NO. 13-17448

In the United States Court of Appeals for the Ninth Circuit

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

GLEN BURKE,
Defendant-Appellant.

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

ANSWERING BRIEF FOR FEDERAL TRADE COMMISSION

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INTRODUCTION

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

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

evidence—which the court found to be "uncontroverted"—demonstrated that Burke played a key role in that scheme by commissioning, reviewing, and approving the deceptive solicitations, even if some other details and formalities were undertaken by others. In sum, Burke's complaints about the ruling below lack any support, in law or in fact, and should therefore be rejected.

STATEMENT OF JURISDICTION

The FTC agrees with appellant's statement of jurisdiction (Br. at 2), except as follows:

The district court had jurisdiction in the FTC's underlying 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 (the Telemarketing 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_050-066.[1]

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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 Docket's Document No.

The district court had jurisdiction to enter the contempt order under review pursuant to its inherent power to enforce compliance with its decrees. *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).

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

THE ISSUES PRESENTED FOR REVIEW

The 1998 Injunction barred appellant Burke from "engaging in" or "assisting others in" any telemarketing activities. It further enjoined him 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 good or service, and from "[a]ssisting others in" any such misrepresentation. Burke nevertheless later engaged in those prohibited activities. The questions presented are:

1. Whether the district court properly held Burke—who was the central figure in deceptive telemarketing and direct-mail sweepstakes schemes—in contempt for violating the 1998 Injunction; and

2. Whether the district court properly imposed on Burke a monetary contempt sanction of $20,174,740.36, where uncontroverted

record evidence showed that appellant's contumacious activities have resulted in consumer loss of at least that amount.

STATEMENT OF THE CASE

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

This is a direct appeal from a district court's final civil contempt order, entered against appellant Glen Burke for his violations of the district court's 1998 Injunction.

The Commission brought the original action against Burke and others for violations of the FTC Act, 15 U.S.C. §§ 41, *et seq*., and the FTC's "Telemarketing Sales Rule," 15 C.F.R. Part 310, which implements the Telemarketing Act.[2] The FTC's action resulted in the stipulated 1998 Injunction against Burke and others, prohibiting them, *inter alia*, from any telemarketing activities and from misrepresenting any fact material to a consumer's decision to purchase any good or service. EOR_054-055.

On January 28, 2013, the FTC filed in the district court a motion to hold Burke and American Health Associates, LLC (AHA) in contempt

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[2] The Telemarketing Sales Rule prohibits "[m]isrepresenting * * * [a]ny material aspect of an investment opportunity." 16 C.F.R. § 310.3(a)(2)(vi).

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

Following a hearing on the FTC's two motions, the district court ruled, on September 27, 2013, that Burke and AHA "have violated and are in contempt" of the 1998 Injunction. EOR_049.[3] The district court ordered that Burke pay $20,174,740.36 in contempt sanctions, representing the amount of consumer loss from the two deceptive and contumacious schemes, of which amount AHA was found jointly and severally liable for $2,785,508.36. *Id.*

On July 28, 2014, on the FTC's unopposed motion for clarification, the district court reaffirmed its earlier decision and explained further its reasons for holding appellant Burke in contempt and for ordering the contempt sanctions against him. EOR_001-04.

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[3] AHA made no appearance below, and has not appealed the district court's contempt decision.

B. Statement of Facts

1. *The Original Action*

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

Along with other defendants, Burke settled the FTC's original charges by agreeing to the district court's entry of the 1998 Injunction against them. EOR_050-066. That injunction provided in relevant parts:

> 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;
>
> * * *
>
> III. IT IS FURTHER ORDERED that defendants John Iavarone, Glen Burke * * * are hereby permanently restrained and enjoined from either (1) engaging in telemarketing; or (2) assisting others in telemarketing.

EOR_053-055.[4]

2. Burke's *Telemarketing Operation*

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

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

Sworn declarations submitted by consumers evidenced a consistent pattern of deception. Working through AHA, Burke's telemarketers called consumers to tell them that they had been specially selected to enter a sweepstakes promotion and had "already won" one of five valuable prizes: a current-model-year car; a fishing boat; jewelry (described as either a diamond-and-sapphire bracelet or a gold-and-diamond watch); $3,000 in cash; or a cruise trip that could be exchanged for $2,300 in cash if the consumer did not wish to travel. PX6 ¶2 [SER_054]; PX7 ¶2 [SER_056]; PX8 ¶¶2-3 [SER_059]; PX9 ¶¶2-3 [SER_063]; PX10 ¶2 [SER_065]; PX11 ¶2 [SER_069]; PX12 ¶2 SER_072]; PX13 ¶2 [SER_075]; PX14 ¶4 [SER_079]; PX15 ¶2 [SER_082]; PX16 ¶¶2-3 [SER_085]; PX18 ¶¶2-3 [SER_088]; PX19 ¶3 [SER_091]; PX20 ¶¶2-3 [SER_094]; PX21 ¶3 [SER_098]. Consumers were told that all they needed to do to claim those prizes was to purchase a supply of vitamins costing between $299 and $399. *Id*.

Burke's telemarketing script repeatedly assured consumers that they were "guaranteed" one of those five prizes:

> And, you are ABSOLUTELY GUARANTEED to receive 1 of 5 awards. CONGRADULATIONS [sic]!!!! Now, I want you to know Mr./s ___, that this is NOT A CONTEST, you're NOT COMPETING with anyone. You've already been selected and

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

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

Burke negotiated to purchase the lists of potential buyers for his telemarketers to call. PX22 Att. M at 124-128 [EOR_448-482]; PX31 Att. C at 4-8. But his telemarketing scripts proved to be an obstacle at times—when some list brokers refused to sell him leads because his script was facially deceptive. *See, e.g.*, PX31 Att. C at 4-5 (email from list owner noting that the script "fails to disclose information about the prizes * * * Also it can be classified as an illegal lottery.").

After collecting consumers' money, Burke and AHA failed to deliver the promised prizes.[5] Consumers received instead a bracelet or a watch of poor quality, made of base metals and broken stones, whose retail value was appraised at no more than $60—and which Burke had purchased wholesale for $15-$20. PX8 ¶15 [SER_060]; PX13 ¶¶12, 16 [SER_076]; PX14 ¶8 [SER_079]; PX20 ¶¶12, 18 [SER_095]. Those who paid even more in the "VIP" rounds (*see supra* note 5) to receive valuable art received instead a print that Burke bought for $50. PX21 ¶¶5, 8 [SER_098]; PX22 Att. B at 34 [EOR_170]. A court-appointed receiver reported that AHA never sent consumers any of the more valuable prizes promised. Receiver's Second Interim Report and Recommendations (D.177) (hereinafter, "Receiver's Second Report"), at 9 [SER_119].

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[5] Indeed, Burke often sought to wring more money from consumers who bought into his first sales pitch. Burke's telemarketers called those consumers back to claim that they had been entered in a second, "VIP" round of the promotion, and had already won an even bigger prize (from a list of cars, home theaters, lithographs, gold bars, and cash). This time, consumers were quoted a price of $1,000 or more for the vitamins they had to purchase first. PX7 ¶¶5, 7 [SER_056]; PX8 ¶¶10 [SER_060], 12; PX10 ¶¶8-10, 14 [SER_065-66]; PX11 ¶¶7-8 [SER_069]; PX12 ¶5 [SER_072]; PX13 ¶¶7-8 [SER_075]; PX15 ¶7, 9 [SER_082]; PX18 ¶¶11-12 [SER_088-89]; PX20 ¶¶8-9 [SER_094-95]; PX22 Att. B at 34 [EOR_170]; PX31 Att. A at 1-18, 33-46.

Many consumers complained when they realized they had been duped. PX31 ¶12, Att. A at 47-86. Those who complained directly to AHA had difficulty getting their money back. PX2 ¶¶13-14 [SER_050-51]; PX7 ¶12 [SER_057]; PX8 ¶¶18, 20, 23 [SER_060-61]; PX10 ¶19 [SER_066]; PX11 ¶¶11, 15 [SER_070]; PX12 ¶8 [SER_072-73]; PX13 ¶18 [SER_076]; PX14 ¶9 [SER_079]; PX16 ¶¶8-11 [SER_085-86]; PX18 ¶21 [SER_089]; PX19 ¶6 [SER_091]; PX20 ¶20 [SER_095-96]; PX21 ¶¶10-11 [SER_098-99]. Consumers' complaints to credit card companies resulted in such high chargeback rates for AHA's merchant accounts that Burke continually sought new merchant accounts for AHA.[6] PX1 ¶29 [SER_006]; PX8 ¶20 [SER_061]; PX11 ¶14 [SER_070]; PX14 ¶12 [SER_080]; PX22 Att. M at 113-116 [EOR_437-440]; PX31 Att. C at 10-14; *see also* Receiver's Second Report, at 8-9 [SER_118-19].

Burke carefully managed AHA's finances.[7] He received daily updates from his bookkeeper on AHA's bank balance and directed her to

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[6] A "chargeback" occurs when a bank returns money to a credit card holder because of a disputed charge. PX5 ¶7. High chargeback levels can lead to termination of a merchant's ability to process credit card payments. *Id.* ¶9.

[7] The individual formally named on AHA's corporate filings and bank accounts, Vincent Calise, was no more than a rubber stamp—literally.

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

Burke's telemarketing scam resulted in millions of dollars in consumer losses. AHA maintained an accounting of its total sales, chargebacks, and refunds. Those records show that AHA took in gross telemarketing revenue (net of cancellations) of $3,078,614.36, returned $111,048 to consumers in refunds, and incurred an additional $182,058 in credit card chargebacks. Receiver's Second Report, at 8 [SER_118]. Consumers thus lost a minimum of $2,785,508.36.[8]

AHA's bookkeeper testified that she kept a stamp of Calise's signature and used it to sign checks and documents. Calise had nothing to do with AHA's operations, but was paid $500 weekly. PX27 at 13:13-16, 56:15-21, 66:1-19, 74:1-11 [EOR_518, 554, 564, 571]; PX31 ¶13 & Att. B [SER_274].

[8] Other evidence points to an even higher figure. AHA also retained a database with Salesforce.com to track sales and customer information. PX31 ¶10 & Att. A at 1-18. That database shows that AHA made 6,905 sales totaling $4,808,437.94 from late 2010 through January 2013, with

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

From at least 2008 until January 2013, Burke conducted a deceptive sweepstakes operation, via direct mail, that also violated the 1998 Injunction. Despite that injunction's prohibition on misrepresenting or failing to disclose "any fact material to a consumer's decision to purchase any item, product, good, service, or investment," Burke falsely informed consumers that they could collect substantial amounts of money for a small processing fee. His direct mailers induced consumers to send $20-$30 in "fees" in order to claim payouts worth hundreds of thousands – and, sometimes, millions – of dollars in "prizes," "sweepstakes payments," or other "unclaimed" or "unawarded" funds. *See, e.g.*, PX22 Att. D at 68 [EOR_250] ("Include the $26.59 Transfer Fee for processing this $532,500.00 Stimulus Rebate Benefit into your name"); *id.* at 70 [EOR_252] ("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 [SER_257] ("Access to documentation for these additional monies–$7,041,846–

1828 of those sales, totaling $1,177,331, cancelled and $2,990 paid in refunds, for net sales totaling $3,631,106.94. Receiver's Second Report, at 8.

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

Burke directed every aspect of the scheme. He commissioned, reviewed, and approved the sweepstakes mailers, overseeing the copywriting and design processes to ensure they had enough appeal—or "heat"—to entice consumers. *See, e.g.*, PX22 Att. M at 32-34 [EOR_356-58] (Burke communicating with new copywriter regarding sweepstakes assignments); *id.* at 35-36 [EOR_359-360] (Burke asking copywriter for another version, with "more heat," of a sweepstakes solicitation mailer, noting that he plans to test both versions); *id.* at 37-42 [EOR_361-66] (Burke approving—"This is more what we're looking for * * * "—the conversion of copywriter's text into sweepstakes mailer design "to simulate what a contract looks like"). Burke also directed the mailing of his sweepstakes solicitations to consumers, using mailing information he obtained from list brokers. PX22 Att. M at 49-53 [EOR_373-77]; PX31 Att. C at 40-58, Att. G.

Burke's sweepstakes mailers used a roster of fictitious senders,[9] and were designed—using carefully selected fonts, graphics, and wording—to convey officialdom and urgency, in order to pressure consumers into sending Burke their money. *See, e.g.*, PX22 Att. D at 6 [EOR_187] ("Certified Letter" from "Hancock Financial Services"); *id.* at 14 [EOR_195] (Certificate-like letter from the "Office of the Director, Security Services" that "[Consumer] Has Won A Cash Prize! Respond Immediately or Risk Forfeiture!"); *id.* at 20 [EOR_201] (bar-coded letter from "Peterson & Associates" concerning "Disclosure of Unclaimed Funds"); PX22 Att. M at 37 [EOR_361] (Burke and copywriter discussing mailer design "to simulate what a contract looks like").[10]

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[9] Burke registered dozens of fictitious firm names (DBAs)—often through intermediaries—that drew hundreds of consumer complaints, mostly concerning sweepstakes ventures operating in Nevada. PX1 ¶¶5-9, 10-12, 16 & Atts. A-B, I-L [SER_002-04, 009-010].

[10] Other mailers used fonts and layouts similar to those used in tax forms, or looked like checks or bond certificates. *See, e.g.*, PX22 Att. D at 18, 35, 55, 56, 62 [EOR_119, 216, 236, 237, 243]. 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_138, 141].

Some of Burke's sweepstakes mailers contained blocks of dense text, placed on the back of the mailer, purporting to disclose details of the contest that the recipient purportedly had "already won." *E.g.*, PX22 Att. D at 65, 69, 71, 74 [EOR_246, 251, 253, 256]. 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_251, 253].

Consumers who did not send any money in response to Burke's initial mailers were sometimes sent an additional flier to underscore the message that payment of the fee was the only remaining impediment to receiving a "life-changing" cash payout. 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_226]. The consumer was also provided with a "Trouble Ticket"—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_225]. *See also* PX22 Att. M at 43-48 [EOR_367-372] (Burke communicating with copywriter regarding the design and content of the "Winner's Satisfaction Survey / Trouble Ticket" mailer).[11]

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. PX28 at 15:21-25, 29:1-7, 88:11-19 [SER_130, 133, 138]. Files at his offices that were designated for shredding, PX31 ¶¶14, 16, contained numerous letters from consumers complaining that they had sent their money but never received the payouts they were promised. *E.g.*, PX22 Att. B at 25, 31 [EOR_161, 167]; 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_184-85, 188-89, 195-201, 203-04, 206-217, 219-220, 223-24, 228-234, 239-242]. Burke

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[11] Burke was especially aggressive to consumers who *were* lured by his initial mailer and sent money in anticipation of a large prize payout. Burke directed his list brokers to compile new mailing lists of those responsive consumers, PX31 Att. C at 40-52, 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 retort: "Seems like a lot, but I guess you know what your [sic] doing." *Id.* at 42.

arranged for some of these consumers to receive trivial amounts—typically less than $2—as their "winnings." *See, e.g.*, PX22 Att. D at 41 [EOR_222] (fulfillment prize of $1.12), 49-51 [EOR_230-32] (fulfillment prize of $0.79 sent in response to consumer's demand letter); PX28 at 29:12-25 [SER_133] (Burke's employee testifying that $1.12 was a typical amount of prize money); PX22 Att. M at 144-45 [EOR_468-69] (Burke noting the same).

As with his deceptive telemarketing scheme, Burke sought to evade detection by state and federal law enforcement agencies by using other individuals, often a Panamanian associate named Errol Seales, as "fronts" for him—to be the nominal principals and actors in his deceptive direct-mail scheme.[12] *E.g.*, PX22 Att. M at 18-22, 56-59, 76-78, 144 [EOR_342-46, 380-83, 400-02, 468]; PX31 Att. C at 59, 62-69. For

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[12] To receive the payments that consumers sent in response to his mailers, for example, Burke often hired fronts to rent numerous mailboxes—which Burke actively managed—in order to keep those mailboxes spread across multiple jurisdictions. PX22 Att. M at 60-78 [EOR_384-402]; *see id.* at 76 [EOR_400] (an associate writing to Burke: "we don't want all our eggs in one basket (box) especially when others are at the same location * * * just makes it easier to get popped for everyone."). Burke's fronts opened mailboxes for him in California, New Jersey, Pennsylvania, Illinois, Mexico, Panama, the Netherlands, and elsewhere. *E.g.*, PX22 Att. D at 19, 69 [EOR_200, 251]; PX22 Att. M at 20-22, 60-68 [EOR_344-46, 384-392]; PX1 Att. V at 2.

example, although Burke's contact in the Netherlands communicated exclusively with Burke about the mailboxes that Burke rented there, the contact used only Seales's name on the invoices. PX22 Att. M at 2-5, 9-13 [EOR_326-29, 333-37]; PX31 Att. C at 60-62; *see id.* at 65 (Burke's associate reporting that Seales was asked to "send over his paperwork" to open new mailboxes for Burke). Likewise, when an associate was complaining to Burke about "trying for months to get a corporation or something to be able to open" new mailboxes in New Jersey, she wrote: "I have asked many times Errol to open some or use him to open some. * * * We need one of those old corps that were from panama so we have business paperwork to send in." PX22 Att. M at 76 [EOR_400]. Burke also used Seales's name on corporate founding documents, *id.* at 76, 144 [EOR_400, 468], and on Burke's accounts with Pac Net, the payment processor for Burke's sweepstakes operation, even though Burke controlled all disbursements from those accounts. *E.g.*, *id.* at 6-8 [EOR_330-32]; PX31 Att. C at 66-69, 72; PX30 ¶¶6-7.

One particular incident illustrates Burke's role as puppeteer of the sweepstakes operations. In January 2012, a FedEx package from the Netherlands to Burke's firm (National Print and Mail) that

contained $12,000 in cash broke open in transit, prompting inquiries from U.S. Customs and the FBI. Burke and an associate planned to conceal Burke's involvement by having Burke's "front," Errol Seales, claim ownership. PX22 Att. M at 23-28 [EOR_347-52]. In carrying out that plan, the associate sought Burke's review and approval of a draft message, which she planned to send to Burke's contact in the Netherlands to seek that contact's help in shielding Burke's name from discovery by U.S. authorities. The draft message 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_347]. Nonetheless, despite his efforts to keep his active role hidden, Burke was quick to remind Errol Seales who between the two of them was truly in charge, writing to Seales 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 (sovereign, signatures, PO boxes and stuff) * * *.

PX22 Att. M at 57 [EOR_381]. Seales concurred, replying to Burke: "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_380-81].

Burke's direct-mail sweepstakes operation resulted in millions of dollars in consumer loss. Most consumers sent their money via checks and money orders made out to the myriad fictitious names that Burke used on his mailers. *See, e.g.*, PX22 Att. D at 84-93 [EOR_266-275] (consumers' checks found in Burke's offices); PX28 at 25:19-27:2, 28:6-10, 29:1-21 [SER_131-33]. Burke deposited some of these checks and money orders into overseas bank accounts, PX22 Att. M at 14-22 [EOR_338-346], but the majority of them were processed through a foreign check processor that held the money on Burke's behalf. Declaration of Thomas A. Seaman in Support of Preliminary Injunction

(D.167) (hereinafter "Receiver Decl.") ¶¶4-5 [SER_106-07]; PX28 at 31:8-21, 32:8-24 [SER_134-35]; PX30 ¶¶3-7 [SER_269-270].[13] On average, according to estimates by Burke's own staff, 90 percent of the direct-mail sweepstakes proceeds arrived by checks or money orders, with the remaining ten percent coming in cash. *See* PX31 Att. C at 70-71 (Burke's associates testing the cash proceeds from one particular location, to determine if any of it was stolen by intermediaries, against their expectation that "all the boxes averaged almost 10% in cash!").

Since 2007, Burke's foreign check processor has credited $17,576,927 to Burke's accounts. PX30 ¶¶9-13 [SER_108]. Given that Burke expected his revenue from the direct-mail scheme to average ten percent in cash, which would not go through his check processor, Burke likely received from consumers an additional $1,952,992 (in cash)

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[13] Burke paid for his sweepstakes operation's expenses by directing the check processor to wire money from his accounts to his copywriters, list brokers, and fronts. Receiver Decl. ¶5 & Att. A [SER_106-07]; PX22 Att. M at 6-8 [EOR_330-32]; PX30 ¶7 [SER_270]. Burke tapped his operation's profits by directing the check processor to wire money in large, round increments to his print shop, which in turn issued checks for those wired funds to Burke's own company, Merchant's Depot. Receiver Decl. ¶5 & Atts. A, B [SER_106-07].

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

4. *Burke's Refusal to Testify on Fifth Amendment Grounds*

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

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[14] These amounts represent conservative estimates of Burke's proceeds from the direct-mail operation. They do not account for the checks and money orders deposited directly into overseas bank accounts, thus bypassing the operation's check processor, *see, e.g.*, PX22 Att. M at 14-22 [EOR_338-346], or for those additional checks' corresponding ten-percent that consumers would have been expected to send in cash.

[15] Burke provided no accounting of refunds to consumers whose payments he deposited directly in overseas accounts. Moreover, the $2,140,687 debit figure obtained from the check processor's records likely overestimated the amount of money returned to consumers. As detailed in the processor's declaration (PX30) [SER_105-08], the processor had records regarding the nature of *all* debits only from July 15, 2011, forward. *Id.* ¶¶5, 8 [SER_106, 108]. For debits processed prior to that date, the only available identifiers denote outgoing wire transfers ordered by Burke. *Id.* The $2,140,687 figure, therefore, may include categories other than returned checks and refunds to consumers – such as payments to Burke himself. *Id.*

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

- his stipulation to, and the district court's entry of, the 1998 Injunction, PX29 at 13:4-14:12 [SER_141-42];
- his control of the telemarketing and direct-mail sweepstakes operations, *id.* at 17:1-18:20, 24:17-26:2, 103:13-104:10 [SER_143-47, 205-06];
- his role in developing the telemarketing scripts and sweepstakes mailers, *id.* at 26:3-29:10, 34:24-42:7, 104:11-117:12, 125:5-128:20 [SER_147-159, 206-223];
- his purchase of leads and mailing lists for both operations, *id.* at 42:9-51:19, 130:10-131:11 [SER_159-168, 224-25];
- his purchase of vitamins and prizes on behalf of AHA, *id.* at 53:19-58:10, 69:11-79:18 [SER_169-185];

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

C. The Proceedings Below

On January 28, 2013, the FTC filed in the district court a motion to hold Burke and AHA in contempt for violating the 1998 Injunction. EOR_578-627. The FTC argued (i) that the contempt defendants were bound by the 1998 Injunction—Burke as a party to that stipulated order, and AHA because it had notice through Burke, its *de facto* principal, and was in active concert with Burke, EOR_594-95; (ii) that Burke's and AHA's telemarketing scheme violated the 1998 Injunction's permanent ban on Burke's engaging or assisting in any telemarketing activities, and its prohibition on material misrepresentations,

EOR_595-97; and (iii) that Burke's and AHA's deceptive telemarketing scheme caused consumer losses of, at least, $2,217,280.91. EOR_598.

Along with its motion for contempt, the FTC filed an *ex parte* motion for temporary restraining order (TRO), which the district court granted on January 28, 2013. The TRO included the ancillary relief of, *inter alia*, an asset freeze, an order for repatriation of foreign assets, the appointment of a receiver, immediate access to the contempt defendants' business premises and records, and certain expedited discovery. *See Ex Parte* Temporary Restraining Order with Ancillary Relief (D.133), at 1-24.

Evidence acquired under the provisions of the TRO revealed Burke's deceptive direct-mail sweepstakes operations. Thus, on March 1, 2013, the FTC filed a second motion for contempt against Burke (but not AHA) for violation of the 1998 Injunction. EOR_096-577. The FTC argued that Burke's direct-mail sweepstakes scheme violated Section II of the 1998 Injunction—which prohibits the misrepresentation or non-disclosure of any facts material to a consumer's purchase of any item,

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

Following briefing by the FTC and Burke (AHA made no appearance below), the district court held a hearing on both contempt motions on September 5, 2013. EOR_006-045. There, Burke attempted to shield his role in the direct-mail sweepstakes scheme by shifting the blame to Errol Seales as the alleged principal actor. EOR_017:16-018-1.[17] Nonetheless, Burke admitted, through his counsel, to "obtaining bank accounts to be utilized * * * post office boxes and the printer * * * also provid[ing] some financial * * * acumen or accounting and some financial advice for [Seales]." EOR_020:5-20; *see also* EOR_024:17-20 (Burke provided "[t]he printer, the accounting of the monies that came

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[16] Burke's newly discovered direct-mail activities prompted additional discovery which permitted the more detailed calculation of consumer loss amount discussed above (*supra* at 21-23).

[17] Against the overwhelming contemporaneous and documentary evidence of his key role in the direct-mail operation, *see supra* at 13-21, Burke's principal evidence was a declaration by Errol Seales that disclaimed Burke's responsibility for the scheme in conclusory and unsupported assertions. *See* EOR_684-86. The declaration did not explain the contrary evidence from Burke's own records that was proffered by the FTC. But it confirmed that, at a minimum, Burke assisted significantly in the deceptive scheme—by providing consulting, financial, and monitoring services. *Id*.

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

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

After Burke filed his notice of appeal, the FTC sought to have the district court further clarify its reasoning for holding Burke and AHA in contempt. Thus, on February 11, 2014, the FTC simultaneously filed a motion to stay the proceedings in this Court and a request pursuant to Fed. R. Civ. P. 62.1 in the district court for an indicative ruling that the

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[18] As with his direct-mail operation, and against the contemporaneous documentary evidence, *see supra* at 7-12, Burke sought to shift the blame for the telemarketing scheme to others—this time, AHA, which did not appear below. But, again, his principal evidence was a conclusory and unsupported declaration by his employee, Glenda Zimmer. *See* EOR_655-58.

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD BURKE IN CONTEMPT FOR VIOLATIONS OF THE 1998 INJUNCTION

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

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

A. The District Court's 1998 Injunction Prohibited Burke from Engaging in, or Assisting Others in, Any Telemarketing or Deceptive Activities

"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 unquestionably covers the activities that the FTC challenged below. Burke does not contend otherwise.

The 1998 Injunction applies expressly to Burke. He was a defendant in the underlying action, and a signatory to the court's consent order. *See* EOR_601-03 (FTC complaint); *id.* at 626 (consent order's signature page). *See also* EOR_053, ¶I.C (1998 Injunction defining "defendants" to include "Glen Burke").

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

B. Burke's Telemarketing Activities Violated the District Court's 1998 Injunction

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

fraud/sweepstakes scheme"); *see also id.* at 2-3 (issues presented for appeal concern only direct-mail scheme); *id.* at 12-17 (Burke's argument challenging district court ruling only as to direct-mail scheme).

In any event, Burke's violations of the telemarketing provisions of the 1998 Injunction are incontrovertible. The Injunction's bar on Burke's telemarketing activities is absolute; it does not exclude even *non*-deceptive telemarketing from its proscription. EOR_055. It also extends to "assisting others" in such activity, *id.*, defined to include providing or arranging for the provision of, *inter alia*, customer service, telemarketing scripts, consumer call lists, and marketing material. EOR_053, ¶I.B. As detailed above (*supra* at 7-12), unchallenged record evidence shows that Burke engaged in all of these activities. He negotiated the purchase of consumer lists for his telemarketers to call. PX22 Att. M at 124-128 [EOR_448-452]; PX31 Att. C at 4-8. He purchased the cheap bracelets and watches that were sent to consumers instead of the high-value prizes they had been promised by his telemarketers. PX8 ¶15 [SER_060]; PX13 ¶¶12, 16 [SER_076]; PX14 ¶8 [SER_079]; PX20 ¶¶12, 18 [SER_095]; PX31 Atts. C at 9, D-F. And he admitted at the contempt motions hearing that he provided the

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

C. Burke's Deceptive Direct-Mail Sweepstakes Scheme Violated the District Court's 1998 Injunction

As detailed above (*supra* at 13-18), the unrebutted record evidence shows that appellant Burke's direct-mail sweepstakes scheme swindled unwitting consumers, many of whom were elderly and financially desperate, out of millions of dollars. *See, e.g.*, PX22 Att. D at 22-23, 58-59, 60-61 [EOR_203-04, 239-240, 241-42]. Burke's mailers told consumers that large prize payouts worth hundreds of thousands or millions of dollars awaited them, and that consumers could claim those prizes with payments of $20-30. *See, e.g.*, PX22 Att. D at 5-6, 10-13, 14-20, 26-37, 44-45, 62, 63, 64, 68, 70, 72-73, 75, 78-80, 81-83 [EOR_186-87, 191-93, 195-201, 207-218, 225-26, 243-45, 250, 252, 254-55, 257, 260-65]. What consumers got, instead, were booklets about more sweepstakes, or checks for less than two dollars (for those consumers who wrote to Burke to demand their prizes),[19] or—even worse—an

[19] Numerous consumers complained to Burke that they made their payments but never received their prizes. *E.g.*, PX22 Att. B at 25, 31 [EOR_161, 167]; Att. D at 3, 4, 7, 8, 14-20, 22-23, 25-36, 38-39, 42-43,

avalanche of additional deceptive Burke mailers. PX28 at 15:21-25, 29:1-7, 29:12-25, 88:11-19 [SER_130, 133, 138]; PX22 Att. M at 144-45 [EOR_468-69]; PX31 Att. C at 40-52. Consumers who did not initially fall for Burke's deception were targeted even more aggressively, with a flier purporting to survey named consumers about what they did with all their "life-changing" cash payout, and offering them—if they had not yet received it—a "Replacement Winner's Sweepstakes Check" for a fee of $20.25. PX22 Att. D at 44-45 [EOR_225-26].

Uncontroverted record evidence 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_356-366]; 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_373-77]; PX31 Att. C at 40-58, Att. G. He was, simply, at the heart of every stage of the deceptive scheme.

47-48, 49-51, 52-53, 58-59, 60-61 [EOR_184-85, 188-89, 195-201, 203-04, 206-217, 219-220, 223-24, 228-29, 230-31, 233-34, 239-240, 241-42].

That evidence proves definitively that Burke violated the 1998 Injunction forbidding him from engaging in material omissions or misrepresentations in the sale of any item, product, good, service, or investment. EOR_054, ¶II.B. First, Burke's mailers misrepresented the cash payout amounts awaiting the consumers who sent back the $20-30 "fees" quoted in those mailers. The mailers failed to properly inform those consumers that what they had "already won"—the "already approved" and "ready for disbursement" check awaiting their response—was in fact *not* the large cash amount printed so conspicuously on the front of the mailers, but an insignificant amount of money, and often only upon the consumer's further demand.[20] Indeed, the message that was conveyed by those initial mailers—that

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[20] Burke's attempt to provide, in some of his mailers, a "Consumer Disclosure"—in cryptic fine-print statements on the back side of the mailers, *see, e.g.*, PX22 Att. D at 69, 71, 74, 79 [EOR_251, 253, 256, 261]—did nothing to correct the prominent and misleading statements on the front of those mailers, and in fact contributed to the misleading message that consumers were "lucky," *see supra* at 16. *See FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006) (small-print disclaimers on the reverse side of mailers containing misrepresentations do not preclude finding of deception); *see also EDebitPay*, 695 F.3d at 944 (small-font disclosures failed to change deceptive impression of express misrepresentations); *Standard Oil Co. v. FTC*, 577 F.2d 653, 659 (9th Cir. 1978) (same).

consumers were to expect payments worth thousands or millions of dollars—was further reinforced by Burke's follow-up "Winner's Satisfaction Survey / Trouble Ticket" mailers that purported to survey consumers about what they had done with all their prize money: "Buy a new home?", "Buy a new car?", or make another large investment. PX22 Att. D at 44-45 [EOR_225-26].

These misrepresentations were material to consumers' decisions to send their payments to Burke. "A misleading impression created by a solicitation is material if it 'involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.'" *Cyberspace.com*, 453 F.3d at 1201 (quoting *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165 (1984)). Here, the misleading statements regarding large payout amounts—which were expressly and conspicuously shown on the front of Burke's mailers—are material as a matter of law. They were express misrepresentations about the very nature of benefits that consumers expected from Burke's mailers, and thus could be expected to affect the consumers' decisions to respond to those mailers by paying the quoted "fees." *See*, *e.g.*, *EDebitPay*, 695 F.3d at 944 ("that the credit line can *only* be used at a third-party's online

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

Furthermore, the numerous consumer complaints that reached Burke's offices show that the misrepresentations regarding payout amounts in Burke's mailers were the primary factor in the consumers' decisions to send Burke the fees demanded by his mailers. *See Cyberspace.com*, 453 F.3d at 1201 (while not required, proof of consumers' actual deception is highly probative that a practice is likely to mislead consumers acting reasonably under the circumstances) (citing *Trans World Accounts v. FTC*, 594 F.2d 212, 214 (9th Cir. 1979)).

Burke's deceptive direct-mail operation therefore falls squarely within the prohibitive scope of Paragraph II.B of the 1998 Injunction. *See supra* at 6. Accordingly, the district court's decision to hold Burke in contempt for violating its earlier decree was entirely proper.

Burke makes two principal arguments to the contrary. Neither withstands scrutiny. He first argues that the 1998 Injunction forbids deception with respect to "a consumer's decision to purchase any item, product, good or service," but the FTC did not show that he "attempted to induce the consumer to purchase anything." Br. at 13. Thus, he claims, he did not violate the injunction.

Burke's assertion that consumers were not induced to purchase anything is patently false. The record amply demonstrates 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_054, ¶II.B. Burke himself was well aware of this *quid pro quo*. *See, e.g.*, PX22 Att. M at 46-48 [EOR_370-72] (copywriter sending Burke new text for the "Trouble Ticket" mailer that "should cut WAY down on no pays"). 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_250] ("Include the $26.59 Transfer Fee for processing this $532,500.00 Stimulus Rebate Benefit into your name");

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

Second, Burke argues that the FTC failed to prove that he participated in the direct-mail sweepstakes scheme. Br. at 12-15. The claim is that Burke did not personally design or mail the deceptive solicitations and therefore "was not engaged in the creation or direction" of the scheme. Br. at 13. To begin with, the 1998 Injunction prohibited Burke not only from engaging in, but also from "[a]ssisting others in," any deceptive scheme. *See supra* at 7, 34-35. Burke plainly violated that latter prohibition. In any event, Burke's factual argument fails even on its own terms because it runs headlong into overwhelming record evidence showing that he was in fact the driving force behind the entire direct-mail sweepstakes operation. In particular, unchallenged evidence showed that Burke was deeply involved at every stage of the scam—by recruiting, collaborating with, and supervising the copywriters,

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

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

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

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

part III of its opinion, *id*. at 1238-44, this Court turned to the separate issue of defendants' alleged contempt—and its distinct standard of liability, *id*. at 1239; *supra* at 33-34—for refusing to comply with the terms of the preliminary injunction.

Finally, Burke is wrong that the district court's contempt orders lack findings of fact necessary to hold him in contempt for the direct-mail scheme. Br. at 14-15. The district court's orders are not lengthy, but they did not have to be. That is because the FTC presented overwhelming evidence that Burke controlled the direct-mail scheme – in response to which Burke presented only unsupported conclusory declarations. *See supra* notes 17 and accompanying text. Furthermore, Burke refused to respond to deposition questions posed by the FTC, relying instead on the Fifth Amendment, which justified an adverse inference against him. *See, e.g.*, *Nationwide Life Ins. Co. v. Richards*, 541 F.3d 903, 911-12 (9th Cir. 2008) ("When a party asserts the privilege against self-incrimination in a civil case, the district court has discretion to draw an adverse inference from such assertion"); *see also United States v. $133,420.00 in U.S. Currency*, 672 F.3d 629, 640 (9th

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

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

The record evidence that the FTC proffered on these points, on which the district court relied for holding Burke in contempt, consists of unchallenged contemporaneous documentary evidence from Burke's own records and his admissions at the contempt hearing. *See*, *e.g.*, *supra* at 13-23, 27-28. In response, Burke offered only unsupported and conclusory evidence that, in fact, supports the FTC's case against him.

Burke relied principally on a declaration by Errol Seales, who claimed—without any supporting evidence or explanation for the overwhelming contrary evidence in the record—that Burke had no responsibility for the scheme. *See* EOR_684-86. In fact, the Seales declaration evidences Burke's contumacious acts. As discussed above, the 1998 Injunction barred Burke from "[a]ssisting others in," any deceptive scheme. *See supra* at 7, 34-35. Seales's declaration establishes exactly such "assistance," describing how Burke "did do some consulting" concerning the development of the sweepstakes mailers, "utilize[d] 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[ed] the [check processor] accounts." EOR_684, 685. Burke also relied on the deposition testimony of an employee, Lindsay Reid, who claimed that she was the one who fulfilled the sweepstakes prize awards—by mailing checks to consumers. But she also testified that she did that *at Burke's direction*. PX28, at 87-88 [SER_137-38].

On that record, there was no genuine issue of fact on which to make findings. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-

52 (1986) (an issue of fact is "genuine" only if the record as a whole would allow a reasonable factfinder to rule for the nonmoving party; a "mere scintilla" of evidence is insufficient); *FTC v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009) (same). *See, e.g.*, *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007) ("[c]onclusory, speculative testimony in affidavits and moving papers is insufficient to raise issues of fact."); *Publ'g Clearing House*, 104 F.3d at 1171 ("conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact").

Thus, the district court was required to say no more than it did. This Court has established that it may affirm a judgment where "a full understanding of the question is * * * possible" even "without the aid of separate findings," and "there can be no genuine dispute about the omitted findings." *Enforma Natural Prods.*, 362 F.3d at 1212. The factual record here easily permits this Court to meaningfully review the ruling below.

In the end, Burke's argument is no more than an attempt to delay redress for the consumers he had swindled, and should, therefore, be

rejected by this Court. The FTC has more than met its burden of proving that Burke violated the 1998 Injunction against him.

II. THE DISTRICT COURT DID NOT ABUSE ITS BROAD DISCRETION IN SANCTIONING BURKE FOR THE CONSUMER HARM CAUSED BY HIS CONTUMACIOUS CONDUCT

Having concluded that Burke's deceptive schemes violated its 1998 Injunction against him, the district court ordered Burke to pay "contempt sanctions in the amount of $20,174,740.36." EOR_049. In its subsequent clarification order, the court explained that its "compensatory monetary sanction" against Burke was based on "the evidence presented by Plaintiff FTC," concerning the consumer losses caused by his schemes, which the court found "uncontroverted," and which "warrant[ed] the award" of those sums. EOR_004. That ruling was fully supported by the record evidence and well within the court's wide 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)). More specifically, "district courts have broad discretion to use consumer loss to calculate sanctions for civil contempt of an FTC consent order." *Id.*

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

As detailed above, the FTC's evidence of consumer loss appropriately used Burke's own records of consumer payments in response to his deceptive telemarketing and direct-mail solicitations to calculate—using conservative figures and assumptions—the amounts of monetary contempt sanctions that the district court rightly approved and ordered Burke to pay. *See supra* at 12, 21-23. Burke offered nothing in response below.

On appeal, he does not challenge the monetary sanction of $2,785,508.36 that the district court ordered against him and AHA, jointly and severally. Br. at 16. But he raises two objections to the sanctions ruling against him for $20,174,740.36, Br. at 15-17, neither of which has merit.

First, derivative of his specious liability argument, Burke contends that, because the district court did not set forth separate findings of fact concerning his role in the direct-mail scheme, "the corresponding monetary sanctions should be reversed." Br. at 17. As set

forth above, given the uncontroverted evidence establishing the amount of consumer loss, no such findings were necessary. *See supra* at 45-49. That evidence, the court found, was "uncontroverted." It consisted mostly of documentary evidence from Burke's own records and a declaration from his check processor. Burke challenged neither its authenticity nor its factual basis. Accordingly, there are no genuine issues of material facts regarding the calculation of the monetary sanctions against Burke, and this Court should uphold the district court's sanctions calculation.

Burke next argues that the monetary sanctions against him are somehow improper either because the FTC "did not bring any action against any of the other purported players in the mail fraud/sweepstakes scheme," Br. at 15-16, or because the FTC did not "initiate[] a new action against all of the purported participants in the mail fraud/sweepstakes scheme"—either of which scenario resulting in "joint and several liability" for the imposed sanctions, Br. at 17.

That argument is spurious. The FTC's decision to proceed against Burke for contempt, rather than initiating a new case against him and other participants in the deceptive schemes, 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 may also have been involved in his misdeeds. Burke cites no law to the contrary. Indeed, in Burke's proffered scenario of joint and several liability, even bringing an action against him and the others would not have reduced the amount of monetary sanctions for which Burke himself would be responsible.

CONCLUSION

The district court's orders should be affirmed.

STATEMENT OF RELATED CASES

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

Respectfully submitted,

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December 19, 2014

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 10,443 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and using the Microsoft Word word-processing system.

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CERTIFICATE OF SERVICE

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

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