U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
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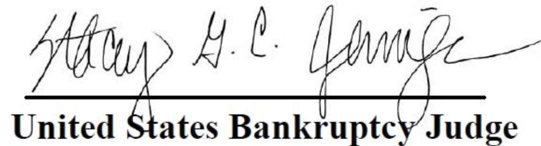
The following constitutes the ruling of the court and has the force and effect therein described.

Signed March 4, 2014



United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	**Case No. 05-39136-SGJ-7**
CARL YECKEL,	§	
Debtor.	§	**(Chapter 7)**
SUSAN MILES YECKEL,	§	
Plaintiff,	§	
v.	§	**Adversary No. 12-03023**
	§	
JAMES CUNNINGHAM, CHAPTER 7	§	
TRUSTEE OF CARL YECKEL,	§	**(Dist. Ct. #3:11-CV-01704-N)**
Defendant.	§	

BANKRUPTCY COURT'S REPORT AND RECOMMENDATION TO THE DISTRICT COURT, PROPOSING THAT IT GRANT SUMMARY JUDGMENT FOR DEFENDANT AND DISMISS THE FIRST AMENDED COMPLAINT OF PLAINTIFF

This Report and Recommendation to the district court by the bankruptcy court is made pursuant to 28 U.S.C. § 157(c) & (d), in a somewhat unusual procedural context, as set forth in the below Introduction.

I. Introduction.

First, this civil action (the "Action") pertains to a homestead (the "Homestead") that was previously sold for $1,326,000.00 cash, in a Chapter 7 bankruptcy case of an individual, whose case was styled *In re Carl Yeckel,* Case No. 05-39139-7 (the "Bankruptcy Case").[1] The Plaintiff in this Action is Susan Miles Yeckel, the ***non-debtor spouse*** of the Chapter 7 debtor (the "Plaintiff" or "Non-Debtor Spouse" or "Mrs. Yeckel"). The Plaintiff's spouse, the Chapter 7 debtor, is named Carl Yeckel (the "Debtor" or "Mr. Yeckel"). The Debtor is not a party to this Action. The one and only Defendant is James Cunningham, the Chapter 7 Bankruptcy Trustee (the "Defendant" or "Bankruptcy Trustee"), who presides over the Bankruptcy Case of Mr. Yeckel. The short version of this dispute is that: (a) there was a significant amount of equity in the Homestead; (b) the Debtor's homestead exemption was limited in his Bankruptcy Case to $125,000, pursuant to Section 522(q) of the Bankruptcy Code,[2] due to a more than $5 million dollar prepetition fraud judgment obtained against the Debtor by the Attorney General for the State of Texas, on behalf of a public interest charity, and by the Carl B. and Florence E. King Foundation; and (c) now the Non-Debtor Spouse seeks a share of the net sale proceeds from the Homestead, above and beyond the $125,000 that her Debtor-husband already received, arguing two different theories (that will be further described below).

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[1] The location of the Homestead was 3900 Marquette Street, Dallas, Texas 75225. As alluded to above, the Homestead was sold by a Chapter 7 bankruptcy trustee, on or about August 10, 2011, for a sale price of $1,326,000. Said bankruptcy trustee later deposited the sum of $900,434.66 into the Registry of the Bankruptcy Court (where the funds still sit), which was the net amount of sale proceeds after paying commissions, fees, liens, and $125,000 to the Chapter 7 debtor on account of his limited homestead exemption, pursuant to Section 522 (q) of the Bankruptcy Code. DE # 350 & DE # 358 in the BK Case. References to "DE # __ in the BK Case" herein refer to the docket entry number at which a pleading appears in the docket maintained by the Bankruptcy Court Clerk in the Bankruptcy Case.

[2] The Bankruptcy Case was filed in year 2005, when Section 522(q)'s dollar limitation on a homestead exemption was $125,000. Such amount has been adjusted periodically, pursuant to Section 104 of the Bankruptcy Code, to reflect changes in the Consumer Price Index for All Urban Consumers, and is currently set at $155,675.

This Action was originally filed on July 18, 2011, in the United States District Court for the Northern District of Texas (Dist. Ct. #3:11-CV-01704-N)—arguably, an unusual forum selection, since the Bankruptcy Case was—and still is—ongoing (and since the Action simply involves property of a bankruptcy estate and is, essentially, a claim against the debtor's ongoing bankruptcy estate—although not a proof of claim, *per se*).[3] In any event,[4] in this Action, the Plaintiff brings only one claim against the Bankruptcy Trustee: a claim seeking declaratory judgment, pursuant to 28 U.S.C. § 2201. Specifically, the Plaintiff asserts that she had a separate compensable interest in the Homestead, as either "a joint [fee] owner" of the Homestead or as a "homestead [exemption] claimant,"[5] and that her interest was not included in the Debtor's bankruptcy estate, and that she is entitled to a share of the proceeds from the Bankruptcy Trustee's earlier sale of the Homestead to compensate her for her interest (separate and apart from the $125,000 the Debtor has already received).[6] While the language of the Plaintiff's First Amended Complaint is somewhat imprecise, the Plaintiff, in essence, argues two alternative theories: (a) the characterization of the Homestead (*i.e.,* the characterization of the fee simple of the Homestead) was half her ***separate property*** and half the Debtor's separate property, so that ***her half*** of the Homestead was never a part of the bankruptcy estate, pursuant to Section

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[3] *See* 11 U.S.C. § 102(2) ("claim against the debtor" includes claim against property of the debtor); *see also* 11 U.S.C. § 101(5) ("'claim' means—(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured . . .").

[4] Certainly no criticism should be inferred here, regarding the Plaintiff's forum selection. Parties and courts have reason to be uncertain about the authority of a bankruptcy court to enter final orders in these post-*Stern v. Marshall* times, particularly where state law issues are involved. *See Stern v. Marshall,* 131 S. Ct. 2594 (2011). Notably, this Action was filed shortly after the *Stern v. Marshall* decision.

[5] *See* Plaintiff's First Amended Complaint at paragraph 11 (DE # 7 in the DC Action). References to "DE # __ in the DC Action" herein refer to the docket entry number at which a pleading appears in the docket maintained by the District Court Clerk in the Action.

[6] *See* footnote 1, *supra*.

541(a)(2) of the Bankruptcy Code; or (b) even if the Homestead should be characterized as the couple's ***community*** property that entirely became part of the Mr. Yeckel's bankruptcy estate, pursuant to Section 541(a)(2) of the Bankruptcy Code, Plaintiff still had ***her own homestead exemption-interest*** in it, separate and apart from her Debtor-husband's homestead exemption interest, so that the homestead "cap" that applied to the Debtor's homestead exemption must be essentially doubled from $125,000 to $250,000.

On July 20, 2011, the Bankruptcy Trustee filed a Motion to Refer Case to Bankruptcy Court (which was later renewed and amended on October 26, 2011) (the "Motion to Refer") asking the district court to refer this Action to the bankruptcy court presiding over the Bankruptcy Case, asserting that the issues raised by the Plaintiff were "core" in nature and should be determined by the bankruptcy court. On July 21, 2011, the Plaintiff filed a demand for a jury trial in the Action. On January 10, 2012, the district court granted the Motion to Refer, referring all pretrial matters to the bankruptcy court and directing the bankruptcy court to submit dispositive matters to the district court with a recommended disposition.[7] At that point, the bankruptcy court opened an adversary proceeding for the bankruptcy court's administration over this Action (Adversary No. 12-03023) (the "Adversary Proceeding").[8]

On March 28, 2012, the bankruptcy court held its first status conference, after receiving the referral of this Action, and shortly thereafter issued a scheduling order setting forth certain pretrial deadlines.[9] On July 9, 2012, the Bankruptcy Trustee filed a Motion for Summary

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[7] The Defendant had also filed a Motion for More Definite Statement, and the district court also referred this matter to the bankruptcy court.

[8] References to "DE # __ in the AP" herein refer to the docket entry number at which a pleading appears in the docket maintained by the Bankruptcy Clerk in the Adversary Proceeding.

[9] The bankruptcy court also denied the Defendant's Motion for More Definite Statement. *See* DE # 29 in the AP.

Judgment and Brief in Support (the "Motion for SJ").[10] On August 2, 2012, the Plaintiff filed a Response in Opposition to Defendant's Motion for Summary Judgment and Brief in Support.[11] Finally, on August 9, 2012, the Bankruptcy Trustee filed a Reply Memorandum in Support of the Motion for SJ.[12]

In the Motion for SJ, the Bankruptcy Trustee seeks a summary judgment denying the declaratory judgment that Plaintiff seeks—in other words, denying that Plaintiff is entitled to compensation from the bankruptcy estate beyond her community interest in the $125,000 that her Debtor-husband received pursuant to Section 522(q) of the Bankruptcy Code. As stated above, this Action involves two distinct theories, and the Motion for SJ brought by the Bankruptcy Trustee sought summary judgment on both issues, which, if granted, would ultimately cause the Plaintiff's First Amended Complaint to be dismissed.

A. The "*Kim* Issue." The first issue/theory addressed in the Motion for SJ is what might be described as the "*Kim* issue." The *Kim* issue is solely a legal issue, based upon undisputed facts. Specifically, the issue is whether—assuming the Homestead constituted community property that all became part of the Mr. Yeckel's bankruptcy estate, pursuant to Section 541(a)(2) of the Bankruptcy Code—Plaintiff still is entitled to ***her own distinct homestead exemption-interest*** in it, separate and apart from her Debtor-husband's homestead exemption interest in it, so that the homestead "cap" of Section 522(q), that applied to the Debtor's homestead exemption, must be essentially doubled from $125,000 to $250,000. This issue is referred to as the "*Kim* issue" because nearly an identical issue is currently on appeal in *Chong Ann Kim, et al. v. Odes Kim* (Case No. 10-10882) (the "*Kim* Case"), before the United States

[10] *See* DE ## 32 & 33 in the AP.

[11] *See* DE ## 35 & 36 in the AP.

[12] *See* DE # 37 in the AP.

Court of Appeals for the Fifth Circuit (the "Fifth Circuit"). The *Kim* Case involves the ***Section 522(p)*** homestead cap (not Section 522(q)), but otherwise the legal issue is identical (*i.e.,* whether the homestead cap is essentially doubled for a non-debtor spouse). The district court is undoubtedly aware of the *Kim* Case, as it was also the district court that ruled in the *Kim* Case before it was appealed to the Fifth Circuit. Oral argument was heard in the *Kim* Case on July 8, 2011, and the Fifth Circuit has not yet issued a ruling disposing of the appeal.

B. The "Separate Property Issue." The second issue addressed in the Motion for SJ involves an argument made in the First Amended Complaint that the Homestead should be characterized as one-half the Plaintiff's separate property and one-half the Debtor's separate property (rather than their community property), such that the Plaintiff's one-half was never a part of the bankruptcy estate, pursuant to Section 541(a)(2) of the Bankruptcy Code, and, thus, Plaintiff would be entitled to a significant portion of the sale proceeds being held in the registry of the bankruptcy court. To be clear, separate property of a non-filing spouse does not become part of a debtor/spouse's bankruptcy estate, and, thus, the Plaintiff has argued that she would be entitled to compensation for this separate property interest. This issue is not the subject of any pending appeal before the Fifth Circuit.

Because of the existence of the *Kim* Case and to avoid a waste of judicial resources, the bankruptcy court ultimately decided at a status conference held on August 16, 2012, not to rule on the Motion for SJ, and to await a ruling by the Fifth Circuit in the *Kim* Case. Accordingly, the bankruptcy court issued an Order Abating the Adversary Proceeding on August 17, 2012.[13]

C. End of Abatement. It has now been approximately a year-and-a-half since this court abated the Adversary Proceeding. Mr. Yeckel's Bankruptcy Case has now been pending for

[13] *See* DE # 38 in the AP.

several years, and this Adversary Proceeding is the only remaining matter that needs to be resolved in his case. While this court is reluctant to propose a ruling on an issue that is undoubtedly on the brink of being decided by the Fifth Circuit, the court does not believe that it can, in good conscience, make the parties wait any longer. Thus, the bankruptcy court has decided to risk the possibility of proposing a ruling that may ultimately be inconsistent with the Fifth Circuit on the issue raised in the *Kim* Case (which presumably will be forthcoming soon). The goal is to at least move the litigation forward on the second issue (*i.e.,* the "Separate Property Issue"), which is fully briefed and not likely to be impacted by the *Kim* Case.

Accordingly, the bankruptcy court respectfully submits this Report and Recommendation, proposing that summary judgment be granted in full in favor of the Bankruptcy Trustee, which would result in the dismissal of the entire Action. In other words, the bankruptcy court is recommending summary judgment for the Defendant/Bankruptcy Trustee on both the *Kim* Issue and the Separate Property Issue. Set forth herein are the bankruptcy court's reasons for the proposed summary judgment.[14] The district court is requested to consider this *de novo*, and either adopt or reject it, pursuant to the process described in 28 U.S.C. § 157(c)(1).

II. Proposed Memorandum Opinion and Order Granting Summary Judgment in Favor of the Trustee.

Now pending before the court are: (1) the Motion for SJ (DE ## 32 & 33 in the AP); (2) the Response in Opposition to Defendant's Motion for Summary Judgment and Brief in Support filed by the Plaintiff (DE ## 35 & 36 in the AP) (the "Response"); and (3) Reply Memorandum in Support of the Motion for SJ (DE # 37 in the AP). The court also has considered: (1) the Bankruptcy Trustee's Appendix to the Motion for SJ (DE # 32-1 through 32-4 in the AP); (2)

[14] *See* Fed. R. Civ. Proc. 56(a), as adopted in a bankruptcy adversary proceeding pursuant to Fed. R. Bankr. Proc. 7056.

Plaintiff's Appendix in Support of the Response (DE # 35-1 through 35-2 in the AP); and (3) Bankruptcy Trustee's Appendix in Support of the Reply (DE # 37-1 through 37-2 in the AP). Based upon the summary judgment evidence and the arguments presented, the bankruptcy court recommends that summary judgment be granted in favor of the Bankruptcy Trustee and that the Plaintiff's First Amended Complaint be dismissed.

A. Jurisdiction

Bankruptcy subject matter jurisdiction exists in this Action, pursuant to 28 U.S.C. § 1334(b), since the Action, at a minimum, is a proceeding "related to" a bankruptcy case and, more aptly, involves matters "arising in" a bankruptcy case and "arising under" title 11 (*i.e.,* the Action involves a non-debtor spouse's claim to proceeds of a sale of property of the estate and requires an interpretation of Sections 522(q) and 541 of the Bankruptcy Code).[15] The bankruptcy court in this district is generally granted authority to exercise bankruptcy subject matter jurisdiction, pursuant to 28 U.S.C. § 157(a) and the Standing Order of Reference of Bankruptcy Cases and Proceedings (Misc. Rule No. 33), for the Northern District of Texas, dated August 3, 1984. The claims at issue in the Action are statutory "core" matters, pursuant to 28 U.S.C. § 157(b)(2)(B) and (O). Specifically, the court views the issues presented in the Action to involve claims against the Debtor and his bankruptcy estate, by virtue of section 102(2) of the Bankruptcy Code, which states that a "claim against the debtor" includes a claim against the property of the debtor. Specifically, this Action involves claims against the sale proceeds of the Debtor's homestead, which was part of the Debtor's bankruptcy estate as of the Petition Date.

In any event, whether or not the Action involves core or noncore disputes, the bankruptcy court hereby submits this ruling as a ***proposed*** ruling for the district court to consider *de novo*,

[15] *See also* 28 U.S.C. § 1334(e), which grants the district court exclusive jurisdiction of all property, wherever located, of the debtor as of the commencement of his or her bankruptcy case and of property of the bankruptcy estate.

pursuant to the process described in 28 U.S.C. § 157(c)(1), and consistent with the terms of the district court's Order of January 10, 2012.

B. The Summary Judgment Evidence

The unrefuted summary judgment evidence [16] is as follows:

1. The Plaintiff and the Debtor were married in 1962 and have remained married since that time.[17] They purchased the Homestead, post-marriage, in both of their names, on or about April 17, 1992.[18]

2. The Plaintiff and Debtor both represent in Affidavits that their purchase of the Homestead was facilitated with a loan from the Debtor's mother, Jane C. Yeckel (the Plaintiff suggests that the loan was made only to the Debtor; the Debtor's testimony is worded less precisely).[19] ***However, no promissory note or other loan document was submitted into evidence***. Nevertheless, the Debtor's mother's Last Will and Testament, which was signed on January 29, 1999 (approximately 7 years after the Homestead was purchased) was submitted into evidence, and it made reference to a loan that had been made by her to the Debtor and Plaintiff in the 1990's:

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[16] All summary judgment evidence of the Plaintiff will be referred to as "Pl. App. Ex. __, p. ___." Such Appendix appears at DE # 35 of the docket maintained by the Bankruptcy Clerk in this Adversary Proceeding. Similarly, all summary judgment evidence of the Defendant/Bankruptcy Trustee will be referred to as "Def. App. Ex. __, p. ___" and such Appendix appears at DE # 32 of the docket maintained by the Bankruptcy Clerk in this Adversary Proceeding. Additionally, the Defendant/Bankruptcy Trustee attached additional summary judgment evidence in its Reply, which appears at DE # 37 of the docket maintained by the Bankruptcy Clerk in this Adversary Proceeding and will be referred to as "Def. Reply App. Ex. __. p. __." Note, that in determining the merits of the Defendant/Bankruptcy Trustee's Motion for Summary Judgment, the court also has discretion to take judicial notice of all documents filed with this court in the Adversary Proceeding and in Mr. Yeckel's Bankruptcy Case. *See Goldberg v. Craig (In re Hydro-Action, Inc.)*, 341 B.R. 186, 188 (Bankr. E.D. Tex. 2006) (citing Fed. R. Evid. 201(b), (f)).

[17] *See* Def. App. Ex. 1, p. 2.

[18] *See* Def. App. Ex. 1, p. 3; *see also* Pl. App. Ex. A, pp. 1-4 (Warranty Deed from Grantor, Thomas R. Matter, Inc., to Grantee(s), Carl L. Yeckel and Susan M. Yeckel). Note that the Warranty Deed is dated April 15, 1992.

[19] *See* Pl. App. Ex. 1, p. 2 (para. 3) & Pl. App. Ex. 2, p. 2 (para. 3).

> all of the rest and residue of my property and estate, of whatsoever kind and character, whether real, personal, or mixed, and wherever situated, unto my son, CARL LOUIS YECKEL, and my daughter, DOROTHY JANE YECKEL, in equal proportions, with the provision, however, that ***if the promissory note dated July 15, 1996,*** [20] ***payable to me by the said CARL LOUIS YECKEL and his wife, SUSAN M. YECKEL, in the principal sum of $1,208,925, or any renewal, extension or amendment thereof, shall remain unpaid***, in whole or in part, at the time of my death, such note and the indebtedness evidenced thereby shall be allocated and distributed solely to the said CARL LOUIS YECKEL as a portion of his one-half (1/2) of my estate, and there shall be allocated and distributed to the said DOROTHY JANE YECKEL, as a portion of her one-half (1/2) of my estate, an amount in cash equal to the unpaid balance of such note (principal and interest) at the time the same is so distributed.[21]

(Emphasis added.) Additionally, there was a reference to a "Note Receivable dated July 15, 1996, in the amount of $1,208,925.00, rate of interest 6.5%, from Carl L. Yeckel and Susan M. Yeckel" in the "Inventory and Appraisement and List of Claims" filed in the Estate of Jane C. Yeckel, Deceased, Case No. 20-30-P2, in the Probate Court No. 2 of Dallas County, Texas (the "Probate Case") after Jane C. Yeckel's death on December 21, 2001.[22]

3. The Debtor was, for many years, the president of the Carl B. and Florence E. King Foundation (the "Foundation"), which had been established by his grandparents in 1966 (his grandfather, Carl, having been an oilman).[23] On or about June 11, 2004, in a state court lawsuit filed by the Texas Attorney General and the Foundation, and tried before a jury, the Debtor was found liable to the Foundation for significant damages caused by the Debtor's fraudulent conduct and breach of fiduciary duties while President of the Foundation (among other things, taking excessive compensation from the Foundation and taking actions not

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[20] Again, the note itself was not submitted into evidence and no party addressed why not or why the note may have been dated July 15, 1996—more than four years after the acquisition of the Homestead.

[21] *See* Def. Reply App. Ex. B, pp. 17-18.

[22] See Def. Reply App. Ex. A, p.4 & Pl. App. Ex. 1, p. 2.

[23] *See* Pl. App. Ex. D, p. 2.

authorized by the Board of the Foundation).[24] A Modified Final Judgment was entered on August 20, 2004, and awarded actual damages against Mr. Yeckel of over $5 million and punitive damages of over $10 million (the "Judgment").[25] As of April 8, 2010, all appeals relating to the Judgment were exhausted and the Judgment, without the award of punitive damages (which had been reversed during the appeal process), became final and no longer subject to appeal.[26]

4. On August 12, 2005 (the "Petition Date"), during the appeal process of the Judgment, Mr. Yeckel filed a chapter 11 bankruptcy case[27] (the "Bankruptcy Case") as a sole debtor (without the Plaintiff), and listed the residence in which he and the Plaintiff resided (*i.e.*, the Homestead) as exempt property pursuant to Texas law in his bankruptcy schedules.[28] The Debtor did not specify whether the Homestead was community property or separate property on either his Bankruptcy Schedule A or C. Further, on September 20, 2006, during a Bankruptcy Rule 2004 Examination, while represented by sophisticated separate bankruptcy counsel, the Plaintiff did not claim the Homestead as separate property—despite being asked several questions regarding what separate property she might have.[29]

5. The Bankruptcy Trustee, the Foundation and the Attorney General of the State of Texas, on behalf of the public interest in the charity (the "A.G.") objected to the Debtor's homestead exemption, based upon Section 522(q) of the Bankruptcy Code, arguing that Mr.

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[24] *See* Def. App. Ex. 1, pp. 2-3, 8-11, 12-41, & 42-46.

[25] *See* Def. App. Ex. 1, pp. 8-11.

[26] *See* Def. App. Ex. 1, p. 4.

[27] The Bankruptcy Case was later converted to a chapter 7 case on November 3, 2005.

[28] *See* DE # 14 in the BK Case, p. 12 at Schedule C.

[29] *See* Pls. App. Exh. H, p. 1 (line 20) through p. 28 (line 2).

Yeckel's exemption of the Homestead was limited to $125,000 because Mr. Yeckel owed a debt arising from fraud, deceit, or manipulation while acting in a fiduciary capacity when the Bankruptcy Case was filed.[30]

6. By order dated November 24, 2010, the bankruptcy court sustained the homestead exemption limitation of $125,000[31] (the "Exemption Order"). The bankruptcy court gave preclusive effect to the Judgment. The bankruptcy court's order was affirmed by the district court (Civil Action No. 3:11-cv-00236-B), on August 26, 2011.[32] The Exemption Order is, thus, now final and non-appealable.

7. On May 31, 2011, the Bankruptcy Trustee filed a Motion for Authority to Sell Property Free and Clear of Liens, Claims and Encumbrances (the "Motion to Sell") and sought authority to sell the Homestead for $1,326,000.00 cash.[33] An Order Granting the Motion to Sell (the "Sale Order") was entered by this court on July 7, 2011.[34]

8. On July 18, 2011, Mrs. Yeckel filed an appeal of the Sale Order in the Bankruptcy Case and, on the same day, filed the First Amended Complaint, thereby initiating this Action. Pursuant to a Stipulation entered into between the Bankruptcy Trustee, the Debtor, and Mrs. Yeckel, and approved by the bankruptcy court on August 9, 2011, Mrs. Yeckel subsequently agreed to dismiss her appeal of the Sale Order, so as to allow the sale of the Homestead to close, but reserved her right to pursue her claims to the sale proceeds solely through this Action. The Stipulation also provided that, upon the closing of the sale of the Homestead, the Bankruptcy

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[30] *See* DE ## 132 & 133 in the BK Case.

[31] *See* DE # 275 in the BK Case.

[32] *See* DE # 355 in the BK Case.

[33] *See* DE # 318 in the BK Case.

[34] *See* DE # 328 in the BK Case.

Trustee was to pay Mr. Yeckel $125,000 in satisfaction of his homestead interest in the Homestead.

9. After the sale of the Homestead closed, the remaining sale proceeds were placed into the registry of the bankruptcy court pending resolution of this Action.[35]

10. On January 10, 2012, the district court referred all pretrial maters to the bankruptcy court and directed this court to submit dispositive matters to the district court with a recommended disposition.

C. Summary Judgment Standard

Summary judgment is appropriate whenever a movant establishes that the pleadings, affidavits, and other evidence available to the court demonstrate that no genuine issue of material fact exists, and the movant is, thus, entitled to judgment as a matter of law.[36] A genuine issue of material fact is present when the evidence is such that a reasonable fact finder could return a verdict for the non-movant.[37] Material issues are those that could affect the outcome of the action.[38] The court must view all evidence in a light most favorable to the non-moving party.[39] Factual controversies must be resolved in favor of the non-movant, "but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts."[40] If the movant satisfies its burden, the non-movant must then come forward with specific

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[35] *See* DE # 358 in the BK Case.

[36] FED. R. CIV. P. 56(a); *Piazza's Seafood World, LLC v. Odom*, 448 F.3d 744, 752 (5th Cir. 2006); *Lockett v. Wal-Mart Stores, Inc.*, 337 F. Supp. 2d 887, 891 (E.D. Tex. 2004).

[37] *Piazza's Seafood World, LLC*, 448 F.3d at 752 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

[38] *Wyatt v. Hunt Plywood Co., Inc.*, 297 F.3d 405, 409 (5th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003).

[39] *Piazza's Seafood World, LLC*, 448 F.3d at 752; *Lockett*, 337 F. Supp. 2d at 891.

[40] *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

evidence to show that there is a genuine issue of fact.[41] The non-movant may not merely rely on conclusory allegations or the pleadings.[42] Rather, it must demonstrate specific facts identifying a genuine issue to be tried in order to avoid summary judgment.[43] Thus, summary judgment is proper if the non-movant "fails to make a showing sufficient to establish the existence of an element essential to that party's case."[44]

D. Analysis

As stated above, resolution of the Motion for SJ requires this court to examine two key issues raised in the Plaintiff's First Amended Complaint: (a) the characterization of the Homestead (*i.e.,* the characterization of the fee simple of the Homestead)—in other words, whether there is credible summary judgment evidence that the Homestead may have been one-half the Plaintiff's ***separate property*** and one-half the Debtor's separate property, so that the Plaintiff's half of the Homestead was never a part of the bankruptcy estate, pursuant to Section 541(a)(2) of the Bankruptcy Code; and (b) even if the Homestead should be characterized as the couple's ***community*** property that entirely became part of the Mr. Yeckel's bankruptcy estate, pursuant to Section 541(a)(2) of the Bankruptcy Code, whether Plaintiff still had ***her own homestead exemption-interest*** in it, separate and apart from her Debtor-husband's homestead exemption interest, so that the homestead "cap" that applied to the Debtor's homestead exemption must be essentially doubled from $125,000 to $250,000. The nature of Mrs. Yeckel's interest in the Homestead is significant because section 541 of the Bankruptcy Code provides that "[t]he commencement of a bankruptcy case creates a bankruptcy estate comprised of, among

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[41] *Lockett*, 337 F. Supp. 2d at 891; *see also Ashe v. Corley*, 992 F.2d 540, 543 (5th Cir. 1993).

[42] *Lockett*, 337 F. Supp. 2d at 891.

[43] FED. R. CIV. P. 56(c)(1); *Piazza's Seafood World, LLC*, 448 F.3d at 752; *Lockett*, 337 F. Supp. 2d at 891.

[44] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

other things, 'all interests of the debtor and the debtor's spouse in ***community property*** as of the commencement of the case that is under sole, equal, or joint management control of the debtor.''"[45] In other words, if any portion of the Homestead was Mrs. Yeckel's separate property as opposed to community property, this separate property would not have become part of Mr. Yeckel's bankruptcy estate and the issue of whether she is entitled to claim a distinct ***homestead exemption*** beyond what her husband was entitled to under section 522(q) of the Bankruptcy Code would become moot.

a. Is There a Genuine Issue of Material Fact Created by the Summary Judgment Evidence Regarding Whether the Homestead was Separate Versus Community Property?

The term "community property" is not defined in the Bankruptcy Code, but it is a "term of art referring to that certain means of holding marital property in those states which have adopted a community property system."[46] Generally, Congress has left the creation and definition of property interests of a debtor's bankruptcy estate to state law.[47] Thus, "the ultimate characterization of property as either community or separate is determined by applicable state law, and that determination establishes what interest, if any, the bankruptcy estate has in the property."[48]

In Texas, community property consists of property, other than separate property, acquired by either spouse ***during marriage***.[49] Property possessed by either spouse during their marriage

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[45] 11 U.S.C. § 541(a)(2) (emphasis added).

[46] *Anderson v. Conine (In re Robertson)*, 203 F.3d 855, 859 (5th Cir. 2000) (citations omitted).

[47] *Id.* (citing *Butner v. United States*, 440 U.S. 48, 54 (1979) ("Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.")).

[48] *Id.*

[49] Tex. Fam. Code Ann. § 3.002 (West 2006).

is ***presumed to be community property***.[50] Moreover, to overcome this statutory presumption, a spouse claiming assets as separate property is required to establish their separate character by ***clear and convincing evidence***.[51] A party may overcome this presumption by clearly tracing the original separate property into the particular assets on hand during the marriage.[52]

In accordance with the general rule that the character of marital property as community or separate is determined by the facts that existed at the inception of title, the character or status of property purchased during the marriage is determined as of the time that the property is acquired, regardless of whether the entire purchase price is paid at that time.[53] By way of example, ***if purchased property is community property at the time of its acquisition, it will remain community property, even though separate funds of either the husband or the wife are used to make subsequent payments on the purchase price***.[54]

Here, there is no genuine issue of material fact regarding the circumstances that existed when the Homestead was acquired by Mr. and Mrs. Yeckel in 1992, and the court finds, as a matter of law, that the Homestead must be deemed community property. As a preliminary matter, the Homestead was purchased during Mr. Yeckel's and Mrs. Yeckel's marriage, and, thus, is presumed to be community property unless Mrs. Yeckel is able to present clear and convincing evidence to the contrary. The only summary judgment evidence that Mrs. Yeckel has submitted regarding the issue of whether the Homestead is partially her separate property, as

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[50] Tex. Fam. Code Ann. § 3.003(a) (West 2006).

[51] Tex. Fam. Code Ann. § 3.003(b) (West 2006).

[52] *Cockerham v. Cockerham*, 527 S.W.2d 162, 167 (Tex. 1975).

[53] *Hodge v. Ellis*, 268 S.W.2d 275, 283 (Tex. App. —Fort Worth 1954), *aff'd in part*, *rev'd in part on other grounds*, 277 S.W.2d 900 (Tex. 1955); *Cowart v. Cowart*, 515 S.W.2d 359, 362 (Tex. App.—Beaumont 1974, writ ref'd n.r.e.).

[54] *Hodge*, 268 S.W.2d at 283.

opposed to all community property, is contained in an affidavit from Mr. Yeckel, which stated the following: "from the time of the purchase of the Property in 1992, it was my intent to give my wife a gift of a ½ interest in the Property as her separate Property." Mrs. Yeckel contends that this, at the least, creates a fact issue about whether she owned a separate property interest in the Homestead, relying on the case of *Cockerham v. Cockerham*, 527 S.W.2d 162, 168 (Tex. 1975), which held that "where one spouse uses separate property to pay for the property acquired during the marriage and takes title to the property in the name of both spouses, a presumption arises that a gift of one half the separate fund to the other named spouse was intended."

First, the court finds that the statement made by Mr. Yeckel in his affidavit appears to be conclusory, self-serving, and not in the nature of competent summary judgment evidence. Moreover, *Cockerham* would only have some bearing on this case if Mr. Yeckel had used his own separate property to purchase the Homestead initially, and the court finds that the summary judgment evidence does not support such a finding. Rather, the summary judgment evidence, when viewed in a light most favorable to the non-movant Plaintiff, demonstrates that the Homestead was purchased with a ***loan*** from Mr. Yeckel's mother to both Mr. Yeckel ***and*** Mrs. Yeckel. Specifically, there are at least two exhibits in the summary judgment record which make reference to funds loaned by Jane C. Yeckel to Mr. and Mrs. Yeckel. First, Jane C. Yeckel's Last Will and Testament, which was signed on January 29, 1999 (approximately seven years after the Homestead was purchased) specified that:

> all of the rest and residue of my property and estate, of whatsoever kind and character, whether real, personal, or mixed, and wherever situated, unto my son, CARL LOUIS YECKEL, and my daughter, DOROTHY JANE YECKEL, in equal proportions, with the provision, however, that if the promissory note dated July 15, 1996,[55] ***payable to me by the said CARL LOUIS YECKEL and his wife, SUSAN M. YECKEL, in the principal sum of $1,208,925***, or any renewal,

[55] This was approximately four years after the Homestead was purchased by Mr. and Mrs. Yeckel.

> extension or amendment thereof, shall remain unpaid, in whole or in part, at the time of my death, such note and the indebtedness evidenced thereby shall be allocated and distributed solely to the said CARL LOUIS YECKEL as a portion of his one-half (1/2) of my estate, and there shall be allocated and distributed to the said DOROTHY JANE YECKEL, as a portion of her one-half (1/2) of my estate, an amount in cash equal to the unpaid balance of such note (principal and interest) at the time the same is so distributed.[56]

Additionally, a "Note Receivable dated July 15, 1996, in the amount of $1,208,925.00, rate of interest 6.5%, ***from Carl L. Yeckel and Susan M. Yeckel***" is referenced in the "Inventory and Appraisement and List of Claims" filed in the Probate Case after Jane C. Yeckel's death on December 21, 2001.[57] While Mrs. Yeckel, via her affidavit submitted as part of the summary judgment record, stated that "the purchase price which my husband and I paid to Thomas R. Matter, Inc. was funded entirely from funds loaned to my husband,"[58] the court finds that such statement is in direct contravention to Jane C. Yeckel's Last Will and Testament, the Inventory and Appraisement and List of Claims filed in the Probate Case, and Mrs. Yeckel's own previous testimony in the Bankruptcy Case, [59] and does not, by itself, raise a genuine issue of material fact that the Homestead was acquired from a loan made by Mr. Yeckel's mother to Mr. and Mrs. Yeckel.

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[56] *See* Def. Reply App. Ex. B, pp. 17-18 (emphasis added).

[57] *See* Def. Reply App. Ex. A, p. 4 & Pl. App. Ex. 1, p. 2 (emphasis added).

[58] *See* Pl. App. Ex. 1, p. 2.

[59] This statement is also in direct contravention to Plaintiff's own deposition testimony, taken on September 20, 2006, where she testified as follows:

Q: All right. Is there anything else that you are claiming as your separate property other than Susanna's condominium, the stock that we've already talked about, and the tangible property that you got from your parents' estate?

A: I can't think of anything else.

See Def. App. Ex. H, p. 21.

However, whether or not it was a loan to just Mr. Yeckel or both Mr. and Mrs. Yeckel does not seem particularly relevant, as a "loan" is not considered "property" subject to a designation as either separate or community. Specifically, section 3.001 of the Texas Family Code provides:

> A spouse's separate property consists of:
> (1) The property owned or claimed by the spouse before marriage;
> (2) The property acquired by the spouse during marriage by gift, devise, or descent; and
> (3) The recovery for personal injuries sustained by the spouse during marriage except any recovery for loss of earning capacity during marriage.[60]

The summary judgment evidence demonstrates that the Homestead was not gifted or devised to Mr. Yeckel by his mother, but rather was paid for by a loan to both Mr. and Mrs. Yeckel. Furthermore, while the summary judgment evidence may demonstrate that the loan from Mr. Yeckel's mother was paid off with a separate property inheritance, long after the purchase of the Homestead, this does not change the character of the Homestead as community property, because Texas law establishes that the fact that the actual payment of all or some of the installments of the note were later made out of separate funds of a spouse does not affect the community ownership.[61] In conclusion, the court finds that, as a matter of law, the Homestead was community property at its inception and was community property when Mr. Yeckel filed for bankruptcy in 2005. There was no summary judgment evidence submitted by the Plaintiff, even when viewed in the light most favorable to the Plaintiff, to overcome the presumption that the Homestead was community property.

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[60] Tex. Fam. Code Ann. § 3.001 (West 2006).

[61] *Broussard v. Tian*, 295 S.W.2d 405, 406 (Tex. 1956); *see also Williams v. Williams*, 2007 WL 79698, at *3 (Tex. App.—Fort Worth, Jan. 11, 2007, no pet.)

b. There is No Genuine Issue of Material Fact Created, that the Plaintiff, as a Non-Filing Spouse whose Debtor-husband Claimed Exemptions Under the Bankruptcy Code, Has a Distinct, Compensable Homestead Exemption

Having found that there was no competent summary judgment evidence presented creating a fact issue that the Homestead might be partially the Plaintiff's separate property, and that the Homestead is community property, as a matter of law, which became part of Mr. Yeckel's bankruptcy estate pursuant to section 541 of the Bankruptcy Code, the court now turns back to the first issue raised in the Plaintiff's First Amended Complaint: whether the Plaintiff is entitled to claim a separate homestead exemption, independent of her husband, which would not be subject to the exemption cap provided for in Section 522(q) of the Bankruptcy Code. Here, the court finds as a matter of law that Mrs. Yeckel may not assert a separate homestead exemption in the Homestead, beyond her husband's Section 522(q) homestead exemption (*i.e.*, $125,000). The Plaintiff's argument has been rejected by at least one court in this district, as well as others.[62] This court finds that the discussion and analysis of the bankruptcy court in *In re Kim,* 405 B.R. 179 (Bankr. N.D. Tex. 2009), are instructive on this issue and adopts the reasoning of that court as set forth in more detail below.[63]

In *Kim*, the debtor's non-filing spouse claimed she was entitled to assert her own Texas homestead property exemption in the debtor's homestead property. At issue in *Kim* was the application of Section 522(p) of the Bankruptcy Code (*i.e.*, the "mansion loophole" provision of

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[62] *See, e.g., Kim v. Kim (In re Kim)*, 405 B.R. 179, 187-188 (Bankr. N.D. Tex., May 19, 2009) (debtor's non-filing spouse may not assert a homestead interest in community property after debtor has filed a bankruptcy petition and the property has become part of bankruptcy estate); *see also In re Thaw*, 496 B.R. 842, 849 (Bankr. E.D. Tex. 2013), *aff'd*, 2014 WL 186062, at *1 (E.D. Tex. Jan. 16, 2014) (same); *In re Bounds*, 491 B.R. 440, 451-52 (Bankr. W.D. Tex. 2013) (same); *Douglass v. Langehennig (In re Douglass)*, 2008 WL 2944568, at *15 (Bankr. W.D. Tex. Jul. 25, 2008) (same).

[63] The bankruptcy court's decision in *Kim* (after being affirmed by United States District Court Judge Godbey in Civil Action No. 3:09-CV-1082), is currently on appeal at the Fifth Circuit (Case No. 10–10882). As of the date of this Proposed Memorandum Opinion, the appeal has not been resolved.

section 522).[64] Although *Kim* is a Section 522(p) case, this court concludes that its reasoning applies here, because sections (p) and (q) of Section 522 were largely enacted at the same time for the same reason—Congress was exercising its authority to regulate homestead exemptions through the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").[65] In *Kim*, the bankruptcy court first held that community property becomes part of the bankruptcy estate, even if only one spouse has filed for bankruptcy.[66] The bankruptcy court also recognized that, although Texas homestead law gives a spouse rights in property, Section 522(q) of the Bankruptcy Code was meant to override Texas law and specifically held that "it is the federal Bankruptcy law and not Texas state law that ultimately controls."[67] Moreover, the bankruptcy court noted that it is federal bankruptcy law that gives a debtor the power to exempt property from the estate, gives the states the power to opt out of the federal exemption scheme, and determines applicable law under Section 522(b)(3).[68] Further, the bankruptcy court observed that BAPCPA represented a "sea change" regarding state law exemptions, with the consequence being that bankruptcy law dictates how state law exemptions apply or if they are applied.[69]

This court agrees with the bankruptcy court's analysis and ruling in *Kim*, specifically that a non-filing spouse does not have an independent interest in the homestead, so as to add to or

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[64] *Kim*, 405 B.R. at 186.

[65] *Id.* (citing *In re Presto*, 376 B.R. 554, 585 (Bankr. S.D. Tex. 2007) (the addition of §§ 522(o), (p), and (q) demonstrates Congress' intent to prevent states from having unlimited and unregulated homestead exemptions)).

[66] *Kim*, 405 B.R. at 185.

[67] *Id.* at 187.

[68] *Id.* at 186.

[69] *Id.*; *see also In re Sissom*, 366 B.R. 677, 714 (Bankr. S.D. Tex. 2007).

double up on the cap already imposed on Mr. Yeckel pursuant to Section 522(q) of the Bankruptcy Code. As stated by the bankruptcy court in *Kim*:

> Only the Debtor may exempt property that has become property of the estate, which 'effectively eliminates the rights of a non-debtor spouse to manage and control community property....' The Bankruptcy Code makes no provision for a non-debtor to claim an exemption from the estate.... There is also no provision for compensation for the non-filing spouse's property interest.[70]

E. Conclusion

In summary, the court is recommending that the district court grant summary judgment in favor of the Bankruptcy Trustee and dismiss the declaratory judgment action filed by Mrs. Yeckel. There has been no competent summary evidence put forward by the Plaintiff to overcome the presumption that the Homestead was community property. To reiterate, only conclusory, unsupported statements were put forward by the Plaintiff which (even if given any weight at all) were conclusively rebutted by the Defendant. Accordingly, as a matter of law, the Homestead became part of her husband's bankruptcy estate when Mr. Yeckel chose to file alone in August of 2005. While the Fifth Circuit has yet to rule on the issue of whether a non-filing spouse has a protected homestead exemption above and beyond what his or her debtor/spouse was entitled to under the Bankruptcy Code, this court agrees with the reasoning and holding of the bankruptcy court in *In re Kim* (which holding was later affirmed by the district court), and finds, as a matter of law, and based on the unrefuted evidence, that Mrs. Yeckel would not have an additional protected homestead exemption beyond the $125,000 that was already awarded to her husband under Section 522(q) of the Bankruptcy Code.

Accordingly, it is proposed and recommended that the district court

[70] *Kim*, 405 B.R. at 187–88 (internal citations omitted).

ORDER that Summary Judgment is **GRANTED** in favor of the Bankruptcy Trustee and that Plaintiff's First Amended Complaint should be dismissed in its entirety.

###END OF REPORT AND RECOMMENDATION AND PROPOSED MEMORANDUM OPINION###