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Feature

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Debtor Owns Social Media Accounts Created by Its Former Principal

In a case of first impression, the U.S. Bankruptcy Court for the Southern District of Texas recently held in *In re CTLI LLC* that social media accounts created to promote a business are assets of the business's bankruptcy estate, even though the debtor's former majority owner created the social media accounts in his name and claimed they were his property.[1] This decision is noteworthy for two reasons. First, it provides guidance on property rights in social media accounts used to promote a business when those accounts are created by an individual and use the individual's name as part of their moniker. Second, it presents a striking example of a bankruptcy court's ability to compel compliance with its orders: The debtor's former owner refused to turn over social media account passwords until after he spent several weeks in a federal detention center.

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The Origins of the Dispute and the Relief Granted

This dispute arose in the context of a proceeding to enforce the bankruptcy court's order confirming the debtor's reorganization plan (the "confirmation order"). The confirmation order required the debtor's former majority owner (the "former owner") to "deliver possession and control" of "passwords for the Debtor's social media accounts, including but not limited to Facebook and Twitter" to his former associate and new 100 percent owner of the reorganized debtor.[2] The former owner refused to comply with the confirmation order and, as a result, was found in contempt.[3]

In connection with that finding of contempt, the bankruptcy court ordered the former owner to turn over the social media accounts by the next day or be held in custody by the U.S. Marshals Service until such time as he could be brought before the bankruptcy court to purge his contempt.[4] The former owner also failed to comply with this order, so the bankruptcy court issued a bench warrant for his arrest and authorized the Marshals Service "to make forcible entry into any private property on which it is reasonable to believe [that the former owner] may be present or residing" and "to use any force reasonably necessary" to take him into custody.[5]

A few days later, the Marshals Service brought the former owner into bankruptcy court, and at that hearing, the former owner contended that the Facebook and Twitter accounts were his personal property — not estate assets — and that it would be impossible to share control of the accounts without violating his privacy.[6] To resolve the dispute, the former owner agreed to have a neutral third party appointed to sort out the personal and business aspects of the social media accounts.[7] He was released from custody.[8]

However, the former owner then objected to a form of order to subsequently effectuate the bankruptcy court's ruling,[9] which led to an evidentiary hearing on Feb. 12, 2015. The bankruptcy court found that the reorganized debtor was entitled to control of the social media accounts based, in part, on the following understanding of how Facebook works and how it was used in this case: (1) Facebook allows pages to be created for busi-

1 *In re CTLI LLC*, 528 B.R. 359 (Bankr. S.D. Tex. 2015).
2 *Id.* at 362-63.
3 It was not immediately clear from a review of the docket how the bankruptcy court learned of the former owner's contempt, but it appears that he was found in contempt prior to a hearing on the matter.
4 *In re CTLI LLC*, Case No. 14-33564, Order entered at Docket Entry 242 (Bankr. S.D. Tex. Dec. 11, 2014).
5 *In re CTLI LLC*, Case No. 14-33564, Bench Warrant entered at Docket Entry 249 (Bankr. S.D. Tex. Dec. 12, 2014).
6 *In re CTLI LLC*, 538 B.R. at 363.
7 *Id.*
8 *In re CTLI LLC*, Case No. 14-33564, Order for Release entered at Docket Entry 258 (Bankr. S.D. Tex. Dec. 17, 2014).
9 *In re CTLI LLC*, Case No. 14-33564, Emergency Motion Objecting to Proposed Order entered at Docket Entry 259 (Bankr. S.D. Tex. Dec. 17, 2014).

nesses that are "created by an individual User to represent an organization or brand, and that User becomes the first page administrator, which enables him or her to customize the Page, post Status Updates and photos, and access other features"; (2) Facebook users can "like" a business page and then see posts by the page administrator in the "newsfeed" of the individual user; (3) a page administrator can grant different degrees of administrative powers over a business page, including the ability to remove an original page administrator from that role; and (4) the former owner created a Facebook account in his own name and, when he reached its limit for the number of "friends," he created a separate page under the same account for the purpose of marketing the debtor (the "personal page" and "business page").[10]

Social Media Accounts Are Presumed to Be Business Assets

The bankruptcy court began its analysis with the broad view of estate property in § 541 of the Bankruptcy Code.[11] The bankruptcy court then considered whether the Facebook and Twitter accounts were property of the debtor's estate and had vested in the reorganized debtor pursuant to the confirmation order.[12] While no state court in Texas had considered whether social media accounts are property interests, the bankruptcy court observed that the U.S. Bankruptcy Court for the Southern District of New York had treated them like property akin to customer subscriber lists.[13] "Like subscriber lists, business social media accounts provide valuable access to customers and potential customers. The fact that those customers and potential customers can opt out from future contact does not deprive the present access of value. Just as Facebook Users can 'unlike' a Page at any time, subscribers to email lists can also, by federal law, opt out at any time."[14] A personal Facebook page, though, would likely not be an estate asset of a business debtor "[b]ecause the value ... lies in the ability to reach Friends or Fans through future communications."[15]

However, the fly in the ointment stemmed from the fact that the former owner had created both a personal and business page under one Facebook account and that the Twitter account used a handle or moniker based on the former owner's name. Thus, the former owner claimed that the social media accounts were *his personal property* and that it would invade his personal privacy to share these accounts with the reorganized debtor.

The bankruptcy court disagreed, reasoning that Facebook permitted pages for "businesses, brands and organizations" on the one hand, and "individual people" on the other.[16] Because the business page fell under the former category, it "raise[d] a presumption that it was the Debtor's [business page], is now the reorganized Debtor's [business page], and has never been [the former owner's] personal Facebook Page."[17]

The bankruptcy court relied on several key facts to support its application of this presumption: (1) the business page contained a direct link via a URL to the debtor's website; (2) the former owner used the business page to post status updates about the debtor related to its business; (3) the former owner admitted to making promotional status updates; and (4) the former owner had granted an employee with access (but not administrative privileges) to the business page to post status updates about the business directly through a third-party service and directly through Facebook by sharing his personal password information.[18] "This particular use of the [business page] was clearly to generate revenues for the company, and confirms that this Page belongs to the reorganized Debtor."[19]

> **[W]hile many of us have become accustomed to social media in personal and business contexts, the commercial implications of recognizing social media accounts as a species of property are far from clear.**

Employee Goodwill vs. Business Goodwill and Privacy Issues

The bankruptcy court further observed that while the identity of the former owner and debtor were closely linked, like many small businesses and their owners, they were separate entities with separate property interests.[20] "The fact that the [business page] was created in the name of the business, was linked to the business's web page, and was used for business purposes places it squarely in the category of property of the Debtor's estate ... and *not* personal property of [the former owner]."[21] Essentially, the former owner used the Facebook account and the business page for business purposes, and "[a] business social media account is ... a manifestation of the business's accrued goodwill."[22]

Moreover, the bankruptcy court recognized a distinction between goodwill of a business and professional goodwill of an employee. It reasoned that while an employee's professional goodwill *may* be reflected in the employer's social media accounts, only the value of the debtor's goodwill is part of the bankruptcy estate.[23] Said another way, the dividing line between an employee's professional goodwill and a business's goodwill is the dividing line between the goodwill that departs a business when an employee leaves and the goodwill generated for the business that remains.[24] In this context, the bankruptcy court suggested that the goodwill would sort itself out because followers or fans of the Twitter account and business page are free to stop following those social media accounts and can follow the former owner if he has a separate social media presence.[25]

10 *In re CTLI LLC*, 528 B.R. at 365, 368-69.
11 *Id.* at 366-67.
12 *Id.* at 366-74.
13 *Id.* at 366 (citing *In re Borders Grp. Inc.*, No. 11-10614 MG, 2011 WL 5520261, at *13 (Bankr. S.D.N.Y. Sept. 27, 2011)).
14 *Id.* at 367 (internal authorities omitted).
15 *Id.*
16 *Id.* at 367.
17 *Id.* at 367-68.
18 *Id.* at 368.
19 *Id.*
20 *Id.* at 369.
21 *Id.* (emphasis in original).
22 *Id.* at 369, 373.
23 *Id.* at 373.
24 *Id.*
25 *Id.* at 373-74.

The bankruptcy court also disagreed with the former owner's contention that requiring him to grant administrative privileges to the social media accounts to the reorganized debtor (*i.e.*, to forever give up control of these accounts) would violate his privacy rights.[26] The former owner said that he *may* have used his Facebook account for private messaging unrelated to the business, such as with a girlfriend or a doctor, and that the reorganized debtor would then have access to those private messages.[27] However, the bankruptcy court had already determined that the personal and business pages were separate from one another and that the former owner had waived any right to privacy in messages sent from the business page. The bankruptcy court analogized to authorities holding that employees may not have a reasonable expectation of privacy when sending electronic messages through business assets.[28] While such determinations may require courts to consider formal policies of an employer or business with respect to employee privacy when using business resources for electronic messaging, there was no evidence of any such policy here.[29] The bankruptcy court concluded that "given that the social media accounts were named for the Debtor and were used for business purposes, [the former owner] should have been aware that the accounts were property of the Debtor and thus that he did not have a personal privacy interest therein."[30]

Fashioning the Appropriate Relief

This left the bankruptcy court to consider the appropriate relief, which was complicated by two factors. First, shortly before entry of the confirmation order, the former owner had changed the name of the Facebook business page from the debtor's name to one using his personal name, and Facebook's internal rules did not allow the name to be changed again.[31] "[W]ithout changing the name back to a business name, the reorganized Debtor will not be able to utilize most of the former [business page's] value."[32] Second, the Twitter account used the former owner's personal name in its "handle," but Twitter apparently does not have rules preventing a name change for the account.

With respect to Facebook, the bankruptcy court ordered the former owner to transfer administrative privileges for the business page to the reorganized debtor and offered two suggestions to address the page's name:[33] Facebook could (1) make an exception to its name-change policy because the current name is misleading, or (2) migrate the "fans" from the current business page to a new page that the reorganized debtor could create (as the bankruptcy court noted had been done in at least one other case).[34] If neither route proves successful, then the reorganized debtor can consider seeking compensatory damages from the former owner. (The bankruptcy court also ordered the former owner to immediately stop all activity with the business page to prevent further vitriolic posts about the business.) With respect to the Twitter account, the former owner was directed to transfer control of the account, subject only to the right to change the name of the account because it used his personal name.

Takeaway and Remaining Legal Questions

The takeaway from this case is that social media accounts, even in an individual's name, can be business assets and property of the business's bankruptcy estate. Based on this decision, a court is more likely to determine that social media accounts created by an individual or using an individual's name are business assets and estate property when (1) they are clearly used for business purposes and (2) the individual allows business employees to access the accounts for business purposes.

Despite this, it appears that the law still has some work to do to catch up to the question of whether social media accounts are a form of property and what that means. For example, in this case the former owner had both a personal and business page through one Facebook account. Can a court order that a business page be transferred from one account to another without impacting a personal profile or page? Would Facebook need to be a party to the proceeding? That is not clear from *CTLI*.

Looking at the issue more generally, while many of us have become accustomed to social media in personal and business contexts, the commercial implications of recognizing social media accounts as a species of property are far from clear. Are they tangible property (because they appear on touch-screen devices) or intangible property (because they are digital)? Are they freely transferable? Can they be pledged as collateral? If so, then would they be governed by Article 9 of the Uniform Commercial Code (UCC) or the common law? If they are governed by Article 9, then are they a "general intangible," and would an account receivable generated from a social media account be "proceeds" of the social media account within the meaning of Article 9? Would a claim for damage to a social media account (*e.g.*, as the *CTLI* court indicated the reorganized debtor may hold), or a damage to goodwill be "proceeds" of the social media account within the meaning of UCC § 9-102(64)? Would such a claim be a separately assignable commercial tort claim? Could there be a contract-based claim (*e.g.*, a claim against a public relations contractor managing a business's social media presence)? The answers to these questions are not yet clear.

Postscript

Following the Feb. 12, 2015, evidentiary hearing, the bankruptcy court issued its decision on April 3, 2015, and determined that the social media accounts were estate assets and ordered the former owner to turn over access to the accounts.[35] The former owner failed to comply with that order, so the bankruptcy court subsequently held a hearing at which it found the former owner in contempt (again) and

26 *Id.* at 377-78.
27 *Id.* at 377.
28 *Id.* at 377-78.
29 *Id.*
30 *Id.* at 378.
31 *Id.* at 374.
32 *Id.* at 376.
33 *Id.* at 376-77. It is not clear whether the court's order differentiated between the former owner's personal page and the business page.
34 *Id.* at 377 (citing *Mattocks v. Black Entm't Television LLC*, 43 F. Supp. 3d 1311, 1316-17 (S.D. Fla. Aug. 20, 2014)).
35 *In re CTLI LLC*, Case No. 14-33564, Memorandum Opinion on Jeremy Alcede's Emergency Motion Objecting to Proposed Order Regarding Social Media Accounts entered at Docket Entry 334 (Bankr. S.D. Tex. April 3, 2015).

ordered the Marshals Service to take him into custody and hold him until such time as he complied with the court's orders.[36] The former owner submitted himself to Marshals Service custody on April 9, 2015, rather than purging himself of the contempt, and was ordered held until such time as he was prepared to comply with the court's orders.[37] He remained in custody until May 27, 2015, at which point he was ordered to be released after purging himself of contempt by providing the reorganized debtor with the relevant username and password information.[38]

The former owner has appealed several of the court's orders in connection with this dispute, including the order finding him in contempt.[39] That appeal is pending as of this submission of this article in June 2015, and has been followed by the former owner's filing of his motion to revoke confirmation of the plan, alleging that the confirmation order was procured through fraud.[40] abi

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36 *In re CTLI LLC*, Case No. 14-33564, Order Holding Jeremy Alcede in Contempt of this Court's Order of April 3, 2015, entered at Docket Entry 344 (Bankr. S.D. Tex. April 9, 2015).

37 *In re CTLI LLC*, Case No. 14-33564, Findings of Fact and Conclusions of Law Regarding: (1) Jeremy Alcede's Objection to Imposition of Final Ruling and Jury Demand; and (2) Jeremy Alcede's Second Amended Motion to Reconsider or, in the Alternative, for Stay or Release Pending Reconsideration and Appeal and Request for Emergency Hearing entered at Docket Entry 372 (Bankr. S.D. Tex. April 21, 2015).

38 *In re CTLI LLC*, Case No. 14-33564, Order for Release entered at Docket Entry 415 (Bankr. S.D. Tex. May 27, 2015).

39 *In re CTLI LLC*, Case No. 14-33564, Alcede's Notice of Appeal of Orders Concerning Contempt entered at Docket Entry 383 (Bankr. S.D. Tex. 2015).

40 *In re CTLI LLC*, Case No. 14-33564, Jeremy Alcede's Motion to Revoke Confirmation of Plan [Dkt. 237] (Bankr. S.D. Tex. June 8, 2015).