SO ORDERED.

SIGNED this 24th day of September, 2013.

Robert E. Nugent
United States Chief Bankruptcy Judge

NOT DESIGNATED FOR ONLINE OR PRINT PUBLICATION

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:

JEREMY JOSEPH ROY,	)	**Case No. 12-11246**
AMY SUE ROY,	)	**Chapter 7**
Debtors.	)	

ORDER ON TRUSTEE'S MOTION FOR TURNOVER

The "right to receive" an earned income tax credit under § 32 of the Internal Revenue Code or KAN. STAT. ANN. § 79-32,205 (2012 Supp.) was declared exempt for Kansas bankruptcy debtors with the enactment of KAN. STAT. ANN. § 60-2315 (2012 Supp.) in 2011. This seemingly straightforward exemption provision, enacted to preserve this tax attribute for the benefit of low income, working people with children or other dependents, has drawn numerous challenges on multifaceted grounds from

chapter 7 trustees in this District. Unlike the cases in which the trustees have mounted constitutional challenges to the Kansas exemption statute, the trustee in this case seeks to limit the exemption by requiring the debtors to apply some of it to their prepetition tax liability. But because the statute expressly exempts the debtors' right to receive the credit "not to exceed" its maximum amount, and because Kansas law has long prohibited creditors from marshaling a debtor's assets in ways that would impair the debtor's exemptions, this part of the trustee's motion for turnover must be denied.

The trustee's other two concerns, whether the debtors' attorney's fee assignment should be prorated between the federal and state income tax refunds, and whether the trustee can recover the $5.45 remaining in the debtors' bank account on the petition date are resolved as follows. There is no reason why an attorney's form of assignment cannot specify from which refund his or her fees will be collected. When the assignment doesn't specify, however, prorating the assigned fee between the two refunds is workable and makes sense. As to the aggregation of small assets, in this case $5.45 is simply not an economically feasible amount of money to recover in the face of any material resistance and should be abandoned. The balance of the trustee's motion for turnover must therefore be denied.[1]

Facts

The Roys filed this case on May 14, 2012. Their 2012 federal and state income tax returns indicate that they're entitled to receive a federal refund of $5,205 and a

[1] Dkt. 26.

state refund of $369. Their federal earned income credit (EIC) amounted to $1,600 and their state EIC $288. They readily agreed to hand over to the trustee the estate's share of their refunds, 135/366 or 36.88525% of their refunds, after reducing the full federal refund by the $181 attorney's fee assignment and after deducting the entire amount of their EIC. The trustee, however, demands not only that the debtors prorate their attorney's fee assignment between the federal and state refunds, but also that their EIC be reduced to bear its proportionate "burden" of both the fees and any federal or state income tax the debtors owed. These debtors owed no federal tax, but owed state tax of $890.

We begin with the adjustment upon which all parties (including the Court) agree. The Roys filed this case on the 135th day of 2012; accordingly, 135/366 or 36.88525% of the refunds, after deduction of attorney's fees, is property of the estate.[2] The debtors' methodology is the simplest and, therefore, a good place to begin. The Roys received a federal refund of $5,205. They deducted their lawyer's $181 fee assignment and all of their $1,600 EIC, leaving $3,424. Of that amount, 36.88525% is property of the estate, or $1,262.95. They received a state refund of $369 from which they deducted their EIC of $288, leaving $81. The estate's share of that is $29.88.

Table 1: Debtors' Calculations

	Federal Refund	State Refund
Refund	$5,205.00	$369.00

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

Assignment	$(181.00)	$0.00
EIC	$(1,600.00)	$(288.00)
Net Refund	$3,424.00	$81.00
Due to Estate	$1,262.95	$29.88

The trustee's calculations are more intricate. First, he would allocate the debtors' attorney fee assignment between the federal and state refunds. The debtors' total refund being $5,574, the federal portion makes up 93.4% of the total and the state portion makes up 6.6%. The trustee then allocates the fee secured by the assignment, $181, proportionately, deducting $169.02 from the federal refund and $11.98 from the state refund. This leaves $5,035.98 of the federal refund and $857.02 of the state refund for further adjustment.

Then the trustee suggests that the proportion of the EIC to the gross amount of the refund on each return be determined so that the amount of tax "paid" by the credit can be determined. What remains after deducting that pro rata payment is, according to the trustee, the extent of the debtors' EIC exemption. The debtors' contrary view is that after the attorneys fees are deducted, and after the entire EIC amount is subtracted from that remainder, 135/366 or 36.88525% of what is left is property of the estate.

The trustee's proposed calculations are below.

Table 2: Trustee's Calculations--Federal

S	Federal Refund	$5,205.00
T	Fee Assignment	$(169.02)

U	Refund net of fee assignment	$5,035.98
V	Federal EIC	$1,600.00
W	Proportion of EIC *to gross refund*	30.74%
X	Exemptable portion of EIC [U x W]	$1,548.04
Y	Net federal refund [U - X]	$3,487.94
Z	Estate portion [Y x 36.88525%]	$1,286.53

So as to the federal refund, the trustee would reduce the exemption by about $52 and increase the estate's share of the refund by some $23. This effectively requires the EIC to bear a portion of the debtor's attorneys fee assignment, but because the debtor owed no federal income tax, the trustee would not reduce the debtor's share of the EIC any further.

The trustee's treatment of the debtor's state tax refund is significantly different because the debtor did owe state income tax and was entitled to other, non-refundable credits. Thus, the trustee allocates some portion of the refundable state EIC to the payment of state income tax, limiting the amount of the EIC that these debtors would be permitted to retain as exempt. That calculation is as follows:

Table 3: Trustee's Calculations--State

R	State refund	$ 369.00
S	Total state credits	$ 1,259.00
T	Fee assignment	$ 11.98
U	Refund net of fee	$ 357.02
V	State EIC	$ 288.00
W	Proportion of EIC *to total credits*	22.88%

X	Exemptable portion of EIC [U x W]	$	81.69
Y	Net state refund [U - X]	$	275.33
Z	Estate's portion [Y x 36.88525%]	$	101.56

Summarizing the above, the trustee believes the estate is entitled to $1,286.53 of the federal refund and $101.56 of the state refund, while the debtors say they are only obligated to pay $1,262.95 and $29.88 respectively.

The trustee also contends that the estate should receive turnover of the $5.45 remaining in the debtors' bank account on the date of filing while the debtors argue that this amount is burdensome to administer and should be abandoned. There is no dispute that the balance in the debtor's bank account on the petition date was $5.45.

Analysis[3]

Some might be tempted to dismiss the controversies raised here as too petty to dignify serious consideration, but while the numbers are small, the issues are not. Giving appropriate effect to the benevolent purposes of the earned income tax credit and the state's exemption, both of which were intended to benefit working families who earn less than $60,000 a year, approximately $12,000 below the median income of a Kansas family of four,[4] is vital to one of the core purposes of bankruptcy courts – to provide debtors a fresh start in their post-bankruptcy lives.

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[3] A motion for turnover of property of the estate is a core proceeding under 28 U.S.C. § 157(b)(2)(E) over which this Court has subject matter jurisdiction under 28 U.S.C. § 157(b)(1) and §1334.

[4] http://www.justice.gov/ust/eo/bapcpa/20130501/meanstesting.htm, viewed August 19, 2013.

The Attorney's Fee Assignment Adjustment

In a prior set of cases, I have held that when debtors validly assign a portion of their tax refunds to their attorneys for fees incurred in filing their cases in this division, the assigned amount should be deducted before the familiar proportional pre- and postpetition allocation is made under the *Barowsky* case.[5] This case poses the novel question whether the attorney's fee should be prorated between the two refunds (state and federal). Neither party provided any case law to support their positions and my independent review yields none, leading me to conclude that the practicalities of this question have either prevented its being presented to other courts or if it has been, the matter has been decided from the bench. There is nothing inherently objectionable about requiring debtors to allocate fee assignments between the gross cash amounts the debtors receive on account of their state and federal refunds, particularly when the assignment is silent with respect to apportioning the fees among those refunds and the assignment is of the debtors' "income tax *refunds*."[6] The Court will allocate the $181

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[5] *In re Barowsky,* 946 F.2d 1516 (10th Cir. 1991) (that portion of income tax refund attributable to the prepetition portion of taxable year is property of the estate); *See Redmond v. Carson (In re Carson),* 374 B.R. 247 (10th Cir. BAP 2007) (an assigned flat-fee retainer may be deducted from the entire tax refund before the pre- and post-petition allocation of the tax refund.)*; In re Hunter,* 2011 WL 1749933 (Bankr. D. Kan. May 5, 2011) (Debtors' assignment of prepetition portion of income tax refunds to their bankruptcy attorney as a flat fee retainer for filing their chapter 7 case is enforceable and results in attorney's fees being deducted from the estate's prorated share of the refund and not enforced from the post-petition portion of the refund.).

[6] Ex. 2. Emphasis added. *Cf. Hunter, supra* at note 4, where the assignment was expressly limited to the prepetition portion, or the estate's share, of the tax refund.

attorney's fee between the federal refund and state refund as advocated by the trustee.

Burdening the Earned Income Credit

As with the attorney's fee apportionment issue, there are no cases that directly address the trustee's argument that when the debtors owe tax to which the EIC would be applied, the portion of the debtors' refund that can be attributed to the credit should be reduced to force the pro rata application of a portion of the credit to the tax paid. The trustee's view is that permitting the debtors to retain all of their EIC when, in fact, some portion of the taxes they pay should be attributed to it effectively places the burden of paying the debtors' taxes on the creditors by diminishing the estate.

In *In re Earned Income Tax Credit Exemption Constitutional Challenge Cases*, I made the following comments about the nature and purpose of the earned income credit:

> The EIC is a refundable tax credit. As the Tenth Circuit noted in *In re Montgomery*, an individual's tax credits are applied to tax owed for a taxable year and if they exceed the amount of tax owed, they are considered an overpayment that is refunded. So, whether an individual has actually paid in withholdings or not, she is entitled to receive the excess credit as if she had. The EIC "was enacted to reduce the disincentive to work caused by the imposition of Social Security taxes on earned income (welfare payments are not similarly taxed), to stimulate the economy by funneling funds to persons likely to spend the money immediately, and to provide relief for low-income families hurt by rising food and energy prices." As the Tenth Circuit Bankruptcy Appellate Panel has noted, "the EIC benefits low-income married couples and heads of households with qualifying dependent children." The state's EIC is computed as a percentage of the federal EIC, currently set at 18 per cent.[7]

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[7] *In re Earned Income Tax Credit Exemption Constitutional Challenge Cases,* 477 B.R. 791, 796-97 (Bankr. D. Kan. 2012). *See* KAN. STAT. ANN. § 79-32,205.

In support of his position here, the trustee cites several cases that support the general proposition that the EIC can be apportioned. In *In re Montgomery*, which the Tenth Circuit Court of Appeals decided before the legislature enacted KAN. STAT. ANN. § 60-2315, the Circuit held that the prepetition portion of a Kansas debtor's EIC was property of the bankruptcy estate and subject to the same proration required under *Barowsky* as the rest of the tax refund.[8] Later in *In re Borgman*, the Tenth Circuit held that a Colorado statute exempting the "full amount of any . . . tax refund *attributed to* an earned income tax credit or a child tax credit" does not permit the debtor to retain the portion of his refund that is attributable to the child tax credit (different from the EIC) because, unlike the EIC, that credit is not refundable under I.R.C. § 6401.[9] In that case, the debtors had no EIC, only the child tax credit and overpayments.[10] The Circuit affirmed the holdings of both Colorado bankruptcy judges who had concluded that because the child tax credit was not refundable, it could not make up any part of the refund.[11] Holding otherwise would effectively force the exemption of non-refundable overpayments that are not otherwise exempt under Colorado law. *Borgman* bars the exemption of non-refundable elements of a tax refund

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[8] 224 F.3d 1193, 1195 (10th Cir. 2000).

[9] 698 F.3d 1255, 1258 (10th Cir. 2012).

[10] *Id.* at 1258-59. The *Borgman* opinion addressed the identical issue in two separate bankruptcy cases (*Borgman* and *Dunckley*) – whether the nonrefundable portion of the federal child tax credit could be exempted under Colorado law.

[11] *Id.* at 1261.

because there is nothing in the debtor's hands to exempt.[12] The converse of this rule may be that a debtor can only exempt what is attributable to the exempt elements of the refund, requiring the proration the trustee advocates in the Roys' case to determine what precisely is attributable to the credit.

But in *In re Westby*, Judge Karlin refused to permit an allocation of the EIC into pre- and postpetition portions.[13] She correctly held that the *Barowsky* proration did not apply to the EIC because the EIC is exempt, noting that "Senate Bill No. 12 explicitly exempts the "maximum credit" for "one tax year." Therefore, a pro rata division would not be appropriate, because Senate Bill No. 12 exempts the property from the estate entirely."[14] That reasoning disposes of the point here, too. Because the entire EIC is exempt, it should not be burdened with paying the debtor's tax bill. This conclusion is buttressed by the long-held Kansas view that exemptions are to be liberally construed in favor of the debtor.[15]

Another facet of Kansas exemption law also undercuts the trustee's argument. The Kansas Supreme Court has historically rejected creditors' efforts to marshal a debtor's assets in a way that would invade their homestead exemption, instead holding

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[12] *Id.* at 1262.

[13] 473 B.R. 392 (Bankr. D. Kan. 2012), *aff'd* 486 B.R. 509 (10th Cir. BAP 2013), *appeal dismissed, Williamson v. Westby (In re Westby),* Case No. 13-3044 (10th Cir. Mar. 29, 2013)

[14] *Id.* at 421.

[15] *Hodes v. Jenkins (In re Hodes),* 308 B.R. 61, 65 (10th Cir. BAP 2004); *Nohinek v. Logsdon,* 6 Kan. App. 2d 342, 344, 628 P. 2d 257 (1981).

that nonexempt assets must first be liquidated to pay lienholders' and general creditors' debts. In the 1877 case *Colby v. Crocker*, creditors of Crocker's probate estate brought an equitable marshaling action against the estate and its secured creditors, asking to apply the deceased's assets to the payment of his debts in a way most advantageous to them.[16] None of these creditors held liens or other security. One of the defendants held a mortgage on two tracts of real property, one of which was Crocker's homestead, occupied by his widow and children. Colby sought to force the mortgage holder to first realize on the homestead before selling the other encumbered property in an effort to free up nonexempt assets for the general creditors. The Kansas Supreme Court affirmed the district court's order denying the petition. It noted that the equitable doctrine of marshaling requires a person with a lien on two or more funds, one of which another person claims a lien, to satisfy his debt first from the property on which the other person has no claim, even where the funds are of differing character (i.e. real estate and personal property). But the court also noted that –

> . . . this rule has its exceptions and limitations. Judge Story says, that "it is never applied except where it can be done without injustice to the creditor, or other party in interest having title to the double fund, and also without injustice to the common debtor. Nor is it applied in favor of persons who are not common creditors of the same common debtor, except upon some special equity."[17]

The court then addressed the widow's "special equity," noting that "by our constitution and statutes the most sedulous care has been manifested to secure the

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[16] 17 Kan. 527 (1877).

[17] *Id.* at 530.

homestead of the debtor and to his wife and family, as against all debts not expressly charged upon it."[18] The court added that "the homestead is something toward which the eye of the creditor need never be turned. It is an element which may never enter into his calculations in his efforts to collect his debt."[19] Thus, unless Colby's claim was premised on one of the debts excepted from the homestead exemption, the rights of the widow and her family constituted a superior equity to his and the petition to marshal could not be granted. Cited for this proposition over the ensuing 140 years, this case remains good law today and has been cited in Kansas and elsewhere in favor of the proposition that creditors may not force the liquidation of a debtor's homestead to liquidate one creditor's lien when that creditor has a lien on the debtor's nonexempt property as well.[20]

In *Meyer v. United States*, the Supreme Court held that where New York had enacted an exemption for the proceeds of life insurance, and where its courts refused to marshal assets to diminish those rights, requiring the I.R.S. to first enforce its tax lien on the death benefits to the prejudice of the survivor beneficiaries would

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[18] *Id.* at 531.

[19] *Id., quoting Monroe v. May, Weil & Co.,* 9 Kan. 466, 476, 1872 WL 650 (1872).

[20] *See In re Fox,* 2000 WL 33287982 at *12 (Bankr. D. Kan. Aug. 4, 2000); *LaRue v. Gilbert,* 18 Kan. 220 (1877); *Frick Company v. Ketels,* 42 Kan. 527, 22 P. 580 (1889); *Prudential Ins. Co. Of America v. Clark,* 122 Kan. 109, 251 P. 199 (1926) (Homestead rights are superior, both in law and in equity, to the rights of general creditors); *In re Chadwick*, 114 B.R. 663 (Bankr. W.D. Mo. 1990) (applying Kansas law, marshaling of assets is not available where exempt property is sought to be marshaled); *Krueger v. Central Lumber Co.,* 56 S.D. 626, 230 N.W. 243 (1930).

undermine that benevolent policy of the exemption.[21] The same rule should apply in this case. Forcing the proration the trustee seeks effectively calls upon the Roys to apply their exempt asset, the EIC portion of the refund, to the payment of a debt on par with their nonexempt assets. Under the rule in *Meyer*, and, by analogy, the rule in *Colby v. Crocker*, the trustee should not be permitted to marshal the debtor's exempt assets by requiring the EIC portion of the refund to bear some part of their tax obligation.

Finally, the trustee argues that it is unfair for the debtors to retain their entire EIC while the unsecured creditors' share has already been diminished by the taxing authority's deducting the tax owed from the refund. This is no more "unfair" than the priority scheme of the Bankruptcy Code is. Income tax claims are typically paid before the claims of unsecured creditors under § 507(a)(8). So even if the debtors somehow managed to file their return but avoid application of their overpayment to their taxes, the taxing authority would have a priority claim that would be paid before any distribution to the unsecured creditors.

But this conclusion does not end the "proration" discussion because the trustee also seeks to prorate the attorney's fee assignment against the EIC's portion of the refunds. As previously held in this Circuit, fee assignments should be deducted from the tax refund before it is apportioned between the pre and post-petition periods.[22] This

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[21] 375 U.S. 233, 239-240, 84 S.Ct. 318, 11 L.Ed. 2d 293 (1963).

[22] *Redmond v. Carson (In re Carson),* 374 B.R. 247 (10th Cir. BAP 2007).

alone effectuates some form of proration of the fee among the refund's elements. To the extent that this proration impairs the EIC exemption, that impairment does not offend *Colby* or *Meyer* because the debtors' assignment of their refund to their lawyer was consensual. In doing that, they waived their exemption on that portion of the EIC in the same way a consensual mortgagor waives his or her homestead exemption when she mortgages it.

Therefore, the trustee's motion for turnover of the tax refunds should be granted as follows:

Federal refund	$5,205.00	State refund	$369.00
Less fee assignment	$(169.02)	Less fee assignment	$(11.98)
Less EIC	$(1,600.00)	Less EIC	$(288.00)
Remainder	$3,435.98	Remainder	$69.02
Estate's share (36.88525%)	$1,267.37	Estate's Share	$25.46

Small Assets and Aggregation

Finally, the debtors resist the trustee's motion to turnover the $5.45 balance in the debtors' bank account on the filing date. The debtors argue that this asset is simply too small to effectively administer and should instead be abandoned. The trustee replies that consumers' bankruptcy estates are frequently composed of multiple small assets that the trustee has discretion, if not a duty, to accumulate for the benefit of the creditors even when those assets would not, standing alone, warrant administration.

The trustee's statutory powers and duties prescribed by the Code shed some light on this without exactly defining the boundaries of a trustee's discretion. Sections

541 and 542 make clear that the trustee may recover any property that the debtor has or was entitled to receive on the petition date.[23] In fact, § 704 directs the trustee to "collect and reduce to money the property of the estate . . ."[24] The trustee uses the turnover power of § 542 to execute this duty. But if the trustee concludes that the property is "burdensome to the estate" or "of inconsequential value and benefit to the estate," it can be abandoned.[25] Any party in interest may ask the court to order the trustee to abandon such property.[26] In addition to these Code provisions, several Bankruptcy Rules also facilitate the administration of small asset cases.[27] The debtors here argue that, given the trustee's necessary costs incurred in recovering $5.45, expenses that cannot help but exceed that amount, $5.45 is indeed inconsequential and too burdensome for the estate to administer.

A few courts have addressed how far a trustee should go to recover an asset in the context of objections to the trustees' attorneys fees incurred in litigation that proved unsuccessful or excessive. Even though the context of those cases is different, it is hard to argue with their foundational principle: that no trustee has a duty to

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[23] 11 U.S.C. § 541 and § 542.

[24] 11 U.S.C. § 704(a)(1).

[25] 11 U.S.C. § 554(a).

[26] 11 U.S.C. § 554(b); Fed. R. Bankr. P. 6007(b).

[27] *See* Fed. R.Bank. P. 6004(d) permitting the expedited sale of all nonexempt assets of an estate where they have an aggregate gross value of $2,500 or less. D. Kan. L.B.R. 6007.1 permits the trustee to file a blanket abandonment as part of a "report of no distribution" in a no asset case.

"collect an asset . . . if the cost of collection would exceed the value of the asset."[28] In general, trustees should abandon property from which the estate can expect only a small benefit because expeditious reduction of the debtor's property for money for distribution to creditors is the goal of a bankruptcy case.[29] But a trustee's discretion is not unlimited. For instance, courts have forbidden trustees to abandon hazardous or polluted property without making provisions to mitigate its environmental or other hazards.[30]

In connection with the "small asset" problem, a former bankruptcy judge sitting in this division has declined to hold that there is a baseline value of assets that trustees should administer. In *In re Doughman*, the debtors resisted the trustee's motion to turnover bank balances totaling less than $1,500.[31] They argued in part that there should be a $1,500 asset floor in consumers' estates and that trustees should simply be required to abandon estates of lesser amount. Judge Pearson held that doing so would amount to judicial legislation of an exemption. Instead, he stated, "the trustees make the decision about administration of estate assets and presumably, have

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[28] *Matter of Taxman Clothing Co.*, 49 F.3d 310, 315 (7th Cir. 1995) (noting trustee's duty to maximize the value of *net* assets).

[29] *In re Beker Industries Corporation*, 64 B.R. 900, 908 (Bankr. S.D.N.Y. 1986), *rev'd on other grounds*, 89 B.R. 336 (S.D.N.Y. 1988).

[30] *See Midlantic Nat. Bank v. New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 106 S. Ct. 755, 88 L. Ed. 2d 859 (1986).

[31] 263 B.R. 905 (Bankr. D. Kan. 1999).

discretion to decline to administer small estates."[32] He reminded the parties that trustees shouldn't be "encouraged" to administer assets when it appears from the outset that little or no distribution will result.[33]

But $5.45 is a long way from $1,500. Were it the only asset, a $5 account balance would doubtless warrant abandonment. But it doesn't stand alone here. The trustee's January interim report indicates that the estate had net value of $104.51 plus the then-undetermined value of the income tax refunds.[34] As noted above, we know that those are approximately $1,290. The total claims filed in this case are less than $11,651, and several of them are filed as secured, meaning that the unsecured creditors could recover more than a 10% dividend before administrative expenses. While this is not a staggering dividend, it is not "inconsequential." But $5.45 is.

Trustees not only have the duty to conserve an estate's net assets, but also to maximize their value by weighing whether the cost of recovery will outstrip the value recovered. In *Matter of Taxman Clothing, Inc.*,[35] the Seventh Circuit concluded that an attorney's fee award was unreasonable because the trustee's attorney pursued the matter long after it had become "reasonably obvious" that the litigation would cost

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[32] *Id.* at 909.

[33] *Id.*

[34] Dkt. 25. The Court observes that the $104.51 net value listed in the report is for the non-exempt portion of earned wages. The trustee ascribes no net value to the account balances in the Ark Valley Credit Union.

[35] 49 F.3d 310 (7th Cir. 1995).

more than it was likely to net the estate.[36] Judge Posner noted that a trustee's fiduciary duty of care "is not merely care, diligence, and skill in the prosecution of the estate's claims. It is also care, diligence, and skill in deciding which claims to prosecute, and how far."[37]

On the facts before me, $5.45 is "inconsequential" because I can conceive of no method of recovering it, short of the debtors' voluntarily ponying it up, that would not cost more than it is worth to recover. I cannot say generally how much is too little or enough to administer, but "I know it when I see it."[38] This small amount of money is not enough to warrant recovery or administration in these circumstances so the trustee's motion to turnover $5.45 is denied.

Order

The Trustee's Motion for turnover is granted in part and denied in part as follows. That part of the motion requesting turnover of the debtors' 2012 income tax refunds is GRANTED. The debtors shall turnover $1,267.37 from their federal refund and $25.46 from their state refund, for a total of $1,292.83. The balance of the trustee's

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[36] *Id*. at 315.

[37] *Id*.

[38] With apologies to Justice Stewart who coined this phrase in connection with defining obscenity, *see Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("But I know it when I see it, and the motion picture involved in this case is not that.").

motion is DENIED.[39]

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[39] Apparently, no disagreement remains between the parties with respect to the trustee's motion for turnover of earned wages or their amount; that portion of the turnover motion has not been briefed and debtors concede non-exempt prepetition wages of $104.51 are subject to turnover. *See* Dkt. 34, ¶ 9. The trustee's turnover motion is granted to this extent with respect to earned wages.