IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 08-3077

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

RICHARD C. NEISWONGER,
Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Missouri

District Court No. 4:96-cv-02225-SNLJ

BRIEF OF PLAINTIFF-APPELLEE FEDERAL TRADE COMMISSION

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SUMMARY OF THE CASE

The Commission initiated a contempt proceeding against Neiswonger and his business partner for their violation of a prior injunction against certain deceptive sales practices. The Commission sought the disgorgement of defendants' proceeds from their deceptive scheme, to provide compensatory relief to injured consumers. The court conducted a two-day show cause hearing at which defendants had an opportunity to address the Commission's claims and present evidence. When defendants objected to the admission of calculations by the court-appointed Receiver showing their income from the deceptive scheme, the court offered to continue the hearing, but defendants turned down the offer of a continuance. The court subsequently found defendants in civil contempt for their violations of the Permanent Injunction and entered an order requiring defendants to disgorge their income from the deceptive enterprise and to turn over certain assets in partial satisfaction of the judgment. In this appeal, Neiswonger does not challenge the district court's liability findings, only the compensatory contempt award.

The Commission believes that the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

STATEMENT OF JURISDICTION

The Commission initiated the underlying action in the United States District Court for the Eastern District of Missouri seeking relief for violations of Section 5 of the FTC Act, 15 U.S.C. § 45, committed by defendant Neiswonger and others. The district court's jurisdiction over this matter derives from 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 53(b).

In this appeal, Neiswonger seeks review of the Amended Civil Contempt Order entered by the district court on June 30, 2008. That order is final and reviewable under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Whether the district court abused its discretion in awarding a compensatory contempt sanction against defendant in the amount of $3,213,719.13, which represented his proceeds from deceptive sales to consumers, and requiring him to turn over certain assets in partial satisfaction of the judgment, where defendant was given a full opportunity to defend against the contempt claims, including the Commission's request for disgorgement.

- *FTC v. Security Rare Coin & Bullion Corp*., 931 F.2d 1312 (8th Cir. 1991)
- *FTC v. Kuykendall*, 371 F.3d 745 (10th Cir. 2004)
- *Jones v. Swanson*, 341 F.3d 723, 738 n. 6 (8th Cir. 2003)

STATEMENT OF THE CASE

A. Nature of the Case, the Course of Proceedings, and the Disposition Below

The Commission brought an action in 1996 against Neiswonger and others to enjoin their use of deceptive and misleading practices in the sale of business opportunity programs to consumers, in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45.[1] The case settled, and the parties agreed to the terms of a stipulated judgment (the "Permanent Injunction"), which prohibited Neiswonger and his co-defendants from engaging in the types of deceptive practices that the FTC had alleged.

In July 2006, the Commission initiated the present contempt proceeding against Neiswonger, his business associate William Reed ("Reed"), and their company Asset Protection Group ("APG") for violations of the Permanent Injunction. The Commission sought injunctive and compensatory relief for the harm caused by these violations, including disgorgement of the defendants' profits from their deceptive enterprise. After a two-day show cause hearing, at which the parties had the opportunity to present evidence and put on live testimony, the district court found Neiswonger and Reed in civil contempt for violations of the

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[1] Section 5 of the FTC Act prohibits, *inter alia*, "unfair or deceptive acts or practices in or affecting commerce."

Permanent Injunction. In light of these violations, the court modified the Permanent Injunction to ban Neiswonger from promoting any business opportunity program, and indicated that it would require Neiswonger and Reed to disgorge their profits from this scheme to compensate consumers for the harm they suffered, but because the court-appointed Receiver was still in the process of ascertaining the defendants' assets, the court would await a final computation from the Receiver, and then would modify the contempt order to include a compensatory sanction.

The Receiver submitted his final report to the district court in March 2008, showing that Neiswonger had earned $3,213,719.13 and Reed had earned $5,752,093.77 from the sale of the APG program. The Commission then filed a proposed Amended Civil Contempt Order, including compensatory monetary sanctions against the defendants in the amounts specified by the Receiver and asset turnover provisions to take effect in the event that defendants did not pay. Neiswonger opposed the proposed order and moved for an evidentiary hearing on the amount of monetary relief, but the court denied the motion because the defendants had failed to show that there was a genuine dispute of material fact regarding the award amount, and they had already had an opportunity to present evidence regarding damages at the contempt hearing, but had declined to do so.

On July 31, 2008, the district court entered the Amended Civil Contempt Order ("Order") proposed by the Commission. Neiswonger has appealed this Order, challenging the amount of the monetary sanction and the asset turnover provision.[2]

B. Facts and Proceedings Below

1. Background

The Commission commenced the underlying action in November 1996 by filing a complaint in the United States District Court for the Eastern District of Missouri. D. 1.[3] The complaint alleged that Neiswonger and others were engaged in violations of Section 5 of the FTC Act, in connection with their deceptive marketing of business opportunity programs purporting to equip aspiring entrepreneurs (for a fee upwards of $10,000) to become well-paid consultants in the fields of capital acquisitions and expense reduction, among other areas. In February 1997, the district court entered a stipulated Permanent Injunction in settlement of the Commission's claims, pursuant to which Neiswonger and his co-defendants agreed to cease the types of deceptive practices that the Commission had alleged. D. 12. Among other things, the Permanent Injunction prohibited Neiswonger and those acting in concert with him from misrepresenting to

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[2] Contempt defendant William Reed also appealed the Order, but has withdrawn his appeal.

[3] "D." refers to the district court's docket entry number.

consumers that any programs they market will result in substantial financial gain, and required the disclosure of all material facts to consumers – such as the use of paid "references" to promote these programs. Neiswonger subsequently pled guilty to and was convicted of wire fraud and money laundering in connection with the marketing activities that were the subject of the FTC's action, and served 12 months in prison.[4]

Neiswonger did not cease his deceptive business practices. Instead, he found another business partner (Reed, a former Colorado attorney whose licence to practice law was suspended by the Colorado Supreme Court for "engag[ing] in misrepresentations and dishonesty").[5] With Reed, he formed another company, Asset Protection Group ("APG"), and hatched another deceptive business opportunity scheme. In this new program, which Neiswonger began operating immediately upon his release from prison in 1999, Neiswonger and Reed held themselves out as professionals in the area of "asset protection." Citing explosive demand for their services, they represented that consumers who purchased the

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[4] *United States v. Neiswonger*, No. 4:98CR364-RWS (E.D. Mo.). The United States Department of Justice later initiated a civil forfeiture action against Neiswonger for his failure to disclose over $1,300,000 in illicit proceeds to the authorities during plea negotiations in his criminal case. *United States v. One Million, Three Hundred Fifty Thousand, Two Hundred Thirty-Eight Dollars*, No. 4:00CV02018-CDP (E.D. Mo.).

[5] *Colorado v. Reed*, 942 P.2d 1204, 1205 (Colo. 1997).

"APG Program" – for a fee of $9,800 – would become "certified" APG "asset protection consultants" and could expect to make a "very substantial" or "six-figure" income selling APG's services (involving the formation of Nevada corporations and offshore companies) to clients wishing to shield assets from potential litigants, creditors, government agencies, and the courts. PX 6 at 1-16, Appx. 54-69.[6] Neiswonger and Reed further enticed prospective customers with promises that "we will provide your clientele for you" (PX 40a at 2, Appx. 80), touting APG's "proprietary strategic alliance" with an appointment-setting firm that would, they claimed, put APG consultants in touch with "carefully screened" "qualified prospective clients." PX 6 at 12, Appx. 55. They provided potential purchasers with the names of "references" (purportedly active APG consultants) to corroborate these claims, but did not disclose the fact that these "references" were paid to put a positive spin on APG to the inquiring customer. Tr. (Vol. I) 126-28, Appx. 10-12; Tr. (Vol. II) 133-35, Appx. 49-51; PX 33, Appx. 70-72; PX 37, Appx. 76-78.

As purchasers soon discovered, however, the APG program was far from the "lucrative business" that Neiswonger and Reed claimed. In the six years that the scheme was in operation, nearly 2,000 consumers bought the APG program and

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[6] "Appx." refers to the Commission's Appendix containing excerpts of the record, filed concurrently with this brief in a separate volume.

became APG consultants. The overwhelming majority of them – approximately 94% – failed to earn back their initial $9,800 purchase fee, and most of them failed to sell any corporations at all. PX 112 at 5, Appx. 85. In addition to the initial purchase fee, many APG consultants paid hundreds or thousands of dollars to appointment-setting firms recommended by APG, only to find that, contrary to what Neiswonger and Reed represented, the appointments provided by these firms were merely cold-calls with persons who had only the vaguest interest in APG's services, and often had no idea what APG was or why the consultant was contacting them. Tr. (Vol. I) 74-75, 134-35, 184-87, Appx. 4-5, 13-14, 18-21; PX 34, Appx. 73-75; PX 37, Appx. 76-78. APG consultants who tried to find clients for APG's services through other means likewise met with little success. PX 33, Appx. 70-72.

2. The Civil Contempt Proceedings

On July 17, 2006, the Commission filed a motion in the district court to show cause why Neiswonger, Reed, and APG should not be found in contempt for violating the Permanent Injunction. D. 22.[7] The Commission sought injunctive and compensatory relief for the injury to consumers caused by these violations,

[7] Although Reed was not a party to the original litigation, the Commission alleged that he acted in concert with Neiswonger and had actual notice of the Permanent Injunction.

including the disgorgement of the defendants' profits from their deceptive enterprise. D. 22-1, at 30-31. The Commission also sought, and the district court granted, a temporary restraining order, including an asset freeze and appointment of a receiver. D. 29.

The district court held a hearing on October 25 and 26, 2006, to hear evidence concerning the Commission's motion to show cause and motion for a preliminary injunction to extend the receivership and other provisions of the TRO. The Commission presented the live testimony of five witnesses: a Commission investigator; three consumers who, relying upon defendants' misrepresentations, had purchased the APG program and incurred substantial financial losses as a result; and a representative of the Receiver, who detailed the contempt defendants' gross sales of the APG program and their income and expenses attributed to that program. In addition to the live testimony, the Commission presented the deposition testimony and declarations of numerous other consumers victimized by defendants' fraud. The defendants presented the testimony of one witness – Neiswonger – and had the opportunity to cross-examine each of the Commission's witnesses.

The evidence presented by the Commission showed unequivocally that Neiswonger and Reed had marketed the APG program to consumers using

deceptive tactics prohibited by the Permanent Injunction. Neiswonger did not seriously dispute that he had engaged in these violations, but sought to minimize them by claiming that most purchasers of the APG program were not interested in the business opportunity and were satisfied with the APG program, and refunds had been provided to those who complained – although he offered no support for any of these claims.[8] (Indeed, Neiswonger conceded having violated the Permanent Injunction in a proposed modified permanent injunction that he filed with the district court shortly after the hearing. D. 83-1; D. 83-3.)

In addition to the evidence establishing liability, the Commission's evidence demonstrated the considerable consumer harm caused by defendants' fraudulent enterprise. In addition to the consumer testimony and declarations showing individual harm, defendants' own business records demonstrated the overall financial impact of their fraudulent scheme. The Receiver's representative, who obtained and reviewed these records, testified that the defendants' business records showed that nearly 2,000 consumers purchased the APG program between 1999 and mid-2006; the vast majority of these purchasers failed to sell enough

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[8] Two of the Commission's consumer witnesses testified that they succeeded, after persistent efforts, in getting a partial refund of their money from defendants, but none secured anything close to a full refund, and others received no refund at all. Tr. (Vol. I) 81-84, 143-45, 187-88, Appx. 6-9, 15-17, 21-22; PX 33, Appx. 70-72; PX 34, Appx. 73-75; PX 37, Appx. 76-78.

corporations to recoup the initial purchase fee for the program; and over half of these purchasers failed to sell a single corporation. Tr. (Vol. II) 27-38, Appx. 24-35; PX 112 at 12, Appx. 92. He further testified that APG's accounting records – consisting principally of electronic records maintained by Neiswonger on his business computer – showed that APG had earnings of nearly $20,000,000 from the sale of the APG program from 2000 to mid-2006. Tr. (Vol II) 43-46, Appx. 36-39. Defendants' records also showed that Neiswonger used income from APG to pay numerous of his personal expenses (including, *e.g.*, credit card bills, lease payments for a Lexus and a Mercedes-Benz, and his children's school tuition**)**; over this six-year period, Neiswonger's income from APG totaled approximately $3,000,000; and Reed's income from APG was approximately $5,000,000. Tr. (Vol II) 48-50, 55-56, Appx. 40-42, 47-48; PX 114, Appx. 94-115. The Receiver's representative testified that this figure accurately reflected the information found in defendants' accounting records, but might be subject to some revision (most likely upward, not downward) pending the receipt of additional documents sought by the Receiver. Tr. (Vol. II) 49, Appx. 41.

Defendants initially objected to the admission of the Receiver's document (PX 114), which itemized Neiswonger's income from APG, arguing that the underlying data had not been provided to them (notwithstanding the fact that the

underlying data came from defendants' own accounting records, which defendants had always been at liberty to access). Tr. (Vol. II) 50-51, Appx. 42-43.[9] But when the court suggested that a postponement of the hearing might be in order to "let everybody get up to speed" (Tr. (Vol. II) 53, Appx. 45), Neiswonger's counsel expressly rejected the offer:

> MR. MCALLISTER: Judge, clearly we do not want the continuance. If that is the remedy, I withdraw my objection.
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> * * *
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> I made the objection that the Court wants to accept it subject to the objections to avoid any continuance, that is fine with me.

Tr. (Vol. II) 54-55, Appx. 46-47. Reed's counsel concurred. *Id.* Defendants declined to cross-examine the Receiver's representative, and offered no evidence of their own to dispute the Receiver's figures regarding their income from the APG scheme. Defendants also failed to submit proposed findings of fact and conclusions of law following the hearing, as invited by the court.[10]

On April 23, 2007, the district court issued an opinion, finding Neiswonger and Reed in civil contempt for violating the 1997 Permanent Injunction.

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[9] Defendants, however, had no objection to the admission of the Receiver's document containing his calculations of the amount of APG's gross sales. Tr. (Vol. II) 45-46, Appx. 38-39.

[10] The Commission filed Proposed Findings of Fact and Conclusions of Law, setting forth in detail the evidence on both liability and damages. D. 81.

Memorandum Opinion. D. 123, reported as *FTC v. Neiswonger*, 494 F. Supp.2d 1067 (E.D. Mo. 2007).[11] The court found that, contrary to defendants' promises to prospective purchasers of a "substantial" or "six-figure" income in a "lucrative business," a substantial income was nearly impossible to achieve, and approximately 94% of the nearly 2,000 purchasers of the APG program failed even to earn back their initial $9,800 purchase fee. 494 F. Supp. 2d at 1074-75. The court held that defendants' pervasive misrepresentations violated the Permanent Injunction, as did their failure to disclose material facts to prospective purchasers, including the fact that they used paid "references" to vouch for the APG program. *Id.* at 1075.

In light of these violations, the district court modified the Permanent Injunction to prohibit Neiswonger from marketing any business opportunity program in the future. *Id.* at 1082-84. The court also indicated that it would require defendants to disgorge the income they received from this deceptive scheme to provide compensatory relief to injured consumers. *Id.* at 1082 n.20.

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[11] In his brief, Neiswonger repeats factual assertions that the district court rejected. *See, e.g.*, Br. at 4 (stating that 80% of APG customers merely wanted APG services for themselves and were not interested in the business opportunity); *id*. at 6 (stating that Neiswonger posted a bond with the FTC through 2006, as required by the Permanent Injunction). Neiswonger does not, however, challenge the district court's decision that he is liable for contempt, which was based on contrary factual findings.

The court found, based on the Receiver's reports and testimony adduced at the contempt hearing, that the defendants generated a revenue of nearly $20,000,000 from the sale of the APG program; and Neiswonger's and Reed's proceeds from this deceptive enterprise were in excess of $3,000,000 and approximately $5,000,000, respectively. *Id.* at 1076. Because the Receiver was still in the process of ascertaining the defendants' assets, however, the court stated that it would not enter a compensatory sanction at that time, but instead would await a final computation from the Receiver, and then would modify the contempt order to include a compensatory sanction. *Id.* at 1082 n.20.

The district court later entered a preliminary injunction extending the asset freeze and the receivership as to Neiswonger and Reed, finding that there was a "substantial likelihood" that, absent such relief, defendants "will conceal or destroy property and evidence and conceal, dissipate, or otherwise divert their assets and thereby defeat the possibility of effective final relief." D. 140, at 2.[12]

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[12] In its April 2007 Opinion, the district court had found Reed in contempt for violating the TRO's asset freeze by transferring thousands of dollars without the Receiver's knowledge or permission. *Neiswonger*, 494 F. Supp. 2d at 1084-87. In addition to these violations of the TRO, both Neiswonger and Reed attempted to violate the asset freeze by selling their homes, but, fortunately, the FTC learned of these attempted sales and succeeded in halting them. The Commission detailed these attempted violations in its Motion for a Preliminary Injunction (D. 126), and its Memorandum in Support of Proposed Amended Civil Contempt Order (D. 237-4).

The Receiver submitted his final report to the district court in March 2008, showing that Neiswonger had earned $3,213,719.13 and Reed had earned $5,752,093.77 from the sale of the APG program. D. 236, at 2, Appx. 117. Neiswonger objected to the Receiver's report and moved for an evidentiary hearing on the amount of monetary relief, but the court denied the motion because defendants had failed to show that there was a genuine dispute of material fact regarding the final accounting of the disgorgement amount. D. 273. The court noted that defendants had already had a "full and complete opportunity" to contest the Receiver's financial evidence at the contempt hearing, but had chosen not to do so, and defendants had failed to challenge the court's preliminary findings, in its April 2007 Opinion, regarding their ill-gotten gain. *Id.* at 2. On July 31, 2008, the district court entered the Amended Civil Contempt Order including compensatory monetary sanctions against Neiswonger and Reed in the amounts specified by the Receiver and requiring them to turn over certain assets in partial satisfaction of the judgment. D. 275.[13]

On August 27, 2008, Neiswonger and Reed filed a notice of appeal from the Amended Civil Contempt Order. They moved the district court for a stay of that

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[13] The Receiver will liquidate those assets, satisfy legitimate liens to the extent practicable, and add any remaining funds to the receivership estate for disgorgement.

Order pending appeal, which the district court denied. They then sought a stay pending appeal from this Court, which the Court denied on November 14, 2008. Reed subsequently filed a motion to dismiss his appeal, which the Court granted.

SUMMARY OF ARGUMENT

A district court has broad discretion in using its contempt power to require adherence to court orders and enter compensatory awards for contempt through civil proceedings upon notice and an opportunity to be heard. Contrary to Neiswonger's characterizations of the proceedings below, defendants were afforded a full opportunity to defend against the Commission's contempt claims, including the opportunity to contest the Receiver's income analysis and to put before the district court evidence of their own relevant to the issue of damages. Defendants, however, chose not to avail themselves of this opportunity. When the district court suggested a continuance of the contempt hearing in light of defendants' objection to the Receiver's tally of their income from APG, defendants flatly turned down the offer of a continuance. Neiswonger has thus waived his right to challenge the contempt award on the grounds that he was deprived of a further evidentiary hearing to address supposed deficiencies in the Receiver's analysis. (Part I, *infra*.)

In light of the district court's findings regarding defendants' routinely deceptive sales tactics in marketing the APG program (which liability findings Neiswonger does not challenge in this appeal), the court properly exercised its discretion in ordering disgorgement of defendants' income from this scheme as a compensatory sanction. The disgorgement amount is amply supported by the factual record. The district court ordered disgorgement in amounts found by the Receiver to constitute defendants' earnings from APG, which computations were based on information derived from defendants' own detailed accounting records. Defendants did not introduce any evidence to cast doubt on the Receiver's calculations, despite having had ample opportunity to do so. (Part II, *infra*.)

The district court also acted well within its discretion in ordering Neiswonger to turn over certain assets in partial satisfaction of the judgment. Given Neiswonger's history of deceptive conduct and past attempts to conceal and dissipate assets in violation of a court order, these provisions are important to safeguard those assets for consumer redress. Contrary to Neiswonger's contention, there is no legal bar to the asset turnover provisions. (Part III, *infra*.)

STANDARD OF REVIEW

This Court "review[s] a district court's imposition of a civil contempt order and assessment of monetary sanctions for abuse of discretion." *Chaganti &*

Assocs., P.C. v. Nowothy, 470 F.3d 1215, 1223 (8th Cir. 2006). Under this standard, the Court "giv[es] plenary review to conclusions of law and review[s] findings of fact for clear error." *Wright v. Nichols*, 80 F.3d 1248, 1250 (8th Cir. 1996); *see Warnock v. Archer*, 443 F.3d 954, 955 (8th Cir. 2006).

ARGUMENT

I. NEISWONGER WAS AFFORDED DUE PROCESS IN THIS CIVIL CONTEMPT PROCEEDING.

Neiswonger claims that he was ambushed by the district court, and thus deprived of his due process rights, when the court, after offering a continuance of the show cause hearing, turned around and entered a monetary contempt sanction against them without giving them the benefit of a hearing on damages. Neiswonger's recounting of the proceedings below is inaccurate. Throughout this contempt proceeding, defendants were afforded ample opportunity to address the issue of damages (as well as liability), to challenge the appropriateness of the relief sought by the Commission, to contest the Receiver's income analysis, and to put before the district court evidence of their own relevant to the issue of damages. Defendants, however, chose not to avail themselves of these opportunities.

In a civil contempt proceeding, the basic requirements of due process are satisfied if the alleged contemnor is afforded "notice" and "an opportunity to be heard." *International Union, United Mine Workers of America v. Bagwell*, 512

U.S. 821, 827 (1994); *see In re Grand Jury Subpoena*, 739 F. 2d 1354, 1357 (8th Cir.1984). Neiswonger was afforded both. He was put on notice at the outset of this contempt proceeding that the Commission sought monetary sanctions to compensate for the consumer harm caused by his and Reed's violations of the Permanent Injunction – specifically, the disgorgement of the money defendants received from deceptively promoting and selling the APG program. D. 22-1, at 30-31. Defendants filed no opposition to the Commission's contempt motion. Defendants filed no response or objection when the Receiver submitted his first report to the district court in July 2006 indicating that his preliminary analysis of defendants' records showed that, from 1999 through mid 2006, APG had gross sales of approximately $20 million and Neiswonger was paid or received the benefits of nearly $3 million from APG. PX 112 at 3; Appx. 83. When the Commission presented extensive evidence at the October 2006 contempt hearing that Neiswonger's APG earnings totaled over $3 million, defendants declined to cross-examine the Receiver and presented no evidence to rebut the Receiver's income calculations.[14]

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[14] It is demonstrably not the case, as Neiswonger asserts (Br. at 27), that the sole purpose of the October 2006 hearing was to address the appropriateness of a preliminary injunction. As the district court's order setting the hearing clearly shows, that hearing was intended to address the Commission's motion to show cause why defendants should not be held in contempt (which included the Commission's request for entry of a monetary sanction based on defendants'

Neiswonger asserts that the district court offered a continuance when defendants objected to the admission of PX 114, thus reserving the issue of damages for a later evidentiary hearing (Br. at 22-23), but he conveniently neglects to mention that defendants turned the offer of a continuance down. Neiswonger's counsel made it clear that "we do not want the continuance. If that is the remedy, I withdraw my objection." Tr. (Vol. II) 54, Appx. 46. Neiswonger has thus waived his right to challenge the district court's contempt award on the grounds that he was deprived of a further evidentiary hearing to address supposed deficiencies in the Receiver's analysis.

Defendants' dilatory approach to their defense of the Commission's claims continued after the hearing. Although the district court invited the parties to submit proposed findings of fact and conclusions of law at the conclusion of the contempt hearing (Tr. (Vol. II) 172-73, Appx. 52-53), defendants failed to do so. Defendants apparently made no effort to access the records underlying the Receiver's computations (even though, under the terms of the TRO, defendants were at liberty to request access to those records at any time). D. 29, at 20. Nor

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income from their fraudulent scheme), as well as the Commission's request for a preliminary injunction. D. 51 ("**IT IS HEREBY ORDERED** that the show cause and preliminary injunction hearing is **RESET** to October 25, 2006"). At the outset of the hearing, the Commission's counsel reiterated that a key purpose of the hearing was to address the issue of monetary relief. Tr. (Vol. I) 24-25, Appx. 2-3.

did defendants make any effort to bring to the court's attention any perceived problems with the evidence concerning their income from APG following the court's April 2007 Opinion, in which it indicated that it intended to enter a compensatory contempt sanction based on the Receiver's computations and made preliminary findings regarding defendants' APG earnings. That defendants squandered these many opportunities to mount a defense was their own choice, and not the result of any denial of due process by the district court.

Neiswonger's claim of a due process violation is not supported by the cases that he cites (all of which involved default judgments, not contempt orders entered after an evidentiary hearing). Br. at 26-27. Unlike in *Stephenson v. El-Batrawi*, 524 F.3d 907 (8th Cir. 2008), here the district court specified the evidentiary basis upon which its award of monetary relief was based (the Receiver's calculation of defendants' income from sales of the APG program), providing this Court with an "adequate record for the evaluation of the district court's damages determinations." *Id*. at 917. *See Ackra Direct Marketing Corp. v. Fingerhut Corp.*, 86 F.3d 852 (8th Cir. 1996) (affirming the district court's judgment where the court sufficiently articulated its reasoning and the record evidence supported the amount of damages). And, unlike in *KPS & Assocs., Inc. v. Designs by FMC, Inc.*, 318 F.3d 1 (1st Cir. 2003), this is not a case in which "the district court could not have

determined damages without a further evidentiary inquiry." *Id*. at 19. To the contrary, as discussed below, there was ample evidence in the record to support the district court's award of monetary relief.

II. THE RECORD EVIDENCE SUPPORTS THE $3,213,719.13 CONTEMPT SANCTION AGAINST NEISWONGER.

The Commission made out its case regarding the amount of compensatory sanctions in much the same manner as it does in its case in chief in an action under the FTC Act. Because the Commission's consumer protection cases generally involve deceptive practices aimed at large numbers of consumers, the courts – including this one – have recognized that it is appropriate for the Commission to proceed by showing the deceptive nature of a defendant's course of conduct. Where the Commission can show such a pattern of deception – as it did here – it is entitled to a presumption that consumers relied on and were injured by defendants' contumacious conduct. *See FTC v. Security Rare Coin & Bullion Corp*., 931 F.2d 1312, 1316 (8th Cir. 1991) (noting that it would be "virtually impossible" for the FTC to offer proof of subjective reliance by each consumer, "and to require it would thwart and frustrate the public purposes of FTC action").[15] As other courts have recognized, the same reasons that make this principle appropriate in the

[15] *See FTC v. Figgie*, 994 F.2d 595, 605 (9th Cir. 1993) ("It is well established with regard to Section 13 of the FTC Act . . . that proof of individual reliance by each purchasing customer is not needed.").

Commission's case in chief under the FTC Act apply equally in a subsequent civil contempt proceeding and justify a compensatory contempt award in the amount of the gross receipts of the deceptive enterprise. *See FTC v. Kuykendall*, 371 F.3d 745, 764 (10th Cir. 2004) ("When . . . the FTC has shown through clear and convincing evidence that defendants were engaged in a pattern or practice of contemptuous conduct, the district court may use the defendants' gross receipts as a starting point for assessing sanctions."); *McGregor v. Chierico*, 206 F.3d 1378, 1387 (11th Cir. 2000) (granting FTC's request for contempt award of $7.2 million for consumer redress as measured by gross sales where defendants' businesses "routinely used deceptive calling scripts to induce the purchase of toner").

Given the district court's findings regarding defendants' routinely deceptive sales tactics, *Neiswonger*, 494 F. Supp. 2d at 1072-75, the Commission could have sought, and the court would have been justified in awarding, a compensatory contempt sanction in the full amount of APG's gross receipts – nearly $20 million. Instead, the Commission asked for the lesser amount of disgorgement of Neiswonger's and Reed's income from this deceptive scheme. In this appeal, Neiswonger does not directly challenge the legal basis for the district court's award of disgorgement as a compensatory contempt sanction. Rather, he challenges the sufficiency of the evidence supporting this award.

Apart from his argument that defendants were not afforded a hearing on damages, which we address above, Neiswonger argues that the district court's contempt award is erroneous because it was based on the Receiver's "estimate testimony" of defendants' income. Br. at 18. Neiswonger also asserts that the Receiver incorrectly attributed certain amounts to him as income from the APG scheme. Br. at 24. These arguments are without merit. The Receiver made clear at the contempt hearing and in his several reports to the district court that his computations of defendants' APG earnings derived from the accounting records generated and maintained by defendants themselves. Although the Receiver's calculations as of October 2006 were not final because the Receiver was awaiting the receipt of additional records, these computations were based on detailed information in defendant's own accounting records – *i.e.*, they were not mere "estimates."[16] Moreover, the district court did not rely on these preliminary figures, but instead waited until the Receiver completed his review of the relevant records and entered an award based on the Receiver's final computation of defendants' APG earnings as shown by defendants' records ($3,213,719.13, compared to the Receiver's preliminary figure of $3,089,031.10).

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[16] Even if there were some uncertainty regarding the amount of defendants' ill-gotten gains, "the risk of uncertainty should fall of the wrongdoer whose illegal conduct created the uncertainty." *Febre v. FTC*, 128 F.3d 530, 535 (7th Cir. 1997).

Significantly, the evidence of Neiswonger's financial gains from APG included an itemized accounting record, prepared by Neiswonger himself and maintained on his office computer, that recorded hundreds of instances in which Neiswonger converted APG's proceeds for his own personal use, or the use of his spouse or family. PX 114, Appx. 94-115.[17] The majority of these entries (totaling $2,937,313.24) were identified by Neiswonger himself as "personal" in the accounting records; and as for the remaining sums not specifically marked "personal," the Receiver was able to determine from the specific descriptions and accounts to which the payments were directed that they were payments for Neiswonger's personal benefit, not business expenses. D. 236, at 3-4, Appx. 118-19.

This factual record amply supports the monetary contempt sanction entered by the district court. Neiswonger had a full opportunity to challenge the Receiver's analysis in the proceedings below, but chose not to do so. He declined to ask the Receiver any questions, presented no evidence of his own to cast doubt on the accuracy of the Receiver's analysis of defendants' accounting records, and

[17] Contrary to Neiwonger's suggestion (Br. at 24), the fact that some of the accounting entries identified his use of APG's proceeds to pay his taxes or make charitable contributions does not undermine the Receiver's determinations that those sums were proceeds from APG's deceptive sales that Neiswonger received for his personal benefit (and thus were amounts properly subject to disgorgement).

expressly rejected the district court's offer of a continuance to allow him to address whatever concerns he might have regarding the Receiver's computations. Although Neiswonger belatedly suggested that some of these sums were not properly deemed personal income, he never backed up these claims with evidence. On this record, the district court did not abuse its discretion in entering a contempt sanction against Neiswonger based on the Receiver's computation of Neiswonger's proceeds from the deceptive APG scheme.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ORDERING NEISWONGER TO TURN OVER CERTAIN ASSETS.

There is likewise no merit to Neiswonger's argument that the provision of the contempt order requiring him to turn over certain assets to the Receiver in partial satisfaction of the judgment violates state and federal laws. Given the defendants' self-proclaimed expertise in "bulletproofing" assets to avoid paying judgments and/or government authorities,[18] and Neiswonger's previous attempts to evade the TRO in this case and conceal assets in the related criminal action,[19] these asset turnover provisions were particularly important to prevent the dissipation of

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[18] Notably, Neiswonger specifically referred to hiding assets from the FTC in APG promotional materials. PX 6 at 9, Appx. 62 ("If you stop and think about it, there are many reasons someone might want this level of protection. . . . Someone in or interested in a business regulated by and subject to fines from the FTC. . . .").

[19] *See* notes 4 & 12, *supra*.

those assets.

Neiswonger argues, first, that he cannot be compelled to turn over certain real property because his wife shares a marital interest in the property under Nevada's community property laws, and she is a non-party to this litigation. Br. at 28-30. As this Court has recognized, however, "Nevada law holds community property is subject to a spouse's debt irrespective of whether both spouses were a party to the action." *Jones v. Swanson*, 341 F.3d 723, 738 n. 6 (8th Cir. 2003) (citing *Randono v. Turk*, 466 P.2d 218, 224 (Nev. 1970)). See also *Nelson v. United States*, No. 93-15491, 1995 WL 25788, at *1 (9th Cir. May 1, 1995) (under Nevada law "a debt incurred during marriage by either spouse can be collected from community property. . . . It is a community debt and can be collected from the whole of the community, not just the actor's one-half.").

The cases cited by Neiswonger do not support his argument. In *SEC v. Antar*, 120 F. Supp. 2d 431 (D.N.J. 2000), the court addressed the distinct questions whether, under New Jersey law, a spouse's interest in marital property owned as a tenancy by the entirety may be reached by that spouse's creditors and whether those creditors may obtain partition or foreclosure of that property. The court answered both questions in the affirmative, but found that the equities in that particular case did not support partition of the marital home. *Id.* at 449-50. This

case has no bearing, however, on the question whether community property may be used to satisfy a judgment against a spouse.

In *SEC v. Ross*, 504 F.3d 1130 (9th Cir. 2007), the issue was whether the district court could order a non-party employee of a firm found to have violated the federal securities laws to disgorge his earnings from the firm. The court held that entry of the order was error, among other reasons because it was implicitly premised on a conclusion that the employee himself had violated the securities laws, but nothing in the underlying action established such violations. *Id*. at 1142. This case says nothing about whether a party found to have engaged in wrongdoing can be required to turn over assets.

SEC v. Bilzerian, No. 89-1854, 1989 Dist. LEXIS 9013 (D.D.C. Aug. 2, 1989), and *Matrix Essentials v. Quality King Distributors, Inc*., 346 F. Supp. 2d 384 (E.D.N.Y. 2004), likewise fail to support Neiswonger's assertion of error. *Bilzerian* merely involved a discovery issue, while *Matrix Essentials* addressed the circumstances under which non-parties may be held liable for contempt of a court order. These decisions are thus inapposite.

Furthermore, the fact that the real property at issue is held by the "SRN Trust" does not, as Neiswonger appears to suggest (Br. at 32), shield it from the judgment. The trust documents show that Neiswonger is a grantor/trustor, trustee

and beneficiary of the trust. D. 237-7, Appx. 125-30; D. 237-8, Appx. 131-39. These documents show that, as trustee, Neiswonger has the power to act individually to sell and exchange all trust property. Because the 9509 Verlaine Court property is held by the SRN Trust, of which Neiswonger is a trustee with the unilateral power to transfer Trust property, he is able to transfer it to the Receiver as directed by the district court. His assertion that he no longer lives there is irrelevant.

Defendants who have attempted to use trusts to place assets out of the reach of federal court judgment have faced a high burden in convincing courts that they are unable to turn over the assets. *See FTC v. Affordable Media*, 179 F.3d 1228, 1239-43 (9th Cir. 1999) (upholding finding that defendant remained in control of offshore trust with foreign trustee and would be required to repatriate assets); *SEC v. Bilzerian*, 112 F. Supp. 2d 12, 25-26, 28 (D.D.C. 2000) (finding that defendant failed to prove inability to comply with repatriation order because he failed to prove that he had actually relinquished all control of foreign trust). Neiswonger has made no showing that he is unable to turn over this property as required by the district court's order merely because it is held in a trust.

Neiswonger also fails to establish that the district court erred in ordering him to turn over funds held by Neiswonger in his IRA account. Contrary to

Neiswonger's contention, the fact that retirement accounts may be subject to a state law exemption in certain proceedings, including bankruptcy proceedings, does not limit a district court's broad authority, in the exercise of its contempt power, to require adherence to court orders and order equitable relief. *See Steffen v. Gray, Harris & Robinson PA*, 283 F. Supp. 2d 1272, 1282 (M.D. Fla. 2003) (" a district court has both inherent and statutory authority to enforce compliance with its orders through the use of civil contempt" and "can ignore state law exemptions as well as other state law limitations in fashioning a disgorgement order"); *SEC v. Musella*, 818 F. Supp. 600, 602 (S.D.N.Y. 1993) ("Contrary to [defendant's] assertion, the extent to which [his] assets would be exempt from attachment under New York law does not alter his duty to pay the amount he owes under [a federal court] order."). The cases that Neiswonger cites do not hold otherwise.[20]

Moreover, contrary to Neiswonger's assertion that the district court did not consider these issues (Br. at 33-34), they were fully briefed before entry of the Amended Civil Contempt Order. D. 237-4; D. 244; D. 246. The district court, however, with full awareness of Neiswonger's past history in this case, determined that the asset turnover provisions were necessary to provide for effective redress.

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[20] The prospect that Neiswonger will face a tax penalty for withdrawing funds from his IRS account does not affect his ability to turn over those funds remaining in the account after any applicable taxes are paid.

Neiswonger has failed to show that the court's inclusion of these provisions was an abuse of discretion.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that this Court affirm the district court's Amended Civil Contempt Order.

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CERTIFICATE OF COMPLIANCE

Counsel certifies that this brief complies with the type-volume limitation of Fed. R. App. 32 (a)(7)(C), in that it contains 7,120 words, including headings, footnotes, and quotations, but excluding the table of contents and table of authorities, and certificate of compliance.

s/ Michele Arington
Michele Arington

CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2009, ten copies of the Brief of Plaintiff-Appellee Federal Trade Commission, and two copies of the Commission's Appendix were sent to the Clerk of Court by overnight courier; and two copies of the foregoing Brief and one copy of the Appendix were sent by overnight courier to appellant's counsel as follows:

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