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 BRIEF IN OPPOSITION TO THE FTC'S MOTION TO HOLD DEFENDANT TRUDEAU IN CONTEMPT FOR VIOLATING THE JUNE 2, 2010 ORDER, INCARCERATE HIM, AND ORDER HIM TO PROVIDE AN ACCOUNTING OF AND TURNOVER ASSETS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

The FTC's contempt motion, premised on the false notion that Trudeau owns or controls entities through which he has concealed and dissipated assets, is entirely unsupported by the evidence and should be denied. The very documents and declarations presented by the FTC demonstrate that Trudeau does not have sufficient assets to pay the judgment.[1] Indeed, were that not so, the FTC most assuredly would have seized those assets.

Aware that Trudeau personally does not have sufficient assets to pay the judgment, the FTC resorts to speculation—that Trudeau owns or controls entities through which he has concealed assets that can be used to satisfy the judgment. But one will search the FTC's motion in vain for any evidence that Trudeau owns or controls any such entities—let alone any discussion of the governing *legal* framework, or a showing that the Court may reverse-pierce the corporate veil and treat such entities as Trudeau's own.

Nor has Trudeau concealed anything. To the contrary, he has answered all discovery requests fully and fairly. And with the aid of extensive third-party subpoenas, Trudeau's financial and banking records have been thoroughly scrutinized by the FTC. What do these records show? The absence of assets belonging to Trudeau. Indeed, while the FTC obsesses over the "cash flow" of various corporate entities—not the assets of Trudeau himself—even these corporate figures do not begin to approach the gross revenue figures to which the FTC pointlessly directs the Court's attention. The FTC fails to provide any evidence that the entities

[1] The FTC's contempt motion is supported largely by the declaration of FTC trial counsel Michael Mora. Trudeau has moved to strike the Mora Declaration on the grounds that it is ethically improper for trial counsel to insert himself in the case as a witness (*See* ABA Model Rule of Professional Conduct 3.7, as adopted by Northern District of Illinois Local Rule 83.50) and because Mora's declaration is not based on his personal knowledge. *See, e.g.*, *Sullivan v. General Plumbing, Inc.*, No. 06 C 2464, 2007 WL 1030236, at *2, n.1 (N.D. Ill. 2007) (striking portions of affidavits for failing to set forth a basis for personal knowledge). Indeed the Mora declaration consists entirely of lawyer argument and speculation. (*See* Docket No. 501, Trudeau Motion To Strike.)

have any assets.

Moreover, the FTC's motion is premised on the objectively false premise that Trudeau has "refused" to pay anything. To the contrary, Trudeau has repeatedly attempted to work out a remediation plan with the FTC, but the FTC has rebuffed his efforts. He has recently assigned a portion of his salary from his new employment, sent the FTC a check, and proposed a payment plan that will effect full remediation. But the FTC is not interested in consumer remediation. It is focused solely on punishment—an illegitimate purpose of any civil contempt motion.

In short, Trudeau has done nothing warranting a contempt finding, let alone the remedy of incarceration. As demonstrated below, the FTC's argument to the contrary rests on an embarrassingly inept collection of demonstrably false factual assertions, unsupported speculation, and obvious irrelevancies. The FTC's motion is baseless. It should be denied.

II. BACKGROUND

A. While Trudeau Has Taken Steps To Satisfy The Judgment, The FTC Has Refused To Work With Him.

Trudeau does not have $37.6 million to pay the judgment. He has a future salary from Sales Solutions International A.G. ("SSI") and a previously earned salary from KTRN. He has already given the FTC a check for 50% of his new KTRN salary, as well as a right to 50% of his ongoing SSI salary. (Ex. A, 9/21/12 Letter from Marc Lane to Michael Mora.) He also has the capacity to earn sufficient funds to afford meaningful consumer remediation. To that end, he has established an escrow account that was funded with $2 million, as required to resume his infomercial business (Ex. B, Lane Decl. at ¶ 5), and he has requested that, if the FTC will agree to reduce the bond to $1 million, the other $1 million be sent directly to the FTC towards payment of the judgment. (Ex. A.)

In addition, since the entry of this Court's judgment, Trudeau has been diligent in

complying with all aspects of the judgment and has responded fully to all asset discovery requests propounded by the FTC. (Ex. B at ¶ 2.) He and his wife have had their banking activities thoroughly scrutinized by the FTC. (*See generally* Docket No. 481-1, FTC Contempt Motion.) Further, Trudeau's corporate counsel, Marc Lane, has repeatedly and continuously (typically every month) advised the FTC of Trudeau's business activities. (Ex. B at ¶ 3.) In particular, Mr. Lane continuously provides the FTC with an overview of Trudeau's proposed business ventures, explains why he believes the business ventures will comply with all relevant court orders, and then requests that the FTC provide Trudeau with guidance regarding whether, in the FTC's opinion, Trudeau's activities conform to the orders in this case, including the Supplemental Order. (*Id*.) The FTC has not generally been responsive to these requests for guidance; and when it does respond, it provides unproductive commentary that FTC does not "'approve' advertising" and that "[t]he burden to comply with the Court's Orders and other applicable law is Trudeau's." (*Id*. at ¶ 4.)

Trudeau's representatives have also exhaustively attempted to engage the FTC in a plan to accomplish consumer remediation. (*Id.* at ¶ 7.) Initially, Mr. Lane attempted to engage with the FTC. (*Id*.) Then, a Winston & Strawn LLP partner (and former FTC Director), Anthony DiResta, attempted to engage with the FTC. (*Id*.; Ex. C, DiResta Declaration at ¶¶ 3-5.) Although the FTC's representatives finally agreed to meet with Mr. DiResta, they declined to engage in any meaningful discussion about an orderly procedure for Trudeau to satisfy the judgment. (Ex. C at ¶¶ 4-5.) Lacking any cooperation whatsoever by the FTC, Trudeau's lawyers at Winston & Strawn LLP enlisted Rust Consulting to consult regarding a consumer remediation plan to be administered under this Court's supervision. (*See* Docket No. 477-1, Rust Consulting Declaration and Proposal.) Winston & Strawn then approached this Court, on behalf

of Trudeau, with a sound plan to effect consumer remediation. Most recently, Trudeau's corporate lawyer, Marc Lane, sent a letter to the FTC confirming concrete steps that Trudeau has taken to pay the judgment—including the assignment of salary and a payment by check to the FTC. (Ex. A.)

B. Trudeau Does Not Own Or Control Numerous Business Entities, Nor Does He Use "Nominees" To Hide Any Alleged Ownership Or Control.

In response to Trudeau's efforts to pay the judgment and effect consumer remediation, the FTC has filed a misguided Contempt Motion premised on the false notion that Trudeau does not want to pay the judgment and is hiding assets through entities that the FTC claims Trudeau owns or controls. The FTC claims that:

- Trudeau owns or controls five entities—International Pool Tour ("IPT"); Natural Cures; Kevin Trudeau Radio Network ("KTRN"); Website Solutions, USA ("WSU"); and Global Information Network ("GIN") USA (which the FTC has labeled "Trudeau Affiliates")—with total cash flow of $189 million through multiple banks;
- Trudeau owns or controls ten additional entities with cash flow of $31 million;
- Trudeau maintains an extravagant lifestyle, including domestic workers and travel by private airplane and luxury cars, subsidized by entities Trudeau owns or controls; and
- Trudeau makes large personal charges on his credit cards, which are then paid for by the entities he allegedly owns or controls.

As demonstrated below, the FTC's assumptions regarding the ownership and control of these entities not only are unsupported by the record, they are factually erroneous. Similarly lacking in support, as well as factually erroneous, are the FTC's allegations that Trudeau has transferred or concealed assets. He has done neither. We address the FTC's erroneous allegations below.

1. Trudeau Does Not Own Or Control Multiple Entities.

The FTC has provided no proof that Trudeau owns or controls the companies that it

incorrectly describes as "Trudeau affiliates."[2] In fact, the FTC concedes that all but one of these entities is not owned by Trudeau.

The FTC alleges that Trudeau owns nearly 98% of Natural Cures through an offshore trust. But the FTC is mistaken. Although Natural Cures is owned by a trust, Trudeau is not the beneficiary. For years, the FTC has had a copy of the trust agreement. Indeed, the FTC attached a copy of the agreement (established in 1994, long before Trudeau encountered difficulties with the FTC) as an exhibit to its contempt motion. (FTC PX 4, Att. G.)

The FTC also argues that Trudeau "beneficially owns or controls" KTRN and WSU. (FTC Br. at 7.) But, both of these entities are ultimately owned by Nataliya Babenko. As the FTC acknowledges, Trudeau is not a director, officer, bank signatory, or stockholder of those companies. Rather, the FTC argues—without factual support—that Babenko and Sant are "nominees" of Trudeau. But the FTC is without evidence to support its bald assertion, and it is untrue. Babenko is Trudeau's wife, but she also is a successful business woman in her own right. And, she is not a judgment debtor. The FTC has no right to her assets and certainly has no right to cast unfounded aspersions on her. The FTC cites no valid evidence whatsoever that Trudeau owns or controls KTRN or WSU, or that Babenko and Sant are somehow "nominees" of Trudeau—much less establish that any such facts satisfy governing law.[3]

The FTC also argues that Trudeau "beneficially owns or controls" GIN USA and GIN

[2] Trudeau does own International Pool Tour ("IPT"), [redacted] There is no evidence to the contrary. The IPT transactions cited by the FTC reflect a payment for pool tournament sponsorship and repayment of a loan by third parties.

[3] The FTC cites to a 2008 Sant deposition for the proposition that Sant, in the past, performed certain administrative duties for Trudeau in unrelated and discontinued business ventures. But this deposition—taken almost five years ago—does not suggest, much less establish—that Sant is a nominee, owner, and/or officer of KTRN or WSU, which did not even exist in 2008. Yet, this is the sum total of "evidence" that the FTC cites in support of its argument that Sant is somehow Trudeau's "nominee."

FDN. Again, however, the FTC offers no evidence about GIN USA or GIN FDN, or the ownership or control of those entities.[4] While acknowledging that Trudeau is not an owner, officer, or director thereof, the FTC makes the confusing argument that Trudeau somehow beneficially owns or controls the entities that *fund* GIN—GIN USA, GIN FDN, KTRN, and WSU. The FTC argues:

- Both in a radio interview and in a recent promotional video he did for GIN, Trudeau admitted that he is a founder of GIN and a member of its council. PX 1, Att. X, Y.

- Since its inception, Trudeau has been the chief spokesperson for GIN and has heavily promoted it through his *Your Wish* publication, through KTRN on "The Kevin Trudeau Show" and its website, www.ktradionetwork.com, and at GIN promotional seminars. *See id.* at ¶¶ 20-28, Att. Y, Z (video broadcasts of Trudeau promoting GIN, and describing how he founded it and promoted it through seminars).

- In a recent video addressed to his stable of paid speakers for GIN seminars, Trudeau announces major changes in GIN's operations, and explains in detail how he started GIN in 2009 by soliciting customers who purchased his *Natural Cures* and *Debt Cures* books to join the program. *Id.* at Att. Z. Trudeau further recounts how he conducted the initial GIN seminars in Zurich, Chicago, and Cancun. *Id.*

- A testimonial on the web site of a consulting firm Trudeau has used bears his electronic signature as "*Founder & Owner, Trudeau Approved Products, Global Information Network, Kevin Trudeau Radio Network*." *Id.* at Att. W (McClain Companies web pages) (emphasis added).[5]

[4] GIN FDN is a Nevis foundation with no owners. It has thousands of members in over 180 countries. GIN FDN owns GIN USA.

[5] This testimonial was posted by a third-party advertiser, McClain Companies, and not by Trudeau. Trudeau did not approve this language. Trudeau has since requested that McClain Companies take down that testimonial or edit it to reflect correct information about his role in those companies. The FTC also asserts that Trudeau must own or control GIN through WSU because Daniel Hurtado sent a letter to the FTC on behalf of Mr. Trudeau on WSU letterhead, and because a third party, Peter Wink, wrote that Wink's title was "Director Sales and Marketing at Website Solutions/Kevin Trudeau" on his LinkedIn page. Hurtado was employed by and has served as counsel for WSU in the past, including in June 2010 when this letter was written. As Trudeau provides services to WSU, the use of the WSU letterhead is not surprising. It says nothing about ownership or control of WSU. In addition, Trudeau has no control over what third-party individuals write on their LinkedIn profiles. That information is unaudited and

(FTC Br. at 8-9.) But none of this supports a conclusion that Trudeau beneficially owns or controls GIN USA, GIN FDN, KTRN, and WSU—a point underscored by the FTC's failure to cite any authority to that effect. Instead, it merely confirms what Trudeau has consistently told the FTC, and the world, namely that he is a member of GIN (along with thousands of others in over 180 countries) and serves on its council (along with 50 others). This does not make him the owner of GIN, or of any of the companies that may do business with GIN. The FTC has presented no evidence whatsoever that Trudeau somehow controls GIN's finances.

In addition, that GIN FDN provided the $2 million loan necessary for Trudeau to post his bond to continue his infomercial business does not establish that Trudeau controls those entities. Trudeau is a member of GIN, a private club, as well as a frequent motivational speaker at GIN functions and a promoter of GIN events. Therefore, it is in GIN's interests to assist Trudeau so that he may continue his promotions of GIN through, *inter alia*, his infomercial business. The business decision made by GIN, which is independently justified by its self-interest, does not show that Trudeau owns or controls GIN—a point again underscored by the FTC's failure to cite supportive legal authority.

Finally, in a footnote in its brief, the FTC states that Trudeau owns or controls at least 10 other corporations. (FTC Br. at 6, n.8.) The FTC's own exhibits, however, show that Trudeau is an officer, director, or manager for only seven other corporations. In any event, according to the documents that the FTC cites, only one of the entities (Natural Cures Health Institute, a foundation with no owners) has a positive net balance in its bank account, and that balance is only for $19,205. (FTC PX 2, Att. B.) It is not surprising that the FTC does not spend any time discussing these (mostly insolvent) entities because nothing about them furthers the FTC's claim

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inherently unreliable. The FTC's reliance on this type of "evidence" shows only the weakness of its arguments and the desperation of its tactics.

that Trudeau has funds to satisfy the judgment.

2. The FTC's Own Documents—And Elementary Principles Of Corporate Finance—Prove That The FTC's Cash Flow Assertion Is Entirely Misleading.

The FTC next claims that $220 million has flowed through GIN, KTRN, WSU, IPT, Natural Cures, and a handful of other entities, but this figure is incorrect, misleading, and irrelevant. Indeed, the FTC entirely fails to explain the relevance of its "cash flow" analysis. Trudeau does not own or control these entities. Furthermore, even if they were flush with cash, their money could not be used to satisfy the personal judgment entered against Trudeau.

Trudeau does not have access to the financial records of GIN, KTRN, WSU, or Natural Cures, as he is not an officer or director of these companies, and therefore cannot independently confirm the amount of cash flow through these organizations, or the exact nature of any transfers of funds. However, a plain reading of the documents that the FTC cites shows that the FTC's math just does not add up.

As the FTC acknowledges, "much of this cash flow . . . is attributable to intercompany transfers among those accounts and accounts held by other" corporate entities. (FTC Br. at 10.) Therefore, by the FTC's admission, this money would be counted *at least* twice—for example money that was initially deposited into a GIN account and later then transferred to WSU would be counted as "cash flow" for both companies. In addition, it is not surprising that the bank records of these entities show some transfer of monies between them, *as these companies contract with each other for business services*. WSU, for example, performs various administrative functions and website maintenance for GIN. Transfers between these entities are simply for services rendered. There is nothing nefarious about that.

More fundamentally, "cash flow" (i.e., revenue) obviously is not the same as profits. Perhaps the FTC presents its misleading "cash flow" figure to suggest that the corporate entities

have earned profits. But the FTC's own documents indicate the contrary. For example, the FTC's exhibits show that, if one subtracts debits from credits, $3.9 million remains for *all* of the entities in question. (FTC PX 2, Att. B.) Moreover, there is no telling from the FTC's brief what that $3.9 million represents. The FTC has provided no evidence that it is profit, or is otherwise available to pay out. The FTC has provided no information about liabilities to third parties. In addition, the FTC's exhibits reveal that many of the corporate accounts had negative balances overall (*e.g.*, Natural Cures (-$218,689), IPT (-$186,475), Alliance Publishing (-$89,141)). (*Id.*) In short, the FTC's apparent claim—that $220 million in "cash flow" is available to satisfy the judgment against Trudeau—is pure sophistry.

3. Trudeau Did Not Dissipate Assets Through Entities He Neither Owns Nor Controls, Nor Does Trudeau Use Corporate Assets To Pay His Personal Expenses.

The FTC points to Trudeau's credit card statements and argues that, because those statements at times reflected large balances and because those credit card balances are at times paid by the corporate entities, Trudeau uses his alleged corporate entities to maintain a "lavish lifestyle." (FTC Br. at 10, 12.) Here again, however, the FTC has its facts wrong and has adduced no plausible basis for reaching the assets of third-party corporations. Trudeau is a New York Times best-selling author and motivational speaker who is hired by various entities. He travels on behalf of these businesses, relating to various speaking engagements and other events. As with any other motivational speaker who travels from one speaking engagement to another, Trudeau charges his travel-related expenses on his personal credit card, and those charges are later expensed to the company. These expenses include meals, lodging, airfare, rental cars, etc. Trudeau spends a great deal of his time traveling for business purposes (roughly 70%). It is hardly surprising, therefore, that Trudeau incurs credit card debt while traveling or that this debt is paid for by the company for whom the expenses were incurred.

In a misguided attempt to suggest that these are personal expenses, the FTC points to $88,325.34 spent on cigars and $122,000 spent at two jewelry companies. That kind of cigar consumption, however, would kill a herd of large horses. The FTC ignores the obvious business purpose of these expenses, namely, to serve as promotional gifts for the thousands of people who attend Trudeau's motivational speaking events. The business judgment of the various businesses that incur and pay for these marketing expenses is of no legitimate concern to the FTC.

Next, the FTC declares that Trudeau "pays for his lavish housing and domestic staff expenses through one of his corporate accounts." (FTC Br. at 12.) Again, however, the FTC lacks any evidentiary support for its accusations. In fact, the property located at 3108 White Oak Lane in Westmont, Illinois, is not owned by Trudeau. It is not and never has been Trudeau's residence.[6] The property is rented by KTRN as a business facility that provides office space and living quarters for visiting speakers and corporate employees. The property has been leased as a means of avoiding the costs of extended hotel stays and rental of additional corporate offices. KTRN employs domestic workers to keep this facility operational.

The FTC also complains that Trudeau has paid for legal fees and has engaged in "dubious litigation tactics." But Trudeau has established legal defense funds through which his supporters help defray the legal cost of defending against the FTC's ongoing harassment campaign. Moreover, the FTC has no basis for complaining about Trudeau's litigation "tactics." It is not a "tactic" to report an Illinois attorney if he violates Rule 8.4, Illinois Rules of Professional Conduct. To the contrary, reporting professional misconduct that violates Rule 8.4(b) or 8.4(c) is a professional *obligation* of any Illinois lawyer who knows of the misconduct. *See* Rule 8.3(a), Illinois Rules of Professional Conduct. Furthermore, Trudeau had every right to file a petition

[6] As the FTC knows from correspondence sent by Trudeau's attorney, Marc Lane, Trudeau resides in Switzerland with his wife.

for certiorari and to challenge harassing subpoenas that are interfering with his ability to pay the judgment. At the proper time and place, the FTC may defend its conduct (if it can); but Trudeau's efforts to defend himself against the FTC's abusive tactics are not grounds for contempt and incarceration.

4. The Real And Personal Property That The FTC Argues Is Available To Pay The Judgment Is Not Owned By Trudeau, But By Entities That He Does Not Own Or Control.

The FTC next argues that Trudeau has other property available to pay the judgment. Specifically, the FTC first claims that Trudeau is the beneficial owner of real property at 601 Del Oro Drive in Ojai, California, allegedly worth over $1 million. But as the FTC well knows, yet fails to mention, the Ojai property is subject to a large mortgage that leaves it with potentially no equity. And even if that were not so, Trudeau does not hold title to this property. Instead, it is owned by KT Corporation, which is owned by the same trust that holds Natural Cures. Trudeau is not the beneficiary of the trust. The FTC knows this, too, but again fails to mention it.

The FTC also argues that the corporate entities own various vehicles, suggesting that these vehicles should be liquidated to satisfy the judgment. According to the FTC, WSU purchased a 2011 Bentley, and also has a 2012 Bentley titled in its name. Again, the FTC is mistaken. There is just one car, and it is currently owned by WSU, not by Trudeau.[7] It is used for business purposes. The FTC also mentions a 2008 Bentley, but that car was leased, not owned, and has since been returned to the dealership per the lease agreement.

In addition, the FTC points out that KTRN purchased a 2011 Jeep Rubicon driven by Matthew Green. Green was, but no longer is, employed by KTRN. The vehicle was used exclusively by Green (not Trudeau) for business purposes. In any event, KTRN no longer owns

[7] The 2011 vehicle in question was returned to the dealership because it was not in acceptable condition, and was replaced with the 2012 vehicle.

this vehicle because, as part of KTRN's severance with Green, the Jeep was sold to him.

The FTC also argues that Babenko bought a Dodge Challenger, and suggests that this vehicle should be liquidated to pay the judgment. But Babenko's purchases are not the FTC's concern. Babenko bought the vehicle with her own money, separate from that of her husband. It is not available for payment of a personal judgment against Trudeau. As Illinois law (not cited by the FTC) provides: "Neither husband or wife shall be liable for the debts or liabilities of the other incurred before marriage, and (except as herein otherwise provided) they shall not be liable for the separate debts of each other, nor shall the wages, earnings or property of either, nor the rent or income of such property, be liable for the separate debts of the other." 750 ILCS 65/5.

5. Trudeau Has Not Transferred Funds To His Wife Or Overseas To Dissipate Assets.

The FTC further argues that Babenko's personal bank account is funded by Trudeau, various corporate entities, and Sant, but this too is inaccurate. *First*, only one $15,000 check from Trudeau to Babenko appears in the FTC's exhibits, and it was designated as the repayment of a loan. There is no other evidence that any money was transferred from Trudeau to Babenko.

Second, Babenko provided loans to various entities, and the deposited money, as indicated in the FTC's own exhibits, were repayment of those loans. (FTC PX 2, Att. D.) She has her own separate financial means and separate sources of income. Any alleged wires of that money to her mother or otherwise overseas is irrelevant, as judgment has never been entered against Babenko and her money cannot be used to satisfy the judgment. 750 ILCS 65/5.

6. Trudeau Did Not Use A Casino To Conceal His Assets.

The FTC likewise lacks support for its argument that Trudeau used a casino to conceal his assets. Indeed, as the FTC was advised by letter from Trudeau's attorney Marc Lane, Trudeau is researching and writing a book about the casino game of baccarat and horse racing.

(Ex. E, 3/27/12 Letter from Marc Lane to Michael Mora.) The FTC did not object to Trudeau pursuing this business opportunity. Instead, as usual, the FTC was silent when Mr. Lane presented it to the FTC and only now cries foul. But the FTC cannot seriously contend that Trudeau is concealing assets in light of the facts that he wrote the FTC about this activity and that casinos keep meticulous cash records.

As Trudeau's attorney wrote the FTC, "the company [WSU] that will publish the book plans to provide funds for Mr. Trudeau to test his gambling theories, the subject of the proposed book" and "[t]hese funds will be deposited into one or more accounts at a casino or casinos in the name of Mr. Trudeau and/or his wife." (Ex. E, at 1.) Furthermore, Trudeau's letter explains that "Mr. Trudeau will use these funds to gamble as part of his research and, at the conclusion of his research, will return any balance in the account or accounts to the publisher. The funds will not be Mr. Trudeau's personal property." (*Id*.) The funds used at the casino were a business expense, used solely as research, and are not (and never were) Trudeau's personal property. Those funds are therefore irrelevant to the FTC's Contempt Motion.

Also, the fact that Trudeau and Babenko cashed out about the same number of chips as they cashed is probative of nothing—except that they broke even. Breaking even when gambling usually is a good thing.[8]

III. ARGUMENT

A. Legal Standard

The FTC bears the burden to prove by clear and convincing evidence that Trudeau is in

[8] As a further red herring, the FTC argues that Trudeau refused to provide his social security number to casino personnel when cashing out over $10,000 in chips. This somehow is evidence of concealment. Again, the FTC is mistaken. Trudeau did not want to provide his social security number because he did not own the funds. The funds belonged to his corporate employer. Trudeau instead provided his passport and he was allowed by the casino to cash in the chips. This is not the conduct of someone trying to conceal something.

contempt. *FTC v. Trudeau*, 579 F.3d 754, 763 (7th Cir. 2009); *Goluba v. School District of Ripon*, 45 F.3d 1035, 1037 (7th Cir. 1995). Clear and convincing evidence is a high standard: the FTC must "leave[] no reasonable doubt in the mind of the trier of fact as to the truth of the proposition[s] in question." *In re Meyers*, 616 F.3d 626, 631 (7th Cir. 2010). As the Supreme Court has observed, "clear and convincing evidence" is "evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *Cruzan by Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 285 n.11 (1990).

Trudeau may be found in contempt only if the FTC proves by clear and convincing evidence that: (1) the order sets forth an unambiguous command; (2) Trudeau violated that command; (3) his violation was significant, meaning he did not substantially comply with the order; and (4) he failed to take steps to reasonably and diligently comply with the order. *Trudeau*, 579 F.3d at 763; *see also Prima Tek II, L.L.C. v Klerk's Plastic Indus., B.V.*, 525 F.3d 533, 542 (7th Cir. 2008).

Only if the FTC satisfies its burden does Trudeau have to produce evidence of inability to comply with the order, which defense need only be supported by an "adequate factual basis[.]" *In re Resource Tech.*, 624 F.3d 376, 387 (7th Cir. 2010). Moreover, "[i]nability to pay is a valid defense in a contempt proceeding." *Id.* And upon Trudeau's showing of an inability to pay the judgment, the burden of persuasion then shifts back to the FTC to prove that Trudeau has the ability to pay. *See U.S. v. Rylander*, 460 U.S. 752, 757 (1983); *SEC v. Custable*, 94 C 3755, 1999 WL 92260, at *3 (N.D. Ill. Feb. 11, 1999).

Here, the bottom line is that Trudeau simply cannot be held in contempt for failing to do the impossible—namely, use nonexistent assets of companies that he does not own or control to

pay a judgment obtained by the FTC against him personally.

B. The FTC Has Failed To Prove Prima Facie Contempt.

As an initial matter, Trudeau has not "refused to pay anything" as the FTC baldly asserts, (FTC Br. at 3), but has taken concrete steps to reasonably and diligently comply with the Court's order. That should end the inquiry. As stated in *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991), "[o]nce the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate, and a plaintiff who refuses to acknowledge this loses outright . . . ." *Accord Breneisen v. Motorola, Inc.*, 656 F.3d 701, 706 (7th Cir. 2011).

Trudeau's lawyers have repeatedly attempted, through meetings and correspondence, to work out a payment plan. Most recently, Trudeau's lawyer, Marc Lane, sent a letter to the FTC on September 21, 2012, confirming concrete steps that Trudeau has taken to pay the judgment. (Ex. A.) As set forth in the letter, Trudeau has sent a check payable to the FTC and has committed substantial portions of his salary.

Trudeau also has submitted a declaration from Rust Consulting stating the amount likely necessary to afford consumer remediation—an amount that can be satisfied entirely by the $2 million on deposit presently with the court pursuant to this Court's bond requirement. (Ex. A, at 6-7.) Release of all or part of the $2 million bond will afford immediate and complete consumer remediation. (*Id.*) If the FTC were serious about consumer remediation, it would work with Trudeau in effecting this plan.

As Trudeau has taken concrete steps to reasonably and diligently comply with the order, it is evident that the FTC's motion rests on a false premise—namely, that he refuses to pay. Lacking $37.6 million to pay the judgment outright, Trudeau has deployed the resources that he does have—a limited amount of cash, and his salary, and future earnings potential. Under these

circumstances, the FTC has not and cannot meet its burden to show prima facie contempt by clear and convincing evidence, and the inquiry should end right there.

C. Trudeau Presently Is Unable To Pay The $37.6 Million Judgment Against Him.

The Court entered judgment against Trudeau in an amount that the FTC concedes he never received. (Docket No. 267, at 11 (FTC admission that "the amount of consumer loss is significantly greater than any estimate of Trudeau's ill-gotten gains.").) Further, it also cannot be disputed that Trudeau does not personally have $37.6 million; if he did, the FTC would have seized it.

This leaves Trudeau in the position of having to earn sufficient income to pay the judgment. But the FTC has done everything within its power to make this impossible. Using scorched-earth and highly abusive discovery tactics, the FTC has made it impossible for Trudeau to enjoy normal banking relationships and has successfully frightened off most prospective business partners. The FTC cannot attempt to imprison Trudeau for failing to do something (pay the judgment) that the FTC itself is preventing.

The FTC is well aware that Trudeau has been unable to earn the money necessary to pay the judgment. [redacted]

The FTC argues that any inability to pay the judgment is self-induced because Trudeau "transferred assets to his spouse, holds them offshore, or holds them in the name of corporations that he actually or beneficially owns." (FTC Br. at 16.) As shown by the FTC's "evidence,"

however, these assertions are false. After exhaustive examination of Trudeau's finances, the FTC found only one transfer of $15,000 to Babenko—and that was for repayment of a loan. No other evidence exists that Trudeau has transferred any assets to Babenko or anyone else. That companies owned by others may have generated revenues (not even net assets) is not evidence that Trudeau has transferred his assets to any third party. Furthermore, if the FTC had any admissible evidence of fraudulent transfers, it has available remedies.[9] Lacking such evidence, the FTC resorts to its back-door, but illegitimate remedy, of attempting to incarcerate Trudeau. Trudeau has done nothing to warrant being locked up, nor has the FTC shown that such a drastic step will have any legitimate effect. Trudeau cannot be coerced to recover funds that are not, and never were, his to control, much less to use to pay the personal judgment against him.[10]

D. Trudeau May Not Use, Nor May the FTC Seize, Corporate Assets For A Personal Judgment.

A further problem with the FTC's argument is that the potential assets of third-party corporations cannot be used to pay the judgment. Trudeau does not own these corporations, and, even if he did, their corporate assets could not be grabbed by the FTC. Insofar as the corporations have assets (we don't know and the FTC has not adduced any proof of net assets), those assets belong to the corporation's shareholders and creditors. It is black letter law that corporations are separate and distinct legal entities that stand apart from their owners, directors, and shareholders. *J. J. McCaskill Co. v. U.S.*, 216 U.S. 504, 514 (1910) ("[A] corporation is, in

[9] *See, e.g.*, The Illinois Uniform Fraudulent Transfer Act, 740 ILCS 160/1.

[10] In requesting incarceration, the FTC is confusing the difference between civil and criminal contempt. The test for determining whether a contempt order is civil or criminal is well established. *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 826-27 n. 3, (1994); *Hicks v. Feiock*, 485 U.S. 624, 632 (1988); *Shillitani v. United States*, 384 U.S. 364, 368, (1966); *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911). Essentially, contempt is considered civil if the sanction imposed is designed primarily to coerce the contemnor into complying with the court's demands and criminal if its purpose is to punish the contemnor, vindicate the court's authority, or deter future misconduct. *See Hicks*, 485 U.S. at 631-32; *SEC v. Simpson*, 885 F.2d 390, 395 (7th Cir. 1989).

law, a person or entity entirely distinct from its stockholders and officers."); *APS Sports Collectibles, Inc. v. Sports Time, Inc*., 299 F.3d 624, 628 (7th Cir. 2002) ("A [c]orporation is a legal entity which exists separate and distinct from its shareholders, officers, and directors.") (internal quotations omitted). As a result, even if Trudeau owned these corporations (he does not), he could not lawfully misappropriate their assets to satisfy his personal debts. To do so would subject Trudeau to harsh civil and criminal penalties. A respondent may not be held in contempt of court for failing to do that which is factually impossible. *United States v. Rylander*, 460 U.S. 752, 757 (1982).

Although not entirely clear from all the mud thrown on the wall by the FTC, the FTC appears to be requesting that the Court engage in some sort of reverse veil-piercing maneuver. As the Tenth Circuit has explained, however, reverse piercing presents serious legal problems:

> [A] reverse pierce of the corporate veil presents many problems that a standard pierce does not. For instance, use of a reverse pierce 'bypasses normal judgment-collection procedures, whereby judgment creditors attach the judgment debtor's shares in the corporation and not the corporation's assets. Moreover, to the extent that the corporation has other non-culpable shareholders, they obviously will be prejudiced if the corporation's assets can be attached directly.

In re Denton, 203 F.3d 834, 2000 WL 107376, at *3 (10th Cir. 2000).

The Seventh Circuit has likewise frowned upon reverse piercing theories:

> Reverse piercing is ordinarily possible only in one-man corporations, since if there is more than one shareholder the seizing of the corporation's assets to pay a shareholder's debts would be a wrong to the other shareholders. Even in one-man corporations it is a rarity because a simple transfer of the indebted shareholder's stock to his creditors will usually give them all they could get from seizing the assets directly.

Scholes v. Lehmann, 56 F.3d 750, 758 (7th Cir. 1995) (emphasis added).

Reverse piercing has been granted only in very rare cases where the evidence was clear that the judgment debtor was the sole officer, director, and stockholder in the company—

something the FTC admits is not true here. *Boatmen's Nat. Bank of St. Louis v. Smith*, 706 F. Supp. 30 (N.D. Ill. 1989) (allowing reverse piercing against individual who was sole shareholder, director, president, and treasurer of corporation); *see also Sea-Land Services, Inc. v. The Pepper Source*, 941 F.2d 519 (7th Cir. 1992). Thus, even if the FTC had asked for reverse piercing, there would be utterly no basis for granting it.

E. Incarceration Of Trudeau Is An Inappropriate Remedy Under The Law.

Quite apart from the FTC's failure to establish a basis for a finding of contempt, the extraordinary remedy that the FTC requests of incarcerating Trudeau until he pays the judgment in full would be entirely inappropriate and unlawful here. Incarceration is a "severe sanction for a party's failure to comply with a . . . order, and [is a] measure [that] ordinarily should be employed only as a last resort." *United States v. Conces*, 507 F.3d 1028, 1043 (6th Cir. 2007); *see also NASCO, Inc. v. Calcasieu Television & Radio, Inc*., 583 F. Supp. 115, 121 (W.D. La. 1984) (refusing to order incarceration because it is a "drastic coercive measure reserved for the most extraordinary circumstances and should be used sparingly"). Courts refuse to grant "the extraordinary sanction of indefinite imprisonment," even when the defendant's actions are "obstinate and inexcusable," which is not the case here. *Meadoworks, LLC v. Crone*, No. 07-cv-659, 2009 WL 1360335, at *1 (S.D.W.Va. May 14, 2009) (refusing to civilly incarcerate defendant even though he repeatedly failed to pay a small $3,400 and defendant's counsel represented that the defendant had "no intention of complying with" the court's order).

Trudeau has demonstrated a willingness to make payments on the judgment and has shown none of the defiant behavior that has led to incarceration in other cases. For example, in *SEC v. Custable*, a case cited by the FTC, the defendant was incarcerated for civil contempt only after he was given several chances to satisfy the order and several deadlines to meet, all of which

he ignored, including failing to appear at a financial deposition as ordered and failing to meet several court-imposed deadlines for the payment of civil penalty and production of documents. 94 C 3755, 1999 WL 92260 (N.D. Ill. Feb. 11, 1999).

The FTC's other cases are also readily distinguishable. In *Shillitani v. U.S.*, 384 U.S. 364 (1966), a witness was incarcerated for refusing to testify before a grand jury; Trudeau has done nothing of the sort. In *U.S. v. Rylander*, 460 U.S. 752 (1983), the defendant was incarcerated for failing to comply with an IRS summons for documents that the court had previously found him capable of producing (i.e., he had the documents in his possession or control). Again, Trudeau has done nothing of the sort. And in *U.S. v. Lippitt*, 180 F.3d 873 (7th Cir. 1999), the defendant was found in contempt for failing to pay a $56,000 *criminal* fine and the court extended his sentence of incarceration for drug distribution only after an express finding that the defendant had the ability to pay. In contrast to those cases, there has been no affirmative showing that Trudeau has the ability to pay the judgment or that he is unwilling to do so. Nor could there be.

In light of the facts here, incarceration—a "last resort remedy"—is not appropriate even if the Court finds Trudeau in contempt (which itself is unwarranted). Moreover, incarceration will only serve as a roadblock to satisfaction of the judgment because Trudeau will surely be unable to work to satisfy the judgment from a jail cell to which he does not hold the key.

III. CONCLUSION

For the reasons set forth above, the FTC motion for contempt is an illegitimate attempt to punish Trudeau, and should be denied.

September 25, 2012

Respectfully submitted,

KEVIN TRUDEAU

By: /s/ Kimball R. Anderson
One of His Attorneys

CERTIFICATE OF SERVICE

I, Kimball R. Anderson, an attorney, hereby certify that on September 25, 2012, I caused to be served true copies of DEFENDANT KEVIN TRUDEAU'S BRIEF IN OPPOSITION TO THE FTC'S MOTION TO HOLD DEFENDANT TRUDEAU IN CONTEMPT FOR VIOLATING THE JUNE 2, 2010 ORDER, INCARCERATE HIM, AND ORDER HIM TO PROVIDE AN ACCOUNTING OF AND TURNOVER ASSETS, 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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