

## Company's Social Media Monitoring Does Not Stop Court from Granting Trade Secrets Injunction

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On February 25, 2019, a federal court of appeals affirmed a lower court's decision to grant a preliminary injunction in favor of Scherer Design Group, LLC (SDG), an engineering firm that provides services to wireless carriers and other vendors in the telecommunications business, and against several former SDG employees, despite SDG having monitored one of its former employee's social media activity in order to uncover potential trade secret theft.

Defendants Daniel Hernandez, Chad Schwartz, Ryan Waldron, and Kyle McGinley were all former SDG employees before leaving to work for two competing firms started by Chad Schwartz. However, according to the court's findings, while Hernandez, Waldron, and McGinley were still employed by SDG, they discussed Schwartz's new ventures via social media messenger and transmitted SDG documents and information to Schwartz's firms. During the 2017 Christmas vacation period, Schwartz accepted a project from one of SDG's largest clients, who then left to become one of Schwartz's clients. In January 2018, Hernandez, Waldron, and McGinley all resigned from SDG to join Schwartz's firms, prompting suspicion at SDG of potential trade secret theft. SDG had one of its network administrators examine the former employees' SDG laptop computers. As part of the examination of Hernandez's computer, SDG's administrator was able to access Hernandez's social media page and proceeded to install software that allowed him to monitor Hernandez's social media page without detection. SDG's administrator monitored Hernandez's social media activity for two months, purportedly leading to the discovery of messages discussing how SDG's client information and other intellectual property were obtained by the departed employees.

The district court rejected the Defendants' argument that the unclean hands doctrine barred SDG from obtaining an injunction because Hernandez had fully logged out of his social media account before his departure. A party seeking to use the unclean hands doctrine must show that the party seeking equitable relief committed an unconscionable act immediately related to the activities sought to be enjoined. The Third Circuit Court of Appeals affirmed the district court's decision, finding the unclean hands doctrine did not apply because SDG's access to Hernandez's social media account "does not affect the...trade secret violations that are the subject of the litigation which occurred prior to SDG's alleged hacking of Hernandez's account." The court reasoned that Defendants owed a duty of loyalty to SDG long before the social media monitoring occurred, and SDG's monitoring of social media did not give rise to the claim upon which SDG seeks relief and, consequently, was not directly related to Defendants' breach of their duty of loyalty. Of note, while SDG merely needed to defeat an unclean hands argument, accessing data on an employee device or account could, in certain circumstances, potentially violate the Stored Communications Act, the Wiretap Act, the Computer Fraud and Abuse Act, and/or state trespass or privacy statutes.

In fact, there is a [lawsuit](#) currently pending in New York based on an employer accessing data stored on an employee's personal hard drives attached to a computer purchased by the employer.

**TIP: Although the victim-company obtained an injunction, this case should serve as a warning to companies to think critically about what investigative steps may be appropriate and proper, particularly when an individual's personal accounts, devices, or information is involved.**

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