

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 18-61017-CIV-ALTONAGA/SELTZER

FEDERAL TRADE COMMISSION,

Plaintiff,

-vs-

POINTBREAK MEDIA, LLC, et al,

Defendants.

**OBJECTION TO MAGISTRATES REPORT
AND RECOMMENDATION**

COMES NOW Justin Ramsey and Dustin Pillonato by and through the undersigned attorney, and hereby files this, their Objections to Magistrate Judge Barry L. Seltzer's Report and Recommendation.

United States Magistrate Judge Barry L. Seltzer held a hearing on Justin Ramsey and Dustin Pillonato's response and objection to receivers motion to compel turnover or personal laptop computers and personal cell phones. On September 13, 2018, United States Magistrate Judge Barry L. Seltzer issued his written report and recommendation which the defendant's now file their objection.

The Fourth Amendment of the Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue, but upon probable cause, **SUPPORTED BY OATH OR AFFIRMATION**, and **PARTICULARLY DESCRIBING THE PLACE TO BE SEARCHED**, and **THE PERSON OR THINGS TO BE SEIZED**.

Supported by oath and affirmation is not a suggestion, it's a requirement. One not met by the Receiver or the Plaintiff's attorney.

No application, let alone one under oath has ever been made to this Court by either the Receiver or the Plaintiff's attorney requesting to search the Defendant's personal cell phones or laptop computers.

On Page 17 of his Report and Recommendation the Magistrate Judge Seltzer states "the record here shows that in support of his request for a TRO, the FTC submitted 31 declarations from consumers (22), Google (3), investigators (2), a data analyst, a forensic accountant, and an informant who worked at the Receivership Defendants. [ECF Nos. 5 and 14]. And in support of its request for a Preliminary Injunction, the FTC submitted three (3) more declarations. [ECF No. 53]. In addition, the FTC submitted substantial legal briefs supported by competent evidence, including audio and video files, which Defendant's did not contest. Indeed, Defendants did not file any declarations in response".

The Plaintiff's ex parte motion for a temporary restraining order was not supported by oath or affirmation and did not particularly describe the place to be searched or the persons or things to be seized. None of these documents could support a request for a search warrant of the Defendant's personal cell phones and computers, nor was a request made. In fact, the Motion for the Temporary Restraining Order was filed before the Plaintiff's attorney or the Receiver had knowledge of the existence of the personal cell phones or personal computers. How could they possibly request to search something they didn't know existed.

On page 18 the Court states:

"Ramsey and Pillonato argue that even if there were probable cause to believe that Defendants engaged in fraudulent activity, there has been no showing of probable cause to believe that evidence of that fraud is contained on their electronic devices".

"The undersigned does not agree. Preliminary, the undersigned notes that in the TRO, the District Court made the findings that it did in the Preliminary Injunction. TRO at 2 [EFC No. 12]. And in that TRO, the Court ordered Defendants, including Ramsey and Pillonato, to turnover any electronic devices in their possession containing business records of Receivership Entities"

If any Document, computers, or electronic storage devices containing information related to the business practices finances of the Receivership Entities are at a location other than those listed herein, including personal residence(s) of any Defendant, then,

immediately upon receiving notice of this order, Defendant's and Receivership Entities shall produce to the Receiver all such documents, computers, and electronic storage devices, along with any codes or passwords needed for access.

What the report and recommendation is stating here is that the Plaintiff's unsworn Ex Parte Motion for Temporary Restraining Order was in fact or can be called a substitute for an application and under oath affidavit in support of a search warrant. Further, the report and recommendation seems to state that the temporary restraining order is or can be a substitute for an actual search warrant. This is simply not one of the well recognized exceptions to the search warrant requirement of the Fourth Amendment.

The Receiver never provided under oath any evidence whatsoever that the Defendant's personal cell phone and computers contained evidence of a fraud. The only statement made by the Receiver even approaching an attempt to say that the laptops or cell phones contained seizable information is the statement made by the Receiver in his motion at page 6 line 8 through 9:

"the Receiver has grave concerns that the laptop computers have critical information about the operations of the Receivership entities".

He does not enumerate these grave concerns, nor does he share under oath what they are. It should also be noted he makes no mention of the Defendant's personal cell phones. This statement by the Receiver is nothing more than a guess or a hunch it is certainly not probable cause under oath to conduct a search.

The Magistrate Judge relies upon an illegal search and seizure conducted by the Receiver on a separate personal cell phone belonging to Dustin Pillonato that was found at Pillonato's business. The Receiver is using illegally obtained evidence (fruit of the poison tree) to support his position to conduct a second warrantless search and seizure. The search and seizure of the Defendant's other personal cell phones and computers. Which are the subjects of this litigation.

The Magistrate Judge in his report and recommendation has created a new exception to the Fourth Amendment search warrant requirements. He is recommending that an unsworn ex parte application for a temporary restraining order can substitute for a sworn application and affidavit in support of a search warrant and that a Court's temporary restraining order can substitute for a search warrant. The Fourth Amendment requires more.

Respectfully submitted,
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(S) *Frank A. Rubino*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Objection to Magistrates Report and Recommendation 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 27th day of September, 2018.

(S) *Frank A. Rubino*
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