IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
(Roanoke Division)

BH MEDIA GROUP, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No.: 7:18cv388**
	)	
ANDY BITTER	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiff BH Media Group, Inc. ("BH Media" or "Plaintiff"), by and through undersigned counsel, submits this Memorandum in Support of its Motion for Temporary Restraining Order and/or Preliminary Injunction against Defendant Andy Bitter ("Bitter" or "Defendant").

INTRODUCTION AND STATEMENT OF FACTS

BH Media Group, Inc. is a subsidiary of Berkshire Hathaway and the owner and operator of thirty-one award-winning daily newspapers across the Country, which include, but are not limited to, the Roanoke Times (the "Times"). (**Exhibit A**, Declaration of Lawrence McConnell, at ¶ 2.) In addition to providing print news sources, BH Media also provides marketing and advertising opportunities for partners wishing to reach large audiences both in print and via online marketing and advertising avenues. (*Id.* ¶ 3.) BH Media's resources, including the Times, are available online, and BH Media promotes itself and generates pageviews and advertising dollars through various social media outlets, including Facebook and Twitter. (*Id.* ¶ 4.) BH Media depends heavily on its online presence to advertise its business, which requires the ability

to communicate with existing and potential readers and subscribers and react to online trends in real time. (*Id.* ¶ 5.) Due to its online presence, the readership and subscribers of the Times live all over the Country, and in many cases, live internationally as well. (*Id.* ¶ 6.)

Prior to 2010, the Virginian-Pilot hired and employed Kyle Tucker ("Tucker") as a staff or 'beat' writer to cover Virginia Polytechnic Institute and State University ("Virginia Tech") football and athletics for the Pilot and, eventually, the Times. (*Id.* ¶ 7.) In August of 2010, Tucker created a Twitter account within the scope of his employment, the content of which was work product to be owned by the Pilot and licensed to the Times to engage readers and subscribers, solicit future readers and subscribers, promote the newspapers, and cover issues related to Virginia Tech athletics (the "Account").[1] (Ex. A ¶ 8.) The Times licensed the Account and its content from the Pilot (the Pilot and Times were jointly owned by Landmark Media Enterprises, LLC ("Landmark")) until BH Media purchased the Times and the Account in 2013, at which point BH Media became, and remains, the sole and exclusive owner of the content and the Account. (*Id.* ¶ 9.)[2] Following that purchase, Defendant's content (including the Account) was licensed back from BH Media to the Pilot until the end of 2015. (*Id.* ¶ 10.)

Tucker ended his employment with the Pilot in August of 2011, and relinquished the Account to the Pilot. (*Id*. ¶ 11; **Exhibit B**, Screen shots of 2011 transition.) The Times began looking for a replacement writer to cover Virginia Tech athletics, and in October of 2011, Defendant was hired to fill that role. (*Id*. ¶ 12.) In addition to taking over Tucker's regular column, Defendant was provided access to the Account and the login information (including user

[1] As of August 6, 2018, the Account is a*vailable at* <https://twitter.com/AndyBitterVT?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor>.

[2] BH Media is defined herein to include its predecessors-in-interest. At all relevant times, BH Media was either the owner or licensee of all content identified herein.

name and password) to that account, which occurred in October of 2011. (*Id.* ¶¶ 13–14; *see* **Exhibit B**, Screen Shots of Account transition in 2011.) Defendant updated the Account login information (including user name and password) during the time he managed the Account. During his employment, Defendant was authorized by BH Media to access the Account on behalf of BH Media, and use the Account to disseminate information on behalf of and in order to promote the Times. (Ex. A. ¶ 15.)

The manager of the Account (or those with access rights) has access to unique, nonpublic information. (Ex. A ¶ 16.) The list of roughly 27,100 domestic and international followers on the page provides direct, unfettered, and instant access to a unique group of individuals that have affirmatively indicated interest in the products of the Times, namely its reporting, by following the Account and consenting to being contacted directly. (Ex. A ¶ 17.) Likewise, management of the Account provides a unique Twitter Feed visible only to the Account manager (or anyone with access rights) that displays various tweets and retweets of any individuals (including Account followers) that the Account holder itself has chosen to follow, which provides insight into those individuals' interests and tendencies. (Ex. A ¶ 18.) Finally, the manager retains the exclusive right to direct message or "DM" twitter followers, which creates the opportunity share private messages and information not publicly available. (Ex. A ¶ 19.) None of this ancillary Account information is publicly available or readily ascertainable from outside sources. (Ex. A ¶ 20.) The Account and these various sources of information and communication rights constitute what BH Media considers to be its trade secrets ("Trade Secrets"). (Ex. A ¶ 21.)

The primary purpose of the Account is to generate interest in, and by proxy, advertising revenue for, the Times. (*Id.* ¶ 22.) In order to generate pageviews on the Times website, the account manager posts links to articles published on the Times's website directing users to the

Times. (*Id.* ¶ 23.) The Roanoke Times main Twitter account then tweets, retweets and/or links to certain relevant posts from the Account. (*Id.* ¶ 24.) This utilization of Twitter drives traffic to the Times's website and generates advertising revenue for the Times based on the number of clicks it receives on its various original stories and content. (*Id.* ¶ 25.)

There are many details of BH Media's (and the Times's) relationship with its Twitter followers and website users that are not generally known or readily accessible to the public or BH Media's competitors. (*Id.* ¶ 26.) BH Media derives independent economic value from this information, which is valuable because it is not known to the public and which it has developed through many years of substantial time, effort, expense, research, and communication with its users. (*Id.* ¶ 27.) Thus, BH Media has taken extensive efforts to maintain the secrecy of its Trade Secrets by, at least, limiting the individuals with access to the Account (only one writer is given access), maintaining confidentiality obligations with its employees, and maintaining strict IT and institutional protections to prevent disclosure. (*Id.* ¶ 28.) To protect its Trade Secrets and to comply with applicable laws and regulations, BH Media has adopted written policies that include, but are not limited to, comprehensive confidentiality obligations for its employees, which are memorialized in an employee handbook (the "Handbook"). (*Id.* ¶ 29.)

Pursuant to the Handbook, as amended from time to time, communication accounts and social media accounts provided by BH Media to employees are to be used to conduct work-related business only and all accounts and communications on those accounts are the property of BH Media. (*Id.* ¶ 30.) Likewise, under the General Computer Usage Policy of the Handbook, unauthorized use of company property is prohibited and users that have been issued Company-owned information assets, keys or other access items must return them to the Company when the employment relationship ends. (*Id.* ¶ 31.) Defendant was given the Handbook and signed an

acknowledgment of receipt and agreement to be bound by its provisions on a number of occasions, the most recent of which was April 1, 2015. (*Id.* ¶ 32; **Exhibit C**, Acknowledgement of Receipt.)

On or about June 22, 2018, Defendant notified BH Media that he intended to leave his employment at BH Media on July 6, 2018. (*Id.* ¶ 33.) Defendant indicated that he was leaving BH Media to work for the Athletic Media Group (the "Athletic") as a writer to focus on Virginia Tech athletics. (*Id.*) In connection with his departure, BH Media reaffirmed its ownership of the Account and requested that Defendant relinquish the Account and the Trade Secrets so that BH Media could transition the Account to the staff writer that would ultimately replace Defendant (as had previously been done). (*Id.* ¶ 34.) Defendant refused to relinquish the Account, and as of the date of this filing, Defendant has used the Account and Trade Secrets to communicate with BH Media's followers without BH Media's permission and beyond his authorization, which ended upon his resignation. (*Id.* ¶ 35.) Defendant's use targets the follower list for marketing and advertisement of the services and products of his employer, the Athletic. To that end, Defendant pinned a lead post highlighting his move to the Athletic and soliciting subscriptions to the Athletic from the roughly 27,100 followers of the Account. (*Id.* ¶ 36.) Thus, Defendant is actively engaged in competing with BH Media for its own customers, and is using BH Media assets to accomplish that goal. Any effort to create a new account similar to the Account in question would not net 27,100 followers for many years, if ever, and inevitably, the identities of and level of engagement displayed by followers of a new account would not be the same. (*Id.* ¶¶ 39–41.) True and accurate screen shots of Defendant's Account usage after the date of his resignation are attached hereto as **Exhibit D**.

On July 11, 2018, BH Media sent a letter demanding that Defendant cease and desist from accessing the Account and return the same to BH Media. (*Id.* ¶ 37.) As of the date of this filing, Defendant has not relinquished the Account or provided its login information, and continues to use BH Media's converted property and Trade Secrets to actively compete against BH Media. (*Id.* ¶ 38.)

ARGUMENT

Plaintiff seeks a temporary restraining order and preliminary injunction under Federal Rule of Civil Procedure 65 to preserve the status quo until a hearing may be held on Plaintiff's motion for a preliminary injunction. Such relief is appropriate when a plaintiff establishes that (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in the plaintiff's favor; and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346-47 (4th Cir. 2009), *vacated on other grounds*, 130 S. Ct. 2371 (2010).[3] BH Media can establish these criteria, and a temporary restraining order and preliminary injunction should be issued to spare it from grievous harm and maintain the status quo pending a trial on the merits of this case.

[3] The requirements for a temporary restraining order are identical to that for a preliminary injunction. *See Hoechst Diafoil Co. v. Nan Ya Plastics Corp.,* 174 F.3d 411, 422 (4th Cir. 1999); *see also Neiswender v. Bank of Am.,* No. 09–2595, 2009 WL 1834406, at *1 (N.D. Cal. June 23, 2009) (explaining that "[a] request for a temporary restraining order is governed by the same general standards that govern the issuance of a preliminary injunction," and deciding a temporary restraining order through application of a test identical to the Fourth Circuit standard).

A. BH Media will likely succeed on the merits of its claims against Defendant.

1. *BH Media is likely to succeed on its trade secrets claims.*

BH Media is likely to succeed on the merits of its trade secret claims against Defendant under both the Virginia Uniform Trade Secrets Act, Va. Code § 18.2-152.3 ("VUTSA") and the federal Defend Trade Secrets Act, 18 U.S.C. § 1836 ("DTSA").[4] In order to prevail on a VUTSA claim, the plaintiff must establish that (1) the defendant acquired or disclosed a "trade secret" and (2) the "trade secret" was misappropriated.[5] Va. Code. Ann. § 59.1-336; *S&S Computers & Design, Inc. v. Paycom Billing Servs., Inc.*, No. CIV. A. 500CV00058, 2001 WL 515260, at *2 (W.D. Va. Apr. 5, 2001). A "trade secret" is defined as: "[i]nformation, including but not limited to, a formula, pattern, compilation, program, device, method, technique, or process, that: (1) [d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (2) [i]s the subject of efforts that are reasonable under the circumstances to maintain secrecy." Va. Code. Ann. § 59.1-336.[6]

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[4] Because the elements of a misappropriation claim under the DTSA are substantially identical to a claim under the VUTSA, a separate analysis of the DTSA claim is omitted for brevity, and any differences between the statues are noted where appropriate.

[5] Unlike the VUTSA, the DTSA also requires that the alleged trade secrets implicate interstate commerce. *See Hawkins v. Fishbeck*, 301 F. Supp. 3d 650, 658 (W.D. Va. 2017). Here, the Trade Secrets contain information derived from numerous followers of the Account (and readers, subscribers, and potential readers and subscribers to the Times), many of whom live in different states (North Carolina and Tennessee or in different Countries, such as the Netherlands). Furthermore, the Account and its ancillary information are used to solicit potential readers and subscribers on the Internet, which is freely available to and accessed by numerous individuals across the Country. Thus, the interstate commerce requirement is met. *See Id.*

[6] Similarly, the DTSA defines "trade secret" as "all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing

In relevant part, misappropriation under the VUTSA includes "[a]cquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means" or "[d]isclosure or use of a trade secret of another without express or implied consent by a person who . . . [u]sed improper means to acquire knowledge of the trade secret." *Id.*[7] For the reasons outlined below, BH Media can show that information only available through the Account constitutes trade secrets that Defendant misappropriated.

a. Information accessible only through the Account qualifies as a "trade secret" under applicable law.

The ancillary information available to the Account holder squarely fits within the categories of information capable of constituting trade secrets. *See Phonedog v. Kravitz*, 2011 WL 5415612, at *6, 9-10 (N.D. Cal. Nov. 8, 2011) (denying motion to dismiss on trade secret status of Twitter account); *Christou v. Beatport*, 849 F. Supp. 2d 1055 (D. Colo. 2012) (holding that ancillary information available through a social media follower list may constitute a trade secret); *CDM Media USA, Inc. v. Simms*, No. 14 CV 9111, 2015 WL 3484277, at *2 (N.D. Ill. June 1, 2015) (denying motion to dismiss given that a membership list on a LinkedIn page may constitute a trade secret). The Account information qualifies as a trade secret because (1) the information has independent economic value; (2) it is not generally known to the public and not readily ascertainable; and (3) it is the subject of reasonable efforts to maintain secrecy. (*See* Ex. A. ¶¶ 16-21.); Va. Code Ann. § 59.1-336.

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if—(A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information." 18 U.S.C. § 1839(3).

[7] The DTSA's definition of "misappropriation" is identical to the VUTSA definition. *See* 18 U.S.C. § 1839(5).

In the hands of a competitor, the Trade Secrets accessible through the Account enable a competitor to unfairly compete with BH Media by accessing the unique twitter feed to analyze various Account followers' traits and tendencies to inform marketing efforts, by using the direct messaging ("DM") service to communicate privately, and most importantly, by directly communicating with a curated list of followers *en masse*—followers that have actively indicated their assent to being contacted by the Account. By maintaining access to the Account's Trade Secrets, Defendant and BH Media's competitor are soliciting BH Media's roughly 27,100 followers, and controlling messages received through the Account. As evidence of this intent, Defendant's immediate change to the site following his resignation was a pinned tweet about his new employer, the Athletic Group, and soliciting new subscriptions to the Athletic, potentially diminishing the population of readers and subscribers previously dedicated to the Times and BH Media. (*See* Ex. D.)

BH Media's Trade Secrets are not generally known to the public and are not readily ascertainable. *See Phonedog*, 2011 WL 5415612, at *6, 9-10; *Christou*, 849 F. Supp. 2d 1055. Specifically, without access to the Account, BH Media is unable to reach the Account's 27,100 followers directly. *Id.* The Account cannot be replicated because there is no guarantee that all Account followers would follow a new account, and any new account would not have the benefit of eight years of relationship building on Twitter. Only the Account holder may view the unique Twitter feed associated with the Account or review the direct message history associated with the Account. (Ex. A ¶ 18.) The value and secrecy of that information is demonstrated by BH Media's efforts to maintain the secrecy of the login information. BH Media limited access to the login information strictly to one employee at a time and maintained confidentiality provisions and controls over company property, computer, and social media usage via the Handbook. (Ex.

A ¶¶ 28–31.) Not only does the company control access to this information, but Defendant—as well as other employees with access to such information—signed an acknowledgement of BH Media's Handbook regarding their obligation to maintain the confidentiality of BH Media's confidential, proprietary, and trade secret information. (*Id.*; Ex. C.) Consequently, all proprietary business information available to BH Media's employees is provided under both express and implied agreements of confidentiality. (*Id.*) For the above reasons, information associated with the Account qualifies as Trade Secrets.

b. Defendant misappropriated BH Media's trade secrets.

The Defendant's unauthorized access to the Account qualifies as misappropriation. The VUTSA and DTSA define "misappropriation" as: "[a]cquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means" or the "[d]isclosure or use of a trade secret of another without express or implied consent by a person who…[u]sed improper means to acquire knowledge of the trade secret." Va. Code Ann. § 59.1-336; 18 U.S.C. § 1839(5). "Improper means" includes theft, bribery, misrepresentation, breach of a duty or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. Va. Code Ann. § 59.1-336; 18 U.S.C. § 1839(6).

Following his resignation, when Defendant knew or should have known that he was no longer authorized to do so, Defendant accessed the Account and modified and posted new information to BH Media's follower list, including but not limited to a pinned tweet promoting a competing website and soliciting subscriptions. (Ex. A ¶ 36.) And Defendant knew that he did not own the Account or the Trade Secrets associated therewith because it was handed off to him by another employee prior to his joining the Pilot. (Ex. B.) Furthermore, pursuant to the Handbook, Defendant knew that the Account was BH Media property, that the Account

encompassed proprietary information, and that using it to access the site was in excess of his authorization, which terminated on the date he resigned. (*See* Ex. A ¶¶ 30–31; Ex. B; Ex. C.) Thus, Defendant misappropriated these trade secrets by knowingly acquiring them through improper means—namely, through breach of his fiduciary duties to BH Media, breach of his duty to maintain the secrecy of that information to employees on a need to know basis only, and breach of express duties under the Handbook by failing to return the Account and by continuing to access the Account after his resignation. *See Bull v. Logetronics, Inc.*, 323 F. Supp. 115, 133 (E.D. Va. 1971) (noting that a former employee generally has a duty not to reveal confidential information obtained through his employment and not to use such confidential information after she has left her employment). Because Defendant misappropriated BH Media's trade secrets in violation of the VUTSA and DTSA, he should be enjoined from benefitting from his misconduct and forced to relinquish the Account login information and cease accessing and posting to the Account.

2. *BH Media is likely to succeed on its computer crimes claims.*

BH Media is likely to succeed on the merits of its claims arising under the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, *et seq*. (the "CFAA"); the Stored Communications Act, 18 U.S.C. § 2070, *et seq.* ("the "SCA"); and the Virginia Computer Crimes Act, Va. Code §§ 18.2-152.3, 18.2-152.4, and 18.2-152.6, *et seq*. (the "VCCA") (collectively, the "Computer Crimes Claims").

a. Defendant violated the Computer Fraud and Abuse Act ("CFAA").

Defendant's conduct violates several provisions of the Computer Fraud and Abuse Act (CFAA), including 18 U.S.C. § 1030(a)(2)(C); 18 U.S.C. § 1030(a)(4); and 18 U.S.C. § 1030(a)(5)(C). Each of these provisions requires a plaintiff to demonstrate that the defendant (1)

intentionally or knowingly with the intent to defraud (2) accessed a computer or "protected computer," (3) without authorization or in such a way that exceeded the authorization granted, (4) to obtain information of value, and (5) caused damage or loss to one or more persons amounting to at least $5,000 in value within one year.[8]

"Protected Computer" is defined as a computer that is used in or affecting interstate commerce. 18 U.S.C. § 1030(e)(2)(B). The definition of Protected Computer includes accounts connected to and entirely contained within the Internet. *See Estes Forwarding Worldwide LLC v. Cuellar*, 239 F. Supp. 3d 918, 926 (E.D. Va. 2017). "Exceeds authorized access" means "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accessor is not entitled so to obtain or alter." 18 U.S.C. § 1030(e)(6). "loss" is defined as "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring . . . the system . . . to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." 18 U.S.C. § 1030(e)(11). Within the employment context, the Fourth Circuit has held that "an employee is authorized to access a computer when his employer approves or sanctions his admission to that computer." *WEC Carolina Energy Sols. LLC v.*

[8] To establish a violation of § 1030(a)(2)(C), a plaintiff must allege that the defendant: (1) intentionally (2) accessed a computer (3) without authorization or in such a way that exceeded his authorized access, and (4) obtained information (5) from any "protected computer," (6) resulting in a loss to one or more persons during any one-year period aggregating at least $5,000 in value. 18 U.S.C. § 1030(a)(2)(C). To establish a violation of § 1030(a)(4), a plaintiff must plead that the defendant: (1) knowingly and with the intent to defraud (2) accessed a "protected computer" (3) without authorization or exceeding such authorization that was granted and (4) furthered the intended fraud by obtaining anything of value, (5) causing a loss to one or more persons during any one-year period aggregating at least $5,000 in value. 18 U.S.C. § 1030(a)(4). Finally, to establish a violation of § 1030(a)(5)(C), a plaintiff must assert that the defendant: (1) intentionally (2) accessed a "protected computer" (3) without authorization, and, as a result of such conduct, (4) caused damage and loss (5) to one or more persons during any one-year period aggregating at least $5,000 in value. 18 U.S.C. § 1030(a)(5)(C).

Miller, 687 F.3d 199, 204 (4th Cir. 2012). Consequently, Defendant's access and authorization ended upon his resignation. (*See* Ex. A ¶ 35.) The element of a loss or damages of $5,000 within the one-year time frame may be accumulated through an investigation to determine the scope of the breach, and any investigation and the loss of hours of time away from day-to-day responsibilities may be included. *See, e.g.*, *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630, 646 (4th Cir. 2009) ("[18 U.S.C. § 1030(11)] plainly contemplates consequential damages of the type sought by [defendant]—costs incurred as part of the response to a CFAA violation, including the investigation of an offense."); *C.D.S., Inc. v. Zetler*, 298 F. Supp. 3d 727, 763 (S.D.N.Y. 2018) (including attorneys' fees in loss calculation) (citing in accord *Facebook, Inc. v. Power Ventures, Inc.*, 252 F. Supp. 3d 765, 778 (N.C. Cal. 2017)).

Following his resignation, Defendant intentionally accessed the Account without authorization. As a password protected social media account available via the internet, the Account qualifies as a "protected computer" under the statute. Defendant's resignation revoked his authorization to the Account. The information he obtained as a result of his intentional, unauthorized access to the Account was valuable to a direct competitor of BH Media. And BH Media has incurred well in excess of $5,000 in damages in its investigation alone, setting aside any loss of readers, subscribers, or potential readers or subscribes and exclusive of attorneys' fees in preparing this Action. (Ex. A. ¶ 42.)

b. Defendant violated the Stored Communications Act ("SCA").

Defendant's conduct qualifies as a violation of the Stored Communications Act ("SCA"). Under the SCA, it is unlawful for an individual to either "(1) intentionally access[] without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceed[] an authorization to access that facility; and thereby obtain[], alter[], or

prevent[] authorized access to a wire or electronic communication while it is in electronic storage in such system…." 18 U.S.C. § 2701. The SCA authorizes any person aggrieved by any violation to bring a civil action and similarly provides that **"**preliminary and other equitable or declaratory relief as may be appropriate" is available as a remedy. 18 U.S.C. § 2707.

After revocation of his authorization, Defendant intentionally accessed the Account, which constitutes "electronic communication services" and "electronic storage" as defined by 18 U.S.C. §§ 2510(15) and (17); *see also Maremont v. Susan Fredman Design Grp., Ltd.*, No. 10 C 7811, 2011 WL 6101949, at *1 (N.D. Ill. Dec. 7, 2011) (sending claim to jury on issue of whether defendant violated SCA by, among other things, using Twitter without authorization).

c. Defendant violated the Virginia Computer Crimes Act ("VCCA").

Defendant's conduct qualifies as a violation of the Virginia Computer Crimes Act ("VCCA"). Under the VCCA, it is "unlawful for any person, with malicious intent, to engage in certain enumerated types of computer trespass." *See Marsteller v. ECS Fed., Inc.*, No. 1:13-cv-593 JCC/JFA, 2013 WL 4781786, at *6 (E.D. Va. Sept. 5, 2013) (citing Va. Code § 18.2-152.4). The VCCA includes a civil remedy for violations thereof. Va. Code § 18.2-152.12; *iParadigms*, 562 F.3d 630, 646.

The prohibitions of the VCCA include, but are not limited to:

(i) "us[ing] a computer or computer network, without authority [to] convert[] the property of another" Va. Code § 18.2-152.3(3);

(ii) "with malicious intent, to [t]emporarily or permanently remove, halt, or otherwise disable any computer data, computer programs or computer software" Va. Code §§ 18.2-152.4(1);

(iii) "with malicious intent, to … [u]se a computer or computer network to make or cause to be made an unauthorized copy, in any form, including but not limited to, any printed or electronic form of computer data, computer programs or computer software residing in, communicated by, or produced by a computer or computer network" Va. Code §§ 18.2-152.4(6); and

(iv) "willfully obtaining computer services without authority." Va. Code § 18.2-152.6; *see also iParadigms*, 562 F.3d 630, 646.

In order to state a claim under the statute, a plaintiff must plead facts sufficient to show that a defendant was "without authority" or "unauthorized" to access the information. *See, e.g., Supinger v. Virginia*, 167 F. Supp. 3d 795, 821 (W.D. Va. 2016) (citing *Global Policy Partners, LLC v. Yessin*, 686 F. Supp. 2d 631, 640 (E.D. Va. 2009). An individual is "'without authority' when he knows or reasonably should know that he has no right, agreement, or permission or acts in a manner knowingly exceeding such right, agreement, or permission." Va. Code § 18.2–152.2.

Defendant violated the VCCA by willfully and maliciously using a computer, computer network, or computer services without authorization to convert the Account data owned by BH Media in a manner that rendered the Account inaccessible to and unusable by BH Media. Upon information and belief, Defendant may also have produced unauthorized copies of the Account data.

3. *BH Media is likely to succeed on its claim for conversion*.

BH Media is likely to succeed on the merits of its claim for conversion. Under Virginia law, "[a] person is liable for conversion for the wrongful exercise or assumption of authority over another's goods, depriving the owner of their possession, or any act of dominion wrongfully exerted over property in denial of, or inconsistent with the owner's rights." *See E.I. DuPont de*

Nemours & Co. v. Kolon Indus., Inc., 688 F. Supp. 2d 443, 454 (E.D. Va. 2009) (quoting *Simmons v. Miller*, 261 Va. 561, 582, 544 S.E.2d 666 (2001)). While a claim for conversion traditionally has been a means to recoup tangible property, "courts have recognized the tort of conversion in cases where intangible property rights arise from or are merged with a document." *Id.* at 454–455 (citing *Combined Ins. Co. of Am. v. Wiest*, 578 F. Supp. 2d 822, 835 (W.D. Va. 2008) (holding that a conversion claim does not fail merely because the property at issue is "an electronic version of [the] list rather than a hard copy.") Furthermore, courts in Virginia have "demonstrated a distinct willingness to expand the scope of the doctrine of conversion in light of advancing technology." *E.I. DuPont*, 688 F. Supp. 2d at 455 (citing *United Leasing Corp. v. Thrift Ins. Corp.,* 247 Va. 299, 304, 440 S.E.2d 902 (1994)); *see also E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, No. 3:09cv58, 2011 WL 4625760 (E.D. Va. Oct. 3, 2011) (finding Virginia law to "permit a conversion action for converted intangible property [such as] confidential business information").

Regardless of whether the ancillary Account information qualifies as a trade secret,[9] BH Media is still likely to succeed on its conversion claim against Defendant. As shown above, the

[9] The VUTSA preempts conversion theories (and in some cases, breach of fiduciary duty claims) when those common law claims are premised entirely on the same facts supporting the claim for misappropriation of a trade secret. *See Smithfield Ham & Prod. Co. v. Portion Pac, Inc.*, 905 F. Supp. 346, 348 (E.D. Va. 1995). However, to the extent that there is other property at issue, or the claim is supported by allegations separate and apart from the trade secret claims, the preemption standard does not apply. *Wiest*, 578 F. Supp. 2d at 834. Here, BH Media is seeking the Account, which includes Trade Secrets but does not consist entirely of trade secrets. For instance, the public feed of tweets as posted over the course of nearly eight years do not constitute trade secrets, given that they are entirely public. Likewise, BH Media seeks access to the login information to the Account, which is also not protected as a trade secret. Thus, should the court find that the ancillary information in the Account are trade secrets, the public information associated with the Account remains BH Media's property wrongfully converted by Defendant. *Id.* Likewise, to the extent that the court finds that the Trade Secrets do not qualify for trade secret status, BH Media pleads this theory in the alternative with regard to the login information, access rights, and ancillary information associated with the Account.

Account was created prior to Defendant's first employment date and was provided to him within the scope of his employment as a writer for the Times. (Ex. A ¶¶ 8–14; Ex. B.) Upon resigning from his position, Defendant's authorization to access the Account ended. (*Id.* ¶ 35.) By refusing to return the Account and continuing to access the account, he is exercising dominion over BH Media's property to its ongoing detriment, and irreparable harm will occur if those actions are not enjoined. *See Ardis Health, LLC v. Nankivell*, No. 11 CIV. 5013 NRB, 2011 WL 4965172, at *2 (S.D.N.Y. Oct. 19, 2011) (enjoining party from using and requiring disclosure of access information to social media pages because of likelihood of success on conversion claim and irreparable harm). It would take an account representative or writer at BH Media seven years at a cost of at least $150,000 to attempt recreate the Account, but any attempt at recreation would likely never result in the same configuration of followers. (Ex. A ¶ 41.) Accordingly, BH Media is likely to succeed on its conversion claim.

4. *BH Media is likely to succeed on its claim for breach of fiduciary duty*.

BH Media is likely to succeed on its claim for breach of fiduciary duty of loyalty. To demonstrate a breach of fiduciary duty under Virginia law a plaintiff must establish "(1) the existence of a fiduciary duty; (2) breach; and (3) damages resulting from the breach." *All. Tech. Grp., LLC v. Achieve 1, LLC*, No. 3:12-CV-701, 2013 WL 143500, at *4 (E.D. Va. Jan. 11, 2013) (citing *Cartensen v. Chrisland Corp.,* 247 Va. 433, 442 S.E.2d 660 (Va. 1994)). An at-will employee "owes a fiduciary duty of loyalty to his employer during his employment," which may be breached by "misappropriation of trade secrets or misuse of confidential information." *Id.* (citing *Williams v. Dominion Tech. Partners, LLC,* 265 Va. 280, 576 S.E.2d 752, 757 (Va. 2003) (quoting *Feddeman & Co. v. Langan Assoc.,* 260 Va. 35, 530 S.E.2d 668, 672 (Va. 2000))). Furthermore, "[r]esignation or termination does not automatically free a[n][ ] employee from his

or her fiduciary obligations." *Today Homes, Inc. v. Williams,* 272 Va. 462, 634 S.E.2d 737, 744 (Va. 2006). Thus, "[a] former employee may breach his duty to a former employer if the conduct began during employment or if post-termination competition is 'founded on information gained during the [employment] relationship.'" *All. Tech. Grp*, 2013 WL 143500, at *4 (citing *Today Homes*, 272 Va. 462.

Defendant owed a fiduciary duty of loyalty to maintain the confidentiality of the information on the Account during and after his employment with BH Media and a duty to return that information upon resignation. By wrongfully taking, retaining, and using BH Media's confidential information (including but not limited to the login information for the Account and all associated access rights) after his resignation to compete directly against BH Media, Defendant breached a fiduciary duty of loyalty to BH Media. *See All. Tech. Grp*, 2013 WL 143500, at *4. Upon information and belief, those acts were undertaken with actual malice toward BH Media and/or with recklessness or negligence to BH Media's rights, justifying an award of punitive damages.

B. BH Media will suffer irreparable harm if Defendant is not enjoined from further misappropriation.

BH Media is likely to suffer irreparable harm unless Defendant is enjoined from continuing to possess and use BH Media's trade secrets and Account to benefit himself and the Athletic. Irreparable harm is likely to result when the "present predicament endangers [a business'] relations with customers . . . [and] the good will built up by a heretofore successful enterprise . . .," such that the damage is "'incalculable—not incalculably great or small, just incalculable.'" *One Stop Deli, Inc. v. Franco's, Inc.*, No. CIV. A. 93-090-H, 1993 WL 513298, at *7 (W.D. Va. Dec. 7, 1993) (quoting *Federal Leasing, Inc., et al. v. Underwriters at LLoyd's, et al.,* 650 F.2d 495, 500 (4th Cir. 1981)). A plaintiff's "loss of clients' goodwill and future

business ... [is] difficult, if not impossible, to measure fully." *Id.* (citing *IDS v. Sun America*, 958 F. Supp. 1258, 1281 (N.D. Ill. 1997)). Put another way, misappropriation threatens an employer's customer relationships, because "[c]ustomers cannot be unsolicited." *Fid. Glob. Brokerage Grp., Inc. v. Gray*, No. 1:10-CV-1255, 2010 WL 4646039, at *3 (E.D. Va. Nov. 9, 2010) (*quoting Merrill Lynch v. Bradley*, 756 F.2d 1048, 1054 (4th Cir. 1985)).

Here, Defendant has intentionally and deliberately misappropriated the Trade Secrets, accessed the Account property beyond his authorization, and actively solicited BH Media's followers. (Ex. A ¶¶ 36, 38.) Because BH Media depends on its online presence and ability to maintain consistent messaging across all platforms, Defendant's usurpation of the Account is causing irreparable harm in an amount that cannot be quantified. (*Id.* ¶ 39.) Any effort to create a new account similar to the Account in question would not net 27,100 followers for many years, if ever, and inevitably, the identities of and level of engagement displayed by followers of a new account would not be the same. (*Id.* ¶¶ 39–41.) By advertising a competitor on the Account, Defendant is harming the goodwill created over many years between the Account's followers and the Times and may be steering readers, subscribers, and prospective customers from the Times to the Athletic. The effect of those actions will be difficult, if not impossible, to prove at trial. *See One Stop Deli, Inc.*, 1993 WL 513298, at *7; *Ardis Health,* 2011 WL 4965172, at *2. Defendant has already demonstrated his intent to use the Account to unfairly compete. (*See* Ex. D.) Thus, it can be safely presumed that Defendant will continue to exploit his unauthorized access to the account and benefit from that misuse—to the irreparable harm of BH Media—unless enjoined. *See Ardis Health,* 2011 WL 4965172, at *2.

This is compounded by the fact that any attempt to recreate the Account would be futile. To re-establish the Account, BH Media would be forced to hire or redirect a full time employee

to attempt to reengage roughly 27,100 followers. (Ex. A. ¶ 40.) There is no guarantee that any or all of those followers would choose to follow the new account, that they would engage in the same way, or that they would follow without the Account following them back. Accordingly, there is simply no way to identically recreate the Account. However, even attempting to recreate the Account would result in significant expense to BH Media. It would likely take an account representative or writer at BH Media as many as seven years at a cost of at least $150,000 to attempt to recreate the Account, but any attempt at recreation would likely never result in the same configuration of followers. (*Id.* ¶ 41.) Thus, while the time and expense required to recreate the Account is partially estimable, there would be no way to recreate the Account identically. Thus, BH Media can demonstrate irreparable harm.

C. The balance of equities tips decisively in BH Media's favor.

As described above, BH Media faces significant and irreparable harm, including damage to its market share and customer goodwill, if Defendant is not restrained from further misappropriation of BH Media's trade secrets and unauthorized access to its converted property. By virtue of his years of experience in the journalism field (and specifically with online marketing and advertising), Defendant has the interest, network, and ability to achieve or facilitate high level and unfair competition with BH Media.

By contrast, Defendant will suffer no harm from being enjoined from accessing the Account. Where injunctive relief only prohibits a defendant from engaging in any continued illegal or unethical activity, the court should find no likelihood of harm to the defendant. *Home Funding Grp., LLC v. Myers*, No. 1:06CV1400 JCC, 2006 WL 6847953, at *2 (E.D. Va. Dec. 14, 2006). Defendant is legally prohibited from misappropriating BH Media's proprietary information for his (and BH Media's competitors) benefit, and breached his obligations under the

Handbook to return the Account and not access it following his resignation. Granting a temporary restraining order will merely prohibit Defendant from doing something that he does not have the right to do. There is therefore no likelihood of harm to Defendant if this court grants a temporary restraining order protecting BH Media's property.

Conversely, BH Media would be greatly harmed in the absence of a temporary restraining order and preliminary injunction. Any disclosure or use of the proprietary information associated with the Account unavoidably injures BH Media's ability to compete in its market, while simultaneously providing Defendant and his employer an unfair competitive advantage. Second, the risk of harm to BH Media is ongoing and will continue if temporary (and ultimately preliminary and permanent) relief is not granted. Finally, BH Media has expended much time and effort in developing relationships with its followers. Defendant has improperly used BH Media's property to threaten those relationships, the effect of which cannot be measured. *See One Stop Deli, Inc.*, 1993 WL 513298, at *7; *Ardis Health,* 2011 WL 4965172, at *2. Defendant continues to threaten those relationships through his use of BH Media's proprietary information.

Because any further disclosure or continued use of BH Media's trade secrets and converted property would result in irreparable harm to BH Media, and the Defendant will feel no legally cognizable harm as the result of an injunction, the balance of equities necessarily weighs in favor of granting a temporary restraining order and preliminary injunction.

D. Issuing a temporary restraining order and preliminary injunction is in the public interest.

Public policy interests will be furthered by the issuance of a temporary restraining order in this case. Granting a temporary restraining order in this case serves the public interest of protecting the rightful owners of trade secrets and other confidential information. *E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc.*, 894 F. Supp. 2d 691, 709 (E.D. Va. 2012); *MicroStrategy,*

Inc. v. Business Objects, S.A., 369 F. Supp. 2d 725, 736 (E.D. Va. 2005) ("there is certainly a significant public interest in maintaining the confidentiality of trade secrets and preventing their misappropriation."); *Forestry Sys., Inc. v. Coyner*, No. 1:11CV295, 2011 WL 1457707, at *2 (M.D.N.C. Apr. 15, 2011) ("[T]he public interest favors protection of trade secrets."). Furthermore, the public interest is furthered where the *status quo* is maintained and business interests are spared significant harm. *See Microstrategy*, *Inc*., 661 F. Supp. 2d at 562; *STaSIS, Inc. v. Schurtz*, No. 5:11CV117, 2012 WL 242892, at *4 (W.D. Va. Jan. 25, 2012). To maintain the status quo, Defendant should be prevented from harming BH Media by misappropriating its trade secrets and continuing to use BH Media's hard-earned property.

CONCLUSION

BH Media has met its burden and established an entitlement to a temporary restraining order and preliminary injunction arising from misappropriation of its trade secrets, computer crimes, and conversion claims because (1) it will likely succeed on the merits of those claims, (2) it will suffer immediate and irreparable harm if a temporary restraining order and preliminary injunction are not entered, (3) the equities tip decisively in its favor, and (4) a temporary restraining order and preliminary injunction will serve important public interests.

This Court should therefore enter a temporary restraining order immediately to maintain the status quo until a hearing on Plaintiff's motion for preliminary injunction may be heard (i) restraining and ultimately enjoining Defendant from further possession or use of the Account and from any posting or access thereof; (ii) requiring Defendant to relinquish all login information related to that account and identify all other individuals and entities to which any Account information was provided or sold; (iii) awarding BH Media its costs and attorneys' fees incurred herein; and (iv) awarding such other relief as the Court deems appropriate.

Respectfully submitted,
BH MEDIA GROUP, INC.

By: /s/ *Laura D. Windsor*

Laura D. Windsor, Esq.
Virginia State Bar No. 70354
Counsel for Plaintiff
WILLIAMS MULLEN, P.C.
P.O. Box 1320
Richmond, Virginia 23219
Telephone: (804) 420-6466
Facsimile: (804) 420-6507
lwindsor@williamsmullen.com

Meredith M. Haynes, Esq.
Virginia State Bar No. 80163
Counsel for Plaintiff
WILLIAMS MULLEN, P.C.
P.O. Box 1320
Richmond, Virginia 23218-1320
Telephone: (804) 420-6225
Facsimile: (804) 420-6507
mhaynes@williamsmullen.com

Dirk D. Lasater, Esq.
Virginia State Bar No. 92800
Counsel for Plaintiff
WILLIAMS MULLEN, P.C.
P.O. Box 1320
Richmond, Virginia 23218-1320
Telephone: (804) 420-6395
Facsimile: (804) 420-6507
dlasater@williamsmullen.com