

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 18-61017-CIV-ALTONAGA/Seltzer

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

POINTBREAK MEDIA, LLC, et al.,

Defendants.

ORDER

THIS CAUSE came before the Court on Defendants, Dustin Pillonato and Justin Ramsey's Response and Objections to Receiver's Motion to Compel Turnover of Personal Laptop Computers and Personal Cell Phones [ECF No. 108] (the "Motion"). On July 17, 2018, Receiver, Jonathan E. Perlman, filed a Reply to Defendants Dustin Pillonato and Justin Ramsey's Response [ECF No. 129] (the "Response"). On July 26, 2018, Defendants filed an Answer to Receiver's Reply [ECF No. 140] (the "Reply"). Later, the Receiver filed a Notice of Filing Newly Discovered Evidence [ECF No. 146], to which Defendants filed a Reply [ECF No. 160]. After a Hearing [ECF No. 171], Magistrate Judge Barry S. Seltzer entered his Report [ECF No. 176] on September 12, 2018, recommending the Court deny Defendants' Motion and instruct the Clerk of Court to turn over to the Receiver the laptop computers and cell phones currently in the Clerk's possession. (*See generally* Report). Defendants timely filed Objection to Magistrates [sic] Report and Recommendation [ECF No. 179] (the "Objections").

When a magistrate judge's "disposition" has properly been objected to, as is the case here, district courts must review the disposition *de novo*. Fed. R. Civ. P. 72(b)(3). Defendants filed timely objections to the Report (*see generally* Objs.), and so the Court reviews the record *de*

novus. The Court has carefully reviewed the written submissions, the record, and applicable law. For the reasons that follow, Judge Seltzer's Report is affirmed.

I. BACKGROUND

Defendants' Motion arises out of a dispute between the Receiver and Defendants over Defendants' obligations under the Court's Temporary Restraining Order (*see* May 8, 2018 Order [ECF No. 12] 19) (the "TRO") and Preliminary Injunction (*see* June 7, 2018 Preliminary Injunction [ECF No. 64] 21) to turn over certain electronic devices the Receiver contends contain business records and data belonging to the Receivership. (*See generally* Receiver's Motion to Compel Turnover and for an Order to Show Cause [ECF No. 49]). As is relevant here, the Receiver asked the Court to compel Defendants to turn over "their laptop computers and cellphones for imaging." (*Id.* 10).

At the Preliminary Injunction Hearing [ECF No. 60] held on June 6, 2018, Defendants objected to turning over their cell phones and laptops, asserting a Fifth Amendment privilege against self-incrimination and Fourth Amendment right against unreasonable searches and seizures. (*See* Preliminary Injunction Hearing Transcript [ECF No. 117] 63:6-22). To resolve the parties' dispute over the compelled turnover while preserving Defendants' asserted constitutional objections, the Court entered an Order [ECF No. 62] instructing Defendants, Pillonato and Ramsey, to turn over their laptop computers and cell phones to the Clerk's Office. (*See id.* 1). The Clerk's Office would "maintain control of the property while the parties brief issues relating to Defendants' asserted claim to the Fifth Amendment's privilege against self-incrimination." (*Id.*). The parties have completed extensive briefing on Defendants' constitutional objections to the Receiver's requested compelled turnover. Defendants' Motion is thus ripe for review.

II. ANALYSIS

In his Report, Judge Seltzer thoroughly analyzes Defendants' Fifth Amendment (*see* Report 6–10) and Fourth Amendment (*see id.* 11–22) objections to the Receiver's request for turnover of Defendants' property. Judge Seltzer rejects both objections, recommending the Court instruct the Clerk to turn over Defendants' laptop computers and cell phones to the Receiver. (*See id.* 22). The Court addresses Defendants' Fifth Amendment and Fourth Amendment objections in turn.

A. Fifth Amendment Objection

First, Judge Seltzer finds Defendants' surrender of electronic devices is not a testimonial communication for which Defendants can successfully invoke a Fifth Amendment objection. (*See id.* 10 (alterations added)). As Judge Seltzer notes (*see id.* 8), the Supreme Court has consistently held the Fifth Amendment does not apply to the contents of voluntarily prepared and previously generated documents, even though they may contain incriminating information. *See, e.g., United States v. Hubbell*, 530 U.S. 27, 35 (2000). Because the Receiver requests the production of records (stored in electronic devices) that were voluntarily prepared, Defendants do not enjoy Fifth Amendment protection to those records. (*See* Report 9). Nor does the act of producing the devices in question require Defendants to reveal the contents of their minds or to exercise any judgment or discretion to comply with the requests. (*See id.* 9–10 (citing cases)). In sum, Defendants' release of electronic devices is not a testimonial communication for which Defendants can invoke their Fifth Amendment privilege against self-incrimination. (*See id.* (citing cases)).

Defendants do not raise any objections to Judge Seltzer's findings regarding application of the Fifth Amendment. (*See generally* Objs.). The undersigned has reviewed the Report, the

record, and the applicable law. In the light of that review, the undersigned agrees with the analysis in the Report and rejects Defendants' asserted Fifth Amendment defense to the Receiver's requested turnover of Defendants' laptop computers and cell phones.

B. Fourth Amendment Objection

Judge Seltzer also finds "there is sufficient probable cause to order the turnover and search . . . of the electronic devices in the custody of the Clerk and that such an order would satisfy the Fourth Amendment's requirement of reasonableness." (Report 21–22 (alteration added)). Judge Seltzer concludes (1) Defendants did not waive their right to raise a Fourth Amendment objection (*see id.* 11–13); (2) Defendants have standing to assert Fourth Amendment objections because they have a legitimate expectation of privacy in their laptops and cell phones (*see id.* 13–15); and (3) there is probable cause that the business operations of the Receivership Entities will be found on Defendants' laptop computers and cell phones (*see id.* 15–22).

The Court agrees with Judge Seltzer's findings that Defendants did not waive their right to raise a Fourth Amendment objection and have standing to raise their Fourth Amendment objection. (*See generally* Objs.). The Court thus reviews the merits of Defendants' Fourth Amendment objection *de novo*, in light of Defendants' Objections.

Defendants contend the Receiver cannot seize and search their electronic devices without a search warrant, or at a minimum, a showing of probable cause. (*See generally* Mot.; *see also* Objs.). As Judge Seltzer notes (*see* Report 16), although the Fourth Amendment's protections against unreasonable searches and seizures extend to civil matters, reasonableness is assessed less stringently in the civil context than in the criminal context. *Owens v. Swan*, 962 F. Supp. 1436, 1440 (D. Utah 1997) ("Although notions of probable cause and specificity guide courts in

the determination of the overall reasonableness of a civil search, they do not apply strictly in the case of an administrative or civil order of seizure.” (citations omitted)).

Judge Seltzer concludes probable cause exists that Defendants used their personal cell phones and laptops to conduct business activity pertaining to the Receivership for two reasons: (1) Plaintiff’s evidence in support of the Court’s TRO and Preliminary Injunction; and (2) forensic examination of the messages sent and received from Defendants’ cell phones, which the Receiver obtained from Ricardo Diaz’s voluntary turnover of his own cell phone. (*See* Report 17–21).

Defendants raise the following objections to Judge Seltzer’s Report: (1) Plaintiff’s *ex parte* motion for a temporary restraining order was not supported by oath or affirmation and did not with particularity describe the place to be searched or the persons or things to be seized (*see* Objs. 3); (2) Plaintiff’s unsworn *ex parte* motion for a temporary restraining order cannot serve as a substitute for an application under oath in support of a search warrant nor as a substitute for an actual search warrant, which is required here (*see id.* 4); (3) the Receiver never enumerated the specific concerns about the fraudulent information on Defendants’ laptop computers, thus failing to show the probable cause necessary to seize and search the computers (*see id.* 4); and (4) Judge Seltzer improperly relies on illegally obtained evidence — Pillonato’s other cell phone recovered at Pillonato’s business — to justify the search of Defendants’ cell phones in dispute here (*see id.* 5).

Defendants’ objections all implicate the showing necessary for the Court to compel Defendants to turn over electronic devices to the appointed Receiver, as part of the Federal Trade Commission’s investigation into Defendants’ alleged unfair or deceptive acts or practices.

(*See generally id.*). Defendants assert the Fourth Amendment requires the Receiver to obtain a search warrant, as this case does not present an exception to the warrant requirement. (*See id.* 4).

The Court is not persuaded by Defendants' demand for more compelling evidence, and a formal warrant, to support the TRO and Preliminary Injunction compelling Defendants to turn over their electronic devices to the Receiver. "[N]o court has ever held that the equivalent of a warrant must be issued in order for a receiver to be permitted to seize the property of the subject entity." *United States v. Setser*, 568 F.3d 482, 488 (5th Cir. 2009) (alteration added). Indeed, "particularity is not translatable to the receiver context [because] once appointed, the receiver often takes possession of the distressed or distrusted entity" and the "seizure of all assets on behalf of the court is a central purpose for the appointment of a receiver." *Id.* (alteration added).

Judge Seltzer's reliance on Plaintiff's supporting evidence justifying the Court's TRO and Preliminary Injunction is well-founded. (*See Report 17*). The Fifth Circuit made the following pertinent observation about the role of receivers, equally applicable here:

A receiver takes over property only after a court has agreed with the arguments and evidence that such a takeover is necessary

Because the receiver was taking possession of everything in those categories that had been the property of the defendants for whom the receivership was authorized, further particularity would have served no purpose. After the seizure, the receiver had possession of the property only because had had been authorized by court order. We find no basis to support the argument that more was needed.

Setser, 568 F.3d at 487–88.

The Court entered its TRO and Preliminary Injunction compelling Defendants to turnover their laptop computers and cell phones only after it "agreed with the arguments and evidence that such a takeover [was] necessary." *Id.* at 488 (alteration added). As Judge Seltzer aptly notes, Plaintiff provided substantial evidence to warrant the TRO and Preliminary Injunction compelling Defendants to turn over their electronic devices to the Receiver. (*See Report 17*).

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The Receiver thus articulated probable cause, without need for a search warrant, that the cell phones and laptops at issue contain information related to the Receivership. *See, e.g., F.T.C. v. Credit Bureau Ctr., LLC*, 284 F. Supp. 3d 907, 909 (N.D. Ill. 2018) ([T]he evidence submitted in support of the temporary restraining order and the preliminary injunction was more than sufficient to establish probable cause authorizing the Court's entry of an order permitting seizure or turnover of the materials in question." (alteration added)). The digital forensic examination of Defendants' cell phones only further bolsters the compelled turnover. (*See Report 20–21*). The Court thus affirms Judge Seltzer's recommendations as to Defendants' Fourth Amendment objections to the compelled turnover.

III. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that the Report [ECF No. 176] is **AFFIRMED**. The Clerk of Court is instructed to turn over Defendants' laptop computers and cell phones, currently in his possession and pursuant to the Court's June 7, 2018 Order [ECF No. 62], to the Court-appointed Receiver, Jonathan E. Perlman.

DONE AND ORDERED in Miami, Florida, this 3rd day of October, 2018.


CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record