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 MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO THE FTC'S MOTION TO DISMISS

Plaintiff Kevin Trudeau ("Trudeau") respectfully submits this memorandum in opposition to the Federal Trade Commission's ("FTC") motion to dismiss Trudeau's Complaint. The FTC seeks dismissal of Trudeau's Complaint under Fed. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction, and under Fed. R. Civ. P.12(b)(6) for failure to state a claim. The FTC's motion is without merit.

INTRODUCTION

Trudeau's Complaint alleges that the FTC issued a false and defamatory press release intended to harm Trudeau's business. It further alleges that the FTC facilitated the media's exploitation of that press release to harm Trudeau's reputation, and engaged in other conduct to harass Trudeau, all in retaliation for his public criticism of the FTC. The Complaint seeks declaratory and injunctive relief, alleging that the FTC's conduct exceeds its authority under the FTC Act and is improper under the First Amendment. Those allegations are sufficient to establish subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1) and to state a claim under Fed. R. Civ. P. 12(b)(6).

Rule 12(b)(1). The FTC argues that the Complaint should be dismissed under Fed. R. Civ. P. 12(b)(1) because, in the FTC's view, the FTC has absolute immunity from suit for the conduct alleged in the Complaint. But the FTC does not cite a single case holding that false publicity by a government agency that is intended to harm an individual and to deprive him of his constitutional rights is immune from judicial review. Instead, the FTC relies on cases holding that the publication of *factual* information by the FTC and other government agencies is not reviewable under the Administrative Procedures Act ("APA"). The FTC asks the Court to disregard the cases that recognize that a government publication that is knowingly false and intended to harm the plaintiff is judicially reviewable under the APA.

Moreover, the FTC completely ignores the Supreme Court's holdings that federal courts have jurisdiction to provide equitable relief for a federal agency's wrongful conduct where that conduct exceeds the agency's statutory authority or is unconstitutional. Under that authority, this Court has jurisdiction independent of the APA to provide equitable relief to Trudeau for the FTC's false and misleading public statements and other conduct intended to deprive him of his First Amendment rights. The FTC further ignores the fact that Section 702 of the APA is a general waiver of sovereign immunity from suits, such as this one, that seek non-monetary relief, irrespective of whether the suit otherwise could be brought under the APA.

Rule 12(b)(6). The FTC argues that even if the Court has subject-matter jurisdiction, the Complaint should be dismissed under Fed. R. Civ. P. 12(b)(6) because the challenged press release is not misleading. But that determination cannot be made on a Rule 12(b)(6) motion, where the allegations of the Complaint are to be taken as true. In fact, the FTC implicitly acknowledges that the press release's bold headline "Kevin Trudeau Banned from Infomercials" is a false statement, but relies on supposedly curative language in the body of the press release to

argue that this Court should find that the press release is not misleading and dismiss the Complaint. But by the FTC's own standards, a disclaimer in the body of the press release does not cure the misleading headline. At minimum, Trudeau is entitled to present expert and other evidence regarding the net impression the press release conveys to the pubic.[1] The FTC's unsupported assertion that the press release is not misleading is not a legitimate basis for denying Trudeau his day in court.

BACKGROUND

Kevin Trudeau has long been an outspoken figure in the infomercial industry and the media. (Compl. ¶ 8.) He has long been a public critic of the FTC. (*Id.*) And the FTC has responded to that criticism.

Trudeau's Past Criticism of the FTC

In June 1999, Trudeau gave an interview for the magazine Brill's Content. (Compl. ¶ 9.) He stated that, in his opinion, the FTC was engaged in "extortion of an honest businessman." (*Id.*) He said that he had recently settled a matter with the FTC only because of its high success rate in bringing suit. (*Id.*) The FTC was aware of the Brill's Content article. (*Id.*) Requests under the Freedom of Information Act have revealed that the article was contained within the FTC's files (*id.*), including the files of the FTC staff attorneys who were later involved in bringing suit against Trudeau.

[1] In connection with his application for a preliminary injunction, Trudeau submitted substantial evidence that the media and people in the direct-marketing industry have understood the press release as stating that Trudeau has been banned from the infomercial industry and was fined by the court for false advertising. (Mem. in Supp. of Prelim. Inj., Exs. C, D, G, H, I.) Though that evidence need not be considered on the FTC's Rule 12(b)(6) motion, it certainly should give the Court pause in considering whether to dismiss the Complaint on the ground that the press release is not misleading.

Soon after the publication of the Brill's Content article, the FTC launched an investigation of Trudeau relating to a product to treat snoring ("Snorenz") marketed by one of Trudeau's companies. (*Id.* ¶ 10.) The FTC subjected Trudeau and his business associates to "investigative hearings" and other burdensome discovery in an effort to find a basis for initiating an action against Trudeau. (*Id.*) Despite those efforts, the FTC was unsuccessful and no action was ever initiated against Trudeau relating to Snorenz. (*Id.*)

The FTC then lay in wait for another opportunity to go after Trudeau. That opportunity came in 2002 when Trudeau produced a very successful infomercial for a dietary supplement known as coral calcium. (*Id.* ¶¶ 13, 14.) There is no indication that the FTC believed coral calcium is in any way harmful to the consuming public (it indisputably contains beneficial vitamins and minerals), nor was there any apparent groundswell of consumer complaints. (*Id.* ¶ 4.) Nevertheless, in June 2003, despite having known of Trudeau's coral calcium infomercial for at least 8 months, and despite knowing exactly how to contact Trudeau, the FTC filed a surprise complaint in the Northern District of Illinois and sought an emergency temporary restraining order and asset freeze. (*Id.*)

The FTC alleged that the infomercial made false claims that coral calcium could prevent or successfully treat certain diseases. (*Id.*) But the FTC had not contacted Trudeau when it first became aware of the coral calcium infomercial and never inquired as to what substantiation he may have had for the benefits his infomercial claimed for coral calcium. (*Id.*) Instead, the FTC stood by for at least 8 months while consumers continued to purchase coral calcium, and then essentially ambushed Trudeau with its "emergency" court action. (*Id.*) The district court denied the asset freeze and the parties entered into a stipulated preliminary injunction. (*Id.* ¶ 15.)

Trudeau publicly criticized the FTC's handling of the coral calcium case in an interview published in Response Magazine, referring to the FTC as a "kangaroo court," and opining that "[t]he FTC is not interested in protecting consumers. They do not do thorough investigations before filing complaints. They do not call the companies to request data and they do not initiate open dialogue with the companies before complaints are filed. They sabotage and ambush companies so that they can make good headlines and send out press releases justifying their existence." (*Id.* ¶ 16.)

During the course of discovery, Trudeau produced to the FTC a number of infomercial tapes that he had tested or intended to test. (*Id.* ¶ 17.) In several of those prototype infomercials, Trudeau harshly criticized the FTC and expressed his views that the FTC had colluded with elements of the drug industry to suppress alternative health products. (*Id.*) In response, the FTC filed a motion to hold Trudeau in contempt of the preliminary injunction on the purported ground that Trudeau had not submitted the prototype infomercials to the FTC for review prior to testing. (Docket Entry 48, Case No. 98-0168, cited in FTC Mem. at 7.) Trudeau argued that he was not required under the preliminary injunction to submit infomercials to the FTC prior to testing, but only *after* testing and prior to a commercial "rollout." The district court declined to hold Trudeau in contempt for testing the infomercials. (Docket Entry 55, Case No. 03-3904, cited in FTC Mem. at 8.) [2]

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[2] As part of an effort to malign Trudeau, the FTC highlights the district court's contempt holding in connection with a direct-mail advertisement for coral calcium. (FTC Mem. at 7-8.) But the court did not find that Trudeau had made any false claims about coral calcium. It found only that Trudeau had not complied with his agreement in the stipulated preliminary injunction not to make *any* disease claims for coral calcium -- irrespective of whether such claims could be substantiated. The preliminary injunction did not prohibit Trudeau from marketing coral calcium. Thus Trudeau distributed a mailer for coral calcium stating that "the [FTC] forbids us from saying that [coral calcium] prevents, or possibly even cures [diseases] -- even if it's true. (con'td.)

Trudeau and the FTC Enter Into a Settlement Agreement.

Trudeau did not agree that the coral calcium infomercial, taken as a whole, made false efficacy claims about coral calcium. Nevertheless, Trudeau entered into a settlement agreement with the FTC to avoid the expense and uncertainty of further litigation. (Compl. ¶ 18.) Trudeau agreed, among other things, (a) to use infomercials only for marketing books and other informational publications (*id.,* Ex. A, at 7-10); and (b) to transfer $2 million in assets to the FTC, which the FTC was to use for consumer refunds. (*Id.*, Ex. A, at 16-18.) At the heart of the settlement agreement, from Trudeau's standpoint, was a stipulation that the settlement involved no findings or admissions of wrongdoing or liability (*id.*, Ex. A, at 3), and an express stipulation that there was no penalty or fine. (*Id.*, Ex. A, at 17-18.)

The settlement agreement was memorialized on September 2, 2004 in the form of a Stipulated Final Order for Permanent Injunction and Settlement of Claims for Monetary Relief ("Stipulated Order") (Compl., Ex. A). The Stipulated Order recites:

> [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] other than the finding against Kevin Trudeau for contempt of Part I of the Stipulated Preliminary Injunction.

(Compl., Ex. A, at 3 ¶ 8, emphasis added.) The Order also expressly provides: "No portion of any payments under the judgment herein shall be deemed a payment of any fine, penalty or punitive assessment." (*Id.*, Ex. A, at 17-18.)

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." That passage is literally true, and Trudeau believed it complied with the preliminary injunction. Ironically, the FTC persuaded the court that the mailer, though literally true, conveyed the net impression that coral calcium prevents or cures disease.

The FTC Announces the Settlement with a False and Misleading Press Release.

On September 7, 2004, the FTC issued the a press release (the "Release') announcing the settlement agreement to the public. (Compl., Ex. B.) The Release was and continues to be posted on the FTC website and has been reported on by news agencies throughout the country. (Compl. ¶ 19.)

The headline of the Release states "Kevin Trudeau Banned from Infomercials." (*Id.* ¶ 19 and Ex. B.) That is misleading statement. (*Id.* ¶ 19.) First, as noted, Trudeau is completely free under the Stipulated Order to produce and/or appear in infomercials for books and other informational publications. (Compl., Ex. A, at Part I.) Second, Trudeau was not "banned" at all. Trudeau agreed as part of the settlement not to produce certain types of infomercials. (Compl. ¶ 9.) The court made no finding of wrongdoing, and it certainly did not impose a "ban" on Trudeau as a penalty for alleged wrongdoing.

The text of the Release then builds on the false assertion that the court had imposed a "ban" on Trudeau, and implies that the "ban" had been entered because there was a finding that Trudeau had repeatedly engaged in false advertising:

> "This ban is meant to shut down an infomercial empire *that has misled American consumers for years*," said Lydia Parnes, Acting Director of the FTC's Bureau of Consumer Protection. "*Other habitual false advertisers* should take a lesson; mend your ways or face serious consequences."

(Compl., Ex. B, emphasis added.)

While the Release does not expressly say that Trudeau was *adjudicated* to be a habitual false advertiser, it creates that misleading net impression in several ways. First, it states, in a factual manner, that Trudeau has misled consumers for years (*id.* ¶ 20 and Ex. B) - without making clear that this is merely an unproven allegation. (*Id.*, Ex. B.) Second, the Release implies that Trudeau was found to be a habitual false advertiser by stating that this court-ordered

ban is an example of what happens to "habitual false advertisers." (*Id.* ¶ 21.) Conspicuously absent is the word "alleged" - or any other indication that the assertion that Trudeau is a false advertiser is an allegation that has never been proved. (*Id.*, Ex. B.) Third, because the FTC represents that this "ban" was the "consequence" of Trudeau's habitual false advertising, the Release strongly implies that the court found Trudeau to have engaged in false advertising and imposed a "ban" as a consequence. (*Id.*) Someone reading the Release could not reasonably believe that Trudeau has *never* been found to have committed false advertising.

The misleading text of the Release is further reinforced by a misleading disclaimer at the bottom of the Release. (Compl. ¶ 22.) The FTC conspicuously omitted from the disclaimer the fact that there was no finding of wrongdoing. (*Id.*) Rather, in a classic example of a half-truth, the FTC only stated that "[t]his stipulated final order is for settlement purposes only and does not constitute an admission by the defendants of a law violation." (*Id.* ¶ 22 and Ex. B.) By contrast, the Stipulated Order itself says, "there have been no *findings* or admissions of wrongdoing or liability." (Compl., Ex. A, at 3.) The Release not only omits that critical word "finding" but - as part of the disclaimer - it goes on to imply that there was an adjudication of false advertising against Trudeau, by stating gratuitously in the very next sentence, "A stipulated final order has the force of law when signed by the judge." (Compl., Ex. B.)

Finally, the Release states that "Trudeau is paying $500,000 in cash and transferring residential property . . . and a luxury automobile to the Commission to satisfy the $2 million monetary judgment against him[.]" (*Id.*) Again, by stating, without qualification, that there was a "judgment against him," the FTC implied that there had been an adjudication on the merits adverse to Trudeau, rather than a settlement agreement in which Trudeau agreed to transfer certain assets of a value much less than what the FTC would have sought at trial.

The FTC Release Spawns Nation-Wide Negative Publicity.

Since September 7, 2004, the FTC Release has been widely picked up on and reported in the media - which has reported, as if it were established fact, that Trudeau is a "habitual false advertiser," and that, as a consequence, he was "banned" from infomercials and fined. (Compl. ¶¶ 26-36.) The Release is still posted on the FTC website at http://www.ftc.gov/opa/2004/09/trudeaucoral.htm. (*Id.* ¶ 26.) The Release is prominently available to anyone seeking information about Trudeau. A search of the name "Kevin Trudeau" on the popular search-engine "Google" returns as one of the most prominent non-sponsored links the FTC Release with its headline that Trudeau has been banned from infomercials and its characterization of Trudeau as a "false advertiser." (*Id.* ¶ 27.) The FTC has refused to remove or modify the Release, despite Trudeau's requests that it do so. (*Id.* ¶¶ 26, 44, 45, and Exs. C, D.)

A Google search of the terms "Kevin Trudeau" with the words "false" and "advertise," returns hundreds of links to various websites. (*Id.* ¶ 28.) Upwards of a hundred of those links include the word "habitual," a word that first appeared in articles and messages about Trudeau only after the FTC Release referred to him as an "habitual false advertiser." (*Id.*)

Presumably because Trudeau is a well known personality, the media took an immediate interest in the FTC Release. (*Id.* ¶ 29.) Stories about Trudeau's settlement with the FTC appeared on CNN, in WTOP Radio, and in the New York Times, Los Angeles Times, and the Washington Post, among others. (*Id.* ¶ 30.) And, several of those stories took words directly from the FTC Release to characterize Trudeau as an "habitual false advertiser" or as having been "banned" from infomercials. (*Id.*)

The Associated Press ("AP") ran a story about Trudeau on its newswire on September 7, 2004 in which it adopted the FTC's characterization of Mr. Trudeau as an "habitual false advertiser." (*Id.* ¶ 31.)

The Associated Press story was picked up by numerous media outlets. (*Id.* ¶ 32.) For example, the Pittsburgh Post-Gazette ran the AP story on September 8, 2004, and the story is still available on the Post-Gazette website at http://www.pittsburghpost-gazette.com/pg/04252/375413.stm. (*Id.*) For another example, the Lexington (KY) Herald Leader picked up the AP story about Trudeau on September 7, 2004 and a reader can still find the article, with the headline "Government Bans Kevin Trudeau Infomercials," the use of the term "habitual false advertiser," and the statement that Trudeau was "fined $2 million for making false health claims" at http://www.kentucky.com/mld/ kentucky/9604510.htm. (*Id.* ¶ 33.)

Numerous other newspapers throughout the country ran the same AP story that characterized Trudeau as an "habitual false advertiser," as having been "banned" from infomercials, and as having been "fined" $2 million for making false claims. Stories appeared in Ft. Wayne, Indiana (*Journal Gazette*, September 7, 2004); Monterey, California (*Monterey Herald*, September 7, 2004); State College, Pennsylvania (*Centre Daily Times*, September 7, 2004); Charlotte, North Carolina (*Charlotte Observer*, September 7, 2004); Wichita, Kansas (*Wichita Eagle*, September 7, 2004); Duluth, Minnesota (*Duluth News Tribune*, September 7, 2004); Tallahassee, Florida (*Tallahassee Democrat*, September 7, 2004) and Myrtle Beach, South Carolina (*Sun Herald*, September 7, 2004). (*Id.* ¶ 34.) Copies of stories characterizing Trudeau as a "habitual false advertiser," as having been "banned" from infomercials, and as having been "fined" for false advertising remain viewable on the websites for each of the listed publications and many others. (*Id.*)

Even outlets that did not use the AP story last September ran their own versions of stories about Trudeau based on the FTC Release that demonstrated the misleading nature of the Release. (*Id.* ¶ 35.) For example, PR Newswire posted a press release on its website that referred to the FTC's case against Trudeau. (*Id.*) The PR Newswire release's headline stated that "False health claims earn 'habitual false advertiser' Kevin Trudeau unprecedented FTC ban." (*Id.*)

The FTC Takes Further Action to Try to Put Trudeau Out of Business.

Despite the FTC Release's headline "Kevin Trudeau Banned from Infomercials," and the FTC's boast that the "ban was meant to shut down [Trudeau's] infomercial empire," Trudeau subsequently produced and distributed an infomercial (the "Natural Cures infomercial") nation-wide that became and remains one of the top-ranked infomercials on the national networks. (*Id.* ¶ 37.) And, to boot, the infomercial (and the book it promotes) harshly criticizes the FTC, expressing Trudeau's view that the FTC and certain elements of the drug industry are colluding to keep natural remedies out of the market. (*Id.* ¶¶ 1, 17, 37.) The distribution of the Natural Cures infomercial was perfectly permissible, of course, because it did not promote any product, but promoted Trudeau's book *Natural Cures "They" Don't Want You to Know About*. (Compl., Ex. A, Part I.)

Nevertheless, there can be little doubt that the FTC was surprised and chagrined by the success of the Natural Cures infomercial and its pervasive distribution throughout the United States, after the FTC had proclaimed to the world that Trudeau had been banned from infomercials and that the FTC had "shut down [Trudeau's] infomercial empire." The FTC retaliated in the following ways.

The Stipulated Order contains what is known as an "avalanche" clause providing for a $20 million forfeiture should it be discovered that Trudeau had materially misrepresented his

financial condition prior to settlement. (Compl. ¶ 40.) The FTC began looking for ways to invoke the avalanche clause. (*Id.*) First, the FTC purported to question how Trudeau was paying for the media time to distribute the Natural Cures infomercial, and essentially accused Trudeau of funding the distribution of the infomercial with assets he had not disclosed prior to the settlement. (*Id.*) Trudeau demonstrated that the accusation was false. (*Id.*)

Second, the FTC purported to question the acquisition of a piece of real property in Ojai, California by one of Trudeau's companies, Trucom LLC. (*Id.* ¶ 41.) Without first receiving an explanation or any documentation, the FTC accused Trudeau of having acquired the property with undisclosed assets, and threatened to seek the court's intervention to freeze any proceeds from the re-sale of the property and to invoke the "avalanche" clause to seek a $20 million judgment. (*Id.*) In fact, the FTC accused Trudeau of lying about his assets in a deposition he gave prior to the settlement. (*Id.*)

Trudeau documented to the FTC that he purchased the property with assets that were disclosed to the FTC and that Trudeau had not lied in his deposition. (*Id.* ¶ 42.) The FTC was then forced to retreat, but not before it had imposed substantial costs on Trudeau in responding to the unfounded accusations. (*Id.*)

It is alleged that the FTC further retaliated against Trudeau by facilitating, if not orchestrating, the news media's use of the FTC Release to unfairly harm Trudeau in the marketplace and to humiliate and embarrass him. (*Id.* ¶ 43.) Among other things, the FTC cooperated with a major network news program to send a camera crew to Ojai, California to film the house and automobile that Trudeau have given the FTC as part of the settlement. (*Id.*)

Trudeau Seeks Corrective Action By The FTC.

On February 16, 2005, Trudeau's counsel wrote to the FTC and requested that the FTC remove the misleading press release from its website and issue and disseminate a corrective retraction. (Compl. ¶ 44.)

On February 22, 2004, the FTC responded. (*Id.* ¶ 45.) It stated in part that "nothing in the press release refers to any 'findings' of fact or law" and disputed such an inference could reasonably be drawn from the press release. It refused to take any of the requested actions. (*Id.*)

ARGUMENT

The FTC's motion to dismiss should be denied because: (1) this Court has jurisdiction to afford Trudeau equitable relief for the FTC's false and misleading press release and other conduct intended to punish Trudeau for exercising his First Amendment rights; and (2) Trudeau's Complaint states a claim for injunctive and declaratory relief for the FTC's conduct exceeding its statutory authority and infringing Trudeau's constitutional rights.

I. THE FTC CONDUCT ALLEGED IN TRUDEAU'S COMPLAINT IS NOT IMMUNE FROM JUDICIAL REVIEW.

The FTC argues that its conduct is immune from judicial review because the issuance of a press release is not "final agency action" under the Administrative Procedures Act ("APA"). That contention is without merit for two reasons. First, the FTC's misleading and punitive Release is a "sanction" within the meaning of the APA and therefore is final agency action reviewable under the APA. Second, under the Supreme Court's recognized exceptions to sovereign immunity, and under the general waiver of sovereign immunity set forth in Section 702 of the APA, this Court has jurisdiction to review agency conduct that, as alleged here, exceeds an agency's statutory authority or is unconstitutional, irrespective of whether that conduct is otherwise reviewable under the APA.

A. The FTC Release Is a "Sanction" and Therefore a Final Agency Action Reviewable Under the APA.

The FTC relies upon a lone case from 1948 for the proposition that a misleading agency press release is not "agency action" reviewable under the APA. (FTC Mem. at 13-14, citing and discussing *Hearst Radio v. FCC,* 167 F.2d 225 (D.C. Cir. 1948).) But the *Hearst Radio* decision has been thoroughly discredited by subsequent D.C. Circuit cases.

In *Impro Products, Inc. v. Block*, 722 F.2d 845 (D.C. Cir. 1983), the D.C. Circuit considered an action against the Department of Agriculture claiming that it had distributed reprints of an article containing false and misleading information about the plaintiff's product. Regarding the *Hearst Radio* court's holding that an FCC publication was not agency action, the D.C. Circuit stated:

> Despite its obvious relevance, we nonetheless have reason to question the continued validity of the *Hearst Radio* decision, particularly in a case such as this one in which there is a specific statutory authorization for dissemination of information. The *Hearst Radio* doctrine has not been reconsidered carefully since 1948. During the thirty-five years since the issuance of the decision in *Hearst Radio*, the Supreme Court and lower courts have developed a more expansive interpretation of the term "agency action" than the one suggested by *Hearst Radio*. [citations omitted] Indeed, we find it troubling that literal adherence to the *Hearst Radio* rule in a case like this one would preclude judicial review under the APA of an agency's dissemination of information that is concededly false and, therefore, completely inconsistent with the statutory purpose of promoting a prosperous agriculture.
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> With these considerations in mind, we believe that *Hearst Radio* may no longer be a viable precedent; we are therefore disinclined to find that no "agency action" has taken place. However, we need not reconsider *Hearst Radio* at this time because the statute of limitations requires reversal in this case. Accordingly, we will defer any reexamination of *Hearst Radio* to another day.

Impro Prods., 722 F.2d at 849. As with the statute at issue in *Impro Prods.*, there is specific statutory authorization under the FTC Act for the dissemination of press releases. 15 U.S.C.

§ 46(f). The FTC Release's concededly false headline and other misleading statements are completely inconsistent with the statutory purpose of disseminating accurate information.

In *Industrial Safety Equipment Assoc., Inc. v. Environmental Protection Agency,* 837 F.2d 1115 (D.C. Cir. 1988), the D.C. Circuit considered a challenge to an EPA report that criticized the asbestos-protection respirators manufactured by the plaintiffs. As in the *Impro Prods.* decision, the D.C. Circuit panel in *Industrial Safety* criticized the *Hearst Radio* decision:

> The problem with *Hearst Radio'* s absolute immunity rule for agency publications is its failure to accommodate two separate goals of a fair administrative process: protecting parties from false or unauthorized agency news releases and promoting Congress' clear mandate that government information, particularly from consumer-oriented agencies, reach the public. . . . Though there is broad consensus that this potential for harm is best controlled by internal agency restraints . . . where it does occur, courts have a duty to decide whether there is a remedy under the APA for the release of the information.

Id. at 1118-19.

The *Industrial Safety* court went on to consider whether adverse agency publicity might be a "sanction" within the meaning of the APA, and therefore judicially reviewable. Responding to the conclusion in *Hearst Radio* that adverse agency publicity cannot be a sanction, the *Industrial Safety* court stated "[a]lthough legislative history was not discussed in *Hearst Radio*, Congress itself did note that in certain circumstances adverse publicity might operate as a sanction." *Id.* at 1119 (citing H. Rep. No. 79-1980, 79th Cong., 2d Sess. (1946) (House of Representatives Report on APA)). "Thus, though adverse impact alone would not necessarily make agency publicity reviewable as a sanction, . . . an agency intent on penalizing a party through adverse publicity, especially false or unauthorized publicity, might well merit a review of its action." *Industrial Safety*, 837 F.2d at 1119.

In the case before it, however, the *Industrial Safety* court found that the EPA report did not qualify as an agency sanction because there was no evidence that the report was intended to penalize the producers of the of the respirators, or that the report was false. *Id.*

Here, Trudeau alleges that the FTC Release is false and misleading, is intended to harm Trudeau's business, and is part of a pattern of conduct by the FTC to retaliate against Trudeau for his successful infomercial criticizing the FTC. It clearly would qualify as an agency sanction under *Industrial Safety*. Indeed, the FTC implicitly acknowledges as much by acknowledging that the agency report in *Industrial Safety* "was not a 'sanction' because plaintiff offered no actual evidence that the publication was intended to penalize or that it was false[.] " (FTC Mem. at 14.)

As the *Industrial Safety* court noted, Congress expressly contemplated that adverse publicity could be a sanction:

> One troublesome subject in this field is that of publicity, which may in no case be utilized directly or indirectly as a penalty or punishment save as so authorized. . . . It shall be the duty of agencies not to permit informational releases to be utilized as penalties or to the injury of parties.

(H. Rep. No. 79-1980, 79th Cong., 2d Sess., p. 274 (1946); *see also* Gellhorn, *Adverse Publicity by Administrative Agencies,* 86 Harv. L. Rev. 1380 (1973) (recognizing the use of agency publicity as a sanction).

The FTC fails to acknowledge the foregoing D.C. Circuit authority. The FTC acknowledges that *Industrial Safety* questioned *Hearst Radio*, but tries to save it by observing that a recent D.C. Circuit case has cited *Hearst Radio* favorably. (FTC Mem. at 14 n. 8, citing *Indep. Equip. Dealers Ass'n v. EPA,* 372 F.3d 420, 427 (D.C. Cir. 2004).) But as the FTC must concede, *Indep. Equip.* did not cite *Hearst Radio* for the proposition that agency publicity, particularly false and injurious agency publicity, cannot constitute agency action reviewable under the APA.

Having little, if any, support in the D.C. Circuit for the proposition that a court may not review false agency publicity that is intended to penalize a person or company, the FTC turns to the Fourth Circuit's decision in *Invention Submission Corp. v. Rogan,* 357 F.3d 452, 457 (4th Cir. 2004). (Mem. at 14-15.) Even if *Invention Submission* were controlling in this Circuit, which it is not, it does not help the FTC. To the contrary, the Fourth Circuit recognized the *Industrial Safety* court's criticism of *Hearst Radio* and stated that "[i]nasmuch as the APA's definition of "agency action" includes agency sanctions, adverse publicity might be a 'sanction' and therefore an agency action in certain circumstances[.]" *Invention Submission,* 357 F.3d at 458. But the Fourth Circuit held that in the case before it the PTO's advertising campaign was not a final agency action because it did not specifically identify or target the plaintiff, and therefore did not reflect "an intent to penalize any particular company." *Id.* at 459-60. Nevertheless, the *Invention Submission* court implicitly recognized that where, as here, an individual is identified with an intent to penalize that individual, the adverse publicity may constitute a sanction and thus be reviewable.

Unlike the plaintiffs in *Industrial Safety Equipment* and *Invention Submission,* Trudeau *has* been named, criticized, and singled out in the FTC's Release, which creates the misleading impression that Trudeau has been banned from the infomercial industry based on a finding that he is a "habitual false advertiser." It thus merits judicial review under the APA according to the teaching of the D.C. Circuit in *Impro Prods.* and *Industrial Safety Equipment*, and the implication of the Fourth Circuit's reasoning in *Invention Submission*.[3]

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[3] None of the other cases the FTC cites from other circuits stands for the proposition that agency publicity is unreviewable under the APA where it is alleged to be false and intended to penalize. *See Flue-Cured Tobacco Cooperative Stabilization Corp. v EPA,* 313 F.3d 852 (4th Cir. 2002) (holding unreviewable an EPA report classifying second hand smoke as a carcinogen, where (con'td.)

Outside the context of sanctions, the general test for "final agency action" is set forth in *Bennett v. Spear*, 520 U.S. 154, 178 (1997), and recognized by this Court in *Nat'l Ass'n of Home Builders v. Norton,* 298 F. Supp.2d 68, 76 (D.D.C. 2003). The Supreme Court held in *Bennett* that a "Biological Opinion" issued by the Fish and Wildlife Service *was* reviewable under the APA, stating that:

> *As a general matter*, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process, [citations omitted] -- *it must not be of a merely tentative or interlocutory nature*. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow," [citations omitted].

Bennett, 520 U.S. 177-78 (emphasis added).

Here, as with the Biological Opinion in *Bennett*, there can be no dispute that the FTC Release is not "of a merely tentative or interlocutory nature," and therefore meets the first element of the *Bennett* test. As to the second element, the FTC Release may not determine Trudeau's "rights or obligations" or have "legal consequences" for Trudeau (although it purports to describe a Stipulated Final Order that does determine Trudeau's rights and obligations and have legal consequences for him), but, as alleged in the Complaint, it clearly carries direct consequences for Trudeau.

The *Bennett* Court did not address how its test would apply to a "sanction" as opposed to a "rule" or "order" (the Court essentially regarded the Biological Opinion as a rule because it

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allegation was that issuance of report was unlawful, not that it was false or intended to penalize); *American Trucking Ass'n, Inc. v. United States,* 755 F.2d 1292 (7th Cir. 1985) (holding that informal ICC report was not reviewable as final agency action, where issue was whether report was a ruling or order, not whether it was false or intended to penalize an individual); *Salt Institute v. Thompson,* 345 F. Supp.2d 589 (E.D. Va. 2004) (holding that publication of dietary study regarding salt was advisory and thus not reviewable; there was no allegation that publication was false or intended to punish the plaintiffs).

"alter[ed] the legal regime to which the [] agency [was] subject" (*id.* at 178)). Nor does the *Bennett* test purport to be applicable to all forms of agency action in all circumstances. Given that the APA itself defines agency action to include "sanctions," and that both the legislative history of the APA and interpretive case law contemplate that adverse agency publicity may be a "sanction" reviewable under the APA, the requirement of "legal consequences" in the case of a "sanction" is superfluous. A sanction necessarily has legal consequences. And viewing a sanction as "agency action" is consistent with the broad view Congress took of what constitutes "agency action":

> The term "agency action" brings together previously defined terms in order to simplify the language of the judicial-review provisions of section 10 [of the APA, codified as 5 U.S.C. § 701] and to assure the complete coverage of every form of agency power, proceeding, action, or inaction. In that respect the term includes the supporting procedures, findings, conclusions or statements or reasons or basis for the action or inaction.

S. Doc. No. 248, 79th Cong., 2d Sess., 255 (1946).

The misleading FTC Release that is intended to penalize Trudeau is an agency sanction that is reviewable under the APA.

B. This Court Has Jurisdiction to Review Trudeau's Claim for Equitable Relief Based on FTC Conduct that Exceeds Its Statutory Authority and Is Unconstitutional.

Even if the conduct alleged in Trudeau's Complaint were not reviewable under the APA *per se,* this Court nevertheless has jurisdiction of this case independent of the APA: (1) under the Supreme Court's exception to sovereign immunity for cases in which official conduct is alleged to be unauthorized and/or unconstitutional; and (2) under the APA's general waiver of sovereign immunity with respect to non-monetary claims against the United States government.

1. Sovereign immunity does not apply where, as here, the challenged official action is alleged to exceed statutory authority or to be unconstitutional.

In his Reply Memorandum in Support of Application for Preliminary Injunction ("Reply Mem."), Trudeau pointed out that, even if the Court were to decline to review Trudeau's claims under the APA, the Court has the inherent equitable power to grant Trudeau's request for injunctive relief under the facts of this case. (Reply Mem. at 7-10, citing *B.C. Morton Int'l Corp. v. Federal Deposit Ins. Corp.*, 305 F.2d 692 (1st Cir. 1962); *Bristol-Myers v. FTC,* 424 F.2d 935 (D.C. Cir. 1970); *FTC v. Cinderella Career and Finishing School,* 404 F.2d 1308 (D.C. Cir. 1968); *Federal Trade Commission v. Freecom Communications, Inc.,* 966 F. Supp. 1066, 1069-70 (D. Utah 1997).)[4]

The *B.C. Morton* case involved an FDIC press release that the plaintiff alleged to be intentionally misleading and to have the purpose of injuring the plaintiff's business. The First Circuit held that the plaintiff stated a claim for declaratory and injunctive relief against the FDIC. *B.C. Morton,* 305 F.2d at 693. The trial court had held that the FDIC, as a federal agency, had "an absolute privilege" to make the challenged statements. *Id.* at 695. In reversing the trial court, the First Circuit held that any governmental privilege that might be applicable to damages claims was not implicated in an action for declaratory and injunctive relief. *Id.* at 695-96 (citing *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951)). Further, the First Circuit embraced the Supreme Court's holding in *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 701-702 (1949), that the doctrine of sovereign

[4] In its memorandum in support of its present motion, the FTC attempts unsuccessfully to distinguish the cases cited in Trudeau's Reply Memorandum on this point. (FTC Mem. at 15-18.) For a full discussion of those cases and why they support Trudeau's position, see Trudeau's Reply Mem. at 7-10.

immunity does not apply where the action of the sovereign's officer is "not within the officer's statutory powers or, if within those powers, . . . the powers, or their exercise in the particular case, are constitutionally void." *B.C. Morton,* 305 F.2d at 696. The First Circuit concluded that "we see no basis, in reason or authority, for extending immunity against civil damages suits . . . to actions for declaratory and injunctive relief against a government agency." *Id.*

Trudeau's Complaint expressly alleges that the FTC's false and misleading press release and other conduct intended to retaliate against Trudeau for his public criticism of the FTC exceeds the FTC's statutory authority and is unconstitutional under the First Amendment. (Compl. ¶ ¶ 4, 48, 50.) It falls squarely within the exception to sovereign immunity set forth in *Larson* and *B.C. Morton.*

Despite the prominence of the *B.C. Morton* case (and its reliance on *Larson*) in the prior briefing, the FTC states in its current brief that "Plaintiff points to no waiver of sovereign immunity that would permit him to evade the APA so easily." (FTC Mem. at 18.) That assertion is obviously incorrect. Indeed, the *Larson* doctrine has been followed in the D.C. Circuit. For example, in *Clark v. Library of Congress,* 750 F.2d 89 (D.C. Cir. 1984), the D.C. Circuit held that claims for non-monetary relief against the Library of Congress were not barred by sovereign immunity, stating that "[i]t is well-established that sovereign immunity does not bar suits for specific relief against government officials where the challenged actions of the officials are alleged to be unconstitutional or beyond statutory authority." *Id.* at 102 (citing *Dugan v. Rank*, 372 U.S. 609, 621-23 (1963); *Malone v. Bowdoin*, 369 U.S. 643, 646-48 (1962); *Larson v. Domestic and Foreign Corp.,* 337 U.S. 682, 689-91 (1949)).

And, in *Ramirez de Arellano v. Weinberger,* 745 F.2d 1500, 1526-27 (D.C. Cir. 1984) (*en banc*), the D.C. Circuit discussed *Larson* and its progeny in holding that injunctive relief

against the United States government was not barred by sovereign immunity even where *some* damages were available under the Tucker Act. The *Weinberger* court quoted *Larson* with approval:

> There are limits, of course [to the reluctance of courts to invoke compulsive powers to restrain the Government from affecting disputed property]. *Under our constitutional system, certain rights are protected against government action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions.*

Id. at 1127 n. 116 (emphasis added by D.C. Circuit court) (citing *Larson,* 337 U.S. at 704).

Thus, there is ample judicial authority that the doctrine of sovereign immunity does not bar Trudeau's Complaint alleging that the FTC's conduct is beyond its statutory authority and violates his rights under the First Amendment.

Moreover, as discussed in the next section, by its 1976 amendment to Section 702 of the APA, Congress expressly waived sovereign immunity from any action for non-monetary relief brought against the United States.

2. Section 702 of the APA waives sovereign immunity as to all actions for non-monetary relief against the United States.

It is well established that the 1976 amendments to Section 702 of the APA, 5. U.S.C. § 702, eliminated the sovereign immunity defense in actions for non-monetary relief against a U.S. agency or officer acting in an official capacity, irrespective of whether an action otherwise may be brought under the APA. *See, e.g.*, *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 523-24 (9th Cir. 1989); *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, (8th Cir. 1988); *Dronenburg v. Zech,* 741 F.2d 1388, 1390-91 (D.C. Cir. 1984).

In *The Presbyterian Church (U.S.A.) v. United States*, the plaintiff churches sued the United States, Department of Justice, INS, and several individual INS officers for violating its First and Fourth Amendment rights by entering churches wearing "body bugs" and

surreptitiously recording church services. 870 F.2d at 520-21. The Ninth Circuit held that Section 702 waives sovereign immunity for non-monetary claims, and that Section 702's waiver of sovereign immunity is not limited to suits challenging "agency action." *Id*. at 525 & n. 8. The opinion stated that nothing in the language of the of the 1976 amendment suggests that the waiver of sovereign immunity is limited to claims challenging conduct falling within the APA definition of agency action, and that the legislative history clearly demonstrated Congress' intent in amending Section 702 to waive sovereign immunity for all suits seeking non-monetary relief. *See also Assinboine and Sioux Tribes of Fort Peck Indian Reservation v. Bd. Of Oil & Gas Conservation of State of Montana*, 792 F.2d 782, 793 (9th Cir. 1986) (abolition of sovereign immunity in § 702 in all suits seeking non-monetary relief not limited to suits under APA); *Cabrera v. Martin*, 973 F.2d 735, 741 (9th Cir. 1992) (same).

The Eighth Circuit also views Section 702 as providing a broad waiver of sovereign immunity for non-monetary claims. *Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 476 (8th Cir. 1988). In *Red Lake Band*, the Eighth Circuit rejected the Secretary of the Interior's argument that judicial review must be done pursuant to the APA: "Contrary to the Secretary's second argument, the waiver of sovereign immunity contained in section 702 is not dependent on application of the procedures and review standards of the APA. It is dependent on the suit against the government being one for non-monetary relief." *Id*. at 476. *See also Raz v. Lee*, 343 F.3d 936 (8th Cir. 2003) (same).

Numerous cases in this Circuit also have held that the 1976 amendment to Section 702 provides a broad waiver of sovereign immunity for parties seeking non-monetary relief. In *Dronenburg v. Zech,* the opinion discussed the legislative history of the 1976 amendment of Section 702 at length after stating that it was bound by precedent to hold that "the United States

and its officers . . . are [not] insulated from suit for injunctive relief by the doctrine of sovereign immunity." 741 F.2d at 1390 (citing *Schnapper v. Foley*, 667 F.2d 102, 107 (D.C. Cir. 1981), *cert denied*, 455 U.S. 948;[5] *Sea-Land Service, Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1981)). The opinion noted that the language of Section 702 was intended "to eliminate the defense of sovereign immunity with respect to any action in a court of the United States seeking relief other than money damages and based on the assertion of unlawful official action by a federal official. . ." 741 F.2d at 1390 (*citing* S. Rep. No. 996, 94th Cong., 2d Sess. at 2 (1976); *Schnapper*, 667 F.2d at 108). *See also Clark v. Library of Congress*, 750 F.2d at 102 (same).

Other circuits agree with the D.C. Circuit, the Ninth Circuit, and the Eighth Circuit that revised Section 702 waives sovereign immunity for parties seeking non-monetary relief. *See, e.g., Johnsrud v. Carter*, 620 F.2d 29, 31 (3d Cir. 1980); *Sheehan v. Army and Air Force Exchange Service*, 619 F.2d 1132, 1139 (5th Cir. 1980), *rev'd on other grounds*, 456 U.S. 728, 741 (1982).

Therefore, even if this Court were to determine that the issuance of the FTC Release is not "final agency action" within the meaning of the APA, sovereign immunity does not bar Trudeau's claim for non-monetary relief based on the FTC's false and misleading Release and other conduct intended punish him for publicly criticizing the FTC.

The FTC ignores Section 702's waiver of sovereign immunity as to non-monetary claims. Instead, in a footnote, the FTC turns to Section 701(a)(2), which provides that judicial review is not available where "agency action is committed to agency discretion by law." (FTC Mem. at 19

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[5] The "clarity and force of the legislative history" of the 1976 amendment to Section 702 and the breadth of the waiver of sovereign immunity contained in Section 702 led the *Schnapper* court so far as to conclude that the revised Section 702 had replaced *Larson* as the authority for determining questions of "the amenability of a federal officer to a suit for injunctive relief. . ." 667 F.2d at 108.

n. 9, citing 5 U.S.C. § 701(a)(2).) But the Supreme Court has held that "committed to agency discretion by law" is a "very narrow exception . . . . applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). The FTC has made no attempt to show that 15 U.S.C. § 46(f) is such a statute or that there is no law to apply in this case. Indeed, the foregoing discussion shows that there is ample law to be applied, including but not limited to the First Amendment of the Constitution.

Moreover, "even where agency action is 'committed to agency discretion by law,' review is still available to determine if the Constitution has been violated." *Padula v. Webster,* 822 F.2d 97, 101 (D.C. Cir. 1987) (citing *Doe v. Casey*, 796 F.2d 1508, 1517-18 & n. 33 (D.C. Cir. 1986); *Overton Park,* 401 U.S. at 413-14; *WWHT, Inc. v. FCC,* 656 F.2d 807, 815 n. 15 (D.C. Cir. 1981)).

Therefore, this Court clearly has jurisdiction to determine whether the FTC has violated the First Amendment by issuing and exploiting a false and misleading press release, and engaging in other conduct to punish Trudeau for exercising his First Amendment rights. Dismissing this case for lack of jurisdiction would set a dangerous precedent and eliminate an important "check and balance" on the power of the Executive Branch to impose ad hoc sanctions through false public postings.

II. TRUDEAU'S COMPLAINT STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

The FTC's motion fares no better under Rule 12(b)(6) than it does under Rule 12(b)(1). Dismissal under Rule 12(b)(6) is "inappropriate unless the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Browning v. Clinton,* 292 F.3d 235, 242 (D.C. Cir. 2002). A court is to "accept the plaintiff's factual allegations as true and construe the

complaint 'liberally,' granting the plaintiff the benefit of all inferences that can be derived from the facts alleged." *Id.* "At the Rule 12(b)(6) stage, [a court does] not assess the truth of what is asserted or determine whether a plaintiff has any evidence to back up what is in the complaint." *Id.*; *accord Major v. Plumbers Local Union No. 5 of the United Assoc. of Journeymen et al.*, Civ. No. 03-0009 (JDB), 2005 WL 1118393 at *2 (D.D.C. March 29, 2005).

The FTC acknowledges that the Complaint alleges that the FTC Release misrepresents the nature of the stipulated order and that the FTC "facilitated or orchestrated the use by the media of those misrepresentations." (FTC Mem. at 20.) And the FTC further acknowledges that the Complaint alleges that the FTC's conduct exceeds its authority under 15 U.S.C. § 46(f) and violates the First Amendment. (*Id.*) The FTC does not argue that those allegations are insufficient to support a claim that would entitle Trudeau to relief. Rather, the FTC: (1) asks the Court to make the factual determination that the Release is not misleading to the public; and (2) suggests that, even if the Release is false and misleading, the Court should dismiss this action for policy reasons. Neither argument has merit.

A. The Court Cannot Make Fact Findings On A Rule 12(b)(6) Motion.

The Court cannot properly determine on Rule 12(b)(6) motion whether the Release is false and misleading. Indeed, the allegations of the Complaint, and the FTC Release itself, which is attached to the Complaint, are more than sufficient to support an inference that the Release is misleading. As shown below, the Complaint demonstrates that the FTC Release is misleading in at least two primary respects. First, the headline of the Release falsely states that Trudeau has been banned from infomercials. (Compl. ¶ 19.) Second, the Release falsely represents that the court banned Trudeau from infomercials to "shut down an infomercial empire that has misled American consumers for years" and to send a message to "other habitual false

advertisers[,]" implying, falsely, that the court found Trudeau to have engaged in false advertising and to be a "habitual false advertiser," and consequently imposed a "fine" of $2 million. (*Id.* ¶¶ 20, 21.)

1. The Statement That Trudeau Is "Banned From Infomercials" is Indisputably False.

The FTC implicitly acknowledges that the Release's headline "Kevin Trudeau Banned From Infomercials" is false. (FTC Mem. at 21.) The FTC further acknowledges that Trudeau has not, in fact, been banned from all infomercials. (*Id.*) But the FTC argues that the false headline is cured by statements in the text of the Release stating that there is an exception for infomercials for books, newsletters and information publications. (*Id.*) But this Court cannot make a determination on a Rule 12(b)(6) motion that the statements in the text dispel the false impression conveyed by the headline, particularly where it is common sense that many readers will not look past the headline.

The FTC itself has recognized that a false statement in one part of a representation is not necessarily cured by an accurate statement elsewhere in the representation. *See, e.g.*, FTC Publication "Dot Com Disclosures -- Information About Online Advertising" ("If a disclosure provides information that contradicts a claim, the disclosure will not be sufficient to prevent the ad from being deceptive.") At minimum, Trudeau is entitled to present evidence to the Court that the consuming public and persons in the relevant industry perceive the Release as representing that Trudeau has been removed from the infomercial business.[6]

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[6] As noted in footnote 1, *supra*, in the context of his application for a preliminary injunction, Trudeau has provided substantial evidence, even before any discovery has been taken in this case, that the Release has misled the media and persons in the infomercial and direct-marketing industry. That evidence should confirm to the Court that it cannot determine by merely examining the Release whether it is misleading.

2. The Implication That Trudeau Has Been Found to Be a "Habitual False Advertiser" is False.

As alleged in the Complaint, the statement that Trudeau is a "habitual false advertiser" appears over and over again in the news reports that were spawned by the FTC Release. (Compl. ¶¶ 28, 29, 30, 31, 33, 34, 35.)[7] Though the Release may not state in so many words that the court *found* Trudeau to be an "habitual false advertiser," the reaction of the media strongly suggests that the net impression of the Release is just that. The FTC knows well that the fact that a presentation may not literally be false does not save it from being deceptive where the net impression is potentially misleading. In *Thompson Medical Co. v. FTC*, 791 F.2d 189, 197 (D.C. Cir. 1986), the court stated:

> The FTC's summation of the law in this area is accurate and succinct. "Advertising representations will be condemned if they are likely to deceive; actual deception need not be shown. The tendency of a particular advertisement to deceive is determined by the net impression it is likely to make upon the viewing public. Consequently, literally true statements may nonetheless be found deceptive, and advertisements reasonably capable of being interpreted in a misleading way are unlawful even though other, non-misleading interpretations may also be possible."

The FTC's position regarding the need to determine the overall impression of an advertisement is consistent with the Supreme Court's statement over a half-century ago:

> Advertisements as a whole may be completely misleading although every sentence separately considered is literally true. This may be because things are omitted that should be said, or because advertisements are composed or purposefully printed in such a way as to mislead.

Donaldson v. Read Magazine, Inc., 333 U.S. 178, 188 (1948).[8]

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[7] The net impression that there was a judicial finding that Trudeau engaged in false advertising is corroborated by the numerous occasions on which news agencies referred to the $2 million settlement amount as a "fine." (Mem. In Supp. of Prel. Inj. at 8-9 and Group Ex. C.)

[8] We recognize that the FTC Act and the FTC's regulations and standards do not, as a legal matter, apply to public statements by the FTC. As a factual and logical matter, however, there is (con'td.)

The net impression here, corroborated even by pre-discovery facts, is that there was a finding of wrongdoing upon which the court imposed a ban on infomercials and a monetary penalty. That implication is false.

The FTC nevertheless argues that any false impression is cured by the disclaimer that there was no "admission" of wrongdoing and by the fact that the Release in several instances uses the word "settlement." (FTC Mem. at 21-22.) But the fact that there has been no *admission* of wrongdoing has nothing to do with whether there has been a *finding* of wrongdoing. Nor can it be assumed without evidence that the general public understands that a "settlement" is not an adjudication or that it is not based on findings of wrongdoing. In fact, it is hardly unheard of, for example, for settlements to be reached after there has been a finding of liability but before there has been a determination of damages, or after a judgment at trial but before an appeal or before any proceedings to enforce the judgment. It is for the factfinder to determine whether the Release's false implications are mitigated by its ambiguity.

B. There Is No Policy Justification For Dismissing This Case.

Finally, the FTC seems to argue that even if the Release is misleading, it nevertheless conforms to the requirements of 15 U.S.C. § 46(f) that the information released be "in the public interest" and "in such form and manner as may be best adapted for public information and use[,]" and therefore that allowing this case to go forward will interfere with the purposes of Section 46(f). (FTC Mem. at 22-24.) That is nonsense of course. The public has no interest in false information. "Both consumers and society have a strong interest 'in the free flow of commercial information'…. Yet, '[f]alse, deceptive, or misleading advertising' does not serve, and, in fact,

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no reason that the FTC's standards should be any less useful or relevant in determining whether agency publicity is misleading.

disserves, that interest." *F.T.C. v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 43 (D.C. Cir. 1985) ((citations omitted).[9]

The FTC cites no authority for the proposition that a court may dismiss an otherwise cognizable claim under the First Amendment because it may somehow "harm" the FTC. Instead, the FTC consumes the last two pages of its brief discussing the public's interest in disclosure of information about FTC proceedings. (FTC Mem. at 23-24.) That is a non sequitur. Trudeau does not challenge the FTC's authority to issue accurate press releases -- only its authority to knowingly issue a false and misleading press release and otherwise retaliate against Trudeau for exercising his First Amendment rights.

The FTC also refers to cases discussing the need to protect the public from false advertising. (*Id.*) But the FTC Release has nothing to do with warning the public about a false advertisement or dangerous product.[10] The product that was at issue in the FTC's lawsuit is no longer being sold by Trudeau or any of his companies. The issue is that the Release misleadingly describes the settlement of the lawsuit in a manner intended to punish Trudeau in ways that are inconsistent with the settlement agreement.

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[9] The FTC cites the district court's dicta in *Bristol-Myers Co. v. FTC,* 284 F. Supp. 745, 748 (D.D.C. 1968), that "[a] press release is nothing but a statement. The courts may no more enjoin Government departments from issuing statements than they may enjoin a public official from making a speech[.]" (FTC Mem. at 24.) But, in affirming the district court's judgment in part, the D.C. Circuit rejected that dicta: "While we affirm the holding of the court below, we regret its broad dictum suggesting that an agency could never be enjoined from publicizing its activities." *Bristol-Myers Co. v. FTC,* 424 F.2d 935, 940 n. 21 (D.C. Cir. 1970) (citing *B.C. Morton Int'l Corp. v. FDIC,* 305 F.2d at 692).

[10] Consequently, the FTC's references to *Hoxsey Cancer Clinic v. Folsom*, 155 F. Supp. 376, 377-78 (D.D.C. 1957) and *United States v. Rutherford,* 442 U.S. 544, 556 (1979) (FTC Mem. at 23, 24), are not apropos. There is no issue before this Court nor in the Release regarding anyone that has foregone conventional therapies in favor of any products now being marketed by Trudeau. Indeed, Trudeau no longer is marketing any products other than books and other informational publications.

The FTC purports to worry that if Trudeau can enlist the Court to review his Complaint "based on the insubstantial allegations he has presented, . . . it would open the courts to countless lawsuits." (FTC Mem. at 24.) But the FTC has not shown that the Complaint's allegations are insubstantial.[11] It surely should be a rare occurrence where, as here, a press release is demonstrably false, and where the government has used a press release to punish an individual for criticizing the government. Limiting review to this kind of case clearly would prevent any run on the federal courts. The fear of opening the floodgates of litigation surely cannot be a justification for giving executive agencies carte blanche to unilaterally mislead the public and to deprive individuals of their constitutional rights without any limited check or balance by the judiciary.

[11] In arguing that the Complaint's allegations are "insubstantial," the FTC refers to a statement by the court in *San Luis Obispo Mothers for Peace v. NRC,* 751 F.2d 1287, 1327 (D.C. Cir. 1984), in declining to supplement an administrative record based on undocumented allegations of bad faith, that "[t]he ease with which charges of 'bad faith' could be leveled, combined with the inordinate burden . . . such claims would entail for courts, persuade us to decline" to supplement the record. (FTC Mem. at 24.) The issue there was whether there was evidence sufficient to re-open the record of an administrative proceeding. The case had nothing to do with whether the allegations in a complaint were sufficient to state a claim.

CONCLUSION

For the foregoing reasons, the FTC's Motion to Dismiss should be denied.

Respectfully submitted,

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By: _____
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