In the United States Court of Appeals
for the Ninth Circuit

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Plaintiff-Appellee,

,

Defendant-Appellant.

ON APPEAL FROM U.S. DISTRICT COURT
FOR THE DISTRICT OF NEVADA
NO. 2:97-CV-00750-PMP-LRL
HON. PHILLIP M. PRO, U.S. DISTR. J.

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December 19, 2014

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The Federal Trade Commission (FTC or Commission) brought this contempt action against appellant Glen Burke (and another contemnor, which has made no appearance) for violating a 1998 consent decree that barred Burke from engaging or assisting others in telemarketing and from misrepresenting facts material to consumers' decisions to buy any goods or services. After a hearing and review of the evidence, which the court found to be "uncontroverted," the district court held that Burke violated its earlier consent decree. The court sanctioned Burke for consumer losses totaling millions of dollars.

On appeal, Burke does not challenge the ruling below concerning his telemarketing scheme. Nor does he seriously challenge the evidence regarding his direct-mail operation. He merely asserts, instead, that his mailers did not really induce consumers to buy anything, and that he personally neither designed nor mailed those solicitations. He also faults the district court for not making separate findings about the direct-mail scheme. But separate findings were neither necessary nor, indeed, appropriate, as there were no genuine issues of material facts regarding Burke's role in the direct-mail operation. Extensive record

The district court had jurisdiction to enter the contempt order under review

record evidence showed

for violating the 1998 Injunction's prohibition on telemarketing activities. EOR_578-627. On March 1, 2013, the FTC filed a second motion for contempt—against only Glen Burke—for violations of the 1998 Injunction stemming from Burke's central role in a deceptive direct-mail sweepstakes scheme. EOR_096-577.

Following a hearing on the FTC's two motions,

The Original Action

The FTC brought its original action against Burke and others on June 20, 1997, for violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the Telemarketing Sales Rule. EOR_602. The FTC's complaint charged that the defendants, including Burke, engaged in a deceptive telemarketing scheme to sell consumers investments in commercial film production partnerships. EOR_604-05.

Along with other defendants, Burke settled the FTC's original charges by agreeing to the distr -2.3(e-3( )]cc 0.012 Tw 0.73d)5( )9nri1c -ns69i1c (

> C. Assisting others in violating any provision in Subsections A and B of this Paragraph;
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> * * *
>
> III. IT IS FURTHER ORDERED that defendants John Iavarone, Glen Burke * * * are hereby permanently restrained and enjoined from either (1) engaging in telemarketing; or (2) assisting others in telemarketing.

EOR_053-055.[4]

Telemarketing Operation

From early 2010 to January 2013, contrary to the 1998 Injunction, Burke and AHA engaged in a deceptive telemarketing operation that involved luring consumers with promises of valuable prizes—which, in fact, were no more than frivolous trinkets—in order to induce the consumers to purchase significantly overpriced vitamins.

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[4] Before the FTC's action, Burke already had been the subject of numerous law enforcement proceedings. In 1991, the U.S. Postal Inspection Service (USPIS) investigated a telemarketing operation that Burke ran in Las Vegas, Nevada, which shut down after USPIS executed search warrants. PX3 ¶3. The FTC obtained an order against Burke in 1996, when he failed to answer a complaint alleging violations of the FTC Act and the FTC's Franchise Rule arising from a business opportunity scam. PX1 ¶30 & Att. T. The following year, the Securities and Exchange Commission obtained an order against him for failing to disclose to investors that at least five States had commenced law enforcement proceedings against his publicly traded telemarketing operation. PX1 ¶31 & Att. U.

Sworn declarations submitted by consumers evidenced a consistent pattern of deception. Working through AHA, Burke's telemarketers called consumers to tell them that they had been specially selected to enter a sweepstakes promotion and had "already won" one of five valuable prizes: a current-model-year car; a fishing boat; jewelry (described as either a diamond-and-sapphire bracelet or a gold-and-diamond watch); $3,000 in cash; or a cruise trip that could be exchanged for $2,300 in cash if the consumer did not wish to travel. PX6 ¶2 [SER_054]; PX7 ¶2 [SER_056]; PX8 ¶¶2-3 [SER_059]; PX9 ¶¶2-3 [SER_063]; PX10 ¶2 [SER_065]; PX11 ¶2 [SER_069]; PX12 ¶2 SER_072]; PX13 ¶2 [SER_075]; PX14 ¶4 [SER_079]; PX15 ¶2 [SER_082]; PX16 ¶¶2-3 [SER_085]; PX18 ¶¶2-3 [SER_088]; PX19 ¶3 [SER_019[N-3 [illegible]

> in about 45 days you will take ownership of 1 of these 5 awards. So grab a pen and paper and write these down and I'll tell you how to redeem your award, let me know when you're ready * * *.

PX22 Att. F at 2 [EOR_278]. *See also, e.g.*, *id.* at 3 [EOR_279] ("Now [b]ecause this is a Licensed and Bonded promotion, and governed by State and Federal Law, we need to show that the top 5 awards are going to our customers, so we can use you in our marketing campaign."); *id.* at 13 [EOR_289] ("We have to give these awards away * * * you are absolutely guaranteed to receive one of them"). The script emphasized that consumers would come out "far ahead" after making the initial $299-$399 vitamins purchase. *See, e.g.*, *id.* at 6 [EOR_282] ("[Y]ou will have a 1 in 5 chance for the car, and even if you got the last one, $2,300

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After collecting consumers' money, Burke and AHA

Many consumers complained when they realized they had been duped. PX31 ¶12, Att. A at 47-86. Those who complained directly to AHA had difficulty getting their money back. PX2 ¶¶13-14 [SER_050-51]; PX7 ¶12 [SER_057]; PX8 ¶¶18, 20, 23 [SER_060-61]; PX10 ¶19

move money or make payments as necessary to keep his operation running. Receiver's Preliminary Report and Recommendations Att. A (D.157) [SER_100-04]; PX22 Att. M at 132-136 [EOR_456-460]; PX27 at 63:16-65:25 [EOR_561-63]; PX31 Att. C at 33-38. Burke ultimately siphoned off AHA's profits by moving them into his own accounts. PX1 Att. M at 85-93, 108-109, 115-116, 122-123 [SER_014-028]; PX1 Att. N at 98-112 [SER_029-043]; PX1 Att. O at 2-3 [SER_046-47].

Burke's telemarketing scam resulted in millions of dollars in consumer losses. AHA maintained an accounting of its total sales, chargebacks, and refunds. Those records show that AHA took in gross telemarketing revenue (net of cancellations) of $3,078,614.36, returned $111,048 to consumers in refunds, and incurred an additional $182,058 in credit card chargebacks.

requires $20 research and processing fee"); *id.* at 5-6 [SER_186-87] (with "payment of $25.00," "I am prepared to * * * send you a check for cash, and upon your timely filing and remittance, the mandatory and requisite data for your claim(s) to sponsored sweepstakes awards now totaling: $2,036,444.88").

Burke directed every aspect of the scheme. He commissioned, reviewed, and approved the sweepstakes mailers, overseeing the copywriting and design processes to ensure they had enough appeal—or "heat"—to entice consumers. *See, e.g.*, PX22 Att. M at 32-34 [EOR_356-58] (Burke communicating with new copywriter regarding sweepstakes assignments); *id.* at 35-36 [EOR_359-360] (Burke asking copywriter for another version, with "more heat," of a sweepstakes solicitation mailer, noting that he plans to test both versions); *id.* at 37-42 [EOR_361-66] (Burke approving—"This is more what we're looking for * * * "—the conversion of copywriter's text into sweepstakes mailer design "to simulate what a contract looks like"). Burke also directed the mailing of his sweepstakes solicitations to consumers, using mailing information

arranged for some of these consumers to receive trivial amounts—

during that period, for a total receipts of $19,529,919.[14] The check processor reportedly debited Burke's accounts by $2,140,687—including debits from issuing refunds to consumers or because consumer checks failed to clear. PX30 ¶¶8-13 [SER_108].[15] Thus, Burke's direct-mail sweepstakes operation resulted in at least $17,389,232 in consumer loss.

Burke's Refusal to Testify on Fifth Amendment Grounds

Commission staff sought to depose Burke regarding his role in the telemarketing and direct-mail schemes. Instead of testifying, however, -

Burke refused to answer any questions about his involvement in these schemes, citing his Fifth Amendment privilege against self-incrimination. PX29 [SER_139-268]. In particular, Burke asserted this privilege on all subjects relevant to his contempt liability and the measure of compensatory relief, including:

- his stipulation to, and the district court's entry of, the 1998 Injunction, PX29 at 13:4-14:12 [SER_141-42];
- his control of the telemarketing and direct-mail sweepstakes operations, *id*. at 17:1-18:20, 24:17-26:2, 103:13-104:10 [SER_143-47, 205-06];
- his role in developing the telemarketing scripts and sweepstakes mailers, *id*. at 26:3-29:10, 34:24-42:7, 104:11-117:12, 125:5-128:20 [SER_147-159, 206-223];
- his purchase of leads and mailing lists for both operations, *id*. at

- his failure to deliver the prizes promised in his telemarketing and direct-mail schemes, *id*. at 79:19-88:13, 131:13-142:7 [SER_185-194, 225-236];
- his network of fronts, and efforts to evade detection by law enforcement agencies, *id*. 144:1-163:6 [SER_237-256]; and
- the amount of consumer losses caused by his and AHA's contumacious activities, *id*. at 88:15-98:23, 164:12-175:4 [SER_194-204, 257-268].

On January 28, 2013, the FTC filed in the district court a motion to hold [h,83 Tw,83Td[(t)-8(o)-8 Tc B3-8()0 Tc 0 T1-2.402 Td[(c)4(o(in)5(h)5(is)3(

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product, good, service, or investment—and caused consumer loss in the millions of dollars. EOR_109-111.[16]

Following briefing by the

in * * * and setting up the bank accounts and the mailers"). Likewise, despite denying being the principal actor in the telemarketing scheme,[18] Burke admitted, through his counsel, to providing that operation with office space and furniture, equipment, phones, and telemarketing scripts. EOR_026:8-027:2.

On September 27, 2013, the district court delivered its ruling on the two motions. It held that, "[b]ased upon the Declarations and evidence adduced in the various motions and the arguments of counsel presented," Burke and AHA "have violated and are in contempt" of the 1998 Injunction. EOR_049. Burke appealed from that ruling. EOR_046.

After Burke filed his notice of appeal, the FTC sought to have the district334 Tw [(,)1("[)the_7.436 0]B291 Tw 22.1fTd[()9(tr(, t)8h)(ha)-14(e)clitg he

court would clarify its contempt order. This Court stayed the proceedings on February 13, 2014. On March 3, 2014, the district court issued an order, indicating that, should this Court remand the case, it would enter a clarified contempt order. Accordingly, on March 4, 2014, the FTC filed in this Court a motion for a limited remand, which this Court granted on March 14, 2014, remanding the case to the district court for the limited purpose of clarifying its contempt order.

On July 28, 2014, the district court issued its order of clarification. EOR_001-04. The district court confirmed that "the Permanent Injunction imposed a ban on Defendant Burke from further telemarketing, and prohibited him from misrepresenting any material facts relating to a consumer's decision to buy a good or service." *Id*. at 002. The court credited the "uncontroverted affidavits and deposition testimony, emails, and other documents" submitted by the FTC. *Id*. at 003. It then explained that "the record clearly establishes that Burke's consulting and services were an integral part of continuing telemarketing schemes carried out by others in conjunction with Defendant Burke," whereby "consumers were subjected to material misrepresentations to induce them to purchase merchandise with an

expectation that they would receive prizes of considerable value * * * when in fact they would receive relatively inexpensive prizes as winners of a 'contest' the consumers had not even entered." *Id*.

The district court concluded, more specifically, that Burke "played an essential role" in setting up the telemarketing scheme, providing the telemarketing rooms and equipment, and "the relatively inexpensive bracelets, watches and art prints that were given to consumers in lieu of the * * * valuable prizes they had been led to believe by telemarketer misrepresentations they would receive." EOR_003. It also noted that Burke "provided consulting services to others * * * regarding the content of telemarketing scripts and flyers." *Id*. The district court also concluded that Burke's refusal to testify at his deposition, by invoking his Fifth Amendment privilege, "warrants an adverse inference" against him, which is supported by the other record evidence, that he was actively engaged in the deceptive schemes. *Id*. Lastly, the district court confirmed its sanctions awards, finding the supporting record evidence "uncontroverted." *Id*. at 004.

On August 29, 2014, this Court terminated its limited remand and ordered the resumption of appellate briefing.

This Court reviews district court orders of civil contempt, including decisions to impose sanctions, for abuse of discretion. *See, e.g.*, *FTC v. EDebitPay, LLC*, 695 F.3d 938, 943 (9th Cir. 2012); *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999). The district court abuses its discretion only if it commits legal error or makes clearly erroneous factual findings. *EDebitPay*, 695 F.3d at 943; *Affordable Media*, 179 F.3d at 1239; *see also United States v. Bright*, 596 F.3d 683, 694 (9th Cir. 2010); *Irwin v. Mascott*, 370 F.3d 924, 931 (9th Cir. 2004).

The district court correctly held that appellant Burke's telemarketing and direct-mail sweepstakes schemes violated its 1998 Injunction, and rightly sanctioned him for the resulting millions of dollars in consumer loss.

The 1998 Injunction expressly applied to Burke. It prohibited Burke from any telemarketing activity—whether deceptive or not—and from any misrepresentation of facts material to consumers' decisions to buy goods or services. Burke's deceptive telemarketing and direct-mail

schemes fell squarely within the prohibitive scope of the 1998 Injunction. (Part I.A).

Burke does not challenge the district court's contempt ruling as it pertains to his telemarketing operation—for which he was a key part of the scheme, providing office space, equipment, customer lists, and telemarketing scripts, and purchasing the trinkets that were sent to consumers in lieu of the cars, boats or jewelry that they were promised. (Part I.B).

Overwhelming and uncontroverted record evidence—mostly documents from Burke's own files—demonstrates that he was the driving force behind the direct-mail scheme. He recruited, coordinated with, and directed the copywriters and designers of the deceptive mailers; he purchased consumer mailing lists; and he directed the worldwide mailboxes and financial network for receiving and processing consumer payments.

Burke challenges none of this evidence. Instead, he merely asserts that he did not violate the injunction because the mailers did not induce consumers to buy anything. But that claim cannot be squared with the enormous amount of contrary evidence. Burke also claims that he

personally neither designed nor mailed the solicitations, but the acts he undisputedly committed place him in contempt of the 1998 Injunction whether or not he designed or mailed the flyers. Lastly, Burke argues that the district court failed to make separate findings of fact on these issues. But no such findings were necessary (or even appropriate), as no genuine dispute existed with regard to Burke's role in the deceptive direct-mail operation. (Part I.C).

Burke's challenge to the amount of the contempt sanction also fails. He contests neither the consumer-loss standard that the district court used for its monetary sanctions against him, nor the evidence underlying the district court's calculation of that consumer loss. Rather, he faults the district court again for not making (the unnecessary) separate findings on the issue. The law requires no such thing. (Part II).

The district court rightly held that Burke had violated its 1998 Injunction against him. The standard for liability in civil contempt cases is well settled in this Court: the movant must show, "by clear and

convincing evidence," that the alleged contemnors violated "a specific and definite order of the court." *Affordable Media*, 179 F.3d at 1239 (quoting *Stone v. City & Cnty. of San Francisco*, 968 F.2d 850, 856 n.9 (9th Cir. 1992)); *see also FTC v. Enforma Natural Prods., Inc.*, 362 F.3d 1204, 1211 (9th Cir. 2004). The overwhelming and largely uncontroverted evidence of Burke's contempt amply satisfies this standard.

"In construing consent decrees like the one at issue here, 'courts use contract principles'." *EDebitPay*, 695 F.3d at 943 (quoting

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The 1998 Injunction also expressly prohibits the activities challenged in the contempt motions. Section II bars Burke from "[m]isrepresenting, in any manner, directly or by implication, or failing to disclose any fact material to a consumer's decision to purchase any item, product, good, service, or investment," and from "[a]ssisting others in" carrying out any such misrepresentation. EOR_053-54. Section III, in turn, provides that "Glen Burke" is "permanently restrained and enjoined from either (1) engaging in telemarketing; or (2) assisting others in telemarketing." EOR_055. Both provisions apply to Burke's deceptive telemarketing scheme, and Section II squarely applies as well to the direct-mail sweepstakes scheme. Appellant Burke does not challenge this element of his liability for contempt. Br. at 13.

Burke does not appear to challenge the district court's contempt ruling as it relates to his telemarketing activities. *See, e.g.*, Br. at 11 ("The Commission purports that Mr. Burke violated the injunction through two schemes: (1) a telemarketing scheme * * *; and (2) a mail fraud/sweepstakes scheme * * *. Mr. Burke appeals and disputes the remaining restitution balance related to the purported mail

telemarketing operators with office space, furniture, equipment, phones, and telemarketing scripts. EOR_026:8-027:2.

As detailed above (*supra* at 13-18), the unrebutted record evidence shows that appellant Burke's direct-mail sweepstakes scheme swindled unwitting consumers, many of whom were elderly and financially desperate, out of millions of dollars. *See, e.g.*, PX22 Att. D at 22-23, 58-59, 60-61 [EOR_203-04, 239-240, 241-42]. Burke's mailers told consumers that large prize payouts worth hundreds of thousands or millions of dollars awaited them, and that consumers could claim those prizes with payments of $20-30. *Tc 0.043 Twa1.5Ales, 25Tc 0 Tw 183(2)TTds)Tj0.42 0*

That evidence proves definitively that Burke violated the 1998 Injunction forbidding him from engaging in material omissions or misrepresentations in the s

consumers were to expect payments worth thous

shop" is a "material attribute" of credit line offer); *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 603 (9th Cir. 1993) (misrepresentations about product's "effectiveness as a fire safety device" are material because consumers were misled "about the single most useful piece of information they could have used" to decide whether to purchase the product) (internal quotation marks and citation omitted).

Furthermore, the numerous consumer complaints that reached Burke's offices show that the misrepresentations regarding payout amounts in Burke's mailers were the primary factor in the consumers' decisions to send Burke the fees de

id. at 70 [EOR_252] ("You must mail the form below with your processing fee [of "$27.95"] in order to process your application * * * CONFIRMED WINNER CLAIM * * * Maximum Prize: $458,389.00"); *see also supra* at 13-14. Consumers receiving these mailers were expressly instructed to send back their money in order to claim a very large cash payout.

Second, Burke argues that the FTC failed to prove that he participated in the direct-mail sweepstakes scheme. Br. at 12-15. The claim is that Burke did not personally design or mail the deceptive solicitations and therefore "was not engaged in the creation 02.o4 Tw -31.564 -2.393

latter showed was deeply involve

designers, list brokers, and "fronts," in the selection of mailers' text and design, consumer lists, and mailbox locations for receiving consumer checks. He also had the ultimate approval authority on these decisions. *See supra* at 13-15, 18-21.

Burke misstates the applicable legal standard for contempt liability when he argues that the Commission:

> had to make a showing that: (1) Mr. Burke had actual knowledge of the material misrepresentations; (2) that Mr. Burke was recklessly indifferent to the truth or falsity of the misrepresentations; or (3) that Mr. Burke had an awareness of a high probability of fraud coupled with an intentional avoidance of the truth.

Br. at 14 (citing *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997)). This is the standard for individual liability under the FTC Act. *See Publ'g Clearing House*, 104 F.3d at 1170 ("the FTC brought this action under Sections 5 and 13(b) of the Federal Trade Commission Act"). It is *not* the correct standard for liability in a contempt proceeding. *See supra* at 33-34. Burke's reliance on *Affordable Media*, 179 F.3d at 1234, fails for the same reason. Indeed, *Affordable Media* directly illustrates the two different standards. First, this Court concluded that "the district court did not abuse its discretion in issuing [a] preliminary injunction" under the FTC Act. *Id*. at 1238. Then, in

Cir. 2012) (defendants cannot use the Fifth Amendment privilege against self-incrimination as both a shield and a sword).

Indeed, as discussed above, Burke raises only two factual issues in connection with this appeal: whether he induced consumers to purchase something, and whether he engaged in the creation or mailing of the solicitations. *See supra* at 42-44. For the reasons described above, however, those questions present no genuine factual dispute. Burke unquestionably induced consumers through deception to pay for large monetary distributions, which as a matter of law constitutes a sale prohibited by the injunction against him. The overwhelming evidence described above likewise demonstrates that Burke was deeply involved in every stage of his scam, whether or not he personally created or mailed the flyers.

Burke relied principally on a declaration by Errol Seales, who claimed—without any supporting evidence or explanation for the overwhelming

(citing

forth above, given the uncontroverted evidence establishing the amount of consumer loss, no such findings were necessary. *See supra* at 45-49. That evidence, the court found, was "uncontroverted.lTh4

prosecutorial discretion. *See Heckler v. Cheney*, 470 U.S. 821, 831 (1985) (a decision not to prosecute or enforce a law

The district court's orders should be affirmed.

Pursuant to Circuit Rule 28-2.6, no other cases in this Court are deemed related to this appeal.

Respectfully submitted,

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December 19, 2014

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i), in that it contains 10,443 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and using the Microsoft Word word-processing system.

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I hereby certify that I electronically filed the foregoing "Answering Brief for Federal Trade Commission" and "Supplemental Excerpts of Record" with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on December 19, 2014. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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