

No. 16-15859

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION ,
Plaintiff-Appellee

v.

GLEN BURKE,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Nevada
No. 2:97-cv-00750-GMN-VCF
Hon. Gloria M. Navarro , Chief U.S. Distr. J.

ANSWERING BRIEF
FOR THE FEDERAL TRADE COMMISSION

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INTRODUCTION

A 1998 consent decree permanently enjoined appellant Burke from “[m]isrepresenting, in any manner ” or “failing to disclose ” any fact material to a consumer’s decision to purchase any good or service, and from “[a]ssisting others in” any such misrepresentation. Burke violated the injunction, and the Federal Trade Commission sought to have him held in contempt. After a hearing and review of extensive evidence that Burke played a central role in a sweepstakes scheme that bilked consumers out of millions of dollars , the district court held Burke in contempt and ordered him to pay compensatory sanctions for the consumer losses.

On appeal, Burke does not dispute that the injunction forbade him from making or enabling material misrepresentations to consumers . Nor does he deny that the FTC introduced voluminous evidence of his activities . Nor does he deny that the court could draw adverse inferences from his refusal to testify , on Fifth Amendment grounds , about his role in the deceptive scheme . Burke

clear error in its factual findings . The extensive record showing that
Burke played a key role in the sweepstakes scheme contradicts his

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STATEMENT OF THE CASE

A permanent injunction entered against Burke in 1998 bars him from telemarketing and from misrepresenting any fact material to a consumer's decision to purchase any good or service. EOR_ 127-128. Burke nevertheless engaged in two separate activities that violated the injunction.

defendants, Burke settled the suit by agreeing to the 1998 Injunction.
EOR_123-139; Op. ¶3 [EOR_003]. As pertinent here, that injunction
prov

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 ”).

Considerable evidence, largely from Burke’s own files, showed that, at a minimum, “Burke played a crucial role in the key aspects of the

Burke registered dozens of fictitious companies to send his sweepstakes mailers, which used fonts, graphics, and wording that Burke selected to convey officialdom and urgency, in order to pressure consumers into sending Burke money. In one mailer, for example, Burke sent a certificate-like letter from the "Office of the Director, Security Services," declaring that the addressed consumer "Has Won A Cash Prize!" and warning the consumer to "Respond Immediately or Risk Forfeiture!"

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71, 74 [EOR_305, 310, 312, 315

a “Replacement Winner’s Sweepstakes Check” for a fee of \$20.25. Id. at 44 [EOR_284].⁴

Burke never delivered the huge sums of money that his mailers promised. One of Burke’s employees testified that consumers often received, instead, booklets about how to enter more sweepstakes. Op. ¶¶27-28 [EOR_007-08]; PX28 at 15:21-25, 29:1-7, 88:11-19 [SER_033, 036, 041]. Files designated for shredding at Burke’s offices, PX31 ¶¶14, 16 [SER_179], contained numerous letters from consumers complaining that they had sent money but never received the

their “winnings.” Op. ¶¶31 -33 [EOR_008]; see, e.g.,

new mailboxes for Burke) [SER_206].⁵ Burke also used Seales's name on corporate formation documents, id. at 76, 144 [EOR_453, 521], and on accounts with payment processors, even though Burke controlled all disbursements from those accounts. Op. ¶39 [EOR_010]; see, eg., PX22 Att. M at 6-8 [EOR_383-85]; PX31 Att. C at 66-69, 72 [SER_207-210, 213]; PX30 ¶¶6-7 [SER_173].

One incident vividly illustrates Burke's role as the puppeteer of the operation. In January 2012, a FedEx package addressed to Burke's business address containing \$12,000 in cash burst in transit, prompting inquiries from U.S. Customs and the FBI. Op. ¶45 [EOR_010-11]. Burke and one of his associates planned to conceal Burke's involvement by having Seales claim ownership of the package. Id.; PX22 Att. M at 23-28 [EOR_400-05]. The associate sought Burke's review and approval of

⁵ Burke actively managed the mailboxes used to receive consumer payments. He often hired fronts to rent numerous boxes in multiple jurisdictions. Op. ¶¶23, 25 [EOR_007]; PX22 Att. M at 60-78 [EOR_437-455]. Burke's fronts opened mail boxes for him in California, New Jersey, Pennsylvania, Illinois, Mexico, Panama, the Netherlands, and elsewhere. Op. ¶25 [EOR_007]; see, eg., PX22 Att. D at 19, 69 [EOR_259, 310]; PX22 Att. M at 20

manage anyone, the stress is to [sic] much. I want to be just another employee * * * ." Id. at 56-57 [EOR_433-34].

Burke scammed consumers out of millions of dollars . Most consumers sent money via check or money order made out to one of the myriad fictitious names Burke used on his mailers. Op. ¶48 [EOR_011]; see, eg., PX22 Att. D at 84 -93 [EOR_325-334] (consumers' checks found in Burke's offices). Burke deposited some of these checks and money orders into overseas ban

deemed consumer refunds,⁹ Burke's direct -mail sweepstakes operation resulted in at least \$17,389,232 in consumer losses.

3. Burke's Refusal to Testify on Fifth Amendment Grounds

Commission staff sought to depose Burke regarding his role in the sweepstakes operation. Burke refused to answer any questions, citing his Fifth Amendment privilege against self-incrimination. Op. ¶¶19, 26, 37, 47, 60 [EOR_006-012]; seePX29 [SER_042-171]. Burke asserted this

The district court also found that the sweepstakes mailers promised recipients prizes of thousands or millions of dollars in exchange for up-front payments . Op. ¶¶ 7-15, 24, 27-31 [EOR_002-05, 007-08]. Yet those making the payments received none of the promised payouts. Id

court noted that Burke would be liable even if his assertion about Seales's ownership of the operation were true, because "the evidence shows Burke played a crucial role in the key aspects of the sweepstakes operation," and "[a]t the very least, then, he 'assisted another' to make these misrepresentations, which was sufficient to violate the [1998 Injunction]." *Id.* ¶¶77; see *id.* ¶¶78-79 [EOR_015-16].

The court concluded that "consumer loss" is an appropriate measure of sanctions, because "Burke's profits from the scheme * * * would not constitute a full compensatory remedy," and at any rate "the FTC has demonstrated that it would have a difficult time proving Burke's net gain, especially given his noncooperation." *Op.* ¶¶84-87 [EOR_017-18]. Finding no "value" in the sweepstakes booklets or de minimis checks sent to some consumers, it held that "Burke is liable for \$17,389,232 in compensatory sanctions related to the direct -mail sweepstakes operation." *Id.* ¶¶88-89 [EOR_018].

STANDARD OF REVIEW

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).

SUMMARY OF ARGUMENT

The district court correctly held that Burke's direct-mail sweepstakes scheme violated the 1998 Injunction , and it rightly sanctioned him for the resulting millions of dollars in consumer loss . Burke has not nearly met his burden to show an abuse of discretion in the court's contempt judgment.

The 1998 Injunction expressly prohibited Burke from misrepresenting "in any manner" "any fact material to a consumer's decision to purchase any item, product, good, service, or investment." Burke's deceptive direct-mail scheme fell squarely within the Injunction's prohibitive scope .

Overwhelming and uncontroverted record evidence—mostlut.8(d)13.9(en

driving force behind the direct-mail sweepstakes

money. Br. 15. The argument is legally irrelevant and factually baseless.

It is legally irrelevant because the 1998 Injunction prohibited

supervising the copywriters, designers, list brokers, and “fronts ;” selecting the mailers’ text and design ; acquiring consumer lists ; and arranging mailbox es to receive payments. He also had the ultimate approval authority on these decisions. See supra at 8-9, 12-16.

The uncontroverted record evidence also shows that Burke himself commissioned, reviewed, and approved the deceptive sweepstakes mailers . He routinely communicated with copywriters and artists about the content and design of the mailers, see, e.g. , PX22 Att. M at 32 -34, 35-36, 37-42 [EOR_409-419]; acquired consumer mailing lists from list brokers, and directed the mailing of his sweepstake s solicitations to those consumers. PX22 Att. M at 49 -53 [EOR_426-430]; PX31 Att. C at 40-58, Att. G [SER_181-199, 214-222]. He was at the heart of the entire scheme. See Op. ¶¶17-20 [EOR_005-06]. Indeed, Burke forcefully instructed Seales, the nominal leader of the business, that he and not Seales was in charge of the operation. See PX22 Att. M at 56-57 [EOR_433-34].

Burke cannot escape the force of the evidence with his claim that the district court erroneously ignored his proffered evidence and relied

the development of the sweepstakes mailers, “utiliz[ing] his American Express card as well as various business accounts to make sure any vendors, printers, lead developers, or any other employees in the United States would be paid,” and “monitor[ing] the [check processor] accounts.” EOR_663-64. Similarly, the other witness on whom Burke relied, Lindsay Reid, testified at deposition that she mailed the sweepstakes prize checks to consumers, but “she only sent consumers money on Burke’s orders and with his funds.” Op. 32 [EOR_ 008]; PX28, at 87-88 [SER_040-41].

Burke also argues that the district court improperly relied on his admissions. The exact argument is unclear, for Burke fails to specify what admissions he refers to or where the district court relied on them. But he contends both that statements made by his attorney cannot be held against him, and that the district court wrongly relied on adverse inferences drawn from his invocations of a Fifth Amendment privilege. Br. 16. Both claims are meritless.

unauthorized , and in his own brief , Burke continues to rely on the very documents he faults the court for relying on . See Br. 10; Op. ¶¶34- 37, 41-47 [EOR_009-011]. Burke “voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent.” Link , 370 U.S. at 633-34.

The district court also properly drew adverse inferences from Burke’s refusal on Fifth Amendment grounds to respond to deposition questions posed by FTC counsel. A defendant may not invoke his privilege as both a shield, to protect against self -incrimination, and a sword, to defeat the FTC’s case. *United States v. \$133,420.00 in U.S. Currency* , 672 F.3d 629, 640 (9th Cir. 2012). To protect against that heads I win, tails you lose approach, “ the district court has discretion to draw an adverse inference” from a defendant’s assertion of the Fifth Amendment in a civil case. *Nationwide Life Ins. Co. v. Richards* , 541 F.3d 903, 911-12 (9th Cir. 2008).

Even if this Court were to disregard the district court’s adverse inferences, the direct evidence summarized above, supra at 7-17, was itself more than enough to establish Burke’s liability. The district court

applied to “any item, product, good, service, or investment interest of any kind” and prohibited misrepresentations “material to a consumer’s decision to purchase any item, product, good, service, or investment.” EOR_127. That broad language covers essentially any quid-pro-quo arrangement where consumers exchange money for some benefit.

The evidence showed that -. (4)JTJ 0-0.004 Tc 0.004 Tw265. (nd)-2.7srt-. wnh(ny

Burke himself was well aware of this quid pro quo : When some consumers initially did not send him their payments, he authorized other mailers , like the Winner’s Satisfaction Survey and Trouble Ticket, designed to get them to change their mind. See, e.g, PX22 Att. M at 46 - 48 [EOR_423-25] (copywriter sending Burke new text for the “Trouble Ticket” mailer that “should cut WAY down on no pays.”). ¹⁶

II. THE FTC WAS NOT REQUIRED TO BRING A NEW CASE AGAINST BURKE

The district court ’s order to pay \$17,389,232 in contempt sanctions was fully supported by the record and well within the court’s discretion.

“District courts have broad equitable power to order appropriate relief in civil contempt proceedings.” *EDebitPay* , 695 F.3d at 945 (quoting *SEC v. Hickey*, 322 F.3d 1123, 1128 (9th Cir. 2003)). Such relief can properly include using “ consumer loss to calculate sanctions for civil

¹⁶ Burke does not challenge the materiality of these misrepresentations, but they plainly were material to consumers’ decisions to send money to tee s iinE245.

contempt of an FTC consent order.” *Id.* (citing *FTC v. Kuykendall* , 371 F.3d 745, 764 (10th Cir. 2004) (en banc); *FTC v. Trudeau*, 579 F.3d 754, 771 (7th Cir. 2009); *McGregor v. Chierico* , 206 F.3d 1378, 1387-88 (11th Cir. 2000)).

As detailed above (*supra* at 15-17, 22), the court used the FTC’s conservative calculation of the harm Burke caused consumers as a measure of contempt sanctions . The FTC’s figure rested on Burke’s own records of consumer payments to calculate consumer loss. Burke offered no alternative measure or means of measurement.

Burke raises a single objection to the court’s sanctions ruling: he claims that the FTC could not simply ask for contempt sanctions against him, but was required to bring a new case against him and the persons he worked with on his sweepstakes scheme. “ [H]ad the Commission initiated a new action against all the purported participants in the mail fraud/sweepstakes scheme, ” he claims, “a finding of joint and several liability would have been appropriate.” Br.

18.

This argument is spurious . The FTC’s decision to proceed against Burke for contempt, rather than initiating a new case against him and

the other participants in the deceptive scheme , was well within its prosecutorial discretion . See Heckler v. Cheney, 470 U.S. 821, 831 (1985)

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CERTIFICATE OF SERVICE

I hereby