No. 16-1967

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: SUSAN BROWN,
Debtor.

SUSAN BROWN,
Debtor/Appellant,

– v. –

DOUGLAS ELLMAN,
Trustee/Appellee.

On Appeal from the United States District Court
For the Eastern District of Michigan
Docket No. 2:15-cv-11017

BRIEF OF AMICI CURIAE NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER AND NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF APPELLANT AND SEEKING REVERSAL OF THE BANKRUPTCY COURT'S DECISION

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On Brief: J. Erik Heath
January 5, 2017

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Brown v. Ellman., No. 16-1967

Pursuant to Fed. R. App. P. 26.1, Amicus Curiae, the National Consumer Bankruptcy Rights Center, makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations. **NONE.**

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock. **NONE.**

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests. **NONE.**

This 5th day of January 2017.

s/ Tara Twomey
Tara Twomey, Esq.
Attorney for Amici Curiae

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s/ Tara Twomey
Tara Twomey, Esq.
Attorney for Amici Curiae

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STATEMENT OF INTEREST OF AMICUS CURIAE

The National Consumer Bankruptcy Rights Center (NCBRC) is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially distressed debtors rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system often are ill-equipped to protect their rights in the appellate process. NCBRC files *amicus curiae* briefs in systemically-important cases to ensure that courts have a full understanding of the applicable bankruptcy law, the case, and its implications for consumer debtors.

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys (NACBA) is a nonprofit organization consisting of approximately 3,000 consumer bankruptcy attorneys nationwide. NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various cases seeking to protect the rights of consumer bankruptcy debtors.

NCBRC, NACBA and its membership have a vital interest in the outcome of this case. NCBRC is concerned that the use of "carve-out" agreement that pay for more to the trustee and real estate professional than to unsecured creditors are improper, create incentives for self-dealing, and cut off important rights of debtors. NACBA member attorneys represent individuals, many of whom file under Chapter 7 and are underwater on property that is normally considered a necessity of daily life, like a personal residence or vehicle. Any issue concerning the nature and extent of a trustee's power to sell such property, thereby depriving the debtor of any property exemptions and/or foreclosure defenses, is of great significance to all such debtors, who seek a "fresh start" with the expectation that this fully encumbered property will be available for their use during and after the bankruptcy process.

AUTHORSHIP AND FUNDING OF AMICUS BRIEF

Pursuant to Fed. R. App. P. 29(c)(5), no counsel for a party authored this brief in whole or in part, and no person or entity other than NACBA, its members, and its counsel made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Although cloaked in legitimacy, "carve-out" transactions, such as the one in this case, are anything but normal. The long-established rule in this Circuit and elsewhere is that fully encumbered assets should be abandoned by the bankruptcy estate, leaving the debtor and secured creditor(s) to resolve such liens outside of bankruptcy court. Abandonment encourages the efficient administration of the estate, while ensuring that trustees do not liquidate property the proceeds of which will not provide any meaningful benefit to the unsecured creditors.

This practice of abandonment is threatened by the use of "carve-out" transactions. These transactions, which usually involve the sale of fully encumbered assets, with a token amount of money carved out for distribution to the estate, are blatant attempts to circumvent the usual rule against the sale of fully encumbered assets. Some courts disapprove of these transactions altogether, and even those who permit them do so skeptically—often creating a presumption that they are improper. This case exemplifies why these transactions are viewed as dubious, as the trustee and real estate professionals here received thousands of dollars in commissions, the general unsecured creditors received no distribution of consequence, and the debtor lost her home. More specifically, the trustee's fees and costs were $4,734.55, the real estate broker received $9,600, and closing costs were approximately $2,800. Unsecured creditors received $512, and the

debtor lost her home. The professionals' profit comes at a significant loss to the debtor, who is deprived of her home and other non-bankruptcy rights, such as the right to redemption. There is no justification for such a transaction, neither in the Bankruptcy Code itself nor in established bankruptcy practice.

Should this Court permit these transactions anyway, then at a minimum, debtors should be allowed to assert their exemptions rights against the property and resulting proceeds. The trustee should not be cripple the debtor's fresh start by selling her residence and not permitting her to claim her homestead exemption. As the Supreme Court made clear in its decision, *Law v. Siegel*, such exemptions cannot be denied unless there is a specific statutory basis for that denial. There is no such statutory basis to deny debtors of these important exemptions in such circumstances.

ARGUMENT

I. Carve-Out Agreements Do Not Justify The Otherwise Improper Sale Of Fully Encumbered Assets By The Trustee.

The court's opinion below starts from the false premise that the sale of property here was permissible in the first instance. However, the type of sale at issue here, involving property fully encumbered by liens and what is commonly

known as a "carve-out agreement," is far removed from accepted practice.[1] This case illustrates why these agreements are so disfavored. The debtor was evicted from her home, and lost all state law rights to redeem the property. But there was no reason for this outcome, as the bankruptcy estate received practically no benefit from this transaction. Instead, the trustee and other real estate professionals were the primary beneficiaries of this arrangement. This Court should reject this abusive form of self-dealing.

A. Fully Encumbered Assets Should Be Abandoned By The Bankruptcy Estate, Not Sold By The Trustee.

"As a general rule, the bankruptcy court should not order property sold 'free and clear of' liens unless the court is satisfied that the sale proceeds will *fully* compensate secured lienholders *and* produce some equity for the benefit of the bankrupt's estate." *In re Riverside Inv. P'ship*, 674 F.2d 634, 640 (7th Cir. 1982) (emphasis added) (citing *Hoehn v. McIntosh*, 110 F.2d 199, 202 (6th Cir. 1940)); *see also* 7 Collier on Bankruptcy ¶ 704.02[1] at 704-8 (16th ed.) ("when a property is encumbered to the extent that its sale, after payment of costs (including *ad valorem* taxes), administrative expenses and encumbrances, will produce little or

[1] "Although the term is widely used but rarely defined, a 'carve-out agreement' is generally understood to be 'an agreement by a party secured by all or some of the assets of the estate to allow some portion of its lien proceeds to be paid to others, i.e., to carve out of its lien position.'" *In re Robotic Vision Sys., Inc.*, 367 B.R. 232, 240 n. 23 (B.A.P. 1st Cir. 2007) (quoting *In re U.S. Flow Corp.* 332 B.R. 792, 796 (Bankr. W.D. Mich. 2005)).

no money for the estate, it is improper for the trustee to take possession of or sell it"). Otherwise, the bankruptcy "court should order the release and surrender possession and control of the property to the lienor to foreclose or otherwise proceed in a court of competent jurisdiction." *Hoehn v. McIntosh*, 110 F.2d 199, 202 (6th Cir. 1940).

This deeply rooted principle from this Circuit's *Hoehn* decision was an early description of a common law doctrine that is now codified and known as abandonment. *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 508 (1986) (Rehnquist, J., dissenting) (describing common law practice); *see* Pub. L. No. 95-598, 92 Stat. 2549, 2603 (1978) (enacting 11 U.S.C. § 554).[2] In the decades since *Hoehn*, it has become "almost universally recognized that where the estate has no equity in a property, abandonment is virtually always appropriate because no unsecured creditor could benefit from the administration." *In re Feinstein Family Pshp.*, 247 B.R. 502, 507 (Bankr. M.D. Fla. 2000); *see also In re Barfield*, No. 11-72074, 2015 Bankr. LEXIS 270, at *22 (Bankr. C.D. Ill. Jan. 29, 2015); *In re Jaussi*, 488 B.R. 456, 458-59 (Bankr. D. Colo. 2013); *In re Covington*, 368 B.R. 38, 41 (Bankr. E.D. Cal. 2006) ("when an asset is fully

[2] Under the Code, property can be abandoned by the bankruptcy estate after formal notice and hearing, or most commonly, property not administered is abandoned back to the debtor by operation of law at the closing of the bankruptcy case. *See* 11 U.S.C. §§ 554(a)-(c); *In re Reiman*, 431 B.R. 901, 907-08 (Bankr. E.D. Mich. 2010).

encumbered by a lien, it is considered improper for a chapter 7 trustee to liquidate the asset."); *In re Ayers*, 137 B.R. 397, 400 (Bankr. D. Mont. 1992).

The abandonment, rather than sale, of fully encumbered property by the estate serves several purposes. First and foremost, such abandonment "serve[s] the overriding purpose of bankruptcy liquidation: the expeditious reduction of the debtor's property to money, for equitable distribution to creditors," because liquidating worthless assets would necessarily "slow[] the administration of the estate and drain[] its assets." *Midlantic*, 474 U.S. at 508 (Rehnquist, J., dissenting). In fact, the Chapter 7 "trustee's duty to expeditiously close the estate [is] his 'main' duty." *In re Riverside-Linden Inv. Co.*, 925 F.2d 320, 322 (9th Cir. 1991); *In re Dorn*, 167 B.R. 860, 865 (Bankr. S.D. Ohio 1994) ("there are two goals in the administration of chapter 7 cases, i.e., to administer nonexempt assets as expeditiously as possible for the benefit of creditors, and to provide a fresh start to debtors.").

Keeping this duty in mind, the abandonment of fully encumbered assets more closely aligns with the role of the Chapter 7 trustee, whose "purpose is to liquidate the estate for the benefit of the unsecured creditors," *In re K.C. Machine & Tool Co.*, 816 F.2d 238, 245-46 (6th Cir. 1987), "and not for the benefit of secured creditors," *Rambo v. Chase Manhattan Mortg. Corp. (In re Rambo)*, 297 B.R. 418, 433 (Bankr. E.D. Pa. 2003). It is important that these loyalties be

delineated because in many ways, the interests of the secured creditor are "totally antagonistic to the interests of the general unsecured creditors." *Feinstein*, 247 B.R. at 507; *see also* 7 Collier on Bankruptcy ¶ 704.02[1] at 704-8 (16th ed.) (noting potential for conflicts of interest in such transactions). Further, secured creditors, whose liens survive the bankruptcy process, need neither the protection nor assistance of the trustee in liquidating their claims, as they may continue to avail themselves of foreclosure proceedings. *See Dewsnup v. Timm*, 502 U.S. 410, 417-418 (1992). Nor do trustees need to administer the claims of such creditors, and many jurisdictions even prohibit compensation to the trustee for liquidating fully encumbered assets. *See In re Lan Associates XI, LP.*, 192 F.3d 109, 120 (3rd Cir. 1999) ("a trustee who expends time and effort administering fully encumbered assets should not receive compensation except to the extent that his actions provide an actual benefit to the estate."); *In re Scoggins*, 517 B.R. 206 (Bankr. E.D. Cal. 2014) (trustee compensation exceeding amount distributed to unsecured creditors was unreasonable).

Allowing trustees to sell fully encumbered assets invites self-dealing. History shows that this concern is far from hypothetical. As noted by this Court, in codifying the abandonment procedures in Section 554,

> Congress was aware of the claim that formerly some trustees took burdensome or valueless property into the estate and sold it in order to increase their commissions. Some of the early cases condemned this particular

> practice in no uncertain terms, and decried the practice of selling burdensome or valueless property simply to obtain a fund for their own administrative expenses.

K.C. Machine, 816 F.2d at 246; *see also In re KVN Corp.*, 514 B.R. 1, 7 (B.A.P. 9th Cir. 2014) (describing "past abuses"). Indeed, "[t]he existence of nominal asset cases, in which the bankruptcy system is operated primarily for the benefit of those operating it, has been one of the most frequently expressed criticisms" of the prior bankruptcy system. H. Rep. No. 95-595, at 94 (1977). Addressing these concerns, this Court's *K.C. Machine* decision admonished against continued "attempt[s] by the trustee to churn property worthless to the estate just to increase fees." *Id*.

Yet, this case presents exactly the scenario that concerned Congress in 1977, and later, this Court in *K.C. Machine*. For selling the debtor's underwater home, the trustee was compensated handsomely receiving **$4,734.55** in fees and costs. Trustee's Final Report and Account, Addendum A, BR Dkt. 104, at 9. The real estate broker was paid **$9,600**, and closing costs totaled more than $**2,800**. *Id*. at 4. By contrast, after the trustee was paid, the total distribution to the estate's general unsecured creditors was **$512**. *Id*. at 10. The primary beneficiaries of this transaction is obvious.

Selling a debtor's residence, which should be protected from liquidation under established bankruptcy practices, and evicting her, in order to benefit the

trustee (rather than the estate) is a form of abuse. Unfortunately, today, the opportunities for this abuse are especially pronounced in regions of the country where consumers continue to struggle from the effects of the housing crisis. If this Court were to endorse the sale of underwater homes by Chapter 7 trustees, despite its admonishment in *K.C. Machine* and despite deeply rooted bankruptcy practice, then the door to this lucrative, and abusive, practice would be flung open.

Given the above principles, it is wholly improper for a "Chapter 7 trustee [to] act as a liquidating agent for secured creditors who should liquidate their own collateral." *Feinstein*, 247 B.R. at 507.

B. Carving Out A Token Payment To The Bankruptcy Estate Does Not Ameliorate This Otherwise Improper Transaction.

Carving out a token payment to the bankruptcy estate does not save transactions such as the one in this case. "The approval of such token 'carve outs'… is a practice neither contemplated by nor provided for in the Bankruptcy Code." *In re Tobin*, 202 B.R. 339, 340 (Bankr. D.R.I. 1996).

There is good reason that such carve-out agreements are absent from the Code. Their obvious function and purpose is to avoid the above limitations normally placed on the sale of fully encumbered property. The *Feinstein* Court succinctly described the workings of such transaction:

> It is not rare that trustees of Chapter 7 estates are approached by secured creditors who seek the trustee's help to liquidate fully encumbered collateral. They

> realize that before the trustee is willing to go along with the proposition the secured creditor must put a little sweetener in the deal by agreeing to pay sufficient sums to compensate the trustee and to pay other costs of administration. The more sophisticated trustee may demand that the secured creditor throw in a pittance to pay a meaningless dividend to unsecured creditors, making the arrangement more palatable to the Court.

Feinstein, 247 B.R. at 507. And it is clear that the parties to such agreements stand to obtain a personal benefit they otherwise could not have obtained:

> The proposition is very attractive from the secured creditor's point of view and economically sound because it may stave off a possible attempt by the Trustee to seek to surcharge the collateral and, most importantly, save the potentially expensive cost of a foreclosure suit. The offered deal is also attractive to the trustee because it assures that he or she will earn a commission in an otherwise no asset case and may seek a commission based on the gross sales price and not on the net distributed to parties of interest.

Id.; *see also In re Fialkowski*, No. 12-12231K, 2012 Bankr. LEXIS 5608 at *7 n. 4 (Bankr. W.D.N.Y. Dec. 3, 2012) ("It is often beneficial for a lienholder to let a bankruptcy trustee sell its collateral, instead of incurring the expense of state-law foreclosure and sale.").

"Carve-out" agreements also fundamentally alter the Code's distribution scheme, by allowing the parties to dictate how the proceeds of the sale will be distributed among the creditors. Needless to say, the Code contains a complex and carefully balanced scheme of distribution that accounts for secured claims, priority

claims, unsecured nonpriority claims, and even the disposition of certain property attached by tax liens. 11 U.S.C. §§ 506, 507, 726, 724 (respectively). Transactions such as this one overwrite this scheme by assigning distributions at the whim of the trustee and parties to the sale. This is most commonly seen when Section 724(b) calls for a specific method of distribution for properties secured by tax liens. *See, e.g.*, *In re Bino's Inc.*, 182 B.R. 784, 788-89 (Bankr. N.D. Ill. 1995). But it is also apparent in this case, where the second mortgage holder – who did not actually file a claim, but whose claim would be wholly unsecured if it had—received a total payout of 16% of its debt ($6,000 payment on its $37,000 loan balance). However, the other unsecured creditors—three of whom actually did file claims—received a total payout of 2.4% on their claims. Trustee's Final Report and Account, Addendum A, BR Dkt. 104, at 10. These different payouts to unsecured creditors appear to violate the pro rata distribution requirement of 11 U.S.C. § 726(b) because one general unsecured creditor—the holder of an unsecured claim based on the second mortgage—received more than other general unsecured creditors.

These concerns have led a number of courts to reject such transactions. *See e.g.*, *Tobin*, 202 B.R. at 340 ("We are aware of no valid reason why the practice should be encouraged or allowed to continue."); *Feinstein*, 247 B.R. at 509.

Even authorities that have allowed the concept of a carve-out agreement have done so with great skepticism. For example, the Ninth Circuit Bankruptcy Appellate Panel has allowed carve-out agreements in limited circumstances, but has applied a "presumption of impropriety" against them. *KVN*, 514 B.R. at 7. Rebutting the presumption requires *inter alia*, a showing not only that there will be some distribution to the unsecured creditors, but that such distribution will be "meaningful." *Id*. at 8.

The official Handbook for Chapter 7 Trustees adopts a similar stance as the *KVN* Court. It allows carve-out agreements only if it "will result in a meaningful distribution to creditors." Handbook for Chapter 7 Trustees, published by the Executive Office for United States Trustee, at 4-14 (2012). However, "[i]f the sale will not result in a *meaningful* distribution to creditors, the trustee must abandon the asset." *Id* (emphasis added).

Although overlooked by the court below, the instant "carve-out" transaction violates these common law principles, as well as the mandate of the U.S. Trustee's Office itself. The debtor's home (referred to as the "Ypsilanti property") was apparently underwater with a first mortgage balance of $189,020.74, and a second mortgage balance of approximately $37,000. The $160,000 in proceeds from the trustee's proposed sale would be disbursed as follows: $138,400.00 to the first mortgagee, $6,000.00 to the second mortgagee, $9,600.00 to the realtor, and

approximately $6,000 for the bankruptcy estate. Appellant's Br. at 4. Of the $6,000 that was left for the bankruptcy estate, $512 was distributed to unsecured creditors, as the remainder was consumed by administrative expenses and the trustee's commission. Trustee's Final Report and Account, Addendum A, BR Dkt. 104, at 8-10.

Much like the other interested claimants whose rights can be materially prejudiced regardless of whether they consent to the terms of a carve-out agreement, debtors also stand to lose important rights and remedies in these transactions. Should a creditor pursue liquidation on its own outside of bankruptcy, then the debtor could, for instance, raise defenses against home foreclosure, or pursue loss mitigation remedies that would prevent foreclosure altogether. Or, as illustrated here, the debtor would apparently have a right to redemption under Michigan law. *See* Appellant's Br. at 7-12 (citing M.C.L. 600.3240). These important rights for homeowners are lost forever in the face of these backroom, "carve-out" deals.

There is simply no reason to deprive homeowners and other consumers of these rights in these "carve-out" deals. By the very nature of the transactions, they provide minimal, if any, benefit to the bankruptcy estate, and serve only to increase compensation to the trustee, allowing the mortgage holder to short-circuit state foreclosure laws and protections.

II. Even Assuming The Carve-Out Transaction Could Permissibly Take Place, The Debtor Is Entitled To Assert An Exemption Against The Property Or Its Proceeds.

Even if carve-out agreements are generally permissible as a device to artificially create a benefit to the estate from the sale of fully encumbered property, it is clearly inappropriate to permit the use of this device to justify the sale of fully encumbered property in which an individual debtor can claim an exemption.

"[E]xemptions in bankruptcy cases are part and parcel of the fundamental bankruptcy concept of a 'fresh start.'" *Schwab v. Reilly*, 560 U.S. 770, 791 (2010). "Exemptions let the debtor maintain an appropriate standard of living as he or she goes forward after the bankruptcy case," and aid a debtor's 'fresh start' by enabling the debtor to emerge from bankruptcy with adequate and necessary possessions." *In re Farr*, 278 B.R. 171, 175 (B.A.P. 9th Cir. 2002) (quoting H. R. Rep. No. 95–595, at 126 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6087); *see also In re Demeter*, 478 B.R. 281, 292 (Bankr. E.D. Mich. 2012) ("the exemption scheme under § 522(d) is crucial to, and an integral part of a debtor's 'fresh start.'"). Thus, "[t]he trustee need not and should not collect or take possession of property that the debtor has claimed as exempt." 7 Collier on Bankruptcy ¶ 704.02[1] at 704-8 (16th ed.).

The federal exemption scheme defines a permissible exemption by the debtor's "interest," not by "equity" or "value." *See* 11 U.S.C. § 522(d)(1) (one of

the exemptions asserted here, defining a "debtor's aggregate *interest*, not to exceed $15,000 in value, in real property" (emphasis added)). Thus, a debtor can exempt any interest in property, even a possessory interest, *see In re Maddox*, 27 B.R. 592, 596 (N.D. Ga. 1983) (this phrase is "a broad term encompassing many rights of a party, tangible, intangible, legal and equitable"), and even if there is no equity in the asset, *In re Chesanow*, 25 B.R. 228, 229 (Bankr. D. Conn. 1982) ("The word 'interest' is not the substantive equivalent of the word 'equity'").[3]

These exemptions are so crucial to a debtor's fresh start that they can only be denied based on the specific, limited circumstances enumerated in the Code. *Law v. Siegel*, 134 S. Ct. 1188, 1194-95 (2014) (bankruptcy court erred by surcharging a debtor's exemption to account for debtor's own fraud). Except in those circumstances, "exempt property 'is not liable' for the payment of 'any [pre-petition] debt' or 'any administrative expense.'" *Ellman v. Baker (In re Baker)*, 791 F.3d 677, 681 (6th Cir. 2015). Further, a debtor may seek protection of the Code's exemption scheme by amendment – even after the bankruptcy case is closed. *See id*., at 683 (citing *Siegel*); *see also Lucius v. McLemore*, 741 F.2d 125, 127 (6th Cir. 1984) (pre-*Siegel* case freely allowing amendments for exemptions at least until the case is closed).

[3] Here, the debtor has properly asserted an exemption against her redemption interest in her home – an interest existing at commencement of her case. Appellant's Br. at 7-12.

Despite these clearly established rules concerning exemptions, the court below did not rely on the Code to deny the debtor her exemption, and instead relied on the unpublished decision of *Baldridge v. Ellmann (In re Baldridge)*, 553 F. App'x 598, 599 (6th Cir. 2014) ("*Baldridge II*"). This Court should not adopt the *Baldridge* approach as binding precedent.

First, the *Baldridge* case was based on the erroneous idea that Section 522(c)(2) prevents the debtor from asserting an exemption on property that is fully encumbered. *See Baldridge v. Ellmann (In re Baldridge)*, No. 12-14612, 2013 U.S. Dist. LEXIS 58512, at *3-4 (E.D. Mich. Apr. 24, 2013) ("*Baldridge I*") (citing Section 522(c)(2), and explaining that "[c]onsequently, if the amount of the secured debt exceeds the fair market value of the property such that there is no equity, the exemption is lost").[4] In fact, parsing Section 522(c)(2) shows that it does not read the way the court in *Baldridge I* explained. That provision simply states that "property exempted under this section" is still liable for a "debt secured by a lien..." 11 U.S.C. § 522(c)(2). However, the general rule remains that, for other debts, such as administrative expenses and other general unsecured debts, a debtor's exemption is not liable. *See* 11 U.S.C. § 522(c), (k). Section 522 does not say that exemptions can be denied on the basis that a particular value was not

[4] Because the district court opinion in *Baldridge* contains more analysis, this brief will focus on the discussion in *Baldridge I*.

realized until after the petition. Nor is there support anywhere else in the Code for such a notion.

The fact that there is no particular provision in the Code that allows the bankruptcy court to deny an exemption on this basis – that the exempted value was only created postpetition – mandates protection of the debtor's exemption. *Siegel*, 134 S. Ct. at 1194-95. Both *Baldridge I* and *Baldridge II* were decided before the Supreme Court clarified this exact issue in *Siegel*.

Even without taking the effects of *Siegel* into account, many courts were already going in a different direction from *Baldridge*. As succinctly explained by one: "Debtor's right to claim the homestead exemption, along with the dollar amount to be claimed, was fixed as of the Petition Date. However, the extent to which the Debtor is entitled to be paid on account of his claimed homestead exemption is governed by the actual sale price." *In re Mannone*, 512 B.R. 148, 153-54 (Bankr. E.D. N.Y. 2014); *see also In re Wilson*, 494 B.R. 502, 506 (Bankr. C.D. Cal. 2013) ("now that the Debtor believes that there may be exemption value because the lenders may pay a tip to the estate for the privilege of avoiding foreclosure proceedings… the Debtor is entitled to file her amended Schedule C to include exemptions relevant to the Properties."). In both *Mannone* and *Wilson*, the debtor was entitled to claim as exempt money that was realized from the sale of property that was underwater at commencement of the case.

In a strained attempt to escape this legal reality, Appellee takes the remarkable position that exemptions are unavailable to the sale proceeds because the proceeds are not property of the estate. As reasoned by Appellee:

> This money is a post-petition asset generated by the work of the Appellee/Trustee. It was not property of the estate at the time Appellant/Debtor filed her bankruptcy petition. Under bankruptcy law, as a post-petition asset, it cannot be subject to an exemption claim.

Appellee's Br. at 19. This argument misstates the law. The bankruptcy estate clearly includes "[p]roceeds, product, offspring rents, or profits of or from property of the estate." 11 U.S.C. § 541(a)(6).

However, even accepting Appellee's faulty position, its reasoning actually supports Appellant's case. It is hornbook bankruptcy law that a Chapter 7 bankruptcy "shield[s] from creditors [a debtor's] postpetition earnings and acquisitions." *Harris v. Viegelahn*, 135 S. Ct. 1829, 1835 (2015). Thus, if Appellee is correct that the money resulting from the sale is not property of the estate, then the trustee should not be administering the asset in the first place, *see* 11 U.S.C. § 704(a)(1) (trustee's duty is limited to the administration of estate property), and in any event, the debtor would not need to assert an exemption to be entitled to the proceeds, *see Harris*, 135 S. Ct. at 1835 (property not belonging to the estate belongs to the debtor).

In the end, should this Court find carve-out agreements acceptable, it should at a minimum, reinforce the text of the Bankruptcy Code and the *Siegel* decision by adopting the reasoning of *Mannone* and *Wilson*, and allowing debtors to protect exemptions in such transactions.

CONCLUSION

For the reasons stated above, *amici curiae* asks this court to reverse the decision of the bankruptcy court.

Respectfully submitted,

/s/ Tara Twomey

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 6th Cir. R. 29(a)(2)(5) because this brief contains 4,622 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This filing complies with Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point type.

3. This brief has been scanned for viruses pursuant to Rule 27(h)(2).

/s/ Tara Twomey
Tara Twomey
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on January 5, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Tara Twomey
Tara Twomey
Attorney for Amicus Curiae

ADDENDDUM A
Trustee's Final Report and Account
Bankruptcy Case No: 14-48421 (Bankr. E.D. Mich.)
Docket # 104

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN

In re:	§	Case No. 14-48421-MBM
	§	
SUSAN G. BROWN	§	
	§	
	§	
Debtor	§	

TRUSTEE'S FINAL REPORT (TFR)

The undersigned trustee hereby makes this Final Report and states as follows:

1. A petition under chapter 7 of the United States Bankruptcy Code was filed on 05/15/2014. The undersigned trustee was appointed on 05/15/2014.

2. The trustee faithfully and properly fulfilled the duties enumerated in 11 U.S.C. § 704.

3. All scheduled and known assets of the estate have been reduced to cash, released to the debtor as exempt property pursuant to 11 U.S.C. § 522, or have been or will be abandoned pursuant to 11 U.S.C. § 554. An individual estate property record and report showing the disposition of all property of the estate is attached as **Exhibit A**.

4. The trustee realized gross receipts of $159,546.80

Funds were disbursed in the following amounts:

Payments made under an interim distribution	$0.00
Administrative expenses	$13,085.45
Bank service fees	$128.45
Other Payments to creditors	$147,086.35
Non-estate funds paid to 3rd Parties	($6,000.00)
Exemptions paid to the debtor	$0.00
Other payments to the debtor	$0.00
Leaving a balance on hand of[1]	$5,246.55

The remaining funds are available for distribution.

5. Attached as **Exhibit B** is a cash receipts and disbursements record for each estate bank account.

[1] The balance on funds on hand in the estate may continue to earn interest until disbursed. The interest earned prior to disbursements will be distributed pro rata to creditors within each priority category. The trustee may receive additional compensation not to exceed the maximum compensation set forth under 11 U.S.C. § 326(a) on account of the disbursement of the additional interest.

6. The deadline for filing non-governmental claims in this case was 07/01/2015 and the deadline for filing government claims was 07/01/2015. All claims of each class which will receive a distribution have been examined and any objections to the allowance of claims have been resolved. If applicable, a claims analysis, explaining why payment on any claim is not being made, is attached as **Exhibit C**.

7. The Trustee's proposed distribution is attached as **Exhibit D**.

8. Pursuant to 11 U.S.C. § 326(a), the maximum compensation allowable to the trustee is $4,684.59. To the extent that additional interest is earned before case closing, the maximum compensation may increase.

The trustee has received $0.00 as interim compensation and now requests the sum of $4,684.59, for a total compensation of $4,684.59[2]. In addition, the trustee received reimbursement for reasonable and necessary expenses in the amount of $237.00, and now requests reimbursement for expenses of $49.96, for total expenses of $286.96.

Pursuant to Fed R Bank P 5009, I hereby certify, under penalty of perjury, that the foregoing report is true and correct.

Date: 06/08/2016 By: /s/ Douglas S. Ellmann
Trustee

STATEMENT: This Uniform form is associated with an open bankruptcy case, therefore, Paperwork Reduction Act exemption 5 C.F.R. § 1320.4(a)(2) applies.

[2] If the estate is administratively insolvent, the dollar amounts reflected in this paragraph may be higher than the amounts listed in the Trustee's Proposed Distribution (Exhibit D).

FORM 1

INDIVIDUAL ESTATE PROPERTY RECORD AND REPORT

ASSET CASES

Case No.: 14-48421-MBM
Case Name: BROWN, SUSAN G.
For the Period Ending: 6/8/2016

Trustee Name: Douglas S. Ellmann
Date Filed (f) or Converted (c): 05/15/2014 (f)
§341(a) Meeting Date: 06/18/2014
Claims Bar Date: 07/01/2015

1		2	3	4	5	6
Asset Description (Scheduled and Unscheduled (u) Property)		**Petition/ Unscheduled Value**	**Estimated Net Value (Value Determined by Trustee, Less Liens, Exemptions, and Other Costs)**	**Property Abandoned OA =§ 554(a) abandon.**	**Sales/Funds Received by the Estate**	**Asset Fully Administered (FA) / Gross Value of Remaining Assets**
Ref. #						
1	5832 Rustic Lane Ypsialnti, MI 48197	$170,000.00	$2,500.00		$159,546.80	FA
2	Cash on hand	$50.00	$0.00		$0.00	FA
3	Bank; Checking/Savings; Account No.:	$1,000.00	$0.00		$0.00	FA
4	Living and Dining room, bedroom, kitchen furniture & utensils.	$1,500.00	$0.00		$0.00	FA
5	Clothing owned by debtors at debtors' residence and in debtors' possession.	$1,000.00	$0.00		$0.00	FA
6	jewerly	$700.00	$0.00		$0.00	FA
7	IRA	$42,931.00	$0.00		$0.00	FA
8	2009 GMC Acadia	$16,000.00	$0.00		$0.00	FA
TOTALS (Excluding unknown value)		**$233,181.00**	**$2,500.00**		**$159,546.80**	**Gross Value of Remaining Assets** **$0.00**

Major Activities affecting case closing:

The Trustee has had oral argument on the Bankruptcy Court appeal.

The Trustee's real estate broker, Dunlap and Associates, has listed the debtor's home for sale.

Initial Projected Date Of Final Report (TFR): 05/15/2017
Current Projected Date Of Final Report (TFR): 05/15/2017

/s/ DOUGLAS S. ELLMANN
DOUGLAS S. ELLMANN

Exhibit B

FORM 2
CASH RECEIPTS AND DISBURSEMENTS RECORD

Case No.	14-48421-MBM	**Trustee Name:**	Douglas S. Ellmann
Case Name:	BROWN, SUSAN G.	**Bank Name:**	Bank of Texas
Primary Taxpayer ID #:	**-***6022	**Checking Acct #:**	******3625
Co-Debtor Taxpayer ID #:		**Account Title:**	
For Period Beginning:	5/15/2014	**Blanket bond (per case limit):**	$2,000,000.00
For Period Ending:	6/8/2016	**Separate bond (if applicable):**	

1	2	3	4		5	6	7
Transaction Date	**Check / Ref. #**	**Paid to/ Received From**	**Description of Transaction**	**Uniform Tran Code**	**Deposit $**	**Disbursement $**	**Balance**
03/24/2015		1st Choice Title Agency LLC	per c/o 3/3/15	*	$6,000.00		$6,000.00
	{1}		$159,546.80	1110-000			$6,000.00
			Payoff First Loan- GreenTree $(141,086.35)	4110-000			$6,000.00
			Payoff Second Loan- First Tennessee $(6,000.00)	4110-000			$6,000.00
			Realtor Commission- Dunlap & Associates (5,600.00) Premier Choice Realty (4,000.00) $(9,600.00)	3510-000			$6,000.00
			Settlement or closing fee- 1st Choice Title Agency, LLC $(500.00)	2500-000			$6,000.00
			Owner's Title Insurance- 1st Choice Title Agency, LLC $(937.45)	2500-000			$6,000.00
			Wire Fee- 1st Choice Title Agency, LLC $(25.00)	2500-000			$6,000.00
			City/County Tax/Stamps- 1st Choice Title Agency $(176.00)	2820-000			$6,000.00
			State Tax/stamps- 1st Choice Title Agency, LLC $(1,200.00)	2820-000			$6,000.00
			2014 Summer Tax Balance- Washtenaw County Treasurer $(22.00)	2820-000			$6,000.00
			Carve Out per Court Order dated 03/03/2015 $6,000.00	8500-002			$6,000.00
03/31/2015		Bank of Texas	Account Analysis Fee	2600-000		$10.00	$5,990.00
04/10/2015	3001	Hanson Reporting	court reporting fees	2990-000		$388.00	$5,602.00
04/30/2015		Bank of Texas	Account Analysis Fee	2600-000		$10.00	$5,592.00
05/29/2015		Bank of Texas	Account Analysis Fee	2600-000		$10.00	$5,582.00
06/25/2015	3002	ELLMANN & ELLMANN, P.C.	Court filing fee for sale motion ($176.00); court costs re appeal record transmittal (61.00)	2200-000		$237.00	$5,345.00
06/30/2015		Bank of Texas	Account Analysis Fee	2600-000		$10.00	$5,335.00
07/31/2015		Bank of Texas	Account Analysis Fee	2600-000		$10.00	$5,325.00
08/31/2015		Bank of Texas	Account Analysis Fee	2600-000		$10.00	$5,315.00
09/30/2015		Bank of Texas	Account Analysis Fee	2600-000		$10.00	$5,305.00
10/30/2015		Bank of Texas	Account Analysis Fee	2600-000		$10.00	$5,295.00
11/30/2015		Bank of Texas	Account Analysis Fee	2600-000		$10.00	$5,285.00
12/31/2015		Bank of Texas	Account Analysis Fee	2600-000		$10.00	$5,275.00
01/29/2016		Bank of Texas	Account Analysis Fee	2600-000		$10.00	$5,265.00
02/29/2016		Bank of Texas	Account Analysis Fee	2600-000		$10.00	$5,255.00
03/31/2016		Bank of Texas	Account Analysis Fee	2600-000		$8.45	$5,246.55
				SUBTOTALS	$6,000.00	$759.45	

Exhibit B

FORM 2
CASH RECEIPTS AND DISBURSEMENTS RECORD

Case No.	14-48421-MBM	**Trustee Name:**	Douglas S. Ellmann
Case Name:	BROWN, SUSAN G.	**Bank Name:**	Bank of Texas
Primary Taxpayer ID #:	**-***6022	**Checking Acct #:**	******3625
Co-Debtor Taxpayer ID #:		**Account Title:**	
For Period Beginning:	5/15/2014	**Blanket bond (per case limit):**	$2,000,000.00
For Period Ending:	6/8/2016	**Separate bond (if applicable):**	

1	2	3	4		5	6	7
Transaction Date	**Check / Ref. #**	**Paid to/ Received From**	**Description of Transaction**	**Uniform Tran Code**	**Deposit $**	**Disbursement $**	**Balance**
			TOTALS:		$6,000.00	$753.45	$5,246.55
			Less: Bank transfers/CDs		$0.00	$0.00	
			Subtotal		$6,000.00	$753.45	
			Less: Payments to debtors		$0.00	$0.00	
			Net		$6,000.00	$753.45	

For the period of 5/15/2014 to 6/8/2016

Total Compensable Receipts:	$159,546.80
Total Non-Compensable Receipts:	$0.00
Total Comp/Non Comp Receipts:	$159,546.80
Total Internal/Transfer Receipts:	$0.00
Total Compensable Disbursements:	$160,300.25
Total Non-Compensable Disbursements:	($6,000.00)
Total Comp/Non Comp Disbursements:	$154,300.25
Total Internal/Transfer Disbursements:	$0.00

For the entire history of the account between 03/05/2015 to 6/8/2016

Total Compensable Receipts:	$159,546.80
Total Non-Compensable Receipts:	$0.00
Total Comp/Non Comp Receipts:	$159,546.80
Total Internal/Transfer Receipts:	$0.00
Total Compensable Disbursements:	$160,300.25
Total Non-Compensable Disbursements:	($6,000.00)
Total Comp/Non Comp Disbursements:	$154,300.25
Total Internal/Transfer Disbursements:	$0.00

Exhibit B

FORM 2
CASH RECEIPTS AND DISBURSEMENTS RECORD

Case No.	14-48421-MBM	**Trustee Name:**	Douglas S. Ellmann
Case Name:	BROWN, SUSAN G.	**Bank Name:**	Bank of Texas
Primary Taxpayer ID #:	**-***6022	**Checking Acct #:**	******3625
Co-Debtor Taxpayer ID #:		**Account Title:**	
For Period Beginning:	5/15/2014	**Blanket bond (per case limit):**	$2,000,000.00
For Period Ending:	6/8/2016	**Separate bond (if applicable):**	

1	2	3	4		5	6	7
Transaction Date	**Check / Ref. #**	**Paid to/ Received From**	**Description of Transaction**	**Uniform Tran Code**	**Deposit $**	**Disbursement $**	**Balance**

TOTAL - ALL ACCOUNTS	**NET DEPOSITS**	**NET DISBURSE**	**ACCOUNT BALANCES**
	$6,000.00	$753.45	$5,246.55

For the period of 5/15/2014 to 6/8/2016

Total Compensable Receipts:	$159,546.80
Total Non-Compensable Receipts:	$0.00
Total Comp/Non Comp Receipts:	$159,546.80
Total Internal/Transfer Receipts:	$0.00
Total Compensable Disbursements:	$160,300.25
Total Non-Compensable Disbursements:	($6,000.00)
Total Comp/Non Comp Disbursements:	$154,300.25
Total Internal/Transfer Disbursements:	$0.00

For the entire history of the case between 05/15/2014 to 6/8/2016

Total Compensable Receipts:	$159,546.80
Total Non-Compensable Receipts:	$0.00
Total Comp/Non Comp Receipts:	$159,546.80
Total Internal/Transfer Receipts:	$0.00
Total Compensable Disbursements:	$160,300.25
Total Non-Compensable Disbursements:	($6,000.00)
Total Comp/Non Comp Disbursements:	$154,300.25
Total Internal/Transfer Disbursements:	$0.00

CLAIM ANALYSIS REPORT

Exhibit C

Case No. 14-48421-MBM
Case Name: BROWN, SUSAN G.

Trustee Name: Douglas S. Ellmann
Date: 6/8/2016

Claims Bar Date: 07/01/2015

Claim No.:	Creditor Name	Claim Class	Claim Status	Uniform Tran Code	Amount Allowed	Amount Paid	Interest	Tax	Net Remaining Balance
1	PYOD, LLC ITS SUCCESSORS AND ASSIGNS AS ASSIGNEE of Citibank, N.A. Resurgent Capital Services PO Box 19008 Greenville SC 29602	General Unsecured § 726(a)(2)	Allowed	7100-000	$15,142.24	$0.00	$0.00	$0.00	$15,142.24
2	PORTFOLIO RECOVERY ASSOCIATES, LLC POB 12914 Norfolk VA 23541	General Unsecured § 726(a)(2)	Allowed	7100-000	$2,601.18	$0.00	$0.00	$0.00	$2,601.18
3	PORTFOLIO RECOVERY ASSOCIATES, LLC POB 12914 Norfolk VA 23541	General Unsecured § 726(a)(2)	Allowed	7100-000	$3,730.91	$0.00	$0.00	$0.00	$3,730.91
					$21,474.33	**$0.00**	**$0.00**	**$0.00**	**$21,474.33**

CLAIM ANALYSIS REPORT

Exhibit C

Case No. 14-48421-MBM
Case Name: BROWN, SUSAN G.
Claims Bar Date: 07/01/2015

Trustee Name: Douglas S. Ellmann
Date: 6/8/2016

CLAIM CLASS SUMMARY TOTALS

Claim Class	Claim Amount	Amount Allowed	Amount Paid	Interest	Tax	Net Remaining Balance
General Unsecured § 726(a)(2)	$21,474.33	$21,474.33	$0.00	$0.00	$0.00	$21,474.33

Exhibit D

TRUSTEE'S PROPOSED DISTRIBUTION

Case No.: 14-48421-MBM
Case Name: SUSAN G. BROWN
Trustee Name: Douglas S. Ellmann

Balance on hand: $5,246.55

Claims of secured creditors will be paid as follows: NONE

Total to be paid to secured creditors: $0.00
Remaining balance: $5,246.55

Applications for chapter 7 fees and administrative expenses have been filed as follows:

Reason/Applicant	**Total Requested**	**Interim Payments to Date**	**Proposed Payment**
DOUGLAS S. ELLMANN, Trustee Fees	$4,684.59	$0.00	$4,684.59
DOUGLAS S. ELLMANN, Trustee Expenses	$286.96	$237.00	$49.96

Total to be paid for chapter 7 administrative expenses: $4,734.55
Remaining balance: $512.00

Applications for prior chapter fees and administrative expenses have been filed as follows: NONE

Total to be paid to prior chapter administrative expenses: $0.00
Remaining balance: $512.00

In addition to the expenses of administration listed above as may be allowed by the Court, priority claims totaling $0.00 must be paid in advance of any dividend to general (unsecured) creditors.

Allowed priority claims are: NONE

Total to be paid to priority claims: $0.00
Remaining balance: $512.00

The actual distribution to wage claimants included above, if any, will be the proposed payment less applicable withholding taxes (which will be remitted to the appropriate taxing authorities).

Timely claims of general (unsecured) creditors totaling $21,474.33 have been allowed and will be paid *pro rata* only after all allowed administrative and priority claims have been paid in full. The timely allowed general (unsecured) dividend is anticipated to be 2.4 percent, plus interest (if applicable).

Timely allowed general (unsecured) claims are as follows:

Claim No.	Claimant	Allowed Amt. of Claim	Interim Payments to Date	Proposed Amount
1	PYOD, LLC its successors and assigns as assignee	$15,142.24	$0.00	$361.03
2	Portfolio Recovery Associates, LLC	$2,601.18	$0.00	$62.02
3	Portfolio Recovery Associates, LLC	$3,730.91	$0.00	$88.95

Total to be paid to timely general unsecured claims: $512.00
Remaining balance: $0.00

Tardily filed claims of general (unsecured) creditors totaling $0.00 have been allowed and will be paid *pro rata* only after all allowed administrative, priority and timely filed general (unsecured) claims have been paid in full. The tardily filed claim dividend is anticipated to be 0.0 percent, plus interest (if applicable).

Tardily filed general (unsecured) claims are as follows: NONE

Total to be paid to tardily filed general unsecured claims: $0.00
Remaining balance: $0.00

Subordinated unsecured claims for fines, penalties, forfeitures, or damages and claims ordered subordinated by the Court totaling $0.00 have been allowed and will be paid *pro rata* only after all allowed administrative, priority and general (unsecured) claims have been paid in full. The dividend for subordinated unsecured claims is anticipated to be 0.0 percent, plus interest (if applicable).

Subordinated unsecured claims for fines, penalties, forfeitures or damages and claims ordered subordinated by the Court are as follows: NONE

Total to be paid for subordinated claims: $0.00
Remaining balance: $0.00