#### No. 15-3472

#### IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## FEDERAL TRADE COMMISSION, Plaintiff-Appellee

۷.

# KEVIN TRUDEAU, *Defendant*,

and

HOGAN MARREN BABBO & ROSE, LTD., FARUKI IRELAND & COX, P.L.L., Objectors-Appellants

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 1:03-cv-03904 Hon. Robert W. Gettleman, District Judge

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## INTRODUCTION

The district court ordered Kevin Trudeau to pay \$37 million in compensatory contempt sanctions to redress victims defrauded E \ 7 U X G H D X ¶ V violation of an injunction. In response, Trudeau attempted to hide his assets through a web of companies and business associates he controlled. One of those companies was Website Solutions which the FTC subpoenaed to produce information that would enable it to track the hidden assets. 7 U X G H D X ¶ Wwebsite Solutions and his associates engaged lawyers <sup>2</sup> using the receivership assets to compensate consumers <sup>2</sup> who at best will receive a fraction of their losses <sup>2</sup> and not lawyers who worked on behalf of a company that was used to hide assets that could have gone to compensate those very consumers. The equities particularly disfavor lawyers who may be

the redress plan DQG <sup>3</sup>DQ RUGHU WKDW DGGUHVVHV DO motion that sparked the postjudg

from misrepresenting the content of any book. D.56. Trudeau violated the injunction, and in November 2007, the district court held him in contempt and imposed contempt sanctions. D.92, D.93. This Court affirmed the contempt ruling, but vacated and remanded on remedy. *FTC v. Trudeau*, 579 F.3d 754 (7th Cir. 2009). On remand, the district court imposed a \$37.6 million compensatory sanction, which reflected <sup>3</sup> W Konsumer loss resulting I U R P 7 U Xcontbh@cXonsections deceptive infomercial marketing 'of a diet book. D.372 at 13-14. This Court affirmed. *FTC v. Trudeau*, 662 F.3d 947 (7th Cir. 2011), *cert. denied*, 133 S.Ct. 426 (Oct. 9, 2012). Trudeau claimed poverty and refused to pay the contempt sanction for more than two years.<sup>2</sup>

<sup>2</sup> The law firms wrongly contend t K D W W K H ) 7 & <sup>3</sup> G Ш@ct @n R W K L Q , the contempt sanction. Br. 5. The FTC reasonably waited until 7 U X G H D X ¶ V P X O W L S O H D S S H D O V R I W K H of det wave testol Fed/in F R X U W ¶ October 2012 before it actively engaged in collection efforts. Even before then, the FTC sought discovery from various financial institutions to determine the extent D Q G V R X U F H R I 7 Stark Q. HD 4X0¶ D. 475. V V H W V 7 K H O D Z I L U P V D U H D O V R Z U R Q J W Kt D W W K H ) 7 & M X G J P H Q W F L W Dulwider Rii@pisStatu Ro Festri@tX7UHXVG H D X ¶ V D F F H to his funds. Br. 5 (citing 3/7/13 Tr. at 3). Federal agencies bringing an action for contempt in the public interest are not required to utilize state execution procedures to discover assets. Such procedures would have been particularly inappropriate here because Trudeau was repeatedly shielding his assets by using nominees and transferring assets off shore. See D.575 at 1 (citing McComb v. Jacksonville Paper Co., 336 U.S. 187 (1949)); 3/7/13 Tr.

(ci(civerf**on**isuTr.

On July 13, 2012, the FTC again moved to hold him in contempt.

D.481, D.481-1. In its motion, the FTC showed

entities) and opposed the ) 7 & ¶ V PRWLR.QD.57437; DF5474; FDS57741.O Faruki was no stranger to the matters at hand <sup>2</sup> it had previously represented companies later found to be controlled by Trudeau that had moved to quash other FTC subpoenas issued on banks VHHNLQJ LQIRUPDWLRQ DEF assets, including assets held by Website Solutions.<sup>4</sup>

Faruki objected to the subpoena even though the district court had

already found the FTC had established a prima facie case of contempt based

in part on evidence showing 7 U X G H D X ¶ V E H Q H I L F L Dover F R Q W U R

Website Solutions. The firm denied that Website Solutions possessed any

Trudeau-related assets, and asserted that the only connection between

Website Solutions DQG 7UXGHDX LV Werkgeogrees/Vor Watk HatveFRPSDQ\

previously engaged, in some business with Trudeau. ´ D.574 at 2, 7-8, 11.

Those contentions, it was ultimately revealed, were untrue. Among other

WKLQJV 7UXGHDX KLPVHOI DSSHDUHG DV :HEVL

<sup>&</sup>lt;sup>4</sup> Appellants are thus wrong that Faruki had no involvement with this action until January 2013. Br. 7. Since as early as March 2012, that law firm had represented several companies found to be controlled by Trudeau (including Website Solutions) and aggressively opposed the FTC discovery looking for T U X G H D X ¶ V D VbánHsV )/D K/ K/ G G ¶ Z/L DWK W H P S W V W R E O R information gathering were unsuccessful, and they significantly delayed the ) 7 & ¶ V O R F DUX G G J D R,¶ik@ yDaVoWingWi M to further hide those assets. See, e.g., D.470-D.475; FTC v. Trudeau, No. 1:12-mc-22 (S.D. Ohio motion to quash filed Mar. 1, 2012), denied, 2012 WL 6100472 (S.D. Ohio Dec. 7, 2012); FTC v. Trudeau, No. 5:12-mc-35 (N.D. Ohio motion to quash filed Mar. 20, 2012), denied, 2012 WL 5463829 (N.D. Ohio Nov. 8, 2012).

at a Rule 30(b)(6) deposition. SA113-115 (D.915 (Ex.5) at PDF pp. 87-89). On March 6, 2013, the district court overruled ) D U Xobbjec¶ion/hs and ordered the company % comply forthwith with the subpoena. ´ D.577, D.578 at 8. April 4, 2013, the FTC served another subpoena to Sant in his corporate capacity. D.915 (Ex. 11) at PDF pp. 168-175.<sup>6</sup> To respond to the subpoenas, Website Solutions hired BlueStar Case 6 R O X W L R Q V , Q Fmake<sup>3</sup>a% O X H 6 V copy R I 6 Detective finite/devices. The company had U H M H F W H G W K H ) 7 & to contempt, the court directed the FTC to propose a Receiver to take control of Trudea X  $\P$  V DiMcMudiling/Website Solutions. The court ordered the RHFHLYHU WR <sup>3</sup> P

C. The Order on Review Approving Distribution of Assets

On July 9, 2015, the FTC asked the court to approve a plan to distribute W R 7 U X G H Dtixe \$8/mil/librFre&OL/ePeV from him and his entities. D.892, D.892-1. The FTC proposed a redress administrator that would provide *pro rata* payments to consumers deceived by 7 U X G H D X ¶ V infomercial who had not received a refund, 1,278,559 purchasers in all. *Id.;* D.949. On July 15, 2015, the Receiver asked the court to approve a notice of its proposed distribution of proceeds to the FTC to give interested parties an opportunity to object. D.898. The appellants (along with Trudeau and three individuals) objected. D.907, D.909-D.912.

At an October 7, 2015, hearing, the district court JUDQWHG WKH ) 7 & motion and overruled all objections to the distribution plan. A1 (D.917). That determination is the ruling now on review. In its oral ruling, the court rejected the law firms ¶objections. The court <sup>3</sup>VDZ QR UHDVRQ ZK\ > L<sup>\*</sup> UHLPEXUVH > WKH OD 120. I)LRUP WW& HD WFRD/ONO S´DU\$W <sup>3</sup>D doing is resisting the discovery \* \* \* which led to the receivership, which led WR WKH UHFRYHU\ RI WK2.HI-4P TRHQIAMA IWUKRDW¶ ZH KDYH resistance to discovery GLG QRW <sup>3</sup>EHQHILW > @ WKH UHFHLY LPSHGHG WKH MJ.HE-B. HOLR/UHHUR/YKHLS ´GHVSLWH WKH OF assertions to the contrary, the asset-shielding entities like Website Solutions

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<sup>3</sup>ZHUH LQ IDFW FR,Q IZVOUGR C%ODHECH GEN RY UDXOEOH ID IX Q W <sup>3</sup> ZLWK ′7UXGHDX WU kdL1Q,J14-W5RTHKuts, tG bellovD recorderyW V of any fees would amount in effect WISS D \LQJ 0U 7UXGHDX ¶ V OHJ complying with discovery that he was resisting because he was trying to hide DOO WKH/k/. H12-124.VF/unithbell/, bes the FTC reported at the hearing, the Receiver has determined that Trudeau likely continues to hold substantial assets, primarily overseas, A8:14-17.

The court also recognized the trade-off between paying the requested IHHV DQG FRQVXPHU UHGUHVV 7UXGHDX¶V YLF anywhere near the amount that they VKRXOG EH ´ WK77:118F19R XUW VW The Receiver had collected 38 million of the 37 ´million Trudeau owed to his with discovery should be shifted to the requester under Fed. R. Civ. P. 45.

See Spears v. City of Indianapolis, 74 F.3d 153, 158 (7th Cir. 1996) <sup>3</sup> > \$ @ Q abuse of discretion is established only where no reasonable [person] could agree with the district court; if reasonable [people] could differ as to the SURSULHW\ RI WKH FRXUW ¶ V DFWLRQ QR DEXVE Washington v. Sherwin Real Estate, Inc., 694 F.2d 1081, 1087 (7th Cir. 1982) (citation omitted); see Trudeau, 579 F.3d at 762-63 (abuse of discretion UHTXLUHV D <sup>3</sup>FOHDUO\ HUURQHRXVUniu@GLQJ´ RU States v. Silva, 140 F.3d 1098, 1101 n.4 (7th Cir. 1998)).

## SUMMARY OF ARGUMENT

1. The district court ¶ V G H F þrivonLitikze@the WolfsRribution of UHFHLYHUVKLS IXQGV WR 77abbhe/c0Bahrl 100 Dawnfy/e/rs F R Q V X P H U representing his companies and associates

retains significant assets, particularly abroad. SA146 (D.890-1 at 50); A8:14-

17. Thus, the lawyers may attempt to collect their fees from him. It was well

ZLWKLQ WKH FRXUW¶V EURDG inhthokselwdeoh GLVF

circumstances that the lawyers did not merit an awardti

WKH\VKRXROQGOSMENHIIÓn out of the 37 ´PLOtKoe bookmQnad directed Trudeau to pay. A7:18-19, 24. And the deficit was only growing larger through the effect of postjudgment interest. A8:1-8. Every dollar of the limited Receivership assets paid to the lawyers was a dollar not used for FRQVXPHU UHGUHVV 7KDW ZDV <sup>3</sup>HQRXJK WR RY ILUPV ´WR WKH 5HFHLYHU¶V SODQ WR GLVWULE than splitting it between victims and lawyers. *Id.* 21-22. That equitable MXGJPHQW ZDV DOVbRoaZdist/detKdn.Q WKH FRXUW¶V

& R X U W V K D Y H G H F O L Q H G W R S D \ O D Z \ H U ¶ V I (indeed, less egregious) situations. In *CFTC v. Nobel Met* D O V, 670FV30d¶ O 766 (9th Cir. 1995), for example, the Ninth Circuit affirmed the denial of a U H T X H V W W R SIDIW DRVXWWR RUQ HUN ¶ Y H Q D V V H W V Z K H Q V K R U W R I W K H D P R X Q W Q H H G H G W R F R P S H Q V D V F X V W R RUH T T S. As a matter of equity, the need to maximize consumer redress adequately justified the denial of fees. *Nobel Metals* relied in turn on *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344 (9th Cir. 1989), which signaled approval of a O L P L W D W L R Q R Q ( ðeni UHFHLYHUVKLS HVWDWH WR SD\ >GHIHQGDQW¶V YDOXH RI IUR]HQ DVVHWV ZDV <sup>3</sup>ZHOO VKRUW RI WKH GHIHQ G. DdQaW7889¶TNeIThirW/Curleuit affirmed that judgment. *CFTC v. Am. Metals Exch. Corp.*, 991 F.2d 71, 79-80 (3d Cir. 1993). *See also FTC v. Sharp*, No. CV-S89-870 RDF, 1991 WL 214076, at \*2 (D. Nev. July 23, 1991) <sup>3</sup>% HFDXVH LW GRHV QRW DSSHDU money in the estate to recompense all potential victims, [the attorney] should not be allowed at this time WR UHFRYHU DWWRUQH\$s¶V IHHV II HVWDWH <sup>′</sup>

The equities weigh even more strongly against paying the lawyers in this case, which involves a final postjudgment distribution order, as distinct IURP FDVHV EDUULQJ DW Wrift phased of average AULQ, the large shortfall in consumer redress is known and certain. *FTC v. Jordan Ashley, Inc.*, No. 93-2257-Civ, 1994 U.S. Dist. LEXIS 7577, at \*12 (S.D. Fla. May 3, 1994) (denying request after final judgment for defendant Vattorney \$ fees from fund designed to compensate consumers EHFDXVH GRLQJ VR <sup>3</sup> GHSULYH 'HIHQGDQWV¶ YLFWLPV RI WKH IXOO P LQMX).ULHV ´

Even beyond the inequity of paying lawyers before victims and the anomaly of rewarding the agents of delay and deceit, the equities particularly

company had only limited business dealings with Trudeau. D.574; SA113-115 (D.915 (Ex. 5) at PDF pp. 87-89). And, as noted, the FTC had showed as early as July 2012<sup>2</sup> months before it issued its principal subpoena to Website Solutions<sup>2</sup> that Trudeau controlled the company (and used nominee officers V X F K D V 7 U X G H D Xa¶st/regitesehted%syD E H Q N R Faruki) and was in contempt. D.481, D.481-1; *see* SA1-71. The connection between Trudeau and Website Solutions<sup>2</sup> and thus the risk of non-payment <sup>2</sup> had been squarely raised before Faruki performed any work responding to the subpoena. The firm is therefore responsible for its own predicament: had it promptly complied with the December 2012 subpoena to Website Solutions, it may have been able to collect its fees before the receivership was imposed.

Hogan Marren is in a similar posture. To the degree it assisted with Website Solutions ¶ V S U R OE Wass Wildje BE OD the same warnings as Faruki. To the extent it represented Sant, the signs were equally (if not more) powerful.

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efforts to obtain information from Website Solutions (and other Trudeaurelated entities). It should have come as no surprise to the firm that Website Solutions would end up placed in a receivership and unable to pay its bills.

+ R J D Q 0 D U U H Qit (gation Support Rexplanses is similarly unavailing. The FTC offered some of these services (including imaging 6 D Q W (V F H O O S (Khrs Qersonal Quait actobut)) (Fet of Charge, but the law firm refused. Equity in no way compels allocation of limited resources away from the victims of deception to lawyers who are paid large amounts of money for unneeded services.

In short, even if the law firms could not pursue Trudeau for payment, they assumed the risk of non-payment when they agreed to their representation knowing that the FTC sought to seize 7 U X G H D X ¶ V D V V H W V Y L F W L P V ¶ E H Q H I L W , DQ Q W KSRD/UHWFLIFUKFOXDPU/OW D<sup>3</sup>Q F @ V important consumer interests at stake in this case \* \* \* the fairest course of D F W L R Q L V W R U H T X L U H F R X Q V H O W R EsetH D U W K H should have known its client <sup>3</sup> P L J K W O D F N V X I I L FstfetesQ W I X Q G V when the representation began. *FTC v. Williams, Scott & Assoc. LLC*, No. 1:14-CV-1599-HLM, 2015 WL 7351993, at \*3 (N.D. Ga. Sept. 22, 2015), *appeal pending sub nom. FTC v. Lenyszyn*, No. 16-10063 (11th Cir. docketed Jan. 5, 2016); *see also Sharp*, 1991 WL 214076, at \*1 (cited in *Williams*, and holding that {[w]hen [a O D Z \ H U @ G H F L G H G W R abd FTTSC U H V H Q W F D V H <sup>3</sup> K H V K R X O G K D Y H N Q R Z Q W K D W S D \ P H Q W guaranteed ).

7KH ODZ ILUPV GR QRW VHULRXVO\ FRQWHVV

The ILUPV¶ FRQWHQWLRQ WKDW GLVWULFW FR IRU GLVFRYHU\ H[SHQVHV EDVHG RQ LWV <sup>3</sup>>V@X rule.<sup>10</sup> Br. 21-22. The rule does not support an award of fees for multiple reasons.<sup>11</sup>

First, the law firms themselves lack standing under Rule 45. The Rule authorizes fee-VKLIWLQJ RQO\LQ IDYRU RI SHUVRQV <sup>3</sup>V their counsel. As the district court held, <sup>3</sup>XQGHU 5XOH LW¶V WKH to the subpoe QDV ZKR KDYH D domber/set/von/MoRex/demsels XHVW ´ <sup>3</sup>LQFXURHROS OQLQJ ZLWK /A/Sk20H23/ The formsholio 100V ´ authority allowing lawyers themselves to seek compensation under Rule 45.

Second, Website Solutions itself was not a non-party eligible for a fee award under Rule 45 because it was not a non-SDUW\ 5XOH <sup>3</sup>WHOO KRZWR REW îD0 plqét`@DWLRV @T@copQ@\$SSD0pHHT( plain terms, Rule 45(d)(2)(B) DSSOLHV RQO\ WR 3D SHUVRQ ZI QRU D SDUW\¶V RIILFHU ´

Website Solutions was not a non-party. The district court expressly found that Website Solutions (and the other asset-protection companies) <sup>3</sup>ZHUH WRWDOO\ FRQWUROOHG E\ 754274657HDX ´ LQ SA118, 121-122 (D.729 (citing D.713 at 4, 15)); SA73 (D.535 at 2). The company <sup>2</sup> and its law firms <sup>2</sup> are not entitled to protections intended for nonparties. % HFDXVH WKH ODZ ILUPV GR QRW FKDOOI finding that Website Solutions was essentially an alter ego of Trudeau, they cannot show that the district court abused its discretion in refusing to award their fees.

Third, there is no reason to reimburse Website Solutions or its lawyers for complying with the subpoena. Clients, not third parties, ordinarily bear the cost of compliance. *See, e.g., SEC v. Capital Counsellors, Inc.,* 512 F.2d 654, 658 (2d Cir. 1975) (citations omitted); *see also Alyeska Pipeline Serv.* & R Y 7 K H : L O G4211U/GS.1240, 2476 (R975) X Q G H U W K H <sup>3</sup> \$ P H U U X O H ´ Optically\_SID Q WW K H L U R Z Q HD/W W R K & V \ \$ Z K H Q D party is ordered to produce documents pursuant to a subpoena, the presumption is that the responding party must bear the expense of F R P S O \ *UnDedl States v. Cardinal Growth, L.P.*, No. 11 C 4071, 2015 WL 850230, at \*2 (N.D. III. Feb. 23, 2015) (citing, DeGeer

Moreover, the law firms are in a much better position to bear the costs

receivership, Br. 22-24, does not support reimbursement. The law firms

automatic stay, and motion to continue hearing; document production by third party Next Media; 6 D Qp $\emptyset$ st¶ V

bogus Chapter 7 bankruptcy filing, including motions to stay discovery based on that filing.

## CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7,562 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted by the Microsoft Word 2010 word processing program. Further, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6) and Circuit Rule 32(b), because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type style.

April 13, 2016

<u>/s Michael D. Bergman</u>

Michael D. Bergman Attorney Federal Trade Commission 60