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Debtor's Founder Ordered to Turn Over Social Media Accounts to Reorganized Company

A recent bankruptcy court decision highlights the importance of Facebook pages, Twitter accounts, and similar social media assets in today's business marketplace. It's not always clear how these might be best protected, but the decision provides some context for considering the very real problems business owners and their lenders face today.

BACKGROUND

Tactical Firearms, LLC, sought Chapter 11 protection against a backdrop of shareholder discord and threats of foreclosure from its major secured creditor. The minority shareholder successfully terminated the debtor's exclusive period for filing a chapter 11 plan and then proposed his own plan. After his plan was confirmed and became effective, he became the sole owner of the reorganized debtor.

At the time of the bankruptcy filing, the debtor's majority shareholder, who was also the founder, maintained several social media accounts—some for personal use and others for promoting the debtor's firearms showroom and firing range. The confirmation order required him to “deliver possession and control” of “passwords for the [d]ebtor's social media accounts” to the reorganized debtor. Embittered by the result of the chapter 11 proceedings, the debtor's founder refused to comply, contending that all of the social media accounts were personally his, not the debtor's. In the meantime, he also changed the title of the Tactical Firearms Facebook page and began making disparaging remarks about his former partner and the bankruptcy proceedings.

WHOSE PAGE IS IT ANYWAY?

Faced with the ownership dispute, the court set out to determine who owned the Twitter and Facebook accounts associated with Tactical Firearms. The court began its analysis with § 541 of the Bankruptcy Code, which provides that all legal and equitable interest of the debtor in property become property of its bankruptcy estate upon filing of a petition. What constitutes a property interest for bankruptcy purposes is generally determined by reference to state law. Relying upon a string of inconsistent decisions concerning ownership of social media accounts, the court considered the particular facts and circumstances surrounding the creation and use of Tactical Firearms' Twitter and Facebook accounts in determining their ownership.

Based on all of the facts and arguments presented, the court concluded that the social media accounts at issue had been property of the debtor's bankruptcy estate and were now property of the reorganized debtor. The court noted that the accounts were (1) created in the name of the business (as opposed to its principal personally), (2) linked to the business's web page, (3) used for business purposes, and (4) occasionally maintained by business employees.

In arguing that he was the owner of the Tactical Firearms Facebook page, the debtor's principal noted that he was the only individual who had administrative privileges with respect to the page (through his separate personal Facebook account), that he often posted status updates concerning his personal activities, and that he often posted status updates that referenced his personal political beliefs. In rejecting these arguments as proof of ownership of the debtor's social media accounts, the court first noted that Facebook would allow the debtor's principal to reassign administrative privileges to the Tactical Firearms Facebook page without compromising any of his personal data associated with his personal account. Regarding the personal references and political commentary contained on the Tactical Firearms Facebook page, the court noted that these uses were characteristic of normal social media marketing for a gun business, where personal attendance at gun shows and opposition to gun control were part of effectively promoting the debtor's business. In light of its conclusions, the court ordered the debtor's principal to stop making posts and tweets that were damaging to the reorganized debtor's business on the debtor's social media accounts and to transfer control of the social media accounts to the reorganized debtor (the debtor's former principal ignored this order for months, leading to his eventual incarceration for contempt).

WRAPPING UP THE DETAILS

Finally, the court addressed some of the practical hurdles associated with the ordered transfer of social media accounts. First, the title of the Tactical Firearms Facebook page had been changed by the debtor's principal in the midst of the bankruptcy proceedings, and Facebook policies prohibited more than one account name change for accounts with more than 200 "likes." The court suggested that Facebook could make an exception to its policies or, if it would not, the reorganized debtor could seek compensatory damages from the debtor's former principal. Also, the debtor's former principal complained that the password to the debtor's Twitter account was a password he used for other personal accounts. The court suggested that the password could be changed prior to it being given to the reorganized debtor.

THE TAKEAWAY

Social media is an increasingly integral part of the goodwill and marketing strategy of many businesses. The loss of thousands or tens of thousands of Twitter followers and Facebook friends or "likes" can result in a tangible financial loss to a bankruptcy estate or business in distress. For secured lenders or purchasers of distressed businesses, preserving social media assets could be important, if not essential, to preserving a business's going concern value.

The Tactical Firearms decision offers some guidance through the relatively uncharted waters surrounding property interests in social media and may help lenders and asset purchasers develop strategies to safeguard the value of social media assets. First, as part of any diligence process involving a business dependent on its social media presence, lenders and asset purchasers will likely insist on understanding the history and operation of the business's social media accounts. Who created them? When were they created? Who has access to and control over the accounts? How are the accounts used? If the answers to these questions do not provide a clear answer about ownership or practical control, it may be necessary for the business to take steps to clarify ownership of and control over the accounts that are important to a business's success. Second, in the event of a distress situation, lenders and other interested parties may insist on procedures being put in place to prevent the diminution in value of social media assets. Like other forms of goodwill, social media assets such as Facebook pages, Twitter handles, "likes," and "followers" are virtually impossible to monetize through liquidation. Recovery of value could be made even more difficult if an unruly or disgruntled employee actively uses a business's social media accounts to disparage the very business others are hoping to preserve (as the former principal of Tactical Firearms did).

To prevent the potential loss of enterprise value, it might be worthwhile to have plans and agreements in place to govern accessing social media accounts in the event of financial distress and transferring passwords and other account information in the event of liquidation.

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