



SO ORDERED.

SIGNED this 01 day of November, 2011.


JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

**IN RE:
NATHAN ORIE GIFFORD
RENAE LOUISE GIFFORD,**

**Case No. 11-40589
Chapter 7**

Debtors.

**IN RE:
CARRIE LYNN ROLIN,**

**Case No. 11-40950
Chapter 7**

Debtor.

**IN RE:
JAMES BRANDON BONNETTE,**

**Case No. 11-40985
Chapter 13**

Debtor.

**IN RE:
DUSTIN JAY WESTBY
BRANDI MICHELLE WESTBY,**

**Case No. 11-40986
Chapter 7**

Debtors.

**IN RE:
KENNETH ANDREW ROSS
VERA ROBERTA ROSS,**

**Case No. 11-40987
Chapter 7**

Debtors.

**IN RE:
MITCHELL RAY JONES SR,**

**Case No. 11-40996
Chapter 7**

Debtor.

**IN RE:
DARRAN B. COOK
SUSAN E. COOK,**

**Case No. 11-41054
Chapter 7**

Debtors.

**IN RE:
SUMMER ROSE SEQUEIRA,**

**Case No. 11-41140
Chapter 7**

Debtor.

**IN RE:
SHARON BREANNA ASBURY,**

**Case No. 11-41141
Chapter 7**

Debtor.

**IN RE:
TARA SUE SCHUMOCK,**

**Case No. 11-41142
Chapter 7**

Debtor.

**IN RE:
DAVID CYRUS BAKER
MELISSA INEZ BAKER,**

**Case No. 11-41394
Chapter 7**

Debtors.

**IN RE:
JOHN WESLEY GIVENS
ANGELA DAWN GIVENS,**

**Case No. 11-41428
Chapter 7**

Debtors.

**IN RE:
TABITHA MARIE CHAMBERS,**

**Case No. 11-41430
Chapter 7**

Debtor.

**IN RE:
PROLO DAVID SPANN
RHONDA MICHELLE SPANN,**

**Case No. 11-41489
Chapter 7**

Debtors.

**IN RE:
CHARLES ANDREW RAILSBACK
JENNIFER DIANE RAILSBACK,**

**Case No. 11-41546
Chapter 7**

Debtors.

**INTERVENING CASE MANAGEMENT ORDER GOVERNING
CHALLENGES TO THE CONSTITUTIONALITY OF THE EARNED INCOME
CREDIT EXEMPTION**

This matter is before the Court on its own motion. In the above cases, a Chapter 7 Trustee has filed an Objection to Exemption, raising the constitutionality of the recently enacted Earned Income Tax Credit (“EIC”) exemption passed as Senate Bill No. 12 by the Kansas Legislature. Senate Bill No. 12 states that a debtor “may exempt the debtor’s right to receive tax credits allowed pursuant to section 32 of the federal internal revenue code of 1986, as amended, and K.S.A. 2010 Supp. 79-32,205, and

amendments thereto.”¹ This exemption is available “for one tax year,” and became effective April 14, 2011.²

The Court enters this Case Management Order to govern all further proceedings in the above-named cases, and in future like cases.³

A. Notices of Constitutional Challenge and Intervention by the State of Kansas

1. Above-Named Cases

In each of the above-named cases, the Trustee has filed a notice of constitutional challenge to the EIC exemption and the Court has certified the constitutional challenge to the Attorney General for the State of Kansas, all as provided by Fed. R. Civ. P. 5.1 as it applies to bankruptcy pursuant to Fed. R. Bankr. P. 9005.1. In some of the above-named cases, the Court has already granted the Attorney General permission to intervene. In some of the above-named cases, the Attorney General has filed a motion to intervene. In the remaining cases, the Attorney General’s time to intervene has not yet expired.

In each of the above-named cases in which a motion to intervene on behalf of the

¹ S. 12, 2011 Reg. Sess. (Kan. 2011), 2011 Kan. Sess. Laws ch. 25. The Court understands the exemption may ultimately be codified as K.S.A. § 60-2315.

² *Id.* (“This act shall take effect and be in force from and after its publication in the Kansas register.”); Vol. 30, No. 15 Kan. Reg. page 437 (April 14, 2011) (publication).

³ This Case Management Order tracks the procedures outlined by Judge Nugent in his Initial Case Management and Procedural Order No. 1 Governing Jointly Administered Earned Income Tax Credit Exemption Cases, available at www.ksb.uscourts.gov (click link “Wichita Earned Income Credit Exemption Cases”). Because this Court has already set a briefing schedule concerning the exemption’s constitutionality, this Court only adopts those procedures specifically delineated herein.

Attorney General has not been granted, the **Attorney General shall, within 14 days of the date of this Order, confer with the Trustee and Debtor's Attorney (if any) and, upon consent of all parties, upload an Agreed Order Granting Intervention.** The Agreed Order shall be signed by the Attorney General, Trustee, and Debtor(s)' Attorney. In the event a party does not consent to intervention by the Attorney General in an above-named case and declines to approve an Agreed Order, the Attorney General shall file a motion to intervene (if not already filed), and the Court will hear the motion on the Court's regular motion docket. The party refusing to consent to intervention by the Attorney General shall file his or her opposition in accordance with standard procedures.

2. *Subsequently Filed Cases*

If a Trustee objects to a debtor's claimed EIC exemption in any other bankruptcy and asserts the same or a similar constitutional challenge as that discussed above, the Trustee shall continue to give the notice of constitutional challenge to the Attorney General required by Fed. R. Civ. P. 5.1. The Court will likewise continue to certify a constitutional challenge to the Kansas Attorney General as appropriate under Fed. R. Civ. P. 5.1. Upon receipt of an Objection to Exemption challenging the constitutionality of the EIC exemption, the Clerk shall file this Case Management Order in the new case, signifying that the new case will also be governed by this Case Management Order.

Upon receipt of the Trustee's notice, the Attorney General will not be required to file a separate motion to intervene in each case and set the matter for hearing. Instead, the Attorney General may simply upload an Agreed Order Granting Intervention in the subsequently-filed case (after conference and signatures as stated

above). **Such Agreed Orders shall be filed within 14 days of service of the Trustee's notice in the applicable case.**

In the event a party objects to intervention by the Attorney General in a future case and declines to approve an Agreed Order, the Attorney General shall file a motion to intervene and set it for hearing on the Court's regular motion docket. The party refusing to consent to intervention by the Attorney General shall file his or her opposition in accordance with standard procedures.

B. Debtors' 2011 Tax Returns and Refunds

1. Determining the Existence of a Case or Controversy

Because the income tax benefits that these debtors have claimed exempt will not be determined or become available to them until after the close of the 2011 tax year, the Court is unable to presently determine whether the Trustees' objections to the exemptions present an actual case or controversy. The Court, therefore, establishes interim provisions for the determination of, and disposition of such benefits, if any, pending the entry of a final order.

In order to promptly determine whether any debtor is eligible for the claimed EIC exemption and, if so, to what extent the tax refund reflects the EIC, **Debtors claiming this exemption shall file their 2011 Federal and State Income Tax Returns on or before *March 1, 2012*, and serve a full and complete copy of those returns on the Trustee and Attorney General by *March 15, 2012*.** If, based upon the filed return, a debtor is entitled to a refund stemming in whole or in part from the EIC, that **Debtor shall: (1) inform the Court of the same by filing a Notice in his or her individual case by *March 16, 2012*, and (2) deposit, immediately upon receipt**

of the tax refund, the bankruptcy estate's share of any refund received in his or her attorney's trust account, as calculated by the Trustee, pending the entry of a final order on the Trustee's objection to the EIC exemption

In no event shall the Debtor(s) spend, transfer, or distribute the estate's claimed share of the refund during the pendency of these proceedings.

2. *Calculation of the Estate's Share of the Refund*

The Trustee's calculation of the estate's share of any tax refund shall be based upon a fraction, the numerator of which shall be the number of days of the calendar year 2011 that had elapsed prior to the date of the petition and the denominator of which shall be 365.⁴ This allocation shall be presumed valid on an interim basis. If any party disputes the presumptive allocation amounts, that party shall file an appropriate motion, setting the matter for hearing on the miscellaneous docket in accordance with this Court's motion docket instructions. Until the dispute is resolved either among the parties or by the Court, the estate's presumptive share of any refund as calculated by the Trustee shall remain in the debtor's attorney's trust account.

3. *If There is No Refund*

If, upon preparation and filing of Debtors' 2011 tax returns, a Debtor concludes that he or she is not eligible for the EIC or will receive no refund, the **Debtor shall amend Schedule C in his or her individual bankruptcy case on or before March 16, 2012. The Trustee shall, within 14 days thereafter, withdraw as moot**

⁴ See *In re Barowsky*, 946 F.2d 1516 (10th Cir. 1991).

his or her objection to the previously claimed EIC exemption.

4. *If The Debtor is Pro Se* (Unrepresented by an attorney)

If the Debtor is proceeding pro se in his or her bankruptcy case, that Debtor remains bound by the procedures outlined herein, with only one modification. If, based upon a filed return, the Debtor is entitled to a refund stemming in whole or in part from the EIC, rather than deposit the estate's portion of the tax refund in an attorney trust account, the **Debtor shall, immediately upon receipt of the tax refund, send the bankruptcy estate's share of the refund to the Trustee, who will hold that money pending the entry of a final order on the Trustee's objection to the EIC exemption.**

In no event shall the Debtor(s) spend, transfer, or distribute the estate's claimed share of the refund during the pendency of these proceedings (other than by sending it immediately to the Trustee).

C. **Briefing in *In re Gifford*, Case No. 11-40589, and Placement Under Advisement of Other EIC Objections**

1. *Above-Named Cases*

In the first case captioned above, *In re Gifford*, Case No. 11-40589, the Court has entered a Scheduling Order, as follows:

Stipulations of Fact were due (and filed on) October 6, 2011;

Trustee's Brief was due (and filed on) October 20, 2011;

Attorney General's Brief and Debtor's Brief (if Debtor elects to file one) are due by **November 4, 2011**;

Trustee's Reply Brief (if any) is due by **November 21, 2011**.

In addition, the Court previously set a hearing for December 20, 2011 at 1:30 p.m. in both the *Gifford* case and many other cases, anticipating that a decision would be rendered at that time. Due to the procedures outlined above and the concerns over ripeness, the Court continues this hearing in all cases to **April 11, 2012 at 9:00 a.m.**

If any party in interest in the *Gifford* case believes the facts have changed sufficiently to cause a different legal conclusion and wishes to file supplemental briefs after any return is filed or refund issued, that party shall file an appropriate motion outlining what additional briefing is needed and why, attaching a copy of the supplemental brief requested as an exhibit. Any such motion shall be filed by **April 1, 2012.**

In the remainder of the above-named cases, the Court has entered an Order taking the Objection to Exemption under advisement until a decision is rendered in *In re Gifford*. Accordingly, the Court will continue to hold under advisement the Objections to Exemption filed in the remainder of the above-named cases. The Court has also previously notified the parties of the time frame within which they should notify the Court of any facts in their specific case that could or should cause a different legal conclusion on the constitutional question, and the procedure for filing a legal brief, if any.⁵

2. *Subsequently Filed Cases*

In any case not included, above, where a Trustee objects to a debtor's claimed EIC

⁵ Similarly, if after the 2011 returns are timely filed any party in interest believes the facts have changed sufficiently to cause a different legal conclusion and wishes to file supplemental briefs, that party shall file an appropriate motion outlining what additional briefing is needed and why, attaching a copy of the supplemental brief requested as an exhibit.

exemption and asserts the same or a similar constitutional challenge, the Court will place that Objection to Exemption under advisement until a decision is rendered in *In re Gifford*. **Within 45 days of the entry of an Order on the Attorney General's intervention into any subsequently filed cases, the parties should notify the Court if the facts of their case require briefing separate from the briefing in *In re Gifford*. Within the same time frame, the parties also should notify the Court if they wish to file an amicus brief in *In re Gifford* on the legal issues, if no decision has been entered.**

D. Miscellaneous Orders

1. Subsequently Filed Cases

Unless otherwise ordered, all future bankruptcy cases before this Court in which the Trustee objects to the Debtors' claimed EIC exemption on constitutional grounds shall be governed by this Case Management Order. Upon receipt of an Objection to Exemption challenging the constitutionality of the EIC exemption, as referenced in Section A.2. herein, the Clerk shall file this Case Management Order in the new bankruptcy case to effectuate notice and service of this Order on debtors' attorney, if debtor is represented, and on the debtor, if unrepresented. Such newly filed cases will be subject to the terms of this Case Management Order, except as the Court may order otherwise.

2. Compliance with this Order

Failure to comply with this Case Management Order may result in the exclusion of evidence, dismissal of a case, striking of pleadings, assessments of costs and attorney fees, or other appropriate action or sanction under the Federal Rules of Civil and

Bankruptcy Procedure and/or 11 U.S.C. § 105(a).

3. *Modification of this Order*

This Case Management Order shall govern all further proceedings in the EIC exemption constitutional challenge cases filed in this Court, unless and except as modified by the Court *sua sponte* or for good cause shown.

4. *Service of this Order*

The Clerk shall forthwith docket this Order in each of the individual debtors' bankruptcy cases named above.

5. *Court Website*

The Clerk shall post this Case Management Order to the Court's website, www.ksb.uscourts.gov, under the link "Judge Karlin Earned Income Credit Exemption Cases." Further, a copy of this Case Management Order shall be transmitted to the Bankruptcy List-serve and be made available in paper form at the counter of the Clerk's Office in Topeka upon request.

IT IS SO ORDERED.

###