**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

KEVIN TRUDEAU,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 05-0400 (JDB)
	)	
FEDERAL TRADE COMMISSION,	)	
	)	
Defendant.	)	

FEDERAL TRADE COMMISSION'S MOTION TO DISMISS

The Federal Trade Commission hereby moves to dismiss this case under Federal Rule of Civil Procedure 12(b)(1) because this Court is without jurisdiction over the subject matter of plaintiff's complaint, and under Rule 12(b)(6) because the complaint fails to state a claim upon which relief can be granted. These grounds are explained in greater detail in the memorandum of points and authorities filed with this motion.

Respectfully submitted,

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June 10, 2005

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	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF THE
FEDERAL TRADE COMMISSION'S MOTION TO DISMISS

INTRODUCTION

Plaintiff in this case is challenging the wording of a press release issued by the Federal Trade Commission (FTC or Commission). Although plaintiff generously uses the words "false" and "misleading" in describing the press release, a careful review of the complaint reveals that, at most, it alleges that the press release did not emphasize the aspects of a settlement between the plaintiff and the FTC that plaintiff would have preferred be emphasized. The press release, however, does not mischaracterize the settlement, and the FTC is explicitly authorized by statute and case law to publicize such matters – and it is given broad discretion in doing so. Plaintiff's attempt to create a cause of action about the wording of a press release should be summarily rejected.

In 1998 and again in 2003, the FTC filed cases in United States District Court against plaintiff alleging false and deceptive practices in violation of the Federal Trade Commission Act. Among other things, plaintiff claimed that one of his products, Coral Calcium Supreme, could treat or cure cancer, multiple sclerosis, lupus, other autoimmune diseases, and heart disease and high blood pressure. In one of these cases, plaintiff was held in contempt for violating a

preliminary injunction. In September 2004, plaintiff chose to enter a stipulated order resolving the two cases (2004 Order or stipulated order). In the stipulated order, plaintiff agreed to a court order that gave the FTC essentially all the injunctive relief it had sought, including a broad prohibition of the type of infomercial that had led to the lawsuits. In the instant case, plaintiff is trying to enlist this Court's aid in rewriting a routine FTC press release about the 2004 Order so that it is more to his liking.

The primary reason that this case should be dismissed is that the press release is not final agency action subject to judicial review. Courts – including the D.C. Circuit – that have analyzed agency press releases or publicity under the Administrative Procedure Act (APA) have concluded that such conduct is not subject to review under the APA.

If the complaint were not dismissed for this reason, it can be dismissed because it fails to state a claim on which relief can be granted. Plaintiff alleges that the press release exceeds FTC's authority and violated his constitutional rights. Plaintiff's principal complaint is that the press release improperly states that he is banned from infomercials when in fact he is permitted to be involved in infomercials pertaining to books and publications. However, the very first sentence of the press release states that plaintiff is prohibited from infomercials "except for truthful infomercials for informational publications." This limited exception is repeated later in the press release. Plaintiff's other principal allegation is that the press release did not go far enough to point out that the stipulated order did not constitute a finding or admission of wrongdoing. Again, a simple reading of the press release reveals that it does not mischaracterize the stipulated order at all. The press release accurately points out, repeatedly, that the stipulated order was a settlement and explicitly states that it did not involve an admission of a violation of

law. In fact, the only point at which the press release discusses a court finding is when it discusses, accurately, that plaintiff had in fact been found in contempt for violation of a preliminary injunction.

The statements in the press release are well within the FTC's authority. The public interest is served by the publication of information about FTC activities. Both the FTC and the public interest would be harmed if plaintiff were able to obtain an order from this Court rewriting the press release in a manner he prefers. Such a precedent could wreak havoc on all agencies of the government: Many press releases are issued every day, and if challenges to them were permitted on the slimmest pretext, such as alleged by plaintiff, it would cause a significant waste of agency and judicial resources. Plaintiff's attempt to invoke the jurisdiction of this Court for this endeavor should be flatly and soundly rejected.

BACKGROUND

For several years the FTC sought relief against plaintiff, alleging that his infomercials misled consumers about bogus cures for serious diseases such as cancer and multiple sclerosis and conditions such as hair loss and obesity. The stipulated order resolved two cases that the FTC had filed against plaintiff, dating back to 1998. Some information about those cases provides background for the instant litigation.[1]

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[1] This Background section is virtually the same as that included in the FTC's memorandum in opposition to plaintiff's application for a preliminary injunction; it is repeated here for the convenience of the Court.

I. "EDEN'S SECRET NATURE'S PURIFYING PRODUCT"

In January 1998, the FTC filed a complaint against Trudeau alleging numerous violations of Sections 5 and 12 of the FTC Act, 15 U.S.C. §§ 45, 52.[2] FTC v. Trudeau, No. 98-0168 (N.D. Ill.). According to the complaint, Trudeau marketed a variety of products including four products known as "Eden's Secret Nature's Purifying Product," "Sable Hair Farming System," "Dr. Callahan's Addiction Breaking System," and "Howard Berg's Mega Reading." (D.1, No. 98-0168).[3] The complaint quoted extensively from the products' advertising, and alleged that, through this advertising, which consisted primarily of program-length infomercials, Trudeau had falsely and misleadingly represented that:

1) Eden's Secret Nature's Purifying Product would cause significant weight loss; would prevent or cure illnesses such as arthritis, depression, premenstrual syndrome, immune suppression, fatigue and headaches; would "cleanse" the body of harmful toxins; and would "purify" the body's blood supply.

2) Sable Hair Farming System would stop, prevent, cure, relieve, reverse, or reduce hair loss; would promote hair growth where hair has already been lost; was superior to Rogaine and Minoxidil in preventing hair loss; and that its efficacy had been scientifically demonstrated.

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[2]Section 5 prohibits, inter alia, unfair or deceptive acts or practices in or affecting commerce. Section 12 prohibits, inter alia, the dissemination or the causing to be disseminated of any false advertisement in order to induce the purchase of food, drugs, devices, services, or cosmetics.

[3]Items in the dockets of the various cases against Trudeau are referred to as "D." followed by the case number.

3) Dr. Callahan's Addiction Breaking System would reduce the desire to eat, resulting in weight loss without the need to diet or exercise; and would cure addictions to smoking, eating, alcohol, or heroine.

4) Howard Berg's Mega Reading program would teach anyone, including adults, children, and disabled individuals, to significantly increase reading speed.

The FTC sought injunctive relief and the refund of money to consumers who had bought the products.

At the same time that the FTC filed its complaint, it filed a Stipulated Order for Permanent Injunction and Final Judgment ("1998 Order"), thereby settling all the charges against Trudeau. (D.2, No. 98-0168). The 1998 Order required that, inter alia, with respect to each of the four products listed above (or with respect to any product similar to those four) Trudeau cease and desist making the claims challenged in the complaint. In addition, in connection with the marketing of any product, the 1998 Order prohibited Trudeau from making any representation, "in any manner, expressly or by implication, about the benefits, performance, or efficacy of such product, unless, at the time the representation is made, [Trudeau] possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation." The 1998 Order required Trudeau to pay $500,000 into a fund to provide redress to purchasers of the products. Finally, the 1998 Order provided that it was not to "be interpreted to constitute either an admission by defendant Kevin Trudeau or a finding by the Court that defendant Kevin Trudeau has engaged in violations of the FTC Act or of any other facts alleged in the complaint."

As is the FTC's practice, it issued a press release announcing the settlement. http://www.ftc.gov/opa/1998/01/megasyst.htm . The release set forth the charges in the complaint, noted the terms of the settlement, and specifically advised that "[c]onsent agreements are for settlement purposes only and do not constitute admissions of law violations."[4]

II. "CORAL CALCIUM SUPREME"

By 2003, Trudeau was back in business, this time using infomercials to sell two new products, "Coral Calcium Supreme," and "Biotape."[5] The FTC took action on two fronts to combat the marketing of these products. In June 2003, it filed a Motion for an Order to Show Cause Why [Trudeau] Should Not Be Held in Contempt of the 1998 Order. (D.12, No. 98-0168). At the same time, the FTC challenged Trudeau's marketing of Coral Calcium Supreme by initiating a new action against him and six other defendants, alleging that the marketing of Coral Calcium Supreme violated Sections 5 and 12 of the FTC Act. FTC v. Trudeau, et al., No. 03-3904 (N.D. Ill.). Again, the FTC presented the court with extensive quotes from the advertising for the products. According to the complaint and the memorandum supporting the motion, Coral Calcium Supreme is a dietary supplement that contains a form of calcium derived from marine coral. The FTC alleged that the ads for Coral Calcium Supreme falsely claimed that

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[4]This press release, and all press releases that the FTC has issued since 1985, are maintained by the FTC on its website and are available to the public. *See* http://www.ftc.gov/ftc/news.htm .

[5]In the intervening years, the Commission has brought law enforcement actions against two different infomercials in which Trudeau participated after entry of the 1998 Order. See FTC v. Enforma Natural Products, Inc., No. CV 00-04376-JSL (CWx) (C.D. Cal.) (FTC contempt action regarding claims made in infomercials for a weight loss product hosted by Trudeau); Tru-Vantage Int'l, LLC, 2002 WL 225231 (F.T.C. Feb 5, 2002) (snoring cessation product infomercial featuring Trudeau). Trudeau himself, however, was not charged in connection with these infomercials.

the calcium ingredient in the product is an effective treatment or cure for all forms of cancer, for multiple sclerosis, for lupus, for other autoimmune diseases, and for heart disease and high blood pressure; that the body absorbs significantly more (and in some case, 100 times more) of the calcium ingredient in Coral Calcium Supreme than the calcium contained in other supplements; and that scientific research published in reputable scientific journals proves that calcium supplements cure all forms of cancer. (D.13, No. 98-0168; D.1, No. 03-3904).

According to the Memorandum in Support of the FTC's Motion for an Order to Show Cause (D.13, No. 98-0168), Biotape is similar in appearance to electrical tape. Trudeau's advertising claimed that Biotape contained "space age mylar that connects the broken circuits [in the body] that cause the pain." The ads further claimed that, by applying Biotape to the body where the user felt pain, the pain would be instantly eliminated.

In connection with both actions, which had been consolidated, the FTC sought injunctive relief and redress for consumers. The FTC also sought preliminary relief, and on July 1, 2003, the court entered a Stipulated Preliminary Injunction that prohibited Trudeau from making any of the claims for Coral Calcium Supreme and Biotape that the FTC challenged. (D.22, No. 98-0168; D.26, No. 03-3904).

Despite the preliminary injunction, Trudeau did not stop making the challenged claims with respect to Coral Calcium Supreme. On June 7, 2004, the FTC moved that Trudeau be held in civil contempt for violating the preliminary injunction. (D.48, No. 98-0168). According to the FTC's memoranda supporting its motion, Trudeau sent more than 350,000 copies of a letter to consumers in which he stated:

> the Federal Trade Commission forbids us from saying that [Coral Calcium Supreme] prevents, or possibly even cures cancer, heart disease, diabetes and pain

> – even if it's true. Therefore we make no claims about what Coral Calcium can do for you. But whatever it does, it only takes 3-6 months before most people start to feel the difference in their own health.

(D.54, No. 98-0168). On June 29, 2004, the court granted the FTC's motion, finding by clear and convincing evidence that Trudeau had, after entry of the preliminary injunction, continued to advertise that Coral Calcium Supreme was an effective treatment or cure for cancer. (D.55, No. 03-3904). The court again ordered Trudeau to cease all advertising for Coral Calcium Supreme, and reserved imposition of any additional remedial measures.

In September 2004, the FTC and Trudeau entered into the 2004 Order. Attachment A to plaintiff's complaint. The 2004 Order resolved 1) the FTC's attempt to have Trudeau held in contempt of the 1998 Order; 2) the FTC's request for additional remedial measures in connection with Trudeau's contempt of the preliminary injunction; and 3) the FTC's 2003 complaint. (D.56, No. 98-0168; D.56, No. 03-3904). The 2004 Order, inter alia, banned Trudeau "from producing, disseminating, making or assisting others in making any representation in an infomercial aired or played on any television or radio media. . . ." 2004 Order at 8. The 2004 Order did contain a limited exception to the ban, allowing Trudeau to make representations on radio or television in connection with the marketing of any book, newsletter, or other informational publication so long as that book, newsletter, or publication does not refer to any product Trudeau is marketing, is not an ad for any product or service, and is not sold in conjunction with a product or service that is related to the content of the book. Id. The 2004 Order also prohibited Trudeau "from manufacturing, labeling, advertising, promoting, offering for sale, sale, or distribution of any product containing coral calcium . . . ," or from making any representation regarding benefits, performance, or efficacy of any product, program or service unless such representation is true and

not misleading. Id. at 10-11. Finally, the 2004 Order made Trudeau liable for equitable monetary relief in the amount of $2 million. Id. at 16.

The 2004 Order provided that the FTC premised its acceptance of the settlement on the accuracy of information provided by Trudeau regarding his financial condition, and further provided that if it were subsequently determined that he had failed to disclose any material asset, the court would enter judgment against him in the amount of $20 million. Id. at 18-19. The 2004 Order also provided that the district court would retain jurisdiction for purposes of construction, modification, and enforcement. Id. at 29. The court found that the 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." Id. at 3-4.

III. THE FTC PRESS RELEASE

As it did in 1998 after entry of the 1998 Order, the Commission, on September 7, 2004, issued a press release announcing entry of the 2004 Order. (The press release is Exhibit B to the complaint, and attachment A to the FTC's memorandum in opposition to the preliminary injunction, and appears on the FTC's website at http://www.ftc.gov/opa/2004/09/trudeaucoral.htm). The release is headed "Kevin Trudeau Banned from Infomercials," with a subheading "Trudeau Settles Claims in Connection with Coral Calcium Supreme and Biotape." The first paragraph explains that, pursuant to the settlement, Trudeau is broadly banned from infomercials that involve any type of product,

service, or program, but not from truthful infomercials for informational publications. It also mentions that he "agreed" to pay $2,000,000.00 to "settle" the charges the FTC had brought. The next paragraph explains the terms of the monetary judgment. The third paragraph quotes from a statement made by an FTC employee, Lydia Parnes, on the meaning of the 2004 Order to the FTC: "This ban is meant to shut down an infomercial empire that has misled American consumers for years." Ms. Parnes also referred to the cautionary effect she hoped the 2004 Order would have: "Other habitual false advertisers should take a lesson; mend your ways or face serious consequences." The fourth paragraph detailed what the FTC "alleged," and was followed by a paragraph describing what the court "found" regarding Trudeau's contempt of the 2003 preliminary injunction. The sixth and seventh paragraphs provided additional detail regarding the terms of "the settlement announced today." Finally, the press release closed with a note similar to the one in the 1998 press release:

> NOTE: This stipulated final order is for settlement purposes only and does not constitute an admission by the defendants of a law violation. A stipulated final order has the force of law when signed by the judge.[6]

The press release has been on the FTC's website continuously since September 2004. However, it was not until February 16, 2005, that Trudeau raised any objection regarding its contents. On that day, Trudeau sent a letter to the FTC complaining that he had not been "banned" from infomercials. (Exhibit C to the complaint, and Exhibit E to the preliminary

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[6]A virtually identical note appears in many other FTC press releases announcing settlements. *See, e.g.*, http://www.ftc.gov/opa/2004/07/gateway.htm (July 7, 2004, press release announcing settlement of charges against Gateway Learning Corp.); http://www.ftc.gov/opa/2004/05/greetingcards.htm (May 13, 2004, press release announcing settlement of charges against Greeting Cards of America, Inc., et al.); http://www.ftc.gov/opa/2004/01/cmsjudgment.htm (January 15, 2004, press release announcing settlement of charges against Certified Merchant Services).

injunction motion). He also complained that Ms. Parnes' statement, which was included in the release, was misleading because it implied that there had been a finding of wrongdoing by Trudeau. In addition, he contended that the release also implied a finding of wrongdoing because, although it stated that the settlement did not constitute an admission of wrongdoing, it did not specifically state that there had been no finding of wrongdoing. Trudeau asked that the FTC remove the press release from its website and publish a retraction.

Six days later, Trudeau received a response from the FTC's Deputy General Counsel, Christian S. White. (Exhibit D to the complaint, and Exhibit F to the preliminary injunction motion). Mr. White's letter rejected Trudeau's request, and explained that the press release explicitly stated that the settlement does not constitute an admission by Trudeau of a law violation, and that it could not reasonably be read to imply that there had been any findings of fact or law that had not been made by the court. The letter further noted that the heading was not misleading since Trudeau had been broadly banned from infomercials, and that such a ban was an extraordinary remedy not typically sought by the FTC. The letter also noted:

> [P]ublic access to the information in question continues to be in the public interest to the extent it continues to serve as a guide to the kinds of activities and allegations that may result in FTC enforcement action, including potential remedies, settlement amounts, and other relevant terms and conditions. This remains true of orders and settlements, even after full compliance has been achieved.

IV. THE ALLEGATIONS IN THIS ACTION

On February 28, 2005, Trudeau filed his complaint initiating this action. In his complaint, Trudeau explains that he has written and marketed a book titled Natural Cures "They" Don't Want You to Know About, which, according to plaintiff, is critical of the FTC. Complaint ¶¶2, 37. He claims that he entered the 2004 Order prior to the success of the Natural Cures book,

and that he has sold more than one million copies of the book. Id. He alleges that the FTC has violated two provisions of law through the issuance of the press release. He alleges that, in issuing the press release, the FTC has "exceeded its authority under 15 U.S.C. § 46(f)." Id. ¶50. This statutory section authorizes the FTC:

> To make public from time to time such portions of the information obtained by it hereunder as are in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

He also alleges that the press release violated his First Amendment rights. Id. He asked that this Court issue a declaratory judgment that the FTC's press release intentionally misrepresented the 2004 Order, and that the FTC's conduct is improper under the First Amendment. He also seeks to have this Court enjoin the FTC "to correct the misleading statements in its press release." Id. ¶ 4.[7]

ARGUMENT

I. THE PRESS RELEASE IS NOT FINAL AGENCY ACTION SUBJECT TO JUDICIAL REVIEW

The APA permits judicial review of: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court. . . ." 5 U.S.C. § 704. Because judicial review of the press release is not "made reviewable by statute," this Court must determine whether it is "final agency action." In order to constitute final agency action, the

[7]On the same day that Trudeau filed his complaint in this case, he also filed a complaint in the Court of Federal Claims against the United States alleging that the 2004 Order constituted a contract, and that, by issuing the press release, the government violated that contract. Trudeau v. United States, No. 05-263C (Fed. Cl.). In the Court of Federal Claims case, Trudeau seeks damages for breach of contract. Plaintiff has not sought any relief from the court that entered the 2004 Order.

conduct at issue must "mark the consummation of the agency's decisionmaking process" and "must also 'be one by which rights or obligations have been determined, or from which legal consequences will flow.'" Nat'l Ass'n of Home Builders v. Norton, 298 F. Supp. 2d 68, 76 (D.D.C. 2003) (quoting in part Bennett v. Spear, 520 U.S. 154, 178 (1997)).

The press release does not determine "rights or obligations," nor do "legal consequences flow" from it. In fact, cases that have analyzed this type of allegation under the APA have held that agency publicity is not final agency action; some have held that agency publicity is not even "agency action." In Hearst Radio v. FCC, 167 F.2d 225 (D.C. Cir. 1948), plaintiff alleged that agency publicity (a report) was known to be false and caused plaintiff "public shame, obloquy, contumely, odium, contempt, ridicule, aversion, degradation and disgrace" and "resulted in direct damage and prejudice to the plaintiff." Id. at 226. This Circuit assumed these allegations to be true, and held that the agency report was "unjustifiable." Id. at 227. The Court held that judicial review was not available because "the Administrative Procedure Act does not provide judicial review for everything done by an administrative agency." Id. The Court held that judicial review is only available for "agency action" and looked to the definition of "agency action:"

> "agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act. . . .

Id. (the current cite for this definition is 5 U.S.C. § 551(13), and is the same in all respects except that "every agency rule" now reads "an agency rule"). The Court held that the only part of this definition that came close to describing the agency publicity there was the word "sanction," which was defined as

> the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) withholding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or

> withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation or suspension of a license; or (7) taking of other compulsory or restrictive action.

Id. (the current cite for this definition is 5 U.S.C. § 551(10), and it is essentially the same except for a few minor, nonmaterial changes). The Court held that this definition "obviously does not cover an act such as publication of the" report. Id.

This Circuit again addressed this issue – and reached similar results – in Indus. Safety Equip. Ass'n v. EPA, 837 F.2d 1115 (D.C. Cir. 1988). In that case, plaintiff challenged publication of a report recommending against use of certain respirators, alleging that the report violated the APA and the Constitution. Id. at 1116. Although the Court questioned whether the Hearst Radio rule of absolute immunity for agency publications was still viable, it affirmed the district court's dismissal of the case. Id. at 1116-18. The Court held that the publication was not agency action: It was not a "sanction" because plaintiff offered no actual evidence that the publication was intended to penalize or that it was false, and it was not a rule because it was advisory in nature and it did "not change any law or official policy presently in effect." Id. at 1119-20.[8]

Similar results were reached by the Fourth Circuit recently in Invention Submission Corp. v. Rogan, 357 F.3d 452 (4th Cir.), cert. denied, 125 S.Ct. 415 (2004), in which the Court held that agency publicity did not constitute final agency action under the APA. In Invention Submission, the Patent and Trademark Office (PTO) undertook an advertising campaign to alert

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[8] Although the D.C. Circuit questioned Hearst Radio in Industrial Safety Equipment, it did not overrule it. In fact, this Circuit recently cited Hearst Radio with approval (for the proposition that the term "agency action" "is not so all-encompassing as to authorize us to exercise 'judicial review [over] everything done by an administrative agency.'"). Indep. Equip. Dealers Ass'n v. EPA, 372 F.3d 420, 427 (D.C. Cir. 2004).

the public about "invention promotion scams." Although the publicity campaign did not mention plaintiff by name, plaintiff alleged that the campaign was "false and unauthorized" and knowingly "target[ed] Invention Submission in order to penalize it and put it out of business." Id. at 456-57. The Court examined the publicity material itself, and held that the campaign material did not reflect an "intent to penalize" and was not "final agency action that is reviewable in court." Id. at 460. Plaintiff's proper venue was "through the political process." Id. See also Flue-Cured Tobacco Cooperative Stabilization Corp. v. EPA, 313 F.3d 852, 857-62 (4th Cir. 2002) (EPA report that classified tobacco smoke as a human carcinogen not final agency action under the APA); American Trucking Ass'n, Inc. v. United States, 755 F.2d 1292, 1296-97 (7th Cir. 1985) (ICC report was not agency action; it did not "impose an obligation, determine a right or liability or fix a legal relationship."); Salt Institute v. Thompson, 345 F.Supp.2d 589, 602 (E.D. Va. 2004) ("Agency dissemination of advisory information that has no legal impact has consistently been found inadequate to constitute final agency action and thus is unreviewable by federal courts under the APA.").

The case principally relied on by plaintiff in his preliminary injunction application for the proposition that a cause of action exists to challenge a press release was B.C. Morton Int'l Corp. v. FDIC, 305 F.2d 692 (1st Cir. 1962). See Memorandum in Support of Kevin Trudeau's Application for Preliminary Injunction ("Pl. Mem.") at 14. B.C. Morton, however, does not help plaintiff. In that case, B.C. Morton alleged that the defendant was in essence attempting to regulate by press release. That is, defendant Federal Deposit Insurance Corporation, which insures certain bank deposits, had issued a press release interpreting the law to preclude certificates of deposit of the type that plaintiff sold from qualifying for insurance. Without such

insurance, plaintiff's business was drying up; thus, the FDIC had ended a line of business simply by publicizing its interpretation of the law. The court did not analyze the press release in terms of the APA, but held that dismissal of the complaint was improper. Under the type of APA analysis discussed above, the FDIC press release at issue in B.C. Morton would appear to have constituted a "rule" because it determined "rights or obligations" and had "legal consequences."

Other cases relied upon by plaintiff for the proposition that a cause of action exists to challenge a press release are similarly unhelpful to plaintiff. See Pl. Mem. at 15. In fact, those cases declined to exercise judicial review over press releases or agency publicity. Those courts may have said, in dicta, that such a cause of action might exist in some situations. They did not, however, analyze whether a press release was "final agency action" under the APA.

In FTC v. Cinderella Career and Finishing Schools, Inc., 404 F.2d 1308 (D.C. Cir. 1968), the FTC had issued a complaint and the defendant corporations, aware of the usual FTC practice of issuing press releases, petitioned the Commission to defer the press release until after final adjudication. Id. at 1309-10. The petition was denied, the press release was issued, and accounts of the complaint appeared in newspapers. The corporations filed suit, alleging that the press release had harmed their business and caused "inquiries from financial institutions and others with whom appellees were doing business." Id. at 1310. They also alleged that the Commission action "resulted in irreparable damage to them since they, by the press release, 'are subjected to public and business disrepute, scorn and obloquy; will lose and be deprived of economic opportunities; will suffer serious economic injury; and their continuing existence will be irreparably impaired.'" Id. at 1313.

The district court granted an injunction but it was reversed on appeal. The Court of Appeals rejected the claim that the FTC had no authority to issue the press release:

> Since the Commission is charged by the broad delegation of power to it to eliminate unfair or deceptive practices in the public interest, and since it is specifically authorized to make public information acquired by it, we conclude that there is in fact and law authority in the Commission, acting in the public interest, to alert the public to suspected violations of the law by factual press releases whenever the Commission shall have reason to believe that a respondent is engaged in activities made unlawful by the Act. . . . The press releases predicated upon official action of the Commission constitute a warning or caution to the public, the welfare of which the Commission is in these matters charged.

Id. at 1314 (emphasis added). Thus, the Court found that the FTC had authority to issue the press releases even regarding allegations that had yet to be proven, and directed dismissal of the complaint; it did not address the issue of final agency action. Id. at 1316.

In plaintiff's application for a preliminary injunction, he relied on the dicta in Cinderella Career and Finishing Schools in which the Court stated that it was not alleged there that the news release was "knowingly false" or "did not fairly and accurately summarize the Commission's complaint." Pl. Mem. at 15, citing 404 F.2d at 1314. However, the Court did not hold that such conduct would be "final agency action" under the APA. In fact, the Court stated that it was intimating "no opinion as to the sufficiency of a complaint" if those allegations were at issue. 404 F.2d at 1314 n.10.

Similarly, in Bristol-Myers Co. v. FTC, 424 F.2d 935 (D.C. Cir. 1970), this Circuit refused to enjoin the FTC from publicizing a rulemaking proceeding. Id. at 940. The Court recognized that Cinderella Career and Finishing Schools had, with respect to press releases, held that "the benefit to the public outweighed any harm inflicted on the party to the proceedings." Id. In his preliminary injunction application, plaintiff relied on a footnote in Bristol-Myers in which

the Court stated that it regretted the "broad dictum" of the district court that "an agency could never be enjoined from publicizing its activities." Pl. Mem. at 15, citing 424 F.2d at 940 n.21. Again, the Court did not analyze the issue under the APA or hold that a press release constituted "final agency action."

The other case relied on by plaintiff, FTC v. Freecom Communications, Inc., 966 F.Supp. 1066 (D. Utah 1997), similarly did not analyze the issue under the APA. Significantly, the court in Freecom was analyzing agency publicity in the context of an ongoing enforcement case that had been filed by the FTC and was pending before the court. The court's primary concern was whether the publicity would prejudice the fairness of this ongoing case: "The court would have authority to restrict counsel or a party from making public statements if there were a substantial likelihood that any declaration would preclude a fair trial. * * * Whether this court has inherent authority to enjoin the FTC, a party, by a motion, must depend on whether the offensive conduct is related to this litigation and somehow threatens the efficacy of the litigation." Id. at 1067-68. After reviewing the publicity at issue, the court denied defendant's request for a protective order against such publicity.

For these reasons, the press release challenged by plaintiff is not agency action, much less final agency action, subject to judicial review under the APA. In his Reply Memorandum in Support of Application for Preliminary Injunction ("Pl. Reply"), plaintiff argued that even if the press release were not reviewable under the APA, the Court would have "inherent equitable power" to grant injunctive relief. Pl. Reply at 7-10. Plaintiff points to no waiver of sovereign immunity that would permit him to evade the APA so easily. In fact, under the APA a reviewing court is permitted to:

hold unlawful and set aside agency action, findings, and conclusions found to be –

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity; [or]
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

5 U.S.C. § 706(2). These provisions cover the allegations made by plaintiff in this case. Plaintiff cannot avoid the APA restrictions limiting review to agency action or final agency action by claiming to be proceeding under the "inherent equitable power" of this Court. Cf. Harvard Pilgrim Health Care v. Thompson, 318 F.Supp. 2d 1, 10 (D.R.I. 2004) ("The APA's restriction of judicial review to the administrative record would be meaningless if any party seeking review based on statutory or constitutional deficiencies was entitled to broad-ranging discovery.").

For these reasons, this case should be dismissed.[9]

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[9] This case can also be dismissed because the contents of the press release are within the FTC's discretion. The APA provides that judicial review of agency action is available except to the extent that "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2). See Lincoln v. Vigil, 508 U.S. 182, 191 (1993) (the court is to determine whether "the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'"), quoting in part Heckler v. Chaney, 470 U.S. 821, 830 (1985); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971); Steenholdt v. FAA, 314 F.3d 633, 638-39 (D.C. Cir. 2003); Drake v. FAA, 291 F.3d 59, 70 (D.C. Cir. 2002). The FTC Act authorizes the FTC to "make public" information that is "in the public interest;" and "in such form and manner as may be best adapted for public information and use." 15 U.S.C. § 46(f). There are no limitations on FTC's discretion in deciding what is in the "public interest" or what constitutes the "form and manner as may be best adapted for public information and use." See Claybrook v. Slater, 111 F.3d 904, 908 (D.C. Cir. 1997) (statute authorized representative to adjourn meeting "whenever he determines it to be in the public interest," and the D.C. Circuit stated: "Whether to adjourn an advisory committee meeting is a decision committed to agency discretion.").

II. THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Even if this Court were to hold that it had jurisdiction to review the merits of plaintiffs' complaint, the complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. In his complaint, plaintiff alleges that the press release "misrepresented" the nature of the stipulated order and that the FTC "facilitated or orchestrated the use by the media of those misrepresentions." Complaint ¶49. This conduct is alleged to be in excess of the FTC's authority under 15 U.S.C. § 46(f), and a violation of the First Amendment. Id. ¶50.

Under Rule 12(b)(6), factual allegations are accepted as true; however, courts "accept neither 'inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint,' nor 'legal conclusions cast in the form of factual allegations.'" Browning v. Clinton, 292 F.3d 235, 242 (D.C. Cir. 2002). See also Major v. Plumbers Local Union No. 5, Civ. No. 03-0009 (JDB), 2005 WL 1118393 at 5 (D.D.C., March 29, 2005) ("Conclusory legal and factual allegations . . . need not be considered by the court."); Luck's Music Library, Inc. v. Ashcroft, 321 F.Supp.2d 107, 112 (D.D.C. 2004).

An examination of the actual facts alleged by plaintiff reveals that he has failed to state a claim. Plaintiff is generous with conclusory allegations (e.g., "The FTC press release is false and misleading," Complaint ¶25; the press release "falsely characterizes the Stipulated Order. . . ," Id. ¶48). A comparison of what the press release actually states, however, with what plaintiff argues it should have stated reveals that this case is quibbling about wording and emphasis. Plaintiff does not allege that the FTC is without authority to issue press releases or that the FTC could not issue a press release about the 2004 Order. Plaintiff seeks to have this Court review

the press release and rewrite it so that it is more to his liking: He would prefer that different aspects of the 2004 Order be emphasized. However, the manner in which the press release is written is consistent with the public interest and within the FTC's discretion. Plaintiff cites no authority for the remarkable proposition that courts may adjudicate the accuracy of press releases and direct that they be rewritten so as to change their emphasis.

Plaintiff asserts that the press release is misleading because it implies he is banned from all infomercials, when he is not banned from all infomercials. Complaint ¶19. However, the very first sentence of the press release states that Trudeau is banned from infomercials "except for truthful infomercials for informational publications." The sixth paragraph repeats this point: "The order's ban on future infomercials exempts infomercials for books, newsletters, and other informational publications." Thus, the press release did in fact disclose the limited exception permitting plaintiff to engage in some infomercials; it just did not say it in the manner plaintiff would have preferred.

Plaintiff also alleges that the press release was misleading because it states that the stipulated order was not an admission by plaintiff. Complaint ¶22. Plaintiff concedes that this is a disclaimer, but finds fault in that it did not go even further: it "conspicuously omits the agreement that the Order was not a *finding* of wrongdoing." Id. However, the press release contains repeated references to the fact that the 2004 Order was a settlement. For example, the subtitle of the press release is: "Trudeau Settles Claims in Connection with Coral Calcium Supreme and Biotape." The first sentence refers to the "settlement with Kevin Trudeau." The third sentence states: "Trudeau agreed to these prohibitions and to pay the FTC $2 million to settle charges that he falsely claimed that a coral calcium product can cure cancer and other

serious diseases. . . ." Significantly, the fifth paragraph notes that the court did find Trudeau in contempt of court for violating a preliminary injunction and "ordered Trudeau to cease all marketing for coral calcium products." Thus, the press release does not state that the stipulated order was a finding of wrongdoing; it simply did not use phrasing that plaintiff would have preferred.[10]

Plaintiff also alleges that the disclaimer discussed above is "insufficient to negate the net impression" that he is an "habitual false advertiser." Complaint ¶23. This allegation pertains to a quote from an FTC employee, who is clearly stating what the FTC meant to accomplish and the importance of the 2004 Order to the FTC, an intent that reflects the long litigation history described above. This statement by an FTC employee does not purport to state what the court held.

Plaintiff also argues that the press release "implies that Trudeau was ordered to pay $2 million based on a finding of wrongdoing, when he agreed to provide those funds as part of a settlement. . . ." Complaint ¶24. As discussed above, however, the press release makes clear that the stipulated order was a settlement, and does not state or imply (except where it is accurate to do so) that there was a finding of wrongdoing by the Court.

Even if this Court were to measure the press release against the statute, it could not conclude that the FTC's description of the 2004 Order was not "in the public interest" or that it is not "in such form and manner as may be best adapted for public information and use." See 15

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[10] A comparable disclaimer was addressed in Cinderella Career and Finishing Schools. The Court recognized that this language might not have a "practical value in minimizing the derogatory inferences upon the respondents' integrity," but that it did not impair respondents' legal rights. 404 F.2d at 1316.

U.S.C. § 46(f). For these reasons, the press release is well within the FTC's authority and thus is not in violation of § 46(f) or the First Amendment.

The interest of the Federal Trade Commission Act is to protect the public; thus the interests of the public and the FTC are the same. See, e.g., Cinderella Career and Finishing Schools, 404 F.2d at 1313-14. As noted above, both the statute and this Circuit recognize the important public interest in the FTC disclosure of information about its proceedings. Cinderella Career and Finishing Schools, 404 F.2d at 1314; Bristol-Myers, 424 F.2d at 940. The press release accurately states the nature of the proceeding against plaintiff, the resolution of that proceeding, and the importance of the proceeding to the FTC.

Plaintiff has done nothing to show that permitting him to rewrite the FTC's press release in a manner he believes would be better for his business is in the public interest or that it would not harm the FTC in the future. In fact, even permitting plaintiff to proceed with this lawsuit could harm the public interest by preventing publication of information about the government's enforcement activities: "If the unsophisticated consumer is to be protected . . . from deceptive or unfair practices, it is essential that he be informed . . . as to the identity of those most likely to prey upon him utilizing such prohibited conduct." Cinderella Career and Finishing Schools, 404 F.2d at 1314 (emphasis added). The law "'is not made for experts but to protect the public, – that vast multitude which includes the ignorant, the unthinking and the credulous. . . .'" Id., quoting Aronberg v. FTC, 132 F.2d 165, 167 (7th Cir. 1942). See also Hoxsey Cancer Clinic v. Folsom, 155 F. Supp. 376, 377-78 (D.D.C. 1957) (FDA circular "warning the public that the so-called Hoxsey cancer treatment has been found worthless insofar as internal cancer is concerned" is

within agency's authority: "The defendants are performing a public duty when they are urging the use of certain treatments or warning the public against the use of certain treatments.").

Press releases provide important guidance to the public regarding the kinds of activities that may result in FTC enforcement action. They also advise the public as to the sorts of remedies the FTC seeks. Such publicity is especially important when consumers are presented with claims of miracle cures for serious diseases. See United States v. Rutherford, 442 U.S. 544, 556 (1979) ("if an individual suffering from a potentially fatal disease rejects conventional therapy in favor of a drug with no demonstrable curative properties, the consequences can be irreversible.").

The FTC routinely issues press releases. See Cinderella Career and Finishing Schools, Inc., 404 F.2d at 1309-10 & n.3; **http://www.ftc.gov/ftc/news.htm;** see also Bristol-Myers Co. v. FTC, 284 F. Supp. 745, 748 (D.D.C. 1968), aff'd in relevant part, 424 F.2d 935 (D.C. Cir. 1970) ("A press release is nothing but a statement. The courts may no more enjoin Government departments from issuing statements to the public than they may enjoin a public official from making a speech,"). In another context, this Circuit has noted the "ease with which charges of 'bad faith'" can be leveled at the government and the burden that Courts would face if they were to investigate all such charges. San Luis Obispo Mothers for Peace v. NRC, 751 F.2d 1287, 1327 (D.C. Cir. 1984), decision aff'd on reh'g en banc, 789 F.2d 26 (D.C. Cir. 1986). If plaintiff can enlist this Court in rewriting the FTC's press release based on the insubstantial allegations he has presented, it would cause significant harm to the FTC as well as to other government agencies. Moreover, it would open the courts to countless lawsuits brought by anyone dissatisfied with the wording of an agency's press release.

CONCLUSION

For the foregoing reasons, plaintiff's complaint should be dismissed.

Respectfully submitted,

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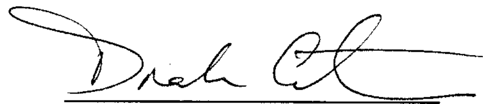

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