

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

KEVIN TRUDEAU,)	
)	
Plaintiff,)	Case No. 05 CV 00400
)	
v.)	Honorable John D. Bates
)	
THE FEDERAL TRADE COMMISSION,)	
)	
Defendant.)	

**TRUDEAU'S SURREPLY IN OPPOSITION
TO THE FTC'S MOTION TO DISMISS**

Plaintiff Kevin Trudeau ("Trudeau") respectfully submits this surreply in opposition to the Federal Trade Commission's ("FTC") motion to dismiss Trudeau's Complaint.

In its opening brief, the FTC argued that the Complaint should be dismissed under Rule 12(b)(6) because the FTC's press release is, on its face, not misleading. (Op. Br. at 20-22.) In his response, Trudeau pointed out that on a Rule 12(b)(6) motion the Court cannot resolve the factual issue of whether the press release is misleading, and that the allegations of the Complaint are sufficient to show that elements of the media and the infomercial industry have been misled by the press release. (Trudeau Resp. at 26-29.)

In its Reply, the FTC asserts for the first time that, in reviewing whether the Complaint states a claim under Rule 12(b)(6), the Court is limited to the FTC's press release and the Stipulated Final Order ("Stipulated Order"), and that the Court must disregard all other factual allegations in the Complaint. (FTC Reply at 14.) The FTC further asserted:

If this case is not dismissed, it will proceed as an APA case. Among other things, under the APA the Court's inquiry is limited to the agency record. . . . The record is composed of the factual material on which the agency relied when

it made the challenged decision. Thus, the plaintiff's "media" material, which did not exist at the time the press release was issued, would be irrelevant.

(*Id.* at 14 n. 6.)

First, it is not accurate that if this case proceeds, it necessarily will proceed solely as an APA case. The Complaint is founded upon the First Amendment and 28 U.S.C. § 1331(a), as well as 5 U.S.C. §§ 702 and 706, and may proceed completely independent of, or in conjunction with, the APA. *Western Energy Co. v. U.S. Dept. of Interior*, 932 F.2d 807, 809 (9th Cir. 1991) (observing that courts review constitutional claims *de novo*); *Commercial Drapery Contractors, Inc. v. U.S.*, 967 F. Supp. 1, 3 (D.D.C. 1997) (holding that authority to examine due process claim is independent of APA and requires independent assessment of facts and law).¹

Second, there is no "agency record" in this case to which the Court's review could be limited. The Stipulated Order resolved a case that the FTC brought in federal court, and Trudeau's Complaint is not based on any administrative proceeding or decision, but on conduct that Trudeau alleges exceeded the FTC's statutory authority and violated Trudeau's rights under the First Amendment. The Complaint alleges facts subsequent to the issuance of the FTC's press release demonstrating that the press release is misleading and that the FTC's conduct has injured him. On this Rule 12(b)(6) motion, those factual allegations must not only be considered by the Court, but must be taken as true.

Even if this case were to proceed solely under the APA, a court's review under the APA is not limited to the "administrative record" where the record is incomplete or absent. *American Littoral Soc. v. U.S.E.P.A.*, 199 F. Supp.2d 217, 228-29 (D.N.J. 2002); *McDonnell Douglas*

¹ Moreover, the FTC does not address the case law holding that Section 702 of the APA waives sovereign immunity from cases, like this one, that seek non-monetary relief from the United States, even if the case otherwise cannot be brought under the APA. (Trudeau Resp. at 22-24.)

Corp. v. E.E.O.C., 922 F. Supp. 235, 241 (E.D. Mo. 1996); *Texas Medical Assoc. v. Mathews*, 408 F. Supp. 303, 304 (D. Tex. 1976). Of course, even those cases assume that there was some type of adjudicative proceeding by the agency to which a court presumptively should defer. Here, it is absurd to speak in terms of an administrative record when there was no administrative proceeding; only agency conduct in issuing a misleading press release and engaging in other conduct to retaliate against Trudeau for his public criticism of the FTC.

CONCLUSION

For the foregoing reasons, and the reasons stated in Trudeau's Memorandum of Points and Authorities in Opposition, the FTC's Motion to Dismiss should be denied.

Respectfully submitted,

KEVIN TRUDEAU

By: _____ /s/ _____
One of His Attorneys

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