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

FEDERAL TRADE COMMISSION, Plaintiff, v. KEVIN TRUDEAU, Defendant.	Case No. 03-C-3904 Hon. Robert W. Gettleman

REPLY IN SUPPORT OF FEDERAL TRADE COMMISSION'S MOTION FOR APPROVAL OF PARTIAL VICTIM REDRESS PLAN AND RESPONSE TO OBJECTIONS THERETO

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I. INTRODUCTION

Unsurprisingly, Trudeau argues for a redress approach that would take millions out of the pockets of his victims and into his own. Specifically, Trudeau claims an "opt-in" process similar to the one the Court rejected in 2012[1] is necessary to prevent supposed "perfectly happy" customers with *Weight Loss Cures* from receiving refunds. However, both this Court and the Seventh Circuit have already rejected Trudeau's purported "satisfied customer" defense. Moreover, opt-in response rates establish what Trudeau knows, but does not say: opt-in processes are destined (if not designed) to fail. As explained below, in this context, an opt-in approach would benefit only a tiny fraction of Trudeau's victims (3%-5%). This would leave roughly 780,000 victims without redress, and award Trudeau more than $6 million of their money. Neither law nor equity can countenance such an unconscionable result.

Trudeau's two other contentions are baseless. First, he protests the cost of the FTC's plan. However, Trudeau's opt-in approach seems comparatively cheap only because it would compensate so few victims. Measured on a cost-per-compensated-consumer basis, the FTC's plan is significantly less expensive than Trudeau's 2012 opt-in proposal. Second, Trudeau suggests the redress plan must somehow cover his taxes. However, there is no legal basis to use victims' money to pay Trudeau's still-unknown tax liability.

Additionally, the law firms that aggressively fought FTC discovery requests on behalf of Trudeau's companies and associates now (two years later) ask the Court to use victims' money to pay their fees. However, the law they cite is wildly inapposite, and the notion that their actions "benefited" the FTC's effort is revisionist history (indeed, one lawyer's sworn claim that he "made every effort to cooperate" is particularly disturbing).[2] In short, the law firms' request should be denied, and Trudeau's objections are baseless.

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[1] *See* DE492 (Aug. 17, 2012).

[2] DE912-2 (Sept. 4, 2015), D. Donnellon Dec. ¶ 11. Through the law firms' filing, Donnellon also asks the Court to reimburse him for, among other things, time he spent "creating issues for [a] potential recusal motion." *Id.* at 77 (Feb. 19, 2013 "DJD" time entry).

II. TRUDEAU'S OBJECTIONS TO THE FTC'S PLAN ARE BASELESS, AND HIS ALTERNATIVE IS UNCONSCIONABLE.

A. Trudeau Cannot Relitigate the So-Called "Satisfied Customer" Defense.

Trudeau's primary objection to the FTC's plan is that, allegedly, the FTC would compensate satisfied customers who "were perfectly happy with Trudeau's book." Opp. at 2. However, because this Court and the Seventh Circuit have already rejected the "satisfied customer" defense, the law of the case doctrine precludes Trudeau's objection.

In the Seventh Circuit, "[t]he law of the case doctrine generally provides that once an appellate court either expressly or by necessary implication decides an issue, the decision will be binding upon all subsequent proceedings in the same case." *Zamora-Mallari v. Mukasey*, 514 F.3d 679, 695 (7th Cir. 2008) (quotation omitted); *see also Kathrein v. City of Evanston,* 752 F.3d 680, 685 (7th Cir. 2014) ("According to the law of the case doctrine, 'a ruling made in an earlier phase of a litigation controls the later phases unless a good reason is shown to depart from it.'") (quoting *Tice v. American Airlines,* 373 F.3d 851, 853 (7th Cir. 2004)).

The procedural history establishing the law of the case begins with Trudeau's 2009 appeal. Specifically, the Seventh Circuit rejected the bulk of Trudeau's appeal, but asked the Court to further specify the basis for the $37.6 million Order To Pay. *See FTC v. Trudeau*, 579 F.3d 754 (7th Cir. 2009). The Seventh Circuit explained that consumer loss could be a valid basis for the $37.6 million figure,[3] but also noted that Trudeau could attack the number by pointing to evidence (if it existed) "that some consumers were wholly satisfied with their purchase."[4] *See Trudeau*, 579 F.3d at 773. Significantly, the court made clear that "[t]his should

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[3] *See Trudeau*, 579 F.3d at 771 ("Consumer loss is a common measure for civil sanctions in contempt proceedings and direct FTC actions. Indeed, some courts, including ours, have held that in certain cases consumer loss is a more appropriate measure than ill-gotten gains.") (citations omitted).

[4] As the Seventh Circuit explained, placing the burden on the FTC would "thwart and frustrate the public purposes of FTC action," and "[t]o the extent the large number of consumers affected by the defendants' deceptive trade practices creates a risk of uncertainty, the defendants must bear that risk." *Trudeau*, 579 F.3d at 773 n.15 (citations omitted).

allay Trudeau's concern that he should not have to pay for purchasers who 'spurn the opportunity' for a refund." *Id.* at n.15. Furthermore, the Seventh Circuit rejected Trudeau's position "that the FTC should bear the burden of proving that customers were dissatisfied with their purchases." *Id.* (citations omitted). Thus, to support some sort of "satisfied customer" attack on $37.6 million figure, Trudeau had to prove that there were, in fact, satisfied customers.

Following the remand and further litigation regarding the amount of the Order To Pay, this Court explained that Trudeau had already "eschewed the opportunity to present evidence of so-called consumer satisfaction," and the Court would not "open the record to give him a second (or third) bite at the apple."[5] *FTC v. Trudeau*, 708 F. Supp.2d 711, 717 (N.D. Ill. 2010). When Trudeau appealed again, he did not dispute that he failed to present evidence of "so-called consumer satisfaction," or that he was not entitled to another chance to do so[6] (nor could Trudeau dispute these facts). Instead, Trudeau attacked the $37.6 million figure by attempting (again) to shift the burden to the FTC to prove consumer dissatisfiaction.[7] The Seventh Circuit rejected Trudeau's arguments completely. *See FTC v. Trudeau*, 662 F.3d 947, 951 (7th Cir.

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[5] The Court also explained its calculation: the $37.6 million figure "includes only the cost of the book purchased through the '800' telephone number displayed during the deceptive infomercial (including infomercials that were broadcast over the internet), along with shipping and handling costs, less returns to consumers." *Trudeau*, 708 F. Supp.2d at 717. Put differently, the $37.6 million is the loss suffered by consumers who purchased the book "through the '800' telephone number displayed during the deceptive infomercial"—which is precisely the group of consumers whom the FTC's plan seeks to redress. Indeed, this is only a subset of the consumers Trudeau injured. As the Court also correctly explained, $37.6 million is a "conservative" estimate of the total consumer loss Trudeau caused because it excludes consumers who purchased the book through retail stores or online, but "were influenced to buy the book by the deceptive infomercials." *Id.*; *see also FTC v. Trudeau*, 662 F.3d 947, 951 (7th Cir. 2011) ("In fact, it is worth emphasizing that the district court showed restraint in calculating the remedial sanction based only on 800–number sales.").

[6] *See* Br. of Appellant Kevin Trudeau, *FTC v. Trudeau*, No. 10-2418 (7th Cir. July 23, 2010) at 15-28; Reply Br., *FTC v. Trudeau*, No. 10-2418 (7th Cir. Sept.13, 2010) at 10-12.

[7] Brief of Defendant-Appellant (7th Cir. July 23, 2010) at 20 (complaining "that the [FTC] is not required to identify any complaining consumers" and arguing that, as a result, consumer loss should not be the measure of redress).

2011) ("[T]he district court's careful approach has left us with a reliable and conservative figure—$37.6 million—that is comfortably within its discretion.").

Accordingly, this Court decided—and the Seventh Circuit affirmed—that Trudeau failed to prove there are any "perfectly happy" customers. As such, the law of the case doctrine precludes any argument that depends on this rejected hypothesis, including Trudeau's current claim that an opt-in process is necessary to avoid compensating such nonexistent people.[8]

B. Trudeau's Opt-In Alternative Would Produce Grossly Inequitable Results.

1. Trudeau's Opt-In Alternative Would Violate the Equitable Obligation To Provide Full Remedial Relief.

The Court's contempt power includes the ability—and the duty—to provide "full remedial relief," *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949), "to compensate the complainant for losses sustained," *United States v. United Mine Workers of Am.*, 330 U.S. 258, 303-04 (1947) (emphasis added). As discussed above, those losses are $37.6 million. Indeed, once the loss is established, the Court has no discretion not to provide for full compensatory sanctions (or, at minimum, the maximum redress possible under the circumstances). *See, e.g.*, *Thompson v. Cleland*, 782 F.2d 719, 722 (7th Cir. 1986) ("If Ms. Thompson was able to establish that the defendant violated the court's order . . . the award of compensatory damages for past violations would not be subject to the discretion of the court."); *Vuitton et Fils S. A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979).

Significantly, an opt-in remedy will not benefit any meaningful number of Trudeau's victims. As the Seventh Circuit recently explained, opt-in procedures are often designed to fail. *See Pearson v. NBTY, Inc.*, 772 F.3d 778, 783 (7th Cir. 2014) ("It's hard to resist the inference that [the Defendant] was trying to minimize the number of claims that class members would file, in order to minimize the cost of the settlement to it."). Among the many problems with using an

[8] As noted above, a court may depart from prior rulings if "unusual circumstances" exist. *Kathrein*, 752 F.3d at 685. There are no "unusual circumstances" that justify reconsidering this issue, nor has Trudeau argued there are.

opt-in approach here: (1) victims must understand the process (*i.e.* not be concerned that opting-in will have some negative ramification); (2) remember the product (in this case, purchased seven years ago); (3) remember the infomercial (seen seven years ago); (4) analyze for themselves, from memory, the infomercial's claims relative to the product delivered, or otherwise determine somehow whether they were "perfectly happy" with the book seven years ago;[9] and (5) take an unnecessary affirmative act (submitting a claim form). *See* PXA, R. Simmons Dec. ¶ 11; PXB, C. Lawson Dec. ¶ 3 (Sept. 23, 2015).

Problems like these explain why, in the class-action context, opt-in mechanisms have response rates that are "typically 10% or less," *Walter v. Hughes Communications, Inc.*, No. 09-2136, 2011 WL 2650711, *13 (N.D. Cal. July 6, 2011), and often much less, *see, e.g.*, *In re Compact Disc Antitrust Litig.*, 370 F. Supp.2d 320, 321 (D. Me. 2005) (2% submission rate); *Buchet v. ITT Consumer Fin. Corp.*, 845 F. Supp. 684, 695 (D. Minn. 1994), *as amended* 858 F. Supp. 944 (rejecting settlement where similar settlement had only a 3% redemption rate); *Strong v. Bellsouth Telecomm., Inc.*, 173 F.R.D. 167, 169 (W.D. La. 1997) (4.3% rate); *Union Life Fid. Ins. Co. v. McCurdy*, 781 So.2d 186, 188 (Ala. 2000) (0.1% rate). Indeed, in a harshly-worded opinion, the Seventh Circuit reversed the approval of a settlement that would have compensated "only one-fourth of one percent" of consumer victims. *See Pearson*, 772 F.3d at 787; *see also id.* at 782 ("the percentage of [consumer victims] who file claims is often quite low. . . . The parties may not have expected only 6.4 claims per each 1000 class members who received postcard notice to file claims. But they don't claim to have been surprised by the low rate."). To provide a final example, one court in this District approved an opt-in procedure similar to the one Trudeau originally proposed in 2012 (and managed by Rust Consulting, whom Trudeau

[9] This would not only ignore the law of the case, it would inappropriately force victims to decide the extent of Trudeau's liability themselves. This is not how our legal system works; courts make these decisions. In this case, two courts—this one and the Seventh Circuit—have already determined that the claims were deceptive, and that everyone who purchased the book through Trudeau's infomercial was deceived.

proposed to use, *see* DE492 (Aug. 17, 2012)). Rust Consulting mailed 1,279,514 postcards asking victims to make claims, but received only 3,335 claims—a .26% response rate. *See* Mem. Op., *Kaufman v. Am. Expr. Travel Related Servs.*, No. 07-cv-1707 (N.D. Ill. June 25, 2012) (Gottschall, J.) at 2-3. The poor results forced the court to appoint an independent expert in notice procedures to help redo the notice. *See id.* at 8.

With respect to this case, the FTC's proposed redress administrator estimates that Trudeau's opt-in alternative would produce a 2.84%-3.59% response rate, PXA ¶ 12; and the FTC's Redress Program Manager estimates a 3% to 5% response rate, PXB ¶ 4.[10] Accordingly, Trudeau's opt-in approach would come nowhere near providing the legally-required "full remedial relief" to as many victims as possible.

2. Trudeau's Opt-In Alternative Is Inequitable Because It Would Return Millions Needed To Redress Victims To Trudeau.

Contempt actions are "in equity," *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 451 (1911), and governed by "equitable principles," *Spallone v. United States*, 493 U.S. 265, 274 (1990). Adopting Trudeau's opt-in ruse would produce a grossly inequitable result—namely, Trudeau would recover millions while hundreds of thousands of victims would receive nothing. Optimistically assuming that Trudeau's opt-in plan would produce a 5% response rate, only 41,067 victims would receive compensation, leaving 780,264 victims without redress[11]—while approximately $6 million would "revert" to Trudeau.[12] Put differently, under Trudeau's plan, he

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[10] Conspicuously, in 2012, Trudeau did not estimate his opt-in plan's response rate, *see* DE477 (June 11, 2012), DE477-1 (June 11, 2012), nor does he estimate it now. For purposes of various analyses included herein, we give Trudeau the benefit of the doubt and assume a generous 5% response rate—the high end of the ranges that the FTC's Redress Program Coordinator and proposed Redress Administrator have provided. *See* PXA ¶ 12; PXB ¶ 4.

[11] There are 821,331 victims. *See* Opening Br. (July 9, 2015) (DE 892-1) at 5 n.24.

[12] Not including interest, each victim is entitled to approximately $45.80 ($37,616,161 judgment divided by 821,331 victims = $45.80). As explained above, Trudeau's opt-in plan would redress (at most) 5% of the 821,331 victims, or 41,067. Thus, Trudeau's opt-in plan contemplates $1,880,868.60 in redress (41,067 x $45.80). Additionally, Trudeau estimated that his plan would entail $437,799 in administrative expenses. *See* DE477 (June 11, 2012) at 8 n.4. Accordingly, the opt-in plan's total cost would be $2,318,667.60 ($1,880,860.60 + $437,799).

would keep $6 million that he stole from hundreds of thousands of consumers in the course of violating this Court's Order. Equity prohibits such an offensive result.[13]

C. The FTC's Proposal Is Reasonable and Cost-Effective.

Trudeau objects to the FTC's proposal as "wildly exorbitant." Opp. at 2. However, Trudeau's position is misleading because he compares the costs of the FTC's effective approach with his own, which is designed to redress only a small fraction of the number of consumers the FTC would reach. Specifically, Trudeau measures "cost" on a "per customer" basis, *see id.*, which makes the opt-in alternative appear inexpensive due to its extremely low response rate: Trudeau would spend $.53 "per consumer," *i.e.*, 821,331 victims divided by $437,779 in total costs.[14] Of course, the right measure is not the cost "per consumer," but the cost per redressed consumer.[15] Measured correctly, on a cost-per-redressed-consumer basis, Trudeau's proposal would cost $10.66 per redressed consumer, whereas the FTC's plan would $4.52.[16] Indeed, both

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The Receiver has collected more than $8,300,000 against Trudeau's obligation. *See* DE887 (June 8, 2015) ($6,391,505.65 estate balance, not including $2 million in escrow proceeds). If the Court adopted Trudeau's opt-in approach, around $6 million would "revert" to Trudeau ($8,300,000 - $2,318,667.60).

[13] Trudeau asserts that he "is entitled to a reversion of funds not reimbursed to consumers," Opp. at 2, but he wrongly implies that he might receive a "reversion" before he pays what the Court ordered. Specifically, the Order To Pay provides, first, that Trudeau must "pay forthwith to plaintiff the sum of $37,616,161." DE372 (June 2, 2010) at 14. Second, the FTC must "use its best efforts to use this fund [of $37,616,161] to reimburse all consumers who bought the *Weight Loss Cures* book." *Id.* Third, "after such reimbursement to consumers," any leftover funds revert to Trudeau. *See id.* Trudeau has not yet satisfied the first requirement.

[14] *See* DE477 (June 11, 2012) at 8 n.4. In his opposition to this motion, Trudeau claims a "cost of $0.33 per customer," Opp. at 2, but he misquotes his earlier filing, *see* DE477 (June 11, 2012) at 8 n.4 (asserting a $0.33 cost to notify each victim, but noting that "[t]he total cost" per victim, including remediation, would be $0.53 per victim).

[15] To put this in perspective, if one used nearly all of the $8.3 million available to redress one victim his $46.80 loss, the cost "per customer" would seem like an amazing bargain—less than $0.10 "per customer" (821,331 divided by $8.3 million)—although the "cost per redressed customer" would be a $8.3 million.

[16] If Trudeau's opt-in redress plan compensates approximately (at most) 5% of 821,331 victims (41,067 victims) and costs $437,799 to implement, *see* DE477 (June 11, 2012) at 8 n.4, then Trudeau's plan will cost $10.66 per redressed victim ($437,999 ÷ 41,067), *see* PXB ¶7. If the FTC's distribution plan compensates approximately 64% of victims (525,652 victims) and costs $2,371,000 to implement, then the agency's plan will cost approximately $4.52 per

the FTC's proposed redress administrator and its Redress Program Manager conclude that the costs of the FTC's plan are reasonable.[17]

D. Victims Have No Duty To Pay Trudeau's Potential Tax Liabilities.

Finally, Trudeau claims that the FTC "must set forth a clear plan for dealing with Trudeau's tax liabilities" before victims begin receiving redress. Opp. at 2. However, the Court appointed the Receiver to collect money for Trudeau's victims, not for Trudeau. Victims' money should not go to pay Trudeau's taxes, or his legal bills, or to satisfy other obligations he incurred as part of his massive resistance to this Court's Order. *See, e.g., FTC v. Think Achievement*, 312 F.3d 259, 262 (7th Cir. 2002) (holding that "once the court determined that all the frozen assets were either a product of fraud or necessary to compensate the victims of the fraud for their losses, [the contemnor] had no right to use any part of the frozen money for his own purposes[.]") (emphasis added).

III. THE LAW FIRMS' FEE CLAIM IS PROCEDURALLY DEFECTIVE AND SUBSTANTIVELY MERITLESS.

In addition to Trudeau's personal counsel, two other law firms ("the Law Firms") aggressively resisted FTC subpoenas on Trudeau's behalf: Faruki, Ireland & Cox ("Faruki") and Hogan Marren Babbo & Rose ("Hogan"). The Law Firms represented Trudeau's wife (Nataliya Babenko), his "right hand man"[18] (Neil Sant), and three businesses Trudeau controlled (Website Solutions USA ("WSU"), GIN USA ("GIN"), and KT Radio Network ("KTRN")). The Law Firms now seek to recover more than $200,000 in alleged fees and costs, supposedly because their stonewalling somehow "benefited" the Receivership Estate and the FTC, or because Rule

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redressed victim ($2,371,000 ÷ 525,652). *See id.*; *see also* PXA ¶¶ 26-27 (similar calculation using slightly different assumptions and estimating Trudeau's likely cost-per-consumer to be $12.41). Another reasonable metric is cost-per-check-issued. *See id.* ¶ 28. By this measure, Trudeau's opt-in alternative is vastly more expensive, because the FTC's plan would distribute nearly fifteen times more checks than Trudeau's plan. *See id.*

[17] *See* PXA ¶ 20; PXB ¶ 6; *see also* Ex. C, Opening Br., DE892-2 (July 9, 2015), Simmons Dec. ¶¶ 39-40.

[18] *See* DE729 (July 26, 2013) at 1; DE713 (July 15, 2013) at 9.

45 purportedly allows their claim. However, the Law Firms' fee claim is both procedurally and substantively defective. Procedurally, the Court already denied fee requests for the same work in 2013. Substantively, the Law Firms' work did not "benefit" the Receivership Estate or the FTC, and the Law Firms badly misconstrue Rule 45's limited cost-shifting provision.[19]

A. Procedural History Relevant to the Law Firms' Fee Claim[20]

1. WSU, KTRN and GIN USA

As the Court correctly found, Trudeau falsely claimed that his wife or associates controlled various asset protection vehicles including WSU, KTRN and GIN USA. DE713 (July 15, 2013) at 13-15.[21] In 2012, when the FTC attempted to take discovery from three financial

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[19] Several individuals who apparently lost money through Trudeau's Global Information Network ("GIN") pyramid scheme have also filed objections. *See* DE911 (Sept. 3, 2015); DE910 (Sept. 1, 2015); DE907 (Aug. 17, 2015). Although Trudeau undoubtedly injured millions of consumers over the past two decades, this proceeding concerns only the *Weight Loss Cures* victims. Whatever claims GIN members may have against Trudeau are secondary to the FTC's fully-litigated claim on behalf of the *Weight Loss Cures* victims. Indeed, the Court already denied various GIN members' motion to intervene in this action, and allowing GIN members to object to *Weight Loss Cures* redress effectively would undo the Court's ruling.

[20] The Law Firms severely mischaracterize the record. For instance, citing Donnellon's sworn declaration, the Law Firms assert that expenses "were incurred as a result of the FTC's conduct—*e.g.* requiring travel to New York for a deposition that the FTC suddenly cancelled." Obj. at 6 (citing Donnellon Dec. ¶ 20) (emphasis added). In reality, Trudeau cancelled Babenko's April 23 deposition following his April 22 sham bankruptcy. *See* DE638 (Apr. 23, 2013). On April 22, 2013, Trudeau's counsel emailed the FTC about Trudeau's bankruptcy (copying Donnellon), and informed the FTC that all depositions "should be cancelled." PXC:1, J. Cohen Dec. (Sept. 24, 2015). Donnellon thanked Trudeau's counsel for the information and announced he would return from New York. *See* PXC:2. Babenko's deposition occurred only after another failure to appear, *see* PXC:3, and extensive further litigation, *see infra* at 12. Remarkably, Donnellon's time records reveal that he travelled to New York knowing that the April 23 deposition would not occur. Specifically, on April 19, 2013, Donnellon communicated with Trudeau's counsel "regarding new strategic development and need to travel for depositions before filings could stay discovery." Donnellon Dec., Att. A (Apr. 19 "DLD" entry) (emphasis added). The same day, Donnellon spoke with his co-counsel regarding "the potential chapter 7 bankruptcy filing of K. Trudeau." *Id.* (Apr. 19 "KDL" entry). On April 20, Donnellon travelled to New York. *Id.* (Apr. 20 "DLD" entry). While there, Donnellon never met with Babenko and did no work related to her deposition other than talking with Trudeau on the phone. *See id.* ("DLD" entries Apr. 20-24). On April 22, Trudeau filed his sham bankruptcy. *See* DE638 (Apr. 23, 2013). On April 24, Donnellon returned from New York. Donnellon Dec., Att. A (Apr. 24 "DLD" entry). The notion that the FTC caused Donnellon to travel to New York unnecessarily is false—Donnellon knew the deposition would not occur, but chose to travel anyway.

[21] DE713 is the FTC's Proposed Findings of Fact and Conclusions of Law. The Court

institutions seeking records related to WSU, KTRN, and GIN USA, these Trudeau-controlled entities litigated unsuccessful motions to quash in three different forums. *See* DE475 (May 24, 2012); *FTC v. Trudeau*, No. 1:12-mc-022, 2012 WL6100472 (S.D. Ohio Dec. 7, 2012), *FTC v. GIN USA*, No. 5:12MC35, 2012 WL 5463829 (N.D. Ohio Nov. 8, 2012).

In January 2013, the FTC subpoenaed the entities directly, seeking corporate testimony and financial records. PXC:4. In response, they asserted myriad boilerplate objections and again moved to quash. Their motions asserted that if they were "forced to collect any information for the benefit of the FTC, then this Court should force the FTC to reimburse [them]" for fees and costs incurred. *See* DE572 (Feb. 28, 2013) at 14; DE573 (Feb. 28, 2013) at 14; DE574 at 12-13. On March 7, 2013, the Court overruled their objections and ordered WSU, KTRN, and GIN USA to comply "forthwith." *See* DE578; DE580.

They did not comply "forthwith." Although they produced some documents two weeks later, they refused to produce a corporate designee. On April 1, the FTC moved to hold the entities in contempt. DE634. Following several additional stalling tactics (including a dubious proposal to conduct the depositions illegally in Switzerland, *see* DE604-1 (Apr. 6, 2013) and the filing of Trudeau's sham bankruptcy, DE638 (Apr. 23, 2013)), Trudeau finally appeared as his entities' designee on May 18. PXC:5. Notably, six weeks earlier, the FTC had served the entities, Babenko, and Sant with subpoenas seeking information related to assets and Trudeau's control over the entities. PXC:6. Trudeau's entities began a "rolling" production that began on May 2 and concluded on May 20, *see* PXC:7—after Trudeau had already appeared as his entities' designee. Thus, far from aiding the FTC's effort, the Trudeau-controlled entities implemented a litigation strategy that led to months of delay.

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adopted those facts cited herein. *See* DE729 (July 26, 2013) at 1.

2. Babenko

Trudeau married Ukrainian national Nataliya Babenko on June 26, 2008, DE713 at 3, less than six weeks before the Court first ordered Trudeau to compensate his victims, *see* DE147 (Aug. 7, 2008). Despite having no discernable business experience, Babenko served as the nominee officer, director, or owner of eight different entities Trudeau controlled.[22] DE713 at 8. In 2012, when the Order To Pay contempt proceedings began, Babenko executed a power of attorney appointing Marc Lane as her agent, and authorizing him to act on her behalf with respect to all "business operations," and "financial institution transactions." *Id.*

Babenko's importance was obvious and, in late 2012, the FTC sought her deposition. PXC:8. Over the next four months, the FTC proposed fourteen dates on which it would take Babenko's deposition, including five specially chosen to accommodate her class schedule. *Id.* Babenko's counsel declined all fourteen dates and—with one exception—Babenko's counsel proposed no alternatives.[23] The exception, discussed *supra* at 10 n.20 was that Babenko's counsel eventually offered April 23, which the FTC immediately accepted. PXC:8. But this was a game: Trudeau filed a sham bankruptcy on April 22, then argued it stayed discovery. *See* DE638 (Apr. 23, 2013). Trudeau's personal counsel notified the FTC that the deposition "should be cancelled" due to the bankruptcy stay and (of course) the Law Firm attorney defending Babenko immediately concurred. *See* PXC:1; *see also supra* at 10 n.20. To depose Babenko at last, the FTC moved the Court to confirm that the stay did not halt discovery, DE626 (Apr. 24, 2013), then litigated Trudeau's emergency appeal of that decision before the Seventh Circuit, *see FTC v. Trudeau*, No. 13-1898 (7th Cir. Apr. 29, 2013) (DE11), then subpoenaed Babenko for May 10, *see* PXC:3 (but she failed to appear), then successfully moved a New York court to order Babenko to appear, *see FTC v. Trudeau*, No. 1:13-mc-116 (S.D.N.Y. May 16, 2013). The

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[22] When ultimately asked how she met Trudeau, Babenko "took the Fifth." DE713 at 3.

[23] Donnellon falsely claims that he "made every effort to cooperate." Donnellon Dec., Att. A. (DE912-2) at ¶ 11.

deposition finally occurred in mid-May, *see* PXC:9, after nearly five months of delay the Law Firms orchestrated.

3. Sant

Neil Sant has known Trudeau since the early 1990s and worked for him from 1996 until 2013. DE713 at 3. In particular, Sant served as a nominee officer for seven companies Trudeau controlled, as well as a bank signatory for WSU and KTRN. When he created GIN's offshore affiliate (GIN FDN), Trudeau instructed Sant that Babenko did not run GIN and that she knew "nothing." *Id.* at 8. Rather than admit this fact, Sant "took the fifth" when asked whether he reported to Trudeau rather than Babenko.[24] *Id.* at 9. But the record is clear that Trudeau trusted Sant with his most important tasks. For instance, in 2008, Sant personally travelled to North Carolina to collect $100,000 worth of gold bars for Trudeau. *Id.* Trudeau referred to Sant as his "right hand man," and he told others that they should "chat with [Sant] as if he were me." *Id.*

Because the FTC had already subpoenaed documents from WSU, KTRN and GIN USA, the agency only subpoenaed documents from Sant that the corporate entities had not produced. PXC:10 at 8. Nevertheless, Sant moved to quash on multiple grounds, including that the "act of production" would incriminate him. *See* DE591 (Mar. 25, 2013) at 4-6. Importantly, Sant also contended that "none of the documents sought by the FTC were created by or for Sant personally." *Id.* at 11. Put another way, Sant argued that he did not possess or control any responsive documents other than documents belonging to the corporate entities the FTC had already subpoenaed.[25] Finally, Sant argued that the FTC should pay any expenses associated with his production. *Id.* at 13.

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[24] In fact, throughout most of his deposition (and all of the critical portions), Sant "took the Fifth." PXC:12.

[25] *See, e.g.*, DE591 at 3 (stating that the subpoena seeks "corporate records from an individual, which are available and have been sought from the . . . corporate entities"); *id.* at 4 (arguing that the requests "should be stayed . . . pending the production pursuant to the motions to compel filed against Website Solutions, GIN USA, and KT Radio already decided by the Court"); *id.* at 8 (claiming that the corporate entities "possess or control the documents sought").

Following a hearing on Sant's motion to quash (and the FTC's related cross-motion to compel), the Court continued both motions. DE606 (Apr. 4, 2013). The FTC issued a new subpoena to Sant in his corporate capacity, PXC:11, and, as the Law Firms note, Sant responded "in his corporate capacity and on behalf of Website Solutions." Obj. at 3. Specifically, WSU (rather than Sant himself) produced documents on Sant's behalf in response to the subpoena WSU received. The Court later denied the original cross-motions concerning Sant himself as moot. *See* DE674 (May 21, 2013). Sant did not challenge this denial. Therefore, Sant never incurred any costs personally responding to his subpoena, nor did he seek relief when the Court (correctly) denied his motion seeking expenses as moot.

B. The Fee Claim Is Procedurally Defective and Substantively Meritless.

1. Law of the Case Precludes the Fee Claim.

Law of the case precludes the fee claim because the Court already addressed this issue during the subpoena litigation. As explained *supra* at 2, "a ruling made in an earlier phase of a litigation controls the later phases unless a good reason is shown to depart from it."[26] *Kathrein*, 752 F.3d at 685 (quotation omitted). The Court already denied Faruki's request for expenses associated with the documents WSU, KTRN, and GIN USA ultimately produced.[27] *See* DE578; DE580. "Good reason" to depart from this ruling requires that the Law Firms establish "unusual circumstances," which include only (1) "substantial new evidence," (2) a new Supreme Court decision, or (3) a determination that the first decision "was clearly erroneous." *Kathrein*, 752

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[26] Even if one considers the present issue arguably "interlocutory" because the Seventh Circuit never reviewed the Court's 2013 decision to deny Faruki's fee request, the law of the case doctrine still applies. *See, e.g.*, *Johnson v. Pushpin Holdings, LLC*, No. 13 C 7468, 2015 WL 4692491, at *3 (N.D. Ill. Aug. 6, 2015) (noting that the law of the case applies to an "interlocutory judgment or order") (quoting *Mintz v. Caterpillar Inc.*, No. 14–1881, __ F.3d __, 2015 WL 3529396, at *5 (7th Cir. June 5, 2015)).

[27] Except for the grossly inaccurate reference to travel expenses associated with the attempted deposition of Babenko that Trudeau cancelled, *see supra* at 10 n.20, the Law Firms' objection does not mention any fees or costs incurred with respect to Babenko.

F.3d at 685 (citations omitted). Because the Law Firms have not argued—let alone established—any of these exceptions, Faruki's claim is precluded.

Significantly, Hogan simply assisted with WSU's production, and the Court already denied WSU's fee request.[28] Specifically, WSU responded to the subpoena it received on both its own behalf and that of Sant, its nominee officer. *See supra* at 13. Indeed, as the Law Firms make clear, Hogan "coordinated [Sant's] response with Faruki" (WSU's counsel), P. Deady Dec. ¶ 6 (DE912-1), and Hogan did no further subpoena response work "after the production of the corporate records of Website Solutions in May 2013," *id.* ¶ 9.[29] Accordingly, law of the case also bars Hogan's claim because Hogan's client (Sant) never responded to a subpoena.

2. The Law Firms' Fee Claim Is Substantively Meritless.

The Law Firms support their fee claim with two alternative theories. First, they argue that their actions "benefited" the FTC or the Receivership Estate. Second, they contend that Rule 45 mandates their recovery. Both theories fail.

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[28] Mysteriously, the Law Firms assert that, after the Receivership began, the Receiver "did not permit [them] to pursue any action on behalf of Website Solutions against the FTC" for the expenses WSU incurred. *See* Obj. at 11. It is unclear why they needed the Receiver's permission. Likewise (and without support), the Law Firms claim the Receiver did not seek approval for the expenses they incurred because the FTC "directed" the Receiver not to. Obj. at 11. The FTC did not "direct" the Receiver not to do this, although the FTC certainly would have opposed such a motion if the Receiver had filed one. More plausibly, the Receiver did not pursue claims on the Law Firms' behalf because, first, this is not the Receiver's job and, second, the claims are meritless for the reasons explained herein.

[29] The Law Firms note that, during the receivership, they produced certain electronic data concerning Trudeau's entities and Sant to the Receiver in early 2014. For several reasons, this issue is a "red herring." First, the Law Firms have not documented or claimed any expenses associated with this (or any) post-receivership production. Second, Sant argued that he did not possess anything responsive other than corporate materials, *see supra* at 13, making it virtually certain that the data the Law Firms produced to the Receiver was Receivership property to begin with. The Receivership order governing Trudeau's companies compelled the Law Firms to produce this material. *See* DE742 (Aug. 7, 2015) at 12. Third, if the Law Firms objected to the Receiver's request, they should have raised this issue in early 2014.

a. The Law Firms Did Not "Benefit" the FTC or the Estate.

"[F]or a court to award compensation to a party other than a court-appointed administrator or receiver or his or her court-approved counsel from a fund or an estate, the party's services must have actually benefitted the estate." *Exch. Nat. Bank - Colorado v. Hendrickson*, No. IP 83-1821 C-B, 1996 WL 750201, at *5 (S.D. Ind. Sept. 24, 1996) (citing *First Sec. Co.*, 528 F.2d at 453 and *Godfrey*, 159 F.2d at 331) (emphasis added). The Law Firms "bear the burden of persuading this Court that whatever [work they performed] actually added value to the Receivership Estate[.]" *Hendrickson*, 1996 WL 750201, at *13. The Law Firms cannot satisfy this burden because Trudeau, his companies, his employees, his wife, and his attorneys all aggressively resisted the FTC's discovery efforts. *See supra* at 10-14. They produced nothing of substance without extensive motions practice, months of delay, or both. *See id.* Furthermore, the Law Firms could not have benefited the estate because it did not exist yet (and the Law Firms do not seek any post-receivership expenses, *see supra* at 14 n.29). Indeed, the Law Firms' discovery stonewalling delayed the creation of the Receivership Estate.[30]

Attempting to bolster the preposterous theory that they "benefited" the FTC or the Estate, the Law Firms refer to one case involving facts somewhat similar to this one: *SEC v. Capital Counselors, Inc.*, 512 F.2d 654 (2nd Cir. 1975). However, they conspicuously fail to mention its holding. *See* Obj. at 9. *Capital Counselors* involved a receivership created in an SEC enforcement action. The Second Circuit affirmed the denial of a fee request from attorneys that represented a defendant who opposed creating the receivership. *Id.* at 657. The court reasoned that the "opposition to the SEC application in no way furthered the interests" of the victims. *Id.*

[30] The Law Firms cite bankruptcy statutes and argue that bankruptcy law is "analogous." Obj. at 8. Remarkably, the Law Firms discuss bankruptcy law without mentioning *SEC v. Capital Counselors, Inc.*, 512 F.2d 654 (2nd Cir. 1975), which they cite on the next page. *See* Obj. at 9. In *Capital Counselors*, the Second Circuit affirmed the denial of attorneys' fees to a law firm that unsuccessfully helped a defendant in an SEC enforcement action resist the creation of a receivership. *See infra* at 15. The court agreed that "the analogy to the Bankruptcy Act is compelling"—and cited the fact that "[l]egal services in resisting a bankruptcy petition are not compensable under that Act" as an additional argument against the fee petition. *See id.* (quotations omitted).

The same logic applies here. The Law Firms also mistakenly cite *Godfrey v. Powell*, 159 F.2d 330 (5th Cir. 1947). *See* Obj. at 8-9. *Godfrey* affirmed the denial of a fee request to attorneys representing intervenors because the intervenors "were actually representing their own individual interests" and "did not secure any benefit" for the estate. *See Godfrey*, 159 F.2d at 332. Next, the Law Firms cite two cases for the proposition that "a person who contributes to the preservation or recovery of a common fund" may receive compensation. Obj. at 8-10. This authority is inapposite because it involves fee claims related to work found to benefit the estate. *See SEC v. First Sec. Co. of Chi.*, 528 F.2d 449, 451-54 (7th Cir. 1976) (per curiam) (allowing award when there was evidence that some creditors' committee filings benefited the estate and the SEC recommended that the committee's counsel be compensated; attorney requested $40,000, but court allowed only $12,000 (the amount the SEC recommended)); *Walsh v. Nat'l Savings & Trust Co.*, 247 F.2d 781, 781-82 (D.C. Cir. 1957) (fees awarded to trustees who successfully defended an action to terminate the trust). Finally, the Law Firms cite *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which holds that courts cannot award attorneys' fees in "private attorney general" actions without statutory authority, *id.* at 269-270. *Alyeska* is obviously irrelevant. In short, the notion that the Law Firms actions "benefited" either the Receivership Estate or the FTC is patently ridiculous.

b. The Law Firms Have Not Met the Test in Rule 45.

The Law Firms assert that "[a] non-party is entitled to fees and costs incurred in complying with a subpoena when compliance subjects the respondent to significant expense." Obj. at 12 (citation omitted) (emphasis added). First, WSU is not a "non-party" because the Court found that the Defendant (Trudeau) controlled WSU. DE713 at 15. Because WSU was simply Trudeau by another name, WSU is not entitled to "non-party" protections.[31] Second, the Law Firms are not "respondents" to the subpoenas. Rule 45 protects the parties that receive

[31] Relatedly, if WSU were to recover any money under Rule 45, it would simply go to the Receivership, not to the Law Firm, because WSU is in the Receivership.

subpoenas, not their counsel. *See* FRCP 45(d). Rule 45 makes no provision for attorneys to recover fees. Third, although Sant and Babenko are both "non-parties" and "respondents," the Law Firms have not established that either bore any expense. In fact, the limited evidence the Law Firms present proves the opposite. For instance, Faruki sent the bill covering Babenko's deposition to WSU "c/o Lee Kenny,"[32]—an offshore Trudeau associate to whom Trudeau sent millions of dollars. *See* DE892-1 (July 9, 2015) at 3 n.13. Some Faruki bills also went to Sant, but none went to Babenko.[33] As for Sant himself, WSU (*i.e.*, Trudeau) indemnified him.[34]

Fourth, not all subpoena-response expenses qualify as "significant" enough to warrant reimbursement. Rather, "[w]hen a third-party is ordered to produce documents pursuant to a subpoena, 'the presumption is that the responding party must bear the expense of complying with discovery requests[.]'" *United States v. Cardinal Growth, L.P.*, No. 11 C 4071, 2015 WL 850230, *2 (N.D. Ill. Feb. 23, 2015) (quoting *DeGeer v. Gillis,* 755 F. Supp.2d 909, 928 (N.D. Ill. 2010)). To determine whether a subpoena recipient has overcome this presumption, courts generally consider three factors: "(1) whether the nonparty has an interest in the outcome of the case; (2) whether the nonparty can more readily bear its costs than the requesting party; and (3) whether the litigation is of public importance." *Cardinal Growth*, 2015 WL 850230, at *2 (quotation omitted).

To begin, Trudeau's associates and companies were not "typical disinterested part[ies]," *see id.* at *3; rather, Trudeau controlled them. Additionally, Trudeau's victims were less able to bear the costs of discovery than Trudeau's associates were. *Cf. id.* at *3 (rejecting fee request in part because "the federal government (and ultimately the taxpayers) would be forced to foot the bill"). To the extent counsel for nominal nonparties such as WSU and Babenko must now bear a

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[32] Donnellon Dec., Att. A. at 49-61.

[33] *See id.* at Att. A.

[34] *See* Deady Dec. ¶ 2 (explaining that WSU "agreed to indemnify Mr. Sant for fees and expenses incurred by him in connection with this representation," and WSU paid those costs).

portion of the costs, they assumed this risk when they undertook the engagement knowing that the FTC sought to seize Trudeau's assets for his victims' benefit. *Cf. CFTC v. Am. Metals Exch. Corp.*, 991 F.2d 71, 80 (3d Cir. 1993) ("An attorney who knowingly consents to represent a defendant whose assets have been frozen assumes the risk of not being paid."). Finally, as an enforcement action, this litigation is of substantial public importance. *See id.* (rejecting fee request in part because the Small Business Administration needed subpoenaed documents to effect its mission). In short, Rule 45 does not entitle the Law Firms to expenses.

IV. CONCLUSION

For the foregoing reasons, the FTC asks the Court to approve the partial redress plan, and to reject the Law Firms' fee claim.

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CERTIFICATE OF SERVICE

I, Jonathan Cohen, hereby certify that on September 25, 2015, I caused to be served true copies of the foregoing by electronic means, by filing such documents through the Court's Electronic Case Filing System, which will send notification of such filing to:

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