UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

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| FEDERAL TRADE COMMISSION,<br><br>Plaintiff,<br><br>v.<br><br>MICHAEL RANDO, VALERIE RANDO, PROSPERITY TRAINING TECHNOLOGY LLC, ELITE CUSTOMER SERVICES, LLC, DIGITAL BUSINESS SCALING LLC, FIRST COAST MATCHMAKERS INC., FIRST COAST MATCHMAKERS LLC, FINANCIAL CONSULTING MANAGEMENT GROUP LLC, RESOURCE MANAGEMENT INVESTMENTS, LLC,<br><br>Defendants. | Case No. 3:22-cv-00487-TJC-MCR |

**RECEIVER'S RESPONSE TO DEFENDANTS' RESPONSE TO THE ORDER TO SHOW CAUSE**

Receiver Maria M. Yip ("Receiver"), by and through undersigned counsel and pursuant to the Court's Order to Show Cause (Dkt. 41), hereby files this Response to Defendants, Michael and Valerie Rando's, Response to the Order to Show Cause (Dkt. 49), and states as follows:

1. On June 6, 2022, the Receiver filed its Motion for Order to Show Cause Why Defendants Michael and Valerie Rando Should Not Be Held in

Contempt for Failure to Comply with the Court's May 26, 2022 Order (the "Motion for Order to Show Cause") (Dkt. 40).

2. On that same day, the Court granted the Motion for Order to Show Cause and entered its Order to Show Cause (Dkt. 41), directing Defendants Michael Rando (a/k/a Mike Singles) and Valerie Rando (a/k/a Valerie Payton, Val Rando, and Val Singles) (collectively, the "Defendants") to show cause why they failed to comply with the Court's May 26, 2022 Order (Dkt. 35) and permitting Plaintiff, Federal Trade Commission, and the Receiver to file responses no later than June 15, 2022.

3. Thereafter, on June 10, 2022, Defendants timely filed their Response to the Order to Show Cause (the "Response) (Dkt. 49), wherein Defendants argue that they have properly invoked their Fifth Amendment privilege against self-incrimination, that the "foregone conclusion" doctrine is inapplicable, and that they should not be held in contempt. *See generally*, Dkt. 49.

4. In the Response, the Defendants argue that the foregone conclusion doctrine is inapplicable to compel Defendants to turn over access to and/or produce documents from the mikesingles@gmail.com and val.10xlife@gmail.com email accounts (the "Email Accounts at Issue"). *See Id.*, at pgs. 6-8.

5. Despite Defendants' assertions otherwise, for the reasons stated herein, the foregone conclusion doctrine is clearly applicable. Accordingly, Defendants should be ordered to comply with the Court's May 26, 2022 Order, including providing shared access to the Email Accounts at Issue, and be held in contempt for having failed to do so.

## MEMORANDUM OF LAW

### I. Legal Standard

"An individual must show three things to fall within the ambit of the Fifth Amendment: (1) compulsion, (2) a testimonial communication or act, and (3) incrimination." *In re Grand Jury Subpoena Duces Tecum Dated Mar. 25, 2011*, 670 F.3d 1335, 1341 (11th Cir. 2012).

"It is well-established that the protection afforded by the Fifth Amendment is triggered only where the communication at issue is testimonial in nature." *U.S. v. Lawrence*, 2014 WL 2153944, at *3 (S.D. Fla. Apr. 29, 2014) (internal citation and quotation omitted). "To be testimonial, a communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Id.* (internal citation and quotation omitted). Further, when invoking a claim of Fifth Amendment privilege, "there must be a substantial and real fear of self-incrimination." *Grand Jury Subpoena Dated*

*Apr. 9, 1996 v. Smith*, 87 F.3d 1198, 1204 (11th Cir. 1996) (internal citation and quotation omitted).

Moreover, "[i]t has long been established that a person may be required to produce specific documents, even though they contain incriminating information." *Sallah v. Worldwide Clearing, LLC*, 855 F.Supp.2d 1364, 1371 (S.D. Fla. 2012) (citing *U.S. v. Hubbell*, 530 U.S. 27, 35-36 (2000) (citing *Fisher v. U.S.*, 425 U.S. 391) (1976))). "Where documents are voluntarily prepared before they are requested, for example, the Supreme Court has held that such documents do not contain 'compelled testimonial evidence' within the meaning of the Fifth Amendment, even if the contents are incriminating." *Id.* (quoting *Hubbell*, 530 U.S. at 36).

The Supreme Court has recognized that the act of producing documents has a communicative aspect of its own that can be subject to the Fifth Amendment privilege, separate and apart from whether the sought-after documents are protected. *See Hubbell*, 530 U.S. at 36 ("On the other hand, we have also made it clear that the act of producing documents in response to a subpoena may have a compelled testimonial aspect"); *Fisher*, 425 U.S. at 410 ("The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced."). "Drawing out the key principles from the Court's two decisions

[in *Fisher* and *Hubbell*], an act of production can be testimonial when that act conveys some explicit or implicit statement of fact that certain materials exist, are in the subpoenaed individual's possession or control, or are authentic." *In re Grand Jury Subpoena Dated Mar. 25, 2011*, 670 F.3d at 1345. Accordingly, "[t]he touchstone of whether an act of production is testimonial is whether the government compels the individual to use the contents of his own mind to explicitly or implicitly communicate some statement of fact." *Id.* (internal citation and quotation omitted).

Nevertheless, the Supreme Court has set forth two ways in which the act of production is not testimonial: (1) "where the Government merely compels some physical act, i.e. where the individual is not called upon to make use of the contents of his or her mind[;]" and (2) "under the foregone conclusion doctrine, an act of production is not testimonial . . . if the Government can show with reasonable particularity that, at the time it sought to compel the act of production, it already knew of the materials, thereby making any testimonial aspect a foregone conclusion." *Id.* at 1345-46 (internal citation and quotation omitted).

Thus, under the foregone conclusion doctrine, "[w]here the location, existence, and authenticity of the purported evidence is known with reasonable

particularity, the contents of the individual's mind are not used against him, and therefore no Fifth Amendment protection is available." *Id*. at 1344.

## II. The Foregone Conclusion Doctrine Applies.

Even assuming *arguendo* that Defendants have adequately demonstrated the applicability of the Fifth Amendment, the foregone conclusion doctrine clearly applies such that the act of turning over access to the Email Accounts at Issue by way of providing passwords to the same or producing documents from the same would not be testimonial.

Admittedly, there is case law supporting the proposition that providing the password to the Email Accounts at Issue would be considered testimonial in nature. *See In re Grand Jury Subpoena Duces Tecum Dated Mar. 25, 2011,* 670 F.3d at 1346 ("Doe's decryption and production of the contents of the drives would be testimonial, not merely a physical act[.]"); *McKathan v. U.S.*, 969 F.3d 1213, 1224 (11th Cir. 2020) (pin access to phone considered testimonial). Nevertheless, because the location, existence, and authenticity of Receivership assets (i.e., documentation necessary to effectively manage the Receivership Entities) can be shown with reasonable particularity, the foregone conclusion applies, and Defendants' act of production is not testimonial.

Throughout the Response, Defendants contend that Plaintiff and Receiver cannot demonstrate the requisite "reasonable particularity" needed

to establish application of the foregone conclusion doctrine because there is merely a "general suspicion" of the contents of the Email Accounts at Issue and that the same were used for business purposes. *See* Dkt. 49, at pg. 8, n. 2 ("It cannot reasonably contend that it knows anything about the contents of the Email Accounts aside from the general suspicion that they were used occasionally for business purposes or that specific payment platform notifications were sent there."); *see also Id.*, at pg. 6 ("At best, the Plaintiff and the Receiver can identify categories of documents that are likely to exist in the Email Accounts."). This contention that Plaintiff and the Receiver have but a "general suspicion" that the Email Accounts at Issue were used for business purposes is entirely disingenuous.

There is no "general suspicion," but instead, it is **known for a fact** that the Email Accounts at Issue were used for business purposes. *See* Receiver's Motion for Order to Require Compliance with Temporary Restraining Order (Dkt. 29), at Exhibit 1 (Declaration of Non-Compliance by Receiver Maria M. Yip (the "Receiver's Declaration")), ¶¶ 6-8 & 10, and Exhibits A & B.[1] In fact, Defendants themselves **admitted that the Email Accounts at Issue were**

[1] The organizational chart for Defendant Prosperity Training Technology LLC ("Prosperity") attached as Exhibit A and Prosperity's submission to the Florida Secretary of State attached as Exhibit B to the Receiver's Declaration clearly show that the Defendants were using the Email Accounts at Issue as the operative email addresses for Prosperity and in their respective capacities as Owner/CEO and Marketing Director of Prosperity.

**used for business purposes**. *See* Defendants' Response in Opposition to the Receiver's Motion to Compel (Dkt. 31), at ¶¶ 3-4 & 6 ("Defendants do not dispute that the Email Accounts have also been used for purposes relating to the Receivership Entities."); *see also Id.*, at Exhibit 1 (Declaration of Michael Rando), ¶ 3 ("Over the years I have occasionally used the Email Account for business purposes, including to monitor various business accounts relating to the Receivership Entities . . . .") & Exhibit 2 (Declaration of Valerie Rando), ¶ 3 ("Since it was opened, I have occasionally used the Email Account for business purposes, including to monitor various business accounts relating to the Receivership Entities . . . ."). Given that Defendants declared under penalty of perjury that they were using the Email Accounts at Issue for business purposes, including monitoring Receivership Entities' business accounts, that they would now assert that the Receiver has but a mere "general suspicion" of the contents and use of the Email Accounts at Issue is without basis or credibility.

Moreover, "[c]ase law from the Supreme Court does not demand that . . . [a requesting party] identify exactly the documents it seeks, but it does require some specificity[.]" *In re Grand Jury Subpoena Duces Tecum Dated Mar. 25, 2011,* 670 F.3d at 1347. Despite Defendants' argument otherwise, Plaintiff and the Receiver can demonstrate with the requisite reasonable particularity

that the Email Accounts at Issue contain documentation germane to the Receivership Entities.

On this point, *In re Boucher* is instructive and analogous. In *Boucher*, the US District Court in Vermont found that the Government made a sufficient showing that it had knowledge of the existence and location of contents of Boucher's encrypted hard drive that may consist of child pornography because an ICE agent viewed the contents of some of the drive's files and was able to deduce that the drive's contents consisted of child pornography. 2009 WL 424718, at *3 (D. Vt. Feb. 19, 2009). Thus, the court found that "providing access to the unencrypted Z drive 'adds little or nothing to the sum total of the Government's information' about the existence and location of files that may contain incriminating information." *Id*. (quoting *Fisher*, 425 U.S. at 411).

Defendants posit that *Grand Jury Subpoena Duces Tecum Dated Mar. 25* is more analogous to this situation. In *Grand Jury Subpoena Duces Tecum Dated Mar. 25*, the Eleventh Circuit found that the record was devoid of any demonstration by the government that files, purporting to contain child pornography, existed and were located on the encrypted portion of the hard drive. 670 F.3d at 1346 ("Nothing in the record before us reveals that the Government knows whether any files exist and are located on the hard drives[.]"). This is simply not the situation that is currently before the Court.

In the situation at bar, Plaintiff and Receiver know that Defendants were using the Email Accounts at Issue for business purposes and for business accounts of the Receivership, as Defendants have admitted as much, and can identify with particularity the business accounts that were using those email addresses. *See, e.g.,* Dkt. 29, ¶ 8. Unlike the government in *Grand Jury Subpoena Duces Tecum Dated Mar. 25* and similar to the government in *Boucher*, the FTC and the Receiver have more than a suspicion of the documents/emails contained within the Email Accounts at Issue; the FTC and the Receiver know, with reasonable particularity, that these email accounts contain information pertinent to the Receivership Entities. *See also U.S. v. Apple MacPro Computer*, 851 F.3d 238, 248 (3d Cir. 2017) (finding that unlike *Grand Jury Subpoena Duces Tecum Dated Mar. 25*, the government provided evidence showing that images containing child pornography existed on the encrypted portions of the devices).

Consequently, because the foregone conclusion doctrine applies thereby rendering Fifth Amendment protection unavailable, Defendants have not established cause for failing to comply with the May 26, 2022 Order.

## III. Defendants Should Be Held in Contempt for Failing to Comply with the May 26, 2022 Order.

A party commits contempt when it or he "violates a definite and specific court order requiring him to perform or refrain from performing a particular

act or acts with knowledge of that order." *Whitfield v. Pennington*, 832 F.2d 909, 913 (5th Cir 1987), *cert. denied* 487 U.S. 1205 (1988) (citing *S.E.C. v. First Fin. Grp. of Texas, Inc.*, 659 F.2d 660, 669 (5th Cir. 1981)). In a civil contempt proceeding, the Movant has the burden of establishing by clear and convincing evidence that: (1) a court order was in effect; (2) the order required certain conduct by the respondent; and (3) the respondent failed to comply with the court's order. *Petroleos Mexicanos v. Crawford Enterprises. Inc.*, 826 F.2d 392, 401 (5th Cir. 1987) (citing *McComb*, 336 U.S. at 191). Contempt is established where there is clear and convincing evidence that the "violated order was valid and lawful; . . . the order was clear and unambiguous; and the . . . alleged violator had the ability to comply." *F.T.C. v. Leshin*, 618 F.3d 1221, 1232 (11th Cir. 2010) (ellipses in original) (internal citation and quotation omitted); *see also McGregor v. Chierico*, 206 F.3d 1378, 1383 (11th Cir. 2000) (same). This question does not focus on the "subjective belief or intent" of the alleged contemnor, but rather, simply whether or not they complied with the order at issue. *S.E.C. v. Solow*, 682 F.Supp.2d 1312, 1325 (S.D. Fla. 2010); *see also Howard Johnson Co., Inc. v. Khimani*, 892 F.2d 1512, 1516 (11th Cir. 1990).

In the situation at bar, the May 26, 2022 Order was valid and lawful and clearly and unambiguously required Defendants to grant shared access to the

Email Accounts at Issue until the business and personal affairs contained in the accounts could be separated. Defendants had the ability to comply, but they chose not to. Whether that was their intent or not, the fact remains that they failed to comply with the Order and have failed to demonstrate cause excusing said failure because the foregone conclusion doctrine applies such that Fifth Amendment protection is unavailable.

WHEREFORE, Receiver Maria M. Yip requests this Court find Defendants Michael and Valerie Rando in contempt and order that they comply with the May 26, 2022 Order (Dkt. 35).

Respectfully submitted,

**/s/ Katherine C. Donlon**
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*Attorney for Receiver Maria Yip*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on June 15, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notice of electronic filing to all counsel of record.

**/s/ Katherine C. Donlon**
Attorney