of water per day, and is advised to get at least three Thai massages per week, to avoid ice-cold drinks, and air conditioning, and to walk for one hour per day. If, after 45 days on Phase 2, the dieter still needs to lose more weight, then the dieter must take six weeks off, "eating normally with the exception of no sugar and no starch." *WLC* at 96 (FTC App. at A26). After this hiatus, the dieter who wants to lose more weight resumes Phase 2.[12] *WLC* at 92-98 (FTC App. at A22-A28).

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[11] The National Institutes of Health advises that such very low calorie diets should be supervised by a physician. (D.64, Ex. 14h).

[12] The diet described in Phase 2 is not new. Indeed, in 1976, the Commission entered an administrative cease and desist order against a chain of clinics that used a weight reduction method that included both hCG injections and a 500 calorie per day diet. The Commission concluded, *inter alia*, that the clinics' advertising was deceptive because it failed to disclose that hCG had not been approved by the FDA as safe and effective in the treatment of obesity. *In re Simeon Mgm't Corp.*, 87 F.T.C. 1184 (1976), *aff'd sub nom. Simeon Mgm't Corp. v. FTC*, 579 F.2d 1137 (9th Cir. 1978).

Phase 3 of the diet, which lasts for 21 days, and begins only after dieters have reached their goal weight, is also mandatory and rigorous. Dieters may eat as much as they want, but they are restricted as to what they may eat. All sweeteners are forbidden (including any food containing sugar, dextrose, sucrose, honey, molasses, high fructose corn syrup, or any artificial sweetener), and all starches are forbidden (including bread, pasta, any product containing wheat, white rice, potatoes, yams, etc.). Dieters may not drink store-bought juices, or take any medications. Dieters are forbidden from eating any food from fast food restaurants, or from chain restaurants. They may not cook food in a microwave. They are required to walk one hour per day, to drink at least one half gallon of water, one cup of organic chamomile tea, two cups of Wu Long tea, and one cup of Yerba Mate tea every day. Dieters are required, every day, to consume ThreeLac powder (which supposedly combats intestinal yeast), krill oil, coconut oil, and probiotics (dietary supplements containing certain supposedly beneficial bacteria). Dieters are advised to limit ice-cold drinks, or any carbonated beverages, to avoid exposure to fluorescent lights and air conditioning, and to take frequent saunas. *WLC* at 99-105, 220-223 (FTC App. at A29-A35, A56-A59).

After completing the first three phases, dieters are not free to eat whatever they want, because they are required to follow Phase 4, which lasts forever. *WLC* at 105 (FTC App. at A35). For the rest of their lives, dieters must eat only organic food. They must avoid fast food, food sold by national restaurant chains, and food produced

by publicly traded companies. *WLC* at 107 (FTC App. at A37). They are required to do a liver cleanse, a parasite cleanse, a heavy metal cleanse, a colon cleanse, and a full body fat cleanse (all of these procedures purport to remove various toxins from the body).[13] Dieters are permitted to eat raw dairy products, but are advised to avoid those that have been either homogenized or pasteurized. They are required to consume ThreeLac powder, digestive enzymes, Acetyl-L Carnitine (a dietary supplement that purports to assist the body in oxidizing fat), vitamin E, krill oil, probiotics, and Eleotin (a dietary supplement that purports to assist the digestive process). They are also required to eat only 100 percent organic food. They are told to avoid high fructose corn syrup, artificial sweeteners, farm-raised fish, or food cooked in a microwave. Further, for the rest of their lives, dieters are advised to avoid ice-cold drinks, and limit exposure to air conditioning and fluorescent lights. *WLC* at 105-111, 224-227 (FTC App. at A35-A41, A60-A63).

Trudeau sold the rights to *Weight Loss Cure* to ITV Global, Inc., although Trudeau remained involved in the marketing of the book.[14] D.77; D.117 at 9. ITV

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[13] Although *Weight Loss Cure* makes it optional for dieters to do these cleanses on a routine basis, *see WLC* at 112 (FTC App. at A42) (suggesting that the cleanses be done "once or more per year"); *see* Br. at 40, it is clear that it is mandatory for dieters to do each of the cleanses at least once after commencing Phase 4, *WLC* at 224 (FTC App. at A60).

[14] Trudeau creates the impression that he appeared in the infomercials *gratis*. *See* Br. at 8-9. However, Trudeau's contract with ITV included an understanding that he participate in the infomercials. D.77; *see* Transcript of Hearing, 10/20/08 at 23-26.

produced the infomercials in which Trudeau appeared, and sold more than 800,000 copies of the book. Its net sales, which were made through the infomercials, totaled approximately $37.6 million. *See* D.186 at 6-7 and exhibits cited therein.[15]

**4. Proceedings below**

On September 13, 2007, the Commission filed a motion for an order to show cause why, as a result of his *Weight Loss Cure* infomercials, Trudeau should not be held in contempt of the 2004 Order. D.62 (Tru. App. at A121). On November 16, 2007, the district court entered its Memorandum Opinion and Order, holding that Trudeau had violated the 2004 Order. D.93 (Tru. App. at A23). First, the court held that the diet described in *Weight Loss Cure* was not easy, and that Trudeau's infomercials thus misrepresented the content of the book. Tru. App. at A33. The court rejected Trudeau's claim that the word "easy" was only puffing, or an expression of his opinion, citing cases in which terms such as "easily learned," or "easy credit" were held to be the bases of actionable misrepresentations. Tru. App. at A32. The court also rejected Trudeau's claim that, because the book referred to the diet as "easy," the infomercials did not violate the 2004 Order. The court noted that the 2004 Order prohibited Trudeau from misrepresenting the "content" of any book, and that "the word 'content' does not refer to a few cherry-picked phrases." Tru. App.

[15] In addition to the copies sold by ITV through the infomercials, approximately 800,000 additional copies were sold via retail marketers, such as amazon.com.

at A33. Second, the court held that Trudeau's claim that, after following the regime set forth in the book, a dieter could eat anything was a misrepresentation. Indeed, the court observed that, if one were to follow the diet, it would be impossible to eat either the big portion of prime rib "marbled with fat" or the "big hot fudge sundae" that Trudeau claimed to have eaten the night before he appeared on the infomercial. Tru. App. at A34.

The remedy phase followed. Trudeau filed a motion for reconsideration, D.95, and the Commission requested a compensatory monetary sanction, D.186. The Commission also filed a separate motion requesting that the court modify the 2004 Order so that Trudeau would be prohibited from participating in infomercials for books unless he first posted a $10 million bond, D.187. On August 7, 2008, the court rejected Trudeau's motion for reconsideration, modified the 2004 Order, and issued a ruling with respect to an appropriate remedy. D.157 (Tru. App. at A12). First, the court rejected Trudeau's claim that the contempt action was precluded by the Commission's Mirror Image Doctrine[16] because this case involved Trudeau's contempt of the 2004 Order, and the Mirror Image Doctrine was not incorporated into

[16] The Mirror Image Doctrine, which is set forth at 36 Fed. Reg. 13414 (July 21, 1971), was a statement of Commission enforcement policy, and provided that, "ordinarily [the Commission] will not proceed against advertising claims which promote the sale of books * * * [if the] advertising only purports to express the opinion of the author or to quote the contents of the [book] * * *." The Commission has recently rescinded the Doctrine, 74 Fed. Reg. 8542 (Feb. 25, 2009), as unnecessary.

that order. Tru. App. at A14-15. Second, the court reaffirmed its earlier holding that the diet described in *Weight Loss Cure* was not "easy," and that Trudeau's infomercials misrepresented the content of that book. Tru. App. at A16. The court ordered Trudeau to disgorge the royalties he received (approximately $5.2 million). It also modified the 2004 Order. However, instead of imposing the bonding requirement that the Commission had requested, the court modified the 2004 Order so that, for a three-year period, Trudeau was prohibited from participating in any infomercials for any product, including books, in which he had an interest. Tru. App. at A19-21.

The Commission then moved, pursuant to Fed. R. Civ. P. 59(e), for reconsideration of the court's order to correct a mathematical error in the court's calculation of disgorgement, and to resolve certain ambiguities in the three-year ban. D.165. On November 4, 2008, the court entered a Supplemental Order and Judgment. D.220 (Tru. App. at A4). Instead of requiring Trudeau to disgorge the royalties he received, the court required that he pay $37.6 million, the amount of consumer injury suffered as a result of Trudeau's contumacious and deceptive infomercials (*i.e.*, the net amount that consumers paid for those copies of Trudeau's book that were sold by ITV). Tru. App. at A7. The court reaffirmed that the 2004 Order remained in effect, and also required that, for a three-year period, Trudeau be prohibited from "disseminating, or assisting others in disseminating" any infomercial that in any way

promoted the sale or distribution of any book, newsletter, or informational publication in which he had an interest. Tru. App. at A7-8.

On November 13, Trudeau filed a motion requesting that the court alter or amend its Supplemental Order and Judgment, or that, in the alternative, the court stay the Order pending appeal. D.224 (Tru. App. at A53). On December 12, the court denied Trudeau's motion. D.229 (Tru. App. at A1). Trudeau filed his Notice of Appeal on December 16, D.231 (Tru. App. at A36); he filed an Emergency Motion for Stay Pending Appeal on December 23; this Court denied that motion on January 21, 2009.

## STANDARD OF REVIEW

This Court should affirm the district court's order holding Trudeau in contempt unless it concludes that the court abused its discretion. *Autotech* 499 F.3d at 751.[17] "[A] court abuses its discretion when its decision is premised on an incorrect legal principle or a clearly erroneous factual finding, or when the record contains no evidence on which the court rationally could have relied." *In re Kmart Corp.*, 381 F.3d 709, 713 (7th Cir 2004). Similarly, this Court should affirm the district court's decision to modify the 2004 Order unless it determines that the court abused its

[17] Trudeau notes that, in the Second Circuit, a court reviewing a contempt order applies the abuse-of-discretion standard in a more rigorous manner than in other situations. *See* Br. at 13, citing *U2 Home Entertainment, Inc. v. Wei Ping Yuan*, 245 Fed. Appx. 28, 29 (2d Cir. 2007). Even if this Court were to apply the Second Circuit's standard of review, the district court's order should be upheld. *See infra*.

discretion. *Browder v. Director, Dept. of Corrections of Illinois*, 434 U.S. 257, 263 n.7 (1978); *Mares v. Busby*, 34 F.3d 533, 535 (7th Cir. 1994).

## SUMMARY OF ARGUMENT

The district court correctly held Trudeau in contempt of its 2004 Order. That order allowed Trudeau to participate in infomercials promoting books, so long as Trudeau did not misrepresent the content of any book he was selling. But Trudeau, who has a history of misrepresentations, could not resist. In 2006 and 2007, his infomercials for the book, *Weight Loss Cure*, falsely depicted the diet described therein as "easy," when, in fact, the diet, which involved daily injections of an unapproved drug, colonics, and a 500-calorie-per-day menu, was excruciatingly difficult. Trudeau cannot contend that he was merely puffing when he described the diet as "easy," because "easy" was the primary claim trumpeted by Trudeau as the reason consumers should buy *Weight Loss Cure*.

Trudeau also misrepresented the book when he claimed that, after completing the first three phases of the diet, dieters could eat anything they wanted. In fact, however, Phase 4 of the diet, which lasts for the rest of the dieter's life, is, like the first three phases, highly restricted. Although Trudeau claims that Phase 4 is optional, it is, according to the book, only optional if dieters do not care whether they regain the weight they lost during the first three phases. Because Trudeau touts the book as a "permanent cure" for obesity, his contention that Phase 4 is optional is false. Nor is

there any merit to Trudeau's contention that his misrepresentations, however extreme, should be excused because the Commission somehow "blessed" his infomercials. Although Trudeau repeatedly contacted the Commission regarding other aspects of his business, he never sought advice regarding his *Weight Loss Cure* infomercials, and the Commission first became aware of those infomercials at the same time they were viewed by the rest of the public. Finally, Trudeau's contempt is not absolved by the fact that it took the Commission a few months to prepare its case after it first became aware of Trudeau's misrepresentations. Such minor delay is no defense, and, in any event, even after learning of the Commission's concern, Trudeau did not alter his conduct until ordered to do so by the district court. (Part I, *infra*.)

The court correctly ordered Trudeau to pay $37.6 million as a monetary sanction for his contempt. This is the amount paid by those consumers who purchased *Weight Loss Cure* through the 800 number posted in Trudeau's infomercials. Such a compensatory remedy is well within the authority of a court in a civil contempt proceeding. Trudeau complains that the sanction is "punitive" because he mistakenly believes that it will be paid to the government. But the court made clear that the sanction is to be used to provide restitution to the victims of Trudeau's contempt, and the Commission has already taken the first steps toward making such refunds. Trudeau also claims that the sanction is punitive because the Court did not account for those consumers who, despite Trudeau's misrepresentations, where nonetheless

satisfied with their purchase of *Weight Loss Cure*. In fact, it was Trudeau's burden to show that such consumers exist, a burden that he did not meet. Finally, the sanction is not rendered punitive merely because Trudeau did not receive the $37.6 million that consumers paid for the book. A compensatory sanction is measured by the harm a contemnor causes, not by the benefit he receives. (Part II.A., *infra*.)

Trudeau is mistaken when he suggests that he did not receive appropriate procedural protections. He had notice of the allegations of contempt, he was represented by counsel, he had ample opportunity to prepare his defense, he had a hearing at which his counsel presented witnesses, evidence, and argument. Trudeau contends that he was entitled to a jury trial with proof beyond a reasonable doubt. But it is well settled that, although these protections may be required in a *criminal* contempt proceeding, they are not necessary when, as here, a court holds a contemnor in civil contempt. (Part II.B, *infra*.)

The district court imposed the three-year infomercial ban on Trudeau not as a sanction for his contempt, but in response to a separate motion filed by the Commission seeking a modification of the 2004 Order. This ban, which prohibits Trudeau for three years from participating in infomercials for any publication in which he has an interest, was no abuse of discretion because, as Trudeau's contempt clearly shows, the 2004 Order was not achieving its goal of bringing Trudeau into compliance with the FTC Act's prohibition of deceptive advertising. (Part III.A, *infra*.)

This ban only restricts Trudeau's commercial speech -- speech promoting the sale of a publication. If Trudeau wants to speak out on other subjects, subjects that may be fully protected by the First Amendment, he is free to do so. Trudeau contends that the ban on his commercial speech is unconstitutional because, according to him, in his infomercials, he has "inextricably intertwined" his commercial speech with his fully protected speech. Trudeau is wrong: there is nothing that requires Trudeau to incorporate his fully protected speech into his infomercials, and nothing that precludes him from speaking on fully protected topics outside the context of his infomercials. The defamation cases that Trudeau cites are irrelevant. Those cases merely hold that a defamatory statement does not lose constitutional protection merely because it may have been included in an advertisement. They do not state that commercial speech in an advertisement that includes speech entitled to a higher level of protection is somehow entitled to greater constitutional protection. (Part III.B, *infra*.)

Finally, the three-year ban easily passes the test imposed by *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm. of New York*, 447 U.S. 557 (1980). The government has a substantial interest -- putting a halt to Trudeau's deceptive advertising. The ban furthers that interest because, for three years, Trudeau will be prohibited from participating in infomercials, a format that, in the past, he has repeatedly abused. And the ban is not more extensive than necessary because Trudeau's repeated deceptions and contempt of court orders demonstrate that a lesser

remedy would not work. This ban is not too broad because it does not prohibit him from selling publications or from expressing his opinions on any subject he wants. He can sell publications through any format other than infomercials, and he can express his opinion on any subject outside the context of such infomercials. (Part III.C, *infra*.)

## ARGUMENT

### I. THE DISTRICT COURT CORRECTLY HELD TRUDEAU IN CONTEMPT OF THE 2004 ORDER

The district court correctly held Trudeau in contempt for violating the 2004 Order because, during the course of his infomercials, he repeatedly misrepresented the content of *Weight Loss Cure*. In particular, throughout the infomercials he claimed *ad nauseum* that the *Weight Loss Cure* diet was easy when, as described above, it was anything but. Indeed, in the infomercials, he provided no details whatsoever of the diet -- he made no mention of the colonics, of the hCG injections, of the liver/parasite/heavy metal/colon/full body fat cleanses, of the 500 calorie per day menu. Clearly, by claiming that the diet was easy, Trudeau misrepresented the content of *Weight Loss Cure*.

Trudeau concedes that the 2004 Order specifically prohibits him from misrepresenting the content of any book, *see* Br. at 4, and he does not dispute that the diet was arduous. Instead, he seeks refuge in his contention that, *in his opinion*, the

diet is easy, and in the fact that the word "easy" appears at least 31 times during the course of the 255-page book.[18] *See* Br. at 37, 39. But these arguments miss the point. It does not matter whether he thought the diet was easy or that the word "easy" appears in the book. What does matter is that Trudeau's infomercials repeatedly claim that, by buying a copy of *Weight Loss Cure*, consumers will be provided with an "easy" diet. As the district court correctly found, that claim is plainly false.[19]

Nor is it relevant that Trudeau may have believed his diet was easy, because none of the infomercials ever states that Trudeau is merely expressing his own opinion. To the contrary, in the infomercials, Trudeau repeatedly states that *Weight Loss Cure* reveals an easy diet. These statements are false. In any event, "easy" is not even a fully accurate reflection of Trudeau's own opinion of the diet (as set forth in

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[18] Trudeau claims that, in his infomercials, he "quotes" from *Weight Loss Cure*. *See* Br. at 9, 10, 11, 38. In fact, however, Trudeau conceded that he merely ad libs his infomercials. *See* Trudeau deposition at 40-45. Moreover, as the district court found, "Trudeau admitted that he doesn't even read his books after dictating the text, and further that he does not script his infomericals or review them after they are recorded. It would thus be impossible for him to choose his words carefully while making the infomercials in light of the precise language contained in the Weight Loss Book." D.157 at 3 (Tru. App. at A14).

[19] It is irrelevant that the word "easy" appears in the book. The 2004 Order prohibits Trudeau from misrepresenting the "content" of any book. As the district court correctly recognized, "the word 'content' does not refer to a few cherry-picked phrases. * * * [A]ccording to Webster's, the word "content" means 'all that is contained in something, everything inside.'" D.93 at 11 (Tru. App. at A33). The content of *Weight Loss Cure* is not an easy diet.

*Weight Loss Cure*) because at several places in the book, he concedes that many aspects of the diet are not easy at all. *See WLC* at 76 (FTC App. at A6) ("[i]t may be difficult for most people to do all the steps in [Phase 1] with strict adherence"); *id.* at 91 (FTC App. at A21) (describing the requirements of Phase 1 as "overwhelming"); *id.* at 106 (FTC App. at A36) (recognizing that complying with the critical requirement of Phase 4, eating only organic food, "can be next to impossible"); *id.* at 111 (FTC App. at A21) (describing the requirements of Phase 4 as "overwhelming and difficult").[20]

Nor is there any merit to Trudeau's suggestion that the word "easy" is "puffing," *i.e.*, that "easy" is so subjective that his claims may not be made the basis of a contempt action. *See* Br. at 38-39, citing *Carlay Co. v. FTC*, 153 F.2d 493 (7th Cir. 1946). While the "easiness" of a diet may be somewhat subjective, it is undoubtedly one of the most salient characteristics to a consumer considering whether to purchase a diet book. Moreover, in *Carlay*, which involved a diet plan touted as "easy," this Court considered "undisputed facts," and concluded that, because the diet

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[20] Trudeau contends that he "had no direct control over the publication of the offending infomercials," as if this somehow absolved his conduct. He forgets that, by stipulating to (and personally signing) the 2004 Order, he agreed that he would not *make any representation* in any infomercial that misrepresented the content of a book. D.56 at 9, 29 (Tru. App. at A146, 166). The mere fact that Trudeau was not also involved with the dissemination of the infomercial is irrelevant. (The Commission is independently pursuing ITV in connection with the dissemination. *FTC v. Direct Marketing Concepts, Inc.*, No. 1:07-CV-11870 (D. Mass.).)

involved no drugs or "restricted or rigorous diet," "the only inference possible to draw from the undisputed facts leads necessarily to the conclusion that the plan is not a complicated one, but rather a relatively easy one * * *." *Id.* at 496. *See also Reilly v. Pinkus*, 338 U.S. 269, 271-75 (1949) (Court held that a finding of mail fraud could be based on false claim that a diet plan would allow dieters to shed pounds "easily"); *Goodman v. FTC*, 244 F.2d 584, 597 (9th Cir. 1957) (court held that the evidence supported the Commission's conclusion that, despite Goodman's claims, the technique in question (reweaving) could not be learned "easily"). As this Court has explained:

> [n]either are we impressed with the suggestion that representations relied upon can be excused on the basis that they are only "puffing," as that expression is sometimes used. It seems plain that the representations were made in order to induce the purchase of petitioners' products * * *. Statements made for the purpose of deceiving prospective purchasers * * * cannot properly be characterized as mere "puffing."

*Steelco Stainless Steel, Inc. v. FTC*, 187 F.2d 693, 697 (7th Cir. 1951). Here, Trudeau's claims that the *Weight Loss Cure* diet was "easy" were clearly made with the intention to induce consumers to purchase the book. Thus, as the district court recognized, puffing is no defense. D.93 at 10 (Tru. App. at A32). Accordingly, Trudeau has failed to show that the district court erred when it held that he had violated the 2004 Order.

The district court also correctly held that Trudeau misrepresented the content

of *Weight Loss Cure* when he stated that, after completing Phase 3, dieters could eat anything they want. In fact, dieters cannot eat anything they want because the *Weight Loss Cure* diet requires a dieter in Phase 4, which lasts for the rest of the dieter's life, to eat only "100% organic food," and prohibits the dieter from eating any food produced by publicly traded corporations, or any food containing sweeteners, or farm-raised fish, or any food cooked in a microwave.[21] *See WLC* at 106, 107, 110 (FTC App. at A36, A37, A40). Although Trudeau contends that Phase 4 is optional, Br. at 40, nothing in the book justifies this characterization. To the contrary, in the book, Phase 4 is described as a list of dos and don'ts that a dieter must follow "[t]o keep the weight off permanently * * *." *WLC* at 106 (FTC App. at A36). The *Weight Loss Cure* diet is touted as a permanent cure for obesity. *See WLC* at flyleaf (FTC App. at A2). Plainly, there is nothing "optional" about this critical part of the diet.

Trudeau's contention that the Commission had somehow "blessed" his infomercials for *Weight Loss Cure* is simply wrong. *See* Br. at 37. He contends that, because the Commission raised no objection to a 2004 infomercial in which Trudeau quoted from, and touted, an earlier book he had written ("*Natural Cures 'They' Don't*

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[21] In one of the infomercials, Trudeau claimed that the previous night he had eaten a "big" portion of prime rib "marbled with fat," a "big hot fudge sundae with real ice cream, real hot fudge, real nuts, and real whipped cream," etc., that was served to him at a Boston restaurant. D.157 at 6 (Tru. App. at A17). As the court noted, the meal Trudeau claimed to have eaten would not have complied with Phase 4 because the restaurant at which Trudeau dined does not serve organic food, and does not avoid sweeteners or food produced by publicly traded corporations. *Id.*

*Want You to Know About*"), this precluded the Commission from challenging his infomercials that misrepresented the content of *Weight Loss Cure*. Although, in 2004, the Commission raised no objection to one version of an infomercial for the earlier book, the Commission repeatedly cautioned Trudeau with respect to subsequent versions to make sure that he did not misrepresent the content of any book he was selling. *See* Tru. Ex. K at 1; FTC Ex. 31I. When it came to his *Weight Loss Cure* infomercials, Trudeau ignored that admonition.[22]

Further, the Commission never "blessed" the *Weight Loss Cure* infomercials because Trudeau never sought such a blessing, or any other input, from the Commission. Trudeau makes it appear that the Commission contacted him whenever it had any concern regarding his conduct. Br. at 6 ("the Commission regularly contacted Trudeau to advise him of any concerns it had with his compliance with the 2004 Consent Order"). In fact, after entry of the 2004 Order, Trudeau flooded the

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[22] Trudeau contends that he should be absolved of his contempt because he believes his conduct is consistent with the Commission's Mirror Image Doctrine (which is described *supra* at fn. 16). But the Mirror Image Doctrine is a statement of policy that describes how the Commission will normally exercise its discretion when it brings new enforcement actions regarding advertising for books. The Doctrine has no application here because this contempt action is not a new enforcement action, and Trudeau's conduct is governed by the 2004 Order. In any event, even if Trudeau had not been subject to the 2004 Order, the Mirror Image Doctrine would not apply because the infomercials do not merely express Trudeau's opinion. Instead, they mischaracterize the content of *Weight Loss Cure*, in a manner geared to promote the sale of the books. The Commission has never indicated that it would shy away from challenging such deceptive advertising.

Commission with requests for advice regarding compliance. The Commission responded to these requests but did not initiate these contacts. What is crucial is that Trudeau never requested any advice, and never contacted that Commission, regarding his *Weight Loss Cure* infomercials.[23]

Nor is there any merit to Trudeau's contention that the Commission should be precluded from obtaining any relief simply because Trudeau's infomercials had been airing for more than eight months before the Commission initiated this contempt action. *See* Br. at 41. In fact, although the first *Weight Loss Cure* infomercials were broadcast in December 2006, the book had not actually been published at that time, and the Commission did not obtain a copy until March 2007. Tru. Ex. CC at 2. Further, this sort of laches defense may be applied in an action brought by the government only when a defendant can make a showing of inexcusable delay (which Trudeau has not made), *United States v. Lindberg Corp.*, 882 F.2d at 1164 (delay of 13 months held not inexcusable). Indeed, "it is not true that once a government agency smells a rat, the agency must exterminate it forthwith or allow it the run of the public's house *in perpetuo*." *United States v. Michael Schiavone & Sons, Inc.*, 430

[23] To the extent that Trudeau is suggesting that the Commission is somehow estopped from seeking to have him held in civil contempt for his violations of the 2004 Order, such an estoppel defense can succeed against the government only if Trudeau can demonstrate "exceptional circumstances," a showing he most certainly has not made, and cannot make. *See United States v. Lindberg Corp.*, 882 F.2d 1158, 1163 (7th Cir. 1989).

F.2d 231, 233 (1st Cir. 1970). Finally, Trudeau's own conduct undermines his contention that, if he had known of the Commission's concern earlier, he would have "addressed the FTC's concerns." *See* Br. at 41. In fact, the *Weight Loss Cure* infomercials continued to run for more than two months after the Commission filed its motion to have Trudeau held in contempt, and did not cease until the district court issued its contempt order. Trial Transcript, 7/23/08 at 182-183.

## II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT ORDERED TRUDEAU TO PAY $37.6 MILLION TO COMPENSATE CONSUMERS INJURED BY HIS CONDUCT

### A. The monetary sanction imposed by the district court is compensatory, not punitive

The district court did not abuse its discretion when it ordered Trudeau to pay $37.6 million to compensate consumers injured by his conduct. It is well settled that a federal court possesses "the full panoply of powers necessary * * * to enforce whatever judgments it has entered." *Autotech*, 499 F.3d at 744; *see Spallone v. United States*, 493 U.S. 265, 276 (1990) ("'courts have inherent power to enforce compliance with their lawful orders through civil contempt,'" quoting *Shillitani v. United States*, 384 U.S. 364, 370 (1966). "Sanctions for civil contempt are designed either to compel the contemnor into compliance with an existing court order or to compensate the complainant for losses sustained as a result of the contumacy." *United States v. Dowell*, 257 F.3d at 699.

Most of Trudeau's arguments are based on his mistaken belief that the monetary sanction is "punitive." *See* Br. at 18-22. In fact, however, compensating those injured by a contemnor's contumacious conduct is a primary purpose of a civil contempt proceeding. The monetary sanction imposed by the district court accomplishes that very goal. Trudeau complains that the court did not "calibrate" the sanction to the damages he caused, but he is mistaken. *See* Br. at 19. Indeed, he does not deny that, as a result of his deceptive infomercials, consumers paid $37.6 million for copies of the *Weight Loss Cure* that they purchased from ITV.[24] The monetary sanction imposed by the court seeks to compensate injured consumers for that amount, and, therefore, is an appropriate compensatory award.

Trudeau complains that, although the district court initially assessed a monetary sanction of $5.1 million, it subsequently increased that amount to $37.6 million. *See* Br. at 18. The court based the $5.1 million sanction on the amount of royalties that Trudeau had received from the retail sales of *Weight Loss Cure* (*i.e.*, sales made by retailers, as opposed to sales made through the toll-free number listed in the infomercials). Although profits received as a result of contumacious conduct may, in

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[24] Trudeau repeatedly contends that the district court referred to the $37.6 monetary sanction as "draconian." Br. at 11, 13, 16, 25. In fact, what the court referred to as draconian was the Commission's request for a monetary sanction of nearly $47 million, which sought restitution for all purchasers of *Weight Loss Cure*, including not just those who purchased the book through the infomercials' 800 number, but also those who purchased the book at retail outlets. *See* D.186.

appropriate cases, serve as a surrogate for the damages caused by contumacious conduct, *Connolly v. J.T. Ventures*, 851 F.2d 930, 933-34 (7th Cir. 1988), citing *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 456-57 (1932), Trudeau argued that the $5.1 million sanction was inappropriate because it was linked to retail, not infomercial, book sales. D.170 at 10. Trudeau further claimed that he had not received any royalties from the infomercial sales. As the court observed, this left it with a choice: no monetary sanction at all (representing Trudeau's purported infomercial profits), or $37.6 million (representing infomercial sales, *i.e.*, the harm Trudeau caused). Little wonder that the court chose the $37.6 million sanction. This sanction was clearly compensatory, not punitive, and was no abuse of discretion.

Trudeau mistakenly complains that the sanction is not compensatory because it will be paid to the government, not to the victims of his contempt.[25] *See* Br. at 18. In fact, however, the district court made clear that it imposed the monetary sanction

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[25] Trudeau also complains that it was not appropriate for the court to refer to the monetary sanction as "coercive." Br. at 21-22. In fact, the court stated that it regarded the monetary sanction to be "appropriate as both a coercive and compensatory measure." D.220 at 2 (Tru. App. at A5). As explained above, the sanction is clearly compensatory. It is also clear that, having twice held Trudeau in contempt, the court was frustrated by Trudeau's flouting of its orders. *See* Trans. 11/4/08 at 21 (Tru. App. at A171). Thus, when the court referred to the sanction as coercive, it was presumably expressing its hope that, as a result of having been twice held in civil contempt, Trudeau would, in the future, appreciate the gravity of, and comply with, the court's orders. *See Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 443 (1911) (a remedial sanction in a civil contempt proceeding also serves to vindicate the court's authority).

"to make him [Trudeau] pay his victims for the losses that they suffered[.]" Trans. 11/4/08 at 21 (Tru. App. at A171). Thus, the sanction is clearly compensatory. Moreover, it is simply irrelevant that the court did not set forth all the details of the refund mechanism in its order. Indeed, in law enforcement actions brought by the Commission, courts frequently enter orders that require law violators to make restitution to injured consumers, but leave it to the Commission to establish the details of the refund mechanism. *See, e.g.*, *FTC v. Think Achievement Corp.*, 144 F. Supp.2d 1013, 1025 (N.D. Ind. 2000), *aff'd*, 312 F.3d 259 (7th Cir. 2002); *FTC v. Sili Neutraceuticals, LLC*, 2008 WL 474116 (N.D. Ill. 2008); *FTC v. J.K. Publications, Inc.*, 2000-2 Trade Cas. (CCH) ¶ 73,027 (C.D. Cal. 2000). That is what happened here, and the Commission is already attempting, through discovery, to obtain information regarding purchasers of *Weight Loss Cure* so that it can return whatever money it is able to collect to those consumers.

In any event, the monetary sanction would be appropriate even in the unlikely event that the Commission were ultimately unable to return the full sum it collected from Trudeau to purchasers of *Weight Loss Cure*. "A contempt fine * * * is considered civil and remedial if it * * * 'compensate[s] the complainant for losses sustained.'" *Int'l Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 829 (1994), quoting *United States v. United Mine Workers of America*, 330 U.S. 258, 303-304 (1947). In this action, the "complainant" is the Commission, and it procured

the 2004 Order to protect the public. Therefore, in this contempt action, the Commission stands in the shoes of the victims of Trudeau's contempt, and compensatory fines are properly paid to it. (Indeed, those victims could not bring an action to enforce either the FTC Act or the 2004 Order. *See Holloway v. Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973).)

The situation here is very different from *SEC v. McNamee*, 481 F.3d 451 (7th Cir. 2007), *see* Br. at 19. In that case, the SEC had obtained a preliminary injunction that prohibited McNamee from selling "penny stock" or other unregistered securities to the public. McNamee violated that order by selling more than 400,000 shares of penny stock in a company he controlled. The district court's civil contempt order required that McNamee disgorge the money he had received as a result of selling the penny stock. The contempt order further provided that, if purchasers of the stock could not be located, or elected not to surrender their shares, then any remaining funds would be transferred to the Treasury. 481 F.3d at 454. Although McNamee sold the penny stock in violation of the court's order, that stock had value. *Id.* at 457. But the order required McNamee to disgorge money he received regardless of whether the consumers who purchased the securities chose to cancel their purchases. This Court held that, to the extent that McNamee's disgorgement was not matched by a return of shares, his disgorgement constituted a fine, not a compensatory sanction. Because such a fine would not be an appropriate sanction in a civil contempt proceeding, this

Court remanded the case to the district court for further proceedings. *Id.* at 457-58.

In this case, however, the victims of Trudeau's contempt did not purchase a security, or any other item that may be traded on a market or has continuing value. Here, the injured consumers purchased books, copies of which are now used, and several years old. Trudeau has not made any showing that these copies have other than nominal value. Thus, regardless of whether consumers return the used copies of *Weight Loss Cure*, there is no possibility that the monetary sanction imposed by the district court could constitute a fine. Accordingly, there is no similarity between this case and *McNamee*. *See FTC v. Kuykendall*, 371 F.3d 745, 766 (10th Cir. 2004) (*en banc*) (when ordering a compensatory sanction for consumers injured by the defendants' contempt, "the district court need not offset the value of any product the defrauded consumers received").

There is no merit to Trudeau's contention that the monetary sanction is punitive, not compensatory, merely because some consumers might have been satisfied with *Weight Loss Cure* (despite the deception used to market the book).[26] *See* Br. at 20-21, 25. The district court held Trudeau in contempt because he made false and deceptive claims to sell his book. Those claims were material and they were

[26] This Court has repeatedly rejected the contention, which Trudeau now advances, *see* Br. at 19, that a money-back guarantee is a defense to deception. *FTC v. Think Achievement Corp.*, 312 F.3d 259, 261 (7th Cir. 2002), and cases cited therein.

widely disseminated. Thus, consumers are presumed to have relied on them. *FTC v. Freecom Communications, Inc.*, 401 F.3d 1192, 1206 (10th Cir. 2005); *McGregor v. Chierico*, 206 F.3d 1378, 1388 (11th Cir. 2000). "The fraud in the selling, not the value of the thing sold, is what entitles consumers in this case to full refunds * * *." *FTC v. Figgie Intern., Inc.*, 994 F.2d 595, 606 (9th Cir. 1993). In a situation such as this one, the burden falls on Trudeau to show that there are satisfied consumers. *See FTC v. Febre*, 128 F.3d 530, 535 (7th Cir. 1997). Although Trudeau had ample opportunity to produce evidence of satisfied consumers, he never did so.[27] Absent such evidence, Trudeau's contention that there were some satisfied purchasers of *Weight Loss Cure* is sheer speculation.

Finally, Trudeau repeatedly complains that the monetary sanction is punitive because he did not receive the proceeds of the sales of *Weight Loss Cure*, *i.e.*, the $37.6 million. *See* Br. at 19, 20, 23, 25, 26. But a compensatory sanction in a civil contempt proceeding is determined by the amount of harm caused by a defendant's contumacious conduct; it is not limited to the amount of profit the defendant may have

[27] Trudeau cites *FTC v. Kuykendall*, and contends that the district court must reduce its sanction to compensate for satisfied customers. *See* Br. at 20. But that case actually states that such an allowance must be made only if the defendants meet their burden of showing that such customers exist. 371 F.3d at 766-67. Trudeau failed to show that any of the purchasers of *Weight Loss Cure* were satisfied.

received. *See United States v. United Mine Workers*, 330 U.S. at 304.[28] Indeed, harm caused by a contemnor's conduct does not necessarily result in profits to the contemnor. *See*, *e.g.*, *United States v. Dowell*, *supra*, (attorney, who was held in civil contempt for failing to appear at his client's trial, was required to pay the costs incurred by the United States for the impaneling of the jury); *Mid-American Waste Systems, Inc. v. City of Gary, Indiana*, 49 F.3d 286 (7th Cir. 1995) (city, which was held in civil contempt for failing to comply with an order requiring it to honor a landfill lease, could be required to compensate the lessee for lost profits); *BPS Guard Services, Inc. v. Int'l Union of United Plant Guard Workers of America, Local 228*, 45 F.3d 205 (7th Cir. 1995) (employer, who was held in civil contempt for failing to comply with an order requiring that it rehire an employee, was required to pay the employee three years of back pay).

Similarly, *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48 (2d Cir. 2006), is irrelevant. *See* Br. at 24-25. That case, which interpreted the Commission's authority under the FTC Act, held that, when the Commission prosecutes violations of the FTC Act, it may not obtain restitution for injured consumers that exceeds amounts received by the

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[28] In holding that a civil contempt sanction may be based on the harm caused by the defendant, the Supreme Court relied on, *inter alia*, *Parker v. United States*, 126 F.2d 370, 380 (1st Cir. 1942), where the First Circuit held that "Parker's obligation to make reparation for the consequences of his civil contempt is measured not by the amount to which he can be shown to have thereby profited personally, but rather by the amount which, as the result of his contumacious acts" he harmed the ultimate victim. *United States v. United Mine Workers*, 330 U.S. at 304 n.80.

defendants. *Id*. at 67. But here, the Commission is prosecuting violations of the district court's order, not violations of the FTC Act. As explained above, in such a situation, the court's remedial authority comes not from the FTC Act, but from its inherent authority to remedy violations of the orders it has entered. *See McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949) (when imposing a sanction for civil contempt, a district court is not limited by remedial restrictions in the agency's underlying enforcement authority). The limitation set forth in *Verity* simply does not apply.[29]

### B. The district court employed appropriate procedures when it held Trudeau in contempt

Trudeau received all the procedural protections to which he was entitled prior to the entry of the civil contempt order. There is simply no merit to Trudeau's contention that, because the court assessed a large monetary sanction, and because his

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[29] In any event, *Verity* was wrongly decided because, when the Second Circuit interpreted the Commission's remedial authority, it improperly relied on the Supreme Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). *Great-West* held that the term, "equitable relief," as used in the Employee Retirement Income Security Act ("ERISA"), should be narrowly interpreted. But the FTC Act is not ERISA, and the enforcement actions that the Commission brings in the public interest are very different from the private action that was at issue in *Great-West*. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 397 (1946) (when the public interest is involved, the agency's equitable powers assume an even broader and more flexible character than when only a private controversy is at stake); *see also FTC v. Stefanchik*, 2009 WL 636510 (9th Cir., Mar. 13, 2009) (in an action brought by the Commission, "equity may require a defendant to restore his victims to the status quo where the loss suffered is greater than the defendant's unjust enrichment").

contempt involves "out-of-court disobedience" to a "complex injunction," he is entitled to additional procedural protections, including a "neutral factfinder" (presumably a jury), and "proof beyond a reasonable doubt." *See* Br. at 28.[30] In fact, a defendant in a civil contempt proceeding is not entitled to a jury trial. *Shillitani v. United States*, 384 U.S. at 371; *Daniels v. Pipe Fitters Ass'n, Local Union 597, USA*, 113 F.3d 685, 688 (7th Cir. 1997). Nor is it necessary that the contempt be demonstrated beyond a reasonable doubt. *See United States v. Dowell*, 257 F.3d 694, 699 (7th Cir. 2001) (proof in a civil contempt proceeding need only be clear and convincing). Trudeau seeks support for his argument from *UMW v. Bagwell*, *supra*. But that case involved a criminal, not a civil, contempt, and a court must follow criminal procedures before it enters an order for criminal contempt. *Id.*, 512 U.S. at 826.

Trudeau also cites *NLRB v. Ironworkers Local 433*, 169 F.3d 1217 (9th Cir. 1999), and *FTC v. Kuykendall*, 312 F.3d 1329 (10th Cir. 2002), *vacated* 371 F.3d 745 (10th Cir. 2004) (*en banc*), *see* Br. at 28, but neither case advances his cause. In *NLRB v. Ironworkers*, the court held that contempt actions brought by the NLRB are civil, and there is no right to a jury trial, even if the court imposed a noncompensatory fine having a punitive aspect. 169 F.3d at 1221. And, although a 2002 decision in

[30] Trudeau's claim that he should be accorded "the right to counsel," *see* Br. at 28, is confusing because he has been represented by counsel throughout these proceedings.

*Kuykendall* might have supported Trudeau's contention that he is entitled to a jury trial, the portion of that decision on which Trudeau relies was specifically vacated and superseded in 2004 by the Tenth Circuit's *en banc* ruling. In particular, the *en banc* court held that, even where the contempt action involves violations of a complex injunction, and even where the court imposed a large compensatory sanction ($39 million), neither a jury nor proof beyond a reasonable doubt was required. 371 F.3d at 754. Because the proceeding before the district court was for civil contempt, Trudeau received all the procedural protections to which he was entitled.[31]

## III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT IMPOSED A THREE-YEAR INFOMERCIAL BAN ON TRUDEAU

### A. The district court did not abuse its discretion when it granted the Commission's motion to modify the 2004 Order

The district court did not err when it amended the 2004 Order to prohibit Trudeau, for a three-year period, from participating in any infomercial for any book or other publication in which he has a financial interest. This modification was not

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[31] Not only is there no requirement for additional procedural protections merely because the contemnor violated a complex injunction, *see* Br. at 28, but also Trudeau cannot show that the 2004 Order was complex. Indeed, he conceded that the provision of the 2004 Order that he violated, which required that he "not misrepresent the content of the book," was "straightforward." Trial Transcript, 7/23/08 at 169. Moreover, although he contends that he should receive additional protections because the contempt took place out of court, *see* Br. at 28, he ignores that the record before the district court included transcripts and recordings of his infomercials, as well as the relevant portions of *Weight Loss Cure*. The court could, therefore, view Trudeau's contempt firsthand.

imposed, as Trudeau mistakenly complains, *see* Br. at 22-23, 26-27, as a sanction for contempt. Instead, it was entered in response to a separate motion filed by the Commission seeking a modification of the 2004 Order. In that motion (D.187), filed pursuant to Fed. R. Civ. P. 60(b), the Commission explained that, as a result of Trudeau's exploitation of the exception in the 2004 Order, his contumacious conduct, and his refusal to accept responsibility for that conduct, additional relief was necessary to protect consumers. That is, the 2004 Order, like the 1998 Order before it, had not achieved its purpose, *i.e.*, it had not put a halt to Trudeau's deceptive infomercial practices. Indeed, the court found that it could not trust Trudeau to comply with the 2004 Order as it was originally entered. *See* Trans. 9/9/08 at 6 (Tru. App. at A194) ("I don't trust him to make or publish infomercials anymore"). Thus, the court did not abuse its discretion when it granted the Commission's motion and banned Trudeau for three years from participating any infomercial for a publication in which he had an interest. (The 2004 Order already prohibited Trudeau from participating in infomercials for other products, programs, and services.)

**B. The three-year ban applies only to commercial speech**

Despite the ample justifications for the district court's modification of the 2004 Order, Trudeau attacks the time-limited infomercial ban as a violation of the First Amendment. *See* Br. at 29-36. The ban readily passes muster, however, under pertinent First Amendment principles. Significantly, the ban only imposes a

restriction on Trudeau's ability to engage in commercial speech. It is well settled that commercial speech, speech that proposes a commercial transaction, is entitled to a lesser degree of First Amendment protection than fully protected speech such as political, religious, or scientific discourse. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995). The speech banned by the modification to the 2004 Order fits within the core definition of commercial speech: infomercials in which Trudeau touts publications in which he has a financial interest.

Trudeau contends that, because he uses his infomercials not only to sell his books but also to express his views regarding various issues, his infomercials should be treated as fully protected speech, and be accorded the same level of constitutional protection as political, religious, or scientific discourse. *See* Br. at 32 n.7, 33. But as the Supreme Court recognized, "many, if not most, products may be tied to public concerns with the environment, energy, economic policy, or individual health and safety. * * * There is no reason for providing [the full panoply of First Amendment protections] when such statements are made only in the context of commercial transactions." *Central Hudson*, 447 U.S. at 562 n.5; *see Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 475 (1989) ("[w]e have made clear that advertising which links a product to a current public debate is not thereby entitled to the constitutional protection afforded noncommercial speech" (internal quotation marks and citations omitted)).

Trudeau mistakenly contends that, pursuant to *Riley v. Nat'l Fed'n of the Blind of North Carolina*, 487 U.S. 781 (1988), his infomercials are entitled to the highest level of First Amendment protection because his commercial speech is somehow "inextricably intertwined" with fully protected speech. *See* Br. at 33. But *Riley* involved charitable fundraising, not advertising, and the Court has held that fundraising, unlike the touting of diet books, is fully protected speech. *See Fox*, 492 U.S. at 474. In *Riley*, North Carolina had sought to compel professional fundraisers to include a disclosures of their fees in any solicitations, and the state characterized this compelled disclosure as commercial speech. *Riley*, 487 U.S. at 795. But, as the Court subsequently explained in *Fox*, the fee disclosure in *Riley* was inextricably intertwined with the fully protected fundraising only "because the state *required* it to be included." 492 U.S. at 474 (emphasis in original).

Trudeau's situation is similar to *Fox*, not to *Riley*. In *Fox*, a company that sold housewares to college students combined its sales presentation with instruction regarding subjects such as financial responsibility and home economics. 492 U.S. at 474. The company argued that its sales presentations were entitled to the highest level of First Amendment protection because the instructional portions of the presentation were inextricably intertwined with the sales presentations. The Court rejected this argument: even though the instructional portions of the sales presentations might be fully protected speech, they were not inextricably intertwined with the commercial

speech: "[n]o law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares." *Id.* Accordingly, the sales presentations in *Fox* were treated as commercial speech. Similarly, there is "no law of man or nature" that compels Trudeau to incorporate his musings on food company executives, the FTC, and the FDA into his infomercials. He chooses to do so, but that does not elevate his commercial infomercials to fully protected speech.

Nor is Trudeau helped by the state and district court cases he cites regarding advertising for books. *See* Br. at 33-34. In *Lacoff v. Buena Vista Publ'g Co.*, 705 N.Y.S. 2d 183 (N.Y. Sup. Ct. 2000), the court held that statements on the cover and flyleaf of a book constituted fully protected speech. The court based its decision in part on the fact that the cover and flyleaf are part of the book itself, not separate advertisements. *Id.* at 190. Trudeau's infomercials are separate from the books he is selling. The *Lacoff* court also relied on fact that New York law provides broader protection for speech than federal law, and it held that "advertising that promotes noncommercial speech, such as a book, is accorded the same constitutional protection as the speech it advertises." *Id.* at 189, 190. This is clearly inconsistent with numerous Supreme Court cases that treat advertising for legal services as commercial speech even though the legal services themselves are fully protected speech. *See*, *e.g.*,

*Florida Bar v. Went For It*, *supra*.[32]

In *Rezec v. Sony Pictures Entertainment, Inc.*, 116 Cal. App. 4th 135 (Cal. Ct. App. 2004), the court did state that advertising reflecting the content of films may be fully protected speech. *See* Br. at 34. But the court explained that this rule would apply only when the advertisements were "merely . . . adjunct[s] to the exhibition of the film[s], such as by using photographs of actors in the films * * *." 116 Cal. App. 4th at 142 (internal quotation marks and citations omitted). Trudeau's infomercials are not "mere adjuncts" to the books he is selling. Instead, they are separately produced advertisements that rely on the force of Trudeau's personality to sell a product, which happens to be a book.

Trudeau also cites *Nat'l Life Ins. Co. v. Phillips Publ'g Co.*, 793 F. Supp. 627 (D. Md. 1992), and *Lane v. Random House, Inc.*, 985 F. Supp. 141 (D.D.C. 1995), *see*

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[32] In *Keimer v. Buena Vista Books, Inc.*, 75 Cal. App. 4th 1220 (Cal. Ct. App. 1999), a state court in California considered a challenge to the same book that was at issue in *Lacoff*, and, unlike *Lacoff*, held that quotations from the book repeated on the book cover and flyleaf were commercial speech. Trudeau mistakenly contends that *Keimer* held that advertising materials related to books are noncommercial speech if they consist of "'advertising statements which were true, or were opinion or "rhetorical hyperbole" and thus were not verifiably false.'" *See* Br. at 35, citing *Keimer*, 75 Cal. App. 4th at 1231. In fact, Trudeau has taken the quote out of context. What the court in *Keimer* actually stated was that it would not "dwell at length" on the cases cited by defendant because, unlike the statements on the book cover and flyleaf, the speech in those other cases consisted of true statements, opinion, or hyperbole, which would not be actionable under California law. The court never indicated whether true statements, opinion, or hyperbole might, in appropriate situations, also be commercial speech.

Br. at 34, but, again, those cases do not help him. In *Nat'l Life*, a defamation case, the plaintiff, an insurance company, argued that its burden should be reduced because the defamatory statement that it challenged (an article that cast doubt on plaintiff's financial stability), which had appeared in a newsletter, had been reprinted in an advertisement promoting the newsletter. 793 F. Supp. at 643. *Id.* at 648. The court held that, even though the article was reprinted in an advertisement, and the overall purpose of the advertisement was to promote the newsletter, the particular statements at issue -- *i.e.*, those claimed to be defamatory -- could not be characterized as commercial speech because "[t]he content of th[os]e statements bears no direct relationship to the product, the newsletter, that is being sold." *Id.* at 644. Here, by contrast, the statements found to be deceptive and contumacious -- *i.e.*, Trudeau's infomercial statements that the book contained an "easy" method of permanent weight loss -- bore the most direct and salient relationship to the product being sold. There can be no doubt that such statements were commercial in nature.

*Lane* was also a defamation case. The author of a book regarding the Kennedy assassination made statements regarding Lane in his book. However, Lane sued the publisher of the book in connection with an advertisement for the book that included a summary of those statements. The court held that, just as a book is fully protected speech, so too is a summary of argument and opinion that appears in that book. 985 F. Supp. at 152. As the court explained in *Groden v. Random House, Inc.*, 61 F.3d

1045 (2d Cir. 1995), "advertising statements made to summarize an argument or opinion *within* a book and those made *about* a book as a product" are treated differently for First Amendment purposes, and the latter are entitled to no special protection. *Id.* at 1052 (emphasis in original). Again, *Lane* is not inconsistent with the ban imposed in this case, because nothing in that ban prohibits Trudeau from making statements that summarize arguments expressed in his books, so long as he does not do so in the context of an infomercial that promotes that book.

Because the ban applies to infomercials that promote the sale of publications, it applies to commercial speech. It in no way restricts Trudeau's speech outside of such infomercials.

### C. The three-year ban passes the *Central Hudson* test

The First Amendment in no way constrains the three-year infomercial ban that the court imposed on Trudeau. The government has the power to regulate commercial speech if (1) its interest in doing so is "substantial," and the regulation it proposes both (2) "directly advances" that interest, and (3) "is not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566. Under this test, the government must show, not that its regulation will effect a complete cure, but that it will alleviate identified harms to a "material degree." *Florida Bar v. Went For It*, 515 U.S. at 626. In regulating commercial speech, the government is not required to employ the least restrictive means of advancing its interests; it is sufficient that there

is a "reasonable fit" between means and ends -- "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.'" *Fox*, 492 U.S. at 480 (citation omitted). "Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Id.*

The three-year ban easily passes the *Central Hudson* test.[33] First, the government has a substantial interest in prohibiting the dissemination of deceptive or misleading infomercial advertising. *Novartis Corp. v. FTC*, 223 F.3d 783, 789 (D.C. Cir. 2000). Second, Trudeau does not dispute that the injunction directly advances the government's interest: for three years, Trudeau will be prohibited from participating in the dissemination of infomercials. This will alleviate to a "material degree" Trudeau's deceptive infomercials. Finally, the injunction is not more extensive than necessary to further the government's interest. This remedy is a reasonable fit to the problem (*i.e.*, the government's inability to put a halt to Trudeau's chronic deceptions), and is in proportion to the government's interest.

There is absolutely no merit to Trudeau's contention that the injunction

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[33] Trudeau complains that the injunction is a "prior restraint." *See* Br. at 30-31. But the Supreme Court has explained that, with respect to commercial speech, "traditional prior restraint doctrine may not apply." *Central Hudson*, 447 U.S. at 571 n.13. Instead, it has been supplanted by the three-part test set forth in that case. Because, as explained *infra*, the injunction passes that test, it is not an unconstitutional prior restraint.

prohibits "far more speech than necessary" or "trample[s] on [his] right to express opinions." Trudeau has twice been held in contempt of court orders that were intended to preclude him from participating in deceptive infomercials. When Trudeau was first held in contempt, the court entered the 2004 Order, to which Trudeau had stipulated, and which precluded him from participating in any infomercial for "any product, program or service." The 2004 Order did include an exception that permitted him to participate in infomercials for books, so long as he did not misrepresent the content of the book he was selling. But Trudeau exploited this exception, and, as the court found, he participated in infomercials that misrepresented the content of the book *Weight Loss Cure*. Because Trudeau has now twice been held in contempt, and has shown a clear penchant for deceptive infomercial advertising, the court quite properly forbade him, for a three-year period, from any participation in infomercials for publications in which he has an interest.

Trudeau is simply wrong when he contends that the three-year ban prohibits "far more speech than necessary." The situation that confronted the district court was extreme. Trudeau acts as if he is above court orders, as if he can ignore them with impunity. And it is also clear that, if Trudeau is allowed to participate in an infomercial, he cannot resist the temptation to deceive. The court imposed a less restrictive injunction when it entered the 2004 Order, but that failed to put a halt to Trudeau's deceptive conduct. The three-year ban is in proportion to the government's

interest.[34]

Nor does the ban "trample" on Trudeau's right to express his opinions. Indeed, the ban only precludes Trudeau from expressing himself in the infomercial format. He can advertise a book in which he has an interest in television, radio, video, or internet advertising, so long as the advertisements are less than two minutes long. He can advertise his books in print media without restriction. And he can even participate in infomercials for publications, if those infomercials are not for publications in which he has an interest. Further, as explained above, Trudeau is always free to engage in fully protected speech because, as the Supreme Court noted in *Fox*, "no law of man or nature" compels Trudeau to incorporate his opinions on the issues of the day into sales infomercials for publications in which he has an interest. He has chosen to do so in the past. However, because Trudeau has repeatedly abused that format, for the next three years, he must find another forum.

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[34] Trudeau complains that the injunction will prohibit him from appearing as a guest on shows such as the *Oprah Winfrey Show*. Br. at 32-33. In fact, however, he is free to appear on that show (and denounce the FTC or the FDA, if he chooses), so long as he does not take advantage of that appearance to sell a publication in which he has an interest.

## CONCLUSION

For the reasons set forth above, this Court should affirm the district court's decisions order holding Trudeau in contempt and modifying the 2004 Order.

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## CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2009, I sent 15 copies of the Brief of Plaintiff-Appellee Federal Trade Commission and 10 copies of the Commission's Supplemental Appendix to the Clerk of this Court by express overnight delivery. I also submitted an electronic version of the brief to this Court through its website. On the same day, I served two copies of the brief and one copy of the appendix by both express overnight delivery and by e-mail on counsel for appellants:

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## CERTIFICATES OF COMPLIANCE

1) I certify that this brief complies with Fed. R. App. P. 32(a)(7)(B). It is proportionally spaced and contains 13,871 words, as counted by the WordPerfect word processing program.

2) I certify, pursuant to Circuit Rule 31(e)(1), that the contents of the appendix are not available in digital format.

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