No. 15-3472

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee

v.

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

BRIEF OF THE FEDERAL TRADE COMMISSION

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INTRODUCTION

The district court ordered Kevin Trudeau to pay $37 million in compensatory contempt sanctions to redress victims defrauded by Trudeau's 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. Trudeau's company Website Solutions and his associates engaged lawyers — the appellants here — to fight the subpoenas, and then (after they lost that fight) to produce the information. Ultimately, the court placed Website Solutions under the authority of a Receiver appointed to marshal Trudeau's assets, and the law firms asked to be paid their fees from the Receiver's proceeds. Because the money recovered by the Receiver amounted to less than one-quarter of the contempt judgment, any money paid to the lawyers necessarily would be unavailable for consumer redress. Exercising its equitable discretion, the district court denied the request for fees. The law firms now appeal that decision.

The law firms have not nearly met their burden to show that the district court abused its discretion when it declined to place the lawyers' interests over those of defrauded consumers. The equities weigh heavily in favor of

using the receivership assets to compensate consumers — who at best will receive a fraction of their losses — 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 able to recover their fees elsewhere and should have known that their clients were likely involved in evading a contempt judgment. Eyes wide open, they assumed the risk that they would not get paid.

STATEMENT OF JURISDICTION

The appellants' jurisdictional statement is not complete and correct. The parties agree that the Court has jurisdiction, but disagree on its basis.

1. The district court's jurisdiction. The FTC originally sued Trudeau in June 2003 under the authority granted in Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). D.1.[1] The district court had jurisdiction over that case under Section 13(b), as well as 15 U.S.C. §§ 45(a), 52, and 28 U.S.C. §§ 1331, 1337(a), and 1345.

In 2004, the parties settled the initial case through entry of an injunction. Trudeau violated the injunction, and the FTC moved to hold him

[1] "D.xxx" refers to items in the district court's docket; "Br." refers to Appellants' March 22, 2016 corrected brief; "A[#]" refers to pages in the Appellants' Required Short Appendix; "SA[#]" refers to pages in the Commission's Supplemental Appendix filed pursuant to Circuit Rule 30(e); and "Tr." refers to district court hearing transcripts.

in contempt, which the court ordered in November 2007. D.92, D.93. The court also entered a final sanctions order in June 2010 (after further litigation and appeals). D.372. When Trudeau failed to pay the contempt sanction, the FTC moved again for contempt in July 2012, which the court granted in July 2013. SA122-125 (D.729). As part of that ruling, the court appointed a Receiver to marshal and liquidate Trudeau's assets. D.742. On July 9, 2015, the FTC moved the district court to approve a partial victim redress plan, D.892, and on July 15, 2015, the Receiver filed a related motion to approve notice of distribution of net receivership assets to the FTC. D.898. Several parties (including appellants, D.912) objected to the distribution. In the October 7, 2015, order on review, the district court denied the objections and granted the FTC's motion. A1 (D.917). The district court had jurisdiction over these postjudgment contempt-related proceedings in order to "to bring [this] suit to resolution and to enforce whatever judgments it has entered." *Autotech Tech. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 744 (7th Cir. 2007).

2. This Court's jurisdiction. The law firms timely filed their notice of appeal on November 3, 2015. D.921. In the FTC's view, this Court has jurisdiction pursuant to 28 U.S.C. § 1291 on either of two grounds. First, the order on review resolved all the issues raised in the FTC's motion to approve

the redress plan, and "an order that addresses all the issues raised in the motion that sparked the postjudgment proceedings is treated as final for purposes of section 1291." *Solis v. Current Dev. Corp*., 557 F.3d 772, 776 (7th Cir. 2009). This Court "treat[s] each postjudgment proceeding like a freestanding lawsuit and look[s] for the final decision in that proceeding to determine the scope of our review." *Id.* at 775. The order was final even though on February 23, 2016, the court approved the Receiver's final accounting, authorized final distribution to the FTC of all remaining funds in the receivership, and closed the receivership without payment of pre-receivership claims. D.952.

Alternatively, the Court may deem the order on review to be an appealable final postjudgment decision under section 1291 because it ended the Receiver's collection proceeding over Trudeau's assets and required the Receiver to transfer those assets to the FTC for consumer redress pursuant to the receivership order. *See United States v. Antiques Ltd. P'ship*, 760 F.3d 668, 671 (7th Cir. 2014) (judgment concluding a receiver's collection proceeding is an appealable final judgment).

Appellants erroneously state that the October 7 order is appealable under 28 U.S.C. § 1292 as an interlocutory order under the "collateral order doctrine." Br. 2. To begin with, Section 1292 and the collateral order

doctrine are separate bases for interlocutory appellate jurisdiction. Further, neither one applies here because the October 7 order was not an interlocutory decision, but a final postjudgment decision. Appellants' reliance on *SEC v. Wealth Mgmt., LLC*, 628 F.3d 323, 330-31 (7th Cir. 2010), Br. 3, is misplaced because in that case the receiver distributed assets *prior* to a final judgment, and the order approving the plan thus was interlocutory. *Id*. at 330 ("The district court's order affirming the receiver's distribution plan is not a final order . . ."). Here, approval of the Receiver's distribution to the FTC constituted a final postjudgment order entered long after the 2004 injunction. The timing in this case transforms the October 7 order from a non-final interlocutory order to a final postjudgment order.

ISSUE PRESENTED FOR REVIEW

Whether the district court abused its broad equitable discretion when it declined to give payment priority from funds collected by a Receiver to lawyer fees and instead ordered that the money be used for consumer redress.

STATEMENT OF THE CASE

A. The Underlying Contempt Proceedings

The FTC sued Trudeau in June 2003 for deceptive acts or practices in marketing a bogus disease prevention and treatment product. D.1. The parties stipulated to a permanent injunction in 2004, which barred Trudeau from making infomercials except those marketing books, but prohibited him

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 "the consumer loss resulting from Trudeau's contumacious and 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.[2]

[2] The law firms wrongly contend that the FTC "did nothing" to collect on the contempt sanction. Br. 5. The FTC reasonably waited until Trudeau's multiple appeals of the district court's 2010 sanctions order were resolved in October 2012 before it actively engaged in collection efforts. Even before then, the FTC sought discovery from various financial institutions to determine the extent and source of Trudeau's assets. *See*, *e.g.*, D.470; D.475. The law firms are also wrong that the FTC was required to use "post-judgment citation procedures" under Illinois law to restrict Trudeau's access 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 offshore. *See* D.575 at 1 (citing *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949)); 3/7/13 Tr. at 4. Finally, the so-called "remediation plan" proposed by Trudeau, *see* Br. 5, was meritless, as it would have removed responsibility for consumer refunds from the FTC and vested it in Trudeau, who has proven himself untrustworthy. It also would have allowed Trudeau to return to the

On July 13, 2012, the FTC again moved to hold him in contempt. D.481, D.481-1. In its motion, the FTC showed Trudeau's involvement with multiple businesses that had generated millions of dollars of revenue. It also showed that he concealed significant assets through an extensive web of domestic and offshore entities and that he dissipated assets through a lavish lifestyle. *Id.* In particular, the FTC showed that Trudeau concealed assets through his ownership or control of five corporations — including Website Solutions USA Inc. ("Website Solutions") — through which nearly $190 million flowed. The complex machinations used Trudeau's wife, Nataliya Babenko and his long-serving associate Suneil Sant as nominal officers of many of the companies. Trudeau, however, was the true owner.[3] *See, e.g.*, SA4-10; D.481-1 at 5-11 (citing SA19 (D.481-2 (Att. U)); D.481-3 (Att. V-Z); SA24-32 (D.481-4 (Att. A-D, F)); SA36, 38-44 (D.481-5 (¶ 13, Att. B-D, H)); SA48-71 (D.481-6 (Att. F, J))).

The FTC sought Trudeau's incarceration until he purged his contempt by paying the sanction in full or providing a full accounting and complete

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infomercial business. *See* D.487. The district court called the plan "preposterous." D.494.

[3] Babenko served as corporate officer or owner of eight Trudeau-related entities, including Website Solutions, despite having no discernable business experience. *See* SA119-120, 122 (D.729 (incorporating findings in D.713 at 8)).

turnover of assets to the FTC. In response, Trudeau failed to establish his inability to pay or to refute his control over the corporations, including Website Solutions. *See* D.517 at 9-12. In December 2012, the district court held that "there is no question that the FTC has * * * establish[ed] a prima facie showing of contempt" by clear and convincing evidence. SA72-73 (D.535 at 1-2). The court based this holding in part on the FTC's evidence showing that Trudeau controlled Website Solutions. Although Trudeau had the burden to prove his inability to pay the contempt sanction, the court expressed interest in supplementing the record concerning assets he controlled.

After the district court's ruling that the evidence showed a *prima facie* case of contempt, the FTC undertook additional discovery, including discovery of Website Solutions, in preparation for an evidentiary hearing on the extent of Trudeau's assets and the entities under his control. Thus, on December 21, 2012, the FTC subpoenaed Website Solutions seeking, among other things, financial records, information regarding corporate governance and control, and asset transfers. SA75-84 (D.915 (Ex. 4) at PDF pp. 58-85). Website Solutions produced none of the requested information, and the FTC moved to compel on January 18, 2013. D.538. Appellant Faruki Ireland & Cox appeared on behalf of Website Solutions (and other Trudeau-related

entities) and opposed the FTC's motion to compel. D.543, D.544; D.574. Faruki was no stranger to the matters at hand — it had previously represented companies later found to be controlled by Trudeau that had moved to quash other FTC subpoenas issued on banks seeking information about Trudeau's assets, including assets held by Website Solutions.[4]

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 Trudeau's beneficial control or ownership over Website Solutions. The firm denied that Website Solutions possessed any Trudeau-related assets, and asserted that the only connection between Website Solutions and Trudeau is that the company "engages, or may have previously engaged, in some business with Trudeau." D.574 at 2, 7-8, 11. Those contentions, it was ultimately revealed, were untrue. Among other things, Trudeau himself appeared as Website Solutions's designated witness

[4] 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 Trudeau's assets held with banks. Faruki's attempts to block the FTC's information gathering were unsuccessful, and they significantly delayed the FTC's locating of Trudeau's assets, likely allowing him 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 Faruki's objections and ordered the company "to comply forthwith with the subpoena." D.577, D.578 at 8.

Before the court issued that ruling, the FTC in February 2013 had subpoenaed Suneil Sant (Website Solutions's nominal officer) in his personal capacity, requesting to a large extent similar information previously sought from Website Solutions — which the company itself should have produced already.[5] D.915 (Ex. 10) at PDF pp. 159-166. Sant, represented by appellant Hogan Marren, moved to quash the subpoena in March 2013. D.590. Significantly, Sant denied creating any responsive documents personally, but admitted that any responsive documents he possessed were all created "in connection with [his] employment activities on behalf of" the Trudeau-related entities (including Website Solutions), and that the corporations possessed or controlled the requested documents. D.591 at 3, 8, 10-11. In other words, Sant acknowledged that these documents belonged to the corporate entities that the FTC had already subpoenaed and should have already produced. On

[5] The December 21, 2012, subpoena issued to Website Solutions asked for responsive material in the possession, custody, or control of its "directors, officers, partners, [or] employees" (among other persons), *see* SA82 (D.915 at PDF p. 65 (Schedule B – Instructions; item B. Scope of Search)), and thus covered Sant anyway.

April 4, 2013, the FTC served another subpoena to Sant in his corporate capacity. D.915 (Ex. 11) at PDF pp. 168-175.[6] To respond to the subpoenas, Website Solutions hired BlueStar Case Solutions, Inc. ("BlueStar") to make a copy of Sant's electronic devices. The company had rejected the FTC's offer to assist Sant with complying with the subpoenas by searching his personal email account and imaging his personal phone to locate responsive materials at no charge. *See* SA86 (D.592 (Ex. A ¶2)).[7]

B. 2013 Contempt and Receivership Orders

On July 26, 2013, the district court held Trudeau in contempt of its June 2010 order. D.728, SA122-125 (D.729). The court found that Trudeau had hidden substantial assets derived from his unlawful schemes by diverting those assets to corporate entities he created and controlled, including Website Solutions, through figureheads such as Sant and Babenko. SA118-122 (D.729 at 1 (adopting D.713 at 4, 8-9, 15)). Having found Trudeau in

[6] On the same day, the FTC issued a second subpoena to Website Solutions (and other Trudeau entities). D.915 (Ex. 6) at PDF pp. 91-96. This second subpoena did not supersede Website Solutions's obligation to respond to the December 21, 2012 subpoena.

[7] The law firms' assertion that the FTC "approved" the services of BlueStar, Br. 8, is without merit. Other than attorney Deady's self-serving and conclusory declaration, no evidence in the record shows that the FTC "approved" of BlueStar's services or that the FTC would pay for such services. Doing so would have been inconsistent both with the FTC's offer to provide some of the services itself, and with agency practice not to "approve" the work of a third-party vendor.

contempt, the court directed the FTC to propose a Receiver to take control of Trudeau's assets, including Website Solutions. The court ordered the Receiver to "marshal and hold such assets for the purpose of paying to the FTC" the $37,616,161 contempt sanction. SA122-123 (D.729 at 1-2). The court formally appointed the Receiver on August 7, 2013. D.742 § IV.

The court required the Receiver to apply to the court for prior approval to pay any prereceivership debt incurred by Trudeau or one of his entities, except as necessary to secure receivership assets. *Id.* § V(7).[8] The Receiver ultimately collected more than $8 million in net funds belonging to Trudeau, largely from the corporate entities he controlled, such as Website Solutions. D.898 at 5. He noted, however, that at least $30.6 million generated by Trudeau-related companies remains unaccounted for. SA146 (D.890-1 at 50).

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[8] The law firms incorrectly state that when they requested payment for their unpaid expenses from the Receiver, they were told the Receiver "was forced to deny these requests at the direction of the FTC." Br. 11. In fact, the FTC did not direct or require the Receiver to deny these requests (or to take or withhold any action); rather, FTC counsel told the Receiver it would oppose payment of such prereceivership fees and the Receiver's counsel conveyed that position to the law firms. *See* D.913 at 3. The Receiver also informed the law firms that as creditors they were free to petition the district court directly for such fees, but the law firms never did so. Further, the law firms assert that that the Receiver did not "permit" Hogan Marren to pursue a Rule 45 claim against the FTC, Br. 12, which is incorrect because the Receiver did not bar the law firms from pursuing such a claim and could not have done so anyway.

C. The Order on Review Approving the Receiver's Distribution of Assets

On July 9, 2015, the FTC asked the court to approve a plan to distribute to Trudeau's victims the $8 million recovered 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 Trudeau's 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 granted the FTC's 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 "saw no reason why [it] would reimburse [the law firms] at all." A7:9-10. For the most part, "all they were doing is resisting the discovery * * * which led to the receivership, which led to the recovery of the money that we have." *Id*. 1-4. The law firms' resistance to discovery did not "benefit[] the receivership" but "delayed and impeded the receivership." *Id*. 6-8. Moreover, despite the law firms' assertions to the contrary, the asset-shielding entities like Website Solutions

"were, in fact, controlled by Trudeau," and Babenko and Sant "were in league with" Trudeau trying to hide assets. *Id.* 11, 14-15. Thus, to allow recovery of any fees would amount in effect to "paying Mr. Trudeau's legal fees for complying with discovery that he was resisting because he was trying to hide all these assets." *Id*. 12-14. Further, as 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 fees and consumer redress. Trudeau's victims are "not getting reimbursed anywhere near the amount that they should be," the court stated. A7:18-19. The Receiver had collected "8 million of the 37" million Trudeau owed to his victims, which did not include potentially substantial postjudgment interest. A7:20-A8:4. "[A]ll those reasons," the court found, are "enough to overrule the objections of the law firms." A8:20-22.

STANDARD OF REVIEW

This Court reviews a district court's ruling governing the distribution of funds from an equitable receivership for abuse of discretion. *Duff v. Cent. Sleep Diagnostics, LLC*, 801 F.3d 833, 841 (7th Cir. 2015) (citing *Wealth Mgmt.,* 628 F.3d at 332-33). The Court likewise reviews for abuse of discretion a district court's ruling regarding whether the costs of complying

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). "[A]n abuse of discretion is established only where no reasonable [person] could agree with the district court; if reasonable [people] could differ as to the propriety of the court's action, no abuse of discretion has been shown." *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 requires a "clearly erroneous finding" or "an error of law") (citing *United States v. Silva*, 140 F.3d 1098, 1101 n.4 (7th Cir. 1998)).

SUMMARY OF ARGUMENT

1. The district court's decision to prioritize the distribution of receivership funds to Trudeau's consumer victims rather than to lawyers representing his companies and associates fell well within its broad equitable discretion. The equities do not favor the law firms for multiple reasons.

First, as the court recognized, the firms' main activity was impeding the FTC's investigation and enabling Trudeau to hide his assets. Those detrimental actions far outweigh any benefit from the law firms' work. Second, Website Solutions was "in fact, controlled by Trudeau," A7:11, and awarding fees to the lawyers constituted "paying Mr. Trudeau's legal fees for complying with discovery." The law firms may seek their fees against

Trudeau, its real client. The court thus properly subordinated the lawyers' claims in order to pay the victims first. Third, equity strongly favors using Trudeau's assets to compensate defrauded consumers rather than lawyers. Every dollar spent on legal fees comes directly from the pockets of defrauded consumers.

The law firms are especially undeserving of equitable consideration because they assumed the risk that they might not get fully compensated. The FTC had shown, and the district court had rendered a *prima facie* determination, that Website Solutions was controlled by Trudeau before the firms undertook the representation for which they seek payment. They were well aware of the risk that the assets of Website Solutions would be found to be tainted. Even in the absence of the FTC's demonstration and the court's finding, both firms had ample reason to perceive the risk. Faruki Ireland had spent the prior year opposing the FTC's discovery efforts. Hogan Marren represented Trudeau's right hand man.

2. The law firms' suggestion that Fed. R. Civ. P. 45 entitles them to fees is wrong for multiple reasons. First, the rule protects the recipients of subpoenas, not their lawyers. The firms thus lack standing to bring their claim. Second, the rule protects *nonparties*. Website Solutions was "totally controlled by Trudeau" and thus essentially his alter ego.

Third, under established law, Website Solutions did not rebut the presumption that it must bear its own costs. For one thing, its close association with Trudeau gave it a substantial stake in the case. Further, the firms are better able to bear the costs of discovery than Trudeau's victims, who will receiving only a fraction of the money of which they were defrauded. And because this case was brought by the FTC to vindicate those consumers, this case is of substantial public importance.

ARGUMENT

I. THE DISTRICT COURT PROPERLY EXERCISED ITS EQUITABLE DISCRETION WHEN IT PRIORITIZED CONSUMER REDRESS OVER LEGAL FEES

In overseeing the receivership and its disposition of assets, the district court had "broad equitable power." *Duff,* 801 F.3d at 841; *SEC v. Capital Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005) (district court authority over an equity receivership is "extremely broad.") (citations omitted). The court's powers included ensuring that the distribution of funds from the receivership is "fair and reasonable," *Wealth Mgmt*., 628 F.3d at 332, "classify[ing] claims sensibly," *SEC v. Enter. Trust Co.*, 559 F.3d 649, 652 (7th Cir. 2009), and "subordinat[ing]" some claims to others to ensure fairness, *Wealth Mgmt.*, 628 F.3d at 333.

The district court properly exercised those powers when it gave priority to distribution of receivership assets to defrauded consumers rather than to lawyers who had represented parties that delayed the receivership.[9] The court provided three reasons for its decision, any of which is sufficient to sustain its judgment and all of which fell well within the court's ample discretion.

First, the district court ruled that the principal function of the law firms in this case had been "resisting the discovery" necessary to enable the FTC to track Trudeau's assets. In the main, the firms' actions did not "benefit[] the receivership," but "[i]f anything they delayed and impeded the receivership." A7:1, 6-8. As a result of that behavior, the court stated, "I just don't see any reason why I would reimburse [the law firms] at all." *Id*. 9-10. Indeed, in resisting discovery rather than cooperating with the FTC's reasonable discovery requests (and in wrongly asserting that Trudeau did not control Website Solutions), the law firms not only impeded the receivership, but secured more time for Trudeau to hide assets or secrete them abroad. *See* A8:14-17. Indeed, the Receiver determined that at least $30.6 million from Trudeau-related entities remains unaccounted for and it is likely that Trudeau

[9] We do not challenge the law firms' standing on appeal. *See* Br. 16-18. As creditors of Website Solutions, the firms may appeal the district court's denial of their request for compensation. *See Wealth Mgmt.*, 628 F.3d at 330 n.3.

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 within the court's broad equitable discretion to determine in those circumstances that the lawyers did not merit an award of fees, even if a portion of their work was beneficial. That disposition ensured that division of the money was "fair and reasonable." *Wealth Mgmt.,* 628 F.3d at 332.

Second, the court determined that because Website Solutions was "in fact, controlled by Trudeau," awarding fees to the law firms that represented the company would amount to "paying Mr. Trudeau's legal fees for complying with discovery." A7:11-13. That outcome would be especially unfair to consumers because the Receiver had recovered far less money than Trudeau owed to his defrauded victims, and any money paid to Trudeau's lawyers thus effectively would be taken from the pockets of victims. That determination also fell within the court's discretion to "subordinate" some interests to others as equity demands. *Wealth Mgmt*., 628 F.3d at 333. The ruling was especially fair when the lawyers may pursue Trudeau for payment, but the victims have no such recourse.

Third, the court relatedly held that the paramount interest in redress to defrauded consumers took priority over fees for law firms. The court found that consumers are "not getting reimbursed anywhere near the amount that

they should be" — only "8 million out of the 37" million the court had 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 consumer redress. That was "enough to overrule the objections of the law firms" to the Receiver's plan to distribute all of the money to victims rather than splitting it between victims and lawyers. *Id*. 21-22. That equitable judgment was also within the court's broad discretion.

Courts have declined to pay lawyer's fees from receiverships in similar (indeed, less egregious) situations. In *CFTC v. Nobel Metals Int'l*, 67 F.3d 766 (9th Cir. 1995), for example, the Ninth Circuit affirmed the denial of a request to pay attorney's fees out of frozen assets when those assets "fell far short of the amount needed to compensate [the defendants' defrauded] customers." *Id*. at 775. 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 limitation on attorney's fees "out of concern for preserving funds for ultimate distribution to defrauded customers." *Id*. at 348. In *CFTC v. Am. Metals Exch. Corp*., 775 F. Supp. 767 (D.N.J. 1991), the district court found that "it would be inequitable to further deplete the

receivership estate to pay [defendant's officer's] attorneys' fees" where the value of frozen assets was "well short of the amount of losses suffered by" the defendants' victims. *Id*. at 788. The Third Circuit 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) ("Because it does not appear there is sufficient money in the estate to recompense all potential victims, [the attorney] should not be allowed at this time to recover attorney's fees from the Receiver's estate.").

The equities weigh even more strongly against paying the lawyers in this case, which involves a final postjudgment distribution order, as distinct from cases barring attorney's fees during the interim phases of a case. Here, 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 defendants' attorney's fees from fund designed to compensate consumers because doing so "might deprive Defendants' victims of the full measure of compensation for their injuries.").

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

disfavor the law firm appellants in this case. When the firms represented their clients against subpoenas requesting materials regarding Website Solutions, the FTC had already shown that Trudeau controlled that company, D.481, D.481-1, D.517, and the district court had already found a *prima facie* showing of contempt based on that evidence. SA72-74 (D.535). Having undertaken their representation with that knowledge, the firms assumed the risk that Website Solutions's assets were tainted, and that the company therefore would be unable to pay its legal bills. Had they wanted assurance, they should have secured payment up front. Indeed, the FTC's evidence "clearly demonstrate[d] sufficient facts to trigger [the lawyer's] duty of inquiry as to the source of [his client's] funds." *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1143-45 (9th Cir. 2010) ("an objectively reasonable and diligent inquiry would have revealed that Appellant's assets were potentially tainted by their participation in the [illegal] scheme."). The Faruki Ireland firm had been deeply involved for nearly a year in resisting the FTC's efforts to discover from several banks information that would demonstrate the connections between Trudeau and Website Solutions (and other companies). Faruki plainly knew that Trudeau likely controlled its client — indeed, it produced Trudeau himself as a 30(b)(6) deposition witness on behalf of the company, despite having previously asserted that the

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 — months before it issued its principal subpoena to Website Solutions — that Trudeau controlled the company (and used nominee officers such as Trudeau's wife Babenko, also represented by Faruki) and was in contempt. D.481, D.481-1; *see* SA1-71. The connection between Trudeau and Website Solutions — and thus the risk of non-payment — 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's production, it was subject to the same warnings as Faruki. To the extent it represented Sant, the signs were equally (if not more) powerful. Sant had worked for Trudeau since 1996, served as an officer of Website Solutions and six other Trudeau-controlled entities, and handled nearly all of Trudeau's and his related entities' finances. SA120, 122 (D.729 (citing D.713 at 9)). Trudeau referred to Sant as his "right hand man." *Id.* Moreover, Hogan Marren represented Sant in connection with the FTC's

efforts to obtain information from Website Solutions (and other Trudeau-related 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.

Hogan Marren's claim for litigation support expenses is similarly unavailing. The FTC offered some of these services (including imaging Sant's cell phone and searching his personal email account) free 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 Trudeau's assets for his victims' benefit. In those circumstances, and particularly "[g]iven the important consumer interests at stake in this case * * * the fairest course of action is to require counsel to bear the risks of nonpayment" because counsel should have known its client "might lack sufficient funds to pay" its fees 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 lawyer] decided to represent" defendants in an FTC case "he should have known that payment for his services was not guaranteed.").

The law firms do not seriously contest the district court's equitable balancing. Instead, in an attempt to show a legal error, they claim that the court misunderstood their claim for reimbursement. Br. 18-20. According to the firms, the court wrongly believed that the firms sought payment for *all* of the fees related to their representation of Website Solutions and Sant, when in fact they sought payment only for fees incurred to comply with the December 2012 subpoena.

The argument distorts the district court's ruling. In fact, the court found it inequitable to prioritize legal fees over consumer redress because paying the fees would amount to "paying Mr. Trudeau's legal fees for *complying with discovery* that he was resisting." A7:12-13 (emphasis added). The court's reference to fees for "complying with discovery" makes clear that it understood the nature of the fee request. The court nevertheless found that given the law firms' overall course of conduct, the equities disfavored any fee payment. In particular, because the firms "delayed and impeded the receivership," there was no "reason [to] reimburse [the firms] at all." A7:7-8, 9-10.

The firms' contention that district court improperly denied their claims for discovery expenses based on its "[s]ubsequent [f]inding" that Trudeau controlled Website Solutions is also meritless. Br. 24-26. In fact, as described above, the FTC had shown by July 2012 that Trudeau hid his assets through nominal third-party corporations — including Website Solutions — and by using Sant and Babenko as front men for these Trudeau entities. *See* SA4-71 (D.481-1 at 5-11 (and exhibits cited therein)); D.517 at 9-11. Relying on that evidence, the district court found in December 2012 that the FTC had stated a *prima facie* case of contempt. SA72-74 (D.535). That finding was rendered *before* the FTC issued its primary subpoena to Website Solutions in December 2012 and the firms undertook their representations regarding the FTC's discovery requests.

II. THE LAW FIRMS ARE NOT ENTITLED TO FEES UNDER RULE 45

Fed. R. Civ. P. 45(d)(2)(B), states that a court order directing compliance with a subpoena "must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance." The law firms suggest that they were entitled to payment of their fees under that

rule.[10] Br. 21-22. The rule does not support an award of fees for multiple reasons.[11]

First, the law firms themselves lack standing under Rule 45. The Rule authorizes fee-shifting only in favor of persons "subject to the subpoena," not their counsel. As the district court held, "under Rule 45, it's the respondents to the subpoenas who have a right to request" compensation for expenses "incurred in complying with the subpoenas." A5:20-23. The firms cite no 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-party. Rule 45 "tells litigants how to obtain information from nonparties." *FM Indus., Inc. v. Citicorp Credit Servs., Inc.*, 614 F.3d 335, 339 (7th Cir. 2010). Thus, "nonparty status is an important factor to be considered in determining whether to allocate discovery costs on the demanding or the producing party." *United States v. Columbia Broad. Sys., Inc.*, 666 F.2d 364, 372 (9th Cir. 1982). Indeed, by its

[10] The law firms miscite the rule as Rule 45(c)(2)(B). A 2013 amendment re-numbered the provision.

[11] The district court correctly determined that the law firms never brought a motion under Rule 45 seeking the fees they now request. A6. Because Faruki Ireland made a cursory request for compensation in its February 2013 opposition to the FTC's motion to compel, however, we do not challenge their arguments on that ground. *See* D.574 at 12-13; D.914 at 13.

plain terms, Rule 45(d)(2)(B) applies only to "a person who is neither a party nor a party's officer."

Website Solutions was not a non-party. The district court expressly found that Website Solutions (and the other asset-protection companies) "were totally controlled by Trudeau," in order to hide his assets. *See* A6:7; SA118, 121-122 (D.729 (citing D.713 at 4, 15)); SA73 (D.535 at 2). The company — and its law firms — are not entitled to protections intended for nonparties. Because the law firms do not challenge the district court's 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. Co. v. The Wilderness Soc'y*, 421 U.S. 240, 247 (1975) (under the "American rule," litigants typically pay their own attorney's fees). Thus, "when a third party is ordered to produce documents pursuant to a subpoena, the presumption is that the responding party must bear the expense of complying." *United States v. Cardinal Growth, L.P.*, No. 11 C 4071, 2015

WL 850230, at *2 (N.D. Ill. Feb. 23, 2015) (citing, *DeGeer v. Gillis*, 755 F. Supp. 2d 909, 928 (N.D. Ill. 2010)). Courts consider three factors in determining whether compliance costs should be shifted to the requester: 1) whether the subpoena recipient has an interest in the outcome of the case; 2) whether the recipient can more readily bear its costs than the requesting party; and 3) whether the litigation is of public importance. *Cardinal Growth*, 2015 WL 850230, at *2 (citing *DeGeer*, 755 F. Supp. 2d at 928).

Website Solutions satisfies none of those criteria. It plainly had an interest in the outcome of this litigation. This factor is particularly apt where the subpoena recipient derives substantial income or economic benefit from a party such that it cannot be considered a "classic disinterested non-party." *See In re Honeywell Int'l Sec. Litig.*, 230 F.R.D. 293, 302-03 (S.D.N.Y. 2003) (denying request for expenses by nonparty which was defendant's financial auditor); *see also Cardinal Growth*, 2015 WL 850230, at *3 (denying request for expenses by subpoena recipient which had "derived substantial income" from the defendant). As shown above, the district court found that Website Solutions was controlled by Trudeau, was used to hide his assets, and derived substantial income from Trudeau's activities. *See* A6:7; SA118, 121-122 (D.729 (citing D.713 at 4, 15)). In light of these findings, the district court properly exercised its discretion to decline to award fees.

Moreover, the law firms are in a much better position to bear the costs of discovery than Trudeau's consumer victims to whom the receivership proceeds will be paid. As it is, consumers will receive less than a quarter of their total losses, and every dollar paid to the lawyers reduces that figure further. Further, the law firms received compensation for their prior work resisting Website Solutions's compliance with the subpoena (and, as noted above, they assumed the risk of non-payment). And the firms were better able to protect themselves (for example, by demanding up-front fees) than deceived consumers, who had no such option. *See Cardinal Growth*, 2015 WL 850230, at *3 (law firm could more readily bear the costs of production where "the federal government (and ultimately the taxpayers) would be forced to foot the bill."). This further shows that the district court acted well within its discretion by ruling that consumers, and not the law firms, should receive the receivership funds.

This case also is of substantial public importance. It is an enforcement action filed by a government consumer protection agency to vindicate defrauded consumers. *See id.* (rejecting fee request where federal agency needed subpoenaed documents for its mission).

The law firms' further argument that Website Solutions's document production assisted the contempt case against Trudeau and the subsequent

receivership, Br. 22-24, does not support reimbursement. The law firms produced materials as a benefit to their clients who were legally obligated to comply with the subpoena and court order compelling their production. And, as the district court determined, on balance the firms' conduct hindered the investigation more than it helped.

Finally, even if it could be appropriate to award fees to the law firms, they have failed to substantiate their request. Their own supporting documentation shows that numerous claimed expenses either had nothing to do with the document production to the FTC or involved Website Solutions's opposition to that production.

For example, Hogan Marren claims that it earned $93,485.45 in fees for the document production to the FTC in April and May 2013 (excluding $22,053.76 in unpaid expenses for BlueStar). Br. 19-20. Its invoices show, however, that $8,145.45 of that amount is the unpaid balance from a previous invoice. The invoices lack any description of the earlier work, which likely included activities opposing the FTC's discovery efforts. *See* SA126 (D.912-1 at PDF p. 7). Further, a number of time entries reflect work that is facially unrelated to Website Solutions's document production to the FTC. They include work relating to: discovery served on Marc Lane (Trudeau's "asset protection" attorney); Trudeau's sham bankruptcy filing, applicability of the

automatic stay, and motion to continue hearing; document production by third party Next Media; Sant's post-employment agreement with Website Solutions; deposition transcript review; and potential Sant trial testimony. *See* SA126-133 (D.912-1 at PDF pp. 7-14).

Faruki Ireland's $47,908.32 claim is even less substantiated. The claimed amount simply appears to be the total unpaid balance owed to the firm by Website Solutions as of August 8, 2013 (excluding one entry from July 2013). SA112 (D.912-2 at PDF p. 66). The supporting invoices fail to connect that amount to particular work expended to comply with the FTC's subpoena issued to Website Solutions. Indeed, even during the April-May 2013 period when the law firms assert Website Solutions finally began complying with the FTC's subpoenas, many of the line items are wholly unrelated (or outright opposed) to Website Solutions's production, including: "[p]reparation of objections to supplemental FTC subpoena"; motion to quash the Babenko subpoena and travel for scheduled Babenko deposition; motions to stay and appeal the district court's decision granting the FTC's motion to compel; preparation and participation in the depositions of Marc Lane, Neil Sant, M. Dow, and Trudeau; and work related to the document production by Lane, Sant's separation agreement from Website Solutions, and Trudeau's

bogus Chapter 7 bankruptcy filing, including motions to stay discovery based on that filing.[12] SA88-111 (D.912-2 at PDF pp. 34-46, 50-60).

CONCLUSION

The order of the district court should be affirmed.

Respectfully submitted,

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[12] Indeed, the district court recognized that the FTC's efforts to obtain asset discovery from various entities it contended were controlled by Trudeau (including Website Solutions) "have been met with stiff resistance, forcing the FTC to litigate the enforcement of its subpoenas * * * in this court." D.649 at 2.

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.

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