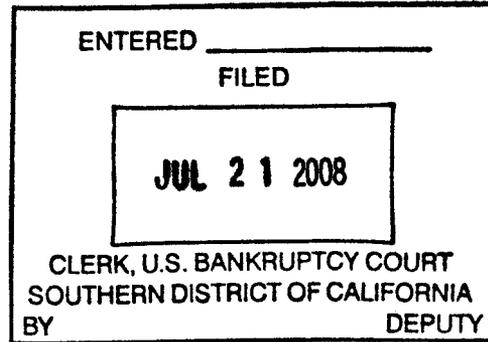


1 **WRITTEN DECISION - NOT FOR PUBLICATION**



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6 UNITED STATES BANKRUPTCY COURT
7 SOUTHERN DISTRICT OF CALIFORNIA

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11 In re) Case No. 05-13886-PB7
 12 CHRISTINA M. ROLL,) ORDER ON TRUSTEE'S
 13 Debtor.) FEE APPLICATION
 14 _____)

15 The debtor's estate included real property which was subject
 16 to a secured claim. The chapter 7 trustee sold the equity in the
 17 property to the debtor and the property remained subject to the
 18 secured claim. The trustee and the United States Trustee
 19 disagree on whether the amount of the secured claim should be
 20 included in the disbursements used to calculate the trustee's
 21 maximum allowable fee award under Bankruptcy Code § 326(a).
 22 After consideration, the Court concludes that it should not.

23 This Court has subject matter jurisdiction over the
 24 proceeding pursuant to 28 U.S.C. § 1334 and General Order
 25 No. 312-D of the United States District Court for the Southern

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1 District of California. This is a core proceeding under
2 28 U.S.C. § 157(b) (2) (A).

3 **BACKGROUND**

4 On October 14, 2005, Christina M. Roll (Debtor) filed a
5 petition and this case was commenced as a chapter 7. The chapter
6 7 trustee, Leslie Gladstone (Trustee) filed a motion to compel
7 turnover, and Debtor responded by converting to a chapter 13.
8 However, on October 3, 2006, the case was reconverted due to
9 Debtor's failure to actively participate in the chapter 13
10 process. The Trustee was reappointed.

11 Debtor's estate included her residential real property at
12 9438 Pearlwood Rd., Santee, CA (Property). The Property was
13 encumbered by a mortgage in favor of Countrywide Mortgage in the
14 approximate amount of \$225,000. Debtor claimed a homestead
15 exemption of \$75,000.

16 On January 22, 2007, the Court granted the Trustee's
17 application to employ a broker to market the Property. On
18 April 9, 2007, the Trustee filed and served a Notice of Intended
19 Action indicating her intent to "sell the Estate's equity in the
20 debtor's [Property] for a net purchase price of \$35,000 to the
21 debtor, calculated using a gross purchase price of \$365,000, less
22 \$225,000 estimated mortgage, less \$75,000 exemption, and less
23 \$30,000 approximate costs of sale." The Trustee provided a copy
24 of the "Residential Purchase Agreement" which provided:

25 Buyer agrees to purchase and Seller agrees to sell the
26 Estate's equity in the Property for a net purchase
price of ... \$35,000.00...

1 The Notice of Intent was unopposed and on May 24, 2007, the Court
2 entered an Order authorizing the Trustee to sell the Estate's
3 interest in the Property to the Debtor for a net payment of
4 \$35,000 "subject to all liens and encumbrances, including . . .
5 the lien by Countrywide Mortgage having an approximate balance of
6 \$225,000.00." The Order provided that the "Countrywide Mortgage
7 lien and real property taxes will remain the responsibility of
8 the Debtor."

9 On August 8, 2007, the Trustee filed her initial fee
10 application seeking fees of \$12,755.32. The Trustee calculated
11 her fees "based upon receipts of the estate in the sum of
12 \$365,106.39; less exemption of \$75,000.00, and less a voluntary
13 reduction of fees of \$5,000..." The \$365,106.39 figure was a
14 hypothetical "gross purchase price" which included the secured
15 claim of Countrywide Mortgage. The application was unopposed,
16 and approved by the Court.

17 On October 9, 2007, the United States Trustee filed a motion
18 for reconsideration of the fee application and order setting
19 aside approval of the fees. The Court granted the motion, and
20 set a briefing schedule on the issue of whether the Trustee's fee
21 calculation could be based upon a gross sales price which
22 included the secured claim, or whether it was limited to the
23 amount actually paid to (and eventually disbursed by) the estate.
24 The United State Trustee filed an Objection to the Application
25 and the Trustee filed her response thereto. A hearing was held
26 and the Court took the matter under submission.

1 treated as a distribution under § 326(a) as a sort of
2 "constructive distribution" to the secured creditor. In support
3 of this contention Trustee cites two Ninth Circuit cases -
4 Southwestern Media, Inc., 708 F.2d 419 (9th Cir. 1983) and Matter
5 of York International Building, Inc., 527 F.2d 1061 (9th Cir.
6 1975).

7 In Southwestern Media, Inc., the court stated that an equity
8 sale subject to an existing lien should be considered a
9 constructive disbursement to the lienholder for purposes of cap
10 calculations. 708 F.2d at 423-24. However, as the United
11 States Trustee points out, the statement is dictum. The
12 Southwestern Media case did not involve a sale subject to a lien.
13 Rather, the trustee in that case had sold the property free and
14 clear and actually paid off the lienholders.

15 The court in Matter of York International Building, Inc.,
16 however, did suggest that where property was sold subject to a
17 secured claim the amount of the claim was to be included in the
18 cap calculation. York is, in its own way, a form of dictum. The
19 court explained that it was trying to determine a reasonable
20 trustee's fee in a chapter X proceeding. It noted:

21 Although § 48 of the Bankruptcy Act (11 U.S.C. § 76),
22 dealing with the compensation of trustees in ordinary
23 bankruptcy, is expressly made inapplicable to fees
24 allowed in Chapter X proceedings by 11 U.S.C. § 641,
there is no sound reason we cannot also look to the
former for some guidance in arriving at a reasonable
fee on the record before us.

25 527 F.2d at 1073. The panel then reviewed the percentage
26 structure applicable in ordinary bankruptcies, then noted that in

1 chapter X cases fees could not "exceed twice the maximum
2 allowance permitted in a normal administration." The reason why
3 fees in a chapter X case may have been higher is because the
4 trustee had conducted the business of the bankrupt, with all that
5 entails. 527 F.2d at 1074.

6 Then the court said:

7 Applying this formula to the record before us, we find
8 that as of January 31, 1974, the trustee had disbursed
9 a subtotal of \$1,071,401.19. To this we add the sum of
10 \$1,750,000.00 (footnote 12), the total sales price of
11 the property as authorized by the court order of March
12 2, 1973.

13 Id. Footnote 12, in turn, reads:

14 FN 12. For the purpose of calculating the trustee's
15 fee under this section, we treat the assumption of the
16 existing mortgages as a disbursement.

17 Id. Importantly, the last section referenced immediately
18 preceding the foregoing was 11 U.S.C. § 76(c)(1), (2), which was
19 the section which imposed the cap on chapter X cases at not more
20 than two times the maximum for normal administration.

21 The York panel does not disclose where the substance of
22 footnote 12 came from. To whatever extent it may have been
23 applicable in a chapter X case, it does not help us in an
24 "ordinary bankruptcy", which this case is, nor does it help us in
25 the circumstances of this case with its hypothetical "gross sales
26 price" that left the mortgage untouched.

27 The Court has some problem with the notion that a transfer
28 of property subject to a secured claim is a "disbursement,"
29 "constructive" or otherwise, to that secured creditor where no

1 actual payment is made. It is the Court's view that the present
2 case is distinguishable. In both the hypothetical situation in
3 Southwestern Media and the actual sale in York International, the
4 property of the estate was sold to a third party. In such a
5 case, although the secured creditor may receive no actual
6 distribution, there is at least an impact on the secured creditor
7 in that the "borrower" has changed. In the case at hand,
8 Countrywide Mortgage's position was not changed at all. As far
9 as Countrywide's secured claim is concerned, nothing happened.

10 It is to be noted that the Third Circuit Court of Appeals
11 considered a somewhat similar fee request by a trustee in In re
12 Lan Associates XI, L.P., 192 F.3d 109 (1999). There, the
13 question was whether the trustee could seek fees when the secured
14 creditor credit bid its debt because the debt of the estate was
15 thereby eliminated. The Third Circuit said "no". Many years
16 before, the Third Circuit had considered a case factually
17 analogous to the instant one. In American Surety Co. v. Freed,
18 224 F. 333 (1915), the court focused on what the estate received.
19 It observed: "The trustee sold for a small consideration his only
20 salable interest in the property, namely, the value of the
21 property, over and above the liens on the property." 224 F. at
22 337. To the same effect is In re Old Oregon Mfg. Co., 236 F. 804
23 (W.D. Wash. 1916).

24 The Court concludes that on facts such as in this case,
25 where the equity in property of the debtor's estate is sold to
26 the debtor with no actual distribution to the secured creditor,

1 the amount used in calculating the § 326(a) cap is the amount
2 actually paid to the trustee, regardless of how the transaction
3 is structured. In this case, that amount was \$35,000, not
4 \$365,000. Accordingly, the maximum compensation under § 362(a)
5 in this case is \$4,260.64.¹

6 **CONCLUSION**

7 For the reasons set forth above, the Court sustains the
8 United States Trustee's Objection to the Trustee's Application.
9 The prior award of fees in the amount of \$12,755.32 is hereby
10 reduced to \$4,260.64.

11 IT IS SO ORDERED.

12 DATED: JUL 21 2008

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16 PETER W. BOWIE, Chief Judge
17 United States Bankruptcy Court
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25 ¹ The Court adopts the calculations which are set forth at
26 Exhibit 2 to the January 14, 2008 Declaration of Randall Horton
filed in support to the United States Trustee's Objection to the
Application.