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

JESSICA RICH
Director

SARAH WALDROP
REENAH L. KIM
Attorneys
Bureau of Consumer Protection

DAVID C. SHONKA
Acting General Counsel

JOEL MARCUS
Deputy General Counsel

IMAD D. ABYAD
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., N.W.
Washington, DC 20580
(202) 326-3579

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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 merely disagrees with the district court's interpretation of the record evidence. But his preferred interpretation does not nearly demonstrate that the court committed

clear error in its factual findings. The extensive record showing that Burke played a key role in the sweepstakes scheme contradicts his naked assertions on appeal that he was not responsible for the deceptive solicitations and that those solicitations were not "material to a consumer's decision to purchase any item, product, good, service, or investment." Overwhelming evidence proves that Burke commissioned, reviewed, and approved the deceptive solicitations. Consumers sent him millions of dollars in exchange for his empty promises of "life-changing" prizes. The district court properly held him in contempt for that conduct, which plainly violated the injunction.

JURISDICTION

The district court had jurisdiction over the FTC's original action pursuant to Sections 13 and 19 of the FTC Act, 15 U.S.C. §§ 53, 57b, and Sections 6102 and 6105 of the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6102, 6105. The FTC's original action resulted in the court's entry of a Stipulated Final Order for Permanent Injunction and Settlement of Claims for Monetary Relief,

dated October 1, 1998 (hereinafter, the "1998 Injunction"). EOR_123-139.[1]

The district court had inherent power to enforce compliance with its decrees through contempt proceedings. *See*, *e.g.*, *Spallone v. United States*, 493 U.S. 265, 276 (1990); *Reebok Int'l Ltd. v. McLaughlin*, 49 F.3d 1387, 1390 (9th Cir. 1995).

The district court's final contempt judgment was entered March 16, 2016, and Burke filed a timely notice of appeal on May 11, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

QUESTIONS PRESENTED

1. Whether the district court properly held Burke in contempt of the 1998 Injunction for his central role in a deceptive scheme; and

2. Whether the FTC was required to bring a new case against Burke rather than enforcing the existing injunction through contempt proceedings.

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[1] "EOR" refers to appellant's Excerpts of Record. "SER" refers to the FTC's Supplemental Excerpts of Record, filed herewith. "D.xxx" refers to the district court's Docket's Document Number.

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. First, he engaged in telemarketing, and in January 2013, the FTC moved the district court to hold Burke and a co-defendant in contempt for violating the 1998 Injunction's prohibition on telemarketing. Second, Burke ran a sweepstakes contest, and in March 2013 the FTC filed a separate contempt motion seeking to hold Burke in contempt for violating the prohibition on material misrepresentations. EOR_169-630. This case concerns the second violation.

After a consolidated hearing on both motions, the district court (Phillip M. Pro, J.) held, on September 27, 2013, that Burke and his co-defendant violated the 1998 Injunction. EOR_122. The court ordered Burke to pay $20,174,740.36 in sanctions for the consumer losses from the two contumacious schemes. The co-defendant was found jointly and severally liable for $2,785,508.36, the amount attributed to the telemarketing scheme. *Id.*

Burke appealed the misrepresentation judgment, but not the telemarketing judgment. On appeal, this Court reversed and remanded the case for further proceedings, because the findings as to the sweepstakes operation "d[id] not afford [this Court] a clear understanding of the basis of decision." Memorandum, *FTC v. Glen Burke*, No. 13-17448 (9th Cir. June 11, 2015), at 3 (hereinafter, "*Glen Burke I*"). EOR_070-073.

On remand, the district court (Gloria M. Navarro, C.J.) reconsidered the record and again held Burke in violation of its 1998 Injunction. In the judgment on review, the court issued detailed Findings of Fact and Conclusions of Law (EOR_002-019, hereinafter, "Op.") and ordered Burke to pay $17,389,232 in sanctions. EOR_019.

1. *The Original Action*

The FTC sued Burke and others in 1997 for violating the FTC Act by running a scheme to sell bogus investments in commercial film production partnerships. Op. ¶1 [EOR_002].[2] Along with other

[2] Burke was no stranger to federal law enforcement. In 1991, he shut down a telemarketing operation after the Postal Inspection Service executed search warrants. PX3 ¶3 [SER_025]. In 1996, the FTC obtained a default judgment against Burke for violations of the FTC Act arising from a business opportunity scam. PX1 ¶30 & Att. T [SER_005,

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

> II. THEREFORE, IT IS HEREBY ORDERED that defendants and their agents, employees, officers, and servants, and all other persons or entities in active concert or participation with them who receive actual notice of this order by personal service or otherwise, in connection with the advertising, promotion, offer for sale, or sale of any item, product, good, service, or investment interest of any kind, * * * are hereby restrained and enjoined from:
>
> * * *
>
> B. Misrepresenting, 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 * * *;
>
> 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 * * * Glen Burke * * * [is] hereby permanently restrained and enjoined from either

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007-017]. In 1997, the Securities and Exchange Commission obtained an order against Burke for failing to disclose to investors that at least five States had sued his publicly traded telemarketing firm. PX1 ¶31 & Att. U [SER_005, 018-022]. Most recently, on August 31, 2016, Burke was indicted for conspiracy to commit mail and wire fraud stemming from the same telemarketing scheme in the FTC's civil contempt proceeding. *United States v. Glen Burke et al.*, No. 2:16-cr-262-JAD-PAL (D. Nev., *filed* Aug. 31, 2016) [SER_223-233].

> (1) engaging in telemarketing; or (2) assisting others in telemarketing.

EOR_126-128; *see* Op. ¶2 [EOR_002].

2. *Burke's Direct-Mail Sweepstakes Operation*

The district court found that from at least 2008 until January 2013, Burke orchestrated a direct-mail sweepstakes operation that violated the 1998 Injunction. He falsely told consumers that they could collect substantial amounts of money in exchange for a small processing fee. Op. ¶¶4, 7, 9, 28-32 [EOR_003-04, 008]. His mailers "directed recipients to send back" $20-$30 in "fees" in order to claim the "advertised payouts worth hundreds of thousands or even millions of dollars in 'cash prizes,' 'sweepstakes payments,' or other 'unclaimed' or 'unawarded' funds." Op. ¶¶9, 7 [EOR_003-04]. *See, e.g.*, PX22 Att. D at 68 [EOR_309] ("Include the $26.59 Transfer Fee for processing this $532,500.00 Stimulus Rebate Benefit into your name"); *id.* at 70 [EOR_311] ("You must mail the form below with your processing fee [of "$27.95"] in order to process your application * * * Maximum Prize: $458,389.00"); *id.* at 75 [EOR_316] ("Access to documentation for these additional monies–$7,041,846–requires $20 research and processing fee"); *id.* at 6 [EOR_246] (for "financial services fee of $24.94," "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").

Considerable evidence, largely from Burke's own files, showed that, at a minimum, "Burke played a crucial role in the key aspects of the sweepstakes operation." Op. ¶77 [EOR_15]. He commissioned, reviewed, and approved the sweepstakes mailers, overseeing the copywriting and design processes to ensure they had enough "heat" to entice consumers. For example, in one email, Burke asked his copywriter to produce a solicitation mailer with "more heat" and explained that he planned to test both versions to see which worked better. PX22 Att. M at 35-36 [EOR_412-413]; *see* Op. ¶¶17-19 [EOR_005-06]; PX22 Att. M at 32-34 [EOR_409-411] (Burke instructing new copywriter); *id.* at 37-42 [EOR_414-419] (Burke approving a sweepstakes mailer design "to simulate what a contract looks like"). Burke also directed the mailing of his sweepstakes solicitations to consumers, using information he personally obtained from list brokers. Op. ¶20 [EOR_006]; PX22 Att. M at 49-53 [EOR_426-430]; PX31 Att. C at 40-58, Att. G [SER_181-199, 214-222].

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!" PX22 Att. D at 14 [EOR_254]. *See* Op. ¶¶10-12, 14 [EOR_004-05]; PX22 Att. D at 6 [EOR_246] ("Certified Letter" from "Hancock Financial Services"); *id.* at 20 [EOR_260] (bar-coded letter from "Peterson & Associates" concerning "Disclosure of Unclaimed Funds").[3]

Some of Burke's mailers contained blocks of dense text, printed on the back, purporting to disclose details of the contest that the recipient had "already won." Op. ¶13 [EOR_005]; *see, e.g.*, PX22 Att. D at 65, 69,

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[3] Other mailers used fonts and layouts used in tax forms, or looked like checks or bond certificates. *See, e.g.*, PX22 Att. D at 18, 35, 55, 56, 62 [EOR_258, 275, 295, 296, 302]. Sample mailers found on Burke's desk at his Las Vegas offices also included the stamp "Official Certification" with a seal for the "Property Auditor," and a purported "Award Voucher-Payments & Transfers" form with an "Official Document" watermark printed across it. PX22 Att. B at 2, 5 [EOR_192, 200].

71, 74 [EOR_305, 310, 312, 315]. Some of these "consumer disclosures" provided the odds of winning the various prizes in the sweepstakes, including the payout represented on the front of the mailer, conveying the impression of how "lucky" the consumer must have been and reinforcing the message that a large payout awaited the consumer. *Id.* at 69, 71 [EOR_310, 312].

Consumers who did not send any money in response to Burke's initial mailers were sometimes sent an additional flier, designed by Burke to underscore the message that payment of the fee was "the only remaining impediment to receiving a 'life-changing' cash payout." Op. ¶15 [EOR_005]. The flier contained a "Winner's Satisfaction Survey" that conveyed the impression that the recipient consumer should already have received a large-enough cash prize to, for instance, "Buy a new home" or "Buy a new car." PX22 Att. D at 45 [EOR_285]. Burke was directly involved in the creation and design of that alleged survey. *See* PX22 Att. M at 43-48 [EOR_420-425]. He was similarly involved in designing a "Trouble Ticket"—ostensibly to use in the event that the consumer did not receive his or her "life changing" prize—that promised

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 promised payouts. *E.g.*, PX22 Att. B at 25, 31 [EOR_220, 226]; PX22 Att. D at 3, 4, 7, 8, 14-20, 22-23, 25-36, 38-39, 42-43, 47-48, 49-51, 52-53, 58-59, 60-61 [EOR_243-44, 247-48, 254-260, 262-63, 265-276, 278-79, 282-83, 287-292, 298-301]; *see* Op. ¶¶29-30 [EOR_008]. Burke arranged for some of these consumers to receive trivial amounts—typically less than $2—as

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[4] Burke was especially aggressive to consumers who *were* lured by his initial mailer and sent money in anticipation of a large prize payout. Op. ¶21 [EOR_006]. Burke directed his list brokers to compile new mailing lists of those responsive consumers, PX31 Att. C at 40-52 [SER_181-193], whom Burke then targeted with an avalanche of as many as 40 additional mailers, promising more payouts and seeking more money—prompting one of his list brokers to remark to him in an email, "Seems like a lot, but I guess you know what your [sic] doing." *Id.* at 42 [SER_ 183].

their "winnings." Op. ¶¶31-33 [EOR_008]; *see, e.g.*, PX22 Att. D at 41 [EOR_281] (fulfillment prize of $1.12), 49-51 [EOR_289-291] (fulfillment prize of $0.79 sent in response to consumer's demand letter); PX28 at 29:12-25 [SER_036] (Burke's employee testifying that $1.12 was a typical amount of prize money actually sent to consumers); PX22 Att. M at 144-45 [EOR_521-22] (Burke noting the same).

The district court determined that Burke sought to evade detection by law enforcement agencies by using other people as fronts, often a Panamanian associate named Errol Seales. They served as the nominal principals and actors, while he conducted all of the day-to-day business. Op. ¶¶38-44, 46-47 [EOR_009-011]; *see, e.g.*, PX22 Att. M at 18-22, 56-59, 76-78, 144 [EOR_395-99, 433-36, 453-55, 521]; PX31 Att. C at 59, 62-69 [SER_200, 203-210]. For example, Burke rented mailboxes in the Netherlands, but the invoices were in Seales's name. Op. ¶44 [EOR_010]; PX22 Att. M at 2-5, 9-13 [EOR_379-382, 386-390]; PX31 Att. C at 60-62 [SER_201-03]; *see id.* at 65 (Burke's associate reporting that Seales was asked to "send over his paperwork" to open

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, e.g.*, 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

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[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 mailboxes for him in California, New Jersey, Pennsylvania, Illinois, Mexico, Panama, the Netherlands, and elsewhere. Op. ¶25 [EOR_007]; *see, e.g.*, PX22 Att. D at 19, 69 [EOR_259, 310]; PX22 Att. M at 20-22, 60-68 [EOR_397-99, 437-445]; PX1 Att. V at 2 [SER_024]. One associate wrote to Burke that "we don't want all our eggs in one basket (box)," which "just makes it easier to get popped for everyone." PX22 Att. at 76 [EOR_453].

a draft message to Burke's contact in the Netherlands asking her to shield Burke's name from discovery by the U.S. authorities. The draft read:

> I have become aware of the issue regarding FedEx and Errol's package. While I don't wish to imply I'm trying to tell you what to do, I do believe some caution needs to be taken if you have to deal with US authorities. Regardless of who you have interaction with on a day to day basis you should be very careful if you are asked who the client is and only give the information used for billing. Several of the people you deal with on a regular basis are consultants only and not principals in any of the businesses and I believe they should not be brought into the mix (for example, Glen [Burke] is only a consultant, Errol is the principal). While not anticipating that you will have any contact, having much experience in the industry in the States for many years, I know an unsatisfactory outcome could affect the consultant's ability to earn a living if they were brought into the picture needlessly.

PX22 Att. M at 23 [EOR_400]. Earlier, however, Burke had forcefully reminded Seales who was truly in charge, writing to him in 2010:

> Errol I really don't get what you're doing * * * you said you wanted to get back into fold with all of us and start making money again and I don't have a problem with that but you're not going to run the show * * * I gave you some ideas that would be helpful to the group and further the programs along but I have seen no results as of yet * * *.

PX22 Att. M at 57 [EOR_434]. Seales acknowledged his role, responding: "I'm the last person on the Totem Pole, so to speak, here in Panama, and no way am I trying to take over * * * I do not want to

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, e.g.*, 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 bank accounts, PX22 Att. M at 14-22 [EOR_391-99], but the majority of them were processed through a foreign check processor that held the money on Burke's behalf. Op. ¶¶49-51 [EOR_011]; *see* Declaration of Thomas A. Seaman in Support of Preliminary Injunction (D.167) (hereinafter "Receiver Decl.") ¶¶4-5 [SER_235-36]; PX28 at 31:8-21, 32:8-24 [SER_037-38]; PX30 ¶¶3-7 [SER_172-73].[6]

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[6] Burke paid his expenses by directing the check processor to wire money from his accounts to his copywriters, list brokers, and fronts. Op. ¶¶39, 46, 52 [EOR_010-12]; Receiver Decl. ¶5 & Att. A [SER_235-36, 238-259]; PX22 Att. M at 6-8 [EOR_383-85]; PX30 ¶7 [SER_173]. Burke tapped his profits by directing the check processor to wire money to his print shop, which in turn issued checks for those wired funds to Burke's own company, Merchant's Depot. Op. ¶53 [EOR_012]; Receiver Decl. ¶5 & Atts. A, B [SER_235-36, 238-266].

Since 2007, Burke's foreign check processor has credited $17,576,927 to Burke's accounts. Op. ¶56 [EOR_012]; PX30 ¶¶9-13 [SER_174-75]. That figure likely underestimates the total income, for about ten percent of the proceeds were cash and would not have gone through the check processor. Op. ¶55 [EOR_012]; *see* PX31 Att. C at 70-71 (Burke's associates confirming that "all the boxes averaged almost 10% in cash!"). Burke thus likely received from consumers an additional $1,952,992 in cash, for total receipts of $19,529,919. Op. ¶¶56-57 [EOR_012].[7] The check processor debited Burke's accounts by $2,140,687 for various reasons, including refunds to consumers or because consumer checks failed to clear. PX30 ¶¶8-13 [SER_174-75].[8] Thus, assuming that the check processor's entire debit amount was

[7] These figures conservatively estimate Burke's proceeds because they do not account for the checks and money orders that bypassed the check processor and were deposited directly into overseas bank accounts, or for cash deposited into those accounts. *See, e.g.*, PX22 Att. M at 14-22 [EOR_391-99].

[8] Burke provided no accounting of refunds to consumers whose payments he deposited directly in overseas accounts. Op. ¶60 [EOR_012].

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]; *see* PX29 [SER_042-171]. Burke asserted this privilege on all subjects relevant to his contempt liability and the measure of compensatory sanctions, including:

- his stipulation to, and the district court's entry of, the 1998 Injunction, PX29 at 13:4-14:12 [SER_044-45];
- his control of the direct-mail sweepstakes operation, *id.* at 103:13-104:10 [SER_108-09];
- his role in developing the sweepstakes mailers, *id.* at 104:11-117:12, 125:5-128:20 [SER_109-126];

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[9] The $2,140,687 debit figure obtained from the check processor's records likely overestimated the amount of money returned to consumers. The processor had records regarding the nature of *all* debits only from July 15, 2011, forward. PX30 ¶¶5, 8 [SER_173-74]. Records before that date denote only outgoing wire transfers ordered by Burke. *Id.* The $2,140,687 figure therefore may include payments to Burke himself. *Id.*

- his purchase of leads and mailing lists for the direct-mail operation, *id.* at 130:10-131:11 [SER_127-28];
- his failure to deliver the prizes promised in his sweepstakes mailers, *id.* at 131:13-142:7 [SER_128-139];
- his network of fronts, and his efforts to evade detection by law enforcement agencies, *id.* 144:1-163:6 [SER_140-159]; and
- the amount of consumer losses caused by his contumacious activities, *id.* at 164:12-175:4 [SER_160-171].

In light of Burke's refusal to testify, the court ultimately drew "adverse inferences on all points to support a finding of contempt and an order to pay compensatory sanctions." The court explained that "the FTC has presented independent evidence to corroborate each of these points." Op. ¶82 [EOR_016].

4. *Contempt Proceedings*

In January and March 2013, the FTC filed motions for contempt against Burke for violating the 1998 Injunction both through a

prohibited telemarketing operation and through the sweepstakes scheme. EOR_169-630.[10]

After a hearing on both motions, *see* EOR_079-118, the district court issued a brief ruling on September 27, 2013, concluding that Burke and a co-defendant "have violated and are in contempt" of the 1998 Injunction. EOR_122. It sanctioned Burke $20,174,740.36 for the consumer losses caused by the two contumacious schemes. *Id.*

Burke appealed that ruling. EOR_119. Before briefing, the FTC asked this Court to stay the appeal and partially remand to allow the agency to seek an indicative ruling from the district court clarifying its order. The district court issued a clarification order on July 28, 2014. EOR_074-77. The court set forth its findings concerning Burke's "essential role" in the telemarketing scheme, but it did not directly address his role in the direct-mail sweepstakes operation. *Id.*

In June 2015, this Court reversed "the portion of the order finding Burke in contempt for his participation in the sweepstakes operation

[10] The first motion resulted in a temporary restraining order (TRO), the appointment of a receiver, and immediate access to Burke's business premises and records. (D.133). Evidence acquired under the TRO then revealed the sweepstakes operation.

and sanctioning him in the amount of $17,389,232," and remanded the case for further proceedings, "so that the district court can provide findings that will facilitate reasoned review of its order." *Glen Burke I*, at 4 (EOR_073).

On remand, the district court issued the decision now on appeal. EOR_002-019. It reviewed the extensive record anew, EOR_021,[11] and issued detailed findings and conclusions concerning Burke's role in the direct-mail sweepstakes scheme.[12] Relying on the evidence described at length above, the district court found that Burke directed and controlled all aspects of the deceptive sweepstakes operation, from the design and content of the mailers, to securing consumer mailing lists, to arranging receipt mailboxes and payment processors, to the decisions on any prize "fulfillment." Op. ¶¶4-6, 16-23, 25-26, 32-33, 38-47, 50-53 [EOR_003, 005-012].

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[11] On remand, the case was reassigned from Judge Pro, who had retired, to Chief Judge Navarro. The district court found there to be no genuine disputes over material facts and determined that no hearing was necessary. Op. ¶¶90-95 [EOR_018-019].

[12] Burke claims that the district court's findings "are verbatim the findings" proposed by the FTC. *See* Br. 6. This is demonstrably false. *Compare* EOR_002-019 *with* EOR_046-066.

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.* ¶¶29-31, 33-37 [EOR_008-09]. Finally, using the conservative estimates described above, the court found that Burke's scam resulted in consumer losses of at least $17,389,232. *Id.* ¶¶48-50, 54-60 [EOR_011-12]. The court found that Burke's proffered evidence did not support his arguments that some consumers received their prizes, and that Errol Seales was the operation's real principal. *Id.* ¶¶34-37, 41-47 [EOR_009-011].

Based on these findings, the district court concluded that Burke "'made' the representations to consumers or assisted in" making them; that those representations "were 'material' because they were both expressly made and concerned the very nature of the benefits consumers expected to receive"; and that "[i]n reality, no consumer ever received the promised payouts." Op. ¶¶72-75 [EOR_015]. Burke, thus, "made misrepresentations material to consumers' decisions to purchase services, in violation of the [1998 Injunction]." *Id.* ¶76 [EOR_015]. The

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—mostly documents from Burke's own files—demonstrates that he was the

driving force behind the direct-mail sweepstakes 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 fails to seriously confront any of this evidence. He contends that he personally neither designed nor mailed the solicitations, but even if that claim could be squared with the record, it would not help him. The Injunction barred Burke from "[a]ssisting others in violating" its strictures—and his brief admits outright that he "acted as a consultant" to the scheme, whether or not he personally designed or mailed the flyers. Br. 7. More fundamentally, however, Burke fails entirely to come to grips with the exhaustive evidence, including adverse inferences drawn from his invocation of the Fifth Amendment, showing that he in fact directed the operation, whether or not he personally put the misleading solicitation in the mailbox.

Burke also asserts that the district court did not consider the contrary evidence that he proffered, but in its opinion the court directly considered that evidence and found it insufficient to support his

arguments. Lastly, Burke claims (belatedly) that admissions made by his counsel on his behalf cannot be attributed to him. But he provides no basis to believe that the admissions were unauthorized, and at any rate those admissions were a fraction of the evidence showing Burke's liability.

Burke claims in passing that he did not violate the injunction because the mailers did not induce consumers to purchase anything. Burke has waived the argument by failing to raise it sufficiently. But it is wrong anyway because the injunction applies to "the advertising, promotion, offer for sale, or sale of any item, product, good, service, or investment interest of any kind" and prohibits misrepresenting "any fact material to a consumer's decision to purchase any item, product, good, service, or investment." That language plainly applies to a consumer's decision to pay money to receive a payout.

The FTC was not required to bring this case as a new action against Burke and additional defendants. The law requires no such thing, and even if Burke were held jointly and severally liable with others, he would still face the same ultimate monetary sanction.

ARGUMENT

I. THE EVIDENCE FULLY SUPPORTS THE DISTRICT COURT'S DECISION TO HOLD BURKE IN CONTEMPT FOR VIOLATING THE 1998 INJUNCTION

The 1998 Injunction expressly barred 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 or omission. EOR_126-27; *see supra* at 6-7. Burke acknowledges that the Injunction "makes it clear that Mr. Burke is prohibited from * * * acting in a deceptive manner." Br. 14; *accord* Br. 11-12. The overwhelming and uncontroverted evidence of Burke's conduct set forth above amply supports the district court's determination that Burke violated the injunction. Burke did not "contest[] the validity or admissibility of any of th[at] evidence" below, Op. ¶93 [EOR_019], and he presents no good challenge to it now.

Burke's principal claim is that "he was not engaged in the creation or direction of sending the mailers" that induced consumers to send

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

It is legally irrelevant because the 1998 Injunction prohibited Burke not only from engaging in, but also from "[a]ssisting others in," deceptive schemes. *See supra* at 6. Burke plainly violated this latter prohibition, even if he did not personally create or send the deceptive mailers.[13] The district court held explicitly that "[a]t the very least" Burke "'assisted another' to make these misrepresentations, which was sufficient to violate" the Injunction. Op. ¶77 [EOR_015-16]. He directly admits as much at page 7 of his brief, which states that he "argued and submitted evidence to support that he acted as a consultant in the mail sweepstakes." This Court need not proceed further to reject his claims.

Burke's claim also runs headlong into overwhelming record evidence showing that "Burke played a crucial role in the key aspects of the sweepstakes operation." Op. ¶77 [EOR_015]. He was deeply involved at every stage of the scam: recruiting, collaborating with, and

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[13] In arguing that he "did not engage in any activity that violated his Permanent Injunction," Burke quotes the provisions of the 1998 Injunction prohibiting him from engaging in *telemarketing* activity. Br. 15. He ignores the part of the injunction pertinent here.

supervising the copywriters, designers, list brokers, and "fronts;" selecting the mailers' text and design; acquiring consumer lists; and arranging mailboxes 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 sweepstakes 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

on unspecified "admissions" that "cannot be attributed directly" to him. Br. 10, 16. Both claims founder on the record.

The district court in fact considered Burke's proffered evidence, but found it unconvincing. *See, e.g.*, Op. ¶¶34-37, 41-47, 77-79 [EOR_009-011, 015-16]. And for good reason: Burke's "evidence" was unsupported and conclusory. He relied principally on a declaration from Seales, who claimed—without any support or explanation for the huge amount of contrary evidence—that Burke had no responsibility for the scheme. *See* EOR_663-65. But this Court has established that a "conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact." *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir. 1997). That is particularly true when an unsupported affidavit runs counter to overwhelming contrary evidence. *See Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007).

Far from exonerating Burke, the Seales declaration directly supports the finding of contempt. As explained above, the injunction prohibited assisting misleading schemes, and the declaration attests that Burke provided assistance by "do[ing] some consulting" concerning

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.

To begin with, Burke raised no claim below that the court could not rely on admissions made in his pleadings and he may not do so now (indeed, he is represented by the same lawyer). An issue "will generally

be deemed waived on appeal if the argument was not raised sufficiently for the trial court to rule on it." *Armstrong v. Brown*, 768 F.3d 975, 981 (9th Cir. 2014) (internal quotation marks and citations omitted).

Even if the claim is not waived, it is wrong. It makes no difference that admissions in Burke's filed pleadings and proffered evidence were "statements from his legal counsel." Br. 16. "Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 (1962) (internal quotation marks and citations omitted).[14] Burke provides no legal or factual reason why this general rule should not apply here; indeed, he does not claim that statements in his pleadings were

[14] "It is well settled that short of a compromise of a client's claim or a confession of judgment the authority of counsel in a case extends generally to all the customary incidents of litigation and embraces all agreements, stipulations, and admissions appertaining to its conduct through the courts." *Christy v. Atchison, T. & S.F. Ry. Co.*, 233 F. 255, 256-257 (8th Cir. 1916). *See also Moore v. Allied Chem. Corp.*, 480 F. Supp. 377, 383 (E.D. Va. 1979) (counsel "may make admissions of or stipulations as to facts, the effect of which is to dispense with proof of such facts.") (quoting *Harris v. Diamond Constr. Co.*, 36 S.E.2d 573, 578 (Va. 1946)).

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

recognized as much when it ruled that "the FTC has presented independent evidence to corroborate each of [its] points" on contempt. Op. ¶82 [EOR_016].[15]

Finally, Burke argues that the FTC did not show that he violated the 1998 Injunction, because it did not prove that Burke "attempted to induce the consumer to purchase anything." Br. 14-15. The contention is both waived and wrong.

It is waived because Burke raises the issue only by passing cursory mention in two sentences of his brief. "Generally, an issue is waived when the appellant does not *specifically* and *distinctly* argue the issue in his or her opening brief." *United States v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005) (emphasis added).

If the Court considers the argument, it is meritless. "In construing consent decrees like the one at issue here, 'courts use contract principles'." *EDebitPay*, 695 F.3d at 943 (quoting *Thompson v. Enomoto*, 915 F.2d 1383, 1388 (9th Cir. 1990)). The 1998 Injunction stated that it

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[15] At the very end of his brief, Burke contends that the district court erroneously failed to "set forth any Findings of Fact related to the mail fraud/sweepstakes scheme." Br. 18. That contention is plainly inaccurate and appears to be left over from Burke's brief in the first appeal of this case.

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 Burke's mailers were designed to—and did—induce consumers to pay $20-30 in return for what consumers were led to believe were guaranteed payouts. The payment of money up front in exchange for the promised payout plainly constitutes the purchase of an "item, product, good, service, or investment." EOR_127, ¶II.B. This link between the payment of fees and receiving the cash prizes is evident on the face of these mailers. *See, e.g.*, PX22 Att. D at 68 [EOR_309] ("Include the $26.59 Transfer Fee for processing this $532,500.00 Stimulus Rebate Benefit into your name"); *id.* at 70 [EOR_311] ("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 7-8. Consumers receiving these mailers were expressly instructed to send back their money in order to claim a very large cash payout. And

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

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[16] Burke does not challenge the materiality of these misrepresentations, but they plainly were material to consumers' decisions to send money to him—there was no other reason for them to have done so. A representation is material if it "involves information that is important to consumers" and is therefore "likely to affect their * * * conduct." *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006) (quoting *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165 (1984)). *See* Op. ¶73 (Burke's misrepresentations "were 'material' because they were both expressly made and concerned the very nature of the benefits consumers expected to receive"). [EOR_015].

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) (a decision not to prosecute or enforce a law is "generally committed to an agency's absolute discretion"); *Alaska Fish & Wildlife Fed'n and Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 938 (9th Cir. 1987) (same). As long as Burke was in contempt of the 1998 Injunction, the FTC could proceed against him for that violation, whether or not others also may have been involved in his misdeeds. Burke cites no law to the contrary. Nor does he explain what practical relief he would get from a different prosecutorial decision. His preferred action for joint and several liability would leave him liable to the same degree he is now.

CONCLUSION

For the foregoing reasons, the district court's order should be affirmed.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, *Federal Trade Commission v. Glen Burke*, Appeal No. 13-17448 (9th Cir.), is related as a prior appeal heard by this Court in the case being briefed. No other cases in this Court are deemed related to this appeal.

Respectfully submitted,

DAVID C. SHONKA
Acting General Counsel

JOEL MARCUS
Deputy General Counsel

/s/ Imad Abyad
IMAD D. ABYAD
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., N.W.
Washington, DC 20580
(202) 326-3579
iabyad@ftc.gov

JESSICA RICH
Director

SARAH WALDROP
REENAH L. KIM
Attorneys

BUREAU OF CONSUMER PROTECTION

December 1, 2016

CERTIFICATE OF COMPLIANCE

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 7,337 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and using the Microsoft Word word-processing system.

/s/ Imad Abyad
IMAD D. ABYAD
Attorney
FEDERAL TRADE COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2016, I electronically filed the foregoing "Answering Brief for the 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. I certify that all participants in the case are registered CM/ECF users, and thus service will be accomplished by the appellate CM/ECF system.

/s/ Imad Abyad
IMAD D. ABYAD