

IN THE UNITED STATES DISTRICT COURT

¹These terms are taken from the book jacket of the weight loss book that is the subject of these proceedings.

²Mr. Trudeau has had two felony convictions in the early 1990s, one for depositing bad checks and one for credit card fraud.

for a rule to show cause why defendant Mr. Trudeau should not be held in contempt for violating a provision of that permanent injunction.

FACTS

The 2003 litigation arose from Mr. Trudeau's marketing of coral calcium as a cure for many diseases, and of a product called "biotape," an adhesive pain relief product that supposedly eliminated pain from migraines, arthritis and sciatica. Despite the prohibition in the 2003 stipulated permanent injunction against false claims concerning coral calcium, Mr. Trudeau continued to represent that this product cured cancer. As a result, this court held him in contempt of the injunction. The parties ultimately resolved that matter by entering into a "Stipulated Final Order for Permanent Injunction" in September 2004, which prohibited Mr. Trudeau generally from producing or disseminating infomercials, with one narrow exception: he was allowed to make infomercials in connection with the advertising or promotion of publications such as books, provided that he "must not misrepresent the content of the book." He has since published several books, including Natural Cures "They" Don't Want You to Know About, Natural "Cures" Revealed: Previously Censored Brand Named Products that Cure Disease, and, most recently, The Weight Loss Cure "They" Don't Want You to Know About. It is the marketing of this last book through a series of three infomercials that brings Mr. Trudeau back to the attention of the FTC and the court.

The Weight Loss Book

The Weight Loss Cure “They” Don’t Want You to Know About (“the Weight Loss Book”) is a 255-page hardback volume copyrighted in 2007 and published by Alliance Publishing Group, Inc. of Elk Grove Village, Illinois. Mr. Trudeau’s infomercials describes the Weight Loss Book as disclosing the “easiest,” “simplest,” and “most effective” diet for fast and permanent weight loss. The Weight Loss Book details a protocol consisting of four phases, the last of which is life-long. Each of these phases has mandatory “things you MUST do,” “things you MUST NOT do,” and “things STRONGLY SUGGESTED you do.” Without describing the book in detail, these phases can be summarized as follows.³ In Phase One (which the book states “is strongly recommended, but not required”), “things you MUST do” include: fifteen colonics (from a licensed colon therapist) within a 30-day period; drinking one half to one gallon of pure water with coral calcium supplements daily; walking outside for one hour each day; and consuming a number of specified foods, organic foods and food supplements. The list of “things you MUST NOT do” includes complete avoidance of “fast food, regional, or national chain restaurants,” artificial sweeteners, specified fats and sugars, and all “non-prescription, over-the-counter or prescription medication (done only under the supervision of a physician).” Under the category of “STRONGLY SUGGESTED” are: deep breathing daily; 100% organic foods; yoga; massages; the use of shower filters; “play[ing] baroque classical music or other relaxing music at mealtime”; and playing a musical instrument. According to the book, dieters “should lose between five and thirty pounds during Phase 1.”

³A complete list of “MUSTs,” “MUST NOTs” and “STRONGLY SUGGESTED” do’s and don’ts from the summary at pages 213 through 230 of the Weight Loss Book is attached as Appendix A.

After 30 days of this regimen the dieter enters Phase Two (which is mandatory and lasts three to six weeks), when he or she “MUST” be supervised under the care of a licensed physician, drink one half to one gallon pure water with coral calcium supplements daily,

⁴As noted by the FTC, the National Institute for Health refers to any diet under 800 calories a day as a “very low calorie diet,” intended for the obese and requiring supervision by a physician.

⁵According to the FDA’s website, “FDA requires all labeling and advertising of HCG to state that it has not been demonstrated to be effective in the treatment of obesity. The ads must also

things: 1) travel outside the United States to obtain the substance without a prescription; or 2) find a doctor to prescribe HCG for a purpose not approved by the FDA and administer prescription injections in direct contravention of Phase Two's prohibition on prescription medications.

In Phase Three (also mandatory), the dieter "MUST" consume a number of specified organic and other food products, walk one hour a day outside, do a "colon cleanse" and colonics, eat six times a day, "[g]et personalized individual care from a licensed health care practitioner who does not use drugs and surgery," and drink one half to one gallon of pure water with coral calcium daily. The dieter "MUST NOT" consume sugar, starch, store-bought bottled, canned or cartoned juice, fast food, food from any "regional or national chain restaurant," certain sugars, meat, poultry, MSG, or trans fats. The Weight Loss Book "STRONGLY SUGGESTS" essentially the same items that were "STRONGLY SUGGESTED" in Phase Three, although it does add the use of "homeopathic human growth hormone."

Finally, the dieter comes to Phase Four, which is to last the rest of his or her life. The "MUST do" list includes (among other things): liver, parasite and colon cleanses; colonics; eating 100% organic foods; taking one hour walks outside daily; drinking one half to one gallon pure water with coral calcium supplements daily; a "supervised fast within twelve months"; and the consumption of other dietary supplements. The dieter "MUST NOT": ever use a microwave; consume fast food or any "regional or national chain restaurant food"; eat diet, low carb, low fat, non-fat, or "light" food, nitrates, MSG, artificial sweeteners, trans fats, or refined sugars; or use

state that HCG is not approved by FDA as safe and effective in treatment of obesity of weight control." See <http://www.vm.cfsan.fda.gov/~dms/cos-822.html>.

any “non-prescription, over-the-counter, or prescription drugs (must be done under the supervision of a licensed physician).” The Weight Loss Book “STRONGLY SUGGEST[S]” a number of special teas, yoga, resistance training, deep breathing, avoidance of “food from any restaurant,” exposure to air conditioning and florescent lights, and a number of the other items contained in the previous phases.

⁶Apparently, the December 2006 infomercial was produced prior to Mr. Trudeau’s obtaining the copyright on the Weight Loss Book in 2007.

Mr. Trudeau also repeats throughout the infomercials that after the four phase protocol is completed, “you’re done with the protocol, eat whatever you want and you don’t gain the weight back.” Referring to his own experience after purportedly having taken the “cure,” Mr. Trudeau states in a dialog with the supposed interviewer, “I’ve been off the program now . . . guess what I can eat? Anything.” [Interviewer] “Nothing is restricted?” [Mr. Trudeau] “Oh, let’s see, 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, real hot fudge, real nuts and real whipped cream.” He further states that “you’ll keep the weight off forever. You’ll never have to diet again.”

DISCUSSION

This court has the inherent power to enforce its orders through civil contempt proceedings. Shillitani v. United States, 384 U.S. 364, 370 (1966); Jones v. Lincoln Elec. Co., 188 F.3d 709, 737 (7th Cir. 1999). The FTC, as a party to the original action, can invoke the court’s power by initiating a proceeding for civil contempt. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 44-45 (1911). To establish defendant’s liability for civil contempt, the FTC must show by clear and convincing evidence that: 1) a valid court order existed; 2) defendant had knowledge of the order; and 3) defendant failed to comply with the order. Stotler & Co. v. Able, 870 F.2d 1158, 1163 (7th Cir. 1989). Once the FTC makes such a prima facie showing, the burden then shifts to defendant to demonstrate why he was unable to comply with the order. FTC v. Think Achievement Corp., 144 F. Supp. 2d 1029, 1034 (N.D. Ind. 2001), aff’d in part, 312 F.3d 259 (7th Cir. 2002).

To hold defendant in contempt, the court need not find that defendant willfully violated

FDA approved hormone, are mandatory, as are a large number of the onerous dietary and lifestyle restrictions and requirements of the protocol.

Mr. Trudeau also fails to mention that many courts have found the use of the word “easy” to be more than mere puffing for more than fifty years. The Supreme Court found the statements that a dieter could shed pounds “easily” and “without tortuous diet” to be more than puffing when the facts clearly demonstrated that the advertisements for the diet in question misrepresented the actual program dieters had to follow. Reilly v. Pinkus, 338 U.S. 269, 271-75 (1949). The Ninth Circuit found the use of the phrase “easily learned” to be more than puffing because the technique in question was, in fact, difficult to learn. Goodman v. Federal Trade Commission, 244 F.2d 584, 597, 603 n. 43 (9th Cir. 1957). The D.C. Circuit found the term “easy credit,” as used by a jewelry store making loans, to be misleading when such loans involved purchasing jewelry at “unconscionably high prices” and garnishing of the purchaser’s wages after receiving such credit. Tashof v. Federal Trade Commission, 437 F.2d 707, 712 (D.C. Cir. 1970). Mr. Trudeau is simply incorrect that the term “easy” is always puffing or the expression of an opinion, and he is certainly incorrect as to its use in the instant case.

Additionally, the instant case differs from the cases relied upon by defendant in disputing the FTC’s argument because it arises in the context of a contempt proceeding. This court ordered Mr. Trudeau not to mispresent the “content” of his books.⁷ Despite Mr. Trudeau’s

⁷As noted by the FTC, Mr. Trudeau expressly waived his “right to engage in speech protected by the First Amendment” in the Order, and that waiver was “voluntary, knowing, and intelligently made” as required in the context of constitutional rights. D.H. Overmyer Co., Inc. v. Frick, 405 U.S. 174, 185 (1972). Additionally, despite Mr. Trudeau’s arguments to the contrary, his infomercials are quite clearly commercial speech; indeed, their entire purpose is to entice viewers to enter into a commercial transaction—the purchase of his book. Misleading commercial speech, such as the language at issue in the instant case, is entitled to no First

Amendment protection. See, e.g., Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n

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, real hot fudge, real nuts and real whipped cream.” According to Mr. Trudeau, when “you’re done with the protocol, eat whatever you want and you don’t gain the weight back.”

These claims are patently false. Phase Four of the protocol is described repeatedly as lasting “the rest of your life.” As noted by the FTC, the fact that the protocol lasts until the dieter dies necessarily means that the dieter can never complete the protocol. The diet is also, of course, a far cry from one with “no restrictions.” Phase 4 has, in fact, 50 such restrictions, including, among others: a strict regimen of only 100% organic foods; complete avoidance of all “fast food, regional or national chain restaurant food”; no “brand name” food—i.e., no food “produced by large publicly traded corporations”; no highly refined sugars, including corn syrup, fructose, and dextrose; no artificial sweeteners; no trans fats; no monosodium glutamate; no food with nitrites; no farm-raised fish; no food cooked in a microwave; and no “diet, low carb, low fat, non-fat, or ‘lite’ food.”

How Mr. Trudeau was able to eat a “big” portion of prime rib “marbled with fat” and a “big hot fudge sundae with real ice cream, real hot fudge, real nuts and real whipped cream” and still follow Phase 4 of his own protocol remains a mystery. As far as this court can tell, it is impossible. More importantly, though, it is misleading, and it misrepresents the content of his book in flagrant violation of this court’s order.

CONCLUSION

As discussed above, Mr. Trudeau has violated

