

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS**

FEDERAL TRADE COMMISSION,	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 03-C-3904
	:	
KEVIN TRUDEAU,	:	
Defendant.	:	

**PLAINTIFF'S REPLY BRIEF SUPPORTING ITS MOTION FOR DEFENDANT
TRUDEAU TO SHOW CAUSE WHY HE SHOULD NOT BE HELD IN CONTEMPT**

Plaintiff, Federal Trade Commission, demonstrated in its Show Cause Brief that Defendant Kevin Trudeau violated the Court's 2004 Stipulated Permanent Injunction ("Order") by misrepresenting the content of his book, *The Weight Loss Cure 'They' Don't Want You to Know About* (WLC), in widely distributed infomercials. Trudeau's Response fails to rebut the overwhelming disparity between his infomercial claims and the explicit content of his book. Specifically, Trudeau cannot credibly deny that his infomercial claims about his weight loss plan (e.g., "easy to do," "easy to follow," "eat whatever you want") misrepresent the content of his book, which describes a difficult, complicated, and highly restrictive protocol. Nor are Trudeau's misrepresentations of the facts and benefits of his protocol mere puffery. Moreover, Trudeau's attempts to shield his violative conduct with the First Amendment – a defense he expressly waived when he agreed to the Order – and the Mirror Image policy, also fail because neither protects misleading advertising about the content of a book. Trudeau's infomercial misrepresentations are precisely the conduct prohibited under the Order. Consequently, Trudeau should be held in civil contempt.

I. Trudeau Violated the Order by Misrepresenting the Content of His Book

Trudeau does not dispute that the Court's Permanent Injunction prohibits him from misrepresenting. Defendant's Response (Resp.) at 2, Ex. 1 at Part I.¹ Nor does Trudeau dispute that he expressly claims in his infomercials that the weight loss protocol in his book is "easy to do" and ultimately allows consumers to eat "everything they want." Resp. at 5, 8-9.

Nonetheless, Trudeau seeks to avoid the plain language of the Order that he may not "misrepresent" the "content" of his book. Specifically, Trudeau implausibly asserts that the "content" of his book -- which undeniably includes hundreds of mandates and prohibitions including daily injections of a prescribed substance, a 500-calorie-a-day diet, and never-ending dietary restrictions barring all "brand named" and non-organic food -- really is "easy to do" and permits you to "eat whatever you want." Resp. 11-13. Trudeau also argues that by sprinkling similar misrepresentations in select parts of his book, he somehow has changed the "content," thereby magically inoculating the stark contradictions between his infomercials and the detailed

¹ All references to Exhibits 1-14 are references to the exhibits filed with our September 13, 2007 Show Cause Brief.

content of his book from the plain language of the Order. Resp. 5-6. To the contrary, Trudeau has violated the Order because his infomercial statements plainly “misrepresent” the “content” of the book. Moreover, Trudeau’s claims are not mere puffery because Trudeau misrepresents the facts of the weight loss protocol in his book and assigns the protocol benefits it does not possess.

A. The Plain Language of the Order Bars Trudeau From Misrepresenting the “Content” of His Book

Trudeau agreed to an Order that restricts his infomercial activity to advertising or promoting “informational publications” such as books. Ex. 1 at Part I. Significantly, when advertising a book in infomercials, Trudeau must not “**misrepresent the content of the book.**” *Id.* (emphasis added).

This prohibition is plain and unambiguous. A “misrepresentation is an express or implied statement **contrary to fact.**” FTC Policy Statement on Deception, appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 169 n.4 (1984) (emphasis added). “Content” is “**all that is contained in something; everything inside** [the *contents* of a jar, trunk etc.]” Webster’s New World Dictionary (3d college ed. 1988) (emphasis added). Thus, put simply, Trudeau may not make infomercial claims that are contrary to the facts of what is contained inside his book.

Contrary to Trudeau’s Response, the weight loss protocol is undeniably part of the content of Trudeau’s book.² Indeed, both the title (“The Weight Loss Cure”) and the substance of the book (*see, e.g.*, Ch. 5, “The Cure Revealed”) establish that his weight loss protocol is a critical part of the book’s content. Ex. 12, *WLC* at cover and 76; 73-114; 213-230. Specifically, the content of the book establishes in explicit detail a weight loss protocol that is arduous and complex. Trudeau misrepresents this content when he repeatedly touts the ease and simplicity of his book’s protocol in infomercials (*e.g.*, “It’s very easy to do” Ex. 14b at 8-9). Similarly, the content of his book sets forth a weight loss protocol that contains life-long food restrictions, which Trudeau misrepresents when he claims in his infomercials that consumers can eat “everything they want” once the protocol ends. Ex. 14b at 20.

² In an attempt to avoid the contradictions between the challenged infomercial claims and the content of his book, Trudeau asserts that under the Order, the question is not whether his infomercials are misleading as to the nature of the weight loss protocol and but rather is “whether the infomercials are misleading as to *the content* of the book.” Resp. at 4-5. Trudeau’s argument is a distinction without a difference because the protocol is contained within the book and therefore is part of its content.

B. The Content of Trudeau's Book Sets Forth a Difficult Weight Loss Protocol

Trudeau asserts in his response that the "content" of his book accurately reflects his infomercial claims that his protocol is "very easy to do," "easy to follow," and that "you can do it home." Resp. 11-12; *see, e.g.*, Ex. 14b at 8-9, 13, 16, 27-28; Ex.14a at 4, 10, 13-14; and Ex. 14d at 6-7, 22, 26. However, the content of Trudeau's book sets out a weight loss protocol that contains 4 phases, hundreds of mandates, restrictions, and "strong" recommendations including daily injections, frequent colonics, severe dieting, and lifelong food restrictions. *See WLC* at 76-11, 213-27; FTC Br. at 9-12. Trudeau's protocol is a formidable regime, so formidable that in his book, Trudeau describes it as "overwhelming," "difficult," and "impossible." *WLC* at 111-12.

Trudeau responds to this overwhelming evidence of difficulty by stating that his protocol is easy to "understand." Resp. 11. However, easy to "understand" is very different than Trudeau's infomercial claim that the protocol is "easy to do." Moreover, the fact that Trudeau's protocol doesn't require "surgery" or "suppressants," Resp. at 11, does not make the injections, colonics, severe dieting, and lifelong food restrictions disappear from the content of the book.³

Trudeau's response addresses but one arduous aspect of the protocol, the daily hCG injections, which he claims are "optional." Resp. at 12. However, Trudeau's statement that hCG may be "dispensed with" (Resp. at 12) is directly contradicted by his book's description of Phase 2: "In order to achieve permanent results you must continue the treatment **exactly as described**" for 21-45 days; "for this protocol to work, you must **strictly follow the exact procedures to the letter.**" *WLC* at 96 (emphasis added). Indeed, in Trudeau's chapter of Frequently Asked Questions (FAQs), he invokes a parade of horrors that will occur if you do Phase 2 **without the hCG**: "you will be hungry and tired; most importantly, you will be losing muscle and structural fat; . . . your body will not be reshaped. . . your metabolism will be lower than before and your

³ The overwhelming difficulty of the content is highlighted in Chapter 5, "The Cure Revealed." In this chapter, Trudeau describes "The Weight Loss Protocol": a 4-Phase plan that requires, among other things, supervision by a licensed health care practitioner, a daily intragluteal injection of "hCG (human chorionic gonadotrophin) first thing in the morning," and strict adherence to a 500 calorie a day diet for 21-45 days. *WLC* at 93-96. These last requirements only pertain to Phase 2 of the plan, but Phases 3 and 4 each present their own lengthy lists of infeasible mandates and restrictions (*see, e.g.*, Phase 3 "no non-prescription, over the counter or prescription drugs" *WLC* at 95, 218, 222; "no sugar or starch" *WLC* at 99, 222; Phase 4 "eat only 100% organic food," *WLC* at 106, 225; "No brand name food. . . produced by publicly traded corporations." *WLC* at 107).

hunger higher than before. **You will not have achieved the results you want.**” *WLC* at 117. Thus it is not surprising that the content of his book establishes that Trudeau’s “miracle substance” is a central part of the weight loss protocol.⁴

Trudeau also points to his statement in his FAQ’s indicating that following “all the steps in Phase 1 with strict adherence for 90-120 days” is an “alternative” for those who do not want or are unable to do the hCG protocol. *WLC* at 146. However, as discussed above, Trudeau explicitly states in Phase 2 that hCG is a crucial part of his weight loss cure. *WLC* at 96, 117. Moreover, even if hCG shots were optional, the protocol remains formidable. *See* FTC Br. at 9-10. Trudeau’s “strongly” recommended Phase 1 contains 60 separate requirements each described in its own paragraph. *WLC* at 76-91. These requirements include getting colonics every other day; walking outside for one continuous hour each day; eating only organic meat and dairy; and eating 100 grams of organic meat right before bed. *WLC* at 76-77, 80, 82, 84 and 213.⁵ Trudeau concedes in his book that his list “may seem **overwhelming**” and that “the average person may find it **difficult** to do.” *WLC* at 91. Indeed, swapping the hCG injections changes the status of Phase 1 from “strongly recommended” for 30 days to “**strict adherence**” for three to four months. Put simply, strictly adhering to an every-48-hour regime of professionally administered colonics, and a daily regime of hour-long walks, eating six times a day, and discontinuing the use of all prescription and non-prescription drugs is an arduous task.

Phases 3 and 4, which are mandatory phases of the protocol, are difficult as well. Like Phase 1, Phase 3 permits only 100% organic food. In addition, Phase 3 prohibits all starches (bread, pasta, potatoes, white flour, etc), sweeteners (both natural and artificial), trans fat, and nitrates. *WLC* at 99-101, 220. Moreover, the book “strongly” recommends that during Phase 3, consumers should limit their exposure to air conditioning and florescent lighting, take

⁴ Trudeau does tell readers how to buy a **different** protocol in his FAQs, a protein diet, if hCG is unavailable. However, he makes clear that this substitution involves a different program than the one he recommends and it “is not as effective” as his Phase 2 weight loss cure protocol. *WLC* at 118.

⁵ In addition, Trudeau directs followers to consume a variety of specific fruits, vegetables, oils, teas, and dietary supplements. *WLC* at 77-91. Finally, Trudeau prohibits the consumption of man-made sweeteners, artificial sweeteners, trans fat, MSG, nitrites, food from chain restaurants, and anything that isn’t **100% organic** (emphasis added). *WLC* at 81-85.

homeopathic human growth hormone, get massages, and take frequent saunas. *WLC* at 221-223, 99-101. Trudeau's "rest of your life" Phase, Phase 4, also presents a detailed list of mandates and lifelong restrictions on what followers eat, where they eat, and how they prepare their food. Phase 4 contains 50 requirements including a mandate to only eat food that is 100% organic. *WLC* at 105-11. In addition, consumers may not eat "brand name" food, which bans an extraordinarily broad range of foods including all foods produced by "publicly traded corporations," fast foods, and foods available in regional or national chain restaurants.⁶ *WLC* at 105-11. Trudeau concedes in his book that his Phase 4 list "may seem **overwhelming and difficult to implement** in real life" and that it is "**impossible** for the average person to eat this way all the time." *WLC* at 111-12.

In short, notwithstanding Trudeau's assertions, the content of his book sets out a four phase protocol that is lengthy, demanding, and restrictive. Contrary to his advertising claims, his protocol is not "easy to do."

C. The Content of Trudeau's Book Contains Lifelong Dietary Restrictions

Trudeau asserts that the "content" of his book meets his infomercial claims that, once finished with the protocol, consumers may eat "everything they want, any time they want." Resp. 13; Ex. 14b 20; *see also id.* at 30-31; Ex. 14a 18-19, 26-27. In fact, as discussed above, these claims directly contradict the content of Trudeau's book which does **not** allow eating "anything" and "everything" one wants. In sum, the contents of Trudeau's book reveal that his weight loss protocol requires enduring restrictions on a broad swath of food categories.

Trudeau argues that these infomercial claims do not misrepresent the content of his book because consumers completing the protocol "will not have the *desire* to eat in a manner that would cause them to gain weight." Resp. at 13. However, the long term effects of Trudeau's protocol on consumers' appetites are not at issue -- only his misrepresentations about what his protocol allows consumers to eat (*i.e.*, "everything they want"). Trudeau also points out that his book claims that "most foods can be purchased in forms that have healthy, organic ingredients" and hence followers "can eat virtually any *kind* of food you want and not gain weight." Resp. at

⁶ Furthermore, consumers must avoid the following "at all costs": highly refined sugars, artificial sweeteners, trans fat, msg, nitrates, farm-raised fish, and microwaved foods. *WLC* at 106-11.

13. However, once again, Trudeau misses the point. Indeed, whether consumers **could** in fact get “100%” organic food (a questionable claim) is not what Trudeau misrepresents. Rather Trudeau states that consumers can “eat everything they want” but the protocol in his book specifically prohibits such freedom of choice by requiring, among other the things, 100% organic food. *See WLC* 105-11; 224-27. As a result, Trudeau has misrepresented the content of his book.

D. Trudeau’s Isolated Repetition Of Misrepresentations In His Book Does Not Alter the Fact That He Misrepresents the Book’s Content In His Infomercials

Trudeau asserts that his infomercial claims are not misrepresentations because at certain points his book repeats those same misrepresentations. Trudeau’s assertion that this repetition in essence cures his misrepresentations is unsupported by law and would effectively void a crucial part of the Order.⁷

In *Keimer v. Buena Vista Books, Inc.*, the appellate court rejected a similar attempt to obtain immunity by linking the misleading statements promoting a book to substantially similar statements made in the book. *Keimer v. Buena Vista Books, Inc.*, 89 Cal. Rptr. 2d 781, 788-89 (Cal. Ct. App. 1999). In *Keimer*, the court considered whether false investment performance claims stated on the cover for the Beardstown Ladies Investment Club book were protected by the First Amendment when those statements were reiterated in the book. Leaving aside the constitutional issues raised in this case, which we address later in this Reply, the court observed that allowing such a defense would “completely eviscerate” the state’s Unfair Trade Practices Act because an advertiser could immunize false statements by simply repeating those deceptive claims in a book. *Id.* Similarly, accepting Trudeau’s argument, would allow him a free pass to misrepresent his book in infomercials so long as Trudeau repeated those representations somewhere in his book.⁸

⁷ In an effort to bolster his argument, Trudeau attaches a chart that purports to show how his infomercials “accurately” reflect the content of the book. However, many of the examples on Trudeau’s chart describe isolated elements of the protocol rather than the protocol as a whole. In order to rebut the FTC’s challenge, Trudeau must compare the challenged infomercial claims **about the entire protocol to the content of the protocol itself** as it is set forth in his book.

⁸ The following example illustrates the fallacy of Trudeau’s logic. If Trudeau were to represent in infomercials that his new book offered a “safe” cure for cellulite, but the content of the book required

E. Trudeau's Infomercial Claims Are Not Mere Puffing Because They Misrepresent the Facts of the Protocol in His Book

Trudeau attempts to brush aside his violative misrepresentations as mere "puffing." However, Trudeau's misrepresentations are not puffery because he misrepresents the facts of the weight loss protocol in his book and assigns the protocol benefits it does not possess.

Statements that misrepresent facts are not puffing. Indeed, "[p]uffing refers generally to **an expression of opinion not made as a representation of fact. A seller has some latitude in puffing his goods, but he is not authorized to misrepresent them or to assign them benefits they do not possess.**" FTC Policy Statement on Deception, 103 F.T.C. at 181 n.42 (emphasis added). Thus, puffery is not a defense when a seller misrepresents the facts or assigns his goods benefits they do not possess.

For example, in *FTC v. US Sales Corp.*, the Northern District applied the Deception Statement's criteria when it concluded that advertisements misrepresenting the facts related to cars for sale and assigning them benefits they did not possess were not puffery. *See FTC v. US Sales Corp.*, 785 F. Supp. 737, 745-46 (N. D. Ill. 1992). The ads at issue claimed "hot cars" for "hot prices . . . as little as \$100" and that by calling a 900 number, consumers would get information about how to buy confiscated and repossessed automobiles in top condition. *Id.* at 739-40, 745. However, the facts established that the cars offered were either in poor condition or priced at no discount for fair market value. *Id.* at 746-47. As a result, the court concluded that the advertisements were not puffing because they misrepresented the facts and benefits about both the quality and cost of the advertised cars. *Id.* at 746.

Here, Trudeau's misrepresentations relate to the facts of the protocol in his book and the alleged benefits it possesses. Trudeau's advertising touts the benefits of a protocol, namely that it is "easy to do" and that once completed, his book's protocol allows consumers to eat

ingesting a lethal dose of cyanide, then Trudeau's safety claim would misrepresent the content of the book. The safety representation in the infomercial would remain a misrepresentation of the content of the book whether or not other parts of the book described cyanide as perfectly safe. Similarly, Trudeau's infomercial misrepresentations about the ease and restrictiveness of the weight loss protocol in his book remain misrepresentations regardless of whether he repeats those misleading statements in the book because his advertising claims still contradict the detailed protocol in his book.

“everything they want.” However, when consumers actually read Trudeau’s book, they learn different facts that contradict the benefits touted in Trudeau’s advertising, namely that his weight loss protocol involves daily injections, severe dieting, and lifelong dietary restrictions.⁹

Carlay Co. v. FTC, upon which Trudeau relies heavily, is entirely consistent with this analysis. *Carlay* involved a challenge to ads claiming that a weight loss plan, which required nothing more than eating one or two pieces of caramel candy before meals, would deter one from eating fattening foods. *Carlay v. FTC*, 153 F.2d 493, 494 (7th Cir. 1946). Significantly, the court’s decision in *Carlay* was expressly hinged on its conclusion that the challenged ads did not misrepresent the weight loss regime at issue because in that case, unlike here, it really was easy: “the undisputed facts lead necessarily to the conclusion that **the plan is not a complicated one, but rather a relatively easy one involving no drugs, no restricted or rigorous diet**; that its workings are simple in that it is only necessary for the user to eat the candy before meals and thus curb his desire for food.” *Id.* at 496 (emphasis added). As a result, the advertiser in *Carlay* did not misrepresent the facts of their protocol or assign it benefits it did not possess.

In contrast to the weight loss regime in *Carlay*, as discussed above, Trudeau’s weight loss plan is complicated, involving hundreds of mandates, prohibitions, and recommendations, requiring daily injections of a prescribed substance, and imposing a severely restricted diet. Because Trudeau has misrepresented the facts of his protocol and assigned it benefits it does not possess, he may not characterize his advertising as puffing. *See also Reilly v. Pinkus*, 338 U.S. 269, 271-75 (1949) (ads for kelp diet which claimed followers could “eat plenty” yet reduce 3-5 pounds a week “easily” and “without tortuous diet” not permissible puffing when facts established that respondents’ diet ads misrepresented diet’s benefits); *Goodman v. FTC*, 244 F.2d 584, 597, 603 n.43 (9th Cir. 1957) (ads misrepresenting that reweaving is “easily learned”

⁹ Trudeau coyly claims that he can’t be expected to “give away” everything in his advertisements. Resp. at 12. This statement is disingenuous because even if Trudeau kept the identity of his “miracle substance” a secret, he still fails to disclose numerous key facts that his protocol includes such as the requirement for daily injections of a prescription drug that is not approved for weight loss, the need to refrain from all over the counter and prescription drugs, and the lifelong requirement to eat only 100% organic food. It is well settled that omissions, as well as affirmative statements, may constitute misrepresentations. *See, e.g., Am. Home Prods. Corp.*, 98 F.T.C. 136, 368 n.7 (1981) (ads claiming Anacin contained an unusual, special, and stronger-than-aspirin ingredient were deceptive when ad failed to disclose that Anacin’s only analgesic ingredient was aspirin); FTC Policy Statement on Deception, 103 F.T.C. at 173-74.

in Petitioner's correspondence course not puffing when facts established reweaving was difficult to learn; distinguishing use of "easy" in *Carlay*).

Trudeau acknowledges that the term "easy" (as in "easy credit") may constitute a misrepresentation when the facts contradict such a representation. *See* Resp. at 11, citing *Tashof v. FTC*, 437 F.2d 707 (D.C. Cir. 1970). In *Tashof*, the court considered whether jewelry store advertisements that repeatedly referenced "easy credit" were misleading. *Id.* at 712. The court concluded the references to "easy" credit were misleading because the facts established that the credit extended was not "easy." Indeed, the jewelry store sold its goods at "unconscionably high prices" and often garnished its customer's wages after extending credit. *Id.* at 712. In *Tashof*, the court focused on the disconnect between the advertisement's claims and the reality offered. Trudeau's advertising claims present the very same disconnect. He misrepresents the facts concerning the weight loss protocol in his book and assigns the protocol benefits it does not in fact possess. Hence, the Court should reject Trudeau's puffery defense.¹⁰

II. Trudeau Expressly Waived Any First Amendment Defenses in Part XI of the Stipulated Permanent Injunction

As discussed below in Section III, the First Amendment does not protect misleading commercial speech and hence does not offer any protection to Trudeau in this contempt action. Significantly, even if the First Amendment did extend to Trudeau's misrepresentations, Trudeau waived any First Amendment rights applicable to enforcement of the Order provision at issue. Specifically, Trudeau agreed to Part I of the Order which explicitly prohibits him from "misrepresent[ing] the content" of a book in infomercials. Moreover, in Part XI of the Injunction, titled "FIRST AMENDMENT," Trudeau agreed that "with the exception of any waiver in connection with Parts I-X herein, nothing in this Order shall constitute a waiver of the Defendant's right to engage in speech protected by the First Amendment." Hence, by agreeing to both provisions, Trudeau explicitly waived any First Amendment rights otherwise applicable to conduct prohibited in Parts I-X.

Trudeau signed the Order following lengthy negotiations in which he had the benefit of legal counsel and the benefit of a hearing reviewing the Order. *See* Ex. 11. During this hearing,

¹⁰ Trudeau's misrepresentations are not puffery. Even if they were, however, it is questionable whether puffery is a defense to an action where an Order bars a recidivist from misrepresentations.

Trudeau assured the Court that he had no questions or concerns about the Order and that “everything is very clear.” *Id.* at 7-8. Trudeau, having voluntarily, knowingly, and intelligently agreed to an Order containing a prohibition on misrepresenting the content of his books in infomercials and expressly waiving any First Amendment rights attached to such conduct, may not now assert that the First Amendment shields him from contempt for violating this prohibition. The Supreme Court has held that a party can waive its constitutional rights so long as the waiver is “voluntary, knowing, and intelligently made.” *D.H. Overmyer Co., Inc. v. Frick*, 405 U.S. 174, 185 (1972). Other courts have applied this standard to waivers of First Amendment rights. *See, e.g., Erie Telecommc’ns, Inc., v. City of Erie*, 853 F.2d 1084, 1096 (3d Cir. 1988); *Forbes v. Milwaukee Cty.*, No. 05-C-591, 2007 US Dist. LEXIS 1282, at *26-30 (E.D. WI Jan. 4, 2007).

III. The First Amendment Does Not Protect Trudeau’s Misleading Commercial Speech

Contrary to Trudeau’s legally unsupportable assertion that the *Weight Loss Cure* infomercials are “clearly non-commercial speech. . . entitled to a higher level of protection” *Resp.* at 7, n. 5, the *Weight Loss Cure* infomercials are commercial speech in no small part because they explicitly propose a commercial transaction. The fact that Trudeau links his protocol to a current debate such as food industry conspiracies does not alter the determination that Trudeau’s infomercials are commercial speech. As misleading commercial speech, Trudeau’s misrepresentations are not afforded First Amendment protection.

The Supreme Court has long recognized that the First Amendment affords less protection to commercial speech because it is “more easily verifiable by its disseminator” and because advertising is indispensable in the commercial world, it is more durable and less vulnerable “to being chilled by proper regulation” than non-commercial speech. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 (1976). The determination of whether speech is commercial speech “rests heavily on the ‘common sense distinction’ between speech proposing a commercial transaction. . . and other varieties of speech.” *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637-38 (1985). As a result, the determinant factor is whether the speech at issue “propose[s] a commercial transaction.” *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 473-74 (1989).

Here, the plain language of Trudeau's infomercials and their on-screen content make clear that the purpose of Trudeau's paid advertisements is to propose a commercial transaction, namely to sell a specific product, his book. *See* Ex. 13a,d,h (infomercial recordings); and transcripts (*e.g.*, Ex. 14a at 31 ("This is the book, if you need to lose weight, The Weight Loss Cure They Don't Want You to Know About. Nothing out there has this information. It's the only place you can get it, not available in stores yet. \$29.95. Call right now"). *See also id.* at 15, 27; Ex. 14b at 15-18, 23, 25-26, 29-32; Ex. 14d at 21,23-26, 33-36. Indeed, Trudeau's own words in his infomercial and in his Declaration show that both he and ITV, the entity that allegedly owns the infomercials, have an economic motivation for disseminating the infomercials in order to sell the book, and that both Trudeau and ITV benefit from such sales.¹¹ *See* Resp., Trudeau Decl. Accordingly, Trudeau himself makes clear that his infomercials propose a commercial transaction and thus are commercial speech.

Trudeau's argument that the references in his advertisements to criticism of the FTC and the food industry somehow transform the nature of his commercial speech into noncommercial speech is misplaced. The Supreme Court has rejected similar arguments. As the Supreme Court explained in *Bolger v. Youngs Drug Prods. Corp.*, communications can constitute commercial speech notwithstanding the fact that they contain discussions of important public issues: "We have made clear that advertising which 'links a product to a current debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67-68 (1983) citing *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563, n.5 (1980). *See also Bd. of Trustees*, 492 U.S. at 473-75 (Tupperware parties that also touch on topics such as how to be financially responsible and run an efficient home are still commercial speech); *Zauderer*, 471 U.S. at 637-38 (lawyer advertising soliciting clients injured by Dalkon shield is commercial speech notwithstanding reference to public issue). Significantly, as the Supreme Court noted in *Bolger*, to find otherwise would allow advertisers to "immunize false or misleading product information from government regulation simply by including references to public issues." 463 U.S. at 68.

¹¹ Trudeau's infomercials promote the sale of the book in both retail and direct response outlets. *See* Ex. 14d at 23 ("You can buy this in Wal-Marts, in Costcos, in Sam's Club. You can go to Borders or Waldenbooks.").

Moreover, individuals “have the full panoply of protections available to [their] direct comments on public issues, so there is no reason for providing them similar constitutional protection when such statements are made in the context of commercial transactions.” *Id.* Thus, Trudeau may state opinions in his book, but he cannot avoid a contempt action based on his infomercial misrepresentations by also electing to include his opinions on other topics.

Because the *Weight Loss Cure* infomercials are commercial speech, the First Amendment does not protect Trudeau’s misrepresentations. If the commercial speech at issue is either “misleading” or concerns unlawful activity, it has no First Amendment protection and the analysis need go no further. *Central Hudson*, 447 U.S. at 562-63 (for First Amendment to protect commercial speech “it at least must concern lawful activity and not be misleading”). The Order only prohibits Defendant from **misrepresenting** the content of a book in an infomercial. Stip Order, Part I at 8. Thus, the First Amendment offers no cover to statements that violate this provision.

Significantly, the First Amendment does not protect misleading commercial speech even if the advertising is promoting a movie or book. For example, a California appellate court rejected a film studio’s argument that its ads promoting certain movies with “quotes” from a fictitious film critic were protected speech even if the underlying film was protected speech. *Rezec v. Sony Pictures Entertainment, Inc.*, 10 Cal. Rptr. 3d 333, 338-340 (Cal. Ct. App. 2004). Characterizing such an approach as “absolutist,” the court pointed out that accepting such an argument would mean that “every film advertisement, no matter how false, would be outside the scope of consumer protection laws.” *Id.* at 339. Cognizant that accepting such an absolutist position “would shield all sorts of mischief” the court rejected Sony’s arguments and held that the misleading statements in the advertisements were not speech protected by the First Amendment. *Id.* at 340.

The cases relied upon by Trudeau to support his absolutist contention that the First Amendment protects his misleading speech are distinguishable. *See* Resp. at 7. Neither *Lane* nor *Groden* involved challenges to advertising that *misrepresented* facts about a book. Instead, both cases involved a challenge to an advertisement that accurately reflected the content of a book. *See Lane v. Random House, Inc.*, 985 F. Supp. 141, 150, 152 (D.D.C. 1995); *Groden v.*

Random House, Inc., 61 F.3d 1045, 1051-52 (2d Cir. 1995).¹² Similarly, the *Lacoff* court emphasized that the “the complaint here does not allege that plaintiffs were misled as to the contents of the product or service being offered.” *Lacoff v. Buena Vista Pub. Inc.*, 705 N.Y.S. 2d 183, 192 (N.Y. Sup. Ct. 2000). By contrast, Trudeau’s claims explicitly misrepresent the content of his book.

In *Keimer*, which concerned the same facts as *Lacoff*, an appellate court rejected the very argument raised by Trudeau that the First Amendment protects misleading book advertisements. The court concluded that the First Amendment does not protect misleading commercial speech even if that speech occurs on a book jacket and (unlike Trudeau’s statements about his book) accurately reflects the content of the book. *Keimer*, 89 Cal. Rptr. 2d at 788-89. As discussed, *supra*, *Keimer* involved a challenge to investment claims made on the cover of a book about the investment performance of the Beardstown Ladies Investment Club book. The court, though noting that the **content** of the book is entitled to full First Amendment protection, highlighted the state’s “legitimate and broad interest in protecting its populace from the dissemination of false and misleading advertising.” *Id.* Consequently, the court determined that the First Amendment did not bar an action challenging misleading commercial speech promoting a book.

IV. Mirror Image Policy Does Not Protect Trudeau’s Misrepresentations of His Book

The Mirror Image policy, a discretionary FTC enforcement policy adopted over 35 years ago, neither applies to nor protects Trudeau’s infomercial misrepresentations. Most importantly, Trudeau concedes that this doctrine does not apply to misrepresentations of a book’s content. Prelim. Resp. at 3. Moreover, contrary to Defendant’s assertion that this case represents an “extraordinary departure” in FTC enforcement, *id.*, the current action fits squarely within the FTC’s approach since the adoption of the Mirror Image policy, of safeguarding the public against deceptive advertising for books.¹³ *See, e.g., Wayne Phillips*, 114 F.T.C. 587, 590-92

¹² Specifically, both cases dealt with ads that featured photos of book author espousing a Kennedy assassination conspiracy theory. The ads contained the caption: “Guilty of Misleading the American Public.” Two of the authors challenged these ads under various defamation and false light theories.

¹³ Trudeau contends that a New York Consumer Protection action supports his argument that “both the FTC and a federal court have reaffirmed application of the ‘mirror image’ rule.” Resp. at 9. However, the FTC did not bring that case, and therefore could not have used it to “reaffirm” the mirror image doctrine. Furthermore, the case is inapposite because it did not involve allegations that the infomercials at

(1991) (challenging advertising that book consists primarily of information on how average consumers can easily obtain grants from the government to start virtually any kind of small business, which, in truth, it did not); *Del Dotto Enters., Inc.* 117 F.T.C. 446, 450-51 (1994) (challenging ads that books and audiotapes would show consumers how to pocket portions of \$17,500 government home improvement loan and get over \$100,000 of unsecured credit through credit cards when book did not contain discussion of these topics); *Wyatt Mktg Corp.*, 118 F.T.C. 86, 88-89; 91-92 (1994) (challenging advertising claims that book contained content, which in fact it did not); *WLAR Co.*, 121 F.T.C. 98, 104-05 (1996) (challenging ads for booklet that claimed purchasers were not required to diet to lose weight when booklets in fact required diet); *Johnson & Collins Research Inc.*, 121 F.T.C. 675, 678 (1996) (challenging ads for booklets claiming thinner body and less fat after 2 weeks without diet when booklet in fact required dieting). Here, the FTC once again seeks to prohibit misrepresentations in advertising for a book – this time pursuant to an explicit Court Order that Trudeau agreed to abide by.

V. Trudeau Cannot Show Reasonably Diligent and Energetic Order Compliance

Apparently recognizing the paucity of his arguments, Trudeau foreshadows that, if found in violation of the Order, he will argue that he was “reasonably diligent and energetic in attempting to accomplish what was ordered.” *United States v. Berg*, 20 F.3d 304, 311 (7th Cir. 1994) (citing *Stotler & Co. v. Able*, 870 F.2d 1158 (7th Cir. 1989)). In light of his considerable efforts in marketing his book in three violative infomercials, it is not plausible for Trudeau to argue that he was “reasonably diligent and energetic” in trying to comply with the Order. Rather, his infomercials show considerable energy expended without regard for the Order.¹⁴

While Trudeau points to what he calls “virtually continuous dialogue” between his attorneys and the FTC, this dialogue concerned different infomercials touting a different book, *Natural Cures*. Resp. at 14-15. At no time did Trudeau approach the FTC regarding his *Weight*

issue misrepresented the content of his *Natural Cures* book.

¹⁴ Even if Trudeau could show good faith intent with respect to the infomercials, it would not suffice. The “reasonably diligent and energetic” standard is not satisfied by a showing of good faith intent. See *CFTC v. Premex, Inc.*, 655 F.2d 779, 784 (7th Cir. 1981) (“Good intentions cannot sterilize conduct otherwise contemptuous.”); *NLRB v. Fairview Hospital*, 443 F.2d 1217, 1220 (7th Cir. 1971) (finding defendants’ claim of good faith “without merit” in a contempt action).

Loss Cure infomercials, to discuss order compliance or otherwise. Even more importantly, the Order's mandate was not that Trudeau's attorneys "run ideas by the FTC," but that he not misrepresent the content of his book in an infomercial. Trudeau cannot dilute the order's prohibition on misrepresentations into a mere requirement that he engage in dialogue with the FTC on other topics.¹⁵ Put simply, with reasonable diligence and energy Trudeau could have avoided his violations by making infomercials that did not misrepresent the content of his book.

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¹⁵ Trudeau's reliance on his attorneys' communications with the FTC is also misplaced because the Seventh Circuit has firmly foreclosed an advice-of-counsel defense to contempt. *SEC v. McNamee*, 481 F.3d 451, 455-56 (7th Cir. 2007). An advice-of-counsel defense attempts to rest on a showing that the "person lacked a culpable intent," an irrelevant inquiry in civil contempt actions. *Id.*

CERTIFICATE OF SERVICE

I, Sandhya Prabhu, an attorney, hereby certify that on October 12, 2007, I caused to be served true copies of the *Plaintiff's Reply Brief Supporting Its Motion for Defendant Kevin Trudeau to Show Cause Why He Should Not Be Held in Contempt* by electronic means, by filing such documents through the Court's Electronic Case Filing System, which will send notification of such filing to:

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