

**ALABAMA STATE BAR ASSOCIATION  
BANKRUPTCY AND COMMERCIAL LAW SECTION  
BANKRUPTCY AT THE BEACH  
SOCIAL MEDIA AND BANKRUPTCY<sup>1</sup>  
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Bankruptcy and Commercial Law Section  
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## **SOCIAL MEDIA AND BANKRUPTCY**

### **Hypothetical**

On May 1, 2014, nearly 6 months after obtaining a third round of financing, in the form of “Futures Installment Lending Contracts” (“Futures Contracts”), for Nestor Trading Company, Inc. (“NTC”), well-known commodities trader Norman Nestor announced that NTC would be filing for Chapter 11 protection. On May 5, 2014 (the “Petition Date”), Nestor signed and had NTC’s counsel file Chapter 11 petitions for NTC and 12 NTC affiliates. Nestor, himself a licensed attorney, declared that “the dramatic slowdown in the global economy forced NTC and its affiliates to file Chapter 11 to maximize NTC’s enterprise value for the benefit of all creditors and parties in interest.”

Nestor's public optimism and bullish attitude regarding the “tremendous” assets of NTC and the company's prospects for a successful reorganization in Chapter 11 quickly proved misguided. Within 10 days of the Petition Date, multiple creditors filed papers in the NTC and related Chapter 11 cases alleging that NTC had defaulted on millions of dollars of Futures Contracts. Most of the Futures Contracts had been executed on behalf of NTC by “Freddie” Nestor, Norman Nestor's 26-year-old son. NTC's corporate filings listed Freddie as NTC's Vice President and Chief Technology Officer.

As the Chapter 11 cases moved forward, it became clear that Norman and Freddie, along with several accomplices, had created an elaborate web of companies far beyond the 13 companies in Chapter 11. Through this elaborate web of companies and a deceiving online subscription program created by Freddie, the Nestors had pocketed millions of dollars from unsuspecting investors to fund their lavish lifestyles. Freddie had also created an extensive online social media profile for NTC, including Facebook, LinkedIn, Instagram, and Twitter accounts (the “NTC Social Media Accounts”). Freddie managed the

NTC Social Media Accounts and used the accounts to create the "buzz" necessary to push NTC's online subscription program.

During the 341 Meeting, Norman Nestor appeared as NTC's designated corporate officer and testified on NTC's behalf. The Bankruptcy Administrator ("BA") performed the requisite inquiries, and then turned the 341 Meeting over to counsel representing five of NTC's creditors. As might be expected, creditors' counsel made detailed inquiry of Mr. Nestor. In answer to most of the detailed questions, Mr. Nestor stated: "I am not sure, I would need to have my iPhone with me to fully answer that question." It is unclear whether Mr. Nestor had his iPhone in his possession during the 341 Meeting.

Two days after the 341 Meeting, a group of creditors filed an emergency motion to appoint a Chapter 11 trustee. After taking evidence during the 2-day emergency hearing, the Bankruptcy Court determined that appointment of a Chapter 11 trustee was warranted. The Court stopped short of making a finding that the Nestors had been running a Ponzi scheme through NTC and its affiliates, even though the Bankruptcy Judge noted during the oral ruling that the evidence pointed strongly in that direction. The Bankruptcy Court ordered that a Chapter 11 trustee (the "Trustee") be appointed immediately.

Immediately after her appointment, the Trustee took control of all NTC bank accounts and secured all document storage facilities, computer equipment, and other data and information storage devices at NTC's corporate headquarters. The Trustee hired legal counsel who:

1. Filed an emergency motion seeking the immediate turnover of Mr. Nestor's iPhone prior to the beginning of any Rule 2004 Examinations.
2. Took Rule 2004 Examinations of the Nestors, both of whom invoked their Fifth Amendment privilege and refused to testify.
3. Issued Subpoenas *duces tecum* and took Rule 2004 Examinations of NTC's and its affiliates' key personnel, including the in-house accounting and information technology ("IT") staff. This discovery

produced:

- A. Documents showing a tangled mess of email addresses bearing the suffix “ ntcventures.com.”
- B. Evidence that every employee of NTC and its affiliates was issued an e-mail address with the domain “@ntcventures.com,” along with a copy of the "NTC Corporate Email Policy," which provided that all employees were to only use “@ntcventures.com” email addresses when conducting the business of NTC.
- C. Documents showing that high-level NTC employees often used multiple email addresses for business purposes, including Gmail accounts hosted by Google.
- D. Testimony by NTC's former lead sales manager, Simon Smith (“Smith”), that he had never used any email address other than his @ntcventures.com in conducting business for NTC. During his testimony, Smith accurately parroted NTC's corporate email policy, and acknowledged reading and signing a copy of such policy, marked as an exhibit to his examination testimony. Three times during his Rule 2004 examination Smith denied using any other emails for NTC business. After these denials, Trustee's counsel presented Smith with a composite exhibit of 15 email communication threads, all emanating from “speedysmith12345@gmail.com,” that conclusively showed that Smith consistently used his "personal" email account to conduct NTC business. These email threads represented emails sent by Smith to Freddie’s “@ntcventures.com” email address. Under intense pressure, Smith admitted that his prior three denials were "mistaken," and abruptly asked for a break in the Examination.

## DISCUSSION

1. **NORMAN’S iPHONE:** Given Norman’s references to his iPhone

during the 341 Meeting, the Trustee believed that the iPhone would be a critical component of her investigation and filed a motion for turnover of the iPhone. Norman vehemently objected to the turnover of his iPhone, citing his “right of privacy,” among other things.

- A. Should the Bankruptcy Court order the turnover of Norman’s iPhone?
- B. Does Norman’s right of privacy outweigh the rights of the Trustee?
- C. If the Court rules against the Trustee by denying her request for turnover of Norman’s iPhone, how should the Court address the Trustee’s *ore tenus* motion for an order designed to prevent the potential spoliation of evidence contained on the iPhone?

2. **THE EMERGENCY MOTIONS:** During the lunch break, Trustee’s counsel drafts and files an emergency motion seeking turnover of all communications from Smith’s personal email and other social media accounts pertaining in any way to NTC business. In the same motion, the Trustee requests a TRO and preliminary injunction seeking to prevent Smith, the Nestors, NTC and its affiliates from destroying or otherwise disposing of all email and other communications between them pertaining to NTC business. Upon filing this emergency motion, Trustee’s counsel calls the Judge’s chambers to request an emergency hearing that day. Later the same day, counsel for Smith files a competing emergency motion for protective order, arguing that Smith’s personal emails are not property of the NTC estate and are not subject to discovery or seizure by the Trustee; he requests that it be set for hearing simultaneously with Trustee’s motion.

- A. What should Trustee’s counsel do to ensure the emergency motion gets heard before spoliation can occur? How might the Court react to the request for a same-day emergency hearing?
- B. How will the Court rule on these emergency motions and why?
- C. If the Court grants the Trustee’s motion, should the Court

compel production of emails in “native” format?

D. If, as part of her motion, the Trustee seeks an order that requires Smith to reveal the password to his personal Gmail account, what should Smith’s counsel argue and how should the Court rule?

3. **GOOGLE DISCOVERY:** The Court refuses to order Smith to turn over to the Trustee the password to his personal Gmail account.

A. Can the Trustee subpoena Smith’s emails from Google?

B. How should the Trustee go about this?

C. If Google files a motion for protective order against responding to such a subpoena, how should the Court rule?

4. **NTC’S SOCIAL MEDIA ACCOUNTS:** The NTC bankruptcy case quickly became big news across the country. Almost daily, new facts and circumstances came to light that revealed a much wider conspiracy than had initially appeared. As stories of the Nestors' fraud and deceit circulated throughout social media, NTC Social Media Accounts were bombarded with messages from angry investors. In light of the increased focus on NTC’s social media use, the Trustee filed a motion seeking authority to take immediate control of the NTC Social Media Accounts and for turnover of the passwords to those accounts. NTC and the Nestors opposed this relief on the basis that the NTC Social Media Accounts and their passwords are not property of NTC’s or its subsidiaries’ estates pursuant to Section 541 of the Bankruptcy Code, and therefore turnover is not an appropriate form of relief under Section 542 of the Bankruptcy Code.

A. How should the Court rule on this motion?

B. Can NTC and the Nestors obtain the requested relief by motion, or do they have to file an adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7001?

5. **FREDDIE'S & NORMAN'S SOCIAL MEDIA ACOUNTS:** As of the Petition Date, Freddie and Norman Nestor boasted large personal social media profiles, including in-depth Facebook, Instagram, LinkedIn, and YouTube profiles. Despite the advice of counsel, the Nestors insisted upon leaving their social media accounts "active" after the appointment of the Chapter 11 trustee. Employees of NTC testified that Norman would often brag about the number of his LinkedIn connections. Norman's extensive "friendships" and social media connections were consistent with Freddie's goal of expanding NTC's "Social Media Platform."

A. Can the Trustee review publicly available social media pages to find assets of NTC and its affiliates?

B. Can the Court, on its own, review publicly available social media, including, but not limited to, the Nestors' social media pages?

6. **"FRIEND REQUEST":** When reviewing Smith's "personal" email account, which the Court ordered to be turned over to the Trustee, the Trustee's counsel discovers a Facebook generated email dated April 27, 2014 stating "Your Friend Request to Ronnie Cranston is still pending." Judge Ronald Cranston is the Bankruptcy Judge presiding over the NTC Chapter 11 cases.

A. What should the Trustee do with this information?

B. If the Trustee discloses this information to Smith, and if Smith moves to recuse Judge Cranston based on this information, what should the ruling be?

7. **TWITTER ACCOUNT:** More emails in Smith's personal email inbox show a series of Twitter "Direct Messages" from Freddie starting in early April 2014 that appear to show that Freddie operated a Twitter account called "@bigmoneymaker." Publicly available "tweets" from that account made it obvious that Freddie had been using this Twitter account to continue the NTC fraud and harvest even more potential investors. The publicly available tweets from @bigmoneymaker say

things like "DM me for details about big deals." The Trustee has filed a motion seeking to take control of Freddie's Twitter account in order to read otherwise private DMs (Direct Messages) between Freddie and Smith (and presumably many others). Of course, Freddie, Smith and others vehemently oppose this motion.

A. What are the arguments for and against this motion?

B. How should the Court rule?

C. Would the arguments change if the publicly available tweets from "@bigmoneymaker" said "DM me for information about NTC's big deals?"

**BANKRUPTCY AT THE BEACH  
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MATERIALS AND SOURCES LIST**

I. Discovery and Production of Personal/Non-Debtor E-mail and Documents;  
Account Information in a Business Bankruptcy Setting

a. Case Law

- i. *Royal Park Investments SA/NV v. Deutsche Bank National Trust Company*, 2016 WL 5408171 (S.D.N.Y. Sept. 27, 2016).
- ii. *Export-Import Bank of U.S. v. Asia Pulp & Paper Co., Ltd.*, 233 F.R.D. 338 (S.D.N.Y. 2005).
- iii. *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130 (2d Cir. 2007).
- iv. *In re Tednek, LLC*, 2006 WL 2136046 (Bankr. N.D. Ill. June 30, 2006).
- v. *In re Sledziejowski*, 533 B.R. 408 (Bankr. S.D.N.Y. 2015).
- vi. *In re EZ Pay Services, Inc.*, 389 B.R. 776 (Bankr. M.D. Fla. 2008).
- vii. *In re Willingham*, 493 B.R. 628 (Bankr. M.D. Fla. 2013).

b. Statutes

- i. 11 U.S.C. § 542(e).
- ii. Fed. R. Bankr. P. 2004(a)-(c) & 9016.
- iii. Fed. R. Civ. P. 45(a)-(b).

II. E-Discovery

a. Case Law

- i. *John B. v. Goetz*, 531 F. 3d 448 (6th Cir. 2008).
- ii. *Sony BMG Music Entertainment v. Arellanes*, 2006 WL 8201075 (E.D. Tx. Oct. 27, 2006).
- iii. *In re American Medical Systems, Inc.*, 2016 WL 6666890 (S.D. W.V. Nov. 10, 2016).
- iv. *Rehberg v. Paulk*, 611 F.3d 828 (11th Cir. 2010).
- v. *Pla-Fit Franchise, LLC v. Cole*, 2015 WL 4725377 (D. Me. Aug. 10, 2015).

b. Articles and Materials

- i. Adam I. Cohen and Gin A. Dombosch, *The Jurisprudence of Hard Disk Inspections: Protection by Protocol* (2004).
- ii. Henry Trawick, Jr., *Fla. Practice & Procedure*, §16:1 (2018 ed.)

- iii. Sara Anne Hook and Cori Faklaris, *OH SNAP! The State of Electronic Discovery Amid the Rise of Snapchat, Whatsapp, Kik, and Other Mobile Messaging Apps*, 63-MAY Fed. Law. 64 (2016).
- iv. Jason Conti, *Privacy and Security Concerns in E-Discovery*, 2012 WL 3058128 (Aug. 2012).

### III. Social Media and Judges

#### a. Case Law

- i. *Law Offices of Herssein and Herssein, P.A. v. United Services Automobile Association*, 229 So. 3d 408 (Fla. 3d DCA 2017).
- ii. *Domville v. State*, 103 So. 3d 184 (Fla. 4th DCA 2012).
- iii. *Chace v. Loisel*, 170 So. 3d 802 (Fla. 5th DCA 2014).

#### b. Articles and Materials

- i. Hon. M. Sue Kurita, *Electronic Social Media: Friend or Foe for Judges*, 7 St. Mary's J. Legal Mal. & Ethics 184 (2017).
- ii. ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 462 (2013).
  - i. Available at [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/formal\\_opinion\\_462.auth\\_checkdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_462.auth_checkdam.pdf)
- iii. Florida Supreme Court, Judicial Ethics Advisory Committee, Opinion No. 2009-20 (Nov. 17, 2009).
  - i. Available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html>
- iv. U.S. Courts, Published Advisory Opinions, No. 112, Volume 2B, Guide to Judiciary Policy, Committee on Codes of Conduct (Apr. 2017).
  - i. Available at <http://www.uscourts.gov/sites/default/files/vol02b-ch02.pdf>