

**United States Bankruptcy Court
Central District of California
Santa Ana
Judge Theodor Albert, Presiding
Courtroom 5B Calendar**

Thursday, November 17, 2016

Hearing Room 5B

10:00 AM

8:15-12496 Jana W. Olson

Chapter 7

Adv#: 8:16-01168 United States Trustee v. Olson

**#1.00 STATUS CONFERENCE RE: Complaint Objecting to Discharge Pursuant to 11 U.S.C. Section 727
(cont'd from 11-17-16)**

Docket 1

Tentative Ruling:

Tentative for 11/17/16:

Status conference continued to December 8, 2016 at 10:00 a.m.

Party Information

Debtor(s):

Jana W. Olson Pro Se

Defendant(s):

Jana W. Olson Pro Se

Plaintiff(s):

United States Trustee Represented By
Frank Cadigan

Trustee(s):

Richard A Marshack (TR) Represented By
Sarah Cate Hays
D Edward Hays
Ashley M Teesdale

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#2.00 STATUS CONFERENCE Re: Order to Show Cause Why Debtor Jana Olson Should Not Be Held In Contempt (set from evidentiary hrg held on 1-26-16) **(cont'd from 9-22-16)**

Docket 105

Tentative Ruling:

Tentative for 7/7/16:
Status? Is Ms. Olson retaining counsel or not?

Tentative for 6/7/16:
Status?

Tentative for 4/28/16:
Status? The court is evaluating Debtor's efforts to purge her contempt.

Tentative for 4/7/16:
The trustee's report filed April 6 is not encouraging.

Tentative for 3/29/16:
Status?

Tentative for 3/15/16:
Status? The court expects discussion on a workable protective mechanism as

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requested in paragraph 7 of the order shortening time.

Tentative for 1/19/16:
A status report would be helpful.

Tentative for 1/5/16:
No tentative. Request update.

Revised tentative for 11/5/15:

This matter is being immediately transferred to Judge Albert, who will hear the matter as scheduled at 10:00 a.m. in Courtroom 5B. A separate transfer order will issue shortly.

Tentative for 11/5/15:

Physical appearances are required by all parties, including Debtor, in Courtroom 5C, located at 411 West Fourth Street, Santa Ana, CA 92701.

Party Information

Debtor(s):

Jana W. Olson

Represented By
Thomas J Polis

Movant(s):

Passport Management, LLC

Represented By
Philip S Warden

Trustee(s):

Richard A Marshack (TR)

Represented By

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Sarah C Boone
D Edward Hays

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#3.00 Order To Show Cause Why Debtor Jana Olson Should Not Be Held In
Contempt For Failure To Comply With Stipulated Order To Turn Over Assets In
Pink Panther Trust
(cont'd from 9-22-16)

Docket 0

Tentative Ruling:

Tentative for 7/7/16:
No tentative.

Tentative for 6/7/16:
Status?

Party Information

Debtor(s):

Jana W. Olson

Pro Se

Trustee(s):

Richard A Marshack (TR)

Represented By
Sarah Cate Hays
D Edward Hays
Ashley M Teesdale

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#4.00 STATUS CONFERENCE RE: COMPLIANCE Renewed and Amended Motion for Order Compelling Debtor's Surrender and Turnover of Estate Property and Books and Records, Pursuant to 11 U.S.C. Section 521, 542, and 105(a) (cont'd from 9-22-16)

Docket 286

Tentative Ruling:

Tentative for 7/7/16:
No tentative.

Tentative for 6/7/16:
Status?

Tentative for 5/12/16:
The court has two concerns: (1) by now hopefully the Trustee has more particularized descriptions of the exact items including records to be turned over (e.g. all monthly statements of Bank of America Account _____). Some or even most may still not be known to the trustee, but all specificity should be given where possible preliminary to a contempt charge and (2) how do we incorporate mediation efforts before Judge Wallace into this program. This court is reluctant to enter any order that would short circuit that effort.

Party Information

Debtor(s):

Jana W. Olson

Pro Se

Trustee(s):

Richard A Marshack (TR)

Represented By
Sarah C Boone
D Edward Hays
Ashley M Teesdale

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#5.00 Motion For Sanctions Against Chapter 7 Trustee And/or Passport Management, LLC And/Or Their Attorneys Of Record

Docket 450

Tentative Ruling:

This is attorney Wayne Philips' ("Philips") FRBP 9011 Motion for Sanctions against Chapter 7 Trustee Richard Marshack ("Marshack"), Passport Management, LLC ("Passport") and their respective attorneys of record.

A. Facts and Movant's Contentions

Philips was initially retained by Debtor Jana Olson ("Olson") on April 13, 2015 to defend her in a collection case. On April 27, 2015, Olson hired Philips to secretly supervise her attorney Lisa Hughes, who was representing her in her legal separation case. Olson eventually disclosed his involvement to Hughes, and Philips and Hughes began working more closely together on her domestic case. According to Philips, he was never substituted in as counsel of record in the legal separation case.

Olson retained Thomas Polis ("Polis") on May 13, 2015 to provide limited bankruptcy services, with Polis' representation of Olson terminating at the end of Olson's first 341(a) meeting. Philips maintains he never represented Olson in her bankruptcy case, aside from helping Olson fill out a bankruptcy worksheet she received from Polis. Rather, Olson represented herself or sought the assistance of *pro bono* counsel. Philips characterizes his professional relationship with Olson as that of her "general counsel," as he was tasked with "coordinating" Olson's various cases (the collection defense case and legal separation case in state court, along with this bankruptcy proceeding) to ensure that a position taken in one matter did not adversely affect Olson's interests in another matter. Motion at 4, lines 8-13.

In contrast, Olson has since alleged that Philips did provide bankruptcy related legal services to her. On December 14, 2015, this court entered an order finding that at

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least some of the legal services Philips provided to Olson were indeed in contemplation of or in connection to her bankruptcy case. This order also required Philips to file a statement that included the total amounts paid from Olson, the manner and source of each payment, and to turnover any client documents in his control to Trustee, excluding any documents protected by attorney-client privilege. In response, Philips filed a Disclosure and Addendum on December 8, 2015, with the addendum explaining that Philips provided "all documents in [his] possession, custody, or control regarding Jana Olson[.]" Motion at 5, lines 11-12.

On September 1, 2016, Trustee and Passport jointly moved for disgorgement of funds paid to Philips from Olson. Philips contends that Trustee and Passport's demands for turnover of estate records in their disgorgement motion are based on the belief that these documents will lead to approximately \$20 million dollars allegedly hidden by Olson. Philips asserts that Trustee and Passport's only basis for believing this is a "biography postcard" Olson filled out on July 8, 2010 in which she stated her net worth was \$20 million. Philips however, argues that there are number of reasons to doubt the veracity of this figure. Accordingly, Philips contends that Trustee and Passport have brought the disgorgement motion without evidentiary support and therefore their claims are frivolous, warranting sanctions. In support, Philips also argues that Trustee and Passport's claim for turnover of "other estate property" highlights their lack of evidence, as they are unable to cite specific evidence or documents they want. Philips also stresses how he has already turned over all Olson related documents to Trustee and Passport, that Trustee and Passport have misrepresented the nature of the Miyim/Pink Panther Trust allegedly settled by Olson, and that Trustee and Passport's disgorgement motion should have been brought as an adversary proceeding. In short, Philips argues that Trustee and Passport's disgorgement motion is not only unfounded on evidentiary grounds, but is also procedurally improper and being used to intimidate and harass Philips, Accordingly, he argues this conduct necessitates sanctions by the court.

B. Trustee and Passport's Contentions

In response, Trustee and Passport first argue that their disgorgement motion

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was not improperly brought as a contested matter, and that it does not need to be prosecuted as an adversary proceeding. In support, Trustee and Passport cite to FRBP 2017 ("on motion by any party in interest...the court after notice and a hearing may determine whether any payment of money...by the debtor...to an attorney for services rendered or to be rendered is excessive") and argue that their action is a proceeding for recorded information, which may be brought as a motion.

Trustee and Passport also contend that despite his protestations Philips has not turned over all documents relating to Olson and her bankruptcy estate. On February 16, 2016, this court entered an order approving a stipulation between Trustee and Olson wherein Olson agreed to waive her attorney-client privilege with Philips. Following entry of this order, Trustee and Passport asked Philips for documents protected under privilege that were not initially disclosed. Trustee and Passport assert that because Philips has yet to turn over the documents they have requested, they sought turnover of the documents through their disgorgement motion. That is, their request for turnover of documents related to Olson is not intimidation—they are merely seeking documents no longer under the purview of attorney client privilege. Allegedly missing emails and retainer agreements are mentioned.

C. The Court's View

This motion is a great deal about nothing. First, the procedural argument would seem more appropriate in response to the disgorgement or turnover motion itself, not as a separate motion for sanctions. Procedurally, at least one court in this circuit has ruled that a disgorgement motion need not be prosecuted as an adversary proceeding. See *Olson v. Anderson, (In re Anderson)* 2015 WL 5883276 n.6 (9th Cir. BAP Oct. 7, 2015) ("Under Rule 7001(1) Trustee was required to bring a request for turnover in an adversary proceeding. By characterizing the motion as one for disgorgement, Trustee's request was properly before the court by motion."). Moreover, the plain language of FRBP 2017 cuts against Philips' argument. FRBP 2017(a) provides that "on motion by any party in interest...the court after notice a hearing may determine whether any payment of money or any transfer of property by the debtor...to an attorney for services rendered or to be rendered is excessive." Finally,

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Phillips' right to due process does not appear to have been harmed here, as he received notice and because the disgorgement motion was set for hearing. He never really articulates why an adversary proceeding affords any additional due process; certainly nothing is mentioned that would begin to rise to the level of sanctionable conduct. Lastly, Phillips goes on at length about how the Trustee and Passport do not provide evidence to support their contention that documents are still missing and/or that there is money in the Cook Islands trust (or elsewhere). But the Trustee and Passport do not need to prove any such thing; they instead have the right to *all of the documents* irrespective of whether there is anything of value there or not. Part of the Trustee's task is to understand what happened here and he should be given every tool available in that effort. It is not for Phillips as former attorney for Olson to pre-judge whether the effort will prove worthy. Nor is the premise correct. It is entirely reasonable (and hence not sanctionable) that the Trustee or Passport might simply choose not to believe Phillips.

"The initial basis for imposing sanctions...is Rule 9011, the bankruptcy counterpart to Civil Rule 11. Case law interpreting Rule 11 is applicable to Rule 9011." *In re Nakhuda*, 544 B.R. 886, 899 (B.A.P. 9th Cir. 2016)(citing *Marsch v. Marsch (In re Marsch)*, 36 F.3d 825, 829 (9th Cir.1994)). "Rule 9011(b) requires parties and their attorneys to ensure papers filed before a bankruptcy court are 'warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law' and that 'allegations and other factual contentions have evidentiary support....' Rule 9011(b)(2) and (3). Rule 9011(b) incorporates a reasonableness standard which focuses on whether a competent attorney admitted to practice before the involved court could believe in like circumstances that his actions were legally and factually justified." *Nakhuda* at 899, citing *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830-31 (9th Cir.1986).

"An attorney has a duty to conduct a reasonable factual investigation as well as to perform adequate legal research that confirms that his position is warranted by existing law (or by a good faith argument for a modification or extension of existing

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law). *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002). The bankruptcy court must measure the attorney's conduct 'objectively against a reasonableness standard, which consists of a competent attorney admitted to practice before the involved court.' *In re Grantham Bros.*, 922 F.2d at 1441." *Olson v. Anderson (In re Anderson)*, 2015 WL 5883276 at *6. Here, Trustee and Passport's actions do not appear to rise to the level of sanctionable conduct. Although Philips has told Trustee and Passport he has turned over all documents relating to Olson, it appears (possibly) that Phillips has yet to turn over documents relating to Olson that were once protected by attorney-client privilege. In the instant Motion Philips himself appears to suggest that he has turned over all documents, stating that he has "tendered to the joint movants, 'all documents in [his] possession, custody, or control regarding Jana Olson...including without limitation e-mail exchanges, voicemail, and written correspondence." Motion at 5, lines 11-13. However, inspection of Philips' disclosure filed on December 8, 2015 (and attached to Trustee and Passport's Opposition at Exhibit 1, 192: 2-9) reveals that he did not turn over documents excluded by privilege as his Motion appears to suggest on its face ("I made available to Counsel for the Trustee...and to Passport's Counsel, all documents in my possession...regarding Jana Olson **except direct attorney-client communications—such communications including without limitation e-mail exchanges, voicemail, and written correspondence.**")(emphasis added).

This court has since approved a stipulation waiving Olson's attorney-client privilege. Based on the e-mail exchanges provided to the court, it is not clear that Philips has turned over all of his communications and documents related to his representation of Olson. Rather, it appears Philips may have made conflicting statements in his correspondence with Trustee and Passport—statements that could lead a reasonable attorney to believe that he has not fully released all documents in his possession. It might be that since this exchange Phillips has augmented his turnover; but the court cannot on this record conclude that the actions of Trustee and Passport are unreasonable.

In an email dated March 1, 2016, Philips first states that that "[p]er [his]

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representation agreements with Jana Olson, [he does] not maintain a historical client file...and that Olson's case files were deleted per [his office's] standard operating procedures." See Opposition at 8, lines 6-9; Exhibit 1 at 294. Philips then writes that "notwithstanding the above, no additional request for historical case documents or information was received from Jana Olson..." *Id.* Philips also briefly mentions that he has not received Olson's permission and that if Trustee can prove he doesn't need Olson's permission he will tell Trustee whether or not he knows of a particular document or "cannot produce it now." *Id.* It is not entirely clear why Philips would mention he has not received a request from Olson for historical documents that he also claims have been deleted. Put another way, why would Olson make a request for historical documents when she purportedly signed a representation agreement where she agrees that there will be no client file? Further, Philips' assertion that the files have been deleted is even more curious given that he was able to produce documents in compliance with this court's order months after his representation of Olson appears to have concluded (based on his invoices it seems Philips stopped representing Olson sometime in September of 2015). There may be benign explanations. None of the above analysis is meant to vilify Philips—he may have very well have turned over all documents to Trustee and Passport. In fact, Philips does state the following in an email dated March 7, 2016:

"Several months ago, upon your inquiry, I told you I still had some records I could provide if Ms. Olson authorized their release, or if the Court ordered records produced on a waiver of privilege. Ms. Olson subsequently authorized release of those records and you received them. End of story..." See Exhibit 1 at 301.

Philips appears to say that he has turned over the once privileged documents to Trustee. However, based on Trustee's repeated correspondence, it also appears at least possible that Trustee did not receive these documents. Further, it is not clear when this second turnover took place, as Philips does not mention it in his Motion for Sanctions. In short, based on Philips' statements in emails, it does not appear objectively unreasonable that Trustee and Passport would believe he has still not

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turned over all documents in his possession. At the very least, it seems that Philips possibly has retainer agreements or some missing emails. Moreover, while Philips might be sincere in his assertion that there are no supporting documents demonstrating that the biography postcard listing Olson's net worth as \$20 million is accurate, other events raise a suspicion that there may be a hidden source of funds. For example, Olson was allegedly arrested in the Cook Islands with \$18,000 in cash and \$150,000 in cashier checks, Exhibit 1 at 150: 10-15; and Olson allegedly had approximately \$10,000 in cash in her purse the day she was remanded to the custody of the U.S. Marshals for civil contempt).

In short, it does not appear that Trustee and Passport have raised these allegations without research or for any obviously improper motive. In any event, their actions are a long way from sanctionable.

Deny

Party Information

Debtor(s):

Jana W. Olson

Pro Se

Trustee(s):

Richard A Marshack (TR)

Represented By
Sarah Cate Hays
D Edward Hays
Ashley M Teesdale