

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 REPLY TO
TRUSTEE'S TRIAL BRIEF**

A. The Trustee's Brief Raises a New Theory and is the First Opportunity Ms. Erdmann Has Had to Read the Trustee's Claims Against Her

Prior to June 15, Ms. Erdmann and her counsel had never been informed of the precise nature of the Trustee's allegations. The most specific writing that the Trustee had previously submitted was his *Reply to Diane Erdmann's Response to Motion for Authority to Withdraw as Attorney for Debtor*, Dkt. No. 182, in which he asserted that Ms. Erdmann removed "coins and precious metals from the company vault" (emphasis added) before the Retainer Funds were paid, and that the coins Mr. Erdmann liquidated to pay \$99,460.00 of the Retainer Funds were given to Mr. Huffman in the same vault. The claim was supported by a declaration from Mr. Huffman about these same events. Dkt. No. 183. The Trustee did not, however, allege that Ms. Erdmann had stolen cash. Now, the Trustee's brief claims that when Ms. Erdmann stopped working for the Debtor, \$187,695.42 in cash had gone missing. Trustee's Brief, 6:2-3. Ms. Erdmann had no indication that such a claim would be made, and has not had the opportunity to conduct discovery regarding it. Rather, all discovery has been focused on "coins and precious metals." Given that this new claim about cash was only just raised, it should

1 not be decided at an evidentiary hearing one week later. *See In re Cogliano*, 355 B.R. 792, 804-806
2 (9th Cir. B.A.P. 2006) (determination of estate’s interest in property requires procedural protections
3 of adversary proceedings provided by Rule 7001 et seq.).

4 **B. The Burden of Proof Rests on the Trustee**

5 The Trustee asserts that Ms. Erdmann bears the burden to prove that the Retainer Funds are
6 her personal property, citing *In re Altman*, 230 B.R. 6, 11 (Bankr. D. Conn. 1999), *vacated in part*,
7 254 B.R. 509 (D. Conn. 2000). There, the court stated that the burden of proof “as to what is property
8 of the estate generally rests with the creditor.” The “creditor” referenced in that case, however, was
9 the party asserting that property was part of the estate. A better statement of the rule is, “The party
10 seeking to include property in the estate bears the burden of showing that the item is property of the
11 estate.” *In re Neidorf*, 534 B.R. 369, 372 (B.A.P. 9th Cir. 2015). Here, that party is the Trustee.¹ As
12 he acknowledges, the Retainer Funds are only property of the state “to the extent [they] can be traced
13 to property stolen from NWTM pre-petition” Trustee Brief, 9:13. The Trustee cannot meet his
14 burden to trace those funds to property stolen from the Debtor.²

15 **C. The Trustee Has Only Suspicions and Speculation, and asks the Court to Believe an
16 Implausible Theory That Lacks Either Motive or Opportunity for Theft**

17 None of the Trustee’s circumstantial evidence proves the Retainer Funds are proceeds of
18 stolen property. The Trustee offers security tapes showing Ms. Erdmann, Mr. Hansen, and other
19 employees moving boxes; the tapes do not show (1) what was in the boxes, (2) who owned that
20 property, or (3) what became of it. Further, the taped events happened before Ms. Erdmann had any
21 need for the Retainer Funds. To show it is more likely than not that the coins liquidated to pay the
22 Retainer Funds were stolen from the Debtor, all the Trustee can offer is video footage of Debtor’s
23 employees carrying on normal activities at Debtor’s facilities before the Retainer Funds were even an

24 ¹ *See also In re Heritage Org. L.L.C.*, 350 B.R. 733, 737-38 (Bankr. N. D. Tex 2006) (trustee has burden of proving that
25 property is property of the estate); *In re Arter & Hadden, L.L.P.*, 335 B.R. 666, 671 (Bankr. N.D. Ohio 2005) (Trustee
has “prima facie burden to show that the Debtor has an ownership interest in property”).

26 ² *See also, In re Int’l Admin. Servs., Inc.*, 408 F.3d 689, 708 (11th Cir. 2005) (“In an action seeking recovery, the
plaintiff has the burden of tracing funds it claims to be property of the estate.”).

1 issue. This is unconvincing, and asks the Court to believe this implausible story:

- 2 1. The Trustee suggests that on March 26 and 27, Ms. Erdmann, with the help of Mr. Hansen and
3 other Debtor employees, stole boxes of property from the Debtor's Federal Way vault. The Court
4 is asked to disregard that the contents of the boxes are unknown, and no evidence connects that
5 property to the Retainer Funds. The Trustee ignores the lack of any motive for theft at that time,
6 when the Debtor instead had a clearly identified motive for moving property between facilities to
7 avoid execution on the Cohen Judgment before the Debtor could file bankruptcy. The Cohen
8 Judgment became executable on March 25, and the Debtor believed that Cohen was not aware of
9 its Auburn location. Indeed, the Trustee himself, while acting in a different capacity, advised Mr.
10 Hansen to take precautions against imminent execution attempts. Further, the Trustee's story
11 disregards that (a) Ms. Erdmann and Mr. Hansen were well aware of security cameras capturing
12 their every move, (b) that the videos show Ms. Erdmann behaving normally in a manner that is
13 not designed to conceal her actions, and (c) that if Ms. Erdmann or Mr. Hansen had needed money,
14 they could have simply taken a cash owner draw as they did every other time in the past. There
15 was simply no motive for theft.
- 16 2. On March 28, the Debtor gave a check to TTLG for \$150,000 to cover the advance fee deposit.
17 The Court is asked to disregard that when Mr. Hansen gave this check, according to the Trustee,
18 he and Ms. Erdmann had already stolen from the Debtor to pay the deposit.
- 19 3. After Debtor delivered the check to TTLG, Mr. Tracy told Mr. Hansen that he would need to
20 receive the advance fee deposit from someone other than Mr. Hansen or the Debtor. The Court is
21 asked to disregard that this is the first time Ms. Erdmann would have any reason to believe that
22 she needed to pay the advance fee deposit herself, and that there is no evidence at all that Ms.
23 Erdmann took anything from the Debtor after this date.
- 24 4. On March 31, Ms. Erdmann brought a black bag to work with her in the morning and later gave
25 it to David Huffman to liquidate the coins inside for the purpose of paying the Retainer Funds.
26 The Court is asked to disregard: (a) that security footage from this day clearly shows that Ms.

1 Erdmann did not put anything from the vault into the bag before giving it to Mr. Huffman, (b) that
2 there is no evidence connecting the property in the black bag to the property in the boxes moved
3 on March 26 and 27, (c) that according to the Trustee’s theory, if Ms. Erdmann had wanted to
4 take property from the vault to pay the Retainer Funds, she would have simply done so in plain
5 view of the cameras rather than bringing in property from home, and (d) that Mr. Huffman is a
6 former police officer and the Debtor’s head of security, who would be a poor choice of accomplice
7 for someone intending to commit a crime.

8 Beyond this, the Trustee offers irrelevant accusations to color the Court’s perception of Ms.
9 Erdmann, but which have no bearing on whether the Retainer Funds were derived from stolen
10 property. First, the Trustee alleges that Ms. Erdmann did not keep good records while managing the
11 vault. While Ms. Erdmann can testify to the reasons she kept records in the way that she did, it is not
12 relevant to the source of the Retainer Funds. Ms. Erdmann worked for the Debtor for 16 years, and
13 her method of keeping records kept the company operational until it was hit with a judgment of
14 unprecedented size less than two months before it filed bankruptcy. There are no allegations that Ms.
15 Erdmann stole from the company before March (in fact Paul Wagner, formerly the Debtor’s CIO and
16 now its President, has testified that he does not believe she has ever stolen from the Debtor), and
17 her practices did not materially change during that time.

18 The Trustee suggests that after the Cohen Judgment was entered, Ms. Erdmann “ceased
19 maintaining the Vault Cash Log.” Trustee’s Brief at 5:13. This is a misrepresentation of the change
20 that actually occurred. The Vault Cash Log that was kept as an Excel spreadsheet by Ms. Erdmann
21 was based on a hand-written log near the till, which was accessible and regularly updated by multiple
22 employees. That did not stop in February. Hand-written records were still kept while Ms. Erdmann
23 dealt with the stresses that accompanied the Cohen Judgment. There was no material change in the
24 information tracked during this time.

25 Ms. Erdmann also maintained a stock sheet, which at any given time provided a snapshot of
26 the vault inventory. The Trustee insinuates that Ms. Erdmann stopped keeping this stock sheet in

1 March by stating that there was no “shared record” after that time. Ms. Erdmann has provided the
2 Trustee with the information needed to access the stock sheet, which was updated throughout her time
3 working for the Debtor and was stored on her computer in the Federal Way facility. It is true that the
4 record was not “shared,” but the Trustee offers no reason it should have been. Once again, the Trustee
5 uses a vague allegation about recordkeeping to tarnish Mr. Erdmann’s character, but the truth is that
6 her long-standing practices do not amount to evidence of theft.

7 The Trustee also points to an increase in Ms. Erdmann’s comings and goings as having been
8 “noticed by other employees.” Trustee’s Brief, 6:18. There is no indication of what this is supposed
9 to be evidence of, but it will be explained by the Debtor’s bookkeeper, Annette Trunkett, as daily trips
10 to the bank that started occurring after the Cohen Judgment was entered.

11 Ultimately the Trustee is unable to point to either a motive or an opportunity for Ms. Erdmann
12 to have stolen the Retainer Funds from the Debtor. Mr. Hansen had always taken cash owner draws
13 any time he and Ms. Erdmann needed money, and as of March 28, the Debtor believed it would be
14 able to pay its own legal bills by writing a check directly to TTLG. Thus, Ms. Erdmann had no reason
15 to steal the Retainer Funds on March 26 and 27. Further, security footage on March 31 shows that
16 Ms. Erdmann brought coins into work with her and added no property from the vault before handing
17 the bag to Mr. Huffman to be sold. There was no opportunity on that day for Ms. Erdmann to have
18 stolen the coins that were used to pay the Retainer Funds. With a case based totally on circumstantial
19 evidence and speculation, the Trustee cannot meet his burden of proof without showing any motive
20 or opportunity for the alleged theft.

21 **D. Ms. Erdmann’s Bar Complaint Against Todd Tracy, Though It Has Been**
22 **Withdrawn, Was Not a Stay Violation**

23 Due to the Court’s concerns, Ms. Erdmann withdrew her complaint with the Washington bar
24 against Mr. Tracy on Thursday, June 16, 2016. Making the complaint, however, was not a violation
25 of the bankruptcy stay. The Trustee’s argument for finding a stay violation is based almost entirely
26 on the actions allegedly taken by Ross Hansen; the only action that was taken by Ms. Erdmann was

1 to file a complaint with regulatory agencies.

2 Furthermore, the bar complaint process is a governmental function to enforce the Bar's
3 regulatory power;³ its purpose is to "protect the public, the profession and the administration of
4 justice, rather than to serve any pecuniary interests. Continuation of the proceeding, therefore, falls
5 within the scope of the 'police or regulatory power' exception of section 362(b)(4)." *In re Wade*, 115
6 B.R. 222, 228 (9th Cir. B.A.P. 1990), *aff'd*, 948 F.2d 1122 (9th Cir. 1991) (internal citations omitted).
7 "There can be no function more clearly within the police and regulatory exception to the stay than the
8 actions of the judicial branch of a sovereign in regulating the conduct of and in disciplining the officers
9 of the court.... The actions taken and proposed do not have the primary purpose of reimbursing third
10 parties for damages ... but deter improper conduct by members of the bar" *In re Arsi*, 354 B.R.
11 770, 773 (Bankr. D.S.C. 2006). This is true even if the Court finds the Retainer Funds are property of
12 the estate. "A private party's reporting of wrongful conduct to governmental regulatory authorities is
13 neither the commencement of a proceeding under subsection 362(a)(1), nor necessarily an 'act to
14 collect' under subsection 362(a)(6).... [T]he same sound public policy reasons which undergird the
15 subsection 362(b)(4) exception counsel against any rule which might dissuade private parties from
16 providing governmental regulators with information which might require enforcement measures to
17 protect the public from imminent harm." *In re McMullen*, 386 F.3d 320, 328 (1st Cir. 2004).

18 When she paid the Retainer Funds, Ms. Erdmann understood that they remained her property
19 unless and until earned.⁴ Not surprisingly, she was upset to discover that Mr. Tracy had not explained
20 to Ms. Erdmann the potential consequences of making the payment; her complaint was her form of
21 grievance. However, the Court should not inquire into Ms. Erdmann's motivations for making the
22 complaint, for creating any kind of "bad faith" exception to 362(b)(4) "would immerse the bankruptcy
23 courts in 'mini-trials of purely state regulatory issues,' which are far better left to the state" *Id.*

24 ³ The same applies the AG complaint. *In re First All. Mortgage Co.*, 263 B.R. 99, 107 (B.A.P. 9th Cir. 2001)

25 ⁴ Even the beneficial interest the Trustee argues for would not bring the Retainer Funds into the estate. The bankruptcy
26 code does not enhance the debtor's rights after the time of filing. *In re Braker*, 125 B.R. 798, 801 (9th Cir. B.A.P. 1991).
At most, the estate has a beneficial interest to apply the Retainer to fees incurred by TTLG.

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 20th 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 20, 2016, I caused the foregoing document to be electronically filed
3 with the Clerk of the Court using the CM/ECF system which, pursuant to Local Rule 5005-1(c)(1),
4 causes parties who are registered ECF participants to be served by electronic means.
5

6 Dated this 20th day of June, 2016, at Seattle, Washington.

7 DBS | Law

8
9 By: /s/ Dominique R. Scalia
10 Dominique R. Scalia
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26