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

OPPOSITION OF APPELLEE FEDERAL TRADE COMMISSION TO APPELLANT'S MOTION FOR A STAY

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FEDERAL TRADE COMMISSION'S OPPOSITION TO APPELLANTS' MOTION FOR STAY PENDING APPEAL

There is no merit to appellant Kevin Trudeau's attempt to stay the district court's November 4, 2008, order, which found him in contempt, imposed compensatory sanctions, and modified the underlying injunction. The Federal Trade Commission ("Commission" or "FTC") initiated the contempt proceedings because Trudeau had engaged in highly deceptive television advertising, in violation of a Stipulated Order for Permanent Injunction ("2004 Stipulated Order") that was entered on September 2, 2004.[1] That Stipulated Order banned Trudeau from participating in any infomercials,[2] but the ban contained one exception -- Trudeau could participate in an infomercial for a book, so long as, *inter alia*, that infomercial did not misrepresent the content of the book that the infomercial was selling. By December 2006, Trudeau was taking advantage of that exception with infomercials that touted a book he had written: *The Weight Loss Cure "They" Don't Want You to Know About* ("*Weight Loss Cure*" or "*WLC*"). These infomercials grossly misrepresented the content of the book -- the infomercials claimed that the diet described in the book was "easy," and that once the diet ended, dieters could eat anything they wanted, but book described a grueling dietary regimen requiring daily injections, virtually starvation dieting, and a complex web of lifetime food 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 Stipulated Order. On November 4, 2008, the court entered its Supplemental Order and Judgment (Ex. 2), and ordered that Trudeau pay $37.6 million to redress injured consumers. The court also ordered that,

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[1] The 2004 Stipulated order is attached as Exhibit 2 ("Ex. 2") to Trudeau's Emergency Motion for Stay Pending Appeal ("Stay Motion").

[2] The 2004 Stipulated 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."

for three years, Trudeau was banned from participating in any infomercials for books that he had an interest in.

Trudeau has now moved that this Court stay the Supplemental Order and Judgment. This motion fails, however, because Trudeau cannot satisfy even one of the four criteria necessary for entry of the stay he seeks. Most crucially, he does not show how he has any likelihood of success on the merits. Absent such a showing, Trudeau's Stay Motion must be denied.

BACKGROUND

A. The First Enforcement Proceedings

The 2004 Stipulated Order was not the Commission's first go-around with Trudeau. In January 1998, the FTC filed a complaint against Trudeau alleging that he violated Sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45, 52,[3] 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).[4]

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[3] 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.

[4] Items in the dockets of the various district court cases against Trudeau are referred to as "D.xx." All such items were entered in 03-cv-3904 (N.D. Ill.), unless otherwise indicated.

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

B. The Second Enforcement Proceedings

By 2003, Trudeau was back in business, this time using infomercials to sell two new products, "Coral Calcium Supreme," and "Biotape."[5] 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 and other autoimmune diseases, as well as for heart disease and high blood pressure. The motion also alleged that he 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

[5] In the intervening years, the Commission has brought law enforcement actions against two different infomercials in which Trudeau participated after entry of the 1998 Order. *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 the Matter of 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.

in contempt, the Commission brought a new action against Trudeau 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 a new Stipulated Order for Permanent Injunction ("2004 Order") that resolved both the Commission's motion to have Trudeau held in contempt for violating the 1998 Order, and the Commission's 2003 complaint. (D.56). Among other things, 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 29. 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.* In addition, the 2004 Order provided that Trudeau "must not misrepresent the content of the book." *Id.* at 9.[6]

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[6] Although Trudeau notes that 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," Stay Motion at 5, he omits the preceding phrase: "with the exception of any waiver in connection with Parts I-X herein." *See* 2004 Order at 14. This contempt action is based upon violations of Parts I and II of the 2004 Order.

C. 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 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, "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 described in *Weight Loss Cure* (but *not* described in the infomercials) is not simple, but is incredibly arduous. During the "highly recommended" 60-step Phase 1 of the program, dieters are to obtain 15 colonics over a 30-day period.[7] 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 consume 100 grams of organic meat immediately

[7] 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).

before bed.[8]

In Phase 2, which is mandatory and lasts from three to six weeks, the dieter must obtain daily injections of a hormone, human chorionic gonadotropin (hCG). Because hCG is a prescription medication that has not been approved for weight loss, the dieter must find a physician willing to write a prescription for this unapproved use. (Trudeau went to Europe to get his injections.) Trudeau's book advises the dieter to have these daily injections done under the supervision of a physician. *WLC* at 129. During this phase, the dieter is restricted to 500 calories per day, consisting of certain specified foods.[9] The dieter is instructed not to take any medications, and is not to use most cosmetics. *WLC* at 95. The dieter is also advise to avoid ice-cold drinks, air conditioning, fluorescent lights, restaurant food, and the use of microwave ovens.

The mandatory Phase 3 is also rigorous. The dieter must get colonics, and drink at least a half gallon of water with coral calcium supplements. All food must be organic, and the dieter is prohibited from eating any carbohydrates (bread, pasta, potatoes, flour). The dieter must also avoid any sweeteners, trans fats, store-bought juice, and nitrates. Dieters are advised to limit exposure to air conditioning and fluorescent lighting, to take homeopathic human growth hormone, and to get frequent saunas.

Not only is the diet not "easy," but also, after completing the first three phases, dieters are not free to eat whatever they want for the rest of their lives because they are required to follow Phase 4, which lasts forever. For the rest of their lives, dieters must obtain liver, parasite, and colon cleanses, and eat only 100 percent organic food. They are also prohibited from eating, *inter alia*, "brand name" food (*i.e.*, food produced by any large publicly traded corporation), fast food, food

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[8] Excerpts from *Weight Loss Cure* are set forth at D.64, Ex. 12.

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

from any chain restaurant, high fructose corn syrup, artificial sweeteners, farm-raised fish, or food cooked in a microwave.

Trudeau sold the rights *to Weight Loss Cure* to ITV Global, Inc., although Trudeau remained involved in the marketing.[10] ITV sold more than 800,000 copies of the book, and its net sales totaled approximately $37.6 million.[11]

D. 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. On November 16, 2007, the district court entered its Memorandum Opinion and Order, holding that Trudeau had violated the 2004 Order. D.93 (Stay Motion at Ex. 3). 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. 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. 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." D. 93 at 11. The court also 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

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[10] Trudeau creates the impression that he appeared in the infomercials *gratis*. *See* Stay Motion at 6. However, Trudeau's contract with ITV, which entitled him to receive $121 million, included an understanding that he participate in the infomercials. *See* Transcript of Hearing, 10/20/08 at 23-26.

[11] In addition to the copies sold by ITV, approximately 800,000 additional copies were sold by independent marketers, such as amazon.com.

portion of prime rib "marbled with fat" or the "big hot fudge sundae" that Trudeau claimed to have eaten. D.93 at 12.

Trudeau filed a motion for reconsideration, D.95, and the Commission filed a 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, the court rejected Trudeau's motion for reconsideration, modified the 2004 Order, and issued a ruling with respect to a appropriate remedy. D.157 (Stay Motion at Ex. 4). First, the court rejected Trudeau's claim that the contempt action was precluded by the Commission's Mirror Image Doctrine[12] because this case involved Trudeau's contempt of the 2004 Order, and the Mirror Image Doctrine was not incorporated into that order. D.157 at 3-4. The court also 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. The court ordered Trudeau to disgorge the royalties he received (approximately $5.2 million). It also modified the 2004 Order, but instead of the bonding requirement requested by the Commission, it 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 Trudeau had an interest.

The Commission moved 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 court's injunction. D.165. On November 4, 2008, the court entered a Supplemental Order and Judgment. D.220 (Stay Motion at Ex. 1). 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

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[12] The Mirror Image Doctrine, which is set forth at 36 Fed. Reg. 13414, is a statement of Commission enforcement policy, and provides 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] * * *."

Trudeau's contumacious deceptive infomercials (*i.e.*, the net amount that consumers paid for those copies of Trudeau's book that were sold by ITV). D.220 at 4. 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 Trudeau had an interest. D.220 at 4-5.

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. On December 12, the court denied Trudeau's motion. D.229 (Stay Motion at Ex. 5). Trudeau filed his Notice of Appeal on December 16. D.231 (Stay Motion at Ex. 6).

ARGUMENT

Trudeau is entitled to a stay pending appeal of the Supplemental Order and Judgment only if he can show that he is likely to succeed on the merits of his appeal, that he will be irreparably injured if a stay is not granted, that a balancing of hardships favors a stay, and that the public interest will be advanced by a stay. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *see Hinrichs v. Bosma*, 440 F.3d 393, 396 (7th Cir. 2006). Because Trudeau cannot satisfy any element of this test, his request for a stay should be denied.[13]

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[13] Trudeau cites cases such as *Cavel Int'l, Inc. v. Madigan*, 500 F.3d 544 (7th Cir. 2007), and *Sofinet v. INS*, 188 F.3d 703 (7th Cir. 1999), and urges this Court to apply a sliding scale "by which a stronger showing on one of the factors allows the movant to make a lesser showing on the others." *See* Stay Motion at 10. But in *Cavel*, it was unquestioned that the plaintiff would go out of business if a stay were not granted, and in *Sofinet*, the plaintiff would be deported. In this case, as described below, Trudeau cannot make a similar showing of irreparable injury. Thus, even with a sliding scale, Trudeau's request for a stay must be supported by far more than "'some' likelihood of success on the merits." *See* Stay Motion at 10. In any event, application of a sliding scale standard does not obviate a showing that the public would not be harmed by a stay. That, too, is a showing that Trudeau cannot make. *See infra*.

1. Trudeau has not shown any likelihood of success on the merits

Trudeau has failed to demonstrate that he is likely to succeed in his appeal because none of the arguments he raises has merit. First, he is not likely to succeed in showing that the district court erred when it held him in contempt. Second, he mistakenly contends that the district court lacked authority to require that, as a result of his contempt, he pay $37.6 million to compensate consumers injured by his contumacious conduct. And third, although he also complains that the court could not impose the limited infomercial ban in the context of a contempt proceeding, he ignores that the court ordered the ban not as a sanction for his contempt but in response to the Commission's request for a modification of the 2004 Order.

a. Trudeau cannot show that the district court erred when it held him in contempt

The district court correctly held Trudeau in contempt for violating the 2004 Order because, during the course of the infomercials, he repeatedly misrepresented the contents 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. Trudeau concedes that the 2004 Order specifically prohibits him from misrepresenting the content of any book, and he does not dispute that the diet was arduous. Instead, he seeks refuge in his contention that the diet was easy in his opinion, and in the fact that the word "easy" appears at least 31 times during the course of the 255 page book. *See* Mot. at 2, 21. He thus argues that, at most, his only fault is that he made "incomplete" statements because his infomercials did not include the full details of the diet. Mot. at 22-23.

But 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. The district court considered "everything inside" *Weight*

Loss Cure, and correctly determined that the content of the book describes a diet that is clearly not easy. Nor does Trudeau advance his cause whit his contention that he did not misrepresent the content of the book because his statements were merely "incomplete." It is well settled that a statement that is literally true may nonetheless be misleading. *Kraft, Inc. v. FTC*, 970 F.2d 311, 321 (7th Cir. 1992). Similarly, the failure to disclose material facts may be misleading. *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988). Plainly, Trudeau's statements, even if literally true, create the impression that the diet is easy, when, as the district court correctly held, this is a misrepresentation of what is actually described in the book.

Nor is there any merit to Trudeau's suggestion that the word "easy" is merely puffing. *See* Stay Motion at 22, citing *Carlay Co. v. FTC*, 153 F.2d 493 (7th Cir. 1946). But even in *Carlay*, which involved a diet plan touted as "easy," this Court considered "undisputed facts," and concluded that, because the diet 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 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.[14] D.93 at 10. Accordingly, Trudeau has failed to show that the district court erred when it held that he had violated the 2004 Order.

b. Trudeau is not likely to show that the district court erred when it ordered him to pay $37.6 million to compensate injured consumers

The district court did not err when it ordered Trudeau 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 Techs. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 744 (7th Cir. 2007); *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*, 383 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 694, 699 (7th Cir. 2001). Although Trudeau complains mightily regarding the size of the sanction, *see, e.g.*, Stay Motion at 12-14, 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

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[14] Trudeau also claims that he is somehow absolved because the Commission was aware of his infomercials for several months before it filed its complaint. *See* Stay Motion at 7, 16. But a 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 1158, 1164 (7th Cir. 1989). 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 F.2d 231, 233 (1st Cir. 1970).

Nor can Trudeau assert an estoppel defense, a defense that is available against the government only in "exceptional circumstances." *Lindberg*, 882 F.2d at 1163. Trudeau bases this defense on a claim that the Commission somehow gave its blessing to an infomercial regarding a different book written by Trudeau. But as the Commission explained to the district court, the Commission had significant concerns regarding that earlier infomercial. *See* D.131 at pp. 8-11. Moreover, that earlier infomercial was not among those challenged in this contempt action. Trudeau thus can come nowhere close to satisfying the elements of this exceptional defense. *See Lindberg* at *id.*

purchased from ITV. The sanctions imposed by the court seek to compensate them for that amount.[15]

Because the award is compensatory, not disgorgement, it is irrelevant that Trudeau did not receive all the proceeds of the sales made to injured consumers. *See Mid-American Waste Systems, Inc. v. City of Gary, Indiana*, 49 F.3d 286 (7th Cir. 1995) (city received no financial benefit as a result of its contumacious conduct, but could be held liable for losses sustained by plaintiff as a result of the contempt). Similarly, *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48 (2d Cir. 2006), is irrelevant. *See* Stay Motion at 15-16. That case, which interpreted the Commission's authority under 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 defendants. *Id.* at 67. But here, the Commission is prosecuting violations of the district court's order, not violations of the FTC Act. In such a situation, as explained above, 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. The limitation set forth in *Verity* simply does not apply.[16]

There is also no merit to Trudeau's complaint that the award cannot be considered compensatory because the money will go to the Treasury, not to consumers. *See* Stay Motion at 12.

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[15] Trudeau complains that $37.6 million award is punitive. Stay Motion at 12. In fact, however, as the court correctly notes, the award is "a classic remedial sanction," D.220 at 2, because the amount was based solely on the amount of the harm caused by Trudeau's contempt. And the award is not rendered punitive merely because the court (not surprisingly) expressed its annoyance with Trudeau's flouting of its orders. *See* Stay Motion at 12.

[16] 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).

Trudeau is mistaken. Indeed, the Commission is attempting to obtain information regarding purchasers of *Weight Loss Cure*, and it intends to return whatever money it is able to collect to those consumers. Further, the mere fact that the district court's order did not establish a refund procedure, *see* Stay Motion at 13, is simply irrelevant because it is clear from the court's order that it intended the $37.6 million award to be compensatory, and the Commission intends to see that any amount collected is used for that purpose.

Nor is there any merit to Trudeau's contention that the monetary sanction is not compensatory merely because some consumers might have been satisfied with *Weight Loss Cure* (despite the deception used to market the book). *See* Stay Motion at 13. 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 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. Absent such evidence, Trudeau's contention that there were some satisfied purchasers of *Weight Loss Cure* is sheer speculation.[17]

The situation here is very different from *SEC v. McNamee*, 481 F.3d 451 (7th Cir. 2007), *see* Stay Motion at 14. In that case, the district court's civil contempt order required that McNamee

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[17] This Court has repeatedly rejected the contention, which Trudeau now advances, *see* Stay Motion at 14 & n.5, 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.

disgorge the money he had received as a result of selling unregistered securities. Although those securities were unregistered, they had value. But the order required McNamee to disgorge money he received regardless of whether the consumers who purchased the securities chose to cancel their purchases. Thus, to the extent that McNamee's disgorgement was not matched by a return of shares, his disgorgement constituted a fine. In this case, however, consumers did not purchase a security, which may be traded on a market and as a result, has continuing value. Here, the injured consumers purchased books. At best, used copies of *Weight Loss Cure*, which are several years old, have no more than a nominal value. There is, thus, no similarity between this case and *McNamee*.

c. Trudeau is not likely to show that the district court erred when it enjoined him, for three years, from participating in infomercials

The district court did not err when it prohibited Trudeau, for a three-year period, from participating in any infomercial for any product in which he has an interest. Although Trudeau contends that this injunction violates his rights under the First Amendment, this argument is not likely to succeed.[18] *See* Stay Motion at 17-20. The court's injunction is a content-neutral restriction on Trudeau's speech, and it does not violate the his First Amendment rights because it serves a significant government interest, and restricts no more speech than necessary to serve that interest. *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 765 (1994).

First, Trudeau does not dispute that the court's injunction is content neutral. *See* Stay Motion at 18. As the Court has explained, the "principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech without reference to the content of the regulated speech." *Madsen*, *id.* at 763 (quotation marks omitted). Here, the court imposed the

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[18] Trudeau complains that the injunction is not an appropriate remedy for civil contempt. Stay Motion at 16-17. But he forgets that, not only did the Commission request that Trudeau be held in contempt, but also it requested that the court amend the 2004 Order. *See* D.187. The court issued the ban in response to that motion, not as a remedy for Trudeau's contempt.

injunction, not as a result of the content of Trudeau's speech, but as a result of his defiance of the 2004 Order. As in *Madsen*, such an injunction is content neutral.

The government has a significant interest in prohibiting the sorts of misrepresentations that Trudeau has employed. *See United States v. Cueto*, 151 F.3d 620, 634 n.11 (7th Cir. 1998) ("[s]peech which is false and misleading is not protected by the First Amendment's right to freedom of speech"); *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225, 1233 (4th Cir. 1989) (state has legitimate interest in preventing misrepresentations). Trudeau has not argued otherwise.[19] Finally, the injunction imposed by the court prohibits no more speech than necessary to serve that interest. Trudeau has twice violated orders prohibiting him from engaging in misrepresentations, and has thereby shown himself unable to participate in infomercials without engaging in misrepresentations and violating the court's orders. The 2004 Order imposed a more limited restriction -- it allowed Trudeau to participate in infomercials if he did not employ misrepresentations. But that was not sufficient to cabin Trudeau's penchant to deceive. Accordingly, the three-year prohibition on infomercials is necessary to achieve a goal that cannot be achieved otherwise.[20]

Further, the injunction does not restrict more speech than necessary because it only applies to advertising that is longer than two minutes and only if those ads appear in certain media: radio, television, video, and internet. Trudeau remains free to market books on radio, television, etc., if

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[19] Trudeau mistakenly suggests that, because his misrepresentations were made in connection with the marketing of books, those misrepresentations are somehow entitled to a higher level of constitutional protection. But 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). In this case, Trudeau's claims that the book provides readers with an "easy" diet are statements about the book as a product, and are entitled to no special protection.

[20] Trudeau complains that the injunction will prohibit him from appearing as a guest on shows such as the *Oprah Winfrey Show*. Stay Motion at 19. But it is highly doubtful that the *Oprah Winfrey Show* fits within the definition of "infomercial," because that show, and the others referred to by Trudeau, are not designed to create interest in the purchase of goods or services.

his ads are shorter than two minutes. And he can employ any type and length of advertising he chooses so long as it appears in print or any medium other than the four designated in the injunction. Plainly, given Trudeau's track record, and given the flexibility that the injunction allows, he is not likely to succeed in showing that his First Amendment rights have been violated.

2. Trudeau has failed to show irreparable injury

The burden falls on Trudeau to show that he will be irreparably harmed if a stay is not entered, and, absent such a showing, no stay is appropriate. *Adams v. City of Chicago*, 135 F.3d 1150, 1154 (7th Cir. 1998). Moreover, harm that is merely conjectural is not considered irreparable for purposes of granting a stay. *S&S Sales Corp. v. Marvin Lumber & Cedar Co.*, 435 F. Supp. 2d 879, 883 (E.D. Wis. 2006), citing *Public Serv. Co. of New Hampshire v. Town of West Newbury*, 835 F.2d 380, 383 (1st Cir. 1987); *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984). Trudeau has failed to make the necessary showing.

There is no merit to any of the three arguments that Trudeau makes regarding irreparable injury. *See* Stay Motion at 23-24. First, he contends that a deprivation of First Amendment rights constitutes irreparable injury. But as explained above, the limited injunction imposed by the district court does not violate Trudeau's First Amendment rights.

Second, he claims that, absent a stay, he "could be forced out of business pending appeal." Stay Motion at 23. Trudeau provides nothing to support this speculation. Although he attached a letter to his motion that indicates he has lost his position with the Alliance Publishing Group, *see* Stay Motion at Ex. 8, he lost that job last July. He provides no evidence whatsoever that the district court's order will force him out of any business in which he is currently engaged.

Finally, Trudeau claims that, if the order is not stayed, he will be forced into bankruptcy. Stay Motion at 23. Again, Trudeau provides no evidence to support this claim. All he provides is

a declaration in which he states that the $37.6 million judgment "would likely force me into insolvency and force me to file for bankruptcy." Stay Motion at Ex. 8. In that declaration, Trudeau also lists 22 creditors to whom he claims to owe a total of approximately $1.7 million. But conspicuously absent from this declaration is any enumeration of his assets. Without evidence regarding his assets, it is impossible to know whether the judgment in this case will result in Trudeau's bankruptcy. *See* D.157 at 9 (the district court stated that it was, "to say the least, highly skeptical of Trudeau's claims of impecunity. * * * Trudeau is a very creative person who is likely to maintain the lifestyle to which he has become accustomed"); *Caribbean Marine Services Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988) ("a plaintiff must do more than merely allege imminent harm * * * a plaintiff must demonstrate immediate threatened injury").[21] Thus, Trudeau fails to make any showing at all of irreparable injury.

3. The public interest and a balancing of the equities argue against a stay

Trudeau claims that adjudication of his First Amendment rights constitutes a public interest. Stay Motion at 23. As explained above, the injunction does not infringe Trudeau's rights, and, in any event, even if it did, that would not demonstrate any public interest in staying the $37.6 million judgment. With respect to the judgment, Trudeau claims that, if he is forced into bankruptcy, he will not be able to pursue this appeal. But the public has no interest whatsoever in allowing Trudeau to finance his defense with funds that will otherwise be paid to consumers injured by his contumacious conduct. *Think Achievement*, 312 F.3d at 262, citing *Caplin & Drysdale, Chartered v. United States*,

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[21] Trudeau also attached the declaration of his attorney, Marc Lane, to his motion. Stay Motion at ex. 7. Mr. Lane states that, "in the past," he has prepared financial statements for Trudeau or his associates. He then states, without providing any other basis, that execution of the $37.6 judgment "would likely push Kevin Trudeau into insolvency and force him to file for bankruptcy." Again, this declaration does not help Trudeau because it provides no evidence of his assets.(Before the district court, Trudeau attempted to submit two declarations from Mr. Lane, but the court excluded them because it found that Mr. Lane "did not follow generally accepted accounting principles and relied primarily on unverified information submitted by" Trudeau. D.212 at 2.)

491 U.S. 617, 626 (1989). In fact, the public's interest lies in enforcing the court's order. This order will help protect the public from Trudeau, and his misrepresentations. It will also provide redress to consumers he has deceived. And it will vindicate the court's authority, which Trudeau has flouted. Plainly, the public interest and the equities strongly favor denial of the stay.

4. This Court should require Trudeau to post a supersedeas bond

This Court should deny Trudeau's request for a stay *sans* supersedeas bond. As explained above, he has not satisfied the standard for such a stay. Indeed, if the Commission were precluded from collecting on its judgment during the pendency of this appeal, a bond would be the only means for making sure that Trudeau would not dissipate or secrete whatever assets that he currently possesses. A bond would also be the only protection for consumers who have been injured by Trudeau's conduct.

Moreover, Trudeau has provided no justification for this Court to stay the district court's order in the absence of a bond. As this Court has held, "[r]esponsibility for deciding whether to require a bond as a condition of staying execution of the judgment pending appeal is vested initially in the district judge, and we shall reverse his decision only if convinced that he has acted unreasonably." *Dillon v. City of Chicago*, 866 F.2d 902, 904 (7th Cir. 1989). That is, the district court's decision not to waive the bond requirement may be overturned only if there was an abuse of discretion. *Id.* The district court did not abuse its discretion when it denied Trudeau's request for a stay without a bond. As this Court noted, there are five factors to consider with respect to a supersedeas bond:

> (1) the complexity of the collection process; (2) the amount of time required to obtain a judgment after it is affirmed on appeal; (3) the degree of confidence that the district court has in the availability of funds to pay the judgment * * *; (4) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money * * *; and (5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of

the defendant in an insecure position.

Id. at 904-05 (quotation marks omitted).

The first two factors clearly favor a bond because Trudeau has given no indication that collecting on the judgment would be easy or quick. The third and fourth factors also favors a bond because Trudeau has done nothing to assure this court that, at the end of this appeal, funds would be available to pay the judgment. Finally, although Trudeau contends that, if he were required to post a bond, he would not be able to pay his other creditors, he has provided no credible evidence to support this contention. He has provided no evidence as to the cost of a bond, has given no indication that he made any attempt to obtain a bond, and he has not provided any evidence as to the assets he has available to him to pay for a bond. Accordingly, the district court correctly denied Trudeau's request to be freed from the bond requirement, and because that court did not abuse its discretion, this Court should affirm that holding.

CONCLUSION

For the reasons set forth above, this Court should deny Trudeau's Emergency Motion for Stay Pending Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2009, I served a copy of the Opposition of Appellee Federal Trade Commission to Appellant's Motion for a Stay by express overnight delivery and by e-mail on:

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