

Case No. 16-20589

In The Matter of: YEMISI AYOBAMI, Debtor

DAVID G. PEAKE, Trustee, Appellant

v.

YEMISI AYOBAMI, also known as Yemisi Aregbe, Appellee

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR
THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

APPELLANT BRIEF OF DAVID G. PEAKE, CHAPTER 13 TRUSTEE
APPEALING THE DECISION FROM THE BANKRUPTCY COURT

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5th Cir. R. 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

- | | |
|--|--|
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Appelle |
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| 5. Nathan Frederick Jones Smith
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ECF CERTIFICATIONS

I certify to the following:

1. All privacy redaction have been made pursuant to 5th Cir. R. 25.2.13.
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/s/ Dinorah Gonzalez

STATEMENT REGARDING ORAL ARGUMENT

David G. Peake, Chapter 13 Trustee, Appellant, makes no request for oral argument on this matter. The dispute before this Honorable Court is exclusively a legal issue. The Trustee asserts that at, the heart of the matter, this case is, and has always been, about the language of the relevant statutes. The Trustee asserts that the Bankruptcy Code speaks for itself on the issue of exemptions. The Trustee stands on the integrity of his Brief. However, if this Honorable Court is inclined to entertain oral argument, the Trustee is not opposed.

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RECORD CITATIONS

For ease of reference, Appellant adopts the following abbreviations to cite the record:

ROA – Bankruptcy Record, Case No. 15-35488-H1-13

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 as this is an appeal from a final decision of the Federal Bankruptcy Court for the Southern District Court of Texas, Houston Division. The Bankruptcy Court entered its Certification for Direct Appeal to the Court of Appeals on Request on July 5, 2016. (ROA.702); *see* Fed. R. Bankr. P. 8006. On September 2, 2016, this Honorable Court granted Appellant's Motion for Leave to Appeal pursuant to 28 U.S.C. § 158 (d). (ROA.827). This Court shall have jurisdiction of appeals if the bankruptcy court certifies that the judgment involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States. 28 U.S.C. § 158 (d)(2)(A)(ii).

STATEMENT OF ISSUES

The Bankruptcy Court erred in misreading *Schwab v. Reilly* to allow the use of the "100% of fair market value, up to any applicable statutory limit" checkbox in Official Form 106C as a valid and unobjectionable exemption resulting in the absolute removal of an asset from the bankruptcy estate despite the relevant exemption statute expressly limiting the exemption to a maximum dollar value. *See* 11 U.S.C. § 522 (d), 11 U.S.C. § 1306 and Official Form 106C.

The Bankruptcy Court erred in finding that "If a debtor claims an interest

that is measured in a percentage ownership of an asset..., any increase in value goes to the debtor.” (ROA.618).

STATEMENT OF THE CASE

Yemisi Ayobami (“Debtor”) filed a Chapter 13 bankruptcy on October 16, 2015. (ROA.2). On Schedule A, she indicated that she owned two parcels of real property 3118 Thomas Paine Drive with a current value of \$179,560.00, and 22026 Rustic Canyon Lane with a current value of \$228,480.00. (ROA.138). The Debtor reported on Schedule B that she owned, *inter alia*, a 2011 Chevrolet Tahoe valued at \$19,000.00 and a 1999 Nissan Pathfinder with no current value. (ROA.139). The Debtor’s amended Schedule C indicated that she was electing to claim a dollar value of 100% of fair market value, up to any applicable statutory limit under 11 U.S.C. § 522 (d)(1) for the Rustic Canyon Lane property. (ROA.148). The Schedule C also indicated that for the Thomas Paine property she was electing to claim a 100% of fair market value, up to any applicable statutory limit under 11 U.S.C. § 522 (d)(5). (ROA.148).

Appellant David G. Peake, Chapter 13 Trustee, (“Trustee”) timely objected to the Debtor’s claimed exemptions. (ROA.268). The Trustee objected that the 100% fair market value designation serves to cause confusion as to the dollar amount being exempted and may operate to exceed the relevant exemption limits.

(ROA.268). On January 13, 2016, the Court conducted a hearing on the matter.

On June 9, 2016, the Bankruptcy Court entered its Supplemental Memorandum Opinion clarifying the Court's Memorandum Opinion of March 1, 2016 which held, among other things, that: (1) If a debtor claims an interest in an asset that is measured in dollar value, any increase in value goes to the debtor; and (2) If a debtor claims an interest that is measured in a percentage ownership of an asset any increase in value goes to the debtor. This appeal followed.

STANDARD OF REVIEW

The bankruptcy court's "findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses." Fed. R. Bankr. P. 8013. The bankruptcy court's conclusions of law are reviewed *de novo*. *In re Bass*, 171 F.3d 1016, 1021 (5th Cir. 1999).

SUMMARY OF ARGUMENT

The fundamental issue in dispute is whether the Bankruptcy Court's interpretation of the language in the new Form 106C (Schedule C), as amended on December 1, 2015, controls over the plain language and meaning of the Bankruptcy Code.

ARGUMENT AND AUTHORITIES

I. DEBTOR’S POSITION CONTRADICTS THE BANKRUPTCY CODE’S PLAIN LANGUAGE AND MISAPPLIES *SCHWAB*.

In determining whether post-petition appreciation of an asset, for which a debtor has exempted from the estate a 100% interest “up to any applicable statutory limit” is estate property the Bankruptcy Court erred in concluding that: “(1) If a debtor claims an interest in an asset that is measured in dollar value..., any increase in value goes to the estate; and (2) If a debtor claims an interest that is measured in a percentage ownership of an asset..., any increase in value goes to the debtor.” *In re Ayobami*, No. 15-35488, 2016 Bankr. LEXIS 2655 (U.S. Bankr. S.D. Tex. June 9, 2016). This methodology by which a debtor is purportedly able to circumvent statutory limitations on what the debtor may exempt from the estate was ill-conceived and is a misapplication of *Schwab v. Reilly*, 560 U.S. 770 (2010). In doing so, the Bankruptcy Court’s holding mischaracterizes congressional intent by disregarding the Bankruptcy Code’s plain language and imputing the availability of an in-kind exemption where only an interest limited to a maximum dollar value is granted.

A. Exemptions Generally

To help obtain a fresh start, the debtor is permitted to exempt from the estate certain *interests in* property, such as his car or home, up to certain values rather

than turn them over to the trustee for distribution to the creditors. *Rousey v. Jacoway*, 544 U.S. 320, 325 (2005) (emphasis added). Paragraph (1) of Section 541 includes initially as property of the estate all of the debtor's property, including that necessary for a fresh start. 5-541 Collier on Bankruptcy P. 541.03 (16th). Once the property has come into the estate, however, the debtor is permitted to claim certain exemptions under section 522. *See* 11 U.S.C. § 522 (I); *see also* Fed. R. Bankr. P. 4003(a). Section 522 (b) provides that “notwithstanding section 541 of this title, an individual debtor *may exempt* from property of the estate ...” 11 U.S.C. § 522 (b) (emphasis added). Therefore, the exemption must be claimed in order to be effective. Otherwise the exemptible property will remain property of the estate. *See Mehlhaff v. Allred (In re Mehlhaff)*, 491 B.R. 898, 903 (B.A.P. 8th Cir. 2013); *see also In re Steen*, 67 C.B.C2d 850, 2012 Bank. Lexis 1656 (Bankr. D.S.D. Apr. 13, 2012). Schedule C requires debtors to list the property that debtor claims as exempt. 11 U.S.C. § 522 (I). If any party in interest disagrees with the debtor's valuations or claimed exemptions that party may assert such objection within 30 days of the initial meeting of creditors. *See* Fed. R. Bankr. P. 4003(b).

B. Debtor's claimed exemptions contradict the Code's plain language.

By incorrectly claiming an exemption in-kind not in a limited interest Debtor is attempting to remove property from the estate. Debtor further asserts that any appreciation in the property after petition date and before the case is closed,

dismissed or converted is also not property of the estate. Debtor's overbroad interpretation of allowable exemptions and Debtor's narrow application of what constitutes property acquired after petition date, but before the case is closed, work together to give the Debtor a free pass, not a fresh start.

(i) In attempting to exempt the full asset from the estate rather than an interest up to an applicable statutory limit, Debtor forgets the Bankruptcy Code's plain language.

There are two basic types of exemptions a debtor may claim in assets. Some assets are allowed to be exempted in their entirety, or "in-kind." For instance: the debtor's right to receive social security or veterans' benefits, §§ 522 (d)(10)(A) and (d)(10)(B); an award under a crime victim's reparation law, § 522 (d)(11)(A); or unmatured life insurance contracts (other than credit life insurance contracts) § 522 (d)(7) may be exempted in full, regardless of value. Other assets, however, like the exemptions at issue in this case, are exempt only up to certain dollar amounts, or "limited interest." Limited interest exemptions include a "the debtor's interest, not to exceed \$3,675 in value, in one motor vehicle," § 522 (d)(2), or an interest in a residence up to \$22,975.00. 11 U.S.C. § 522 (d)(1). Before December 1, 2015, Official Form 106C (Schedule C) required a specific dollar amount to an exemption. The form [was] plainly read to claim an exemption limited to the specific amount, not an indefinite exemption in the value of the property when it is ultimately determined. *See In re Barroso-Herrans*, 521 F.3d 341, 346 (1st Cir.

2008). Since December 1, 2015, the new Form 106C has a checkbox whereupon the debtor can indicate her intention to exempt “100% of fair market value, up to any applicable statutory limit.” *See* Official Form 106C. Schedule C, before the December 1, 2015, amendment and since, does more than merely require debtors to list exempted property by the kind. By their plain language, the forms require debtors to list in specific dollar amount the claimed interest in the property up to any applicable statutory limits of 11 U.S.C. § 522.

In general, “debtors are only entitled to an exemption to the extent there is equity in the property.” *In re Neal*, 424 B.R. 235 (Bankr. E.D. Mich. 2010). For instance, “[s]ection 522 exempts the debtor's interest in property, not the property itself.” *Id.* at 236, (quoting *Drummond v. Urban (In re Urban)*, 375 B.R. 882, 886 (B.A.P. 9th Cir. 2007)). The *Schwab* Court drew a bright line noting “[w]e decline to construe [Debtor]’s claimed exemptions in a manner that elides the distinction between these provisions [*e.g.* § 522 (d)(9) (professionally prescribed health aids), and § 522 (10)(C) (disability benefits) providing exemptions in kind] and provisions such as §§ 522 (d)(5)[“debtor’s aggregate interest in any property, not to exceed in value \$800...” and (6) [debtor’s aggregate interest, not to exceed \$1,500 in value, in tools of the trade] particularly based upon an entry on Schedule C...” *Schwab*, at 784 (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

Debtor incorrectly contends she is entitled to an exemption in kind where only a limited interest exemption is granted. Debtor's position finds no authority in statutory language. The Code requires a specific dollar amount to a limited interest exemption, the form is plainly read to claim an exemption limited to the specific amount, not an indefinite exemption in-kind to be determined at a later date. Provisions throughout the Bankruptcy Code and Rules reinforce the distinction drawn by this conclusion. The *Schwab* Court held that "[t]he forms, rules, treatise excerpts, and policy considerations on which dissent relies...must be read in light of the Bankruptcy Code provisions that govern this case, and must yield to those provisions in the event of conflict." *Schwab*, at 781 n.5 and *see also Viegelahn v. Frost (In re Frost)*, 744 F.3d 384 (5th Cir. 2014)¹. "Furthermore, to the extent the proposed amended Schedule C could be interpreted to allow debtors to legitimately claim an in-kind exemption where the statute provides for a limited-interest exemption, the form would not trump the plain statutory language." *In re Luckham*, 464 B.R. 67, 75 n.14 (Bankr. D. Mass. 2012) (citing *Schwab* at 2660 n.5).

¹ The Trustee acknowledges that *Viegelahn v. Frost (In re Frost)*, 744 F.3d 384 (5th Cir. 2014), a recent decision of this Honorable Court regarding exemptions, deals primarily in issues of state exemptions, however, the case is cited here for its notions on plain meaning of statutes. The Trustee asserts that *Ayobami* and *Frost* cannot be read together. The Trustee asserts that if *Ayobami* is correct, *Frost* could not be correct.

Debtor's position overlooks the Latin maxim, universally adhered to within statutory construction, *expressio unius est exclusion alterius* meaning that expression of one thing is to the exclusion of the other. *United States v. Arredondo*, 31 U.S. 691 (1832). [It] is generally presumed that Congress acts intentionally and purposefully when it includes particular language in one section of a statute but omits it in another..." *Chi. v. EDF*, 511 U.S. 328, 337 (1994). When a statute's language is plain, the sole function of the court, at least where the disposition required by the text is not absurd, is to enforce it according to its terms. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000). Courts should not go beyond the literal language of a statute unless reliance on that language would defeat the plain purpose of that statute. *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983). The plain language of §522 (d)(1) does not establish an in-kind exemption.

In attempting to exempt the full asset from the estate rather than an interest up to any applicable statutory limit, Debtor usurps the legislative intent manifest in the plain language of the Bankruptcy Code by incorrectly claiming an exemption in-kind not in a limited interest.

(ii) Debtor is attempting to remove property from the estate.

On petition date, debtor's property and any other property debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted becomes property of the bankruptcy estate. *See* 11 U.S.C. §§ 541 and 1306. In Chapter 13, a debtor is allowed to make payments to effect reorganization, in place of turning over property to the trustee. *See generally* 11 U.S.C. § 1325. “§ 1306 (a) operates to replenish the estate post-confirmation until the estate is closed, converted or dismissed.” *In re Nott*, 269 B.R. 250, 257 (Bankr. M.D. Fla. 2000). Contrary to the Code's plain language Debtor asserted, by virtue of Debtor's 100% in kind exemption, whatever value incurred after the commencement of the case and before her case is closed is not property of the estate, but in fact property belonging to Debtor free and clear.

When debtors file a bankruptcy petition, all of [their] property becomes property of the bankruptcy estate. 11 U.S.C. § 541. In addition to property specified in § 541, § 1306 also provides that all property of the kind that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted is property of the estate.² Courts addressing the

² (a) Property of the estate includes, in addition to the property specified in section 541 of this title

relationship between § 541 and 11 U.S.C. § 1306, have held that the property is property of the estate. *See In re Ormiston*, 501 B.R. 303, 307-308 (Bankr. E.D.N.C. 2013). The Fourth Circuit, Ninth Circuit and the Eleventh have all concluded that any windfall acquired by a chapter 13 debtor prior to the case being closed, dismissed or converted is property of the estate. *See Dale v. Maney (In re Dale)*, 505 B.R. 8 (B.A.P. 9th Cir. 2014); *Carroll v. Logan*, 735 F.3d 147 (4th Cir. 2013).

However, Debtor asserted by virtue of Debtor's 100% in kind exemption, whatever value incurred after the commencement of the case and before her case is closed is not property of the estate, but in fact property belonging to Debtor free and clear. Even if Debtor's equity in her assets, based on the property's value as of petition date, is not more than the allowable exemption, the assets still remain property of the bankruptcy estate – all that is exempted from the estate is the “interest in the property up to the value of the claimed exemption.” *In re Evenson*, No. 05-37920-skv, 2010 Bankr. LEXIS 3937 *2 (U.S. Bankr. E.D. Wis. Nov. 3, 2010).

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- (1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, or 11, or 12 of this title, whichever occurs first; and
 - (2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first. 11 U.S.C. § 1306 (a).

In *Reeves*, debtors' residence was encumbered by a first mortgage and a federal tax lien. No equity existed in debtors' residence over and above the first mortgage lien and the federal tax lien. *Reeves v. Callaway*, 546 F. App'x 235, 237 (4th Cir. 2013). The Trustee filed an objection to debtors' exemption claim with respect to debtors' residence on the ground that debtors had no equity in it. *Id.* at 238. Debtors responded with the position that they had a right to exempt their interests in an asset in which they have no equity on the grounds that the exemption had removed the property from the estate. *Id.* The Fourth Circuit found debtors' argument "without merit." *Reeves*, at 239. "The fatal flaw in debtors' position is that it ignores the distinction between exempting an asset itself from the bankruptcy estate and exempting an interest in such asset from the bankruptcy estate." *Id.*

The Supreme Court made the point crystal clear in its *Schwab* decision. *Id.* In that case, most of the relevant claimed exemptions defined "property" a debtor may claim as exempt" as the debtor's "interest" – up to a specific dollar amount – in the assets not as the assets themselves. *Schwab*, at 783; *see also Soost v. NAH, Inc. (In re Soost)*, 262 B.R. 68 72 (B.A.P. 8th Cir. 2001).

The Court of Appeals for the Ninth Circuit in *Gebhart* reasoned "the fact that the value of the claimed exemption . . . [was] equal to the market value of the

[asset] at the time of filing the petition did not remove the entire asset from the estate.” *Gebhart v. Gaughan (In re Gebhart)*, 621 F.3d 1206, 1210 (9th Cir. 2010). Like the Ninth Circuit, the Court of Appeals for the Fourth Circuit in *Reeves* reasoned that “fully encumbered property is still property of the estate until it is either abandoned by the trustee pursuant to Section 554(a) or released upon stay relief and sold by the secured creditor” *Reeves*, at 241 (quoting *In re Feinstein Family Partnership*, 247 B.R. 502, 507 (Bankr. M.D. Fla. 2000)).

Furthering the point that exemption of an asset does not remove such asset from the bankruptcy estate, even the terms of the Debtor’s chapter 13 plan require that the property of the estate will vest on discharge. Paragraph Fifteen of the Debtor’s confirmed plan reads, “Discharge and Vesting of Property. . . . Property of the estate shall vest in the Debtor(s) upon entry of the discharge order.” (ROA.812). The Debtor’s plan is not a uniform plan, utilized by the majority of debtors in the Southern District of Texas because the Debtor altered terms of the usual uniform plan to mark through one other provision of the uniform plan and add additional language regarding liquidation of real estate. (ROA.812). However, the language regarding vesting of estate property remains unchanged. The Trustee asserts that the Debtor is bound by the terms of her plan. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010).

Debtor's assertions that she: (1) is entitled to exempt from the estate an entire asset rather than an interest up to any allowable statutory limit, and (2) that any increased value in property acquired during the bankruptcy would not thereby be part of the estate pursuant to Section 1306 finds no authority in the plain language of the Bankruptcy Code, and *Schwab v. Reilly*.

C. Schwab is not a mandate allowing 100% FMV in-kind exemptions.

The Bankruptcy Court noted that “[n]o court has interpreted the Supreme Court’s holding as either unfettered authorization for debtors to exempt assets in-kind, or as a mandate for courts to allow such exemptions.” (ROA.622); *In re Ayobami*, No. 15-35488, 2016 Bankr. LEXIS 2655 *8 (U.S. Bankr. S.D. Tex. June 9, 2016) (citing *In re Massey*, 465 B.R. 720, 727 (B.A.P. 1st Circ. 2012)). It is a misreading of *Schwab v. Riley*, to conclude that the [Supreme] Court has blessed the use of a designation such as ‘100% of FMV’ as a valid and unobjectionable scheduling of a claimed exemption value where the relevant exemption statute... expressly limits the exemption to a maximum dollar value. *In re Stoney*, 445 B.R. 543, 552 (Bankr. E.D. Va. 2011). Several districts have treated the issue of the alleged right granted to them by the 100% FMV dicta in *Schwab*, and all have

“categorically rejected” interpretations like that of the Bankruptcy Court.³ *In re Luckham*, at 72 n.12.

It is important to note that only if the debtor wished to “facilitate the expeditious and final disposition of assets” which could “enable the debtor (and the debtor's creditors) to achieve a fresh start free of the finality and clouded-title concerns” the *Schwab* Court proscribed a manner by which the Debtor could place those interested parties on notice. *Schwab*, 560 U.S. at 794; *see also In re Luckham*, 464 B.R. 67.

If the exemptions claimed by the debtor are facially invalid they give notice to the trustee which now has a duty to timely object or the subject property will be excluded from the bankruptcy estate even if the exemption’s value exceed the statutory limit. *See Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992). However, if the claimed exemptions are facially valid, the time limits for objecting to an exemption do not apply. *See Schwab*, 560 U.S. 770, and *Sanchez Santiago v.*

³ *See Gebhart v. Guagham (In re Gebhart)*, 621 F. 3d 1206 (9th Cir. 2010). (The fact that the value of the claimed exemption plus the amount of the encumbrances on the debtor’s residence was equal to the market value of the residence as of the petition date did not remove the entire asset from the estate); *In re Darren W.*, No. 10-05827-PCW13, 2010 Bankr. LEXIS 4883 (U.S. Bankr. E.D. Wash. Dec. 20, 2010) (The court is duty bound to sustain an objection to exemption wherein the debtor lists “FMV” in the “Value of Claimed Exemption” and Schedule “C” reflects that the current value exceeds the statutory limit.); *see also Hefel v. Schnittjer (In re Hefel)*, No. 11-CV-1010-LRR, 2011 U.S. Dist. LEXIS 84079 (N.D. Iowa 2011) (The trustee made a facially valid objection whereby the debtor claimed an exemption of “FMV” pursuant to Iowa’s “wildcard” exemption which allows a debtor to exempt certain assets up [a fixed value.]).

Oliveras Rivera (In re Sanchez Santiago), 478 B.R. 516, 522 (B.A.P. 1st Cir. 2012). The *Schwab* Court noted that “[w]e disagree that this policy required Schwab to object to a facially valid claim of exemption on pain of forfeiting his ability to preserve for the estate any value in Reilly's business equipment beyond the value of the interest she declared exempt. This approach threatens to convert a fresh start into a free pass.” *Schwab*, 560 U.S. at 791. “*Schwab* ... stands for the ... limited proposition that the time limits for objecting to an exemption do not apply if the claimed exemption is valid on its face.” *Massey v. Pappalardo (In re Massey)*, 465 B.R. 720, 726 (B.A.P. 1st Cir. 2012).

Thus, as *Schwab* clearly dictates that if the claimed exemptions by the debtor are facially valid the time limits for objecting to an exemption do not apply. See *Schwab*, 560 U.S. at 791. *Schwab* does not provide a method by which a debtor may circumvent congressionally set exemption limits.

(i) The Bankruptcy Court is in the minority in its reading of *Schwab*.

The majority of courts have reasoned that *Schwab* does not stand for the proposition that the Supreme Court has authorized a strategy to exempt the entire asset from the estate. Moreover, the fact that “the value of the claimed exemption ... [was] equal to the market value of the [asset] at the time of filing the petition did not remove the entire asset from the estate.” See *Gebhart*, at 1210. The language in *Schwab*'s footnote 21 holds that “[s]ection 541 is clear that title to the

equipment passed to [the debtor's] estate at the commencement of her case, and §§ 522 (d)(5) and (6) are equally clear that her reclamation right is limited to exempting an interest in the equipment, not the equipment itself.” *Schwab*, at 794 n.21. “Accordingly, it is far from obvious that the Code would “entitle” [debtor] to clear title in the equipment even if she claimed as exempt a “full” or “100%” interest in it (which she did not). *Id.*

Most courts have held that *Schwab* provides a notice mechanism, where a debtor asserts a claim of exemption in an asset in a specific dollar amount that goes unchallenged, “the [property] still remains property of the bankruptcy estate – all that is [exempted] from the estate is the interest in the property up to the value of the claimed exemption.” *In re Luckham*, 464 at 76; *In re Gregory*, 487 B.R. 444, 454 (Bankr. E.D.N.C. 2013) (holding that “listing the value of an exemption as ‘FMV,’ ‘100% of FMV,’ or other comparable language to that effect, is wholly inappropriate in instances where the relevant statutory exemption scheme assigns a maximum dollar value to the exemption.”); *see also In re Stoney*, 445 B.R. at 552 (holding that “it is a misreading of *Schwab* to conclude the Court has blessed the use of a designation such as “100% of FMV” as a valid and unobjectionable scheduling of a claimed exemption value where the relevant exempting statute, such as the Virginia Code, expressly limits the exemption to a maximum cash

value.”).

Chief U.S. Bankruptcy Judge Kishel, for the District of Minnesota, held that the text of § 522(d)(5) limits a debtor’s interest to values. “The interest that is protectable by them is measured by a dollar-value.” *In re Wiczek*, 452 B.R. 762, 766 (Bankr. D. Minn. 2011). Debtors have no right to retain the interests themselves, in-kind and without respect to values. *See generally In re Scotchel*, No. 1:12-bk-9, 2012 Bankr. LEXIS 6088 (U.S. Bankr. N.D.W. Va. Oct. 16, 2012); *Hefel v. Schnittjer (In re Hefel)*, No. 11-CV-1010-LRR, 2011 U.S. Dist. LEXIS 84079 (N.D. Iowa 2011) (affirming the bankruptcy court's order sustaining the objections of the trustee to the debtor's exemption of certain business interests as "FMV"); *see also In re Darren W.*, No. 10-05827-PCW13, 2010 Bankr. LEXIS 4883, *5 (U.S. Bankr. E.D. Wash. Dec. 20, 2010) (holding that “[a]lthough *Schwab* may encourage debtor's counsel to exempt the actual value of the asset if the debtor has a legal basis for and an intent to claim the actual value of the asset exempt, it clearly does not mandate it.”). Judge Robert L. Jones, writing for the Northern District of Texas, held that the “important distinction to be made, as learned from *Schwab*, is that the debtor’s exemption claim is still limited to his interest in the property. *In re Salazar*, 449 B.R. 890, 900 (Bankr. N.D. Tex. 2011). “*Schwab* suggests that the title to the property does not pass to the debtor

even if no objection is filed.” *Id.*

In a factually similar case, *In re Massey*, the First Circuit applied *Schwab* as a notice mechanism and noted “[t]he Supreme Court instructed that when deciding whether to object to an exemption, trustees should look at "three, and only three, entries" on Schedule C: the description of the property, the Code provisions governing the claimed exemptions, and the amounts listed in the column titled "value of claimed exemption." *Massey v. Pappalardo (In re Massey)*, 465 B.R. at 727 (quoting *Schwab*, at *785.). The *Massey* court reasoned that “[e]ven if we accept the premise that the import of *Schwab* remains unclear, one thing is certain: most, if not all, courts which have specifically addressed exemptions of "100% of FMV" in the wake of *Schwab* have found such exemptions impermissible. *Id.* at 727. “No court has interpreted the Supreme Court's holding as either unfettered authorization for debtors to exempt assets in-kind, or as a mandate for courts to allow such exemptions.” *Id.*

The Bankruptcy Court’s decision conflicts with the Supreme Court’s clear holding in *Schwab*, the majority of other court of appeals, as well as lower courts. Those districts that have considered the issue of the alleged right granted to them by the 100% FMV dicta in *Schwab*, have all categorically rejected interpretations like that of the Bankruptcy Court.

(ii) At least one other court has considered Schedule C, in its current form, and rejected that it grants debtors in-kind exemptions.

While Schedule C has contained the checkbox “Amount of the exemption you claim” is “100% of fair market value, up to any applicable statutory limit” only since December 1, 2015, Judge Henry Boroff addressed the checkbox in *Luckham*, a case factually similar to the case at bar. For the Western Division of Massachusetts, before the new Schedule C form, Judge Boroff wrote:

The Court is aware of the Administrative Office of the U.S. Courts’ preliminary draft of a proposed amended Schedule C... that allows debtor the option to check a box under the “value of claimed exemption” column stating “Full fair market value of the exempted property.” ... The Court does not see the proposed amended Schedule C as inconsistent with its holding [that 100% FMV objections are facially valid]. As notes, some exemptions *may be* permissibly claimed in kind, and the proposed form recognizes that by providing a clearer method for debtors to indicate an intent to claim an entire asset exempt. And if a debtor checks the box next to “full fair market value of the exempted property” but the relevant statute creates only a limited interest exemption, nothing prohibits interested parties from objecting to that exemption claim. The utility of the proposed is the ability to provide clear notice of the debtor’s intent and to avoid the type of dispute that arouse in *Schwab. In re Luckham*, 464 B.R. 75 at n.14.

The Trustee requests that this Honorable Court adopt the reasoning of Judge Boroff, over that of the Bankruptcy Court.

II. YEMISI AYOBAMI’S SCHEDULE OF EXEMPTIONS

In the instant case, on April 3, 2016, in her fourth amended Schedule of Exemptions, Debtor exempted virtually all of her assets by checking a box which indicated that the “Amount of the exemption you claim” is “100% of fair market

value, up to any applicable statutory limit.” (ROA.567). The exemption of

Debtor’s homestead, for example, appears on the Schedule C as:

Brief description of the property and line on Schedule A/B that lists this property	Current value of the portion you own Copy the value from Schedule A/B	Amount of the exemption you claim Check only one box for each exemption	Specific laws that allow exemption
Brief description: Riverpark West Sec 10, BLOCK 1, Lot 7 Line from Schedule A/B: <u>1.1</u>	<u>\$228,480.00</u>	<input type="checkbox"/> <input checked="" type="checkbox"/> 100% of fair market value, up to any applicable statutory limit	11 U.S.C. § 522(d)(1) (Claimed: \$0.00 100% of FMV)

(ROA.567). To the Trustee, and every interested party the plain reading of Debtor’s Schedule C is that Debtor is attempting to exempt under 11 U.S.C. § 522 (d)(1), real estate with a “current value of the portion [the debtor] own[s]” displayed as \$228,480.00. Under 11 U.S.C. § 522 (d)(1), a debtor is entitled to exempt an aggregate interest, not to exceed \$22,975.00 in value. On its face, the Debtor is attempting to exempt value in excess of the 11 U.S.C. § 522 (d)(1) exemption limit. Furthermore, Debtor exacerbates the ambiguity regarding the value of the exemption she claims by adding extra language in the column of Schedule C which asks for debtors to list “specific laws that allow exemption.” For Example, next to the alleged specific law, 11 U.S.C. § 522 (d)(1), Debtor has added a parenthetical “(Claimed: \$0.00 100% of FMV).” The Trustee does not know what, if any, legal authority permits the addition of this extra language on Schedule C. The Trustee is unsure as to what, if any, the legal ramifications are of

the alterations to the Schedule C and the addition of this extraneous language other than to remove the mandated up to applicable statutory language. The column header on Schedule C form only asks for a debtor to list “specific laws that allow exemption.” The Trustee asserts that Debtor’s exemption, as claimed, is facially invalid and objectionable.

Similarly invalid and objectionable is every exemption claimed by the Debtor using 11 U.S.C. § 522 (d)(5). Using the “wild card” exemption, Debtor attempts to exempt a second parcel of real estate identified as “3118 Thomas Paine Dr.,” an auto identified as a “2011 Chevrolet Tahoe,” and household furnishings identified as “TV, couch, bed” by checking a box which indicates that the “Amount of the exemption you claim” is “100% of fair market value, up to any applicable statutory limit.” (ROA.568). The exemption of Debtor’s auto, as one example, appears on the Schedule C as:

Brief description of the property and line on Schedule A/B that lists this property	Current value of the portion you own	Amount of the exemption you claim	Specific laws that allow exemption
	Copy the value from Schedule A/B	Check only one box for each exemption	
Brief description: 2011 Chevrolet Tahoe Line from Schedule A/B: <u>3.1</u>	<u>\$19,000.00</u>	<input type="checkbox"/> <u> </u> <input checked="" type="checkbox"/> 100% of fair market value, up to any applicable statutory limit	11 U.S.C. § 522(d)(5) (Claimed: \$0.00 100% of FMV)

(ROA.568). It appears that Debtor is attempting to exempt, under 11 U.S.C. § 522 (d)(5), an auto with a “current value of the portion [the debtor] own[s]” displayed as \$19,000.00. Pursuant to 11 U.S.C. § 522 (d)(5), a debtor is entitled to exempt

their aggregate interest, not to exceed \$12,725.00⁴ in value, depending on the amount available after the exemption of the homestead. With regard to the exemption of the homestead Debtor exacerbates ambiguity with the value of the exemption she claims by adding extra language in the column of Schedule C which asks for debtors to list “Specific laws that allow exemption.” Next to the alleged specific law, 11 U.S.C. § 522 (d)(5), Debtor has added a parenthetical for each asset. The Trustee asserts that, on its face, it appears that Debtor is attempting to exempt value in excess of the 11 U.S.C. § 522 (d)(5) exemption cap.

In addition, Debtor’s claimed exemptions under 11 U.S.C. § 522 (d)(4) are invalid and objectionable. Pursuant to 11 U.S.C. § 522 (d)(4), Debtor exempted “rings,” “watches,” and “earrings” by checking a box which indicates that the “Amount of the exemption you claim” is “100% of fair market value, up to any applicable statutory limit.” (ROA.573). Pursuant to 11 U.S.C. § 522 (d)(4), a debtor is entitled to exempt their aggregate interest, not to exceed \$1,550.00 in value. Again, Debtor has added a parenthetical in the column of Schedule C which asks for debtors to list “specific laws that allow exemption.” (ROA.573).

⁴ A debtor may exempt an aggregate interest in any property, not to exceed \$1,225 in value plus up to \$11,500 of any unused amount of the exemption provided under [the homestead exemption.] 11 U.S.C. § 522 (d)(5).

Finally, even the wearing apparel, the kitchen appliances, the home furnishings, among other assets, are all exempted under 11 U.S.C. § 522 (d)(3)⁵ by checking a box which indicates that the “Amount of the exemption you claim” is “100% of fair market value, up to any applicable statutory limit.” Debtor has again included confusing parentheticals, on each asset, in the column of Schedule C which requires for debtors to list only “specific laws that allow exemption.” (ROA.571).

The Trustee asserts that all of the exemptions claimed listing “[a]mount of the exemption you claim” as “100% of fair market value, up to any applicable statutory limit” are invalid and objectionable because each one of the Debtor’s assets are assets qualified to be exempted using only “limited-interest” exemptions, versus “in kind” exemptions. The addition of the parenthetical language in the column of Schedule C which requires for debtors to list “specific laws that allow exemption” further confuses the issue and blurs the scope and value of the exemptions. It makes it difficult, if not impossible, for an interested party to determine, from Schedule C, how much value Debtor is attempting to exempt from the estate, whether such value exceeds the relevant exemption caps, and whether other conditions of confirmation have been met.

⁵ Using this exemption, a debtor may exempt “an interest, not to exceed \$575 in value in any particular item or \$12,250 in aggregate value...” 11 U.S.C. § 522 (d)(3).

III. THE BANKRUPTCY COURT’S MISGUIDED PATH FORWARD

According to the Bankruptcy Court, following the reasoning of *In re Moore*, the Trustee must seek an evidentiary hearing to establish the value of the property as of the petition date in order to determine whether the “100% of fair market value, up to any applicable statutory limit” exemptions actually exceed the statutory relevant limits. (ROA.633) (citing *In re Moore*, 442 B.R. 865, 868 (Bankr. N.D. Tex. 2010)). Most, if not all, courts that have addressed the issue since *Moore*, have taken the approach that an evidentiary hearing is unnecessary, since “an exemption claim of ‘100% of FMV’ is a facially valid objection [where] the debtor has failed to claim a set amount as contemplated by the exemption statute allowing the exemption. *Salazar*, at 898. The Trustee asserts that the Bankruptcy Court’s ‘path forward’ is improper because the Debtor’s “100% of fair market value, up to any applicable statutory limit” exemption is inconsistent with the relevant statutory provisions, Official Form 106C, and *Schwab v. Reilly* on which the Debtor relies in claiming the exemption.

CONCLUSION

The Bankruptcy Court’s decision must be overturned because it creates a scheme of exemptions which is outside the parameters of the plain language of the Bankruptcy Code, Official Form 106C (Schedule C), and *Schwab v. Reilly*. It dangerously expands a debtor’s “fresh start” and ventures into the zone of a “free

pass.” Neither the Rules Committee, in changing Official Form 106C, nor the Bankruptcy Court, in its application of the new Form, had the authority to change the Code. The Code and The Rules remain unchanged. The Bankruptcy Code, Official Form 106C, and Supreme Court precedent dictates a result different from that reached by the Bankruptcy Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Appellant's Brief was served electronically via the court's ECF/ECM system on October 25, 2016 upon the following:

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