

1 follows:

2 TYPE OF PROPERTY: Any and all proceeds, revenues,
3 or concessions conceded to or granted by the
4 secured mortgage lender on the property at
5 1845 Hidden Hills Dr. Roseville, CA 95661 and or
6 the debtor's intangible personal value contained in
7 the possessory interest in the property.
8 (Hereinafter "Property")

9 STATUTE CREATING EXEMPTION: CCCP § 703.140 (b) (5)

10 VALUED CLAIMED EXEMPT: \$11,764.00

11 The Trustee objects to this exemption, asserting that the
12 asset being claimed as exempt did not exist as of the commencement
13 of the case and will only exist if the Trustee markets and sells
14 the Property post-petition. The monies, to be paid by the creditor
15 from the sales proceeds subject to the creditor's lien, were not
16 property of the Debtor or property in which an exemption can be
17 claimed. Such monies paid to the estate are "carve-outs" from the
18 creditor's sale proceeds, which are paid based upon the post-
19 petition activities of the bankruptcy estate's representatives.

20 The Debtor responds, opposing the objection to her claim of
21 exemption, asserting that the scope of 11 U.S.C. § 541 property of
22 the bankruptcy estate is very broad. She is correct, with
23 11 U.S.C. § 541 sweeping up every conceivable right and interest of
24 the Debtor as of the commencement, with specifically enumerated
25 exceptions. However, notwithstanding these interests and rights
26 being swept into the bankruptcy estate, 11 U.S.C. § 541 does not
27 create rights. *State of California v. Farmers Markets, Inc. (In re*
28 *Farmers Markets, Inc.)*, 792 F.2d 1400, 1402 (9th Cir. 1986).

It is asserted by the Debtor that she was in possession of the
Property as of the commencement of the bankruptcy case, had the
right to negotiate and attempt to conduct a sale (or short-sale) of

1 the Property, and the right to receive payment of any concessions
2 or "incentive payments" a creditor would give her from that
3 creditor's short-sale proceeds. The Debtor asserts that the pre-
4 petition right to do this continues after the commencement of the
5 case and that the Debtor's right to attempt to conduct a short-sale
6 and receive the creditor's concessions may be claimed exempt as a
7 necessary part of her post-discharge "fresh start."

8 DISCUSSION

9 Exemption of the Asset by the Debtor

10 A debtor may claim an exemption in an asset which is property
11 of the bankruptcy estate. The vast majority of exemptions under
12 California Law (the applicable bankruptcy exemptions in California,
13 Cal. Code Civ. Pro. § 703.140) are for monetary amounts in assets
14 of the estate. Such assets continue to remain property of the
15 estate until used, sold, or abandoned from the estate. *Schwab v.*
16 *Reilly*, 130 S.Ct. 2652, 2667, 177 L. Ed. 2d 234 (2010); *Gebhart v.*
17 *Gaughan (In re Gebhart)*, 621 F.3d 1206, 1210 (9th Cir. 2010).

18 The specific exemption claimed by the Debtor is provided in
19 California Code of Civil Procedure 703.140(b)(1) and (5),

20 (1) The debtor's aggregate interest, not to exceed
21 twenty-four thousand sixty dollars (\$24,060) in value, in
22 real property or personal property that the debtor or a
23 dependent of the debtor uses as a residence, in a
24 cooperative that owns property that the debtor or a
25 dependent of the debtor uses as a residence.

26 ...

27 (5) The debtor's aggregate interest, not to exceed in
28 value one thousand two hundred eighty dollars (\$1,280)
plus any unused amount of the exemption provided under
paragraph (1), in any property.

The Debtor's exemption under California law in property of the
estate is determined as of the bankruptcy case filing date. *Owen*

1 *v. Owen*, 500 U.S. 305, 314, 111 S. Ct. 1833, 1838, n. 6; *In re*
2 *Wolf*, 248 B.R. 365, 367-368 (B.A.P. 9th Cir. 2000). A debtor does
3 not have the ability to claim exemptions which did not exist as of
4 the commencement of the case or post-petition increases in the
5 value of the property in excess of the amount claimed as exempt.
6 *In re Hyman*, 967 F.3d 1316, 1319, n. 2 (9th Cir. 1992). To be
7 claimed as exempt the property must exist and become part of the
8 bankruptcy estate. *Owen, supra* at 308.

9 The "asset" being asserted by this exemption is the Debtor's
10 physical possession of her residence and her ability to control a
11 short-sale of the Property. Attempting to claim an exemption in
12 this type of asset is a relatively new phenomenon arising from
13 creditors realizing that a short-sale of the property securing the
14 debt (by which the creditor agrees to take less than the full
15 amount owed) is better than the creditor completing a non-judicial
16 foreclosure sale and the creditor becoming the owner of the
17 property. Once the creditor becomes the owner, it has to take on
18 the responsibility of being an owner, including, (1) evicting the
19 borrower/former owner, (2) managing the property as an asset of
20 the creditor, (3) paying insurance, property taxes, and utilities,
21 (4) employing people or third-party vendors to secure, repair, and
22 maintain the property while it is being marketed, and (5) engaging
23 a real estate broker to sell the property.

24 Savvy borrowers and their counsel often extract not only
25 reasonable moving expenses (in lieu of the creditor having to incur
26 the cost and expense of an unlawful detainer action), but negotiate
27 an "incentive payment" from the sales proceeds for the efforts of
28 the borrower in working with a real estate broker and taking the

1 time to market the property for a short-sale. This is a basic
2 economic calculation in which the creditor determines that the cost
3 of the "incentive payment" is less than the cost of foreclosing,
4 owning the property, and selling the property itself.

5 Recently, Chapter 7 trustees have begun working with creditors
6 to conduct such short-sales of property of the bankruptcy estate.
7 The trustee enters into an agreement with the creditor for a
8 short-sale the property, rather than abandoning the overencumbered
9 property to the debtor. If abandoned, the property would no longer
10 be property of the estate, with the debtor having regained the
11 right and ability to negotiate a short-sale with the creditor. The
12 trustee who consummates a short-sale receives for the bankruptcy
13 estate the "incentive payment" from the creditor's sale proceeds.

14 **Rights of the Estate Asserted by the Chapter 7 Trustee**

15 This Debtor has elected to file the present Chapter 7 case,
16 rather than a Chapter 13 or Chapter 11 case. One of the immediate
17 results of electing to file a Chapter 7 case is that all of the
18 property of the estate is placed under the exclusive control of the
19 Chapter 7 Trustee. The Chapter 7 Trustee is the representative of
20 the bankruptcy estate. 11 U.S.C. § 323(a). He is the only person,
21 absent an order of the court, authorized to collect, control,
22 authorize the use of, liquidate, and disburse the property of the
23 estate. 11 U.S.C. §§ 704(a), 721, 726.¹

24 In filing the Chapter 7 case, the Debtor transferred the
25 overencumbered Property to the estate, giving control to the

27 ¹ This is contrasted to the provisions of 11 U.S.C. §§ 1107,
28 1203, and 1302 which allow the Chapter 11 or 12 debtor in possession
and the Chapter 13 debtor to exercise the powers of a trustee over
property of the estate.

1 Chapter 7 Trustee to administer this Property as part of the
2 bankruptcy estate. The Debtor no longer has the right or power to
3 conduct a short-sale, control, or use this property of the
4 bankruptcy estate. The Debtor no longer has the ability to "sell
5 her owner real estate services" to engage a broker to market and
6 sell the Property to generate cash sales proceeds, which are
7 encumbered by the creditor's lien.

8 The Chapter 7 Trustee has the right to sell the Property. The
9 creditor may enter into a transaction with the Chapter 7 Trustee
10 for the estate to employ a real estate broker, market the Property,
11 and consummate a short-sale of the Property. The Chapter 7 Trustee
12 may choose to undertake the responsibility for maintaining,
13 insuring and protecting the Property pending any sale. It is the
14 Chapter 7 Trustee's labor and estate's expense in working to sell
15 property of the estate which is the subject of the "incentive
16 payment."

17 This view of the Chapter 7 short-sale transaction is
18 consistent with 11 U.S.C. § 506(c), which provides that a
19 creditor's collateral shall be surcharged reasonable and necessary
20 "costs and expenses of preserving, or disposing of, [property
21 securing a claim] to the extent of any benefit to the holder of
22 such claim,..." With the "incentive payment," the creditor and
23 Chapter 7 Trustee monetize the benefit to the creditor for the
24 estate retaining the property and incurring the cost and expense
25 related to maintaining and selling the Property.

26 **The California Exemption is Limited to Involuntary Liens**

27 The Debtor's contention that this "incentive payment" may be
28 claimed exempt also runs afoul the exemption laws of California –

1 the Debtor cannot claim an exemption in the value of the property
2 subject to the creditor's consensual lien. Exemptions may be
3 claimed only against involuntary liens, such as judgments,
4 attachments, and execution liens.

5 § 703.010. Application of exemptions

6 Except as otherwise provided by statute:

7 (a) The exemptions provided by this chapter or by any
8 other statute apply to all procedures for enforcement of
a money judgment.

9 (b) The exemptions provided by this chapter or by any
10 other statute do not apply if the judgment to be enforced
11 is for the foreclosure of a mortgage, deed of trust, or
12 other lien or encumbrance on the property other than a
lien created pursuant to this division or pursuant to
Title 6.5 (commencing with Section 481.010) (attachment).

13 Cal. Code Civ. Pro. 703.010. See *In re Pavich*, 191 B.R. 838, 847
14 (Bankr. E.D. Cal. 1996),

15 The Bankruptcy Code provides uniform 'exemptions'
16 which shield certain types of a debtor's property from
the claims of creditors, helping the debtor to obtain a
17 'fresh start.' See 11 U.S.C. § 522(d). Exemption laws
protect a debtor's property against the enforcement of
18 certain 'nonconsensual' liens, such as money judgments or
attachment liens. 2 CEB, Debt Collection Practice in
19 California § 9.4 (1987); see also Cal. Code Civ. Proc.
§ 703.010.

20 To the extent that a creditor elects to pay a portion of the sales
21 proceeds subject to its lien as an "incentive payment" for the
22 bankruptcy estate to conduct a short-sale of this Property, such
23 monies of the creditor are not assets in which the Debtor may claim
24 an exemption.

25 The Debtor does not have, and cannot claim an exemption in,
26 the rights and powers of the Chapter 7 Trustee to sell property of
27 the estate and for the estate to receive "incentive payments" for
28 the efforts of the estate's representatives (Chapter 7 Trustee and

1 estate employed real estate broker) in selling such Property. The
2 creditor is free to pay a portion of the encumbered sales proceeds
3 to whomever it chooses for conducting a short-sale.

4 **Relationship of Chapter 7 Debtor and Trustee Electing to Retain**
5 **Overencumbered Property.**

6 If a trustee elects not to abandon overencumbered property of
7 the estate, but retain it in an effort to obtain a short-sale
8 "incentive payment," the debtor has several options. These
9 include, without limitation, the following. A debtor is under no
10 obligation to fund insurance, protect the property, maintain the
11 property, or assist the trustee in selling the overencumbered
12 property. That debtor may elect to move out of the property,
13 turning physical possession, and the day-to-day maintenance and
14 security obligations, over to the trustee.

15 In reality, these debtor-trustee issues concerning a short
16 sale are steeped in the highest tradition of bankruptcy – what deal
17 can be made that is in everyone's best interest. Most likely, a
18 trustee wants a debtor to remain in physical possession, keeping
19 the property insured and protected as an occupied home. The debtor
20 would like to stay in possession, paying only the current insurance
21 and maintenance costs, allowing the debtor to avoid paying rent for
22 housing and delaying moving expenses during the first months of a
23 Chapter 7 fresh start.

24 The creditor and trustee likely not only want the debtor to
25 occupy the property, but to do so in a manner that will maximize
26 the short-sale proceeds. This maximizes the ultimate sales price,
27 which will likely maximize the estate's "incentive payment" for
28 conducting a short sale. Additionally, the trustee and creditor

1 want a debtor to not only cooperate with the real estate broker for
2 the estate and the marketing efforts, but to voluntarily move out
3 of the property after the short-sale is completed so that the buyer
4 can immediately take possession of the property.

5 While the no-rent incentive may balance paying the current
6 insurance and maintenance expense, that may not be sufficient
7 incentive for a debtor to cooperate with the trustee and creditor
8 for the short-sale. A debtor may negotiate for a portion of the
9 "incentive payment," including moving expenses. The rules for a
10 debtor negotiating with the trustee for some of the "incentive
11 payment" are the same that apply to the trustee negotiating the
12 "incentive payment" for the estate from the creditor - how hard can
13 a debtor squeeze for a "piece of the action" so that the trustee
14 only squeals, but doesn't scream. If the debtor squeezes too hard
15 and the trustee screams, it is likely that the trustee would
16 exercise the trustee's right to possession of property of the
17 estate and obtain an order from the Bankruptcy Court for the
18 immediate turnover of the property from the debtor.²

19 CONCLUSION

20 The Objection to Claim of Exemption filed by the Chapter 7
21 Trustee is sustained. No interests or rights of the Debtor which
22 are property of the estate exist which may be claimed as exempt.
23 The Debtor retains her right to negotiate for her assistance as the
24 Trustee attempts to sell the Property. If the Trustee abandons the
25 Property to the Debtor, she may then negotiate directly with the
26

27
28 ² Federal Rule of Bankruptcy Procedure 7001(a) permits a trustee to obtain the turnover of property from a debtor by motion rather than requiring an adversary proceeding or unlawful detainer lawsuit.

1 Creditor for a short-sale of the abandoned property. The Debtor
2 cannot exempt (or appropriate) the sales proceeds encumbered by the
3 creditor's lien or the monies due for the future work of the
4 Chapter 7 Trustee.

5 The Debtor expressed concern that to the extent she is
6 entitled to any moving expenses to be paid by the creditor pursuant
7 to any statute or regulation, she was including those rights as
8 part of the exemption. The court does not overrule the exemption
9 to the extent that there is any statute or regulation which grants
10 the right to the Debtor to receive moving expenses from the
11 creditor's proceeds from the short-sale.

12 The court shall issue an order consistent with the Ruling.
13 This Memorandum Opinion and Decision constitutes the court's
14 findings of fact and conclusions of law pursuant to Federal Rule of
15 Civil Procedure 52 and Federal Rule of Bankruptcy Procedure 4003,
16 7052 and 9014.

17 Dated: April 10, 2013

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19 /s/
20 RONALD H. SARGIS, Judge
21 United States Bankruptcy Court
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