2	Marc S. Stern 1825 NW 65 <sup>th</sup> Street Seattle, WA 98117	Hon. Samuel J. Steiner Chapter 7			
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4				UDTCV COLIDT	
5		UNITED STATES FOR THE WESTERN			
6	In re:		)	NO. 02-11255	
7	,		)	DEBTORS' MEMORANDUM OF LAW RE TURNOVER MOTION	
8		Debtors.	)	LAW RETURNOVER MOTION	
9			)		
10			FACTS		
11	1. The de	ebtor was employed as	a real estat	te sales person by Windermere Real Estate	
12	Inc.				
13	2. At no	time was he ever a real	estate bro	ker or the designated broker at	
14	Windermere Real Estate.				
15	3. As a r	eal estate sales person,	his employ	yment was with Windermere and his rights	
16	compensation are a function of his employment contract with Windermere.				
17	4. Pursua	ant to the contract with	Winderme	ere, he was not entitled to receive any	
18	commission until such time as Windermere was paid. He was only entitled to receive				
19	commissions net of the amounts owed to Windermere and owed pursuant to the agreements to				
20	other persons, i.e. listing agents.				
21	5. For ea	ch transaction that the	trustee clai	ims payment, the transaction did not close	
22	until after filing and the debtor was required to perform substantial service, post petition in order				
23	to be paid. The funds from the post petition closings were not paid to Windermere until after the				
24	filing of the original petition herein.				
25	6. For ea	ch transaction it was ne	ecessary fo	or the debtor to remain licensed in order to	
26	be compensated.				
27	7. After	all of Windermere's de	ductions, t	he net amount received by the debtor was	
28	only \$7830.88.				

1	8.	This motion was filed on January 13, 2006. The Order for Relief was entered in			
2	2002.				
3	ISSUES PRESENTED				
4	1.	When a real estate salesperson, employed by a broker, is not, pursuant to his			
5	contract of employment, entitled to receive any commission until the broker actually receives the				
6	commission, are commissions received by the broker and paid to the salesman as his wages, after				
7	the commencement of the case, property of the estate?				
8	2.	If the debtor has no right to the commission on the date of filing, does his			
9	bankruptcy trustee have a greater right?				
10	LEGAL ARGUMENT				
11	The d	lebtor was not entitled to the commissions until actually received by Windermere.			
12	Real Estate sales are a highly regulated profession in the state of Washington. <i>Peter M</i> .				
13	Black Real Estate Co., Inc. v. Department of Labor and Industries, 70 Wash.App. 482, 487, 854				
14	P.2d 46, 48 (1993)				
15	The sale of real estate is a highly regulated profession. We briefly note several statutes that control the agent/broker relationship.**49  Brokers are responsible for the conduct of agents licensed under them. RCW 18.85.155. Brokers must adequately supervise their licensed agents or face sanctions. RCW 18.85.230(25). Brokers are to retain the licenses of agents working under them and must return the license of any agent who ceases to represent the broker to the State. *488RCW 18.85.320. The broker's name must appear on the agent's advertisements. RCW 18.85.230(11). Brokers may divide their commissions only with agents licensed to work for them or with other brokers; agents are prohibited from dividing their commissions with any person, except through their brokers. RCW 18.85.330. Agents may accept commissions only from the broker with whom they are licensed. RCW 18.85.230(22). In general, agents must work with a broker to sell and list real estate and can sell and list only for the one broker with				
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23		whom they associate. See RCW 18.85.010(1) and (2); .230(11) and (22); .320; .330.			
24	The d	lifference between a Real Estate Broker and a Real Estate Salesperson is both			
25	significant and substantial. Pursuant to Washington law, the listing is owned by the broker, not				
26	the salesperson. Each real estate agency must have a Designated Broker. It is this Designated				
27	Broker to whom the commission is owed and the broker who has standing to sue in the event th				
28		to the commission is owed and the broker who has standing to suc in the event that			

- 1 it is not paid. Conversely, the broker has liability in the event that there is a breach of duty.
- 2 After all, legally, the relationship is with the broker, not the salesperson.
- The salesperson, on the other hand is employed by the broker. The manner of
- 4 compensation is set forth in the contract of employment between the salesperson and the broker.
- 5 The salesperson could be paid hourly, on commission, or on some other lawful basis agreed to by
- 6 the parties. Compensation is determined by the agreement. In this case, Windermere, the
- 7 employing broker has a contract with its salespersons that provides
- Schedule A Is attached hereto and incorporated in this agreement
- by reference and summarizes commission shares and conditions.
- 10 Schedule A, Paragraph 1 states specifically:
- 11 C. All commissions must be paid to Broker alone per State law Associate shall have no claim to commission shares except from money actually received by Broker. [emphasis supplied]
- 13 Clearly, until Windermere received the funds, the debtor had no claim to them. Counsel
- 14 for the trustee has filed a memorandum in this case citing bankruptcy cases from California
- 15 regarding the right of the trustee to commissions on sales that were written pre-petition but that
- 16 closed post-petition. However, that case involved California law and involved a "**Broker**."
- 17 California law is substantially different from Washington Law and clearly, under Washington
- 18 law, while the Broker might have a right to the commission, that right does not inure to the real
- 19 estate Salesperson. The right of the broker to a commission is not an issue before the court. The
- 20 debtor agrees that the broker may have had such a right. Unfortunately for the trustee, the debtor
- 21 is not the broker, he is a salesman and his rights are set forth in the contract.
- The relationship between the Broker and Salesperson is governed by the contract of
- employment. Pursuant to § 541, the trustee derives his rights from the debtor and does not have
- 24 any rights greater than the debtor has. In this case, the debtor, pursuant to his contract of
- 25 employment, had no right to any commission until cash was received by Windermere, the broker.
- 26 On the date of filing the debtor had, at best, an expectancy. An expectancy is not property and is
- 27 not an asset to which the trustee succeeds.

1 The law in this Circuit is that a mere expectancy is not property of the estate. See, In re 2 Schlitz 270 F.3d 1254 (9th Cir. 2001). The court cited with approval In re Vote 261 B.R. 439 (8th 3 Cir. BAP. 2001). where the court decided the whether post-petition disaster assistance that 4 resulted from a pre-petition act became property of the estate and held that the rights arising out 5 of adoption of fishing quotas, post petition, were not property of the estate. Such an expectancy (or "hope," if you will) does not rise to the 6 level of a "legal or equitable interest" in property such that it might 7 be considered property of the estate under 11 U.S.C. § 541(a)(1). 8 In this case, the debtor had an expectancy. If he was still licensed as a real estate 9 salesman, was still employed at Windermere and Windermere actually received the commission, 10 he would be paid. If all of these factors were not present, there was no requirement that he paid 11 and, in fact, it might have been unlawful to pay him if some of these conditions were not present. 12 The testimony will also show that the debtor needed to remain employed as a real estate 13 sales person in order to share in the commission. If he was not so licensed, he would not receive 14 a commission. If he left the employment of Windermere, he might be entitled to receive some 15 portion of the commission but the broker would assign a replacement agent and would, if the 16 salesperson remained licensed, provide an arbitrary portion of the commission to him. However, 17 this was not assured, it was just a customary practice. 18 This was clearly personal services contract that the trustee could not, and certainly did not 19 assume. As such he is not entitled to any compensation. Post petition compensation is owned by 20 the debtor and the estate does not have an interest in it. 21 The trustee claims compensation was do to the debtor well beyond anything to which the 22 contract provided. 23 The commission split is set forth in the Employment agreement discussed *supra*. It 24 provides that after the Broker receives the commission, it is split with the Real Estate Sales 25 Person according to the agreement, after deduction of the Broker's portion and any portion due to 26 another Salesperson in the Office. The testimony of \_\_\_\_\_ and \_\_\_\_ will show that from the total 27 28 commission provided for in the Earnest Money Receipt and Agreement, his portion, after

1 deduction of the Broker's portion, the other agent's portion and costs was substantially less than 2 any amount claimed by the trustee herein. It was only \$7830.88. 3 From the total commission received by Windermere, there were deductions for the listing 4 agent (The debtor was the selling agent and did not have a listing.), broker's fees, advertising, 5 and the like. The testimony will show that there were other substantial deductions by 6 Windermere that were owed to it pursuant to the contract prior to any entitlement by the debtor. 7 The trustee, by failing to set a hearing waived any valid claim of objection to exemptions. 8 The Trustee filed a vacuous objection to exemptions that did not set forth any real basis 9 for the objection. Doing so was a denial of due process because the debtor was not apprised of 10 the basis for the objection. *In re Shuman*, 78 B.R. 254, 256 (9th Cir. BAP 1987). The trustee 11 compounded the problem by not setting it for hearing. The trustee has still not set his objection 12 to exemptions on for hearing. Judge Kurtz in In re Bush 346 B.R. 523, 527 (Bkrtcy.E.D. Wash., 13 2006) dealing with the requirement that the objection be filed and mailed within 30 days 14 explained the policy as supporting "the well-established principle that bankruptcy proceedings in 15 general and Rule 4003(b) in particular are designed to efficiently settle bankrupt estates." Stoulig v. Traina, 169 B.R. 597, 601 (E.D.La.1994), aff'd, 45 F.3d 957 (5th Cir.1995). In this case 5 16 17 years have passed and the trustee has still not noted the matter for hearing. This is not the quick 18 and efficient settlement of bankruptcy estates envisioned by the drafters. 19 **CONCLUSION** 20 The "property of the estate" that the debtor seeks is the post petition wages of the debtor. 21 He mistakes California Law concerning real property brokers with Washington Law concerning 22 the rights of real estate salesmen. Salesmen are employees and their right to compensation 23 derives from their contract of employment with their broker. In this case the debtor was not 24 entitled to any compensation until his broker received funds. Whether the broker may have had a 25 right is not relevant to this case. The debtor was not a broker. 26 The amount that the debtor received is vastly less than the trustee claims. He only 27 received a net check. From the total commission Windermere took its portion, paid expenses, 28 and paid the split due to the listing agent.

The court should so rule and deny the motion. The court should also overrule the objection to exemptions that has still not been noted for hearing and direct the trustee to close this case. Respectfully submitted this August 23, 2007 /s/ Marc S. Stern Marc S. Stern WSBA 8194 Attorney for Debtors