IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

08-4249

FEDERAL TRADE COMMISSION,
Plaintiff - Appellee,
v.

KEVIN TRUDEAU,
Defendant - Appellant.

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

BRIEF OF APPELLEE FEDERAL TRADE COMMISSION

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MISCELLANEOUS

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 C

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 i

[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 T

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.

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

[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.

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).

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

[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).

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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 star

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.

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

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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

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 [illegible] Tj 6.9600 0.0000 TD(b)h 0.0000 TD(an)Tj 17.3400 0.0000 TD(y su

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 fa[illegible]

[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

[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

[21] In one of the infomercials, Trudeau claimed that the previous night he had eaten a “big” portion of prime

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.

F.2d 231, 233 (1st Cir. 1970). Finally, Trudeau's own conduct undermines his contention that, if he had k

Trudeau repeatedly contends

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 y D(e).sl

[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 proper

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.

[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.

In any event, *Verity* was wr

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 *t6.1200 0.0000sTD0000 TD(g)Tj6.96*

[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.

[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.0000 97.560

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 w

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 t

In *Keimer v. Buena Vista Books, Inc.*, 75 Ct B t B248400 0.0000 TD.(,)Tj3.4800 0.0000

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 f

[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*

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 decisions

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 adverti

[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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