No. 17-3323

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

In re: GEORGE DIB HABER,
Debtor.

CLYDE HARDESTY,
Trustee/Appellant,

– v. –

GEORGE DIB HABER,
Debtor/Appellee.

On Appeal from the United States District Court
For the Southern District of Ohio (No. 2:16-cv-00247-JLG)

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AND NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER IN SUPPORT OF APPELLEE AND SEEKING AFFIRMANCE OF THE DISTRICT COURT'S DECISION

NATIONAL ASSOC. OF CONSUMER
BANKRUPTCY ATTORNEYS, AND THE
NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER
AMICI CURIAE
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On Brief: J. Erik Heath
June 28, 2017

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Hardesty v. Haber., No. 17-3323

Pursuant to 6th Cir. R. 26.1, Amici Curiae, the National Association of Consumer Bankruptcy Attorneys and the National Consumer Bankruptcy Rights Center, makes the following disclosure:

1) Is party/amicus a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party. **NO**

2) Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list below the identity of the corporation and the nature of the financial interest. **NO**

This 26th day of June, 2017.

/s/ Tara Twomey
Tara Twomey, Esq.
Attorney for Amici Curiae

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STATEMENT OF INTEREST OF AMICI CURIAE

NCBRC is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially distressed debtors rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system often are ill-equipped to protect their rights in the appellate process. NCBRC files *amicus curiae* briefs in systemically-important cases to ensure that courts have a full understanding of the applicable bankruptcy law, the case, and its implications for consumer debtors.

NACBA is also a nonprofit organization, with approximately 3,000 consumer bankruptcy attorney members nationwide. NACBA advocates on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors.

NCBRC and NACBA have a vital interest in the outcome of this case. NACBA member attorneys represent individuals in a large portion of all chapter 7 cases filed. These debtors, and their attorneys, must be able to rely on the finality of the estate's disposition of assets in order to put their financial affairs in order and embark on a fresh start. That reliance would be undermined if the trustee were able to later regain control over their assets simply because they became valuable

after the trustee affirmatively chose to abandon them. Any issue concerning the nature and extent of a trustee's power to claw back such assets to the bankruptcy court's jurisdiction is of great significance to all debtors, who seek a "fresh start."

AUTHORSHIP AND FUNDING OF AMICI BRIEF

Pursuant to Fed. R. App. P. 29(c)(5), no counsel for a party authored this brief in whole or in part, and no person or entity other than NACBA, its members, NCBRC, and their counsel made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Bankruptcy Code delicately balances the interests of the many stakeholders in a bankruptcy case. On the one hand, the primary aim of the Code is to afford the honest, but unfortunate debtor a fresh start. On the other hand, it aims to provide that fresh start while fairly repaying creditors in an orderly manner to the extent possible.

The abandonment provisions of the Bankruptcy Code, which are carried over from common law traditions, exemplify that balance. Abandonment is designed to ensure the efficient administration of the bankruptcy estate. This efficiency benefits debtors and creditors alike: the debtors can rely on the finality of abandonment to organize their post-bankruptcy financial affairs, and creditors can rest assured that, on the whole, their potential distributions are not swallowed by inefficiencies in the bankruptcy system.

Because of this larger picture, courts consistently refuse to revoke abandonment of a properly scheduled asset on the mere basis that it was later discovered to have additional value. Trustee cites no cases to support a contrary result – and indeed, all cases involving such facts support Appellee's position.

Sensing the weakness in this position, Trustee attempts to argue that the debtor's accurate scheduling of his real property at the commencement of the case was somehow insufficient. This argument is based on a smattering of

unsupported assumptions about the form and timing of disclosures. It also ignores that the only requirement for proper scheduling of an asset is that interested parties are put on "inquiry notice" about the asset – a standard that is certainly met by accurate reporting and valuation of an asset and the liens attached to it.

Furthermore, Trustee's strained arguments about abandonment do not change the result here. Even accepting Trustee's flawed argument that the bankruptcy estate could regain control over an abandoned asset, the debtor here would have been able exempt the surplus as part of his personal interest in his homestead. This practical result soundly defeats Trustee's refrain that the surplus here is an unjustified "windfall" – in fact, the debtor is statutorily entitled to receive any foreclosure surplus up to the exemption amount.

ARGUMENT

Bankruptcy is a balancing act. It has two main purposes: to provide a fresh start for the debtor and to facilitate the fair and orderly repayment of creditors to the extent possible. *Kokoszka v. Belford*, 417 U.S. 642, 645 (1974); *In re Sanchez*, 372 B.R. 289, 296 (Bankr. S.D. Tex. 2007).

The primary vehicle for the bankruptcy court to achieve these objectives is the bankruptcy estate. "The commencement of a case under the Bankruptcy Code creates an estate which, with limited exceptions, consists of all of the debtor's

property." *Ohio v. Kovacs*, 469 U.S. 274, 284 n.12 (1985) (citing 11 U.S.C. § 541). The scope of this estate is "broad," including "all legal or equitable interests of the debtor in property as of the commencement of the case." *United States v. Whiting Pools*, 462 U.S. 198, 204-205 (1983) (quoting 11 U.S.C. § 541(a)(1)).[1]

Once property enters the estate, there are a number of ways for it to come back out. Under the delicate balance of the Bankruptcy Code, some of these mechanisms benefit creditors, and some benefit debtors. For example, creditors obviously benefit from the trustee's liquidation of the debtor's property. *See e.g.*, 11 U.S.C. §§ 363(b), 725. But this brief will focus on two relevant mechanisms that withdraw property from the estate that can benefit debtors: abandonment and exemptions.

I. POST-PETITION INCREASES IN VALUE DO NOT ALLOW TRUSTEES TO IGNORE THE INTENDED FINALITY OF ABANDONMENT.

A. By Design, Abandoned Assets Are Unavailable For Distribution To Creditors.

"Abandonment is the release from the debtor's estate of property previously included in that estate." *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 508 (1986) (Rehnquist, J., dissenting) (internal citations and quotations omitted). Assets are generally released either because they are burdensome to the

[1] Only limited kinds of property acquisitions after the petition date become part of the estate. *See* 11 U.S.C. § 541(a)(5)-(7).

bankruptcy estate, or because they add no meaningful value to it. *See generally,* 11 U.S.C. § 554; *see also In re Rambo*, 297 B.R. 418, 433 (Bankr. E.D. Pa. 2003) ("Where property is of inconsequential value to the estate, abandonment under § 554, rather than sale under § 363, is the proper course."); *In re Cunningham,* 48 B.R. 509, 514 (Bankr. M.D. Tenn. 1985).

The Bankruptcy Code sets out three ways to effect abandonment. First, the trustee can choose to abandon a burdensome or inconsequential asset, as he has done here. 11 U.S.C. § 554(a). Alternatively, the court can affirmatively order abandonment of such assets. 11 U.S.C. § 554(b). Or third, and most commonly, any assets not administered, regardless of their value, are deemed abandoned as a matter of law when the bankruptcy case closes (commonly referred to as "technical abandonment"). 11 U.S.C. § 554(c). This abandonment scheme, first codified in 1978, has roots in the much older common law practice barring asset sales that would not result in distribution to creditors. *See e.g.*, *Hoehn v. McIntosh*, 110 F.2d 199, 203 (6th Cir. 1940); *see also* Pub. L. No. 95-598, 92 Stat. 2549, 2603 (1978) (enacting 11 U.S.C. § 554).

The abandonment, rather than sale, of inconsequential assets by the estate serves several purposes. First and foremost, such abandonment "serve[s] the overriding purpose of bankruptcy liquidation: the expeditious reduction of the debtor's property to money, for equitable distribution to creditors," because

administering or liquidating worthless assets would necessarily "slow[] the administration of the estate and drain[] its assets." *Midlantic*, 474 U.S. at 508 (Rehnquist, J., dissenting). The Chapter 7 "trustee's duty to expeditiously close the estate [is] his 'main' duty." *In re Riverside-Linden Inv. Co.*, 925 F.2d 320, 322 (9th Cir. 1991); *In re Dorn*, 167 B.R. 860, 865 (Bankr. S.D. Ohio 1994) ("there are two goals in the administration of chapter 7 cases, i.e., to administer nonexempt assets as expeditiously as possible for the benefit of creditors, and to provide a fresh start to debtors."); *see also* 11 U.S.C. § 704(a)(1). Put simply, the abandonment process promotes this efficiency by forcing the trustee to "either 'fish or cut bait.'" *In re Holzapfel*, No. 98-00109-8-ATS, 2013 Bankr. LEXIS 1985, at *7 (Bankr. E.D.N.C. May 15, 2013).

Second, abandonment safeguards against historical self-dealing by the trustee. As noted by this Court, in codifying the abandonment procedures in Section 554,

> Congress was aware of the claim that formerly some trustees took burdensome or valueless property into the estate and sold it in order to increase their commissions. Some of the early cases condemned this particular practice in no uncertain terms, and decried the practice of selling burdensome or valueless property simply to obtain a fund for their own administrative expenses.

In re K.C. Machine & Tool Co., 816 F.2d 238, 246 (6th Cir. 1987); *see also In re KVN Corp.*, 514 B.R. 1, 7 (B.A.P. 9th Cir. 2014) (describing "past abuses"); H.

Rep. No. 95-595, at 94 (1977) ("The existence of nominal asset cases, in which the bankruptcy system is operated primarily for the benefit of those operating it, has been one of the most frequently expressed criticisms" of the prior bankruptcy system). "Congress has [thus] encouraged the abandonment of nominal assets." 6 Collier on Bankruptcy ¶ 704.02[1] (16th ed.).

The legal effect of abandonment is unmistakable. "After abandonment, the property is not in debtor's estate, and is therefore not available for distribution." *K.C. Mach.*, 816 F.2d at 245; *see also In re Kloian*, 115 Fed. App'x 768, 769 (6th Cir. 2004); *Mgmt. Inv'rs v. United Mine Workers*, 610 F.2d 384, 392 (6th Cir. 1979) (abandonment of legal claim would allow debtor to pursue the claim). This abandoned property "reverts to the debtor and stands as if no bankruptcy petition was filed." *In re Dewsnup*, 908 F.2d 588, 590 (10th Cir. 1990); *see also Morlan v. Universal Guar. Life Ins. Co.,* 298 F.3d 609, 617 (7th Cir. 2002) ("when property of the bankrupt is abandoned, the title reverts to the bankrupt, nunc pro tunc, so that he is treated as having owned it continuously." (internal quotations and citations omitted)); *Catalano v. Comm'r of Internal Revenue*, 279 F.3d 682, 685 (9th Cir. 2002); *Mason v. Comm'r of Internal Revenue,* 646 F.2d 1309, 1310 (8th Cir. 1980); *Stark v. Moran (In re Moran)*, No. 07-8035, 2008 Bankr. LEXIS 1079, at *16-17 (B.A.P. 6th Cir. Apr. 18, 2008); *Brown v. Fla. Coastal Partners, LLC*, No. 2:13-cv-1225, 2015 U.S. Dist. LEXIS 147534, at *8-9 (S.D. Ohio Oct. 30,

2015). At least a century of U.S. Supreme Court jurisprudence shows that the common law concept of abandonment had the same effect. *See Brown v. O'Keefe*, 300 U.S. 598, 602-03 (1937) (Cardozo, J.); *Sessions v. Romadka*, 145 U.S. 29, 51-52 (1892).

Trustee repeatedly characterizes this result as an unjustified windfall to the debtor. Not so. As explained by Judge Posner in the context of property exemptions, assets often change value after leaving the bankruptcy estate, and that can benefit the debtor. But such results "should not be thought a disreputable loophole." *Polis v. Getaways, Inc. (In re Polis)*, 217 F.3d 899, 902-903 (7th Cir. 2000). The Bankruptcy Code handles these uncertainties not by subjecting assets to indefinite claw-back, but through a valuation scheme that takes into account the potential for such appreciation. *Id*. As long as the disclosed value of an asset at the beginning of the case was commensurate with its potential for appreciation, then all parties had full and fair information on which to base their decisions (i.e., whether the debtor should exempt it, or whether the trustee should abandon it). *See id*. Here, it appears that the likelihood of a foreclosure surplus on the underwater home was so small that it did not add any meaningful value to the property – and those valuations have not been challenged in any event. The outcome is thus far from the "disreputable loophole" that Trustee has presented.

B. Abandonment Decisions Are Irrevocable Unless The Debtor Conceals Or Misrepresents Asset Information.

Considering that abandonment is designed to speed administration of the bankruptcy estate, its finality should come as no surprise. As this Court has recognized, "the abandonment of an asset of a bankruptcy estate… is irrevocable," even "if it later becomes clear that a piece of property has greater value than was previously believed." *Kloian*, 115 Fed. App'x at 769; *see also* 5 Collier on Bankruptcy ¶ 554.02[3] (16th ed.).

Other Circuit Courts are in agreement with this approach. *See, e.g.*, *In re Lintz W. Side Lumber, Inc.*, 655 F.2d 786, 789 (7th Cir. 1981) (cases cited) ("Since the trustee is not entitled to benefit from any subsequent unforeseen enhancement in the value of abandoned property, abandonment orders are ordinarily irrevocable."). Otherwise, the goal of efficient estate administration would be frustrated by trustees administering property in the months, or even years, after the debtor's discharge and fresh start. By preventing this indefinite uncertainty, courts recognize "the need for finality in bankruptcy cases and the need for debtors to rely on the conclusiveness of bankruptcy proceedings as they move beyond bankruptcy." *Russell v. Tadlock (In re Tadlock)*, 338 B.R. 436, 439 (B.A.P. 10th Cir. 2006); *In re Gracyk*, 103 B.R. 865, 867 (Bankr. N.D. Ohio 1989).

Some courts reach the same result, but on jurisdictional grounds. This rationale also make sense because "[a]bandonment removes the asset from the jurisdiction of the bankruptcy court." *DeVore v. Marshack (In re DeVore)*, 223

B.R. 193, 200 (B.A.P. 9th Cir. 1998) (citing *Sherrell v. Fleet Bank (In re Sherrell)*, 205 B.R. 20, 22 (N.D.N.Y. 1997)); *see also Kuehn v. The Cadle Company*, 2006 U.S. Dist. LEXIS 18205, at *4 (M.D. Fla. 2006); *In re Helms*, No. 91-2399, 1991 U.S. Dist. LEXIS 18958, at *3 (E.D. La. Dec. 23, 1991). Stated another way, "jurisdiction does not follow the property. It lapses when property leaves the estate." *In re Xonics, Inc.*, 813 F.2d 127, 131 (7th Cir. 1987). The bankruptcy court below expressed its decision in these terms as well, noting that the abandonment order "removed the Real Property entirely from the jurisdiction from the bankruptcy court." *In re Haber*, 547 B.R. 252, 259 (Bankr. S.D. Ohio 2016). Trustee's approach ignores these concerns raised below, and inappropriately requests the bankruptcy court to exert authority over property that has already departed from its jurisdictional reach. In other words, once the home was abandoned and was no longer property of the estate, the later proceeds from the foreclosure sale were not proceeds from property of the estate.

These principles are so highly regarded that courts consistently refuse to reopen an estate to administer abandoned property that was later discovered to be "more valuable than anticipated."[2] *Wallace v. Enriquez (In re Enriquez)*, 22 B.R.

[2] Debtor/Appellee cites many cases that have reached this conclusion in a variety of scenarios. (*See* Appellee's Br., at 16-17.) Given how well-entrenched these concepts are, there are likely numerous others. *See, e.g.*, *In re Josephson*, 121 F. 142 (S.D. Ga. 1903), *aff'd Meyers v. Josephson*, 124 F. 734 (5th Cir. 1903).

934, 936 (Bankr. D. Neb. 1982). Some of these decisions involve facts directly on point to the rare facts here. For example, in *In re Bast*, the Chapter 7 debtors listed a heavily encumbered property in their bankruptcy schedules. 366 B.R. 237, 239 (Bankr. S.D. Fla. 2007). Presumably because the property did not seem to have any worthwhile equity, the asset was not administered, and was therefore abandoned by operation of law at the close of the bankruptcy case. *Id*. at 240; *see* 11 U.S.C. § 554(c). Afterwards, however, the property was foreclosed by the secured creditor, and a fortuitous surplus of $82,000 was generated. *Id*. at 239. The court rejected the trustee's attempt to bring that surplus back into the estate for administration, ultimately concluding that once the property was abandoned, the bankruptcy court no longer had jurisdiction over it. *Id*. at 240. Other courts to address a foreclosure surplus after property has been abandoned reach the same result. *See Tadlock*, 338 B.R. at 439; *In re Sutton*, 10 B.R. 737, 741 (Bankr. E.D. Va. 1981).

Reinforcing the finality of abandonment, courts have made clear that it is "revocable only in very limited circumstances, such as where the trustee is given incomplete or false information of the asset by the debtor, thereby foregoing a

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(abandoned insurance contract made valuable by the insured's death out of reach of trustee).

proper investigation of the asset." *Catalano*, 279 F.3d at 686.[3] Trustee's position is largely an attempt to shoehorn this case into this narrow exception. Yet, as both of the lower courts decided, this exception does not apply here because the schedules accurately disclosed the real property, its value, and its liens when they were filed, and the debtor could not have possibly predicted at the time that a surplus would have been generated from a future foreclosure sale. Trustee even concedes that the debtor did not "attempt[] to intentionally conceal the Surplus Proceeds." (Appellant's Br., at 30.)

The lesson from all of these cases is that abandonment is final. The nature of abandonment demands that result.

C. Trustee Cites No Authority Permitting His Proposed Action.

Trustee builds his novel theory on his recitation of four cases, and a comparison of the situation to tax refunds. (Appellant's Br., at 15-24.) But neither this analogy nor his cited cases address the precise issue before the Court.

The first two cases cited by Trustee deal with *pre-bankruptcy* foreclosure surpluses that the respective debtors never scheduled. *In re Wieder*, Nos. 12-04505-FJO-7, 12-50353, 2013 Bankr. LEXIS 2706, at *2-3 (Bankr. S.D. Ind. July

[3] Bankruptcy courts have slightly more discretion, and can apply Fed. R. Civ. P. 60(d) standards, in cases of technical abandonment. *See LPP Mortg., Ltd. v. Brinley*, 547 F.3d 643 (6th Cir. 2008). Technical abandonment is often distinguished from the other forms of abandonment because it is more ministerial in nature. *See In re Wright*, 566 B.R. 457, 461-62 (B.A.P. 6th Cir. 2017).

2, 2013) (2009 foreclosure sale preceded 2012 bankruptcy filing); *In re Anderson*, 511 B.R. 481, 488-89 (Bankr. S.D. Ohio 2013). The *Wieder* Court premised its decision on the uncontroversial rule that, "[i]f the Debtor was entitled to the entirety of the surplus funds on the petition date, then the surplus funds became property of the bankruptcy estate," and therefore could not be abandoned if unscheduled. *Wieder*, *supra* at *7. Similarly, when the *Anderson* debtors filed for bankruptcy, they "listed as assets in their schedules neither real property nor [the existing] proceeds from the sale of real property." *Anderson*, *supra* at 487. Under the plain language of the Bankruptcy Code, both of these cases reached the correct result. 11 U.S.C. § 554(c) (only "scheduled" property of the estate is subject to technical abandonment). Here, by contrast, the surplus did not exist until after the bankruptcy petition was filed, and apparently after the trustee abandoned the property.

Trustee's third case, *In re Davies*, is entirely beside the point. The bankruptcy court in *Davies* entered an abandonment order that on its face only abandoned a specific piece of real property. *In re Davies*, No. CC-11-1353-PaMkH, 2011 Bankr. LEXIS 5305, at *3-4 (B.A.P. 9th Cir. Dec. 9, 2011). Despite the specificity of the order, the debtor insisted that a completely different asset – a judgment from a domestic relations case – was somehow included in that abandonment order. *Id*. at *12. While the court agreed that revocation of

abandonment was generally improper, the court concluded that the judgment was not part of the plain language of the abandonment order for the real estate. *Id*. at *13-16.

Unlike *Davies*, the abandonment order here clearly covered the asset at issue: the debtor's foreclosed property. Trustee's strained argument that some of the property's value was not included in that abandonment order defies its clear language. And tellingly, Trustee cites no authority to close this large gap between *Davies* and this case.

After cataloging the above authorities – which are all easily distinguishable from the issue facing the court – Trustee unpersuasively compares the surplus in this case to a tax-refund. These assets are factually dissimilar. The right to receive a tax-refund is an unliquidated asset that the debtor owns on the date of the bankruptcy petition and should schedule. The surplus from a future foreclosure is not a standalone future payment, but represents the liquidated value of an underlying asset – real estate. Here, this liquidated value would have been captured in the scheduled value of the real estate. Yet, Trustee's analogy is premised on both assets being unscheduled. (*See* Appellant's Br., 23 ("previously unscheduled refund").) As described above, unscheduled property is not abandoned when the case is closed. Cases that apply the plain language from the Bankruptcy Code to unscheduled tax refunds, such as the one relied upon by

Trustee, *In re Medley*, 29 B.R. 84 (M.D. Tenn. 1983), are therefore hardly remarkable. But the big difference is that, as described in more detail below, the asset in this case was properly scheduled.

II. THE ASSET WAS PROPERLY SCHEDULED.

Trustee makes the remarkable argument that, because the debtor failed to schedule separately the surplus proceeds – which did not exist when he filed bankruptcy -- they were not abandoned. (Appellant's Br., at 25-30.) This argument fails for a number of reasons.

As a threshold matter, Trustee's assertion that there was an unscheduled asset here is a red herring in this appeal. Whether an asset was scheduled is only relevant as to *technical abandonment*. *Compare* 11 U.S.C. § 554(c) ("any property scheduled…"), *with* § 554(a)-(b) ("any property of the estate"). Here, Trustee expressly abandoned the real estate, so any discussion about whether it was scheduled for purposes of being caught in the broad net of technical abandonment is entirely irrelevant. Trustee's brief implicitly recognizes this, and indeed focuses much of this discussion on technical abandonment, even though that is not the form of abandonment that took place here. (*See* Appellant's Br., at 29.)

Should the court reach the issue, the proper scheduling of an asset in a bankruptcy case is not difficult. A sufficient schedule must only provide "inquiry notice to affected parties to seek further detail" about the asset if so desired.

Cusano v. Klein, 264 F.3d 936, 947 (9th Cir. 2001); *see also Payne v. Wood*, 775 F.2d 202, 206 (7th Cir. 1985). The bankruptcy court's description of the debtor's scheduling appears to go well beyond mere "inquiry notice." *See Haber*, 547 B.R. at 259 ("The Debtor disclosed the Real Property on Schedule A and provided the full street address, the current value of the Debtor's interest in the Real Property, and the amount of secured claims related to the Real Property..."). By definition, the scheduled value of the real property would necessarily include the full liquidation value of the asset – including any surplus.

Trustee attempts to rewrite the "inquiry notice" standard by arguing that surplus equity is somehow required to be scheduled separately from the underlying asset. As the district court stated, "[t]he Trustee has cited no legal authority supporting the proposition that the Debtor had an obligation to separately disclose potential proceeds from any future sale of the real property." *Hardesty v. Haber (In re Haber)*, No. 2:16-cv-247, 2017 U.S. Dist. LEXIS 37973, at *5 (S.D. Ohio Mar. 16, 2017). This legal authority is lacking from Trustee's brief for good reason: there is none. No provision of the Bankruptcy Code or rules require assets to be listed in such bifurcated form in order to meet the notice function of the schedules.

Finally, even accepting Trustee's false premise that the surplus should have been scheduled separately, Trustee depicts a moving target as to when those funds

should have been scheduled. At times, Trustee suggests that the debtor had a duty to disclose the future surplus when the case was filed. (*See* Appellant's Br., at 25 ("If a debtor is uncertain about his interest in an asset, 'the asset should be scheduled with an appropriate explanation.'"), 30 ("every document the Debtor filed represented to the Trustee that no such Proceeds would exist").) To the extent Trustee makes that argument, it is of course, absurd. It is impossible to schedule something that only comes into existence after an unforeseeable future event.

To the extent that Trustee argues the schedules should have been amended, that approach is also mistaken. The Bankruptcy Rules expressly define the limited circumstances when amendment is required. Specifically, amended schedules are only required when "the debtor acquires or becomes entitled to acquire any interest in property" pursuant to Section 541(a)(5) of the Code. Fed. R. Bankr. P. 1007(h). The property covered under Section 541(a)(5) is a discrete category, covering only certain fairly unusual, one-time events -- inheritances, divorce settlements, and insurance proceeds, to which the debtor becomes entitled within 180 days of the petition's filing date. 11 U.S.C. § 541(a)(5); *In re Woodson*, 839 F.2d 610, 617 (9th Cir. 1988). But the rules for amendment do not cover the property interests under which Trustee claims this surplus falls: 11 U.S.C. §§ 541(a)(6)-(7). (See Appellant's Br., at 29.) Again, Trustee cites no authority for his proposition that

property entering the estate pursuant to Section 541(a)(6) or (a)(7) requires an amended schedule.

III. EVEN IF THE ASSET WERE NOT ABANDONED, THE DEBTOR CAN AMEND SCHEDULES AND EXEMPT THE PROCEEDS.

Last but not least, Trustee has nothing to gain in cases such as this one, where the funds represent exemptible interests of the debtor anyway.

As with abandoned property, "[p]roperty exempted under § 522 is removed from the estate for the benefit of the debtor." *IRS v. Luongo (In re Luongo)*, 259 F.3d 323, 335 (5th Cir. 2001); *see also Schwab v. Reilly*, 560 U.S. 770, 775-76 (2010); *Owen v. Owen*, 500 U.S. 305, 308 (1991) ("An exemption is an interest withdrawn from the estate (and hence from the creditors) for the benefit of the debtor."); *In re Bell*, 225 F.3d 203, 216 (2d Cir. 2000) ("It is well-settled law that the effect of… exemption is to remove property from the estate and vest it in the debtor."); *In re Yonikus*, 996 F.2d 866, 870 (7th Cir. 1993) ("after an asset is property of the estate… it can still past out of the estate (thus out of the reach of creditors) as a qualified exemption"). Thus, a debtor who can exempt all unencumbered equity in a piece of property regains the asset, and is able to use it in his or her post-bankruptcy life. Accordingly, "exemptions in bankruptcy cases are part and parcel of the fundamental bankruptcy concept of a 'fresh start.'" *Schwab*, 560 U.S. at 791; *see also Rousey v. Jacoway*, 544 U.S. 320, 325 (2005).

These exemptions are so crucial to a debtor's fresh start that they can only be denied based on the specific, limited circumstances enumerated in the Code. *Law v. Siegel*, 134 S. Ct. 1188, 1194-95 (2014) (bankruptcy court erred by surcharging a debtor's exemption to account for debtor's own fraud). Except in those circumstances, "exempt property 'is not liable' for the payment of 'any [pre-petition] debt' or 'any administrative expense.'" *Ellman v. Baker (In re Baker)*, 791 F.3d 677, 681 (6th Cir. 2015). Further, it is already established in this Circuit that a debtor may seek protection of the Code's exemption scheme by amendment – even after the bankruptcy case is closed. *See id*. at 683 (citing *Siegel*); *see also Lucius v. McLemore*, 741 F.2d 125, 127 (6th Cir. 1984) (pre-*Siegel* case freely allowing amendments for exemptions at least until the case is closed).

The debtor's right to assert an exemption against property depends on the nature and value of the property as it existed on the date of the filing of the bankruptcy petition. *See Polis*, 217 F.3d at 902; 11 U.S.C. § 522(a)(2); *see also* Ohio Rev. Code § 2329.66(D) (a person's interest in a homestead exemption under Ohio law is determined "as of the date a petition is filed with the bankruptcy court"). The debtor here amended his bankruptcy schedule to assert an exemption under Ohio Rev. Code § 2329.66(a)(1)(b), which protects a "person's interest, not to exceed one hundred twenty-five thousand dollars" in his homestead. As of the filing date of the petition, the debtor had an interest in his homestead. When that

was subsequently liquidated, he was entitled to assert an exemption against the resulting funds.

CONCLUSION

For the reasons stated above, *amici curiae* ask this court to affirm the decision of the district court.

Respectfully submitted,

/s/ Tara Twomey

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 6th Cir. R. 29(a)(2)(5) because this brief contains 4,725 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This filing complies with Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point type.

3. This brief has been scanned for viruses pursuant to Rule 27(h)(2).

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Tara Twomey
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system on June 28, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Tara Twomey
Tara Twomey
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