

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 18-61017-CIV-ALTONAGA

FEDERAL TRADE COMMISSION,

Plaintiff,

-VS-

POINTBREAK MEDIA, LLC, et al,

Defendants.

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**REPLY TO RECEIVER JONATHAN E. PERLMAN'S
NOTICE OF FILING NEWLY DISCOVERED EVIDENCE
IN SUPPORT OF RECEIVER'S MOTION TO COMPEL
TURNOVER OF LAPTOP COMPUTERS AND CELL PHONES**

COMES NOW Justin Ramsey and Dustin Pillonato by and through the undersigned attorney, and hereby files this, their Reply to Receiver Jonathan E. Perlman's Notice of Filing Newly Discovered Evidence In Support of Receiver's Motion to Compel Turnover of Laptop Computers and Cell Phones.

The Receiver offers "Newly Discovered Evidence" which he obtained from the illegal, warrantless search of Defendant Dustin Pillonato's cell phone seized from the Deerfield Beach office of DCP Marketing LLC.

The Receiver's main, and in fact, only function is the gathering of assets from the Defendants to be held, and if later the Defendants are found to be liable, then those assets are to be distributed to the alleged victims as compensation. The Receiver is neither a criminal investigator, nor is the Receiver a member of the Plaintiff's prosecution team. The Receiver's job is simply to gather and store assets. The TRO instructs to Receiver to take control of assets. It does not grant the Receiver the power to conduct illegal warrantless search and seizures as prohibited by the Fourth Amendment to the United States Constitution. The Receiver simply just "doesn't get it." Taking custody of property and searching property are two different things. The United States Supreme Court in 2014 dealt with the issue of warrantless searches and seizures of cell phones in *Riley v. California*, 573 U.S. ____ (2014) and *United States v. Wurie*, 573 U.S. ____ (2014). In those two cases, the police arrested the defendants and during a search incident to the arrest, they seized the defendants' cell phones and conducted warrantless searches of the contents of them.

Writing for the court, Chief Justice Roberts weighed the degree of intrusion on an individual's privacy against the need for the promotion of legitimate governmental interests. Although the risk of harm to officers and destruction of evidence are present in all custodial arrests, Roberts concluded that these risks are not a concern with digital data on a cell phone. Digital data does not present a risk of harm to an officer, nor help an arrestee to escape. Officers can of course ensure that the cell phone cannot be used as a weapon, but once the phone is physically secured, the digital data itself does not endanger anyone. The Court was also not persuaded that the loss of evidence

risk was implicated. Once secured, there is no longer a risk that the arrestee will delete information from the cell phone. The government was also unable to establish that remote wiping or data encryption were a prevalent problem, or that other technologies could not be used to address these concerns. On the other hand, the intrusion on an individual's privacy is substantial. Unlike physical items, a cell phone can store millions of pages of text, thousands of photographs or hundreds of videos. The term "cell phone" may in fact be a misnomer, wrote Roberts. "They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers." As a result, the information is far more pervasive than any physical item would be. Further complicating matters is that data on a cell phone may be stored elsewhere, such as in the cloud, which would render the search far more expansive than originally contemplated by the officer.

For all of these reasons, the Court concluded that the privacy interests involved clearly outweigh any governmental interests, such that a warrant will be required to search digital information on a seized cell phone.

The Court stressed that cell phones can indeed be searched, but officers must generally obtain a warrant first.

The TRO may clearly give the Receiver the authority to seize the Defendants' cell phones and lap tops if they are property of the business, but the TRO is not a substitute for a search warrant. The Receiver believes that with the TRO, not only can he take custody of the Defendants' cell phones and

lap top computers, but he can conduct an illegal warrantless search of them under the authority of the TRO. The TRO does not trump the Fourth Amendment to the United States Constitution or the decisions of the United States Supreme Court in the Riley and Wurie cases. Simply stated, the Supreme Court has said that one cannot search a cell phone without a search warrant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply to Receiver Jonathan E. Perlman's Notice of Filing Newly Discovered Evidence In Support of Receiver's Motion to Compel Turnover of Laptop Computers and Cell Phones was filed via electronic filing using the CM/ECF system with the Clerk of the Court which sent e-mail notification of such filing to all CM/ECF participants in this case this 15th day of August, 2018.

(S) Frank A. Rubino

FRANK A. RUBINO, ESQUIRE