IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
YEMISI AYOBAMI,	§	**CASE NO: 15-35488**
Debtor.	§	
	§	**CHAPTER 13**

SUPPLEMENTAL MEMORANDUM OPINION

The Court issues this Supplemental Memorandum Opinion to address the issues raised in Chapter 13 Trustee David Peake's motion requesting clarification of the Court's Memorandum Opinion issued on March 1, 2016. (ECF No. 73 and 76).

In the March 1 Memorandum Opinion, among other things, the Court concluded:

- If a debtor claims an interest in an asset that is measured in dollar value (as did Ms. Reilly in *Schwab*), any increase in value goes to the Estate.

- If a debtor claims an interest that is measured in a percentage ownership of an asset (as Ms. Ayobami did in this case by claiming a 100% interest), any increase in value goes to the debtor.

(ECF No. 73 at 4). The Court further concluded that this result was "inescapably driven by the text of the statue and by *Schwab* [*v. Reilly*, 560 U.S. 770 (2010)]." (*Id.*).

Background

On March 28, 2016, a hearing was held on Mr. Peake's motion to clarify. At the hearing, Mr. Peake urged the Court to reconsider its interpretation of *Schwab*. In its March 1 Memorandum Opinion, this Court determined that *Schwab*, in conjunction with the text of 11 U.S.C. § 522, allowed a debtor the option of exempting an interest in an asset from the estate, without respect to future changes in the value of that interest. Before *Schwab*, some believed that under a dollar-limited-exemption statute a debtor was only able to exempt a fixed monetary interest in an asset. However, the Supreme Court in *Schwab* indicated that a debtor may be able

to exempt her entire interest in an asset—even under a dollar-limited-exemption statute. The Supreme Court offered language that debtors could use to indicate an intention to exempt a 100% interest in the asset. The exemption explained by the Supreme Court is distinct from a fixed monetary interest primarily because it would allow post-petition fluctuation in value.

The relevant language of *Schwab* upon which this Court based its conclusion is reproduced below:

> Where, as here, it is important to the debtor to exempt the full market value of the asset *or the asset itself*, our decision will encourage the debtor to declare the value of her claimed exemption in a manner that makes the scope of the exemption clear, for example, by listing the exempt value as "full fair market value (FMV)" or "100% of FMV." Such a declaration will encourage the trustee to object promptly to the exemption if he wishes to challenge it and preserve for the estate any value in the asset beyond relevant statutory limits. If the trustee fails to object, or if it the trustee objects and the objection is overruled, the debtor will be entitled to exclude the full value of the asset. If the trustee objects and the objection is sustained, the debtor will be required either to forfeit the portion of the exemption that exceeds the statutory allowance, or to revise other exemptions or arrangements with her creditors to permit the exemption.

Schwab, 560 U.S. at 792-93 (emphasis added).

In a footnote, the Supreme Court recognized that a debtor's ability to exempt the property itself (as opposed to an interest in property) may not be available under the Code. In response to Reilly's argument that "once the thirty-day deadline passed without objection she was entitled to know that she would emerge from bankruptcy with her cooking equipment intact[,]" the Court stated:

> [H]er argument assumes that a claim to exempt the full value of the equipment would, if unopposed, entitle her to the equipment itself as opposed to a payment equal to the equipment's full value. That assumption is at least questionable. Section 541 is clear that title to the equipment passed to Reilly'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. Accordingly, it is far from obvious that the Code would entitle Reilly to clear title in the equipment even if she claimed as exempt a 'full' or '100%' interest in it (which she did not). Of course, it is likely that a trustee who fails to object to such a claim would have little incentive to do anything but pass title in the asset to the debtor.

Id. at 794 n. 21[1].

Although some of the implications of *Schwab* to Ms. Ayobami's case are derived from dicta, the Court is bound by Supreme Court dicta "almost as firmly as by the Court's outright holdings . . . ." *Gaylor v. U.S.*, 74 F.3d 214, 217 (10th Cir. 1996); *see also Official Comm. of Unsecured Creditors of Cybergenics Corp. ex rel. Cybergenics Corp. v. Chinery*, 330 F.3d 548, 562 (3d Cir. 2003) ("[w]e should not idly ignore considered statements the Supreme Court makes in dicta. The Supreme Court uses dicta to help control and influence the many issues it cannot decide because of its limited docket."). The fact that some of the dicta in *Schwab* that bears materially on the present case is stated in a footnote does not diminish its significance. *Phillips v. Osborne*, 444 F.2d 778, 782 (9th Cir. 1971) (dismissing a party's attempt to diminish the significance of a footnote, stating "[w]e think that the location, whether in the text or in a footnote, of something which the writer of an opinion thinks should be sai[d], is a matter of style which must be left to the writer.").

[1] A Chapter 7 trustee, for example, may elect to utilize his legal title to sell the asset in order to pay debt that is secured by the asset. With exceptions not relevant here, a debtor's exemption of an interest in an asset is subject to the rights of secured creditors. Although a Chapter 7 trustee might ordinarily abandon an asset where the value is held either by the secured creditor (via a lien) or the debtor (via an exemption), the Court imagines a scenario with cross-collateralized debt where repayment of the cross-collateralized lien would inure to the estate's benefit by allowing the disposition of on an asset which is not the subject of an exemption claim. In a chapter 13 context, this situation would not arise. The debtor is burdened with an obligation to pay holders of claims at least the amount that they would receive in a chapter 7 case. 11 U.S.C. § 1325(a)(4).

Analysis

I. Treatment of exemptions post-*Schwab*

The Court will address three opinions interpreting *Schwab* and its effect on debtors attempting to exempt more than a fixed monetary interest in an asset.

a. *In re Orton*, 685 F.3d 612 (3d Cir. 2012).

The Third Circuit addressed whether a debtor, who exempted a 1/8 interest in a piece of real estate subject to an oil and gas lease (but with no well drilled) with a value within the §522(d)(5) limit, was entitled to the "benefits and risks of future ap- or depreciation, free from any creditors' claims." *In re Orton*, 687 F.3d 612, 614 (3d Cir. 2012). Orton, the debtor, contended that he was entitled to any future appreciation in the lease's value which may arise from the discovery of oil and gas and the drilling of a well. *Id.* It is important to note that Orton failed to follow *Schwab's* instruction to indicate his intent to exempt "'full fair market value (FMV)' or '100% of FMV.'"

Orton argued that because he *accurately* valued his interest in the property and lease (something Reilly in *Schwab* failed to do), it was of no consequence that he failed to indicate his intention to exempt 100% FMV. The court did not agree with Orton's attempts to distinguish his case from *Schwab* and ultimately held that Orton was limited to the dollar value he claimed as exempt, not the full market value of the real estate and lease. *Id.* at 618. Furthermore, the court held that any appreciation in the asset's value beyond the monetary interest exempted would devolve to the estate.

The actual holding of *Orton* has limited value with respect to the issue before the Court because Orton failed to follow *Schwab's* explicit instructions. However, dicta in *Orton* bears substantially on the issues faced by the Court.

First, the court in *Orton* stated that "[t]he rationale in *Schwab* focused on concerns about placing trustees on notice, not concerns about inaccurate debtor valuations." *Id.* at 617. This "notice purpose only" sentiment is one echoed by the chapter 13 trustee in this case, and the Court will address it in further detail in Section II of this Supplemental Memorandum Opinion.

Second, the court addressed the footnote in *Schwab* and its apparent inconsistency with the body of the opinion. The court concluded that, "[a]t the very least, the [Supreme Court] was clear that exemptions under § 522(d)(5) are presumed to preserve a debtor's 'interest' in an asset rather than the asset itself; a debtor seeking to retain more than an 'interest' must indicate that fact unambiguously in the Schedules." *Id.* at 617-18.

b. *In re Massey*, 465 B.R. 720 (B.A.P. 1st Cir. 2012)

In 2012, the First Circuit Bankruptcy Appellate Panel conducted a survey of post-*Schwab* cases in an attempt to resolve the uncertainties created by *Schwab*. The court concluded, "[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. 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." *In re Massey*, 465 B.R. 720, 727 (B.A.P. 1st Cir. 2012).

In *Massey*, joint debtors claimed exempt a jointly owned residence valued at $92,000.00 and a jointly owned vehicle valued at $1,455.00. The debtors' Schedule C indicated that the amount of their claimed exemptions in both the residence and the vehicle was "100% of FMV," pursuant to § 522(d). The Masseys did not assign a dollar value to their interest. The bankruptcy court sustained the chapter 13 trustee's objection to the debtors' exemption of 100% of FMV in the residence and vehicle. The Masseys appealed this aspect of the bankruptcy court's ruling.

The thrust of the Masseys' argument that the bankruptcy court erred in sustaining the trustee's objection can best be summarized as follows:

> The [Supreme] Court [in *Schwab*] is *not* saying that a debtor can't keep assets subject to a capped exemption. It is saying instead that the Code does not give the debtor the right to exempt property in-kind if the property's value exceeds the cap. The Bankruptcy Judge misinterpreted the distinction as implying the former, and that was error.

Id. at 724. The Trustee argued that the Masseys' claimed exemptions were facially defective because they failed to claim a specific dollar amount under §§ 522(d)(1)-(2), and that the exemption in the residence exceeded the statutory limit. *Id.*

The *Massey* court held that an exemption of "100% of FMV" is facially invalid. *Id.* at 729. The court indicated that it would sustain such an objection unless the debtor amended the exemption to claim a dollar amount for his exempt interest in the property—an approach recommended by our sister Texas bankruptcy court in *In re Salazar*, 449 B.R. 890, 897-98 (Bankr. N.D. Tex. 2011). *See also In re Luckham*, 464 B.R. 67, 77 (Bankr. D. Mass. 2012) ("where the statutory basis for a debtor's claim of exemption provides only for an exemption of an interest in certain property up to a specific dollar amount, the 'value of claimed exemption' must be identified as a monetary value. Nothing in *Schwab* . . . dictates otherwise . . . .").

The debtors in *Massey* failed to assign a dollar value to their claimed exemption.[2] All of Ms. Ayobami's amended exemptions list a dollar value within the statutory limits. Consequently, the Court is faced with a different issue than the courts in *Massey* and *Orton*: whether a debtor is able exempt a 100% interest in an asset if (1) the debtor follows the *Schwab* "100% of FMV" instructions and (2) the exempt interest has a dollar value, disclosed on the schedules, that is within the statutory limits.

[2] To the extent that this distinction does not matter, the Court rejects *Massey*.

c. *In re Salazar*, 449 B.R. 890 (Bankr. N.D. Tex. 2011).

In 2011, a bankruptcy court from this Circuit was presented with a case very similar to the present case. In *In re Salazar*, the court consolidated several cases with similar issues. In three of the consolidated cases, Chapter 13 debtors electing to take federal exemptions indicated "an actual dollar amount for the value of each of their claimed exemptions in addition to the '100% of FMV' claim." *In re Salazar*, 449 B.R. 890, 893 (Bankr. N.D. Tex. 2011).

In *Salazar*, the trustee objected to the debtors claimed exemptions, and the court was faced with the question of how to proceed. The court outlined at least two possible methods of dealing with an objection to a "100% of FMV" exemption. The first method, set forth by a bankruptcy court in *In re Moore*, 442 B.R. 865, 868 (Bankr. N.D. Tex. 2010), required the court to conduct an evidentiary hearing on the objection where "the debtor has the burden of going forward to establish at least a plausible basis for a claim that '100% of FMV' of an asset falls within the statutory limit . . . ." *In re Salazar*, 449 B.R. at 897. The trustee would then have the burden to prove that the claimed exemption exceeded the statutory limit. If the trustee failed to meet its burden, the objection would be overruled and the "asset claimed will no longer be part of the estate." *Id.*; *In re Moore*, 442 B.R. at 868. The *Salazar* court did not follow this approach, and further disputed the *Moore* conclusion that the asset would leave the estate.

The second method, and the approach adopted by the court in *Salazar*, involves the Court simply declaring an objection to a "100% of FMV" claim of exemption to be a facially valid objection. The court then would sustain the objection unless the debtor amended his exemption to claim "a dollar amount for his exempt interest in the property." *Id.* at 897. This Court finds no support for this approach in the statute.

Because the debtors' exemptions were limited to an *interest* in the property, not the property itself, the *Salazar* court concluded that a valuation hearing was unnecessary. "The value of the property itself is relevant only to the extent that there is sufficient value to support the amount of the exemptible interest." *Id.* at 898. If the trustee does not object, the "100% of FMV" exemption claim stands. However, the *Salazar* court made clear that the exemption claim is "still limited to his interest in the property[]" because "title to the property does not pass to the debtor even if no objection is filed." *Id.* at 900; *Schwab*, 560 U.S. at 794 n. 21.

In addition to setting forth the above analytical framework, the *Salazar* court also addressed how post-petition appreciation in value would affect a debtor's "100% of FMV" exemption claim. The court cited the Ninth Circuit's opinion in *In re Gebhart*, for the proposition that a debtor is not entitled to post-petition appreciation on their exempt interest. *Id.* at 901. This Court will analyze *Gebhart* in further detail below, but at this juncture an important distinction is apparent. In *Gebhart*, the debtors failed to make an exemption claim of "100% of FMV" and were consequently limited to the fixed dollar amount they claimed exempt. *In re Gebhart*, 621 F.3d 1206, 1208 (9th Cir. 2010). In light of *Gebhart*, the *Salazar* court concluded:

> Accordingly, if the trustee wishes to preserve for the estate any excess value—value over the amount of the statutory limit that may exist either at the time the exemption is claimed, as was the case in *Schwab*, or any excess value that may exist as a result of anticipated appreciation in the property, as happened in *Gebhart*—the trustee must object to the exemption claim itself.

In re Salazar, 449 B.R. at 900. To avoid confusion, the *Salazar* court stated, "to be clear, in the unlikely event that an asset, an interest of which has been exempted by the debtor, appreciates in value to the point it exceeds the statutory limit, the trustee will still hold title to such asset." *Id.* at 901. Implicit in this concluding remark is the assumption that if an asset appreciates, the holder of 100% interest in that asset (the debtor, as (now) exempt property) is not entitled to the benefit

of such appreciation. As discussed in detail in Section III, the Court disagrees with that assumption.

II. Use of the *Schwab* language accomplishes more than notice.

At the hearing on March 28, 2016, in response to the Court's statement that " . . . [*Schwab*] says, the Trustee can object if the value of the asset exceeds the fair market value of the allowed exemption" Mr. Peake argued, "[w]hat I really think [*Schwab*] says, is that if you put the Trustee on notice that that's what you're trying to do, the Trustee can object and then limit your exemption to the monetary amounts provided by Congress and the statute." (ECF No. 89 at 35). When asked about the meaning of the "100% of FMV" language that the Supreme Court recommended Reilly use in *Schwab*, Mr. Peake argued "that's just a notice mechanism." (ECF No. 89 at 9).

In *Williams v. Biesiada*, our own district court found that the *Schwab* language served an important notice purpose. In *Williams*, the debtor claimed a lawsuit as exempt property, but indicated his interest in exempting "Full Fair Market Value" in the description of property column of Schedule C, not in the correct column entitled "value of claimed exemption." Because of this error, the court held that the trustee did not have sufficient notice, and therefore did not waive the estate's interest in the lawsuit by failing to object. 498 B.R. 746, 754 (S.D. Tex. 2013). *Williams* falls squarely within both *Schwab* and the holding in this opinion.

The Supreme Court's statement in *Schwab* that a debtor using the "100% of FMV" language would "encourage the trustee to object promptly" suggests it serves *some* notice purpose, but inserting the "100% of FMV" language is not *solely* for notice purposes. The Court questions why the Supreme Court would recommend an approach that—if precisely followed by

a debtor—would always be facially rejected. Surely the Supreme Court would not have adopted a practice that was fatally objectionable and flawed.

The "100 of FMV" language has an independent legal effect. The Supreme Court offered the "100% of FMV" language as an alternative to a debtor who did not wish to exempt a mere interest worth a specified dollar amount. *Compare Schwab* 560 U.S. at 792 ("where a debtor intends to exempt nothing more than an interest worth a specified dollar amount in an asset"), *with id.* at 792 ("where, as here, it is important to the debtor to exempt the full market value of the asset or the asset itself."). The Court contemplated a distinct type of exemption, identified by using the "100% of FMV" language, which both notifies the trustee of the debtor's intent, and defines the scope of the claimed exemption. The language is necessary to distinguish the *Schwab* exemption from "an interest worth a specified dollar amount in an asset." *Id.* at 792.

Perhaps the "100% of FMV" exemption can be best conceptualized as an exemption of an equity interest.[3] Conversely, omitting the "100% of FMV" language results in removing from the estate a fixed monetary interest in the asset, much like a lien.

The Supreme Court in *Schwab* did not consider it a foregone conclusion that a trustee's objection to a debtor's attempt to effectuate a "100% of FMV" exemption of an interest valued within the statutory limit would automatically be sustained. Indeed, the Court contemplated the effect of the language if the objection was overruled: the debtor would be "entitled to exclude the

[3] The question of whether a debtor may exempt an "equity" interest of less than 100% in lieu of a monetary interest in the *value* of the asset is not before the Court. Nevertheless, consider the exemption possibilities for a rare coin owned by the debtor with a fair market value of $10,000.00. Theoretically, under § 522(d)(5) a debtor could exempt a 10% interest in the coin—and thus exempt an interest with a fair market value of $1,000.00. Alternatively, a debtor could exempt a $1,000.00 monetary interest in the *value* of the coin. As of the date of exemption, they are functionally identical, but if the coin changes in value post-exemption, the debtor's equity interest in the coin—which was removed from the estate—is subject to fluctuations in the rare coin market. Fluctuation in value of the debtor's equity interest can work to the debtor's benefit or detriment. If the coin depreciates, the value of the debtor's equity interest depreciates (and he would have squandered valuable exemption space that could have been used for another asset). Conversely, if the coin appreciates, the value of the debtor's equity interest appreciates. Because the debtor's equity interest was removed from the estate, any appreciation in value of that interest is similarly removed from the estate. Had the debtor opted only to exempt a $1,000.00 monetary interest in the asset, the value of his exemption would be unaffected by post-exemption value fluctuations.

full value of the asset." *Id.* at 793. The Court fully understood the exemptions offered by the Code, and it did not offer an alternative that would contravene § 522. It simply determined that in some cases, the value of 100% of the interest in an asset as of the petition date would be within the statutory limits. Under such circumstances, the debtor would be entitled to exempt the "full value of the asset."

The text of the Code underscores this result. As an example, § 522(d)(5) allows a debtor to exempt "[t]he debtor's aggregate *interest* in any property, not to exceed in *value* $1,225 . . . ." In § 522(d)(4) a debtor may exempt his "aggregate *interest*, not to exceed $1,550 in *value*, in jewelry . . . ." 11 U.S.C. § 522 (emphasis added). These examples illustrate that it is the debtor's *interest* to which Code offers exemption. It is true that the value of the interest as of the petition date may not exceed the fixed dollar amount in the statute. But it is the interest, not the value, that is exempted.

III. Post-petition appreciation in value of an exempt interest in an asset devolves to the debtor.

If a debtor exempts her interest[4] in an asset as 100% of FMV and values his interest within the applicable statutory limit, and that claimed exemption is unopposed (or all objections are overruled), 100% of the interest in the asset is *removed* from the estate. *Rousey v. Jacoway*, 544 U.S. 320, 325 (2005) ("To help the debtor obtain a fresh start, the Bankruptcy Code permits him to *withdraw from the estate* certain interests in property") (emphasis added). Bare title to the asset may remain with the estate, but 100% of the interest in that asset is withdrawn. If the asset then appreciates, who benefits from the appreciation? The Court finds it plain that it is the debtor who receives the benefit.

[4] Of course, some state statutes (e.g., Tex. Prop. Code § 41.001) allow for an exemption of the asset itself. This opinion does not address the effect of a state exemption statute that provides for the exemption of an asset.

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*: 1.1	$228,480.00	☐ _____ ☑ 100% of fair market value, up to any applicable statutory limit	**11 U.S.C. § 522(d)(1) (Claimed: $0.00 100% of FMV)**
Brief description: **3118 Thomas Paine Dr** **Legal description:** **Lexington Place Sec 1, Block 1, Lot 1** Line from *Schedule A/B*: 1.2	$179,560.00	☐ _____ ☑ 100% of fair market value, up to any applicable statutory limit	**11 U.S.C. § 522(d)(5) (Claimed: $9,335.49 100% of FMV)**

As reflected in a portion of Ms. Ayobami's Schedule C published above, she claimed as exempt 100% of FMV of her interest with a value of $9,335.49 in real estate located at 3118 Thomas Paine Dr. The total value of the property is $179,560.00, but her Schedule D reflects a lien on the property for $170,224.51. The value of Ms. Ayobami's interest in the property is within the limit offered by § 522(d)(5). It is Mr. Peake's position that Ms. Ayobami exempted a fixed $9,335.49 interest in the property, and that any appreciation in value of the property should remain in, or be returned to, the estate. (ECF No. 89 at 13) (responding to the Court's inquiry regarding the hypothetical exemption of a rare coin worth $5,000, Mr. Peake stated that "the $5,000 would leave [the estate], but any value over and above that, stays the property of the estate.").

In principle, Mr. Peake argues that any appreciation beyond the value of the exemption is non-exempt property, and therefore, property of the estate. (*Id.*).

In re Gebhart was the primary source authority used by the court in *Salazar* to conclude that the estate retains an interest in post-petition appreciation of an asset, even if a 100% of FMV interest with a value within the statutory limit in that asset was reclaimed by the debtor. *In re Salazar*, 449 B.R. at 901. *Gebhart* involved two chapter 7 cases consolidated for appeal. *In re Gebhart*, 621 F.3d 1206, 1209 (9th Cir. 2010). The relevant case—because it involved federal

exemptions—was filed by the Chappells. The Chappells exempted their equity in a homestead with a value as of the petition date of $21,511, well within the § 522(d)(1) limit. *Id.* After receiving a discharge, the holder of the Chappell's mortgage moved for relief from the stay in order to foreclose on the homestead because the Chappells had fallen into default. *Id.* In response, the trustee sought to sell the property, believing the value to have increased substantially since the petition was filed. The bankruptcy court held that the equity in the property had passed entirely out of the estate. *Id.* The trustee appealed and the bankruptcy appellate panel reversed, holding that postpetition appreciation in the homestead belonged to the estate. *Id.*

The Ninth Circuit, citing *Schwab*, held that the Chappells had only exempted a fixed monetary interest of $21,511 from the estate. *Id.* at 1210-11 ("Under [*Schwab*], an exemption claimed under a dollar-value exemption statute is limited to the value claimed at filing.").

This Court does not question the validity of this conclusion. If a debtor fails to indicate his interest in exempting 100% of FMV *or*[5] fails to assign a dollar-value to his interest, he is not entitled to retain the benefit of any postpetition appreciation. The Chappells failed to follow the *Schwab* instructions (admittedly, their case pre-dated *Schwab*); therefore, their legal position was no different from the debtors in *Orton* and *Schwab*.

The Court cannot find, either in the Code or in *Schwab*, any language that mandates that the debtor's exempt interest be a fixed dollar amount. The only mandate is that, as of the petition date, the value of the interest be within the relevant statutory limit. If a debtor employs *Schwab's* "100% of FMV" language, and assigns her interest a dollar-value as of the petition

[5] It is critical that a debtor both, (1) indicate his intent to exempt 100% of FMV, and (2) assign a dollar-value to the interest exempted. Part one of this procedure is necessary to comply with *Schwab* if the debtor wants to exempt 100% of the interest in an asset. Part two of this procedure ensures a trustee has sufficient notice of the value the debtor is claiming exempt as of the petition date so he is better positioned to object.

date, and the trustee either fails to object, or has his objection overruled, the debtor will have successfully reclaimed 100% of the interest in the asset from the estate.

The asset itself may not immediately leave the estate. Footnote 21 of *Schwab* makes clear that proposition is at least dubious. *Schwab* at 794 n. 21. However, in the Chapter 7 context, the footnote also makes clear that in most cases a Chapter 7 trustee will pass title in the asset to a debtor that has exempted a 100% interest in the asset. This is because, presumably, there would usually be no upside for the trustee in retaining bare title in the asset for the estate.[6]

The fundamental issue in dispute is whether post-petition appreciation of an asset, for which a debtor has exempted from the estate a 100% interest, is estate property. Mr. Peake argues that "any appreciation over [the exempted amount] . . . comes back into the estate . . . for the benefit of the creditors." (ECF No. 89 at 11). He further argues that if appreciation occurs, the debtor "ha[s] an absolute duty under [§] 1306 to contact [the trustee], it's no different than acquiring some other property." *Id.* at 10. It is certainly true that § 1306 reserves for the estate any property acquired by the debtor during the course of a Chapter 13 case. 11 U.S.C. § 1306(a). However, it is unclear that post-petition appreciation of an asset, all interest in which has been removed from the estate, constitutes after acquired property as contemplated by § 1306.

Section 541(a) dictates that "all legal or equitable interest of the debtor in property as of the commencement of the case" is property of the bankruptcy estate. Many courts relying on § 541(a)(6) have held that post-petition appreciation in estate property belongs to the estate. *In re Goins*, 539 B.R. 510, 516 (Bankr. E.D. Va. 2015); *In re Potter*, 228 B.R. 422, 424 (8th Cir.

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[6] In Chapter 13, the principle is the same though the process is slightly different. Section 1306(b) states that "[e]xcept as provided in a confirmed plan or order confirming a plan, *the debtor* shall remain in possession of all property of the estate." 11 U.S.C. § 1306(b) (emphasis added). In a Chapter 13 case, if there is no upside in retaining bare title to an asset for the estate, it is the debtor, as the debtor in possession of estate property, who may pass the remaining bare legal title in the asset to himself.

B.A.P. 1999); *In re Reed*, 940 F.2d 1317, 1323 (9th Cir. 1991). This result is prudent. After all, the estate has "all legal or equitable interest" in the debtor's property.[7] It follows then that the estate should benefit from any post-petition appreciation of that property.

But what of the debtor that exempts from the estate a 100% interest in the asset? Does it follow then that post-petition appreciation of the asset, of which the estate only holds bare legal title—and no beneficial title, should devolve to the estate? Certainly not. Post-petition appreciation must devolve to the holder of the interest.

IV. A path forward

The Court adopts a simple approach. While potentially burdensome with respect to case administration, this approach gives effect to the language of *Schwab* and its implications on 11 U.S.C § 522. Significantly, this approach is similar to the approach adopted by another Texas bankruptcy court. *See In re Moore*, 422 B.R. 865 (Bankr. N.D. Tex. 2010).

A debtor must to do two things to exempt a 100% interest in an asset from the estate. First, she must check the box in the third column of Schedule C that corresponds with the text "100% of fair market value, up to any applicable statutory limit." Second, she must assign a dollar value to her interest. Ms. Ayobami accomplished the second requirement by indicating the value of her interest in the assets in the fourth column of Schedule C.

The trustee may object to a debtor's claimed exemption. If the trustee lodges an objection, the court will hold an evidentiary hearing to determine the value of the claimed exemption of a 100% interest in the asset. Perhaps because the debtor's sworn schedules attest to the value of the interest, Fed. R. Bankr. P. 4003(c) imposes the burden of proof on the trustee

[7] While it is universally understood that the estate obtains legal title to the debtor's property under § 541, it is not obvious from the text of the Code that the estate obtains anything more than all interests, legal or equitable, in the debtor's property. *Compare Schwab*, 560 U.S. at 794 n.21, *with* 11 U.S.C. § 541(a)(1). Importantly, it is also the debtor's interest that is available for exemption under the limited-exemption statutes of § 522. Owning a 100% interest in an asset and owning the asset itself might be a distinction without a difference.

to challenge the debtor's value. If the objection is overruled, the debtor's interest will be removed from the estate, and the estate retains only bare title to the asset. Any postpetition appreciation of the asset will go to the debtor. If the objection is sustained, the debtor will be required to amend his exemptions to comply with § 522. *See In re Moore*, 442 B.R. at 868.

A Caution

Mr. Peake, acting with his normal diligence, is concerned that estates could be deprived of undervalued assets. The Court recognizes the administrative burden on trustees that is created by the option given in *Schwab*, but an administrative burden imposed by statute may not be avoided merely because of its burdensome nature.

Nevertheless, in 2008, the Federal Rules of Bankruptcy Procedure were amended to add a provision dealing with fraudulently claimed exemptions. The general rule for the filing of an objection to exemptions requires objections to be filed within 30 days after the conclusion of the § 341(a) meeting of creditors. Fed. R. Bankr. P. 4003(a). The 2008 Amendments give the trustee *up to one year after the case is closed* if the debtor fraudulently claimed an exemption. Fed. R. Bankr. P. 4003(b)(2).

Of course, it is not fraudulent to hold an asset that increases in value. Conversely, it likely would be fraudulent to knowingly misrepresent the fair value of an asset in order to enable an interest in that asset to be claimed as exempt. The Rules adequately provide for the integrity of the bankruptcy exemption scheme.

Conclusion

The Court will issue an order consistent with this Supplemental Memorandum Opinion. Except to the extent of any conflict, the Court's March 1, 2016 Memorandum Opinion remains effective.

SIGNED **June 9, 2016.**

Marvin Isgur
UNITED STATES BANKRUPTCY JUDGE