

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-60907-CIV-MORENO

FEDERAL TRADE COMMISSION, *et al.*,

Plaintiffs,

v.

JEREMY LEE MARCUS, *et al.*,

Defendants.

**RECEIVER JONATHAN E. PERLMAN'S REPLY IN SUPPORT OF HIS MOTION TO
COMPEL TURNOVER OF BMW**

Jonathan E. Perlman, the Permanent Receiver charged by this Court with taking exclusive control of all Receivership assets and with preserving the value of such assets for the benefit of consumers and creditors submits this Reply in Support of his Motion to Compel Defendant Jeremy Lee Marcus ("Marcus") to turnover a BMW i8 purchased for \$133,564.07 with Receivership monies ("Motion").

I. INTRODUCTION

The Receiver moved to compel turnover of the BMW i8 in Defendant Marcus's possession because this Court's Preliminary Injunction ("PI") ordered the Receiver to take exclusive possession over all Receivership Defendants' assets and preserve the value of those assets for the benefit of consumers and creditors. Consumer fees in this case to date exceed \$70 million. Declaration of Jonathan E. Perlman [ECF 92-2]. The BMW, because it was purchased via a Receivership Defendant Halfpay International shareholder distribution to Marcus in the amount of \$133,564.07 with the reference "Jeremy BMW," constitutes "receivership property" subject to turnover. *SEC v. Aquacell Batteries, Inc.*, No. 6:07-cv-608, 2008 WL 4371329, at *2-

3 (M.D. Fla. May 9, 2008); *SEC v. Creative Capital Consortium, LLC*, No. 08-81565-CV, 2013 WL 12167733 (S.D. Fla. Jan. 23, 2013) (same). Moreover, because this asset is depreciating in value with every mile driven, turnover is required to preserve the asset's value for the benefit of consumers. The Motion also demonstrates that turnover is required under the law of constructive trust and fraudulent transfer.

Marcus's primary response is merely that most (but not all) of the cases the Receiver cited in his Motion involved motions for turnover of assets filed by a receiver after a final judgment, and that turnover is therefore premature. [ECF No. 189 at p. 2 n.2]. Marcus cites no case law to support his novel theory, which is contrary to existing law. *SEC v. Aquacell Batteries*, No. 6:07-cv-608, 2008 WL 2915064 (M.D. Fla. July 24, 2008); *SEC v. Creative Capital Consortium* (S.D. Fla. 2013); *FTC v. NHS Sys., Inc.*, 708 F. Supp. 2d 456, 466-67 (E.D. Pa. 2009); *FTC v. Transcontinental Warranty, Inc.*, No. 09 C 2927, 2009 WL 5166213, at *2 (N.D. Ill. Dec. 22, 2009). Moreover, Marcus's response ignores the fact that a final judgment has, in fact, been entered against Receivership Defendant Halfpay, who paid for the BMW, rendering Marcus's "premature" argument invalid for this reason as well. Halfpay Judgment [ECF No. 174].

Marcus also asserts that turnover is premature because he needs time to take discovery that may yield evidence to support a defense to Plaintiffs' claims against him personally. This contention is nonsensical and fails as a matter of law given Marcus's refusal to answer any questions at his deposition and in written discovery on the basis of his Fifth Amendment right against self-incrimination. To the contrary, Marcus's invocation of the Fifth Amendment and

refusal to answer questions in discovery give rise to a negative inference that is fatal to his opposition to this Motion.¹

Plainly, the Receiver's Motion for turnover of the BMW should be granted.

II. DISCUSSION

A. Defendant Marcus Has Failed to Submit Any Evidence to Rebut the Evidence of Deceptive and Fraudulent Conduct Cited in the Receiver's Motion

Marcus argues that turnover of the BMW is inappropriate because there has not been a finding of fraud. [ECF No. 189 at p. 2]. However, the record is replete with evidence of fraudulent conduct by Marcus and in response to the mounting evidence, Marcus invoked his Fifth Amendment privilege against self-incrimination in response to all discovery requests and at deposition, thereby prohibiting him from refuting the record evidence of fraudulent conduct and giving rise to adverse inferences.²

The evidence submitted by the FTC and State of Florida, and this Court's findings in the PI, establish that Marcus directed the fraudulent scheme³ and that the Receivership Defendants generally served as holding companies or conduits for assets derived from Defendants' scheme. PI Motion [ECF No. 6 at pp. 16-18]. As discussed in the Receiver's Motion, the Receiver's investigation has confirmed most allegations made by Plaintiffs against Marcus. *See Receiver Jonathan Perlman's Agreed First Verified Motion to Expand Receivership* (the "Expansion

¹ Moreover, regardless of the ultimate decision on the merits of Plaintiffs' claims against Marcus personally, the BMW would still constitute Receivership Property that must be turned over to the Receiver given the judgments against Halfpay and other Receivership Defendants. Likewise, under Florida law of constructive trust and fraudulent transfer, fraudulent intent on the part of the transferee is simply not an element of the claim. *In re Lee*, 574 B.R. 286 (Bankr. M.D. Fla. 2017).

² At his deposition on December 21, 2017, Marcus invoked his Fifth Amendment right against self-incrimination when asked virtually any question, including the allegations contained in the Receiver's Motion.

³ Marcus is or was at all times the owner, director, president, managing member, or authorized representative of each Receivership Defendant. *Plaintiffs' Ex Parte Motion For Temporary Restraining Order With Asset Freeze, Appointment of A Receiver, And Other Equitable Relief, And Order To Show Cause Why A Preliminary Injunction Should Not Issue, And Memorandum In Support* (the PI "Motion") [ECF No. 6 at p. 10 n.66]. Marcus is also an authorized signatory on nearly all Corporate Defendant bank records. *Id.* at n.67.

Motion”) [ECF No. 89], *Receiver’s Amended First Interim Report* [ECF No. 70], *Receiver’s Second Interim Report* [ECF No. 136] and *Receiver Jonathan E. Perlman’s Motion to Compel Turnover of Real Property by Defendant Jeremy Lee Marcus or, Alternatively, for an Equitable Lien* [ECF No. 184].⁴

Marcus submits nothing to refute the record evidence of fraud cited by the Receiver -- not even his own declaration. This is because Marcus asserted his Fifth Amendment privilege against self-incrimination at his deposition and in response to every discovery request, including 147 requests for admissions. Specifically, Marcus took the Fifth Amendment when asked about:

- His affirmative defenses that he and the Receivership Defendants did not make false or misleading statements or breach any lawful duty to consumers. (ECF No. 184, Exhibit A to Motion, Marcus’s Resp. to Interrog. & Doc. Req., at 1, 3).
- The Receivership Defendants’ organization and operations. (ECF No. 184, Exhibit B to Motion, Marcus’s Resp. to Req. for Admis., at 1-31, 50-53, 60-61).
- The vast number of consumer complaints regarding the Receivership Defendants’ business practices. (*Id.* at 83-99).
- The Receivership Defendants use of false and deceptive sales scripts when engaging in telemarketing. (*Id.* at 32-39); and
- The vast amounts of consumer monies he diverted for personal use through the Receivership Defendants. (*Id.* at 135, 143-147).

Likewise, at Marcus’s deposition, which the Receiver took on December 21, 2017, Marcus asserted his Fifth Amendment privilege and refused to answer any questions except his legal name. Included amongst the hundreds of questions for which Marcus pled the Fifth were

⁴ The Receiver incorporates by reference herein all facts in the Receiver’s Motion to Compel Turnover of Real Property by Jeremy Lee Marcus [ECF No. 184].

questions regarding all of the deceptive and fraudulent conduct that the Plaintiffs have alleged and submitted evidence upon, and evidence establishing that the BMW was purchased with monies derived from such fraudulent, egregious conduct.

Because Marcus asserted his Fifth Amendment privilege, the Court can and should draw all negative inferences therefrom. *See SEC v. Weintraub*, No. 11-21549-CIV, 2011 WL 6935280, at *6 (S.D. Fla. Dec. 30, 2011) (“[T]he Court may, and does, draw adverse inferences for [defendant’s] invocation of his Fifth Amendment right, particularly in view of compelling, independent evidence submitted by the SEC”) (citations omitted) (emphasis added).⁵

Such negative inferences regarding Marcus, who owned and controlled each of the Receivership Defendants, add to the already voluminous documentary evidence establishing that the Receivership Defendants, by and through Marcus, were engaged in a fraudulent scheme designed to prey upon consumers. *See Weintraub*, 2011 WL 6935280 (S.D. Fla.), at *6 (finding that “[defendant] did make materially false or misleading statements and omissions in connection with his proposed Kodak and AMR deals” because he has “not offered any affirmative evidence to refute or contravene the SEC’s factual assertions,” including by invoking his Fifth Amendment to virtually all interrogatories).

⁵ *See also United States v. Two Parcels of Real Property Located in Russell County, Ala.*, 92 F. 3d 1123, 1129 (11th Cir. 1996) (affirming the district court’s decision to draw an adverse inference that “the answers to the [deposition] questions would not have been favorable to the claimants asserting the [Fifth Amendment] privilege”); *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1274 n.4 (S.D. Fla. 2007) (granting Plaintiff’s motion to draw adverse inferences “based on the individual Defendants’ invocation of their Fifth Amendment privilege in their answers and discovery responses”); *Court-Appointed Receiver of Lancer Management Group LLC v. Lauer*, No. 05-60584-CIV, 2009 WL 800144, at *3 (S.D. Fla. Mar. 25, 2009) (Receiver correctly argued that an adverse inference be drawn against defendants who invoked their Fifth Amendment privilege); *Kozyak v. Poindexter* (In re Financial Federated Title & Trust, Inc.), 252 B.R. 834, 838 (Bankr. S.D. Fla. 2000) (acknowledging that trustee may ask the court for an adverse inference against defendant who asserts Fifth Amendment privilege).

B. Final Judgment Is Not Necessary for Turnover

Marcus also argues that turnover is inappropriate because there has not been a final judgment. [ECF No. 189 at p. 2]. Marcus cites no case law in support of this argument. Moreover, Marcus is incorrect – both this Court and the Middle District of Florida have held that property obtained solely with funds from a receivership entity (as is the case here) may be turned over to the Receiver before a final judgment. *See Aquacell Batteries, Inc.*, 2008 WL 2915064 (M.D. Fla. 2008) (granting turnover of real property to receiver four months before final judgment was entered against the Defendant); *Creative Capital Consortium, LLC*, 2013 WL 12167733 (S.D. Fla. 2013) (granting turnover of option accounts funded by receivership proceeds but filed in individual defendant who directed scheme prior to final judgment). Courts in other circuits likewise regularly grant turnover motions before entry of final judgments because it is an equitable remedy designed to maintain the status quo pending final judgment on the merits. *See, e.g., United States v. George*, 420 F. 3d 991, 994 n.1 (9th Cir. 2005) (“A receiver is a court officer or representative appointed to take over the control and management of property that is the subject of litigation before the court, to **preserve** the property, and ultimately to dispose of it according to the **final judgment**”) (citation omitted) (emphasis in original); *Knauer v. Jonathon Roberts Financial Group, Inc.*, 348 F. 3d 230, 236 (7th Cir. 2003) (“[t]he appointment of a receiver . . . **preserves** and retains control of the property to answer **final judgment**”) (citation omitted) (emphasis in original); *United States ex rel. Rahman v. Oncology Associates*, 198 F. 3d 489, 496 (4th Cir. 1999) (“when the plaintiff creditor asserts a cognizable claim to specific assets of the defendant or seeks a remedy involving those assets, a court may in the interim *invoke equity to preserve the status quo pending final judgment* . . .”) (emphasis added); *SEC v. Martino*, 255 F. Supp. 2d 268, 281, 288 (S.D.N.Y. 2003) (granting summary

judgment on SEC's claim for turnover of defendant's yacht in part to "maintain the status quo regarding the availability of the yacht for satisfaction of any monetary judgment that the Court issues against [Defendants]."); *NHS Sys.*, 708 F. Supp. 2d 456 (granting turnover of funds prior to final judgment); *Transcontinental Warranty, Inc.*, 2009 WL 5166213, at *2 (recognizing that receiver may compel non-party to turn over receivership property in its possession before final judgment).

In any event, under Florida law of constructive trust and fraudulent transfer, fraudulent intent on the part of the transferee is simply not an element of the claim. *In re Lee*, 574 B.R. 286 (Bankr. M.D. Fla. 2017); *In re Fin. Fed. Title & Tr., Inc.*, 347 F. 3d 880 (11th Cir. 2003); *In re Hecker*, 264 Fed. App'x 786 (11th Cir. 2008); *Aquacell Batteries, Inc.*, 2008 WL 2915064 (M.D. Fla. 2008); *Sweeteners Plus, Inc. v. Glob. Supply Source, Inc.*, No. 6:11-cv-1799, 2013 WL 6890857 (M.D. Fla. Dec. 31, 2013).

The Receiver here was appointed to maintain the status quo and "preserve the value of those assets for the benefit of consumers and creditors." PI Motion [ECF No. 6 at pp. 18-20]. Absent turnover, the Receiver believes that there is a real and present problem of the BMW's value diminishing. First, Marcus does not appear to have the financial ability to maintain the BMW. Marcus has been the subject of an asset freeze ordered by this Court for the last seven months, and Marcus recently invoked his 5th Amendment right against self-incrimination when asked about his current employment, source of income and business ventures. In addition, the car is a depreciating asset. Based upon discussions with the Receiver's consultants, he believes the car is already worth less than the amount of monies paid by the Receivership Defendants. Absent turnover, the Receiver will not be able to carry out this Court's directive in preserving assets for the benefit of consumers.

C. Marcus Has Not Been Fully Cooperative

Finally, Marcus argues that turnover is inappropriate because he has been “readily cooperative” in the turnover of assets. [ECF No. 189 at p. 3]. This is only partial true and not a defense to the Receiver’s Motion. Marcus has not been cooperative in the turnover of his most valuable assets, such as his house and car. The Receiver’s forensic accountant traced the source of funds for these assets and confirmed that they were purchased solely with consumer funds. Despite this overwhelming evidence, Marcus has not turned them over. In addition, Marcus has invoked his 5th Amendment right to provide sworn testimony to the Receiver regarding assets, including those he disclosed by order of this Court.

Additionally, Marcus without any evidence argues hardship if he is forced to turnover the BMW. [*Id.* at pp. 3-4]. However, Marcus continues to insist on living a life of luxury. The Receiver has learned that Marcus and his wife on December 2, 2017 hosted a lavish wedding at the luxurious W Hotel on the beach in Fort Lauderdale, Fl. Based upon the Receiver’s calculations, the cost of the wedding exceeded \$50,000. Marcus cannot now argue that “[he] is not remotely concerned with having a ‘luxury’ vehicle” [*id.* at p. 4] when recent events prove he maintains a luxurious standard of living.

III. CONCLUSION

For the reasons set forth above and in Receiver’s Motion, the Receiver respectfully requests this Court to enter an Order compelling turnover of the BMW, together with such other and further relief as this Court deems just and proper.

Respectfully submitted this 3rd day of January 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served via CM/ECF

Notification and/or U.S. Mail to all parties on the attached service list on this 3rd day of January

2018.

By: /s/ Gregory M. Garno, Esq.

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USDC, SD Fla., Case No. 17-cv-60907-MORENO

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