

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

The Honorable Christopher M. Alston
Chapter 13
Location: Seattle, Courtroom 7206
Hearing Date: June 22, 2016, 9:30 AM

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re

NORTHWEST TERRITORIAL MINT,
LLC

Debtor.

Bankruptcy No. 16-11767-CMA

DIANE ERDMANN'S TRIAL BRIEF

I. INTRODUCTION

Diane Erdmann submits the following brief in advance of the evidentiary hearing in the above-captioned proceeding. Ms. Erdmann seeks an Order from the Court releasing the remaining \$125,857.50 (the "Funds") of the advanced fee deposit she paid to The Tracy Law Group ("TTLG"), former counsel for Debtor Northwest Territorial Mint, LLC ("Debtor" or "NWTM"). The Trustee has asserted that the Funds are property of the estate, and has alleged that Ms. Erdmann stole property from the Debtor to fund the advance fee deposit to TTLG. The evidence to be presented will instead show that there is no competent evidence of misappropriation by Ms. Erdmann, and Ms. Erdmann had ample available funds from a previous life insurance settlement to fund TTLG's advance fee deposit.

/
/

1 **II. STATEMENT OF FACTS**

2 **a. Background Information Regarding Debtor's Business**

3 NWTM was founded in 1984 and mints coins and medals for governmental, corporate
4 and private entities around the world. It has eight locations, four of them manufacturing and
5 four locations dedicated to administrative and sales functions. NWTM is the primary source
6 for military medals and awards, such as the Purple Heart, Bronze Star and even the Medal of
7 Honor.

8 NWTM is also a direct bullion retailer. Bullion is defined as precious metals, gold,
9 silver, platinum and palladium, that is sold for the value of the precious metals contained plus a
10 small premium. NWTM produces hundreds of unique branded products in its own factories and
11 is also an authorized retailer for bullion minted by other mints, such as the U.S. Mint and the
12 Royal Canadian Mint. NWTM has also been a primary metals supplier to such companies as
13 Citibank, Morgan Stanley and other tier one investment banks.

14 Most investment advisors recommend 5-20% of an individual's net worth be invested in
15 bullion and bullion is even an authorized investment for individual retirement accounts.
16 Bullion's popularity as an investment has substantially increased since the 2008 financial crisis,
17 causing the price of precious metals to widely fluctuate. Several commodity exchanges offer
18 prices for precious metals, such as COMEX (a division of the New York Mercantile Exchange)
19 and the London Bullion Market Association (LBMA). On February 14, 1997 (the day Ms.
20 Erdmann first purchased bullion), the price of gold according to COMEX ranged from \$348 per
21 troy ounce to \$344.50. By contrast, on March 31, 2016 (the day Ms. Erdmann sold coins to
22 fund the advance fee deposit to TTLG), the COMEX price ranged from \$1,239.60 to \$1,224.50
23 – an increase of over 3.5 times.

24 **b. Origins of Ms. Erdmann's Personal Property**

25 The Funds at issue in this case were originally derived from a life insurance policy Ms.
26 Erdmann received when her husband tragically died of cancer in 1993. Upon the death of her

1 husband, Ms. Erdmann received \$133,900 in life insurance proceeds, and she has previously
2 provided documentation of that payment to the Court. In 1997, Ms. Erdmann began using those
3 funds to purchase precious metals as an investment vehicle. During this time, Ms. Erdmann
4 was living with her mother, who paid for most of her living expenses. Over the course of the
5 next several years, Ms. Erdmann continued purchasing precious metals; she also eventually
6 began selling certain metals (when their prices were high) and buying others (when their prices
7 were low) in an effort to increase the value of her initial investment. All of those transactions
8 were conducted through NWTM.

9 Through her interaction with NWTM during her initial metal purchase, Ms. Erdmann met
10 Ross Hansen. Ms. Erdmann and Mr. Hansen began a relationship that has lasted for the past 19
11 years. Ms. Erdmann and Mr. Hansen have never married and have kept their finances separate.
12 The two maintain separate bank accounts and each possess their own personal property.
13 Throughout their relationship, Ms. Erdmann kept her collection of coins and precious metals
14 separate from any property owned by Mr. Hansen, storing it in private safety deposit boxes and
15 her personal safe, to which Mr. Hansen does not have access.

16 Since they began living together, Mr. Hansen has taken on the financial responsibility of
17 providing for the couple's basic living expenses through money he earned at NWTM. With her
18 needs met, Ms. Erdmann has had little need to dip into the money she has made from her bullion
19 investment. By living a modest lifestyle and refraining from extravagant purchases, and also
20 thanks to strategic trading and the more than three-fold increase in the price of gold, Ms. Erdmann
21 has allowed the value of her bullion collection to grow significantly over the past twenty years.

22 **c. Working for Northwest Territorial Mint**

23 Ms. Erdmann eventually went to work for the Debtor. During her 16 years there, she has
24 held a number of positions, mainly in packing and shipping. She was put in charge of the vault
25 in 2005, where her duties included managing the cash and bullion and shipping for the Debtor's
26 Federal Way, Washington and Dayton, Nevada facilities. Ms. Erdmann received health insurance

1 from the Debtor, but did not earn a salary. As the owner of the Debtor, Mr. Hansen was paid
2 through owner draws, which were taken out in cash either by Mr. Hansen himself or by Ms.
3 Erdmann on Mr. Hansen's behalf. On Debtor's logs, these owner draws were recorded as cash
4 transactions. The draws did not follow a regular schedule, and as Ms. Erdmann and Mr. Hansen
5 can testify, they were simply taken out at times and in amounts deemed necessary to meet their
6 basic needs. Since August 2006, Debtor's logs show that draws taken out by Ms. Erdmann total
7 less than \$200,000 over the course of nearly 10 years. These cash draws were deposited into Ms.
8 Erdmann's bank account for the purpose of paying the couple's shared bills.

9 Ms. Erdmann and Mr. Hansen both worked very long hours at NWTM, including regular
10 long nights and weekends; 80-100 hour work weeks were not uncommon. During all of these
11 long hours, the Federal Way facility where they worked was monitored by around-the-clock
12 video monitoring and on-site security. Security guard Patrick Ward, who worked evenings and
13 weekends at the Federal Way facility for approximately 6 years until recent cut-backs in security
14 staffing, will testify to seeing Ms. Erdmann and Mr. Hansen regularly leaving work after 7:00
15 PM on weekdays, and frequently coming in on weekends. Mr. Ward also sometimes had the
16 opportunity to observe Ms. Erdmann taking property home with her to continue working even
17 later into the night, sometimes working on the items themselves and sometimes making deliveries
18 to customers' homes. As will be better articulated by Ms. Erdmann and Mr. Hansen themselves,
19 their work at NWTM was more than a job – it was their passion, their hobby, and the way they
20 spent the vast majority of their time.

21 **d. Cohen Lawsuit**

22 In February 2016, Bradley Cohen and Cohen Asset Management (collectively, "Cohen")
23 obtained a judgment against the Debtor in the amount of \$12,500,000 from the United States
24 District Court for the District of Nevada. On March 10, 2016, the foreign judgment was entered
25 in King County Superior Court. Cohen quickly and aggressively pursued enforcement. Mr.
26

1 Hansen knew it was likely that Debtor's property may be seized in connection with enforcement
2 of the judgment.

3 On the advice of his former counsel, Jay Kornfeld, and after several discussions with
4 Mark Calvert (who was advising Mr. Hansen about restructuring possibilities prior to the
5 bankruptcy), Mr. Hansen took steps to avoid a seizure of physical assets from the Debtor's
6 Federal Way facility. On Saturday March 26, 2016, Mr. Hansen, Ms. Erdmann, and two
7 employees of NWTM named Rod Lawrence and Donald Schwenk went to the Federal Way
8 facility and removed two van-loads of boxes from the vault. They then relocated these boxes to
9 Debtor's facility in Auburn, Washington (known as "Building B"). On April 14, 2016 (after Mr.
10 Hansen and Ms. Erdmann had stopped working at NWTM), Mr. Lawrence and Mr. Schwenk
11 returned to Building B to determine whether all the property they had moved was still present.
12 Both employees have signed affidavits stating that upon their inspection, all the items they had
13 moved were still in place as they had left them.

14 **e. Tracey Law Group Advanced Cost Retainer**

15 Despite efforts to avoid Cohen's judgment, it was clear that Debtor needed to eventually
16 file for bankruptcy. When Debtor hired TTLG to serve as bankruptcy counsel, Todd Tracy asked
17 for an advance fee deposit of \$150,000. Debtor provided TTLG with a check for that amount
18 prior to the filing of the bankruptcy action. TTLG rejected the check, however, and on March 29,
19 2016 told Mr. Hansen that the advance fee deposit must be paid from a source other than Debtor
20 or Mr. Hansen. On a March 30, 2016 phone conversation with Mr. Hansen and Ms. Erdmann,
21 Mr. Tracy explained that the advance fee deposit would be need to be received into Mr. Tracy's
22 account before 4:30 PM on March 31, 2016. Mr. Tracy explained that if a trustee was appointed
23 by the bankruptcy court, TTLG would no longer represent the Debtor and any unused portion of
24 the Funds would be returned immediately.

25 Based on Mr. Tracy's representations, Ms. Erdmann volunteered to supply the \$150,000
26 advance fee deposit. On March 31, 2016, Ms. Erdmann sent it a \$50,000 wire transfer from her

1 checking account to TTLG. She also sold \$99,460 worth of gold coins, previously acquired with
2 the proceeds of her late husband's life insurance policy, to a third party coin dealer, John
3 Drummey of Seattle Coin Shop. The cashier's check from Mr. Drummey was signed over to
4 TTLG and delivered. The bankruptcy was filed at 1:00 AM the following morning.

5 In total, Ms. Erdmann provided TTLG with \$149,460. Based on information provided by
6 Mr. Tracy, it was Ms. Erdmann's understanding that the money she advanced would remain her
7 property unless and until it was earned by TTLG for services performed on behalf of Debtor, and
8 that any funds not used for that purpose would be returned to her. After the bankruptcy was filed,
9 the parties learned that the Court was going to appoint a trustee, and that TTLG would therefore
10 not be appointed Debtor's counsel. TTLG thereafter sought to terminate the attorney-client
11 relationship. Up to that point, TTLG had incurred \$21,885.50 in fees and \$1,717 in costs which
12 had been paid pre-petition, leaving a balance of \$125,857.50 in the trust account. Understanding
13 these funds to be her own property, Ms. Erdmann made demand for their return. Mr. Tracy
14 refused this request absent the Trustee's consent. Believing that TTLG was in violation of its
15 agreement to hold her property in trust, and to repay it upon her demand, Ms. Erdmann made a
16 complaint with the Washington State Bar Association and the Washington State Attorney
17 General's Office.

18 III. ARGUMENT AND AUTHORITY

19 a. The Bankruptcy Trustee Bears the Burden of Proving the Funds Belong to the 20 Bankruptcy Estate.

21 The Debtor's bankruptcy estate is comprised of both its legal and equitable interests in
22 property. *See* 11 U.S.C. § 541(a). Washington State law determines the nature and extent of the
23 debtor's property interests. *Norwest Wholesale, Inc. v. Pac Organic Fruit, LLC*, 184 Wash.2d
24 176, 187 (2015), citing *Butner v. United States*, 440 U.S. 48, 55 (1979) and *In Re Pettit*, 217 F.3d
25 1072, 1078 (9th Cir.2000). The bankruptcy trustee has the burden of proving that the debtor had
26 an interest in property, and that the property thus belongs to the bankruptcy estate. *In Re Dunn*,

1 436 B.R. 744, 747 (Bankr.M.D.Ga 2010) (holding that a Chapter 7 trustee, as the plaintiff, had
2 the burden of proving that escrow funds were property of bankruptcy estate), citing *Schaffer v.*
3 *Weast*, 546 U.S. 49, 56 (2005) and *Grogan v. Garner*, 498 U.S. 279, 286 (1991). The trustee
4 must show by a preponderance of the evidence that the property belongs to the estate. *Id.*

5 The Trustee will be unable to show by a preponderance of the evidence that the Debtor's
6 estate has a valid property interest in the Funds. The Funds were not intended to be a loan or a
7 gift from Ms. Erdmann to the Debtor, and the Trustee has only insufficient circumstantial
8 evidence in support of the assertion that the Funds are actually Debtor's property that Ms.
9 Erdmann unlawfully obtained from NWTM. Evidence presented by Ms. Erdmann will offer the
10 true, and more plausible, explanation for the source of the Funds.

11 **b. The Estate Does Not Have an Interest in the Erdmann Funds Because the Funds**
12 **Never Ceased to be Her Property; The Funds Were Held in Trust by TTLG.**

13 Washington Rules of Professional Conduct ("RPC") Rule 1.15A dictates how attorneys
14 must safeguard client and third-party property within their control. RPC 1.15A(c)(2) states that
15 when a client or third party pays an attorney's fees and costs in advance, the attorney must place
16 the funds in a trust account and may only withdraw funds when the fees have been earned or
17 expenses incurred. RPC 1.15A(f) states that "a lawyer must promptly pay or deliver to the client
18 or third person the property which the client or third person is entitled to receive."

19 The Funds in question were always Ms. Erdmann's and ownership never transferred to
20 any other party. When Ms. Erdmann paid the advanced fee deposit, the funds were merely held
21 in TTLG's possession; they remained Ms. Erdmann's property unless and until TTLG incurred
22 costs or fees. Because the vast majority of the Funds were never earned by TTLG, they remained
23 Ms. Erdmann's property. This was the arrangement that Ms. Erdmann envisioned, and we can
24 only assume it was also TTLG's intent because the RPC clearly dictates how such arrangements
25 are to be conducted and TTLG did not alter the arrangement through a written agreement. There
26 is also no evidence that the Funds were a loan or gift to any other party.

1 The Funds may have become property of the estate if Ms. Erdmann made a loan to the
2 Debtor. There is, however, no evidence of an agreement between Ms. Erdmann and the Debtor
3 that would suggest the Funds were meant as a loan. Ms. Erdmann herself has stated that she did
4 not intend for the Funds to be treated as a loan. Furthermore, if the funds had been considered a
5 loan, it would have defeated the entire purpose of Ms. Erdmann paying the Funds in the first
6 place: that TTLG insisted that they come from a source other than Debtor or Mr. Hansen.

7 There is also no reason to believe the Funds were a gift. In a probate context, the party
8 attempting to classify a transfer of property as a gift “must prove by evidence which is clear,
9 convincing, strong and satisfactory a clear and unmistakable intention on the part of the donor to
10 make a gift of his property.” *In Re Gallinger’s Estate*, 31 Wash.2d 823, 829 (1948) (emphasis
11 added). A “gift will not ordinarily be presumed.” *Id.* Here, there is no evidence suggesting that
12 Ms. Erdmann intended for the Funds to be treated as a gift, and Ms. Erdmann has stated that her
13 intent was that the Funds remain her own property until earned by TTLG.

14 **c. The Trustee Possesses No Evidence of Fraudulent Behavior on the Part of**
15 **Dianne Erdmann.**

16 The Trustee has argued that the Funds were actually derived from Debtor’s property that
17 Ms. Erdmann unlawfully obtained from it. The Trustee cannot satisfy his burden of proof because
18 there is no evidence that the Funds were derived from the theft of NWTM property. There is
19 surveillance video footage showing Ms. Erdmann and other NWTM employees removing items
20 from NWTM facilities shortly before the time that she produced the Funds. However, that
21 property was moved as part of Debtor’s efforts to avoid execution on the Cohen judgment, and
22 the employees that assisted with the majority of those transfers have testified that upon a follow-
23 up inspection of the facilities, the products they helped to move were still in place. Furthermore,
24 surveillance footage shows Ms. Erdmann removing property and bringing property back into
25 NWTM facilities at other times; this was a regular part of her work as Vault Manager. She often
26 brought work home with her, sometimes in the form of just paperwork and sometimes including

1 coins that needed to be inspected, cleaned, or graded; she also sometimes took deliveries to
2 customers at their homes. It is impossible to tell from any of the video tapes what items were
3 removed and what items were returned at any given time. Absent additional information, the
4 Trustee cannot prove that Ms. Erdmann stole Debtor's property simply because Ms. Erdmann
5 was involved in moving it.

6 In contrast to the Trustee's position, Ms. Erdmann provides a reasonable explanation as
7 to the source of the Funds, which explanation is supported by physical documentary evidence.
8 Ms. Erdmann received a large sum of money following the death of her husband more than 20
9 years ago; the check from the insurance company proves this. She used some of that money to
10 purchase precious metals from the Debtor starting in February 1997, many of which purchases
11 are also documented in the Debtor's records. Ever since then, Ms. Erdmann's basic living
12 expenses have been paid for through Mr. Hansen's owner draws, which he was entitled to take
13 and was free to direct to Ms. Erdmann or anything else of his choosing. Ms. Erdmann also made
14 trades in order to increase the value of her investment. Thus, when Mr. Hansen approached her
15 about paying an advance fee deposit to cover legal expenses for the Debtor, Ms. Erdmann had
16 more than sufficient property to cover the cost.

17 Additionally, Ms. Erdmann's relationship to the Debtor would give her no motive to steal.
18 She is involved in a long-term romantic relationship with Debtor's sole owner, and the couple do
19 not live a lavish lifestyle. Ms. Erdmann does not own a large house or other expensive property
20 that would suggest she had been stealing from the company. If she or Mr. Hansen had needed
21 additional funds, they would have simply increased the amount of owner draws that Mr. Hansen
22 used to pay himself. Furthermore, even if Ms. Erdmann was the type of person who might steal
23 from her own place of work, she would have known that her activity was always being monitored
24 by video surveillance and live on-site security 24 hours a day—and she certainly would not have
25 asked other employees to help her.

1 The totality of circumstances points to a complete lack of wrongdoing by Ms. Erdmann.
2 First, her needs were met by Mr. Hansen’s income and by her own collection of valuable coins.
3 Second, any additional needs could have easily been met through Mr. Hansen’s owner draws.
4 Finally, Ms. Erdmann would have been aware that any theft on her part would be witnessed by
5 video and live surveillance. The circumstantial evidence offered by the Trustee does not present
6 a plausible explanation for why she would have stolen from the Debtor, and the physical evidence
7 to the contrary further ensures that the Trustee is unable to meet his burden of proof.

8 **d. The Filing of a Bar Complaint Did Not Violate the Bankruptcy Stay.**

9 The Court has raised a concern that Ms. Erdmann’s bar complaint against Todd Tracy
10 may have been an attempt to obtain a return of the Funds, and therefore may have been a violation
11 of the automatic stay. As discussed above, however, the Funds never became property of
12 Debtor’s bankruptcy estate. Thus, even if the complaint had been an effort to regain control of
13 the Funds, it would not be a stay violation. In addition, even if the Funds were property of the
14 estate, a bar complaint to a regulatory agency is a privileged action that comes with civil
15 immunity. Washington Rule for Enforcement of Lawyer Conduct 2.12 provides that
16 communications to the Washington State Bar Association are “absolutely privileged, and no
17 lawsuit predicated thereon may be instituted against any grievant, witness, or other person
18 providing information.”

19 **IV. CONCLUSION**

20 The Trustee is unable to prove by a preponderance of the evidence that the Estate has a
21 valid interest in the Funds. For that reason, and based on the argument and authority set forth
22 above, Ms. Erdmann respectfully requests that this Court order TTLG to release the balance of
23 the advanced cost retainer to her.

24 /
25 /
26 /

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

DATED this 15th day of June, 2016.

DBS | Law

By: /s/ Dominique R. Scalia
Daniel J. Bugbee, WSBA #42412
Dominique Scalia, WSBA#47313
Attorneys for Diane Erdmann

1 **CERTIFICATE OF SERVICE**

2 I hereby certify on June 15, 2016, I caused the foregoing document to be electronically
3 filed with the Clerk of the Court using the CM/ECF system which, pursuant to Local Rule 5005-
4 1(c)(1), causes parties who are registered ECF participants to be served by electronic means.

5 Dated this 15th day of June, 2016, at Seattle, Washington.

6
7 DBS | Law

8
9 By: /s/ Dominique R. Scalia
10 Dominique R. Scalia