No. __-____

# In the Supreme Court of the United States

KEVIN M. TRUDEAU,
PETITIONER

*v.*

UNITED STATES OF AMERICA,
RESPONDENT

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

1. The Speedy Trial Act applies to "any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a Class B or C misdemeanor or an infraction, or an offense triable by [a military court])." 18 U.S.C. § 3172(2). The criminal contempt statute does not classify criminal contempt as a Class B or C misdemeanor; it provides only that a federal court "shall have power to punish [contempt of its authority] by fine or imprisonment, or both, at its discretion." 18 U.S.C. § 401.

The first question presented is:

Whether a violation of 18 U.S.C. § 401 should be classified as a Class A felony under 18 U.S.C. § 3559 (as the First and Fourth Circuits hold), similarly to the closest analogous offense (as the Sixth, Seventh, and Ninth Circuits hold), or *sui generis* based on the penalty actually imposed by the court (as the Third, Fifth, and Eleventh Circuits hold).

2. The second question presented is:

Whether the willfulness *mens rea* of criminal contempt requires the government to prove that the defendant's wrongful conduct was knowing (as the First and Eleventh Circuits hold), reckless (as the Fifth, Seventh, and D.C. Circuits hold), or negligent (as the Eighth and Ninth Circuits hold).

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## PETITION FOR A WRIT OF CERTIORARI

Kevin Trudeau respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App. 1a–29a) is reported at 812 F.3d 578. The orders denying rehearing (App. 47a–48a) are unpublished. The oral ruling of the United States District Court for the Northern District of Illinois on petitioner's motion for dismissal under the Speedy Trial Act (App. 30a–38a) is unreported. The district court's opinion on petitioner's motion for acquittal (App. 40a–46a) is unpublished, but is available at 2014 WL 321373.

## JURISDICTION

The judgment of the Seventh Circuit was entered on February 5, 2016, and rehearing was denied on March 7, 2016. App. 47a–48a. On May 6, Justice Kagan granted an application to extend the time to file a petition for certiorari until July 6, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

This case involves the Speedy Trial Act, 18 U.S.C. § 3161, *et seq*. (App. 50a–62a), the sentencing classification statute, 18 U.S.C. § 3559 (App. 63a–72a), and the criminal contempt statute, 18 U.S.C. § 401 (App. 49a).

## INTRODUCTION

This case presents two critical questions involving the law of criminal contempt: whether contempt is properly classified as an offense other than a Class B or C misdemeanor, and thus is subject to the Speedy Trial Act; and whether the government may satisfy the willfulness requirement of criminal contempt by proving only a reckless state of mind rather than knowing misconduct. Both questions are recurring, and both have divided the federal circuits. Moreover, the decision below conflicts with this Court's precedents and the plain text of the criminal contempt law.

First, the Seventh Circuit held that the Speedy Trial Act does not apply to a defendant whose charging document—not the offense statute—limits a potential sentence to six months or less. App. 12a. But Congress has extended Speedy Trial Act rights to "any Federal criminal offense" "other than a Class B or C misdemeanor." 18 U.S.C. § 3172(2). Because the criminal contempt statute (18 U.S.C. § 401) does not contain a letter classification or an explicit statutory maximum, the Seventh Circuit held that it would classify Trudeau's contempt as "analogous to an indictment for a Class B misdemeanor." App. 12a. In so doing, the court acknowledged that it was joining the Sixth and the Ninth Circuits, which classify criminal contempt offenses the same as the most analogous offense. App. 12a n.3.

The rule in those circuits, however, squarely conflicts with that applied in the First and Fourth Circuits, which hold that "criminal contempt [] must as a matter of statutory construction be treated as a Class A felony." *United States* v. *Wright*, 812 F.3d 27, 28–29 (1st Cir. 2016); see also *United States* v. *Myers*,

302 F. App'x 201, 206 (4th Cir. 2008) (per curiam). Further, the decisions of those five circuits conflict with the decisions of the Third, Fifth, and Eleventh Circuits, which read *Frank* v. *United States*, 395 U.S. 147 (1969), to require treating criminal contempt as *sui generis*—as neither a misdemeanor nor a felony, but rather as an offense classified by "the actual sentence imposed." *In re Solomon*, 465 F.3d 114, 120 (3d Cir. 2006); accord *United States* v. *Holmes*, 822 F.2d 481, 493 (5th Cir. 1987); *United States* v. *Cohn*, 586 F.3d 844, 848 (11th Cir. 2009) (per curiam). In addition to further dividing the circuits, the decision below grants the government unlimited discretion over when to bring a case to trial, in conflict with *Klopfer* v. *North Carolina*, 386 U.S. 213, 216 (1967).

Second, the Seventh Circuit held that the willfulness element of criminal contempt requires only proof of recklessness—that is, proof that the defendant was "conscious of a substantial risk that the prohibited events will come to pass." App. 16a. In so doing, the court rejected this Court's willfulness precedents as limited to "statutory-willfulness requirements in other contexts." App. 19a. But this Court "ha[s] regularly read the modifier [willfully] as limiting liability to knowing violations." *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 57 n.9 (2007). And it has done so "[a]s a general matter, when used in the criminal context." *Bryan* v. *United States*, 524 U.S. 184, 191 (1998). This Court's willfulness *mens rea* requires proving that a defendant knew what he was doing was wrong. *Dixon* v. *United States*, 548 U.S. 1, 5 (2006).

In concluding otherwise, the decision below deepens an entrenched circuit split. The First and Eleventh Circuits hold that willfulness in criminal con-

tempt cases contemplates "knowledge that one is violating a court order." *United States* v. *Mourad*, 289 F.3d 174, 180 (1st Cir. 2002), *United States* v. *Straub*, 508 F.3d 1003, 1012 (11th Cir. 2007) ("Willfulness means a deliberate or intended violation."). But the Seventh, Fifth, and D.C. Circuits hold that willfulness in the context of criminal contempt is satisfied by "a finding of recklessness" (*United States* v. *Allen*, 587 F.3d 246, 255 (5th 2009)); and the Eighth and Ninth Circuits adhere to the negligence standard where the defendant "should reasonably be aware." *United States* v. *Armstrong*, 781 F.2d 700, 706 (9th Cir. 1986). Worse yet, in many circuits the standard is unclear. See p. 39, *infra*. Only this Court can bring order to the circuits.

These intractable splits are especially troubling in the context of "the contempt power," which "uniquely is liable to abuse." *Int'l Union, United Mine Workers of Am.* v. *Bagwell,* 512 U.S. 821, 831 (1994). That power is the "nearest akin to despotic power of any power existing under our form of government." *Green* v. *United States*, 356 U.S. 165, 194 (1958) (Black, J., dissenting), overruled by *Bloom* v. *Illinois*, 391 U.S. 194, 196 (1968). "In light of the broad sweep of modern judicial decrees, which have the binding effect of laws for those to whom they apply, the notion of judges' in effect making the laws, prosecuting their violation, and sitting in judgment of those prosecutions, summons forth * * * the prospect of 'the most tyrannical licentiousness.'" *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 822 (1987) (Scalia, J., concurring) (quoting *Anderson* v. *Dunn*, 6 Wheat. 204, 228 (1821)).

Recognizing this danger, this Court has repeatedly stated that "care is needed to avoid arbitrary or oppressive conclusions." *Cooke* v. *United States*, 267 U.S. 517, 539 (1925). The "exercise of [the contempt power] must be restrained by the principle that only 'the least possible power adequate to the end proposed' should be used in contempt cases." *Young*, 481 U.S. at 801 (quoting *Anderson*, 6 Wheat. at 231). "This principle of restraint in contempt counsels caution." *Ibid.*

Yet the decision below—like those of several other circuits—was anything but cautious. Petitioner Trudeau is serving a ten-year sentence for criminal contempt based on statements about his own book, made in an infomercial. He was denied his Speedy Trial Act rights based on a flagrant violation of the statutory text. And had the government been required to prove that Trudeau knew what he was doing was wrong, he would have been acquitted.

The Court should grant certiorari.

## STATEMENT

### A. The contempt statute and the Speedy Trial Act

1. The criminal contempt statute (18 U.S.C. § 401) permits a federal court "to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority" as is defined in three subsections. First, courts may punish "[m]isbehavior of any person in its presence or so near thereto as to obstruct the administration of justice." *Id.* § 401(1). Second, courts may punish "[m]isbehavior of any of [the court's] officers in their official transactions." *Id.* § 401(2). Third, and relevant here, courts may punish "[d]isobedience

or resistance to [the court's] lawful writ, process, order, rule, decree, or command." *Id.* § 401(3).

Section 401 traces to the First Congress and the Judiciary Act of 1789. Section 17 of that Act granted the federal courts "power to * * * punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same." 1 Stat. 83.

Yet there were soon abuses of that broad grant of authority. Most notoriously, a contempt prosecution by Judge Peck—who "imprisoned and disbarred one [Mr.] Lawless for publishing a criticism of one of his opinions in a case which was on appeal"—led to "a drastic delimitation by Congress of the broad undefined power of the inferior federal courts." *Nye* v. *United States*, 313 U.S. 33, 45 (1941). In the Act of March 2, 1831, Congress set out the three types of contempt that courts may punish today.[1] Apart from minor changes and a revision permitting both fines and imprisonment (Pub. L. No. 107–273, div. B, tit. III, § 3002(a)(1), 116 Stat. 1805 (2002)), the statute remains largely unchanged. The statute's text specifies no *mens rea* and does not classify the offense.

2. Congress enacted the Speedy Trial Act of 1974 (Pub. L. No. 93-619, tit. I, § 101, 88 Stat. 2085 (1975)) "to give effect to the sixth amendment right." *Betterman* v. *Montana*, 136 S. Ct. 1609, 1616 (2016). The Act generally provides that the "trial of a defendant charged in an information or indictment with the commission of an offense shall commence within sev-

[1] The Act also introduced the precursor to the current § 402, which governs contumacious conduct that is illegal of its own accord.

enty days from the filing date." 18 U.S.C. § 3161(c)(1). Time may be excluded under § 3161(h), but if trial does not begin within 70 (nonexcluded) days "the information or indictment shall be dismissed on motion of the defendant." *Id.* § 3162(a)(2).

The Act defines an "offense" as "any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a Class B or C misdemeanor or an infraction, or an offense triable by [a military court])." *Id.* § 3172(2). Originally, the Act provided that an offense was anything "other than a petty offense." *Id.* § 3172(2) (1980). A petty offense was defined as "[a]ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both." *Id.* § 1(3) (1980). But, when Congress enacted the Sentencing and Reform Act of 1984, "petty offense" was changed to "Class B or C misdemeanor or an infraction." Pub. L. No. 98-473, tit. II, § 223(i), 98 Stat. 2029 (1984).

The 1984 Act also implemented the classification schedule that provides a letter grade for offenses. § 212(a)(2), 98 Stat. 1991. Under that schedule, which lists a range of punishments assigned to letter grades, "[a]n offense that is not specifically classified by letter grade in the section defining it, is classified [by] the maximum term of imprisonment authorize[d]." 18 U.S.C. § 3559(a). When Congress has not prescribed a maximum penalty, courts uniformly hold that a sentence of life imprisonment is authorized. *United States* v. *Bland*, 961 F.2d 123, 128 (9th Cir. 1992) (collecting cases). If the maximum term of im-

prisonment is life, the offense is a Class A felony. *Id.* § 3559(a)(1).

**B. Factual background**

Kevin Trudeau is a #1 *New York Times* bestselling author of books on topics such as natural health, the credit and banking system, the First Amendment, and the American food and weight loss industry. His books provide advice and self-help opinions based on his personal experience and opinions. In part, he promotes those books on infomercials.

In 2004, Trudeau and the FTC entered into a consent order ("2004 Consent Order") before Judge Gettleman to settle an FTC enforcement action alleging deceptive acts and practices in violation of a prior stipulated order. App. 73a–104a. The FTC agreed to end its suit, and there was no finding or admission of guilt. In exchange, Trudeau agreed that he would not, among other things, "misrepresent the content of [a] book, newsletter, or informational publication" in an infomercial. App. 81a. During this process, the FTC approved Trudeau's infomercials promoting his new book: "*Natural Cures 'They' Don't Want You to Know About*" ("*Natural Cures*") as acceptable under the pending consent order.

In 2007, encouraged by his *Natural Cures* success, Trudeau wrote a new book, "*The Weight Loss Cure 'They' Don't Want You to Know About*" ("*Weight Loss*"), and later promoted it in three infomercials. In September 2007, the FTC initiated civil contempt proceedings against him, alleging that he misrepresented the contents of *Weight Loss* in those infomercials. In November 2007, after a bench trial, Judge Gettleman found Trudeau civilly liable and ordered

him to pay $37.6 million in restitution—even though the government was not required to prove, and did not prove, that any consumer was harmed.

**C. Pretrial proceedings**

On April 16, 2010, at the close of the civil contempt proceedings, Judge Gettleman issued a show cause order ("Gettleman Order") (App. 105a–106a) to hold Trudeau criminally liable under 18 U.S.C. § 401 for the same conduct that spawned the civil proceedings. App. 5a. The Gettleman Order "capped" Trudeau's potential punishment at six months' imprisonment. App. 6a.

On April 29, 2010, the U.S. Attorney's Office accepted prosecution and moved to exclude time under the Speedy Trial Act. *Ibid.* And in August 2010, the government informed the court that, after due consideration, "it will not contest the Court's announcement that it will cap at six months any prison term it may impose at the conclusion of the contempt proceedings." App. 109a n.1. Ultimately, the government would move for, and receive, four exclusions of time under the Act.

On September 10, 2010, Trudeau "asked that the criminal proceedings be reassigned to a new judge." App. 5a. "Judge Gettleman exercised his prerogative as a senior judge to have the case transferred." *Ibid.* On October 19, 2010, it was reassigned to Judge Guzmán with a new criminal docket number. On October 21, 2010, the government's fourth and last time exclusion expired.

Judge Guzmán waited until April 7, 2011, to hold a status hearing. App. 6a. By then, the government's

failure to prosecute the case had resulted in a delay of more than 150 nonexcludable days.

At the April 7 hearing, Trudeau moved to dismiss the case, invoking the Speedy Trial Act. App. 6a. The government responded by "ask[ing] Judge Guzmán to withdraw the initial show-cause order and issue an amended one without the six-month cap." *Ibid.* The government alleged no new facts, charges, or sentencing enhancements; it argued only that an uncapped order was more appropriate "given the serious nature of the contempt and Trudeau's history of disobeying court orders." *Ibid.* Neither point had changed since the government informed the court it would not contest the "capped" potential sentence.

On December 7, 2011, Judge Guzmán denied Trudeau's motion and granted the government's motion to issue a new show cause order without the cap. App. 6a. The court orally ruled that the Act applies only to a defendant charged with an offense in an information or an indictment. *Ibid.*[2] Noting that "the charging document in this case defined the punishment as not exceeding six months," the court held that "[t]he Act simply doesn't apply to any criminal proceeding for which the maximum penalty is no more than six months." App. 35a, 36a. The next day the amended show cause order ("Guzmán Order") (App. 107a) issued without the cap.

It is undisputed that, between April 29, 2010, and December 8, 2011, 214 nonexcluded days passed under the Gettleman Order. App. 7a. It is also undis-

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[2] The government conceded the trial court's error on this ground, and the Seventh Circuit agreed the "government was right to make this concession." App. 9a.

puted that, if the Act applies to the Gettleman Order, it was violated.

**D. Trial and post-trial proceedings**

During the six-day trial, the government presented no direct evidence as to Trudeau's state of mind. The government's case-in-chief consisted of presenting the 2004 Consent Order, the *Weight Loss* book, transcripts and recordings of the three infomercials, a chart comparing the alleged misrepresentations with quotations from the book, and two witnesses who did not know Trudeau. The government also presented a purchase agreement from the company responsible for the infomercials, which purportedly reflected Trudeau's profit motive.

The two witnesses, a postal inspector and a dietician, presented no testimony on Trudeau's state of mind. App. 131a. The inspector simply introduced the *Weight Loss* book and infomercials into evidence and read excerpts from the book, as directed by the prosecutor. The dietician merely discussed purchasing items mentioned in the book and compared the book's meals with her own advice to clients. She never mentioned, nor had she seen, the infomercials. In the end, the government rested without offering any statements or correspondence authored by Trudeau explaining the circumstances surrounding the infomercials, his understanding of the 2004 Consent Order, or how he chose the infomercials' content. *Ibid.*

After the jury returned a guilty verdict, Trudeau moved for acquittal, contending that none of the government's evidence established that he acted willfully. Citing *Cheek* v. *United States*, 498 U.S. 192, 200 (1991), Trudeau argued that the prosecution had to

prove that "he voluntarily and intentionally violated" the 2004 Consent Order. App. 133a. The government *conceded* that it had presented no direct evidence of Trudeau's willfulness, stating that it "need not * * * present direct evidence of what was in the defendant's mind when he acted." App. 125a. Ironically, the government relied solely on cases where "the defendant testified and gave some other reason for his actions." App. 127a.

To bolster its lack of evidence, the government noted that, in the *civil* contempt appeal, the Seventh Circuit had "concluded that defendant 'clearly misrepresented the book's content,' 'loaded' his infomercials with 'statements that are patently false,' 'outright lied,' made 'blatant misrepresentations,' and 'repeatedly distorted' the content of the book." App. 125a. According to the government, the jury was "entitled to draw the same inferences" "and to further find that defendant acted willfully"—even though the record, unlike in the civil case, contained no testimony from Trudeau. App. 126a.

The court found that the evidence supported the verdict. Relying on the jury instructions, it held that "direct evidence from a witness about the defendant's state of mind was not required"—essentially, that the government need not prove what Trudeau was thinking. App. 43a. At sentencing, the court departed from a guidelines range of 235–293 months and sentenced Trudeau to ten years' imprisonment—twenty times longer than the six months' imprisonment at which Judge Gettleman had originally "capped" Trudeau's potential punishment. App. 7a.

### E. Proceedings before the Seventh Circuit

Trudeau appealed, challenging the Speedy Trial Act ruling, the jury instruction on willfulness, and the denial of his acquittal motion on sufficiency of the evidence, among other issues. App. 2a–3a. The Seventh Circuit affirmed. App. 29a.

First, the court rejected the argument that the Speedy Trial Act applied to the Gettleman Order's contempt charge. It found an "unusual feature" complicated applying the Act to criminal contempt prosecutions: criminal contempt "carries no statutorily authorized maximum punishment." App. 10a. The court reasoned that Trudeau's textual argument was "hard to square" with this Court's approach "in the analogous context of the right to trial by jury in contempt prosecutions." App. 11a. In those cases, the court reasoned, this Court recognized that contempt was not categorized as "serious" or "petty." *Ibid.* (citing *Frank*, 395 U.S. at 149). Instead, "in prosecutions for criminal contempt where no maximum penalty is authorized, the severity of the penalty actually imposed is the best indication of the seriousness of the particular offense." *Ibid.*

The court created a corollary to the "rule" of *Frank*: "If the document initiating the contempt prosecution caps the sentence at six months or less, then it's not necessary to wait until sentencing to know whether the Speedy Trial Act will apply—it won't." App. 12a. So a document "capping a contempt sentence at six months is analogous to * * * a Class B misdemeanor." *Ibid.* As a result, the court held that the offense based on the Gettleman Order, with its six-month "capped" potential sentence, was not an offense under the Act. *Ibid.*

Second, the court dismissed Trudeau's contention that the government did not present evidence that he violated the 2004 Consent Order willfully. While acknowledging the circuit split over the willfulness standard (App. 18a n.5), the court adhered to its precedent criminalizing conduct that is merely reckless.[3] The court swept aside this Court's willfulness precedents as "cases interpreting statutory-willfulness requirements in other contexts, not the judicially implied willfulness requirement in criminal contempt." App. 19a.

The court thus held that "the government had no obligation to present direct state-of-mind evidence" and approved the district court's use of "common sense in making reasonable inferences from circumstantial evidence." App 21a. The court justified this result on the basis that the panel in Trudeau's *civil* contempt appeal found—based on different evidence and without applying a willfulness standard—that the *Weight Loss* "infomercials included 'blatant misrepresentations' that were 'patently false' and 'outright lies.'" App. 22a.

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[3] When reviewing the evidentiary challenge related to *Natural Cures* evidence, the court noted the willfulness standard's subjective nature and acknowledged that "it was error [for the district court] to impose an objective 'reasonableness' requirement." App. 24a.

## REASONS FOR GRANTING THE PETITION

The decision below warrants this Court's review on two important issues of criminal law that have divided the circuits. *First*, the Court should resolve the acknowledged split over how criminal contempt is classified. The First and Fourth Circuits hold that criminal contempt is always a Class A felony; the Third, Fifth, and Eleventh Circuits treat it as *sui generis*, based on the penalty imposed; and the Seventh, Ninth, and Sixth Circuits hold that criminal contempt is analogous to a Class B misdemeanor. The decision below not only deepens this three-way split, but conflicts with this Court's precedents and turns the statutory text on its head.

*Second*, in refusing to adopt the knowledge standard for criminal willfulness, the Seventh Circuit both deepened another acknowledged split and broke from this Court's teaching that, in criminal cases, willfulness is "regularly" limited "to knowing violations." *Safeco*, 551 U.S. at 58 n.9; accord *Bryan*, 524 U.S. at 192. The First and Eleventh Circuits heed this guidance, holding that the willfulness requirement "contemplates knowledge" (*Mourad*, 289 F.3d at 180)—"a deliberate or intended violation" (*Straub*, 508 F.3d at 1012). By contrast, the Fifth, Seventh, and D.C. Circuits find that "willfulness in the context of the criminal contempt statute at a minimum requires a finding of recklessness" (*Allen*, 587 F.3d at 255); and the Eighth and Ninth Circuits require only that a defendant "should reasonably be aware that his conduct is wrongful." The remaining circuits are all over the map. And even apart from this entrenched split, the recurring question of the proper willfulness standard for criminal contempt would warrant certiorari.

## I. This Court should resolve the entrenched circuit split over the classification of criminal contempt.

The circuits are in acknowledged conflict over the proper classification of criminal contempt. Two treat it as a Class A felony; three treat it as turning on the particular penalty imposed; and three classify it based on their views of the most analogous offense.

### A. The First and Fourth Circuits follow Congress's statutory scheme, classifying criminal contempt as a Class A felony.

The First and Fourth Circuits follow the plain statutory text, treating criminal contempt as a Class A felony based on its potential maximum penalty.

For example, the First Circuit has held "that the criminal contempt here must as a matter of statutory construction be treated as a Class A felony under 18 U.S.C. § 3559(a)." *Wright*, 812 F.3d at 28–29.[4] The defendant there (Wright) was convicted of criminal contempt, receiving a sentence of 80 months. *Id.* at 29. After serving his sentence, he violated his supervised release, and the court sentenced him to another 30 months for criminal contempt. *Id.* at 31. Wright claimed that, during sentencing, he was improperly exposed to a five-year potential maximum, instead of two years, because the trial court treated criminal

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[4] Wright has sought certiorari on whether "the maximum punishment for criminal contempt under 18 U.S.C. § 401 is imprisonment for life." *Wright* v. *United States*, petition for cert. pending, No. 15-9432 (filed May 18, 2016). In support, he identifies the same circuit split between the First, Ninth, and Eleventh Circuits. *Id.* at 11–12. The Court may wish to consider these petitions together.

contempt as a Class A felony. Citing Ninth Circuit precedent, he contended that "his underlying conviction for criminal contempt should be classified as a Class C felony, not a Class A felony." *Ibid.*

The First Circuit rejected this position, explaining that it "do[es] not depart from a statute's plain language absent either" textual ambiguity or an absurd result. *Wright*, 812 F.3d at 33 (quotations omitted). "Under the plain reading of the statute," the court reasoned, "the maximum penalty for criminal contempt" is "life imprisonment." *Ibid.* Then, citing this Court's decision in *Frank*, the court stated that because Congress "declin[ed] to limit the penalty, Congress g[ave] maximum discretion to the sentencing court." *Id.* at 32. The court thus held that the classification statute "makes [criminal contempt] a Class A felony." *Id.* at 32–33.

In so holding, the First Circuit expressly rejected the Ninth Circuit's "analogous offense" methodology (also applied below). As the court noted, "classifying criminal contempt as a Class A felony" is not "patently absurd," and "the concerns raised by the Ninth Circuit are not enough to warrant disregarding the [statute's] plain language." *Id.* at 33. Moreover, "Congress utilizes the classification under § 3559(a) in other criminal statutes," and "it is the choice of Congress, and not the courts, to create sentencing policy." *Id.* at 33–34.

The First Circuit also recognized its disagreement with "the Eleventh Circuit to completely forgo classifying criminal contempt and avoid setting a maximum potential punishment." *Wright*, 812 F.3d at 34. This Court's reference to the offense as *sui generis*, the court stated, was "no basis" to suspect that "Con-

gress could not have intended for an offense with a maximum term of life imprisonment to be classified as a Class A felony for § 3559(a) purposes." *Ibid.* "That contempt may be charged and prosecuted somewhat differently from other crimes is also not reason enough to eschew Congress's scheme." *Ibid.*

The Fourth Circuit likewise rejects the approach of the Seventh and Ninth Circuits. In *Myers*, 302 F. App'x at 206, an attorney did not comply with a subpoena, requiring the court to address the "classification of an offense as a felony or a misdemeanor." *Ibid.* The probation officer recommended a sentence between 15 and 21 months, classifying the offense as a Class A felony. *Ibid.* Although the district court imposed a sentence of four months, it agreed that, under the statutory scheme, contempt was a Class A felony. *Id.* at 207 (citation omitted). Although the court of appeals did not adopt this scheme explicitly, it approved treating "Myers' contempt conviction [as] a Class A felony." *Ibid.*

### B. The Third, Fifth, and Eleventh Circuits read this Court's decision in *Frank* to require classifying criminal contempt based on the "penalty actually imposed."

The Third, Fifth, and Eleventh Circuits, by contrast, treat criminal contempt as *sui generis*, and classify it based on the "actual sentence imposed." *Solomon*, 465 F.3d at 120; *Holmes*, 822 F.2d at 493; *Cohn*, 586 F.3d at 848.

In the Eleventh Circuit, for example, the Speedy Trial Act would apply to Trudeau because the "penalty actually imposed" for his offense was a ten-year sentence. In *Cohn*, the court applied the criminal

contempt statute in sentencing an attorney to 45 days in prison for representing a client when he was "not eligible to practice law." 586 F.3d at 845. The district court held that this punishment was a Class A felony under the classification statute. *Id.* at 846. Accordingly, the court imposed a term of five years of supervised release and the special felony assessment of $100. *Ibid.*

The Eleventh Circuit reversed, holding that a "[u]niform classification of criminal contempt" is "inconsistent with the breadth of § 401 and appropriate sentences for its violation." *Id.* at 848. The court reasoned that criminal contempt covers a broad range of conduct, and that "Congress has not seen fit to impose limitations on the sentencing power for contempts." *Ibid.* Because the classification scheme requires certain punishments based on the offense's grade, treating criminal contempt uniformly would "pigeonhole" the court and "impinge on its ability to impose appropriate sentences." *Id.* at 848 n.9. The Eleventh Circuit thus held that "criminal contempt is best categorized as a *sui generis* offense, rather than a felony or misdemeanor." *Id.* at 848.

In so holding, the court expressly "decline[d] to adopt th[e] method of classification" used by the Ninth Circuit (and now the Seventh). *Id.* at 848 n.7. That approach, the court reasoned, fails when a "sufficiently analogous guideline is absent," and "[m]ore importantly, maximum penalties are established by statute, not the Sentencing Guidelines." *Ibid.* The court thus split with the First Circuit, holding that criminal contempt "cannot be branded a Class A felony in every instance," but likewise rejected classify-

ing contempt by the "maximum sentence a court could impose for the most analogous offense." *Ibid.*

Similarly, the Third Circuit holds that "the severity of the penalty actually imposed is the best indication of the seriousness of the particular offense." *Solomon*, 465 F.3d at 119 (quoting *Frank*, 395 U.S. at 149). Thus, when the "sentence actually imposed by the district court was five months' imprisonment," the crime was "classified [as] a Class B misdemeanor." *Id.* at 120. And the Fifth Circuit likewise does not "characterize[] contempt as either a felony or a misdemeanor" but as "an offense *sui generis*." *Holmes*, 822 F.2d at 493.

### C. The Seventh, Sixth, and Ninth Circuits classify criminal contempt based on the most analogous offense.

Unlike any of the foregoing circuits, the Ninth and Sixth Circuits—now joined by the Seventh—hold that criminal contempt should be classified by the most analogous offense. *United States* v. *Moncier*, 492 F. App'x 507, 510 (6th Cir. 2012); *United States* v. *Broussard*, 611 F.3d 1069, 1072 (9th Cir. 2010); App. 11a–12a. According to these circuits, "[i]t would be unreasonable to conclude that by authorizing an open-ended range of punishments * * * Congress meant to brand all contempts as serious and all contemnors as felons." *United States* v. *Carpenter*, 91 F.3d 1282, 1284 (9th Cir. 1996). Moreover, these courts reject this Court's guidance in *Frank*, which stated that "the severity of the penalty actually imposed is the best indication of the seriousness of the particular offense" (395 U.S. at 1505), by holding that "the actual sentence may not adequately reflect the

severity of the contemnor's conduct." *Carpenter*, 91 F.3d at 1285.

The Ninth Circuit "focuses on the upper limit of the district judge's discretion, classifying the crime according to the maximum sentence the judge was *authorized* to impose rather than the sentence *actually* imposed." *Broussard*, 611 F.3d at 1072. "[T]he statutory maximum" of the most analogous offense is "the upper limit of the district judge's discretion." *Ibid.*[5] Thus, where the most analogous offense to the contumacious conduct is escape, the contempt is a Class D felony because the statutory maximum for escape is five years. *Id.* at 1073.

Similarly, the Sixth Circuit holds that contemnors charged with an offense limited to six months' imprisonment is a Class B misdemeanor. *Moncier*, 492 F. App'x at 510. In *Moncier*, the court "stated on the record" that the contemnor would face a "sentence of no more than six months' incarceration." *Ibid.* The court found that "[a] crime for which a defendant faces a sentence of six months or less is a class B misdemeanor." Thus, it was not an "offense" under the Speedy Trial Act. *Ibid.*

Finally, the court below joined these circuits, holding that "[a] show-cause order capping a contempt sentence at six months is analogous to an indictment for a Class B misdemeanor." App. 12a. The court first rejected the statutory scheme, holding that con-

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[5] Before the Sentencing Guidelines became discretionary, the Ninth Circuit held that "criminal contempt should be classified for sentencing purposes according to the applicable Guidelines range for the most nearly analogous offense." *Broussard*, 611 F.3d at 1072.

tempt "carries no statutorily authorized maximum punishment." App. 10a. The court then found that the contemnor in *Frank* was "not sentenced to any term of imprisonment, and "his contempt was properly treated as a petty offense." App. 11a. Thus, Trudeau's contempt charge that was "capped" at six months should also be treated as a Class B misdemeanor, and the Act did not apply. App. 11a–12a.

### D. Without review, the circuit split will create uneven results.

The decision below and the First Circuit's recent decision in *Wright* have only deepened this mature circuit split, guaranteeing that criminal contemnors will have different rights depending on where they are prosecuted. Because criminal contempt is always a Class A felony under the First Circuit's reading of the Act, Trudeau was unquestionably entitled to dismissal there. *Wright*, 812 F.3d at 34. By contrast, Wright would have received less than 24 months under the Seventh Circuit's analogous offense framework, as his underlying contempt was analogous to a Class C felony. *Id*. at 31.

What's more, the government encourages courts to reach different results. It has advocated the rule that criminal contempt is a Class A felony. See *United States* v. *Love*, 449 F.3d 1154, 1158 (11th Cir. 2006) (Barkett, J., concurring) ("The government argues that criminal contempt is properly classified a Class A felony."); U.S. Br. 17, *United States* v. *Wright*, 812 F.3d 27 (1st Cir. 2016) (No. 14-2335), 2015 WL 5934327, *17 (the government urged the district court to reject the Ninth Circuit's (analogous offense) and Eleventh Circuit's (*sui generis*) precedents). Before the Seventh and Sixth Circuits, the government

has argued that criminal contempt could be analogized to a Class B misdemeanor. Gov't C.A. Br. 18–20 (arguing criminal contempt is not Class A felony); U.S. Br. 46, *United States* v. *Moncier*, 492 F. App'x 507 (6th Cir. 2012) (No. 11-5196), 2011 WL 3662644, *46 (same).

Even if these conflicts could otherwise resolve themselves (they could not), the likelihood of that happening is nil when the lone repeat player benefits from this three-way split. Only this Court can bring uniformity.

### E. The decision below conflicts with this Court's precedents.

Beyond the foregoing split, review is warranted because the decision below conflicts with this Court's decisions in *Frank* and *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967). First, the court misread *Frank* and confused the discretion to punish crime with the power to classify it. Second, the court ignored *Klopfer's* central tenet—that the Speedy Trial right prevents prosecutors from having unlimited discretion in bringing the accused to trial.

Finding the statutory scheme "hard to square" with this Court's jury trial precedents, the court below analyzed whether the Gettleman Order charged Trudeau with a "serious" crime implicating his Sixth Amendment right to a jury trial. App. 11a. Citing *Frank*, the court reasoned that not at all criminal contempts are "serious" crimes, and that the "severity of the penalty *actually imposed* is the best indication" of seriousness. *Ibid.* The court then held that if the charging document "caps the sentence at six months or less, then it's not necessary to wait until sentenc-

ing to know whether the Speedy Trial Act will apply—it won't." App. 12a. Because the Gettleman Order (temporarily) capped any punishment at six months, the Act did not apply.

This "analogous offense" two-step, however, confuses the discretion to *punish* crime with the power to *classify* it—and thus misreads *Frank*. *First*, the rule in *Frank* is remedial: "Penalties presently authorized by Congress for petty offenses * * * may be imposed in federal criminal contempt cases without a jury trial." 395 U.S. at 151. The rule limits only the punishment that may be imposed without a jury trial, not access to a jury trial before sentencing.

*Second*, the Seventh Circuit quoted *Frank* for the proposition that "Congress * * * has not categorized contempts as 'serious' or 'petty.'" Notably, section 401 allows courts "to punish [contemnors] by fine or imprisonment, or both, at its discretion." But the text limits that discretion to the penalty; it does not displace Congress's prerogative to classify the statutory maximum. 18 U.S.C. § 3559. Here, after *Frank* was decided, Congress enacted a classification scheme after *Frank*. And it makes sense that Congress would provide Speedy Trial Act rights for offenses that it did not expressly classify as Class B or C misdemeanors—especially where, as here, the potential punishment for the same conduct can change in the court's discretion.

The decision below also conflicts with *Klopfer*, which guaranteed a speedy trial where prosecutors have unlimited discretion to bring defendants to trial. 386 U.S. at 214. The question there was "whether a State may indefinitely postpone prosecution on an indictment without stated justification over the objec-

tion of an accused who has been discharged from custody." *Ibid.* The prosecutor used a procedural device, the *nolle prosequi*, to keep defendants in permanent limbo with inactive indictments. The defendant was free to go, but the prosecutor could restore the indictment on a whim. *Ibid.* "During [the *nolle prosequi*], there is no means by which [the defendant] can obtain a dismissal or have the case restored to the calendar for trial." *Id.* at 216.

*Klopfer* held that this procedure "clearly denies the petitioner the right to a speedy trial." *Id.* at 222. As the Court explained, "petitioner [wa]s not relieved of the limitations placed upon his liberty by this prosecution merely because its suspension permits him to go whithersoever he will." *Id.* at 221–222. The "pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes." *Id.* at 222.

The decision below conflicts with this principle. It grants the judiciary unlimited discretion to issue charging documents "capping" the punishment at six months while later removing the cap over the defendant's objection. Here, not only did the court agree to a six-month cap, but the government itself agreed not to contest it. But none of that mattered. After more than 214 nonexcludable days had passed, the district court lifted the cap and Trudeau had no recourse.

## II. This Court should determine whether the willfulness element of criminal contempt requires knowledge.

Review is also warranted on the question whether the willfulness requirement of criminal contempt requires the government to prove knowledge, recklessness, or some other *mens rea*. The ruling below both deepens an acknowledged split on that issue and conflicts with this Court's precedents on the meaning of willfulness. Even apart from these conflicts, moreover, the standard for proving willfulness in criminal contempt cases is an important and recurring question that would warrant certiorari.

### A. The circuits are intractably divided over the meaning of the willfulness requirement for criminal contempt.

At least two circuits require knowing misconduct; three require recklessness; two require negligence; and the balance are in hopeless disarray.

Citing the decisions of five circuits, the Seventh Circuit acknowledged that the "circuits are split over whether 'knowledge' or 'recklessness' is the appropriate mens rea." App. 18a n.5. Yet the court did not understand the full scope of the problem, which this chart illustrates:

| Willfulness Standard | Circuits |
|---|---|
| "Knowledge" | *United States* v. *Mourad*, 289 F.3d 174, 180 (1st Cir. 2002)<br><br>*United States* v. *Straub*, 508 F.3d 1003, 1012 (11th Cir. 2007) |
| "Recklessness" | *United States* v. *Allen*, 587 F.3d 246, 255 (5th Cir. 2009)<br><br>*United States* v. *Trudeau*, 812 F.3d 578, 588 (7th Cir. 2016)<br><br>*United States* v. *Rapone*, 131 F.3d 188, 195 (D.C. Cir. 1997) |
| "Reasonably Should Have Been Aware" | *Wright* v. *Nichols*, 80 F.3d 1248, 1251 (8th Cir. 1996)<br><br>*United States* v. *Armstrong*, 781 F.2d 700, 706 (9th Cir. 1986) |
| Intra-Circuit Willfulness Splits | Second,[6] Third,[7] Fourth,[8] Sixth[9] and Tenth[10] Circuits |

[6] Compare *United States* v. *Vezina*, 165 F.3d 176, 178 (2d Cir. 1999) (knowledge), with *Doral Produce Corp.* v. *Paul Steinberg Assoc., Inc.*, 347 F.3d 36, 38 (2d Cir. 2003) (reasonably should have been aware).

[7] Compare *United States* v. *Cheeseman*, 600 F.3d 270, 281 (3d Cir. 2010) ("[A] willfulness requirement, which, if applied, would

Two circuits adhere to this Court's willfulness guidance. In the First Circuit, for example, "willfulness contemplates knowledge that one is violating a court order." *Mourad*, 289 F.3d at 180 (1st Cir. 2002). Similarly, in the Eleventh Circuit, "[w]illfulness means a deliberate or intended violation, as distinguished from an accidental, inadvertent, or negligent violation of an order." *Straub*, 508 F.3d at 1012; see also Judicial Council of the Eleventh Circuit, *Eleventh Circuit Pattern Jury Instructions (Criminal Cases)* § 9.1A (2010).[11]

By contrast, three other circuits—the Fifth, D.C., and Seventh Circuits—analyze motions for acquittal under the recklessness standard applied in *Farmer* v. *Brennan*, 511 U.S. 825, 839 (1994), which held that, "to act recklessly," one must "consciously disregard a substantial risk of serious harm." In *Rapone*, the

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require him to have had actual knowledge that his prohibited conduct was illegal."), with *Pennsylvania* v. *Local Union 542, Int'l Union of Operating Eng'rs*, 552 F.2d 498, 510 (3d Cir. 1977) (should reasonably be aware).

[8] Compare *Ashcraft* v. *Conoco, Inc.*, 218 F.3d 288, 303 (4th Cir. 2000) (knowledge), and *United States* v. *McMahon*, 104 F.3d 638, 642 (4th Cir. 1997), with *United States* v. *Bostic*, 59 F.3d 167 (4th Cir. 1995) (recklessness).

[9] Compare *United States* v. *Hendrickson*, No. 15-1446, 2016 WL 930134, *5 (6th Cir. Mar. 11, 2016) (knowledge), with *United States* v. *Allen*, 73 F.3d 64, 67 (6th Cir. 1995) (should reasonably be aware).

[10] Compare *United States* v. *Beals*, 145 F.3d 1346 (10th Cir. 1998) (knowledge), with *United States* v. *Themy-Kotronakis*, 140 F.3d 858, 864 (10th Cir. 1998) (should reasonably be aware).

[11] http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstruction.pdf.

D.C. Circuit required the government to show that a defendant "act[ed] with deliberate or reckless disregard." 131 F.3d at 195. The law in the Fifth Circuit is to the same effect. *Allen*, 587 F.3d at 255 ("[Willfulness under] the criminal contempt statute at a minimum requires a finding of recklessness."). And the Seventh Circuit requires only that the defendant was "conscious of a substantial risk that the prohibited events will come to pass." App. 16a–17a (citing *Farmer*, 511 U.S. at 839).

The Eighth and Ninth Circuits set the bar even lower. By their lights, willfulness covers "volitional act[s] by one who knows or should reasonably be aware that [her] conduct is wrongful." *Wright* v. *Nichols*, 80 F.3d 1248, 1251 (8th Cir. 1996); accord *Armstrong,* 781 F.2d at 706. In *Wright*, for example, the defendant violated an order not to remove funds or dispose of assets owned by a bankrupt company. 80 F.3d at 1249. After she received a refund check from a former attorney, she endorsed it to the company's new attorney. *Id.* at 1249–1250. The defendant argued that she did not even consider that the refund check might have been the company's asset, such that endorsement would violate the court order. *Id.* at 1251. But as the Eighth Circuit explained in affirming her conviction, "anyone in the position [of the defendant] reasonably should have known" as much, and thus that endorsement was "a violation of the TRO." *Ibid.* The Fifth Circuit, by contrast, has expressly rejected the "reasonably should have known" standard applied by the Eighth and Ninth Circuits. *Allen*, 587 F.3d at 255.

This is to say nothing of the confusion in the Second, Third, Fourth, Sixth, and Tenth Circuits. As the

table above illustrates, those courts do not consistently apply a single willfulness standard, and often do not even cite the conflicting in-circuit authority. Although several cases in these circuits have required actual knowledge, in other cases (sometimes influenced by the Seventh Circuit's standard) those courts lower the *mens rea* threshold.

### B. The Seventh Circuit's recklessness standard conflicts with this Court's precedents, which require knowledge to satisfy willfulness requirements in criminal cases.

Review is also warranted because the decision below conflicts with this Court's willfulness precedents and deprives criminal contemnors of due process. As a result, the courts below weighed the evidence under the wrong legal standard. The government could not satisfy the proper willfulness standard, and Trudeau was therefore denied acquittal as a matter of law. This Court should review the error *de novo*.

1. A host of this Court's precedents confirm that when "'willful' or 'willfully' has been used in a criminal statute, [this Court] ha[s] regularly read the modifier as limiting liability to knowing violations." *Safeco*, 551 U.S. at 57 n.9; see also *Dixon*, 548 U.S. at 5; *Bryan*, 524 U.S. at 191–92; *Ratzlaf* v. *United States*, 510 U.S. 135, 137 (1994); *Cheek*, 498 U.S. at 200–01. This stands in contrast to cases involving "civil liability," where the Court "[has] generally taken [willfulness] to cover not only knowing violations of a standard, but reckless ones." *Safeco*, 551 U.S. at 57.

The Court's criminal willfulness standard requires "the Government [to] prove that the defendant acted

with knowledge that his conduct was unlawful." *Bryan*, 524 U.S. at 191–192. As Chief Justice Shaw long ago explained: "The word wilfully, in the ordinary sense in which it is used in statutes, means not merely voluntarily, but with a bad purpose." *Commonwealth* v. *Kneeland*, 37 Mass. 206, 220 (1838). And a criminal contempt conviction requires the government prove that "the evidence establishe[s], beyond a reasonable doubt, petitioners' knowing violations of the [court] order." *Green*, 356 U.S. at 173–74, 179. Nothing less will do. See American Law Institute, Model Penal Code § 2.02(8) (1985) (defining willfulness as knowledge); *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060, 2069 (2011) (defining *mens reas*—"us[ing] the [MPC]'s definition as a guide"—"in analyzing whether certain statutory presumptions of knowledge comported with due process").

The Seventh Circuit rejected this substantial body of precedent, reasoning that this Court's "cases interpret[ed] statutory-willfulness requirements in other contexts, not the judicially implied willfulness requirement in criminal contempt." App. 19a. Noting that "willful is a word of many meanings, and its construction is often * * * influenced by its context" (*ibid.*), the court adhered to its earlier holdings that willfulness requires "conscious[ness] of a substantial risk that the prohibited events will come to pass." App. 16a (citing *United States* v. *Greyhound Corp.*, 508 F.2d 529, 531–32 (7th Cir. 1974)); *United States* v. *Mottweiler*, 82 F.3d 769, 771 (7th Cir. 1996) (in turn citing *Farmer*, 511 U.S. at 839).

This reasoning, however, cannot withstand scrutiny. *First*, this Court's precedents interpret criminal willfulness generally. In *Safeco*, for example, the

Court contrasted the usage of "willfully" in civil statutes with its general usage in criminal law, where "[the Court] ha[s] regularly read the modifier as limiting liability to knowing violations." 551 U.S. at 56 n.9; see also *Bryan*, 524 U.S. at 191–192 ("As a general matter, when used in the criminal context, a "willful" act is one undertaken with a 'bad purpose.'")

*Second*, the notion that "willful is a word of many meanings" is not a "free pass" to use any meaning. As this Court has explained, whether the statute at issue is civil or criminal is critical: "where willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well." *Safeco*, 551 U.S. at 57. But "[i]t is different in criminal law"—i.e., "[w]here the term willful or willfully * * * limit[s] liability to knowing violations." *Id.* at 57 n.9. "This construction reflects common law usage," as when willfulness is judicially engrafted onto the statute. *Ibid*.

The courts have made willfulness a statutory condition for criminal liability. Accordingly, this Court's precedents tell us that criminal liability exists only for knowing violations. Review is needed to make that clear.

2. There can be no question that, had the court below applied this Court's willfulness standard, Trudeau's motion for acquittal should have been granted. The government presented no evidence that Trudeau knew what he was doing was wrong.

Section 401(3) permits a court to punish such contempt of its authority as "[d]isobedience or resistance to its lawful writ, process, order, rule, decree, or

command." To prove its case here, the government was required to prove beyond a reasonable doubt that: (1) the 2004 Consent Order was reasonably specific; (2) Trudeau violated that Order by misrepresenting the content of his *Weight Loss* book, and (3) the violation of the Order was willful.[12]

On a motion for acquittal, the reviewing court asks whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979). Further, this fundamentally "legal" question cannot properly be decided without applying the correct legal standard. See *Musacchio* v. *United States*, 136 S. Ct. 709, 715 (2016) (holding that the district court was correct to exclude an erroneous element from a sufficiency review included in jury instructions). "A reviewing court's limited determination on sufficiency review thus does not rest on how the jury was instructed." *Id*. at 715.[13] As a result, the lower courts were bound to apply the appropriate definition of willfulness regardless of the instructions provided to the jury.

As this Court has held, the evidence must show, "beyond a reasonable doubt," that the defendant "knowingly disobeyed the [court] order." *Green*, 356 U.S. at 174. In *Green*, two defendants who were out on bail were ordered to surrender to the U.S. Mar-

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[12] Although the contempt statute "contains no element of willfulness," "[c]ourts have added this requirement." Gov't C.A. Br. 42.

[13] The Seventh Circuit held only that the jury instruction was waived or forfeited. Trudeau has pressed the willfulness standard in his motion for acquittal at each stage.

shal. *Id.* at 167. Instead, they "disappeared from their homes, failed to appear in court * * * and remained fugitives for more than four and a half years." *Ibid.* Before turning themselves in, they "issued press releases announcing their intention to surrender," and one admitted: "[I]t seemed incumbent upon me to resist." *Id.* at 177 n.7. The government offered evidence relating to the following time periods: (1) before the surrender notice issued, (2) before the surrender order issued, and (3) surrender by the petitioners (including the press releases). This Court affirmed the lower court's ruling that "petitioners' statements to the press at the time of their eventual surrender * * * indicated their *knowledge* of the issuance of the order." *Id.* at 178 (emphasis added). And it was right to do so.

In contrast, the government's evidence here falls short of proving beyond a reasonable doubt that Trudeau knew the infomercials misrepresented the contents of his book, or that he was "breaking the law." *Dixon*, 548 U.S. at 5–6. The government's evidence boiled down to presenting the *Weight Loss* book, the three infomercials, and witness testimony from people who had never met Trudeau. At most, this evidence reflects that the defendant *objectively* disregarded a risk that he might misrepresent the content of his *Weight Loss* book—not that he acted willfully in so doing.

No evidence here supports an inference that the alleged violation of the 2004 Consent Order by Trudeau, a bestselling author, was done with an "evil-meaning mind." *Bryan*, 524 U.S. at 184. The government offered a purchase agreement as proof that Trudeau would profit from sales of the *Weight Loss*-

book. App. 127a. But proving that he would profit is not enough, and the government did not prove that misrepresenting the book would increase sales or profits. Nor did the government offer evidence that Trudeau needed the money. And at no point did the government attempt to describe the events surrounding the production of the *Weight Loss* infomercials or book.

As a result, there was no evidence from which a rational trier of fact could infer anything about Trudeau's state of mind, let alone that he knew he was violating the 2004 Consent Order. Had the government been required to prove knowledge, Trudeau would have been acquitted. And this Court's review is needed to prevent the lower courts from eroding a basic and fundamental right—requiring the government to prove its case beyond a reasonable doubt—in the context of "the contempt power," which "uniquely is 'liable to abuse." *Bagwell,* 512 U.S. at 831 (quotations omitted).

## CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted.

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JULY 2016

# APPENDIX

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

KEVIN MARK TRUDEAU,

*Defendant-Appellant.*

No. 14-1869

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 10 CR 886 — Ronald A. Guzmán, *Judge*.

Argued and Submitted
January 12, 2015—Washington, D.C.

Argued and Submitted
February 24, 2015—Decided February 5, 2016

Before EASTERBROOK, ROVNER, and SYKES, *Circuit Judges*.

SYKES, *Circuit Judge*. Kevin Trudeau spent his career hawking miracle cures and self-improvement systems of dubious efficacy. When the Federal Trade Commission sued him for violating consumer-protection laws, Trudeau agreed to a consent decree in which he promised not to misrepresent the content of his books in TV infomercials. A few years later,

Trudeau published *The Weight Loss Cure "They" Don't Want You to Know About* and promoted it in three infomercials. The ads said the weight-loss protocol was "simple" and "inexpensive," could be completed at home, and did not require any food restrictions or exercise. The book, on the other hand, described an arduous regimen mandating prescription hormone injections and severe dietary and lifestyle constraints.

The district court imposed a civil contempt sanction and then issued an order to show cause why Trudeau should not be held in criminal contempt and face a penalty of up to six months' imprisonment. At Trudeau's request the case was transferred to a different judge. The new judge issued an amended show-cause order that removed the six-month penalty cap. Trudeau was convicted and sentenced to ten years in prison.

On appeal Trudeau leaves no stone unturned. His primary argument concerns an alleged violation of the Speedy Trial Act. *See* 18 U.S.C. §§ 3161 *et. seq*. More than 70 non-excludable days elapsed between the date the government agreed to prosecute the first show-cause order and the commencement of trial under the second show-cause order. Trudeau moved to dismiss for violation of the Act. The district judge denied this motion. He was right to do so. The Act applies only to crimes punishable by more than six months' imprisonment. Because the first show-cause order capped the potential penalty at six months, the Act did not apply. The second show-cause order removed the cap, triggering the Act's 70-day clock, but Trudeau's trial began within the mandatory timeframe counting from that date. There was no Speedy Trial Act violation.

Trudeau raises an array of other issues as well: He challenges the jury instruction on "willfulness," the sufficiency of the evidence, two evidentiary rulings, and the reasonableness of his sentence. These arguments, too, are meritless. We affirm the contempt conviction and sentence.

## I. Background

Trudeau's bag of tricks contains something to relieve almost any ailment or burden. His infomercials have peddled products like "Biotape" (to cure severe pain); "Coral Calcium Supreme" (to cure cancer); "Howard Berg's Mega Read" (to increase reading speed tenfold); and "Kevin Trudeau's Mega Memory System" (to unlock photographic memory). Because Trudeau's pitches are factually indefensible, the FTC has repeatedly pursued him for violating consumer-protection laws. To settle one of these suits, Trudeau agreed to the entry of a consent decree in which he promised not to market products without the FTC's approval. He soon decided he wanted more leeway to write books, however, and in September 2004 negotiated a modified consent order that permitted him to star in infomercials for his books provided that "the infomercial for any such book ... must not misrepresent the content of the book." Soon after, Trudeau released a book about "natural cures" and produced a promotional infomercial for it. Although the consent order did not require him to do so, Trudeau sent the transcript to the FTC, which indicated its approval. This ad aired without objection.

In 2007 Trudeau published another book, *The Weight Loss Cure "They" Don't Want You to Know About*, which described a complex regimen designed to reduce hunger by "resetting" the hypothalamus.

We detailed the book's weight-loss system in *FTC v. Trudeau* (*Trudeau I*) 579 F.3d 754, 758–59 (7th Cir. 2009), so we provide only a summary here. The regimen consists of four phases (two of which are "strongly recommended" but not obligatory), each with a strict list of dietary and lifestyle dos and don'ts. For example, most or all of the phases—including phase 4, which lasts a lifetime involve abstaining from artificial sweeteners, chain restaurants, prescription and over-the-counter medication, food cooked in microwaves, air conditioning, and fluorescent lighting. Program participants are also instructed to walk an hour a day; eat only organic food; do liver, parasite, heavy-metal, and colon cleanses; and receive colonics, which are enema-like procedures performed by specialists. Phase 2, which is mandatory and lasts between 21 and 45 days, is particularly arduous and requires a 500-calorie-per-day diet and daily injections of human chorionic gonadotropin, a hormone only available by prescription and not indicated for weight loss.

Trudeau promoted *The Weight Loss Cure* in three different 30-minute infomercials staged as scripted conversations between an interviewer and himself. But the protocol Trudeau talked about in the infomercials bore little resemblance to the one described in his book. In the ads he said that the weight-loss protocol was "very inexpensive," could be done at home, and was "the easiest [weight-loss] method known on planet Earth." He also represented that once the protocol was complete, dieters could eat "everything they want, any time they want." The weight-loss program described in the infomercials sounded too good to be true, and it was. Trudeau nev-

er mentioned the dietary or lifestyle restrictions, injections, cleanses, or colonics mandated in the book.

The FTC took Trudeau back to court for violating the 2004 consent order. The district court (Judge Gettleman presiding) found that the infomercials misrepresented the content of *The Weight Loss Cure*, despite Trudeau's jesuitical attempts to harmonize them. Judge Gettleman held Trudeau in civil contempt and entered a $37.6 million judgment against him, an amount equal to the gross revenue from books sold through the infomercials. We upheld the contempt finding in *Trudeau I*, *id.* at 768, and the monetary sanction in *FTC v. Trudeau* (*Trudeau II*), 662 F.3d 947, 949–50 (7th Cir. 2011).

After imposing the civil sanction, Judge Gettleman issued an order to show cause why Trudeau should not also be held in criminal contempt for the same conduct. Under this show-cause order, dated April 16, 2010, Trudeau faced imprisonment of not more than six months. On April 29, 2010, the U.S. Attorney's Office agreed to prosecute the case. At that time the prosecutor told the judge: "I think because this is a criminal proceeding, the Speedy Trial Act would ... apply." She sought and received an exclusion of time that same day, tolling the Act's 70-day clock. In the weeks that followed, the judge granted three subsequent requests for exclusion of time.

Trudeau eventually asked that the criminal proceedings be reassigned to a new judge. Judge Gettleman exercised his prerogative as a senior judge to have the case transferred. On October 19, 2010, it was reassigned to Judge Guzmán. Unfortunately, neither the government nor Trudeau received notice of the reassignment (or the new criminal case num-

ber), and the case sat idle until the parties discovered the oversight. A status hearing was finally held on April 7, 2011. By that time more than 150 nonexcludable days had elapsed since the government agreed to prosecute Judge Gettleman's show-cause order.

At the April 7 hearing (and in subsequent briefing), Trudeau sought dismissal for violation of the Speedy Trial Act. The government responded that, properly understood, Judge Gettleman's show-cause order was outside the scope of the Act. The Act applies to "any case involving a defendant charged with an offense," 18 U.S.C. § 3161(a), and "offense" is defined as "any Federal criminal offense ... *other than* a Class B or C misdemeanor or an infraction," *id.* § 3172(2) (emphasis added). Federal crimes are generally classified based on their maximum penalty, and Class B misdemeanors are punishable by not more than six months' imprisonment. *Id.* § 3559(a)(7). Because Judge Gettleman's show-cause order capped Trudeau's sentence at six months, Judge Guzmán determined that it was analogous to a Class B misdemeanor and therefore the Act did not apply.

At the same April 7 hearing, the government asked Judge Guzmán to withdraw the initial show-cause order and issue an amended one without the six-month cap. The prosecutor argued that an uncapped order would be more appropriate given the serious nature of the contempt and Trudeau's history of disobeying court orders. On December 7, 2011, Judge Guzmán agreed to issue a new show-cause order and told the parties that the original order would be dismissed when the new one was entered. An amended, uncapped show-cause order issued the next day.

The contempt charge was tried to a jury over six days beginning on November 5, 2013. The parties agree that if the speedy-trial clock started when Judge Guzmán entered the new, uncapped show-cause order, the trial commenced within the time period required by the Act. The jury convicted Trudeau of contempt, and Judge Guzmán imposed a ten-year prison sentence, well below the guidelines range of 235 to 293 months.

## II. Discussion

### A. The Speedy Trial Act

The Speedy Trial Act requires most criminal trials to begin within 70 days of (1) "the filing date (and making public) of the information or indictment," or (2) "the date the defendant has app Number Fonteared before a judicial officer of the court in which such charge is pending, whichever date last occurs." 18 U.S.C. § 3161(c)(1). Time can be excluded from the 70-day limit for a variety of reasons. *See id.* § 3161(h). The primary remedy for a violation of the Act is dismissal of the charge, with or without prejudice depending on the court's evaluation of a set of statutory factors. *See id.* § 3162(a)(2). We review the district court's interpretation of the Act de novo and its factual findings for clear error. *United States v. Loera*, 565 F.3d 406, 411 (7th Cir. 2009).

The parties initially disagreed about how many nonexcludable days elapsed in total, but Trudeau now accepts the government's figures—214 nonexcluded days passed between April 29, 2010, when the government agreed to prosecute Judge Gettleman's show-cause order, and December 8, 2011, when Judge Guzmán entered the new, uncapped order. As we've noted, Trudeau also agrees that the Act was properly

applied if time is counted from the date of the second order until the start of trial in November 2013. But if the speedy-trial clock started running back in April 2010, as Trudeau contends, then the case should have been dismissed, though not necessarily with prejudice.

***1. Estoppel***

Trudeau contends that the government is estopped from arguing that the April 2010 show-cause order wasn't subject to the Act because the prosecutor initially told Judge Gettleman that it was. Judicial estoppel "prevents a party from prevailing on an argument in an earlier matter and then relying on a contradictory argument to prevail in a subsequent matter." *Wells v. Coker*, 707 F.3d 756, 760 (7th Cir. 2013). Estoppel is "an equitable doctrine invoked by a court at its discretion," *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001), so the decision not to apply it is reviewed for abuse of discretion, *see In re Knight–Celotex, LLC*, 695 F.3d 714, 721 (7th Cir. 2012).[1]

Judge Guzmán was well within his discretion in declining to estop the government. First, the government did not "prevail" over Trudeau when it initially took the position that the Act applied to the first show-cause order. Trudeau held the identical view, so it makes just as much sense to say that Trudeau prevailed over the government. Second, Trudeau did not

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[1]The government argues that Trudeau failed to raise this argument in the district court, so at most plain-error review applies. It's true that Trudeau did not use the word "estoppel" before the district court, but he did object that "the government's recent position is inconsistent with the position it repeatedly took [earlier]." That's sufficient to preserve the issue.

suffer any "unfair detriment" as a result of the government's changed view. *New Hampshire*, 532 U.S. at 751. He wasn't disadvantaged by the government's earlier position and never meaningfully relied on it. In fact, Judge Gettleman never explicitly held that the show-cause order was covered by the Act, a holding that would have been erroneous in any event, as we'll explain in a moment. Instead, Judge Gettleman appears to have simply assumed—along with everyone else—that the Act applied and proceeded accordingly.

### *2. The Speedy Trial Act in the Context of Contempt*

Two distinctive features of criminal contempt complicate the task of directly applying the Act to contempt prosecutions. The first is that unlike other crimes, contempt can be charged through a court-issued show-cause order that the government later agrees to prosecute. The Speedy Trial Act, however, calculates the 70-day clock by reference to the date that either the "information or indictment" is made public or the defendant initially appears in court on "such charge," whichever is later. § 3161(c)(1).

The government argued in the district court that because show-cause orders are not mentioned in the Act, this contempt prosecution is outside its scope. The government has abandoned this argument on appeal and now concedes that the Act can be triggered when the government accepts a judge's referral to prosecute an alleged contempt. The government was right to make this concession.[2]

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[2]In an analogous context, in *Gompers v. United States*, the Supreme Court held that criminal contempt is covered by

The second unusual feature of criminal contempt is that it carries no statutorily authorized maximum punishment. *See* 18 U.S.C. § 401 ("A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, ... contempt of its authority ... ."). The Speedy Trial Act applies to all offenses more serious than a Class B misdemeanor—that is, offenses punishable by more than six months' imprisonment—regardless of the actual sentence imposed. *See* § 3172(2). Trudeau argues that because the criminal contempt statute does not authorize a maximum penalty, Judge Gettleman's show-cause order charged him with a crime punisha-

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a statute of limitations even though the statute in question only mentioned "the information" and "the indictment." 233 U.S. 604, 611 (1914) ("What follows is a natural way of expressing that the proceedings must be begun within three years; indictment and information being the usual modes by which they are begun, and very likely no other having occurred to those who drew the law."), *overruled in part on other grounds, Bloom v. Illinois*, 391 U.S. 194, 207 (1968). Moreover, the Judicial Conference views criminal contempt as covered by the Speedy Trial Act. *See* 106 F.R.D. 271, 310 (December 1979 revision (with amendments through October 1984)) ("[T]he Committee [on the Administration of Criminal Law] is of the view that the act does apply to contempts ... and that the notice on which prosecution is based should be treated as an information for purposes of calculating the 70-day time limit to trial."). More broadly, the Act's legislative history conveys Congress's expansive purpose of "giv[ing] real meaning to th[e] Sixth Amendment right" to a speedy trial, H.R. REP. NO. 93-1508 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7401, 7404, and there's no question that contempt prosecutions are covered by the constitutional speedy-trial guarantee.

ble by up to life in prison, notwithstanding the order's six-month penalty cap.

This argument is hard to square with the approach the Supreme Court has taken in the analogous context of the right to trial by jury in contempt prosecutions. The Sixth Amendment's jury-trial right applies if the charged crime is "serious" rather than "petty" (and "petty" means punishable by imprisonment of six months or less). *See Frank v. United States*, 395 U.S. 147, 148 (1969). In *Frank* a contemnor had been convicted after a bench trial and sentenced to probation; he contended that he was entitled to a jury trial under the Sixth Amendment. As Trudeau does here, the contemnor in *Frank* argued that because there is no maximum punishment for contempt, it was necessarily a "serious" crime. *Id.* The Court disagreed, explaining that "Congress ... has not categorized contempts as 'serious' or 'petty.'" *Id.* at 149 (citation omitted); *see also Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966) (describing contempt as "an offense sui generis"). Given the broad range of potentially contumacious behavior, the Court held that "in prosecutions for criminal contempt where no maximum penalty is authorized, the severity of the penalty *actually imposed* is the best indication of the seriousness of the particular offense." *Frank*, 395 U.S. at 149 (emphasis added); *see also Bloom v. Illinois*, 391 U.S. 194, 211 (1968) (same for state-court contempt convictions). Because the contemnor in *Frank* was not sentenced to any term of imprisonment at all, his contempt was properly treated as a petty offense and the Sixth Amendment's jury-trial right was not implicated. *Frank*, 395 U.S. at 152.

As applied here, the Court's reasoning in *Frank* includes a logical corollary: If the document initiating the contempt prosecution caps the sentence at six months or less, then it's not necessary to wait until sentencing to know whether the Speedy Trial Act will apply—it won't. Indeed, the Court said its post hoc analysis applies to "prosecutions for criminal contempt *where no maximum penalty is authorized*." *Id.* at 149 (emphasis added). A show-cause order capping a contempt sentence at six months is analogous to an indictment for a Class B misdemeanor, which carries a maximum penalty of six months. Class B misdemeanors are not covered by the Act. As such, neither was Judge Gettleman's show-cause order.[3]

Nor did Judge Guzmán's later, uncapped order effectively a new charging instrument—make Judge Gettleman's earlier order retroactively subject to the Act. And because the trial began within 70 nonexcluded days after Judge Guzmán's show-cause order, there was no Speedy Trial Act violation.

Trudeau insists that this result conflicts with the Act's approach to reprosecutions. The Act provides that if "any charge contained in a complaint ... is dismissed or otherwise dropped" and the defendant is later reindicted for "an offense based on the same conduct or arising from the same criminal episode," then the 70-day clock resets and runs anew from the date of the second indictment. 18 U.S.C. § 3161(d)(1); *see United States v. Hemmings*, 258 F.3d 587, 593

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[3]Two other circuits have addressed this issue and reached the same conclusion, albeit in unpublished orders. *See United States v. Moncier*, 492 F. App'x 507, 510 (6th Cir. 2012); *United States v. Richmond*, 312 F. App'x 56, 57 (9th Cir. 2009).

(7th Cir. 2001); *United States v. Myers*, 666 F.3d 402, 404–05 (6th Cir. 2012); *United States v. Napolitano*, 761 F.2d 135, 137 (2d Cir. 1985) ("Congress considered and rejected [the] suggestion that the Act's dismissal sanction be applied to subsequent charges if they arise from the same criminal episode as those specified in the original complaint ... ."). This is true even if the dismissal remedies a violation of the Act. *See, e.g.*, *United States v. Sykes*, 614 F.3d 303, 307 (7th Cir. 2010). In other words, the baseline rule is that a new charge gets a new clock.

There is, however, one notable exception to this rule. Section 3161(h) lists periods of delay that must be excluded from the 70-day calculation. Under § 3161(h)(5), "[i]f the information or indictment is dismissed *upon motion of the attorney for the* [*g*]*overnment* and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense," the clock does not reset with the issuance of a second charge. (Emphasis added.) Rather, the clock runs from the date of the initial charge and excludes any intermediate period when no charge is outstanding. *See United States v. Rein*, 848 F.2d 777, 780 (7th Cir. 1988).

But this exception can't apply when the first charge did not itself fall under the Act. Section 3161(h) supplies a list of circumstances under which time must be *excluded*. It follows that if the speedy-trial clock did not start running with the first prosecution (because it was not covered by the Act), then *zero* nonexcluded days have accumulated before the start of the second prosecution. "Excluded days" only exist by reference to the Act. Nothing in § 3161(h)(5) implies that a judge is permitted to look back at the first indictment and retroactively exclude days that

could not have been excluded initially. Accordingly, where, as here, an offense covered by the Act is charged following one that was *not* covered, the 70-day clock starts on the day that the eligible prosecution begins.

Trudeau tries an alternative approach, arguing that Judge Guzmán's order was akin to a superseding indictment rather than a reindictment. A superseding indictment is issued without the initial charge first being dismissed. *See United States v. Johnson*, 680 F.3d 966, 973 n.3 (7th Cir. 2012) ("In sum, when a superseding indictment is filed there is only one criminal action; a reindictment results in two." (quoting *United States v. Hoslett*, 998 F.2d 648, 658 (9th Cir. 1993))). In the Speedy Trial Act context, "a superseding indictment restating or correcting original charges does not restart the seventy-day clock." *Hemmings*, 258 F.3d at 593. This follows logically from the fact that no charge is dismissed under § 3161(d)(1) when the government issues a superseding indictment, so the clock runs continuously from the date of the initial charge.

Even if we treated Judge Guzmán's order as a superseding indictment, however, there would be no Speedy Trial Act violation in this case. As we've just explained, if the Act did not apply to the initial charge, then the superseding indictment—to which the Act *does* apply—doesn't retroactively start the speedy-trial clock from the date of the initial charge. If the new charge triggers the Speedy Trial Act for the first time, the clock begins to run when the new, elevated charge is filed. Here, Judge Guzmán's uncapped show-cause order started the speedy-trial clock for the first time.

### *3. Gilding*

Trudeau's final argument is that even if the Act did not apply to the first show-cause order, the second show-cause order was nonetheless improper because it merely "gilded" the first one. This argument rests on two cases suggesting that "if the crimes for which a defendant is ultimately prosecuted really only gild the charge underlying his initial arrest and the different accusatorial dates between them are not reasonably explicable, the initial arrest may well mark the speedy trial provision's applicability as to prosecution for all the interrelated offenses." *United States v. DeTienne*, 468 F.2d 151, 155 (7th Cir. 1972); *see also United States v. Juarez*, 561 F.2d 65, 68 (7th Cir. 1977). Trudeau notes that nothing changed between the two show-cause orders other than identity of the presiding judge. That difference, he says, does not make the different prosecutorial start dates "reasonably explicable."

*DeTienne* and *Juarez* both concerned the Sixth Amendment speedy-trial right, not the Speedy Trial Act, which *DeTienne* in fact predated. Trudeau hasn't raised a Sixth Amendment argument; he relies solely on the Act, which provides its own detailed instructions about how reprosecutions should be handled. We've never applied a gilding theory in a Speedy Trial Act case, and other courts have questioned its doctrinal vitality. *See, e.g.*, *United States v. Watkins*, 339 F.3d 167, 177 (3d Cir. 2003); *see also United States v. Williams*, No. 09-CR-29, 2009 WL 1119417, at *3 (E.D. Wis. Apr. 27, 2009) (no gilding); *United States v. Toader*, 582 F. Supp. 2d 987, 990–91 (N.D. Ill. 2008) (same).

We see no reason to gloss the statute with a gilding doctrine, especially in a case with no evidence of bad-faith abuse of the Act by the government. As a general matter, the risk of improper evasion of the Act by the government is particularly low in a judge-initiated contempt proceeding. And because Trudeau requested that his case be transferred out of Judge Gettleman's court, the government can't be accused of judge shopping. We doubt that the gilding doctrine can ever overcome the terms of the Speedy Trial Act, but we are certain it does not do so here.

**B. Jury Instruction on "Willfulness"**

Trudeau's next argument is a claim of instructional error. He contends that the jury instruction on the elements of contempt misstated the "willfulness" element of the offense. "The essential elements of a finding of criminal contempt under 18 U.S.C. § 401(3) are a lawful and reasonably specific order of the court and a willful violation of that order." *Doe v. Maywood Hous. Auth.*, 71 F.3d 1294, 1297 (7th Cir. 1995). The text of § 401(3) doesn't contain a willfulness requirement, but we, like all circuits, hold that it is a necessary element that must be proved beyond a reasonable doubt. *Id.*

In this context, "willfulness" means "a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful." *United States v. Greyhound Corp.*, 508 F.2d 529, 531–32 (7th Cir. 1974). The phrase "should reasonably be aware" describes the mental state of recklessness, meaning that the defendant was "conscious of a substantial risk that the prohibited events will come to pass." *United States v. Mottweiler*, 82 F.3d 769, 771 (7th Cir. 1996) (citing *Farmer v. Brennan*, 511 U.S. 825

(1994)); *cf.* MODEL PENAL CODE § 2.02(2)(c) (1962) ("A person acts recklessly ... when he consciously disregards a substantial and unjustifiable risk that a material element exists or will result from his conduct.").

The government first proposed a jury instruction on willfulness,[4] and Trudeau then offered several modifications with the stated intent of making the instruction more closely mirror *Mottweiler*'s definition of "recklessness." The government agreed to the proposed modifications. The final instruction was as follows, with Trudeau's additions in bold, his deletions struck through, and subsequent technical edits in brackets:

> A violation of a court order is willful if it is a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful. A person should reasonably be aware that his conduct is wrongful if he knows about is conscious of a substantial and unjustifi[able] risk that his actions the prohibited event will lead to a violation of the court order, (here violation of the September [2], 200[4] Court Order) will come to pass and he disregards that risk.
>
> In deciding whether the defendant acted willfully, you may consider all of the evidence, including what the defendant did or said.

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[4]There are no model jury instructions for criminal contempt in this circuit. *See* FEDERAL CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT p.163 (2012).

Trudeau informed the judge that the jury instructions were "agreed to" as modified, and they were given to the jury without further modification by the court.

Trudeau now argues—for the first time on appeal—that recklessness isn't sufficient to satisfy the "willfulness" element of contempt. He points out that the Supreme Court has interpreted the "willfulness" element of certain criminal statutes to require the government to prove that the defendant *knew* that his conduct violated the law, not merely that the defendant was *reckless* with respect to the illegality of his actions. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 58 n.9 (2007) (collecting cases). He says his case "presents an excellent opportunity for the [c]ourt to revisit *Greyhound*" and overrule it.[5] *See* 7TH CIR. R. 40(e).

Quite the contrary. "We have repeatedly held that approval of a jury instruction in the district court extinguishes any right to appellate review of the instruction." *United States v. Yu Tian Li*, 615 F.3d 752, 757 (7th Cir. 2010). Trudeau expressly approved the willfulness instruction after offering modifications that were accepted in toto. He cannot now argue that the instruction was wrong. *See id*. ("Having proposed

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[5]The circuits are split over whether "knowledge" or "recklessness" is the appropriate *mens rea* in criminal contempt cases. *Compare United States v. Cheeseman*, 600 F.3d 270, 281 (3d Cir. 2010) (knowledge), *and United States v. Mourad*, 289 F.3d 174, 180 (1st Cir. 2002) (knowledge), *with United States v. Iqbal*, 684 F.3d 507, 512 (5th Cir. 2012) (recklessness); *United States v. Smith*, 497 F. App'x 269, 273 n.11 (4th Cir. 2012) (recklessness); *and United States v. Rapone*, 131 F.3d 188, 195 (D.C. Cir. 1997) (recklessness).

a jury instruction virtually identical to the instruction actually used by the district court, [the defendant] cannot now contest that instruction."); *see also* FED. R. CRIM. P. 30(d) ("A party who objects to any portion of the instructions ... must inform the court of the specific objection ... . Failure to object ... precludes appellate review, except as permitted under [plain-error review].").

Trudeau tries to rescue his waived argument by suggesting it was merely *forfeited* because any objection in the district court would have been futile in light of *Greyhound*'s status as binding precedent. Wrong again. Trudeau could have preserved a challenge to the continuing vitality of *Greyhound* even though the district court would have been bound by that decision. *Cf. Dixon v. United States*, 548 U.S. 1, 4 (2006) (considering the arguments of a petitioner who preserved her objection to a well-settled jury instruction by objecting to it even though "the trial court, correctly finding itself bound by Circuit precedent, denied petitioner's request").

In any case, Trudeau's argument fails even if only forfeited. Forfeiture permits review for plain error, and "[a]n error is plain if it was (1) clear and uncontroverted at the time of appeal and (2) affected substantial rights, which means the error affected the outcome of the district court proceedings." *United States v. DiSantis*, 565 F.3d 354, 361 (7th Cir. 2009) (internal quotation marks omitted). The willfulness instruction was—and is—perfectly in line with controlling precedent in this circuit. Trudeau's argument rests on cases interpreting statutory-willfulness requirements in other contexts, not the judicially implied willfulness requirement in criminal contempt. We have emphasized that "willful" "is a 'word of

many meanings,' and 'its construction [is] often ... influenced by its context.'" *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994) (quoting *Spies v. United States*, 317 U.S. 492, 497 (1943)) (alteration in original).

Trudeau relies on *United States v. Holmes*, 93 F.3d 289 (7th Cir. 1996), but to no avail. In *Holmes* the defendant failed to object to a jury instruction that was in line with circuit precedent. *Id.* at 292. After his trial but before his appeal, the Supreme Court held that a jury instruction identical to the one used at his trial was mistaken as a matter of law. *Id.* We held that the defendant's forfeited objection was reviewable for plain error and that in light of the Court's intervening decision invalidating an identical instruction, the plain-error standard was satisfied. *Id.* at 292–93.

Here, in contrast, Trudeau can point to no authority that makes the willfulness instruction used at his trial plainly erroneous. We would need to exercise plenary review to overturn existing circuit precedent in the absence of an on-point holding of the Court.

Finally, Trudeau calls our attention to *Elonis v. United States*, 135 S. Ct. 2001 (2015), a decision issued after we heard oral argument in this case. *Elonis* held that although the federal statute criminalizing threats does not specify a mental state, *see* 18 U.S.C. § 875(c), negligence isn't enough, *Elonis*, 135 S. Ct. at 2011. The Court expressly declined to decide whether recklessness would have sufficed. *Id.* at 2013. *Elonis* does not call *Greyhound* into doubt.

**C. Sufficiency of the Evidence**

Trudeau next challenges the sufficiency of the government's evidence. This is always a heavy lift,

and it's especially so here. *See United States v. Reed*, 744 F.3d 519, 526 (7th Cir. 2014) ("We will overturn a verdict for insufficiency of the evidence only if, after viewing the evidence in the light most favorable to the government, the record is devoid of evidence from which a rational trier of fact could find guilt beyond a reasonable doubt.").

Trudeau's main contention is that the government presented no "state-of-mind evidence" from which the jury could conclude that he willfully violated the consent order. He argues that without direct evidence of his mental state, the jury was left to choose between several equally plausible benign explanations for his misrepresentations. He suggests, for example, that the misrepresentations might have been attributable to the possibility that he left his glasses at home and misread the teleprompter (while filming each of three infomercials?). Or the teleprompter might have been negligently loaded with an unedited version of the script (and he was unaware that the words he spoke bore little resemblance to the book he wrote?).

Setting aside the obvious implausibility of these fanciful explanations, the material point for our purposes is that the government had no obligation to present direct state-of mind evidence. Rather, "the trier of fact is entitled to employ common sense in making reasonable inferences from circumstantial evidence." *United States v. Starks*, 309 F.3d 1017, 1021–22 (7th Cir. 2002). Needless to say, the jury's verdict is not called into doubt because a defendant can hypothesize on appeal a few alternative interpretations of the evidence. Trudeau was free to suggest his lost-eyeglasses or dysfunctional-teleprompter theories to the jury. The only question now is whether the evidence was adequate to prove each element of

contempt beyond a reasonable doubt. We've previously explained that Trudeau's *The Weight Loss Cure* infomercials included "blatant misrepresentations" that were "patently false" and "outright lie[s]." *Trudeau I*, 579 F.3d at 766–68. It's no surprise that the jury reached the same conclusion. The evidence was easily sufficient to convict.

### D. Exclusion of Evidence

Trudeau also challenges the judge's exclusion of two categories of defense evidence. We review the district court's evidentiary rulings for abuse of discretion, *United States v. Foley*, 740 F.3d 1079, 1086 (7th Cir. 2014), and will reverse only if no reasonable person could take the judge's position, *United States v. Schmitt*, 770 F.3d 524, 532 (7th Cir. 2014). Even then, no remedy is available unless the error affected the defendant's substantial rights, meaning that the average juror would have found the prosecution's case significantly less persuasive absent the erroneous evidentiary ruling. *Id.*; *see* FED. R. CRIM. P. 52(a).

#### *1. The Natural Cures Evidence*

Shortly after the 2004 consent decree took effect, Trudeau published a book called *Natural Cures "They" Don't Want You to Know About* and prepared an infomercial to promote it, as he had for other products and pitches. As we've explained, although the consent order didn't require the FTC's approval, Trudeau sent the Commission a transcript of the ad. The Commission had no objection, though it clearly stated that its approval was limited to this single transcript.

At trial Trudeau sought to introduce the *Natural Cures* book and infomercial and related correspond-

ence with the FTC. The ostensible purpose was to show that he relied on the FTC's approval of the *Natural Cures* infomercial in interpreting the boundaries of the consent order's "no misrepresentations" clause. His theory was that if he had used the *Natural Cures* infomercial as a template for *The Weight Loss Cure* ads, it would have been more likely that he acted in good faith—and therefore did not willfully violate the consent order—when producing the infomercials at issue in this case. Trudeau wanted to introduce the *Natural Cures* evidence even if he did not testify that he actually used the FTC-approved infomercial as a template.

Trudeau made essentially the same argument in his civil contempt appeal. There, we said:

> Nothing about the FTC's prior approval should have led Trudeau to believe that he could selectively quote his weight loss book as being "easy" and "simple," while leaving out nearly every relevant detail about the weight loss protocol. ... The extent to which Trudeau could reasonably rely on the FTC's approval of the *Natural Cures* infomercial ended when Trudeau began uttering false statements and quotes that mischaracterized the content of the *Weight Loss Cure*[] book.

*Trudeau I*, 579 F.3d at 767–68. That analysis is not conclusive here, however, because civil and criminal contempt have different elements. Only criminal contempt requires willfulness. Thus, the issue is whether the *Natural Cures* evidence was relevant to Trudeau's state of mind.

The judge held that Trudeau first had to provide some evidence that he actually used *Natural Cures* as

a template, probably through his own testimony. And even if he testified to that effect, the judge added this:

> [The] template testimony is relevant only if there is evidence to suggest that defendant's use of the FTC-approved *Natural Cures* infomercial was *reasonable*, *i.e.*, that ... the content of [the *Natural Cures* book and infomercial] is so similar to that of the *Weight Loss Cure* book and infomercials that approval of one *logically* includes the other. ... [I]f [such evidence] does [exist], and [the] defendant offers template testimony, the *Natural Cures* evidence may be relevant to willfulness.

(Emphases added.)

The second step in the judge's analysis is mistaken. Because the willfulness element of criminal contempt is subjective, it was error to impose an objective "reasonableness" requirement.

The first step in the analysis is a closer call. The judge required Trudeau to testify or present circumstantial evidence linking the *Natural Cures* evidence to his state of mind. It's true that the state-of-mind inquiry is not a free-for-all in which *any* evidence that could *possibly* have influenced a defendant's mental state is *necessarily* relevant; if that were the case, "a defendant could introduce evidence that would invite the jury to speculate a non-existent defense into existence." *United States v. Zayyad*, 741 F.3d 452, 460 (4th Cir. 2014). When a defendant offers nothing but speculation to link a piece of evidence to his state of mind, the evidence is properly excluded unless the defendant offers corroboration that the evidence *in fact* influenced his mental state. *United States v. Kokenis*, 662 F.3d 919, 930 (7th Cir. 2011); *see also id.*

("Kokenis seems to be asserting that just because there may be evidence to show that *someone* could have had a good-faith belief that he wasn't violating the law, then *he* should be able to present such evidence to the jury. ... Without any connection to his state of mind, such evidence is irrelevant.") (emphases added); *Zayyad*, 741 F.3d at 460 ("If the defendant wants to present a theory or belief that might have justified his actions, then he must present evidence that he in fact relied on that theory or belief."); *United States v. Curtis*, 782 F.2d 593, 599 (6th Cir. 1986) ("Unless there is a connection between the external facts and the defendant's state of mind, the evidence of the external facts is not relevant."). Often, but not necessarily, this corroboration comes in the form of the defendant's own testimony.

Whether the inferential gap between the proffered evidence and the defendant's mental state is great enough to require corroboration is necessarily a fact-specific inquiry. In *United States v. Kokenis*, for example, the defendant wanted experts to testify about an accounting theory that he claimed he relied on in good faith (but mistakenly) when calculating his taxes. *See* 662 F.3d at 930. Because the defendant could not offer any evidence that he in fact used that theory, or even knew about it, we held that the judge properly excluded the testimony as irrelevant. *Id.* In other cases we've held that evidence of this type was properly excluded when the link between the evidence and the defendant's state of mind was too attenuated or speculative. *See, e.g.*, *United States v. Beavers*, 756 F.3d 1044, 1050 (7th Cir. 2014) (conditioning the admissibility of evidence of the defendant's actions postarrest on his ability to link them to his mental state at the time of the crime); *Zayyad*,

741 F.3d at 460 (prohibiting cross-examination of witnesses about the "gray market" in diverted prescription drugs because the defendant had not shown that he knew about such markets); *Curtis*, 782 F.2d at 598–60 (excluding expert testimony that an area of tax law was unsettled and complex in the absence of evidence that the defendant himself was confused or relied on the expert's advice).

Although the district judge deserves significant deference in these determinations, we think Trudeau's case is distinguishable from the ones we've just mentioned. There is no question that Trudeau *knew* about the FTC's approval of the *Natural Cures* infomercial; he was the one who asked for it. And there's a logical link between that knowledge and his mental state: It stands to reason that Trudeau's experience with *Natural Cures*—his first infomercial after the consent order—would have had at least *some* effect on the way he approached *The Weight Loss Cure* infomercials just two years later. Although a defendant's right against self-incrimination does not permit him to introduce evidence that would only be relevant in light of his testimony, *see Beavers*, 756 F.3d at 1051, the admission of evidence that is *independently* probative of a defendant's state of mind should not be conditioned on corroboration. Under the circumstances here, the basic relevance of the *Natural Cures* evidence strikes us as straightforward and should not have been conditioned on Trudeau's introduction of corroborating evidence.

If excluding this evidence was error, however, it was clearly harmless. Trudeau's infomercials for *The Weight Loss Cure* contained gross misrepresentations. As we said in *Trudeau I*, nothing about the FTC's approval of the *Natural Cures* infomercial gave

a green light to blatant falsehoods. Furthermore, the large majority of misrepresentations in *The Weight Loss Cure* infomercials bore no relationship at all to the earlier infomercial for *Natural Cures*. For example, Trudeau said that *The Weight Loss Cure* involved no portion control (when it required extensive portion control); no food deprivation (when it required a strict diet); and no restrictions on what you could eat after finishing the protocol (when it had lifetime restrictions). Trudeau doesn't explain how the FTC's approval of the *Natural Cures* infomercial could possibly have led him to believe that these flagrant and highly specific misrepresentations were acceptable. The likelihood that the jury would have been swayed by this evidence is vanishingly small. Substantial justice does not require reversal.

***2. Misinterpretation of the Consent Decree's Terms***

Trudeau also wanted to present evidence that he simply misinterpreted the consent decree by construing it to permit statements of opinion and personal experiences protected by the First Amendment. The judge wouldn't allow it. That ruling was not an abuse of discretion.

A "mistaken interpretation" defense to criminal contempt requires a degree of plausibility and at least *some* evidence of good faith, both of which are utterly lacking here:

> To provide a defense to criminal contempt, the mistaken construction must be one which was adopted in good faith and which, given the background and purpose of the order, is plausible. The defendant may not avoid criminal contempt by "twisted interpretations" or "tor-

> tured constructions" of the provisions of the order.

*Greyhound*, 508 F.2d at 532 (quoting *United States v. Gamewell*, 95 F. Supp. 9, 13 (D. Mass. 1951)); *see also United States v. McMahon*, 104 F.3d 638, 644–45 (4th Cir. 1997) ("[A] person 'is not permitted to maintain a studied ignorance of the terms of a decree in order to postpone compliance and preclude a finding of contempt.'" (quoting *Perfect Fit Indus. v. Acme Quilting Co.*, 646 F.2d 800, 808 (2d Cir. 1981))).

Trudeau says he thought the consent decree preserved his First Amendment right to make statements of opinion or personal experience. As we've explained, however, the infomercials for *The Weight Loss Cure* are replete with blatant factual misrepresentations that could not possibly be classified as statements of opinion or personal experience. The judge was right to exclude this category of defense evidence.

**E. Reasonableness of Sentence**

Sanctions for criminal contempt are intended to be punitive and "to vindicate the authority of the court." *United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828 (1994). Trudeau's guidelines range was 235 to 293 months, but the government recommended a below-guidelines sentence of ten years.[6] Judge Guzmán

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[6]The Sentencing Commission instructs courts to use § 2B1.1, the guideline for Basic Economics Offenses, to calculate a sentencing range for contempt arising out of a violation of a court order enjoining fraudulent conduct. *See* U.S.S.G. §§ 2J1.1 cmt. n.3, 2X5.1. The main component of Trudeau's guidelines calculation was the combined $37.6 million lost by consumers who purchased *The Weight Loss*

found that a within-guidelines sentence would be reasonable, but he adopted the government's recommendation and imposed a ten-year sentence.

Trudeau argues that ten years is disproportionate because Judge Gettleman initially thought a six-month sentence was sufficient. He also notes that the only contempt sentence in this circuit longer than his involved a witness's refusal to testify in a terrorism prosecution. *See United States v. Ashqar*, 582 F.3d 819, 822 (7th Cir. 2009). Finally, he suggests that his offense is less blameworthy than some frauds because each book buyer lost "only" $29.95 (plus shipping and handling).

A below-guidelines sentence will almost never be unreasonable, *United States v. Tahzib*, 513 F.3d 692, 695 (7th Cir. 2008), and this one certainly isn't. Although we don't know the rationale for the six-month cap on the initial show-cause order, nothing suggests that Judge Gettleman made a preliminary calculation of the guidelines range. And it's unsurprising that a terrorism-related contempt conviction would draw a higher sentence than Trudeau's. Trudeau's effort to minimize his culpability by reference to the small losses suffered by each book buyer requires no comment.

Based on the size of Trudeau's fraud and the flagrant and repetitive nature of his contumacious conduct, the ten-year sentence—about half the bottom of the guidelines range was not unreasonable.

**AFFIRMED**.

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*Cure* book by calling the toll-free number publicized in the infomercials.

**APPENDIX B**

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

UNITED STATES OF AMERICA,

*Plaintiff,*

v.

KEVIN TRUDEAU,

*Defendant.*

No. 10 CR 886

Excerpt from Transcript of Proceedings
Before The Honorable Ronald A. Guzmán

Argued and Submitted
December 7, 2011—Chicago, Illinois

APPEARANCES:

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* * * *

interpreting it the way the government wants to do it is demonstrated by what the government is trying to do in this case, which is to then amend it later on so it does apply.

THE COURT: But that's not different. I can't recall the last time I had a major offense here where there wasn't a superseding indictment before the case was brought to trial. The government always has the option, if it causes no prejudice to anyone, to bring a superseding indictment, redefining the charges against a defendant. Why is this any different?

MR. KIRSCH: Well, your Honor, this is much -- I mean, this -- usually in a -- when a superseding indictment is brought, there's additional evidence; additional theories of guilt have been discovered and investigated and uncovered; there have been

additional cooperating informants. I have never ever, ever heard of the U.S. attorney's office anywhere bringing a superseding indictment and lodging more charges against a criminal defendant simply because the judge changed. And that's -- your Honor, that's all we have.

THE COURT: Who has told you that the reason that they have changed this charge is because I'm the judge now as opposed to Judge Gettleman?

MR. KIRSCH: Well, I think that's obvious from their brief. I think it's -- they -- there's nowhere in their brief -- there's nowhere -- there's not one single changed circumstance. And they concede that in their brief. Their whole argument in their brief is, well, we didn't agree with Judge Gettleman; we just chose not to contest Judge Gettleman. Your Honor, there's just -- they -- they chose not to contest Judge Gettleman after much deliberation. It just doesn't hold any weight.

THE COURT: My experience with government prosecutions has been that the government reanalyzes and reevaluates the evidence sometimes almost on a daily basis. And if a reevaluation of the evidence, given all sorts of considerations, the state of health of a witness, the prevailing sentiments and feelings in the jurisdiction in which the case will be tried, all of these things they take into account and they determine is this case worthy of this type of prosecution. And I see no indication anywhere in the record that that's not what happened in this case. They have reevaluated, and they may before the case is over reevaluate again.

But that, by the way, is why you have the Speedy Trial Act. In cases of indictments, informations

involving an offense which can lead to imprisonment for more than six months, you as the defendant can put a cap on that reevaluation any time you want to. You can say, I'm ready for trial and I don't agree to a tolling of the Speedy Trial Act; and you get your trial very quickly.

MR. KIRSCH: Well, your Honor, I just -- briefly. In their response brief, they do not indicate any of those factors that the Court cited. They argue that the nature of the offense and Trudeau's background justify eliminating any cap on the potential sentence, things that were well known to them when they agreed with Judge Gettleman.

Now, your Honor, with respect to Trudeau's background, they rely on offenses that were committed 20 years ago when Trudeau was a young man. For them to say, well, we just discovered a 20-year-old offense and that changes everything -- that changes everything here -- your Honor, I just don't think that's grounds for them to be able to come in here --

THE COURT: Well, I think if they had just discovered it, it might be grounds. I'm just not likely to believe them if they tell me that they just discovered it. But there's a difference there. But reanalysis and reevaluation does not mean or rely necessarily on discovering new evidence or discovering new facts. It just simply means that a reassessment has taken place. It could be a different prosecutor. It could be any number of things that cause a reassessment of the evidence.

I don't sense that you're alleging that there's some illegal or evil or improper motive for the

government's reevaluation. That would be a different matter.

MR. KIRSCH: Your Honor, I'm not, although I've -- although respectfully, there's nothing -- there's nothing in their response brief to indicate that they reevaluated any evidence in this case at all. In fact, they don't -- they don't make that argument to the Court. They never say we reevaluated the evidence and based upon our reevaluation of the evidence, we're now in front of this Court, just like we would have been in front of Judge Gettleman, asking for an enhanced penalty. They don't make that argument, your Honor.

THE COURT: I think we've gone around the bush on this one quite a bit.

Ultimately, after all is said and done, in a contempt citation, it's really the Court's discretion to choose the punishment. It's not the government's. I think that they have a right to reevaluate and reposition themselves before the Court, but it's ultimately the Court's discretion.

And I think, having evaluated all of the proceedings in this case, that the type of conduct alleged here, the gravity of the offense, the importance of any ruling or judgment that comes out of these proceedings in terms of the public good, deterrence and otherwise, lead me to conclude that this is a proper case for the type of punishment that the government seeks in its request to amend the show cause order. And I'm going to grant that motion and allow them to amend.

As far as the Speedy Trial Act is concerned, I think I've pretty much articulated my reasoning. If we read the Act on its face, it applies to a defendant

charged with an offense in an information or an indictment. This defendant is not charged either in an information or an indictment.

So that to apply the Act at all, we have to, as I think the Judicial Conference guidelines -- which, by the way, are close to 40 years old at this point -- we do essentially what the guidelines have done; and, that is, we analogize; we say this isn't an indictment; this isn't an information, but it serves the same purpose. And the purposes of the Act were to put certain limits on the government's time to bring an offense to trial. And, therefore, this Act ought to apply to a contempt proceeding. If we do that then, we end up applying the Act to this proceeding. And we do so because we have, by analogy, taken the court's order to show cause as the charging document in this case. The charging document defines, among other things, the punishment that's allowed in the case. And the charging document in this case defined the punishment as not exceeding six months. That's clear language in Judge Gettleman's order.

Therefore, as the Act applies -- or if we apply the Act to this contempt proceeding, we have to determine that it just simply doesn't apply to this particular contempt proceeding because this is not an offense within the definition of the Act itself. It wouldn't apply if the proceeding had been brought by an indictment or an information, and it ought also not to apply if the proceedings are brought by way of a citation. It's just that simple.

There are cases that you can read both ways. I, frankly, don't find the Richmond case to state what Mr. Trudeau seems to be arguing that it states. Not

to mention the fact that it's an unpublished case and, therefore, has no precedential value.

And the guidelines themselves, even if we agree with their conclusion that the Act should apply to contempt proceedings, the guidelines nowhere imply that the Act should apply to contempt proceedings in a way any differently than it applies to proceedings that are brought under indictment or information. And that, it seems to me, is what the defendant is seeking in this case. The Act simply doesn't apply to any criminal proceeding for which the maximum penalty is no more than six months.

We haven't touched on the double jeopardy argument, but, quite frankly, I think the Seventh Circuit's most recent opinion really determines that. Whether a contempt is civil or criminal depends on essentially the sanction that's involved, the nature of that sanction. And the Seventh Circuit held in this very matter that the sanctions ordered by Judge Gettleman are clearly remedial in nature and therefore civil. The double jeopardy clause simply does not apply. It does not bar a criminal prosecution and a civil sanction based upon overlapping conduct. So the double jeopardy objection and bar is denied.

And as I previously indicated, I determined that the government's request to amend the complaint is appropriate and proper in this case. This is a serious issue involving conduct which, if it is proven, impacts a great number of people. And the need for deterrence of criminal conduct of this nature -- and I do not prejudge the issues as to this defendant -- but criminal conduct of this nature is great, and I don't believe that treating such conduct as a Class B or C misdemeanor is the most appropriate manner to

proceed. I think the government is perfectly within its rights to seek an upgrade of the charges in this case to felony level.

Having said that, it appears to me that given the uncertainty of the law in the area, the most prudent way to proceed would be to proceed from here on out, once the amendment is allowed and officially filed, as if the Speedy Trial Act does apply from there on in.

Now we need some dates. When can the government comply with its Rule 16 disclosures?

MR. KRICKBAUM: Judge, we would ask for a date in 30 days, which the purpose of that, Judge, is so that I can travel to Washington to review documents that are in the FTC's possession but not in my possession and determine whether any additional Rule 16 disclosures are appropriate or other discovery disclosures, including Brady, are appropriate. THE COURT: Carole.

THE CLERK: January 6th.

MR. KRICKBAUM: And, Judge, we submitted as part of our motion to amend a proposed amended rule to show cause, which I'm happy to submit electronically as a proposed order to the Court. My understanding of the Court's ruling and what we asked the Court to do is to dismiss the original order to show cause without prejudice and to enter the amended order to show cause which we submitted to your Honor. That's my understanding of the motion that the Court has granted.

THE COURT: Yes. But I think until the proposed amended rule standing by itself is actually entered, it's not the charging document. So you can submit it to us in hard copy or electronically. Electronically is --

MR. KRICKBAUM: We will do both.

THE COURT: -- better.

MR. KRICKBAUM: We will do both, Judge.

THE COURT: Okay. And we will issue a ruling entering it as the rule and charging document in this case. And from that point forward, the defendant will be -- and at that point we will at the same time dismiss without prejudice the previously filed order by Judge Gettleman.

MR. KRICKBAUM: And I would ask that from this date until January 6th, that time be excluded in the interest of justice.

THE COURT: Response?

MR. KIRSCH: Your Honor, can I just have one minute? THE COURT: Sure.

(Brief pause.)

MR. KIRSCH: Your Honor, that's fine.

THE COURT: Okay. Time is excluded. Assuming the government's compliance with Rule 16 by January 6th, then how much time do the parties want for the filing of their pretrial motions?

MR. KRICKBAUM: And, Judge, here we're talking about standard pretrial motions, not motions in limine, is that -- that's my understanding. Is that true?

THE COURT: That's correct. I won't ask for the motions in limine until after we set a trial date.

MR. KIRSCH: 90 days, your Honor. The parties agree on 90 days if that's okay with the Court.

THE COURT: 90 days after January 6th, Carole. Actually, if we're going to take 90 days, I think we can file the motions in limine as well. By that time you folks will have had ample opportunity to review all the evidence and begin to shape your case up and I don't see why we can't include all of the motions in limine as well, any evidentiary issues that you wish to raise, any other motions in limine.

**APPENDIX C**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

*Plaintiff*,

v.

KEVIN TRUDEAU,

*Defendant.*

Civ. No. 10 CR 886

Judge Ronald A. Guzmán

MEMORANDUM OPINION AND ORDER

In 2004, defendant Kevin Trudeau settled a civil lawsuit with the Federal Trade Commission by agreeing to a consent order that prohibited him from making infomercials that misrepresented the content of his books. (*See* Gov. Ex. 5.) In 2006 and 2007, defendant made multiple infomercials promoting his book *The Weight Loss Cure "They" Don't Want You To Know About*. (*See* Trial Stipulation #3.) In the infomercials, defendant made many claims about the protocol described in his book, including that it was "not a diet," did not involve "portion control," "calorie counting" or "deprivation," and could be "do[ne] . . . at home." (*See* Gov. Ex. 19. ) Defendant also claimed that the protocol involved a "miracle all-natural substance" that "you can get . . . anywhere." (*Id*.)

Defendant further claimed that "when you're done with the protocol, [you can] eat whatever you want and you don't gain the weight back." (*Id*.)

Because the government believed these representations violated the 2004 consent order, defendant was charged with both civil and criminal contempt of court. Specifically, the government alleged that contrary to the infomercials, the book actually contained an onerous diet that involved eating only 500 calories a day from a restricted list of foods; required daily doctor's appointments; been approved for weight loss in the United States; and involved permanently giving up foods that most people eat every day. (*See* Gov. Ex. 4.) Trudeau denied the civil contempt allegations and pleaded not guilty to the criminal contempt allegations. Trudeau was found guilty of civil contempt, *see FTC v. Trudeau*, 579 F.3d 754 (7th Cir. 2009), and after a criminal jury trial held before this Court in November 2013, of criminal contempt. He now files a motion for judgment of acquittal claiming that the evidence at trial was insufficient to prove that he willfully violated the 2004 consent order. For the reasons stated herein, the motion is denied.

In a Federal Rule of Criminal Procedure 29 motion for acquittal challenging the sufficiency of the evidence, the Court views the evidence and all reasonable inferences from it in the light most favorable to the government, defers to the jury's credibility determinations, and will "overturn [ ] a verdict only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt." *United States v. Parker*, 716 F.3d 999, 1007 (7th Cir. 2013); *see United States v. Hach*, 162 F.3d 937, 942 (7th Cir.

1998). The jury was instructed that the government had to establish each of the following propositions beyond a reasonable doubt to prove defendant guilty of criminal contempt: (1) the court entered a reasonably specific order; (2) defendant violated the order by misrepresenting the content of the book *The Weight Loss Cure "They" Don't Want You to Know About* in an infomercial; and (3) defendant's violation of the consent order was willful. There was more than sufficient evidence for a reasonable jury to conclude that the government had met its burden of proof as to each of these elements.

The consent order was admitted at trial pursuant to a stipulation, so the jurors could and did see that it clearly prohibits defendant from making infomercials that misrepresent the content of his books. They also saw that the order was signed by defendant, personally and through counsel, effectively scotching any argument that he was ignorant of its terms. The defendant also stipulated he was the author of the book, thus effectively killing any argument that he was ignorant of the book's content. See Trial Stipulation No. 2. The jury watched the infomericals, hearing from defendant's own mouth the words he used to describe the content of his book, and could compare these descriptions to the content of the book itself, which was also admitted in evidence. All of this evidence supports the jury's conclusion that defendant made blatantly false and misleading statements in the infomercials about the content of his book, including that: (1) the protocol in the book was "not a diet," did not involve "portion control," "calorie counting," or "deprivation"; (2) "you can do [the protocol] at home," with a "miracle all-natural substance" that "you can get . . . anywhere"; and (3)

"when you're done with the protocol, eat whatever you want and you don't gain the weight back."

Despite the wealth of evidence to the contrary, defendant argues that there was a "near-perfect symmetry" between the infomercials and the book, and thus no proof of willfulness. (Mot. J. Acquittal at 6, Dkt. #150.) The jury, however, clearly rejected this argument, and its decision is supported by the record. The evidence showed, for example, that some claims made in the infomercials, *e.g.*, that you can do the protocol at home and can get hCG "anywhere," do not even appear in the book. Moreover, it supports the inference that other infomercial claims, *e.g.*, the protocol is not a diet, appear in the book but still grossly misrepresent its overall content.

Defendant implies that it is impossible to prove willfulness without a confession or "direct evidence" such as testimony from a witness about the defendant's state of mind or testimony from the defendant himself. That is not the law, as the reflected by the following pattern jury instructions, which the Court, with defendant's agreement, gave to the jury:

> You may have heard the terms "direct evidence" and "circumstantial evidence." Direct evidence is evidence that directly proves a fact. Circumstantial evidence is evidence that indirectly proves a fact.
>
> You are to consider both direct and circumstantial evidence. The law does not say that one is better than the other. It is up to you to decide how much weight to give to any evidence, whether direct or circumstantial.

and

> Give the evidence whatever weight you decide it deserves. Use your common sense in weighing the evidence, and consider the evidence in light of your own everyday experience.
>
> People sometimes look at one fact and conclude from it that another fact exists. This is called an inference. You are allowed to make reasonable inferences, so long as they are based on the evidence.

(Jury Instructions at 6-7, Dkt. #147); see Seventh Circuit Pattern Jury Instruction Nos. 2.02 & 2.03. Defendant offers nothing to suggest that the jury disregarded these instructions.

There was ample evidence from which the jury could infer that defendant acted willfully. First and foremost were the infomericals themselves. The jurors watched as defendant made his sales pitch, eagerly answering the "interviewer's" questions and excitedly recounting fantastic success stories, all while looking directly into the camera. (*See* Trial Stipulation #3.) Defendant's speech patterns, manner of delivery and eagerness to engage the audience, all suggest that he understood fully what he was doing. The same inference can be drawn from some of the parties' stipulations. In Trial Stipulation No. 6, the parties agreed that, shortly before the infomercials were filmed, defendant sold several assets to ITV, the company that produced and marketed the infomercials, in exchange for a promise to pay him $121 million. (*See* Trial Stipulation #6.) They also agreed that defendant "anticipated making money

based on this stock purchase agreement in connection with the Weight Loss Cure book" but was not receiving payments from ITV when the infomercials were filmed. (*See id*.) In Trial Stipulation No. 5, the parties agreed that defendant is entitled to 65% of the royalty payments from the retail sales of the book. (*See id*.) The jury could reasonably conclude from this evidence that defendant had a strong financial incentive to increase book sales, and thus to make the books irresistible in his infomercials. The book's cover references the infomercials with a label that states "As Seen on TV" thus inviting consumers to purchase the books based upon the defendant's infomercial representations. *See* Gov. Ex. 4. In short, the evidence amply supports the jury's conclusion that defendant's actions were willful.[1]

For all of the reasons set forth above, the defendant's motion for judgment of acquittal is denied.

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[1] The Seventh Circuit drew the same conclusion in the civil contempt case. After considering much of the same evidence, including the book and the infomercials, the court said that defendant "clearly misrepresented the book's content," "loaded" his infomercials with "statements that are patently false," "outright lied," made "blatant misrepresentations," and "repeatedly distorted" the content of the book. *FTC v. Trudeau*, 579 F.3d 754, 757-68 (7th Cir. 2009). While the Seventh Circuit did not specifically address whether defendant acted willfully, its conclusions support that finding; an outright lie is a willful act.

**SO ORDERED.** ENTERED: January 29, 2014

_____

HON. RONALD A. GUZMAN
United States District Judge

**APPENDIX D**

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

March 7, 2016

Before

FRANK H. EASTERBROOK, *Circuit Judge*

ILANA DIAMOND ROVNER, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

No. 14-1869

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

UNITED STATES OF AMERICA
*Plaintiff-Appellee*,

v.

KEVIN MARK TRUDEAU,
*Defendant-Appellant*.

Ronald A. Guzmán,
*Judge*.

**O R D E R**

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en

banc,[1] and all of the judges on the original panel have voted to deny rehearing. It is therefore ordered that the petition for rehearing and for rehearing en banc is DENIED.

[1] Circuit Judge Joel M. Flaum did not participate in the consideration of this petition for rehearing.

## APPENDIX E

18 U.S.C. § 401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as-

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

(June 25, 1948, ch. 645, 62 Stat. 701 ; Pub. L. 107–273, div. B, title III, §3002(a)(1), Nov. 2, 2002, 116 Stat. 1805 .)

# APPENDIX F

Speedy Trial Act of 1974

18 U.S.C. § 3161. Time limits and exclusions

(a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other shortterm trial calendar at a place within the judicial district, so as to assure a speedy trial.

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirtyday period, the period of time for filing of the indictment shall be extended an additional thirty days.

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate judge on a complaint, the trial shall commence within seventy days from the date of such consent.

(2) Unless the defendant consents in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se.

(d)(1) If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

(2) If the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final, except that the court retrying the case may extend the period for trial not to exceed one hundred and eighty days from the date the action occasioning the trial becomes final if the unavailability of witnesses or other factors resulting from the passage of time shall make trial within seventy days impractical.

The periods of delay enumerated in section 3161(h) are excluded in computing the time

limitations specified in this section. The sanctions of section 3162 apply to this subsection.

(e) If the defendant is to be tried again following a declaration by the trial judge of a mistrial or following an order of such judge for a new trial, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final. If the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final, except that the court retrying the case may extend the period for retrial not to exceed one hundred and eighty days from the date the action occasioning the retrial becomes final if unavailability of witnesses or other factors resulting from passage of time shall make trial within seventy days impractical. The periods of delay enumerated in section 3161(h) are excluded in computing the time limitations specified in this section.

The sanctions of section 3162 apply to this subsection.

(f) Notwithstanding the provisions of subsection (b) of this section, for the first twelvecalendarmonth period following the effective date of this section as set forth in section 3163(a) of this chapter the time limit imposed with respect to the period between arrest and indictment by subsection (b) of this section shall be sixty days, for the second such twelvemonth period such time limit shall be fortyfive days and for the third such period such time limit shall be thirtyfive days.

(g) Notwithstanding the provisions of subsection (c) of this section, for the first twelvecalendarmonth

period following the effective date of this section as set forth in section 3163(b) of this chapter, the time limit with respect to the period between arraignment and trial imposed by subsection (c) of this section shall be one hundred and eighty days, for the second such twelvemonth period such time limit shall be one hundred and twenty days, and for the third such period such time limit with respect to the period between arraignment and trial shall be eighty days.

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to-

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from trial with respect to other charges against the defendant;

(C) delay resulting from any interlocutory appeal;

(D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(E) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(F) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(G) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(2) Any period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.

(3)(A) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness.

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial

cannot be obtained by due diligence or he resists appearing at or being returned for trial.

(4) Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial.

(5) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.

(6) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.

(7)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b), or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

(C) No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.

(8) Any period of delay, not to exceed one year, ordered by a district court upon an application of a party and a finding by a preponderance of the evidence that an official request, as defined in section 3292 of this title, has been made for evidence of any such offense and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(i) If trial did not commence within the time limitation specified in section 3161 because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161, on the day the order permitting withdrawal of the plea becomes final.

(j)(1) If the attorney for the Government knows that a person charged with an offense is serving a term of imprisonment in any penal institution, he shall promptly(A) undertake to obtain the presence of the prisoner for trial; or (B) cause a detainer to be filed with the person having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

(2) If the person having custody of such prisoner receives a detainer, he shall promptly advise the prisoner of the charge and of the prisoner's right to

demand trial. If at any time thereafter the prisoner informs the person having custody that he does demand trial, such person shall cause notice to that effect to be sent promptly to the attorney for the Government who caused the detainer to be filed.

(3) Upon receipt of such notice, the attorney for the Government shall promptly seek to obtain the presence of the prisoner for trial.

(4) When the person having custody of the prisoner receives from the attorney for the Government a properly supported request for temporary custody of such prisoner for trial, the prisoner shall be made available to that attorney for the Government (subject, in cases of interjurisdictional transfer, to any right of the prisoner to contest the legality of his delivery).

(k)(1) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs more than 21 days after the day set for trial, the defendant shall be deemed to have first appeared before a judicial officer of the court in which the information or indictment is pending within the meaning of subsection (c) on the date of the defendant's subsequent appearance before the court.

(2) If the defendant is absent (as defined by subsection (h)(3)) on the day set for trial, and the defendant's subsequent appearance before the court on a bench warrant or other process or surrender to the court occurs not more than 21 days after the day set for trial, the time limit required by subsection (c), as extended by subsection (h), shall be further extended by 21 days.

(Added Pub. L. 93–619, title I, §101, Jan. 3, 1975, 88 Stat. 2076 ; amended Pub. L. 96–43, §§2–5, Aug. 2, 1979, 93 Stat. 327 , 328; Pub. L. 98–473, title II, §1219, Oct. 12, 1984, 98 Stat. 2167 ; Pub. L. 100–690, title VI, §6476, Nov. 18, 1988, 102 Stat. 4380 ; Pub. L. 101–650, title III, §321, Dec. 1, 1990, 104 Stat. 5117 ; Pub. L. 110–406, §13, Oct. 13, 2008, 122 Stat. 4294 .)

18 U.S.C. § 3162. Sanctions

(a)(1) If, in the case of any individual against whom a complaint is filed charging such individual with an offense, no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual contained in such complaint shall be dismissed or otherwise dropped. In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

(2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and

circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

(b) In any case in which counsel for the defendant or the attorney for the Government (1) knowingly allows the case to be set for trial without disclosing the fact that a necessary witness would be unavailable for trial; (2) files a motion solely for the purpose of delay which he knows is totally frivolous and without merit; (3) makes a statement for the purpose of obtaining a continuance which he knows to be false and which is material to the granting of a continuance; or (4) otherwise willfully fails to proceed to trial without justification consistent with section 3161 of this chapter, the court may punish any such counsel or attorney, as follows:

(A) in the case of an appointed defense counsel, by reducing the amount of compensation that otherwise would have been paid to such counsel pursuant to section 3006A of this title in an amount not to exceed 25 per centum thereof;

(B) in the case of a counsel retained in connection with the defense of a defendant, by imposing on such counsel a fine of not to exceed 25 per centum of the compensation to which he is entitled in connection with his defense of such defendant;

(C) by imposing on any attorney for the Government a fine of not to exceed $250;

(D) by denying any such counsel or attorney for the Government the right to practice before the court

considering such case for a period of not to exceed ninety days; or

(E) by filing a report with an appropriate disciplinary committee.

The authority to punish provided for by this subsection shall be in addition to any other authority or power available to such court.

(c) The court shall follow procedures established in the Federal Rules of Criminal Procedure in punishing any counsel or attorney for the Government pursuant to this section.

(Added Pub. L. 93–619, title I, §101, Jan. 3, 1975, 88 Stat. 2079 .)

* * * *

18 U.S.C. § 3172. Definitions

As used in this chapter-

(1) the terms "judge" or "judicial officer" mean, unless otherwise indicated, any United States magistrate judge, Federal district judge, and

(2) the term "offense" means any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a Class B or C misdemeanor or an infraction, or an offense triable by courtmartial, military commission, provost court, or other military tribunal).

(Added Pub. L. 93–619, title I, §101, Jan. 3, 1975, 88 Stat. 2085 ; amended Pub. L. 98–473, title II, §223(i), Oct. 12, 1984, 98 Stat. 2029 ; Pub. L. 101–650, title III, §321, Dec. 1, 1990, 104 Stat. 5117 .)

AMENDMENTS

1984-Par. (2). Pub. L. 98–473 substituted "Class B or C misdemeanor or an infraction" for "petty offense as defined in section 1(3) of this title".

## APPENDIX G

Sentencing Reform Act of 1984

18 U.S.C. § 3559. Sentencing classification of offenses

(a) CLASSIFICATION.-An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is-

(1) life imprisonment, or if the maximum penalty is death, as a Class A felony;

(2) twentyfive years or more, as a Class B felony;

(3) less than twentyfive years but ten or more years, as a Class C felony;

(4) less than ten years but five or more years, as a Class D felony;

(5) less than five years but more than one year, as a Class E felony;

(6) one year or less but more than six months, as a Class A misdemeanor;

(7) six months or less but more than thirty days, as a Class B misdemeanor;

(8) thirty days or less but more than five days, as a Class C misdemeanor; or

(9) five days or less, or if no imprisonment is authorized, as an infraction.

(b) EFFECT OF CLASSIFICATION.-Except as provided in subsection (c), an offense classified under subsection (a) carries all the incidents assigned to the applicable letter designation, except that the maximum term of imprisonment is the term authorized by the law describing the offense.

(c) IMPRISONMENT OF CERTAIN VIOLENT FELONS.-

(1) MANDATORY LIFE IMPRISONMENT.- Notwithstanding any other provision of law, a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if-

(A) the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or of a State of

(i) 2 or more serious violent felonies; or

(ii) one or more serious violent felonies and one or more serious drug offenses; and

(B) each serious violent felony or serious drug offense used as a basis for sentencing under this subsection, other than the first, was committed after the defendant's conviction of the preceding serious violent felony or serious drug offense.

(2) DEFINITIONS.-For purposes of this subsection-

(A) the term "assault with intent to commit rape" means an offense that has as its elements engaging in physical contact with another person or using or brandishing a weapon against another person with intent to commit aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242);

(B) the term "arson" means an offense that has as its elements maliciously damaging or destroying any building, inhabited structure, vehicle, vessel, or real property by means of fire or an explosive;

(C) the term "extortion" means an offense that has as its elements the extraction of anything of value from another person by threatening or placing that person in fear of injury to any person or kidnapping of any person;

(D) the term "firearms use" means an offense that has as its elements those described in section 924(c) or 929(a), if the firearm was brandished, discharged, or otherwise used as a weapon and the crime of violence or drug trafficking crime during and relation to which the firearm was used was subject to prosecution in a court of the United States or a court of a State, or both;

(E) the term "kidnapping" means an offense that has as its elements the abduction, restraining, confining, or carrying away of another person by force or threat of force;

(F) the term "serious violent felony" means-

(i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as described in section 113(a)); assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244(a)(1) and (a)(2)); kidnapping; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118); carjacking (as described in section 2119); extortion; arson; firearms use; firearms possession (as described in section 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; and

(ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense;

(G) the term "State" means a State of the United States, the District of Columbia, and a commonwealth, territory, or possession of the United States; and

(H) the term "serious drug offense" means-

(i) an offense that is punishable under section 401(b)(1)(A) or 408 of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A), 848) or section 1010(b)(1)(A) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(1)(A)); or

(ii) an offense under State law that, had the offense been prosecuted in a court of the United States, would have been punishable under section 401(b)(1)(A) or 408 of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A), 848) or section 1010(b)(1)(A) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(1)(A)).

(3) NONQUALIFYING FELONIES.-

(A) ROBBERY IN CERTAIN CASES. Robbery, an attempt, conspiracy, or solicitation to commit robbery; or an offense described in paragraph (2)(F)(ii) shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that-

(i) no firearm or other dangerous weapon was used in the offense and no threat of use of a firearm or

other dangerous weapon was involved in the offense; and

(ii) the offense did not result in death or serious bodily injury (as defined in section 1365) to any person.

(B) ARSON IN CERTAIN CASES.-Arson shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that-

(i) the offense posed no threat to human life; and

(ii) the defendant reasonably believed the offense posed no threat to human life.

(4) INFORMATION FILED BY UNITED STATES ATTORNEY.-The provisions of section 411(a) of the Controlled Substances Act (21 U.S.C. 851(a)) shall apply to the imposition of sentence under this subsection.

(5) RULE OF CONSTRUCTION.-This subsection shall not be construed to preclude imposition of the death penalty.

(6) SPECIAL PROVISION FOR INDIAN COUNTRY.-No person subject to the criminal jurisdiction of an Indian tribal government shall be subject to this subsection for any offense for which Federal jurisdiction is solely predicated on Indian country (as defined in section 1151) and which occurs within the boundaries of such Indian country unless the governing body of the tribe has elected that this subsection have effect over land and persons subject to the criminal jurisdiction of the tribe.

(7) RESENTENCING UPON OVERTURNING OF PRIOR CONVICTION.-If the conviction for a serious

violent felony or serious drug offense that was a basis for sentencing under this subsection is found, pursuant to any appropriate State or Federal procedure, to be unconstitutional or is vitiated on the explicit basis of innocence, or if the convicted person is pardoned on the explicit basis of innocence, the person serving a sentence imposed under this subsection shall be resentenced to any sentence that was available at the time of the original sentencing.

(d) DEATH OR IMPRISONMENT FOR CRIMES AGAINST CHILDREN.-

(1) IN GENERAL.-Subject to paragraph (2) and notwithstanding any other provision of law, a person who is convicted of a Federal offense that is a serious violent felony (as defined in subsection (c)) or a violation of section 2422, 2423, or 2251 shall, unless the sentence of death is imposed, be sentenced to imprisonment for life, if-

(A) the victim of the offense has not attained the age of 14 years;

(B) the victim dies as a result of the offense; and

(C) the defendant, in the course of the offense, engages in conduct described in section 3591(a)(2).

(2) EXCEPTION.-With respect to a person convicted of a Federal offense described in paragraph (1), the court may impose any lesser sentence that is authorized by law to take into account any substantial assistance provided by the defendant in the investigation or prosecution of another person who has committed an offense, in accordance with the Federal Sentencing Guidelines and the policy statements of the Federal Sentencing Commission

pursuant to section 994(p) of title 28, or for other good cause.

(e) MANDATORY LIFE IMPRISONMENT FOR REPEATED SEX OFFENSES AGAINST CHILDREN.-

(1) IN GENERAL.-A person who is convicted of a Federal sex offense in which a minor is the victim shall be sentenced to life imprisonment if the person has a prior sex conviction in which a minor was the victim, unless the sentence of death is imposed.

(2) DEFINITIONS.-For the purposes of this subsection-

(A) the term "Federal sex offense" means an offense under section 1591 (relating to sex trafficking of children), 2241 (relating to aggravated sexual abuse), 2242 (relating to sexual abuse), 2244(a)(1) (relating to abusive sexual contact), 2245 (relating to sexual abuse resulting in death), 2251 (relating to sexual exploitation of children), 2251A (relating to selling or buying of children), 2422(b) (relating to coercion and enticement of a minor into prostitution), or 2423(a) (relating to transportation of minors);

(B) the term "State sex offense" means an offense under State law that is punishable by more than one year in prison and consists of conduct that would be a Federal sex offense if, to the extent or in the manner specified in the applicable provision of this title-

(i) the offense involved interstate or foreign commerce, or the use of the mails; or

(ii) the conduct occurred in any commonwealth, territory, or possession of the United States, within the special maritime and territorial jurisdiction of the United States, in a Federal prison, on any land or

building owned by, leased to, or otherwise used by or under the control of the Government of the United States, or in the Indian country (as defined in section 1151);

(C) the term "prior sex conviction" means a conviction for which the sentence was imposed before the conduct occurred constituting the subsequent Federal sex offense, and which was for a Federal sex offense or a State sex offense;

(D) the term "minor" means an individual who has not attained the age of 17 years; and

(E) the term "State" has the meaning given that term in subsection (c)(2).

(3) NONQUALIFYING FELONIES.-An offense described in section 2422(b) or 2423(a) shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that-

(A) the sexual act or activity was consensual and not for the purpose of commercial or pecuniary gain;

(B) the sexual act or activity would not be punishable by more than one year in prison under the law of the State in which it occurred; or

(C) no sexual act or activity occurred.

(f) MANDATORY MINIMUM TERMS OF IMPRISONMENT FOR VIOLENT CRIMES AGAINST CHILDREN.-A person who is convicted of a Federal offense that is a crime of violence against the person of an individual who has not attained the age of 18 years shall, unless a greater mandatory minimum sentence of imprisonment is otherwise provided by law and regardless of any maximum

term of imprisonment otherwise provided for the offense-

(1) if the crime of violence is murder, be imprisoned for life or for any term of years not less than 30, except that such person shall be punished by death or life imprisonment if the circumstances satisfy any of subparagraphs (A) through (D) of section 3591(a)(2) of this title;

(2) if the crime of violence is kidnapping (as defined in section 1201) or maiming (as defined in section 114), be imprisoned for life or any term of years not less than 25; and

(3) if the crime of violence results in serious bodily injury (as defined in section 1365), or if a dangerous weapon was used during and in relation to the crime of violence, be imprisoned for life or for any term of years not less than 10.

(g)(1) If a defendant who is convicted of a felony offense (other than offense of which an element is the false registration of a domain name) knowingly falsely registered a domain name and knowingly used that domain name in the course of that offense, the maximum imprisonment otherwise provided by law for that offense shall be doubled or increased by 7 years, whichever is less.

(2) As used in this section-

(A) the term "falsely registers" means registers in a manner that prevents the effective identification of or contact with the person who registers; and

(B) the term "domain name" has the meaning given that term is 1 section 45 of the Act entitled "An Act to provide for the registration and protection of trademarks used in commerce, to carry out the

provisions of certain international conventions, and for other purposes" approved July 5, 1946 (commonly referred to as the "Trademark Act of 1946") (15 U.S.C. 1127).

(Added Pub. L. 98–473, title II, §212(a)(2), Oct. 12, 1984, 98 Stat. 1991 ; amended Pub. L. 100–185, §5, Dec. 11, 1987, 101 Stat. 1279 ; Pub. L. 100–690, title VII, §7041, Nov. 18, 1988, 102 Stat. 4399 ; Pub. L. 103–322, title VII, §70001, Sept. 13, 1994, 108 Stat. 1982 ; Pub. L. 105–314, title V, §501, Oct. 30, 1998, 112 Stat. 2980 ; Pub. L. 105–386, §1(b), Nov. 13, 1998, 112 Stat. 3470 ; Pub. L. 108–21, title I, §106(a), Apr. 30, 2003, 117 Stat. 654 ; Pub. L. 108–482, title II, §204(a), Dec. 23, 2004, 118 Stat. 3917 ; Pub. L. 109–248, title II, §§202, 206(c), July 27, 2006, 120 Stat. 612 , 614.)

**APPENDIX H**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FEDERAL TRADE COMMISSION,
*Plaintiff*

v.

KEVIN TRUDEAU, SHOP AMERICA (USA), LLC, SHOP AMERICA MARKETING GROUP, LLC, TRUSTAR GLOBAL MEDIA, LIMITED, ROBERT BAREFOOT, DEONNA ENTERPRISES, INC., AND KARBO ENTERPRISES, INC.
*Defendants*, and

K.T. CORPORATION, LIMITED, AND TRUCOM, LLC,
*Relief Defendants.*

Civ. No. 03-C-3904
Judge Gettleman

FEDERAL TRADE COMMISSION,
*Plaintiff*

v.

KEVIN TRUDEAU,
*Defendant.*

Civ. No. 98-C-0168
Judge Gettleman

# STIPULATED FINAL ORDER FOR PERMANENT INJUNCTION AND SETTLEMENT OF CLAIMS FOR MONETARY RELIEF AS TO DEFENDANTS KEVIN TRUDEAU, SHOP AMERICA (USA), LLC, SHOP AMERICA MARKETING GROUP, LLC, TRUSTAR GLOBAL MEDIA, LIMITED AND RELIEF DEFENDANTS K.T. CORPORATION, LIMITED, AND TRUCOM, LLC

Plaintiff, the Federal Trade Commission ("Commission") has filed a Complaint for Permanent Injunction and Other Equitable Relief ("Complaint") against Kevin Trudeau, Shop America (USA), LLC, Shop America Marketing Group, and TruStar Global Media ("Defendants"), and K.T. Corp. and TruCom, LLC ("Relief Defendants"), pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), alleging deceptive acts or practices and false advertisements in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52. Additionally, on June 9, 2003, the Commission moved this Court for entry of an order holding Kevin Trudeau in contempt of the Stipulated Order for Permanent Injunction and Final Judgment Against Kevin Trudeau entered by this court on January 14, 1998 in connection with Civ. No. 98-C-0168.

The Commission, Defendants and Relief Defendants have stipulated to the entry of the following Stipulated Final Order for Permanent Injunction and Settlement of Claims for Monetary Relief as to Defendants Kevin Trudeau, Shop America (USA), L.L.C., Shop America Marketing Group LLC, TruStar Global Media Limited, and Relief Defendants K.T. Corporation Limited and TruCom L.L.C. ("Order") in settlement of the Commission's Complaint against

Defendants and Relief Defendants and the Commission's civil contempt action against Kevin Trudeau. Additionally, this Order resolves any additional remedies requested relating to the Court's June 29, 2004 finding of civil contempt against Defendant Kevin Trudeau for violating the preliminary injunction. The Court, being advised in the premises and having conducted a hearing on September 2, 2004 on the subject matter herein, including but not limited to the scope of prohibited activities, finds:

FINDINGS

1. This Court has jurisdiction over the subject matter of this case. For purposes of this Order, all parties consent to the Court's exercise of personal jurisdiction. Venue in the Northern District of Illinois is proper.

2. The Complaint states a claim upon which relief can be granted, and the Commission has the authority to seek the relief which is stipulated to in this Order.

3. The acts and practices of Defendants were and are in or affecting commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

4. Defendants and Relief Defendants waive all rights to seek judicial review of, or otherwise to challenge or contest the validity of, this Order. Defendants and Relief Defendants also waive any claim that they may have held under the Equal Access to Justice Act, 28 U.S.C. § 2412, concerning the prosecution of this action to the date of this Order.

5. Each party shall bear its own costs and attorneys' fees.

6. Entry of this Order is in the public interest.

7. Pursuant to Federal Rule of Civil Procedure 65(d), the provisions of this Order are binding upon Defendants and Relief Defendants, and their officers, agents, servants, employees and all other persons or entities in active concert or participation with them, who receive actual notice of this Order by personal service or otherwise.

8. Defendants and Relief Defendants expressly deny any wrongdoing or liability for any of the matters alleged in the Complaint and the civil contempt action. There have been no findings or admissions of wrongdoing or liability by the Defendants or Relief Defendants other than the finding against Kevin Trudeau for contempt of Part I of the Stipulated Preliminary Injunction, entered by the Court on June 29, 2004.

9. This Order supersedes the Stipulated Order for Permanent Injunction and Final Judgment Against Kevin Trudeau entered by this court on January 14, 1998.

## DEFINITIONS

For the purposes of this Order, the following definitions shall apply:

A. "Advertisement" means any written or verbal statement, illustration or depiction that is designed to effect a sale or create interest in the purchasing of goods or services, whether it appears in a book, brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, free standing insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, packaging, package insert, label, film, slide, radio, television or cable television,

video news release, audio program transmitted over a telephone system, infomercial, the Internet, email, or in any other medium.

B. "Assets" means any legal or equitable interest in, right to, or claim to, any real or personal property, including, without limitation, chattels, goods, instruments, equipment, fixtures, general intangibles, leaseholds, mail or other deliveries, inventory, checks, notes, accounts, credits, contracts, receivables, shares of stock, and all cash, wherever located.

C. "Assisting others" means knowingly providing any of the following services to any person or entity: (a) performing customer service functions for any person or entity (other than traditional fulfillment services, i.e., storing and shipping product and handling product returns), including, but not limited to, outbound or inbound telemarketing, upselling, cross-selling, handling customer complaints (other than returns), credit card or debit account processing, refund processing, web design and marketing, continuity program development or implementation, or designing or preparing or assisting in the preparation of product labeling or packaging; (b) formulating or providing, or arranging for the formulation or provision of, any sales script or any other advertising or marketing material for any person or entity; or c) performing advertising or marketing services or consulting services of any kind for any person or entity.

D. "Commerce" means as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

E. "Competent and reliable scientific evidence" means tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated

in an objective manner by persons qualified to do so, using procedures generally accepted in the professions to yield accurate and reliable results.

F. "Continuity Program" means any plan, arrangement, or system pursuant to which a consumer receives periodic shipments of products without prior notification by the seller before each shipment or service period, regardless of any trial or approval period allowing the consumer to return or be reimbursed for the product.

G. Unless otherwise specified, "Defendants" means:

(1) Kevin Trudeau ("Trudeau" or "Individual Defendant") individually and in his capacity as an officer or manager of Shop America (USA), L.L.C., Shop America Marketing Group LLC, TruStar Global Media Limited, K.T. Corporation Limited, TruCom, LLC, and TruStar Marketing Corp.;

(2) Shop America (USA), L.L.C. ("Shop America USA"), a corporation, its divisions and subsidiaries, its successors and assigns, and its officers, agents, representatives, and employees;

(3) Shop America Marketing Group LLC ("Shop America Marketing"), a corporation, its divisions and subsidiaries, its successors and assigns, and its officers, agents, representatives, and employees; and

(4) TruStar Global Media Limited (TruStar Global"), a corporation, its divisions and subsidiaries, its successors and assigns, and its officers, agents, representatives, and employees.

H. Unless otherwise specified, "Corporate Defendants" means Shop America USA, Shop America Marketing, and TruStar Global.

I. Unless otherwise specified, "Relief Defendants" means:

(1) K.T. Corporation Limited, a corporation, its divisions and subsidiaries, its successors and assigns, and its officers, agents, representatives, and employees; and

(2) TruCom L.L.C., a corporation, its divisions and subsidiaries, its successors and assigns, and its officers, agents, representatives, and employees.

J. "Endorsement" means as defined in 16 C.F.R. § 255.0(b).

K. "Food," "drug," "cosmetic," and "device" mean as defined in Section 15 of the FTC Act, 15 U.S.C. § 55.

L. "FTC" or "Commission" means the Federal Trade Commission.

M. "Infomercial" means any written or verbal statement, illustration or depiction that is 120 seconds or longer in duration that is designed to effect a sale or create interest in the purchasing of goods or services, which appears in radio, television (including network and cable television), or video news release.

N. "Target product" means Coral Calcium Supreme capsules or any substantially similar calcium supplement or Biotape or any substantially similar purported pain-relief product.

0. A requirement that any defendant "notify," "furnish," "provide," or "submit" to the Commission

means that the defendant shall send the necessary information via first class mail, costs prepaid, or via overnight carrier, to:

Associate Director for Advertising Practices
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington D.C. 20580
Attn: *FTC v. Kevin Trudeau et al.*, (N.D. Ill.)

P. The terms "and" and "or" in this Order shall be construed conjunctively or disjunctively as necessary, to make the applicable sentence or phrase inclusive rather than exclusive.

Q. The term "including" in this Order means "including without limitation."

R. The paragraphs of this Order shall be read as the necessary requirements for compliance and not as alternatives for compliance and no paragraph serves to modify another paragraph unless expressly so stated.

## PROHIBITED BUSINESS ACTIVITIES

### I

IT IS THEREFORE ORDERED that Defendants, directly or through any corporation, partnership, subsidiary, division, trade name, or other entity, and their officers, agents, servants, employees, and all persons and entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product, program or service, in or affecting commerce, are hereby permanently enjoined and restrained from

producing, disseminating, making or assisting others in making any representation in an infomercial aired or played on any television or radio media (including but not limited to network television, cable television, radio, and television or radio content that is disseminated on the Internet). This Part I does not prohibit Defendants from making any representation in any television or radio media in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any book, newsletter or other informational publication in any format *provided* that such book, newsletter or other informational publication: 1) does not reference, directly or indirectly, any branded or trademarked product, program or service that Defendants are promoting; 2) is not, directly or indirectly, an advertisement for any product, program or service; and 3) is not sold, promoted or marketed, directly or indirectly, in conjunction with any product, program or service that is related to the content of the book, newsletter, informational publication or infomercial. Additionally, the infomercial for any such book, newsletter or informational publication must also comply with the requirements of Part X herein and must not misrepresent the content of the book, newsletter or informational publication. For purposes of this Part I only, and only until December 31, 2004, the prohibition on infomercials does not include infomercials for the Mega Memory System, provided that such Infomercials comply with all other relevant Parts of this Order, including but not limited to Parts II, IV, V, VI, VII and X. For purposes of this Part I only, Defendants will not be deemed to be disseminating television or radio media on the Internet provided that Defendants do not, directly or indirectly, accept, process, or refer to third parties any orders from any address-

es in the United States or consumers located in the United States.

II

IT IS FURTHER ORDERED that Defendants, directly or through any corporation, partnership, subsidiary, division, trade name, or other entity, and their officers, agents, servants, employees, and all persons and entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product, program or service, in or affecting commerce, are hereby permanently enjoined and restrained from making or assisting others in making, expressly or by implication, including through the use of endorsements or product names, any representation regarding the health benefits of such product, program or service or that such product, program or service can cure, treat, or prevent any disease. This Part II does not prohibit Defendants from making any representation in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any book, newsletter or other informational publication in any format *provided* that such book, newsletter or other informational publication 1) does not reference, directly or indirectly, any branded or trademarked product, program or service that Defendants are promoting; 2) is not, directly or indirectly, an advertisement for any product, program or service; and 3) is not sold, promoted or marketed, directly or indirectly, in conjunction with any product, program or service that is related to the content of the book, newsletter, informational publication or infomercial. Additionally, any representations regarding

the book, newsletter or informational publications shall not misrepresent the content of the book, newsletter or informational publication. This Part II prohibits the making of any representations for, among others, the following products: any coral calcium product, Biotape, Eden's Secret Nature's Purifying Product, Sable Hair Farming System, and Dr. Callahan's Addiction Breaking System.

III

IT IS FURTHER ORDERED that Defendants, directly or through any corporation, partnership, subsidiary, division, trade name, or other entity, and their officers, agents, servants, employees, and all persons and entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are hereby permanently restrained and enjoined from manufacturing, labeling, advertising, promoting, offering for sale, sale, or distribution of any product containing coral calcium, *provided* that until December 31, 2004, Defendants are not prohibited from selling or shipping coral calcium to consumers who are currently enrolled in a coral calcium continuity program and who enrolled in that coral calcium continuity program prior to December 24, 2003.

IV

IT IS FURTHER ORDERED that Defendants, directly or through any corporation, partnership, subsidiary, division, trade name, or other entity, and their officers, agents, servants, employees, and all persons and entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, in connection with the manufacturing, labeling, advertising, promotion, of-

fering for sale, sale, or distribution of any product, program or service, in or affecting commerce, are hereby permanently restrained and enjoined from making or assisting others in making, expressly or by implication, including through the use of endorsements or product names, any representation about the benefits, performance, or efficacy of any product, program or service unless the representation is true and non-misleading.

## MISREPRESENTATION OF TESTS OR STUDIES

### V

IT IS FURTHER ORDERED that Defendants, directly or through any corporation, partnership, subsidiary, division, trade name, or other entity, and their officers, agents, servants, employees, and all persons and entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product, program or service, in or affecting commerce, are hereby permanently restrained and enjoined from making or assisting others in making, expressly or by implication, including through the use of endorsements or product names, any misrepresentation about the existence, contents, validity, results, conclusions, or interpretations of any test or study.

## PROHIBITED BUSINESS ACTIVITIES FROM JANUARY 1998 ORDER

### VI

IT IS FURTHER ORDERED that Defendant Trudeau, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Kevin Trudeau's Mega Memory System or any substantially similar product in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of endorsements or product names, that such product will enable users to achieve a photographic memory; provided, however, that this Part shall not prohibit representations that visualization and association techniques can improve memory, that memory can be visual in nature, that memory includes images of events and experiences, and that visualization and association techniques can help an individual to form and access visual memories, provided such representations comply with Part IV of this Order.

VII

IT IS FURTHER ORDERED that Defendant Trudeau, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Kevin Trudeau's Mega Memory System or any substantially similar product in or affecting commerce, shall not make any representation, in any manner expressly or by implication, including through the use of endorsements or product names, that such product is effective in causing adults or children with learning disabilities or attention deficit disorder to substantially improve their memory.

VII

IT IS FURTHER ORDERED that Defendant Trudeau, directly or through any corporation, subsidiary,

division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Jeanie Eller's Action Reading or any other product or program that provides instruction in learning how to read in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of endorsements or product names, concerning:

A. The extent to which individuals who use such product will learn to read, or

B. The success rate of individuals who use such product,

unless, at the time the representation is made, defendant possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

IX

IT IS FURTHER ORDERED that Defendant Trudeau, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Howard Berg's Mega Reading or any substantially similar product in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of endorsements or product names, that such product is successful in teaching anyone, including adults, children and disabled individuals, to increase their reading speed above 800 words per minute while substantially comprehending and retaining the material.

X

IT IS FURTHER ORDERED that Defendant Trudeau, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product or program in or affecting commerce, shall not create, produce, sell, or disseminate:

A. Any advertisement that misrepresents, directly or by implication, that it is not a paid advertisement;

B. Any television commercial or other video advertisement fifteen (15) minutes in length or longer or intended to fill a broadcasting or cablecasting time slot of fifteen (15) minutes in length or longer that does not display visually, clearly and prominently, and for a length of time sufficient for an ordinary consumer to read, within the first thirty (30) seconds of the advertisement and immediately before each presentation of ordering instructions for the product or service, the following disclosure:

> "THE PROGRAM YOU ARE WATCHING IS A PAID ADVERTISEMENT FOR [THE PRODUCT OR SERVICE]."

Provided that, for the purposes of this provision, the oral or visual presentation of a telephone number, e-mail address or mailing address for viewers to contact for further information or to place an order for the product or service shall be deemed a presentation of ordering instructions so as to require the display of the disclosure provided herein; or

C. Any radio commercial or other radio advertisement five (5) minutes in length or longer that does not broadcast, clearly and audibly, within the first thirty (30) seconds of the advertisement and

immediately before each presentation of ordering instructions for the product or service, the following disclosure:

> "THE PROGRAM YOU ARE LISTENING TO IS A PAID ADVERTISEMENT FOR [THE PRODUCT OR SERVICE]."

Provided that, for the purposes of this provision, the presentation of a telephone number, c-mail address or mailing address for listeners to contact for further information or to place an order for the product or service shall be deemed a presentation of ordering instructions so as to require the announcement of the disclosure provided herein.

FIRST AMENDMENT

XI

IT IS FURTHER ORDERED that, with the exception of any waiver in connection with Parts I-X herein, nothing in this Order shall constitute a waiver of the Defendants' right to engage in speech protected by the First Amendment to the Constitution of the United States.

DESTRUCTION AND/OR TRANSFER OF CUSTOMER LISTS

XII

IT IS FURTHER ORDERED that:

A. Defendants and Relief Defendants, and any other entities, owned, directly or indirectly by Defendants and Relief Defendants, shall, within 30 days of entry of this Order, delete or destroy all customer information in their possession, custody or control, with respect to the approximately 10,000-16,000 cus-

tomers who purchased coral calcium from Defendants after receiving one of the direct mail solicitation letters that was at issue in the Commission's June 5, 2004 motion to find Kevin Trudeau and TruStar Marketing in civil contempt (and the supplemental memorandum in support of that motion). Defendants and Relief Defendants shall provide written confirmation to the Commission, sworn to under penalty of perjury, that all such customer information has been deleted or destroyed. Prior to destroying the customer information, a complete set of the information, in proper searchable electronic format, shall be provided to the Commission at Defendants' expense. For purposes of this Part, "customer information" shall mean information of or relating to consumers collected by the Defendants, including, but not limited to, name, address, billing information, order history, telephone numbers and email addresses.

B. Defendants and Relief Defendants, and any other entities, owned, directly or indirectly by Defendants and Relief Defendants, shall, within 30 days of entry of this Order, delete or destroy all customer information in their possession, custody or control, with respect to any customers who responded to any of the infomercials that were at issue in the Commission's June 5, 2004 motion to find Kevin Trudeau and TruStar Marketing in civil contempt (and the supplemental memorandum in support of that motion). Defendants and Relief Defendants shall provide written confirmation to the Commission, sworn to under penalty of perjury, that all such customer information has been deleted or destroyed.

C. Defendants and Relief Defendants are hereby permanently restrained and enjoined from, directly or indirectly, selling, renting, leasing, transferring, or

otherwise disclosing to anyone the name, address, telephone number, credit card number, bank account number, e-mail address, or other identifying information of any person who paid, who was solicited to pay, or whose identifying information was obtained for the purpose of soliciting them to pay, any money to any Defendant in this action at any time prior to the entry of this Order, in connection with the advertising, promotion, telemarketing, offering for sale, or sale of Coral Calcium Supreme or any books authored by Robert Barefoot; provided, however, that Defendants may disclose such identifying information to a law enforcement agency, or as required by any law, regulation, or court order.

## MONETARY RELIEF AND CONSUMER REDRESS

### XIII

IT IS FURTHER ORDERED that Judgment for equitable monetary relief in the amount of two million dollars ($2,000,000) is hereby entered jointly and severally against Defendants and Relief Defendants, which relief shall include, but not be limited to, consumer redress. The Judgment for equitable monetary relief shall be satisfied as follows:

A. By Defendants and Relief Defendants transferring to the Commission within ten (10) days from the date of entry of this Order title, unencumbered and free of any liens, to: (1) the property located at 537 Del Oro Drive, Ojai, California, Assessor's Parcel Number (APN) 020-0-221-080; and (2) the 2003 Mercedes Benz SL55/6 purchased by Defendants and Relief Defendants on March 27, 2003 for the amount of $179,294, which have been held in escrow by Jenner and Block as of May 12, 2004.

B. By Defendants and Relief Defendants directing Jenner and Block within ten (10) days from the date of entry of this Order to pay to the Commission the five hundred thousand dollar ($500,0000) performance bond established pursuant to Part XVII of the 1998 Stipulated Final Order.

C. All funds paid pursuant to this Order shall be deposited into a fund administered by the Commission or its agent to be used for equitable relief, including but not limited to consumer redress, and any attendant expenses for the administration of such equitable relief. These funds shall be used to provide refunds to consumers who purchased any product containing coral calcium from Defendants in conjunction with the "coral calcium letter" that was at issue in the Court's June 29, 2004 Order finding defendant Trudeau in contempt of court.

D. In the event that direct redress to consumers is wholly or partially impracticable or funds remain after redress is completed, the Commission may apply any remaining funds for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to Defendants' practices alleged in the Complaint. Any funds not used for such equitable relief shall be deposited to the United States Treasury as disgorgement. Defendants and Relief Defendants shall have no right to challenge the Commission's choice of remedies under this Part. Defendants and Relief Defendants shall have no right to contest the manner of distribution chosen by the Commission. No portion of any payments under the judgment herein shall be deemed a payment of any fine, penalty, or punitive assessment.

E. Defendants and Relief Defendants relinquish all dominion, control, and title to the funds paid to and property transferred to the Commission, for use according to the terms of this Order. Defendants and Relief Defendants shall make no claim to or demand for the return of the funds or property, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy of any Defendant or Relief Defendant, Defendants and Relief Defendants acknowledge that the funds and property are not part of the debtor's estate, nor does the estate have any claim or interest therein.

F. In accordance with 31 U.S.C. § 7701, Defendants and Relief Defendants are hereby required, unless they have done so already, to furnish to the Commission their respective taxpayer identifying numbers (social security numbers or employer identification numbers), if any, which shall be used for the purposes of collecting and reporting on any delinquent amount arising out of Defendants' and Relief Defendants' relationship with the government.

## RIGHT TO REOPEN

## XIV

IT IS FURTHER ORDERED that, within five (5) days after the date of entry of this Order, Defendant Trudeau, individually and on behalf of Defendants Shop America USA, Shop America Marketing and TruStar Global and Relief Defendants K.T. Corp. and TruCom, LLC, shall execute and submit to the Commission a truthful sworn statement that shall acknowledge receipt of this Order. The Commission's agreement to this Order is expressly premised on the truthfulness, accuracy, and completeness of Defendants' and Relief Defendants' financial condition as

reflected in the totality of the information provided in the deposition of Defendant Trudeau (and exhibits thereto) on March 26, 2004, the deposition of Marc J. Lane on March 19, 2004 (and exhibits thereto), the deposition of James Coleman on March 17, 2004 (and exhibits thereto), the deposition of Suneil Sant on March 24, 2004 and upon the information contained in the following documents: November 24, 2003 letter from Marc J. Lane to David Bradford, as modified and updated by information and materials provided to the Commission in communications from Daniel J. Hurtado dated March 5, 2004, March 11, 2004, April 6, 2004 April 11, 2004, April 12, 2004, and April 21, 2004; and the November 7, 2003 e-mail from Daniel J. Hurtado to the Commission staff with attached Excel files entitled "FTCAnalysiscoral2002" and "FTCAnalysiscoral2003." If, upon motion by the Commission, the Court finds that the Defendants' or Relief Defendants' financial information failed to disclose any material asset, materially misrepresented the value of any asset, or made any other material misrepresentation or omission, the Court shall enter judgment for consumer redress against Defendants and Relief Defendants, jointly and severally, in favor of the Commission, in the amount of twenty million dollars ($20,000,000); *provided*, *however*, that in all other respects this Order shall remain in full force and effect unless otherwise ordered by the Court; and, *provided further*, that proceedings instituted under this Part would be in addition to, and not in lieu of, any other civil or criminal remedies as may be provided by law, including any other proceedings that the Commission may initiate to enforce this Order. For purposes of enforcing this Part only, Defendants and Relief Defendants waive any right to contest any of the allegations in the Complaint.

## DISTRIBUTION OF ORDER BY DEFENDANTS

### XV

IT IS FURTHER ORDERED that, for a period of five (5) years from the date of entry of this Order, Defendants shall deliver copies of the Order as directed below:

A. Corporate Defendants: must deliver a copy of this Order to all of their principals, officers, directors, and managers. Corporate Defendants also must deliver copies of this Order to all of their employees, agents, and representatives who engage in conduct related to the subject matter of the Order. For current personnel, delivery shall be within (5) days of service of this Order upon Defendants. For new personnel, delivery shall occur prior to them assuming their responsibilities.

B. Individual Defendant Trudeau as Control Person: For any business that Trudeau controls, directly or indirectly, or in which Trudeau has a majority ownership interest, Trudeau must deliver a copy of this Order to all principals, officers, directors, and managers of that business. Trudeau must also deliver copies of this Order to all employees, agents, and representatives of that business who engage in conduct related to the subject matter of the Order, For current personnel, delivery shall be within (5) days of service of this Order upon Defendant Trudeau. For new personnel, delivery shall occur prior to them assuming their responsibilities.

C. Individual Defendant Trudeau as employee or non-control person: For any business where Trudeau is not a controlling person of a business but for which Trudeau: 1) produces or appears in an infomercial or

other advertising; or 2) provides any consulting services regarding infomercials or advertising, Trudeau must deliver a copy of this Order to all principals and managers of such business before producing or appearing in infomercials or other advertising or providing any consulting services regarding infomercials or advertising. For any business where Trudeau is not a controlling person of a business but for which Trudeau has appeared in an infomercial or advertising that is related to the subject matter of Parts I – III and VI through IX of this Order, Trudeau must deliver a copy of this Order to all principals and managers of such business within twenty (20) days of entry of this Order.

D. Corporate and Individual Defendants must secure a signed and dated statement acknowledging receipt of the Order, within thirty days of delivery, from all persons receiving a copy of the Order pursuant to this Part.

## COMPLIANCE MONITORING

## XVI

IT IS FURTHER ORDERED that, for the purpose of monitoring and investigating compliance with any provision of this Order,

A. Within ten (10) days of receipt of written notice from a representative of the Commission, Trudeau, Shop America USA, Shop America Marketing and TruStar Global each shall submit additional written reports, sworn to under penalty of perjury; produce documents for inspection and copying; appear for deposition; and/or provide entry during normal business hours to any business location in such defend-

ant's possession or direct or indirect control to inspect the business operation;

B. In addition, the Commission is authorized to monitor compliance with this Order by all other lawful means, including but not limited to the following:

1. obtaining discovery from any person, without further leave of court, using the procedures proscribed by Fed. R. Civ. P. 30, 31, 33, 34, 36, and 45;

2. posing as consumers and suppliers to: Kevin Trudeau, Shop America USA, Shop America Marketing or TruStar Global; Trudeau, Shop America USA, Shop America Marketing or TruStar Global' s employees, or any other entity managed or controlled in whole or in part by Trudeau, Shop America USA, Shop America Marketing or TruStar Global, without the necessity of identification or prior notice; and

C. Trudeau, Shop America USA, Shop America Marketing and TruStar Global shall permit representatives of the Commission to interview any employer, consultant, independent contractor, representative, agent, or employee who has agreed to such an interview, relating in any way to any conduct subject to this Order. The person interviewed may have counsel present.

*Provided*, *however*, that nothing in this Order shall limit the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1, to obtain any documentary material, tangible things, testimony, or information relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of 15 U.S.C. § 45(a)(1)).

## COMPLIANCE REPORTING BY DEFENDANTS

### XVII

IT IS FURTHER ORDERED that, in order that compliance with the provisions of this Order may be monitored:

A. For a period of five (5) years from the date of entry of this Order,

1. Defendant Trudeau shall notify the Commission of the following:

a. Any changes in residence, mailing addresses, and telephone numbers of Trudeau, within ten (10) days of the date of such change;

b. Any changes in employment status (including self-employment) of Trudeau, and any change in the ownership of Trudeau in any business entity, within ten (10) days of the date of such change. Such notice shall include the name and address of each business that Trudeau is affiliated with, employed by, creates or forms, or performs services for; a statement of the nature of the business; and a statement of Trudeau's duties and responsibilities in connection with the business or employment; and

c. Any changes in Trudeau's name or use of any aliases or fictitious names; and

2. Trudeau, Shop America USA, Shop America Marketing and TruStar Global shall notify the Commission of any changes in corporate structure of Shop America USA, Shop America Marketing or TruStar Global or any business entity that Trudeau directly or indirectly control(s), or

has an ownership interest in, that may affect compliance obligations arising under this Order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order; the filing of a bankruptcy petition; or a change in the corporate name or address, at least thirty (30) days prior to such change, *provided* that, with respect to any proposed change in the corporation about which the Defendants learn less than thirty (30) days prior to the date such action is to take place, Defendants shall notify the Commission as soon as is practicable after obtaining such knowledge.

B. Ninety (90) days after the date of entry of this Order, Trudeau, Shop America USA, Shop America Marketing and TruStar Global each shall provide a written report to the FTC, sworn to under penalty of perjury, setting forth in detail the manner and form in which they have complied and are complying with this Order. This report shall include, but not be limited to:

1. For Defendant Trudeau:

a. The then-current residence address, mailing addresses, and telephone numbers of Trudeau;

b. The then-current employment and business addresses and telephone numbers of Trudeau, a description of the business activities of each such employer or business, and the title and responsibilities of Trudeau, for each such employer or business; and

c. Any other changes required to be reported under subpart A of this Part.

2. For all Defendants:

a. A copy of each acknowledgment of receipt of this Order, obtained pursuant to Part XV;

b. Any other changes required to be reported under subpart A of this Part; and

c. Copies of all then current advertisements, promotional materials, sales scripts, training materials, or other marketing materials utilized by Defendants in the advertising, marketing, promotion, offering for sale, distribution or sale of any product, program or service in the United States.

C. For the purposes of this Order, Defendants shall, unless otherwise directed by the Commission's authorized representatives, mail all written notifications to the Commission to:

Associate Director the Division of Advertising Practices
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington DC 20580
Re: FTC v. Kevin Trudeau, Civil Action No. 03-3904.

D. For the purpose of the compliance reporting and monitoring required by this Order, Defendants shall provide the Commission with their counsel's name and address for the purpose of communications regarding this Order and shall notify the Commission of any change in their counsel for the purpose of this Order.

## RECORD KEEPING PROVISIONS

### XVIII

IT IS FURTHER ORDERED that, for a period of eight (8) years from the date of entry of this Order, Defendants Kevin Trudeau, Shop America USA, Shop America Marketing and TruStar Global and any business where Defendant Trudeau is a majority owner or an officer or director of the business, or directly or indirectly manages or controls the business, and their agents, employees, officers, corporations, successors, and assigns, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are hereby restrained and enjoined from failing to create and retain the following records:

A. Accounting records that reflect the cost of goods or services sold, revenues generated, and the disbursement of such revenues;

B. Personnel records accurately reflecting: the name, address, and telephone number of each person employed in any capacity by such business, including as an independent contractor; that person's job title or position; the date upon which the person commenced work; and the date and reason for the person's termination, if applicable;

C. Customer files containing the names, addresses, phone numbers, dollar amounts paid, quantity of items or services purchased, and description of items or services purchased, to the extent such information is obtained in the ordinary course of business;

D. Complaints and refund requests (whether received directly, indirectly or through any third party)

and any responses to those complaints or requests; and

E. Copies of all advertisements, promotional materials, sales scripts, training materials, or other marketing materials utilized by any Defendant in the advertising, marketing, promotion, offering for sale, distribution or sale of any product, program or service

F. All records and documents necessary to demonstrate full compliance with each provision of this Order, including but not limited to, copies of acknowledgments of receipt of this Order, required by Part XV, and all reports submitted to the FTC pursuant to Part XVII;

G. All materials that were relied upon in making any representations contained in the materials identified in Subpart E, including all documents evidencing or referring to the accuracy of any claim therein or to the efficacy of any product or service, including, but not limited to, all tests, reports, studies, demonstrations, as well as all evidence that confirms, contradicts, qualifies, or calls into question the accuracy of such claims regarding the efficacy of such product or service; and

H. Records accurately reflecting the name, address, and telephone number of each manufacturer or laboratory engaged in the development or creation of any testing obtained for the purpose of advertising, marketing, promoting, offering for sale, distributing, or selling any dietary supplement, food, drug, cosmetic, device, equipment, program, or service.

SCOPE OF ORDER

XIX

IT IS FURTHER ORDERED that this Order resolves claims only against Defendants and Relief Defendants as alleged in the Complaint and in the June 9, 2003 memorandum by the Commission in support of its Order to Show Cause. This Order does not preclude the Commission from initiating further action or seeking any remedy against any other persons or entities, including without limitation persons or entities who may be subject to portions of this Order by virtue of actions taken in concert or participation with Defendants and persons or entities in any type of indemnification or contractual relationship with Defendants. This Order resolves any claim by the Commission arising out of the assignment of claims from Robert Barefoot to the Commission that is set forth in the Stipulated Final Order for Permanent Injunction and Settlement of Claims for Monetary Relief as to Defendants Robert Barefoot, Deonna Enterprises, Inc. and Karbo Enterprises, Inc. that was entered by this Court on January 15, 2004.

ACKNOWLEDGMENT OF RECEIPT OF ORDER BY DEFENDANT(S)

XX

IT IS FURTHER ORDERED that each Defendant and Relief Defendant, within five (5) business days of receipt of this Order as entered by the Court, must submit to the Commission a truthful sworn statement acknowledging receipt of this Order.

RETENTION OF JURISDICTION

XXI

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for purposes of construction, modification and enforcement of this Order.

IT IS SO ORDERED, this 2nd day of September, 2004.

_____
UNITED STATES DISTRICT JUDGE
ROBERT W. GETTLEMAN

SO STIPULATED:

_____

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Individually

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**APPENDIX I**

OPINION

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

FEDERAL TRADE COMMISSION,
*Plaintiff,*

No. 03 C 3904

v.

KEVIN TRUDEAU,
*Defendant.*

Judge Robert W. Gettleman

**ORDER**

This court has found, and the Seventh Circuit has affirmed, that defendant Kevin Trudeau committed civil contempt of this court's September 2, 2004 Consent Order. See, FTC v. Trudeau, 572 F. Supp.2d 919 (N.D. Ill. 2008); aff'd in part, 579 F.3d 754 (7th Cir. 2009); Memorandum Opinion and Order dated April 16, 2010. In addition to the civil sanctions addressed in those opinions, the court finds that, as noted by the Court of Appeals, defendant may be subject to punishment for criminal contempt pursuant to Fed. R. Crim. P. 42. (See, FTC v. Trudeau, 579 F.3d at 776, 779.) Accordingly, it is hereby ordered:

Defendant Kevin Trudeau is directed to appear in courtroom 1703, Dirksen Courthouse, 219 South

Dearborn Street, Chicago, Illinois, on April 28, 2010, at 11:00 a.m., to show cause why he should not be prosecuted for and held in criminal contempt of this court's September 2, 2004 Consent Order. Specifically, defendant will personally be given notice, pursuant to Rule 42(a)(1), that this court will consider imposing a term of imprisonment not to exceed six months for defendant's producing and broadcasting deceptive infomercials that misrepresented the contents of defendant's book entitled The Weight Loss Cure "They" Don't Want You to Know About between December 2006 and November 2007, in direct and willful violation of this court's order of September 2, 2004, prohibiting defendant from misrepresenting the content of any book authored by defendant. At the April 28 hearing, the court will set a date for the trial of this matter, allowing defendant a reasonable time to prepare a defense.

The court, pursuant to Fed. R. Crim. P. 42(a)(2), hereby requests that the United States Attorney for the Northern District of Illinois prosecute defendant Kevin Trudeau for criminal contempt of the September 2, 2004 Consent Order. The United States Attorney, or an Assistant United States Attorney acting at his direction, is directed to appear at the April 28 hearing.

ENTER: April 16, 2010

_____

Robert W. Gettleman
United States District Judge

**APPENDIX J**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

v.

KEVIN TRUDEAU

No. 10 CR 886

Judge Ronald A. Guzman

**ORDER**

Pursuant to Fed. R. Crim. P. 42(a)(1), this Court orders defendant Kevin Trudeau to show cause why he should not be held in criminal contempt, in violation of Title 18, United States Code, Section 401(3), for willfully violating the district court's order of September 2, 2004, in case number 03 CV 3904, when, on or about December 23, 2006, on or about January 8, 2007, and on or about July 6, 2007, defendant made representations in infomercials that misrepresented the content of defendant's book entitled The Weight Loss Cure "They" Don't Want You to Know About. Defendant is hereby notified that the Court will consider imposing a term of imprisonment in excess of six months if it should otherwise be appropriate.

At a later date, the Court will set a date for the trial of this matter before this Court, allowing defendant a reasonable time to prepare a defense.

ENTER:

_____

Ronald A. Guzman
United States District Judge

**APPENDIX K**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FEDERAL TRADE COMMISSION,
*Plaintiff*

v.

KEVIN TRUDEAU,
*Defendant.*

Civ. No. 03-C-3904
Hon. Robert W. Gettleman

UNITED STATES' RESPONSE TO DEFENDANT'S MEMORANDUM IN RESPONSE TO APRIL 16, 2010, ORDER TO SHOW CAUSE AND DEFENDANT'S MOTION TO DISMISS ORDER TO SHOW CAUSE

In ordering defendant to appear in person to answer for a Rule 42 notice of contempt proceedings, this Court gave adequate notice, proceeded in an unbiased manner, and complied with the requirements of the rule and the Constitution. Accordingly, the United States recommends this Court proceed apace and in accordance with the procedures set forth in its April 16, 2010, order and in Fed. R. Crim. P. 42(a).[1]

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[1] The government has considered whether to seek a prison term longer than six months, and by this filing, informs the Court it will not contest the Court's announcement that it will cap at six months any prison term it may impose at the conclusion of the contempt proceedings.

## I. The April 16, 2010, Order Provides Adequate Notice.

Federal Rule of Criminal Procedure 42(a) directs a court pursuing contempt charges to give notice to the alleged contemnor in one of three ways, including through a rule to show cause order. The notice must state the time and place of the trial, allow a reasonable time to prepare a defense and "state the essential facts constituting the charged criminal contempt and describe it as such." Fed. R. Cr. P. 42(a)(1). *See also In re Troutt*, 460 F.3d 887, 894 (7th Cir. 2006); *United States v. Griffin*, 84 F.3d 820, 827 (7th Cir. 1996).

This court's April 16, 2010, order satisfies all these conditions. It refers to detailed civil proceedings and a lengthy appellate court opinion as reference points, then states the court will give notice to defendant in a public proceeding that the court:

> will consider imposing a term of imprisonment not to exceed six months for defendant's producing and broadcasting deceptive infomercials that misrepresented the contents of defendant's book entitled <u>The Weight Loss Cure "They" Don't Want You To You About</u> between December 2006 and November 2007, in direct and willful violation of this court's order of September 2, 2004, prohibiting defendant from misrepresenting the content of any book authored by defendant.

Dkt. 339. In essence, the court has told Trudeau he may have criminally violated a single, specific order when he produced and broadcast three infomercials which advertised one book during a specific time period. Given the significant litigation between defendant and the FTC on the same factual issues, it is in-

credible defendant now claims he has not received proper notice. The Seventh Circuit has held that Rule 42(a) (formerly Rule 42(b)) requires less notice than that required of an indictment, and that "all that is required is that [defendant] ha[s] been fairly and completely apprised of the events and conduct constituting the contempt charged." *United States v. Eichhorst*, 544 F.2d 1383, 1386 (7th Cir. 1976); *accord United States v. Linney*, 134 F.3d 274, 279 (4th Cir. 1998); *United States v. Martinez*, 686 F.2d 334, 345 (5th Cir. 1982). This notice "is to be judged with reference to all of the court papers served on [defendant] in the light of what transpired in the court proceedings." *Eichhorst*, 544 F.2d at 1386. Given what has transpired in this court and the court of appeals, "one would be credulous" to conclude Trudeau is unaware of the nature of the charges against him. *See Griffin*, 84 F.3d at 827.

## II. This Court Can Proceed Fairly and Impartially.

Defendant further seeks dismissal of this action because, he alleges, this court appears to be biased against him. Def. Mem. at 5-10. He is wrong. "Referral of criminal contempt proceedings to another judge is necessary only when the record demonstrates the likely presence of personal animosity between the trial judge and the contemnor," *Griffin*, 84 F.3d at 831, revealing "a deep-seated . . . antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994). Notably not evidence of bias are expressions of mere "impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display." *Id.* at 555-56. Trudeau has not

come close to establishing actual bias or the appearance of bias in this case.

At the last court hearing on this matter, the court told the parties, "I have not made any decision with respect to whether this constitutes criminal contempt," and that it has "an absolutely open mind." Apr. 29, 2010, Tr. at 5. At the first of two hearings in which the court addressed Trudeau after Trudeau's supporters sent emails to the court (the email matter), the court communicated its "sadness" that someone "as talented as Mr. Trudeau obviously is" would encourage his supporters to deluge the court with emails, and the court vowed not "to act hastily or improvidently," and gave Trudeau a chance to be heard and to file written responses. February 11, 2010, Tr. at 17-18. At the second hearing on the email matter, the court emphasized it was "disappointed" with Trudeau, and said it found Trudeau guilty of contempt on the email incident, "not in anger but in sadness." February 17, 2010, Tr. at 20-21.

This is not a record of actual or apparent bias. In a recent case, the district court called a defendant "manipulative, narcissistic and twisted," yet the Seventh Circuit ruled it could still be fair. *United States v. Diekemper*, 604 F.3d 345 (7th Cir. 2010). In *Adams v. Retail Ventures, Inc.*, 325 Fed. Appx. 440 (7th Cir. Apr. 28, 2009), the court sanctioned a party for filing what the court called "vexatious motions," and survived a recusal challenge. *Id.* at *443. In *Brocksmith v. United States*, 1997 WL 44804 (7th Cir. Jan. 30, 1997), the court called the defendant a "world class rat" and said, "you just aren't worth the powder and lead to blow you to hell," but the Seventh Circuit said the court could still be fair. *Id.* at *1-2.

The statements this court has made about Trudeau pale in comparison, and do not approach the "personal animosity" and "intemperate wrangling" necessary for a legally supported finding of bias. *See Griffin*, 84 F.3d at 831. The court has described Trudeau as a "career contemnor," which he is, and has said he "cannot be trusted," which is a credibility finding amply supported by the record in the civil case. "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in . . . trials, he could never render decisions." *Liteky*, 510 U.S. at 551. Likewise, a judge's opinions derived from what he learned in earlier proceedings are not evidence of bias. *Id.* Just as Trudeau cannot escape this court's reasonable conclusions about his credibility in the civil proceeding, he should not be permitted to shop for a more favorable forum by engaging in contemptuous conduct. Otherwise, if a party to a civil proceeding wanted a new judge, it could anger the judge enough to goad him into holding the defendant in contempt, then argue any subsequent proceedings by the same judge are tainted by his apparent bias.

While the court has said in its memorandum opinion that Trudeau has "willfully" violated the 2004 consent decree, it has since assured the parties it understands the difference between civil and criminal contempt, including the different mens rea and burden of proof, and the court stated it has not made any decisions about whether Trudeau's behavior was criminal. Apr. 29, 2010, Tr. at 5. This court's use of "willful" in the civil order was merely an effort to show how egregious Trudeau's conduct was. The court has described it using several different adjectives, each of which demonstrated the court's conclu-

sion the conduct was not even close to being in compliance with the consent decree. The Seventh Circuit reached a similar conclusion, upholding this court's finding of civil contempt and further concluding Trudeau "clearly misrepresented the books's content," "loaded" his infomercials with "statements that are patently false," "outright lied," made "blatant misrepresentations," and "repeatedly distorted" the content of the book. *FTC v. Trudeau*, 579 F.3d 754, 757, 766, 767, 768 (7th Cir. 2009) (*Trudeau I*). In light of this language from the Seventh Circuit, the district court appears no more "biased" than the court that heard the appeal from defendant's civil contempt finding.

Defendant's additional arguments that this court is predisposed to a criminal contempt finding are also baseless. First, they ignore the plain language of Rule 42, which directs a court to provide notice of contempt by one of three means, including a show cause order. This court did not pre-judge Trudeau merely by complying with the rule. Second, Trudeau still has an opportunity to be heard at a trial of this matter, to cross examine government witnesses, and demand the government prove beyond a reasonable doubt that Trudeau *willfully* violated this court's order. Third, the timing of the order after oral argument in the Seventh Circuit on the email matter does not show the court has prejudged Trudeau. This court has squarely and emphatically rejected this charge, saying there is never a good time to refer a matter for criminal contempt:

> if I had waited until after the Seventh Circuit ruled, I guess I would hear the same kind of argument, particularly if they ruled in your favor. . . . This came out when I was ready to issue the larger opinion on the civil contempt

> remedies, which took quite a bit of time. It was ready to go, and I wasn't going to hold it for the Seventh Circuit one way or the other.

Apr. 29, 2010, Tr. at 5-6; *see also* February 11, 2010 Tr. at 10-11 (explaining court was considering referring *The Weight Loss Cure* matter for criminal contempt before email mater occurred). Finally, there is nothing novel about a judge who has found a defendant in civil contempt also presiding over the defendant's trial for criminal contempt. *See, e.g., United States v. Lippitt*, 180 F.3d 873, 876 (7th Cir. 1999) (same court found defendant in civil contempt and increased defendant's criminal sentence based on refusal to pay fine).

In short, the records lacks evidence of personal animosity that would make it impossible for the court to fairly judge this matter. The Seventh Circuit evidently thinks so as well, since both before and after the email matter the panel found that this court was capable of fairly judging the ongoing civil litigation. See Trudeau I, 579 F.3d at 776 ("we have no indication on this record that the district judge's neutrality is compromised"); FTC v. Trudeau, 606 F.3d 382, 391 (7th Cir. 2010) (Trudeau II) (concluding the underlying civil contempt litigation "is unaffected" by appellate court's opinion related to the email matter). The same is true of this criminal contempt.[2]

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[2] The government believes Trudeau will receive a fair hearing before this court. But if the court were to revisit the issue and conclude, in an abundance of caution, that there may be an appearance of bias, the appropriate result is not dismissal of the show cause order, it is recusal.

## III. Criminal Contempt Can Be Established Beyond a Reasonable Doubt.

Trudeau argues he attempted to comply with the 2004 consent order, and the government cannot prove beyond a reasonable doubt he violated the order wilfully. Def. Mem. at 10-13. In fact, there is ample evidence Trudeau's violations of the order were wilful. Most notably, Trudeau's infomercials blatantly misrepresented the contents of the *Weight Loss Cure* book. But more importantly, Trudeau's challenge to the evidence is an argument appropriate for trial, not a motion to dismiss. "Challenging an indictment is not a means of testing the strength or weakness of the government's case, or the sufficiency of the government's evidence." *United States v. Moore*, 563 F.3d 583, 586 (7th Cir. 2009). Whether Trudeau acted wilfully is a question of fact, and is reserved for the fact-finder at trial. See id.[3]

## IV. Trudeau's Remaining Objections are Meritless.

### A. "Least Possible Power" Doctrine

Trudeau has invoked the familiar principle that in contempt cases, courts should use "[t]he least possible power adequate to the end proposed." *United States v. Wilson*, 421 U.S. 309, 319 (1975). Trudeau concludes from this doctrine that if he is punished for criminal contempt on top of the previous judgment against him for civil contempt, he will be the victim of im-

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[3] To the extent defendant's motions present defenses, these, too, can be addressed in motions in limine or trial proceedings. For example, whether defendant asserts an advice of counsel defense (which he has so far not elected to do) may inform other issues he raised in his motions.

permissible "piling on" (Dkt. 357 at 12). This is, at best, an argument for leniency at sentencing, not a motion to dismiss.

The civil judgment did not serve the ends of criminal contempt, and is a separate proceeding altogether. "[T]he touchstone of criminal contempt" is "to vindicate the authority of the court." *Griffin*, 84 F.3d at 827. The civil judgment did not vindicate the court's authority; it compensated consumers for their losses resulting from Trudeau's misrepresentations of *The Weight Loss Cure* book (Dkt. 335 at 2-8). The judgment was large because consumers lost a lot of money, but a high dollar figure in the civil case does not make Trudeau immune from punishment in a criminal case¬ where he is subject to a different sanction—for wilfully violating the court's order. Civil and criminal contempt serve different ends, and a defendant may face significant sanctions for both civil and criminal contempt for the same conduct. *See Lippitt*, 180 F.3d at 875-876 (affirming continuing incarceration for civil contempt followed by increased term of incarceration for criminal sentence, based on defendant's refusal to pay fine); *United States v. Ryan*, 810 F.2d 650, 652 (7th Cir. 1987) (affirming conviction of defendant who served over 16 months in prison for civil contempt followed by two years in prison for criminal contempt for refusing to testify before grand jury).

Contrary to Trudeau's suggestion, this court does not lose its authority to punish Trudeau for criminal contempt merely because after the court imposed the civil judgment, the court waited a period of time before issuing the show cause order for criminal contempt. As explained above, civil and criminal contempt are separate proceedings that serve different purposes, and they need not occur simultaneously.

Trudeau mistakenly relies on the Seventh Circuit's decision in *United States v. Seale*, 461 F.2d 345 (7th Cir. 1972), but the issue in *Seale* was not delay, but whether the defendant had the right to a jury trial. In *Seale*, the district court waited until the end of the criminal trial, and then summarily sentenced the defendant to sixteen separate three-month terms of incarceration—a total of four years' imprisonment—for contemptuous conduct that occurred throughout the trial. *Id.* at 352. The Seventh Circuit held that because these consecutive sentences together exceeded six months, defendant was entitled to a jury trial. *Id.* at 356. Nothing in Seale suggests that a district court acts improperly by merely waiting for a period of time before imposing a sanction for criminal contempt, and indeed the Supreme Court and Seventh Circuit have explicitly approved such delays. *See Sacher v. United States*, 343 U.S. 1, 9-10 (1952) (holding it is within a district court's discretion to defer contempt proceeding until after trial is over); *Griffin*, 84 F.3d at 831 (praising district court for waiting until after trial to adjudicate contempt so as not to interfere with complex criminal case).

**B. Double Jeopardy**

Trudeau further claims the $37.6 million judgment against him in the civil case was actually a criminal punishment, and so an additional criminal conviction would result in double jeopardy. Def. Mem. at 13-20. This argument hinges on Trudeau's criticisms of the civil judgment as a measure of consumer loss, but this court has already considered and reject-

ed those arguments. They have no greater merit now than they did before.[4]

This court has "broad discretion to fashion an appropriate remedy in a civil contempt action." Trudeau I, 579 F.3d at 772; id. at 771. The court's memorandum opinion and order in the civil case made clear that the civil judgment did not punish Trudeau; indeed, the court specifically rejected a remedy that disgorged Trudeau's profits resulting from the infomercials, and instead chose a remedy that compensated consumers for their loss. Accordingly, the court's order explains why consumer loss is an appropriate remedy in this case, and holds that the Second Circuit's decision in FTC v. Verity Int'l Ltd., 443 F.3d 48 (2d Cir. 2006) is not to the contrary. Dkt. 335 at 2-7. The court found the civil judgment was supported by evidence in the record, and in particular by an FTC summary exhibit (Plaintiff's Ex. 20) and excerpts from the deposition of George Potts (Dkt. 335 at 7-10). Finally, the court provided the "key ingredients" the Seventh Circuit called for to justify a compensatory civil contempt sanction, *see Trudeau I*, 579 F.3d at 770, by explaining how the court arrived at the $37.6 million figure, and explaining how the FTC should administer the sanction. *See* Dkt. 335 at 7-10, 12. In short, the court has explained at length why civil remedy compensates consumers for their loss, and is thus an appropriate civil sanction, and not a criminal penalty. There is no reason to revisit the is-

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[4] The law is clear, and Trudueau does not contest, that there is no violation of the double jeopardy clause when a court imposes civil and criminal contempt sanctions for the same conduct. *See Yates v. United States*, 355 U.S. 66, 74 (1957); *Lippitt*, 180 F.3d at 876.

sue, particularly at this stage of the contempt proceedings.

Finally, even if the court of appeals were to disagree with this court's conclusion that $37.6 million is an appropriate measure of consumer loss, the result would be reversal of this court's order and a remand to determine an appropriate civil remedy. It would not convert this court's finding of civil contempt into a finding of criminal contempt, or mean the civil proceeding was actually a criminal proceeding. It also would not mean criminal jeopardy had attached to Trudeau.

**V. Conclusion**

For the foregoing reasons, the government respectfully requests that defendant's motion to dismiss be denied and dates for pre-trial motions be set, so the court may proceed with contempt proceedings under Fed. R. Cr. P. 42(a).

Dated: August 13, 2010 Respectfully submitted,

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**APPENDIX L**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

v.

KEVIN TRUDEAU,

Civ. No. 10 CR 896

Judge Ronald A. Guzmán

GOVERNMENT'S RESPONSE TO DEFENDANT KEVIN TRUDEAU'S MOTION FOR JUDGMENT OF ACQUITTAL

For the reasons set forth below, the government respectfully asks the Court to deny defendant's motion for judgment of acquittal.

BACKGROUND

In 2004, defendant Kevin Trudeau settled a civil lawsuit with the Federal Trade Commission by agreeing to a consent order, in which the district court ordered defendant not to make infomercials that misrepresented the content of his books. See Gov. Ex. 5. In 2006 and 2007, defendant made multiple infomercials promoting his book *The Weight Loss Cure "They" Don't Want You To Know About*. *See* Trial Stipulation #3. In the infomercials, defendant made many fantastic claims about his book, including that it was "not a diet," and that it did not involve "portion control" or "calorie counting," that there was "no deprivation,"

and that "you can do it at home." *See* Gov. Ex. 19. Defendant also claimed that the protocol involved a "miracle all-natural substance," and that, "you can get it anywhere." *See id.* And defendant claimed, "when you're done with the protocol, eat whatever you want and you don't gain the weight back." *See id.*

Defendant's actual book bore little resemblance to the book he described in the infomercials. In fact, the actual book contained an onerous diet that involved eating only 500 calories from a restricted list of foods; required daily doctor's appointments; involved daily injections of the hormone hCG, which is only available by prescription and has not been approved for weight loss in the United States; and involved permanently giving up foods that most people eat every day. *See* Gov. Ex. 4.

After being found in civil contempt for violating the court order, *see FTC v. Trudeau*, 579 F.3d 754 (7th Cir. 2009), defendant was charged with criminal contempt for the same conduct. A jury trial was held from November 4 through November 12, 2013, and, after a brief deliberation, the jury convicted defendant of contempt. On December 3, 2013, defendant filed a motion for judgment of acquittal, claiming that the evidence at trial was insufficient to prove that he violated the court order willfully. Doc. 150.

## ARGUMENT

### I. Legal Standard

In a Rule 29 motion challenging the sufficiency of the evidence, this Court views the evidence and all reasonable inferences in the light most favorable to the government, defers to the jury's credibility determinations, and will "overturn[ ] a verdict only when the record contains no evidence, regardless of

how it is weighed, from which the jury could find guilt beyond a reasonable doubt." *United States v. Parker*, 716 F.3d 999, 1007 (7th Cir. 2013); see also *United States v. Hach*, 162 F.3d 937, 942 (7th Cir. 1998). This is "an extremely difficult burden." *Parker*, 716 F.3d at 1007.

## II. There Was Sufficient Evidence That Defendant Violated the Court Order Willfully

With the agreement of the parties, the Court instructed the jury that "A violation of a court order is willful if it is a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful. A person should reasonably be aware that his conduct is wrongful if he is conscious of a substantial and unjustifiable risk that the prohibited event (here, violation of the September 2, 2004 court order) will come to pass, and he disregards that risk." *See* Doc. 147 at 18. Based on the evidence at trial, a reasonable jury could conclude that defendant knew, or should reasonably have been aware, that his infomercials violated the court order.

First, the jury was entitled to conclude that the court order—admitted at trial pursuant to a stipulation—contained a simple and clear directive: defendant was prohibited from making an infomercial that misrepresented the content of a book. Nothing about the language in the court order stating that defendant "must not misrepresent the content of the book" in an infomercial was complex or confusing. *See* Gov. Ex. 5. Second, the jury was entitled to conclude that defendant knew about the requirements of the court order. The court order was signed by defendant as well as his attorney and stated that it was agreed to by defendant as a settlement of other claims. *Id.*

Third, it was reasonable for the jury to conclude that defendant was familiar with the content of his book. After all, it was stipulated at trial that defendant was the author of the book. *See* Trial Stipulation #2. Fourth, it was reasonable for the jury to conclude that defendant was responsible for the statements made in the infomercials. It was stipulated at trial that defendant appeared in the infomercials at issue, see Trial Stipulation #3, and the jury had the opportunity to watch the infomercials and observe defendant's demeanor, alertness, speech patterns, gestures, and intellectual capacity. In short, nothing about the infomercials indicated anything other than that defendant was a willing participant, was answering the questions asked of him using his own words, and understood what he was saying. Fifth, the jury was entitled to conclude that, based on the actual content of the book, many of the statements defendant made about the book in the infomercials were blatantly false or misleading. These include defendant's statements that the protocol in the book was "not a diet," and that it did not involve "portion control" or "calorie counting," that there was "no deprivation," that "you can do it at home," that the protocol involved a "miracle all-natural substance," and "you can get it anywhere," and that "when you're done with the protocol, eat whatever you want and you don't gain the weight back," among other statements.[1]

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[1] The jury was free to accept defendant's argument—advanced at trial and in defendant's current motion—that there was a "near-perfect symmetry" between the infomercials and the book, and that this showed a lack of willfulness. Doc. 150 at 6. However, as is clear from the verdict, the jury did not accept this argument, and defendant does not provide any evidence that the jury's choice in this re-

This evidence alone was sufficient to conclude that defendant acted willfully. Defendant knew that a federal judge had ordered him not to lie about his books in infomercials, and then defendant made infomercials in which he lied about one of his books. The jury was entitled to conclude that defendant knew what he was doing, and knew, or should reasonably have been aware, that his actions violated the court order.

Defendant suggests that the government presented no evidence of defendant's state of mind, such as statements of defendant acknowledging that he acted willfully. Doc. 150 at 4. But the government need not, and often cannot, present direct evidence of what was in the defendant's mind when he acted. As the Court correctly instructed the jury, with defendant's agreement, "In deciding whether the defendant acted willfully, you may consider all of the evidence, including what the defendant did or said." *See* Doc. 147 at 18. Here, what defendant did and said was ample evidence of his willfulness. In the civil contempt case, after considering the same evidence—the book and the infomercials—the Seventh Circuit concluded that defendant "clearly misrepresented the book's content," "loaded" his infomercials with "statements that are patently false," "outright lied," made "blatant misrepresentations," and "repeatedly distorted" the content of the book. *FTC v. Trudeau*, 579 F.3d 754,

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gard was unreasonable. The evidence at trial showed that some of defendant's claims in the infomercials were not in the book at all (for example, that you can do the protocol at home, and that you can get hCG "anywhere"), while other claims in the infomercials were repeated in the book but nevertheless misrepresented the book's content, viewed as a whole (for example, that the protocol is not a diet).

757, 766, 767, 768 (7th Cir. 2009). While the Seventh Circuit did not specifically address whether defendant acted willfully, its conclusions support that finding. The jury was entitled to draw the same inferences the court of appeals did, and to further find that defendant acted willfully.

The Seventh Circuit has frequently upheld verdicts requiring a *mens rea* of "willfulness" although the government has presented no direct evidence regarding the defendant's state of mind. For example, in *United States v. Lincoln*, 58 Fed. Appx. 646, 648 (7th Cir. 2003), the defendant challenged his conviction for knowingly and willfully making a false statement to a federal agency, and claimed that even though his statements were false, there was not sufficient evidence that the false statements were made willfully, rather than carelessly. In upholding the verdict, the Seventh Circuit pointed to the extensive evidence that defendant's statements were obviously false as itself proof that the statements were made willfully. *Id*. The Court made this finding despite the lack of a confession that defendant knew his statements were false, and even though defendant testified to the contrary. Similarly, in *United States v. Obiuwevbi*, 962 F.2d 1236, 1239 (7th Cir. 1992), the Seventh Circuit relied upon the blatant nature of defendant's lies regarding how much money he was carrying and whether he was concealing a money belt in affirming defendant's conviction for willfully making false statements. Even though defendant had testified that he did not understand the questions he was asked, the Court concluded that the jury could instead infer that the defendant was trying to evade the currency reporting requirements. *Id*. at 1240. As another example, in *United States v. Hanna*, 630 F.3d

505, 509 (7th Cir. 2010), the defendant contended that there was not sufficient evidence that he willfully failed to pay child support when his testimony was that some of his funds came with restrictions regarding how the funds should be spent. In upholding the verdict, the Seventh Circuit noted that willful failure to pay can be established simply by a refusal to pay money in the defendant's possession. *Id.* In all of these cases, the government presented evidence that defendant had a legal obligation to do one thing, and instead did another, coupled with evidence regarding the obvious nature of defendant's failure to abide by his legal obligation. Despite the fact that in all three cases the defendant testified and gave some other reason for his actions, the verdicts were affirmed.

In addition to the evidence that defendant in this case knew he had a legal obligation and blatantly violated that obligation, the government also presented evidence that defendant anticipated that he would profit financially by his actions. This financial motive evidence was further evidence from which the jury could conclude that defendant acted willfully. For example, the jury saw and heard a stipulation that acknowledged that shortly before the infomercials were filmed, defendant sold several assets to ITV, the company that produced and marketed the infomercials, in exchange for $121 million. See Trial Stipulation #6. It was further stipulated that the defendant "anticipated making money based on this stock purchase agreement in connection with the *Weight Loss Cure* book." *See id.* However, the stipulation went on to state that defendant was not receiving the payments that were owed to him by ITV at the time the infomercials were filmed. *See id.* This is evidence from which a reasonable jury could conclude that de-

fendant wanted ITV to sell more books so that it would have the money to pay defendant the money it owed him. Additionally, it was stipulated that defendant was entitled to 65% of the royalty payments from retail sales of the book. See Trial Stipulation #5. This is evidence from which a reasonable jury could conclude that defendant hoped that the infomercials would boost retail sales of the book, and therefore make him money directly.[2] As the government reminded the jury repeatedly in closing argument, if defendant had told the truth about his book, he would have sold many fewer books. That is why defendant willfully chose to violate the court order by lying about the book in the infomercials. That defendant lied to promote sales is further shown by the fact that every one of defendant's lies made his book appear more appealing to consumers. These were inferences a reasonable jury was permitted to make,[3] and all support the jury's finding that defendant acted willfully when he misrepresented his book in his infomercials.

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[2] That defendant knew that the infomercials could lead to retail sales is further supported by defendant's references in one of the infomercials to the fact that the book is available at "Wal-marts, in Costcos, in Sam's Club. You can go to Borders and Waldenbooks." *See* Gov. Ex. 3A at 11. Moreover, the cover of the book itself carries the label "As Seen on TV." *See* Gov. Ex. 4.

[3] Despite defendant's contention that it is "suggestion and innuendo" that defendant was motivated by profit, Doc. 150 at 5, it requires only basic common sense to conclude that when someone who anticipates making money off the sale of a product then appears in a commercial for that product and urges people to buy it, that person is, in fact, motivated by profit.

## CONCLUSION

For the reasons set forth above, the Court should deny defendant's motion for judgment of acquittal.

Respectfully submitted,

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**APPENDIX M**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

*Plaintiff*,

v.

KEVIN TRUDEAU,

*Defendant.*

Civ. No. 10 CR 896

Honorable Ronald A. Guzmán

DEFENDANT KEVIN TRUDEAU'S REPLY IN SUPPORT OF MOTION FOR JUDGMENT OF ACQUITTAL

The Government admits that it introduced no direct evidence of Trudeau's willfulness. (D.E. 151 at 5.) Instead, the government argues that courts "frequently uph[o]ld verdicts requiring a mens rea of 'willfulness' although the government has presented no direct evidence regarding the defendants' state of mind." (*Id.* at 6.) But in all of the government's cases, the court upheld the conviction only after the prosecution proved the defendant's "willfulness" by offering testimony from a witness who had personal knowledge of the defendant's state of mind (i.e. someone who knew or interviewed the defendant) and by cross examining the defendant about his state of

mind. *See e.g. U.S. v. Lincoln*, 58 Fed. Appx. 646 (7th Cir. 2003) (in false statement case, the government proved willfulness through the testimony of defendant's co-worker and by cross examining the defendant); *U.S. v. Obiuwevbi*, 962 F.2d 1236 (7th Cir. 1992) (in false statement case, the government proved willfulness through the testimony of a government agent who interviewed the defendant, a fact witness who knew the defendant, and through the government's cross examination of the defendant); *U.S. v. Hanna*, 630 F.3d 505 (7th Cir. 2010) (in case involving a failure to pay child support, the government proved willfulness through a government agent who interviewed the defendant and by cross examining the defendant).[1]

Here, by contrast, neither of the government's two witnesses – Inspector Carrier and Melissa Dobbins – had ever even met, let alone spoken with, Trudeau[2] Neither witness offered any testimony about Trudeau's state of mind. The government also presented no statements from Trudeau himself. Nor did the government present any statements made to Trudeau that could indicate willfulness to a reasonable jury. For example, the FTC agents who negotiated the 2004 consent order with Trudeau were indisputably available to the government, but the government chose not to call them. Moreover, the government failed to offer any proof that anyone from ITV (or any other company) told Trudeau that the Weight Loss

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[1] Moreover, none of the government's cases involve the crime of criminal contempt.

[2] Inspector Carrier never attempted to interview Trudeau as part of her investigation of this case.

Cure infomercials violated the 2004 Consent Order.[3] (Tr. at 419:19-420:14.) The absence of any evidence of Trudeau's willfulness is a fatal flaw in the government's case that necessitates the entry of a judgment of acquittal.

None of the government's other evidence establishes Trudeau's willfulness. First, the government argues that the 2004 consent decree itself is evidence of Trudeau's alleged willfulness. It is not. While this document could possibly be used to establish whether or not the "court entered a reasonably specific order" (the first element of criminal contempt) it has no bearing on whether Trudeau's alleged violation of that order was willful (the third element of criminal contempt). (Tr. at 674-75 (Jury Instructions).) In other words, the document itself is in no way evidence of Trudeau's state of mind.

Second, the government argues that Trudeau was motivated by profit to willfully violate the court's order. The government, however, called no witnesses to testify to this alleged profit motive, nor did they introduce any documents or stipulations which can fairly be read to show that Trudeau was motivated by profit to willfully violate a court order. The government introduced a stipulation which stated that Trudeau sold assets to ITV in exchange for $121 million

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[3] The evidence does indicate that ITV had in its possession a copy of the 2004 Consent Order from December 23, 2006 through July 6, 2007 (the time period during which the infomercials for *The Weight Loss Cure* book ran on television) (Tr. at 418:2-6), and yet the government did not produce a single witness to testify that Trudeau knew or had been told that the infomercials violated the 2004 Consent Order.

and that Trudeau "anticipated making money based on this stock purchase agreement in connection with the *Weight Loss Cure* book." *See* Trial Stipulation #6. The stipulation also noted that "at no time did ITV meet its payment obligations." *Id*. However, the government failed to establish any connection between Trudeau's anticipation of making money from a stock purchase agreement (which would be true of any author entering into such an agreement) and his alleged state of mind to intentionally violate a court order.[4] In proving "willfulness" in a criminal context, the law requires the government to do more than prove a mere anticipation of profit. An anticipation of profit does not equate to proving that the defendant knew of a legal duty which he voluntarily and intentionally violated. *See Cheek v. U.S.*, 498 U.S. 192, 201 (1991) (to establish willfulness, the government must prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty). Whether or not a defendant may have anticipated a profit is not enough to prove that a defendant acted willfully.

## CONCLUSION

WHEREFORE, Trudeau requests that the Court grant Trudeau's Motion For Judgment of Acquittal.

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[4] Indeed, the evidence actually showed that Trudeau had a profit motive ***not*** to misrepresent the contents of his book because consumers were able to return their books for a full money-back guarantee. *See* DTX 5. Moreover, if Trudeau had any hope of selling more books in the future, he had an incentive to accurately describe his books in his infomercials.

Dated: January 3, 2014 Respectfully submitted,

KEVIN TRUDEAU

By: /s/ Thomas L. Kirsch II
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CERTIFICATE OF SERVICE

I, Thomas L. Kirsch II, an attorney, hereby certify that on January 3, 2014, I caused to be served true copies of DEFENDANT KEVIN TRUDEAU'S REPLY IN SUPPORT OF MOTION FOR JUDGMENT OF ACQUITTAL by filing such document through the Court's Electronic Case Filing System, which will send notification of such filing to:

Marc Krickbaum
April Perry
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/s/ Thomas L. Kirsch II
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