UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FEDERAL TRADE COMMISSION, Plaintiff,	)	
v.	)	Civil Action No. 03-C-3904
KEVIN TRUDEAU, Defendant.	)	Honorable Robert W. Gettleman

DEFENDANT KEVIN TRUDEAU'S MEMORANDUM IN SUPPORT OF MOTION TO STAY THIRD-PARTY DISCOVERY AND APPOINT A SPECIAL MASTER FOR THE PURPOSE OF ESTABLISHING A CONSUMER REMEDIATION PLAN

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I. INTRODUCTION

On January 25, 2013, Kevin Trudeau filed his sworn financial disclosure with this Court, laying out his assets and liabilities, including over $870,000 in past-due legal fees, in painstaking detail. (Docket No. 540.) As the disclosure and other record evidence confirm (including his tax returns and other financial disclosures to the FTC over the past decade or so), Trudeau does not have $37.6 million dollars stashed away to pay the judgment at issue. The FTC has conceded that Trudeau never received the $37.6 million in proceeds from the sale of the *Weight Loss Cure* book. Accordingly, the FTC's avalanche of third-party subpoenas will yield nothing that the FTC and this Court do not already know: Trudeau does not have any substantial assets, hidden or otherwise. Indeed, allowing the FTC to proceed with third-party subpoenas will simply waste more time and, in the end, leave this Court exactly where it started—without any consumer redress.

Consumer remediation *is* possible. With the Court's assistance, each and every consumer who feels misled by Trudeau and desires a refund for the *Weight Loss Cure* book can be compensated. Absent such assistance, however, Trudeau is left in a hopeless deadlock, in which Trudeau cannot take the steps necessary to earn the money to pay the gigantic judgment against him. The FTC's burdensome and harassing subpoenas of third parties (and the threat of additional subpoenas in the future) prevent Trudeau from entering into any potentially prosperous business relationships—and thus prevent him from making progress toward paying the judgment.

Trudeau therefore moves the Court to stay third-party discovery and instead shift its focus to its expressly stated goal of consumer remediation. Trudeau respectfully requests that this Court reconsider appointing a Special Master at this time to work with the parties to put together a consumer remediation plan that is realistic while accomplishing this Court's goals.

II. BACKGROUND

In September 2004, Trudeau settled the FTC's lawsuit against him. The Stipulated Order provided that Trudeau could appear in infomercials for books and other publications and that such infomercials should not "misrepresent the content" of the publication being promoted. The FTC stipulated that Trudeau did not admit any liability or fault.

In September 2007, the FTC sought to have Trudeau held in civil contempt of the 2004 Stipulated Order. Trudeau was accused of misrepresenting the content of his *Weight Loss Cure* book in television infomercials. After an evidentiary hearing in July 2008, this Court entered judgment against Trudeau and banned him from appearing in infomercials for three years, all as a putative remedy for civil contempt. (Docket No. 220.) Initially the Court imposed a sanction of $5.1 million—the amount of royalties that the publisher received for sales of the *Weight Loss Cure* book to retail stores. Then, after counsel pointed out that assessing damages based on retail book sales lacked a meaningful connection with the subject infomercials (Ex. A, 10/30/08 Tr. at 2-4), the court *sua sponte* increased the sanction to $37.6 million (Docket No. 220 at 4)—an amount it had earlier described as "rather Draconian." (Ex. B, 7/25/08 Tr. at 354-55 ("to say that everybody who bought this book should be given a refund strikes me as a bit overdoing it").)

In August 2009, the Seventh Circuit vacated both the $37.6 million judgment and the ban on Trudeau's appearance in infomercials, and remanded the case for further proceedings. *FTC v. Trudeau*, 579 F.3d 754 (7th Cir. 2009). On remand, the FTC filed a renewed motion for monetary sanctions and a motion to modify the 2004 Stipulated Order to include a permanent injunction effectively banning Trudeau from producing or appearing in infomercials. (Docket Nos. 267, 269.)

In 2010, this Court again imposed the $37.6 million fine and granted the injunctive relief

requested by the FTC. (Docket Nos. 337, 372 ("the June 2, 2010 Order").)[1] The Court ordered Trudeau "to pay forthwith to plaintiff the sum of $37,616,161," which represents "consumer loss." (Docket No. 372 at 13-14.) As the Order stated, the express purpose of the $37.6 million sum was to reimburse customers who purchased the *Weight Loss Cure* book through the related infomercials for the cost of the *Weight Loss Cure* book and any associated shipping and handling charges. (*Id.* at 14.) The Order also stated that "[a]ny funds remaining after such reimbursement to consumers, less taxable costs and other costs of disbursement approved by the court, shall be returned to Trudeau." (*Id*.) In other words, the $37.6 million fine was, according to the Court, intended for remediation and was not a punitive fine. The judgment also included a $2 million performance bond, which required Trudeau to post $2 million into an escrow account before he could engage in any further infomercial activities.

The Seventh Circuit affirmed this Court's judgment. *FTC v. Trudeau*, 662 F.3d 947, 949 (7th Cir. 2011). Its opinion repeatedly referred to the $37.6 million as a "remedial sanction" and noted that "any remainder not paid to [purchasers of the *Weight Loss Cure* book] or used in the administration of the sanction [is] to be returned to Trudeau." *Id.* Trudeau's petitions for rehearing *en banc* and certiorari were denied.

Since entry of the June 2, 2010 Order, the FTC has taken no asset discovery of Trudeau. In June 2012, Trudeau took the initiative to propose a consumer remediation plan. In particular, Trudeau filed a Motion to Modify this Court's June 2, 2010 Order, proposing a consumer remediation plan to be administered by Rust Consulting. (Docket No. 476.) Rather than proposing an alternative consumer remediation plan (which the FTC has never done), the FTC responded with its Contempt Motion. (Docket No. 481.) The FTC did so without having taken *any* financial

[1] The initial order was entered on April 16, 2010 (Docket No. 337), but was modified by an order dated June 2, 2010, to correct a typographical error (Docket No. 372).

discovery from Trudeau or any so-called "Trudeau Affiliates." Nor had the FTC attempted to attach to any alleged assets. The FTC thus revealed its true objective—to punish Trudeau and forget consumer remediation.

In August 2012, this Court rejected Trudeau's Motion to Modify, and the parties proceeded with briefing on the FTC's Contempt Motion. Trudeau's opposition to the Motion explained that he does not have the assets to pay the $37.6 million judgment and does not own or control the entities that the FTC claims are related to Trudeau. (Docket No. 508.) Nonetheless, while it has produced no evidence that Trudeau owns or controls any substantial assets, the FTC has consistently urged this Court, in the strongest possible terms, that until Trudeau pays the judgment in full the Court must "incarcerate" him. (*E.g.*, Docket Nos. 481, 517, 538.)

In December 2012 this Court ordered Trudeau to prepare a detailed sworn financial statement. Trudeau complied with the Court's order. (Docket No. 540.) Meanwhile, the FTC has unleashed an avalanche of no less than 28 third-party subpoenas that seek massive document productions and burdensome deposition from virtually everyone who has a business relationship with Trudeau. Those now under attack by the FTC include: American Express, Bank of America, JPMorgan Chase, Diners Club International (BMO Harris), Discover Financial Services, FirstMerit Bank, PNC Bank, Fifth Third Bancorp, New York University, Winston & Strawn LLP, the Law Offices of Marc J. Lane, Marc J. Lane, Nataliya Babenko, Michael Dow, Golden Lion Mint, Rivers Casino (Midwest Gaming), Website Solutions USA, GIN USA, and KTRN.[2] Many of these subpoenas were served on or about Christmas Eve and New Year's Eve. They

[2] The FTC's avalanche of third-party discovery seeks, for example: (1) Nataliya Babenko's courses and class load at New York University; (2) any and all documents governing and relating to payments and compensation to Winston & Strawn LLP and the Law Offices of Marc J. Lane; (3) documents and testimony relating to the sensitive financial records of KTRN, GIN USA, and Website Solutions USA, as well as the corporate structure and control of those entities; (4) documents and testimony from Nataliya Babenko, regarding her personal assets and business interests; and (5) documents from two other third parties, Golden Lion Mint and Rivers Casino.

were accompanied by extremely short response dates, process servers stalking Trudeau's wife, and a flood of harassing and abusive emails from FTC attorneys who refused all requests for more time and all attempts at compromise.

The third parties subject to this discovery abuse have retained counsel and, in most instances, have objected to the subpoenas. The FTC has filed at least one motion to compel thus far seeking discovery from the Law Offices of Marc J. Lane, Winston & Strawn LLP and Website Solutions USA. (Docket No. 538.) The apparent purpose of this discovery attack is to discourage anyone from doing business with Trudeau, thereby making it impossible for him to earn the money necessary to pay the judgment. All while interfering with Trudeau's ability to pay the judgment and refusing to engage with Trudeau's counsel on the subject of an agreed remediation plan, the FTC demands that Trudeau be incarcerated for failing to pay the judgment. If the Court's goal of consumer remediation is to be met, this must stop.

III. ARGUMENT

A. Legal Standard

Under Federal Rule of Civil Procedure 26(c), a court may stay discovery "for good cause," including protecting a party or person "from annoyance, embarrassment, oppression, or undue burden or expense." *See also Olivieri v. Rodriguez*, 122 F.3d 406, 409 (7th Cir. 1997) (district courts have discretion to manage discovery to protect against those ends). As this Court has recognized, the "burden" that would be imposed in "responding to the discovery" is among the "appropriate factor[s] to consider in weighing whether to grant a stay." *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 331, 336 n.3 (N.D. Ill. 2005); *see also Stone v. Lockheed Martin Corp.*, Civil Action No. 08-cv-02522, 2009 WL 267688, at *1 (D. Colo. Feb. 2, 2009) ("a case-by-case analysis is required because such an inquiry is necessarily fact-specific and depends on

the particular circumstances and posture of each case.").

Further, "[a]lthough [Federal] Rule [of Civil Procedure] 69(a)(2) states that discovery may be sought 'from any person,' courts often have imposed a stricter standard when discovery is sought from third persons besides the judgment debtor. Courts explicitly balance the judgment creditor's need for information against the privacy interests of the third person." Moore's Federal Practice 3D § 69.04[1]; *see also Blaw Knox Corp. v. AMR Indus., Inc.*, 130 F.R.D. 400, 403-04 (E.D. Wis. 1990) (denying third-party discovery regarding certain assets and noting that "a judgment creditor must make a threshold showing of necessity and relevance when attempting to obtain discovery of a non-judgment debtor pursuant to Rule 69(a). The interest of third parties in their privacy must be balanced against the need of the judgment creditor to the documents in question. This is a factual determination which can only be made on a case by case basis."); *Cassion Corp. v. County West Bldg. Corp.*, 62 F.R.D. 331, 334 (E.D. Pa. 1974) (finding questions to third party to be proper but noting, "[g]enerally, it is said that the inquiry must be kept pertinent to the goal of discovering concealed assets of the judgment debtor and not be allowed to become a means of harassment of the debtor or third persons. … It has also been said that third persons can only be examined about assets of the judgment debtor and cannot be required to disclose their own assets.")

As explained below, the burden and expense that would be imposed on third parties, as well as the lack of need for the requested discovery, warrant a finding of "good cause" to stay discovery under the facts of this case.

B. The Subpoenaed Information Is Overly Burdensome To Third Parties, Especially When Weighed Against The Need For Such Discovery Considering Trudeau's Sworn Financial Statement.

The circumstances of this case weigh heavily in favor of a stay of third-party discovery. In particular, the need for the requested discovery is far outweighed by the burden and expense

for the third parties involved. *See, e.g.*, *DSM Desotech Inc. v. 3D Sys. Corp.*, No. 08 CV 1531, 2008 WL 4812440, at *2 (N.D. Ill. Oct. 28, 2008) (granting stay and noting that "stays are often deemed appropriate" where "discovery may be especially burdensome and costly to the parties"); *Cataldo v. City of Chicago*, No. 01 C 6665, 2002 WL 91903, at *2 (N.D. Ill. Jan. 24, 2002) (granting stay where discovery would be inefficient and stay would not prejudice plaintiff); *In re Currency Fee Anti-Trust Litig*., No. MDL 1409, M21-95, 2002 WL 88278, at *1 (S.D.N.Y. Jan. 2, 2002) (granting partial stay and noting in considering whether to stay discovery, federal courts consider the burdensome nature of the discovery at issue).

Here, the FTC's attack on all those doing business with Trudeau—as well as his spouse—is counter-productive to the Court's goal of consumer remediation, completely unnecessary, and ultimately unfair. Trudeau recently filed his sworn financial statement laying out all of his assets and liabilities. (Docket No. 540.) In that sworn financial statement, Trudeau provided information regarding every possible financial category, including his employment information and income, his assets, his business and financial interests, his liabilities and amounts owed, his personal property, and his real property. (*Id*.) This statement provides a transparent 360-degree view of Trudeau's current financial condition. Presumably that is why the Court ordered this information to be filed in the first place. But in any event, given the contents of Trudeau's sworn statement, the FTC now seeks discovery that is at best duplicative of the sworn financial statement, and at worst overtly harassing and overly burdensome.

To cite just one example, the FTC seeks documents from the Law Offices of Marc J. Lane relating to payments Trudeau has made for legal services. According to the FTC, this information is relevant to identifying the existence of assets controlled by Trudeau. But the Law Offices of Marc J. Lane have made clear that they are not holding any assets on behalf of Tru-

deau. Moreover, Trudeau's sworn financial statement lists *over $870,000* in overdue legal bills. (*Id.* at 18 (Item 21 Attached List).) Documents from the Law Offices of Marc J. Lane will thus serve only to underscore the fact that Trudeau does not have the funds necessary to pay the $37.6 million judgment.

Moreover, the requested discovery will require the third parties in question, who are not the subject of the $37.6 million judgment or the subject of the FTC's Contempt Motion, to devote extensive time and expense to compiling the requested records, and in some cases to prepare for and give deposition testimony. This Court should stay the FTC's attempt to disrupt the lives of those who would dare to do business with Trudeau—who has written best-selling books and engaged in many business endeavors that the FTC has never questioned—or to associate with him (including his wife and his lawyers). This is especially clear given that such discovery is unlikely to divulge any additional information beyond what the Court has already ordered Trudeau to disclose, namely, his sworn financial statement. *See* Moore's Federal Practice 3D § 69.04[1]; *Blaw Knox Corp.*, 130 F.R.D. at 403-04.

C. The FTC Seeks To Punish Trudeau, Which Is Not An Appropriate Goal Of Coercive Contempt.

The FTC's Contempt Motion, myriad third-party subpoenas, and Motion to Compel all seek to accomplish one transparent and illegitimate goal: to punish Trudeau. Indeed, the FTC has not even attempted to hide its irrational crusade against Trudeau. It asks this Court to imprison Trudeau at every opportunity, even when such a request is irrelevant to the underlying pleading in which the request appears. (*E.g.*, Docket Nos. 481, 517, 538.)[3]

[3] For example, the FTC filed its Motion to Compel on January 18, 2013, requesting that this Court compel the Law Offices of Marc J. Lane, Winston & Strawn LLP, and Website Solutions USA to produce certain discovery. (Docket No. 538.) Despite the fact that this motion had nothing to do with Trudeau personally, and did not seek any action from Trudeau, the FTC could not help but "urge[] the Court to consider imposing coercive incarceration." (Docket No. 538-1 at 15.)

The FTC's efforts rest on a fundamental misunderstanding of the purpose of coercive contempt. Coercive contempt is based on the premise that the contemnor retains the ability to purge the contempt by committing an affirmative act—and thereby "carries the keys of his prison in his own pocket." *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442 (1911). Because coercive sanctions are "not intended as a deterrent to offenses against the public" (*FTC v. Trudeau*, 579 F.3d 754, 770 (7th Cir. 2009)), Trudeau must be able to avoid the penalty, or some part of it, by complying with the order.

It follows that coercive civil contempt may not be used to punish past wrongs. As the Supreme Court explained in *Int'l Union, United Mine Workers of Am. v. Bagwell*: "When a contempt involves the prior conduct of an isolated, prohibited act, the resulting sanction has no coercive effect. '[T]he defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense.'" 512 U.S. 821, 829 (1994) (internal citations omitted). Similarly, "[a] contempt order is considered ... criminal," not civil and coercive, not only "if its purpose is to punish the contemnor[or] vindicate the court's authority," but also if it is intended to "deter future misconduct." *In re Grand Jury Proceedings*, 280 F.3d 1103, 1107 (7th Cir. 2002). Finally, the "coercive … nature" of civil contempt means that "there is no justification for confining on a civil contempt theory a person who lacks the present ability to comply." *McNeil v. Director, Patuxent Inst.*, 407 U.S. 245, 251 (1972).

Rather than develop a plan to bring about consumer remediation, or even discuss one—the explicit goal of the June 2, 2010 Order—the FTC repeatedly attempts to punish Trudeau. The FTC has done nothing with the funds paid by Trudeau in partial payment of the judgment. Nor has the FTC announced any plan to provide for remediation. If the FTC's plan is to hold Trudeau's money, bankrupt him, make it impossible for him to pay the judgment, and (years

from now) send checks into cyberspace, then the FTC's plan is illegitimate and should not be condoned by this Court.

Moreover, the FTC has not provided any reason to conclude that if Trudeau were civilly incarcerated for contempt, he would hold the "key" to his own prison. On the contrary, Trudeau's sworn financial statement confirms that he has an enormous amount of debt and very few assets. The FTC's assertions that Trudeau has control over various other entities are a red herring, because those entities (even if controlled by Trudeau, which they are not) do not have assets with which to pay the $37.6 million judgment. Moreover, the FTC has cited no authority that would allow Trudeau to pay a *personal* judgment using *corporate* funds, even if the entities did have sufficient assets to pay the judgment. Nor is this surprising: There is no such authority. *See Scholes v. Lehmann*, 56 F.3d 750, 758 (7th Cir. 1995) (explaining that reverse piercing of the corporate veil is a "rarity"); *In re Denton*, 203 F.3d 834, 2000 WL 107376, at *3 (10th Cir. 2000) (explaining that reverse piercing causes serious legal problems); *Boatmen's Nat'l Bank of St. Louis v. Smith*, 706 F. Supp. 30 (N.D. Ill. 1989) (allowing reverse piercing in limited circumstance where individual was sole shareholder, director, president, and treasurer of corporation); *see also Sea-Land Servs., Inc. v. The Pepper Source*, 941 F.2d 519 (7th Cir. 1992).

In short, the FTC is focused only on punishment—an illegitimate objective—rather than consumer redress. And it is evident that, without the assistance of this Court, the FTC will not relent in its abusive discovery tactics until Trudeau is incarcerated. Under these circumstances, this Court should act to put this case back on track toward the goal of consumer remediation—an attainable goal, and the only goal that is consistent with the purpose of the June 2, 2010 Order.

D. This Court Should Appoint A Special Master And Refocus This Matter On Consumer Remediation.

Indeed, it seems all but forgotten that the judgment underlying this matter was designed

for one purpose: to provide refunds to consumers who felt misled by Trudeau regarding the contents of the *Weight Loss Cure* book. And this goal is attainable, despite the fact that Trudeau does not currently have the assets or funds necessary to discharge the full $37.6 million judgment (as evidenced by his sworn financial statement). Trudeau remains ready and willing to enter into new contracts and business ventures to raise the monies necessary to fund a consumer remediation plan that will give a refund to *each and every* customer who wants one.

This can be accomplished through Trudeau's original consumer remediation plan, which was proposed in Trudeau's Motion to Modify (Docket No. 476). But if that plan is unacceptable, Trudeau is willing to work earnestly with the FTC, this Court, and/or a Special Master to develop a different plan that might satisfy the goal of consumer redress in a way that is satisfactory to all.

Now that he has submitted his sworn financial statement, therefore, Trudeau requests that this Court appoint a Special Master (per the Court's own suggestion) who can manage this case, get to the bottom of the FTC's unfounded accusations that Trudeau is hiding assets, and bring the parties together around a consumer remediation plan. (*See also* Docket No. 529 (providing additional rationale for the appointment of a Special Master).) Trudeau has pledged full cooperation and transparency with the Special Master.

The alternative to this reasonable plan—following the FTC's path of depositions, complex hearings, and civil incarceration, with no concrete plan to achieve consumer remediation—will inevitably lead to wasting several more months, if not years, attempting to discover assets that do not exist. The FTC's path will only ensure that consumers never receive a refund because the FTC is making it impossible for Trudeau to earn the monies necessary to fund a consumer remediation plan.

III. CONCLUSION

For the foregoing reasons, third-party discovery should be stayed in this matter, and a Special Master (such as a Magistrate Judge) should be appointed in order to work with the parties to put together a consumer remediation plan.

February 4, 2013

Respectfully submitted,

KEVIN TRUDEAU

By: /s/ Kimball R. Anderson
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CERTIFICATE OF SERVICE

I, Kimball R. Anderson, an attorney, hereby certify that on February 4, 2013, I caused to be served true copies of DEFENDANT KEVIN TRUDEAU'S MEMORANDUM IN SUPPORT OF MOTION TO STAY THIRD-PARTY DISCOVERY AND APPOINT A SPECIAL MASTER FOR THE PURPOSE OF ESTABLISHING A CONSUMER REMEDIATION PLAN and accompanying exhibits by filing such documents through the Court's Electronic Case Filing System, which will send notification of such filing to all counsel of record including:

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