

Property of the Estate
Tax Refunds
Chapter 13 Plan Duration
11 U.S.C. § 1306(a)
11 U.S.C. § 1322(d)
11 U.S.C. § 1325(a)(1), (b)
11 U.S.C. § 1327(b)

Charles R. Schiffman, Case No. 05-46152-rld13

3/2/06

RLD

Published

The court sustained objections to two provisions which debtor added to this district's uniform Chapter 13 Plan Form.

The Chapter 13 Plan Form requires debtors to pay to the Chapter 13 trustee all tax refunds attributable to prepetition tax years and net tax refunds attributable to postpetition tax years. Debtor sought to amend this provision to allow debtor to pay off his plan at any time prior to the 36th month by paying to the Chapter 13 trustee "an amount equivalent to the annual average of Debtor(s') tax refunds for the three calendar years immediately preceding the petition date, multiplied by three, less the amounts of tax refunds for postpetition tax years actually paid by the Debtor(s) to the Trustee."

The court held this provision would allow a premature and arbitrary determination of debtor's future income or earnings to be received over the life of the plan. In addition, the provision contained the undefined term "projected disposable income tax refunds" which added inappropriate ambiguity to the plan.

In addressing the debtor's objection to the Chapter 13 Plan Form, which requires the payment of tax refunds as described above, the court noted that 11 USC § 1306(a) includes pre- and postpetition tax refunds as property of the Chapter 13 Estate, and that a plan provision which effectuates the payment of the tax refunds into the Chapter 13 Estate is consistent with 11 USC § § 1322(a)(1) and 1327(b). The Chapter 13 Plan Form was developed to serve the administrative convenience of debtors and the Chapter 13 trustee. Allowing a change in the manner of paying tax refunds received during a plan would increase administrative expenses in almost all Chapter 13 cases because of the need for greater disclosure by debtors and increased scrutiny and objections by the Chapter 13 trustee.

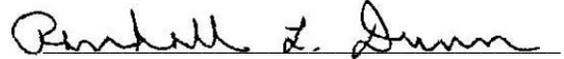
The second provision which debtor included in his plan required the Chapter 13 trustee to provide debtor with a payoff amount within a reasonable time after receipt of a written request from debtor or his counsel. Because there was no indication the Chapter 13 trustee did not respond to reasonable requests of debtors or their counsel regarding the status of plan payments, the court found the provision to be surplusage. In addition, to the extent the provision would require the Chapter 13 trustee to provide plan payoff calculations at the beck and call of debtors and their counsel that may be incorrect or imprecise because of the Chapter 13 trustee's inability to calculate future actual tax refunds, it would place an inappropriate burden on the Chapter 13 trustee. Finally, this provision also contained an undefined term, "plan base" which added inappropriate ambiguity to the plan.

The court then addressed what it found to be the true issue in the case, i.e. whether the Bankruptcy Code permits payment of a Chapter 13 plan in fewer than 36 months where the debtor does not pay 100% of allowed unsecured claims. The issue was addressed by the Bankruptcy Appellate Panel in In re Sunahara, 326 B.R. 768 (9th Cir. BAP 2005). The court noted § 1322(d) "hedges" language regarding the duration of a Chapter 13 plan, discussing periods of from three to five years, but not imposing those periods. In Sunahara, the BAP held that the Bankruptcy Code allows a debtor to modify a confirmed chapter 13 plan to complete the plan in less than 36 months without paying all claims in full, so long as all Bankruptcy Code requirements for plan modification are satisfied, specifically stating that compliance with § 1325(b) is not required for plan modifications. While recognizing that early plan payoffs can occur in Chapter 13, the court held that there is nothing inconsistent with the Bankruptcy Code in requiring debtors to propose an early payoff through the plan modification process if creditors' allowed claims are not being paid in full. Plan modification requires notice and an opportunity to be heard to all creditors and the Chapter 13 trustee.

March 02, 2006

Clerk, U.S. Bankruptcy Court

Below is an Order of the Court.



RANDALL L. DUNN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case
CHARLES R. SCHIFFMAN,) No. 05-46152-rld13
Debtor.) MEMORANDUM OPINION

This case tests the limits of a debtor's rights to alter the court's chapter 13 plan form over the objections of the chapter 13 trustee and concerned creditors. The debtor is attempting through proposed additional plan provisions to establish a right to pay off his chapter 13 plan early, without being obligated to pay all allowed unsecured claims in full and without having to go through the plan modification process. In other words, the debtor seeks the right to be able to pay off his chapter 13 plan and receive a discharge immediately after confirmation of the plan, if he chooses, without having to disclose the source of payment funds, without notice to the chapter 13 trustee, creditors and other interested parties, and without having to obtain an order of the court.

At the initial confirmation hearing in this case, I held that

1 two paragraphs the debtor had added to the court's form chapter 13 plan
2 were inappropriate as a matter of law and sustained objections to those
3 provisions. After allowing the parties an opportunity to make a record
4 of their positions with respect to my rulings, I state my reasons for
5 disallowing the debtor's proposed plan provisions as follows:

6 Background

7 The debtor, Charles R. Schiffman ("Mr. Schiffman"), filed his
8 chapter 13 petition on October 14, 2005. Docket No. 1. Mr. Schiffman is
9 no "run of the mill" chapter 13 debtor. On his Schedule I, Mr. Schiffman
10 states that he is employed as Executive Vice-President of the Jewish
11 Federation of Portland, with monthly gross income of \$10,481. Docket No.
12 1, Schedule I. After payroll withholdings for taxes, Social Security,
13 insurance and charitable contributions totaling \$3,984, and monthly
14 expenses totaling \$6,808, he reports "excess income" of \$919 per month to
15 fund his chapter 13 plan. Docket No. 1, Schedule J.¹

16 This court's Local Bankruptcy Form ("LBF") 1300 is the chapter
17 13 plan form (the "Chapter 13 Plan Form"). Although LBF 1300 ultimately
18 was approved and promulgated by all of the bankruptcy judges for the
19 District of Oregon, it was submitted in draft form for comments to
20 various chapter 13 constituencies prior to its approval, including
21

22 ¹ Calculating "excess income" from Mr. Schiffman's income and
23 expense totals set forth on his Schedules I and J yields -\$311 per month.
24 See Docket No. 1, Schedules I and J. To date, Mr. Schiffman has
25 projected at least \$919 "excess income" per month, in each iteration of
26 his chapter 13 plan. See Docket Nos. 4, 16 and 31. However, using his
own income and expense numbers from his Schedules I and J, Mr.
Schiffman's projected net disposable income calculation clearly is
wrong-high by about \$1,230 per month.

1 debtors' counsel, creditors' counsel, the chapter 13 trustees, the
2 Internal Revenue Service and the Oregon Department of Justice. The
3 Chapter 13 Plan Form was developed to handle efficiently the high volume
4 of chapter 13 cases in Oregon, and chapter 13 debtors are required to use
5 LBF 1300 by Local Bankruptcy Rule ("LBR"). See LBR 3015-1.B.1.

6 The Chapter 13 Plan Form was drafted to treat the interests of
7 the various parties in chapter 13 proceedings evenhandedly. It covers
8 issues commonly faced in chapter 13 cases, with flexibility to allow for
9 the unique circumstances of particular cases.

10 Mr. Schiffman's initial plan used LBF 1300 but added eight
11 separate, nonuniform paragraphs to the form text. See Docket No. 4, pp.
12 2-3. The chapter 13 trustee objected to Paragraphs 10, 11 and 14 in
13 Mr. Schiffman's plan and requested that they be stricken. See Docket No.
14 15. On December 2, 2005, Mr. Schiffman filed a Notice of Pre-
15 Confirmation Modification of Plan, with a proposed amended plan (the
16 "Amended Plan"), dated December 1, 2005, attached. See Docket No. 16.
17 The Amended Plan used LBF 1300, but added nine separate, nonuniform
18 paragraphs to the form text. None of the nonuniform paragraphs in the
19 initial plan to which the chapter 13 trustee objected were removed in the
20 Amended Plan. However, Paragraphs 10 and 11 were expanded to add more
21 text. Compare Docket No. 16, pp. 3-4 with Docket No. 4, pp. 2-3.
22 Creditor/claimant Aaron Thomas ("Mr. Thomas") objected to confirmation of
23 the Amended Plan on a number of grounds, including: "The plan improperly
24 modifies the standard language of the Chapter 13 form Plan in violation
25 of Local rules." See Docket No. 18, pp. 1-2.

26 At the initial confirmation hearing, held on December 22, 2005,

1 the court issued an order to allow discovery among the parties to proceed
2 and adjourned the confirmation hearing to January 30, 2006, to
3 accommodate a possible settlement conference among the parties and
4 further scheduling. See Docket Nos. 22 and 23. In addition, the court
5 discussed with the parties the nonuniform plan provisions included in the
6 Amended Plan and sustained the chapter 13 trustee's and Mr. Thomas'
7 objections to Paragraph 14, and sustained Mr. Thomas' objection to
8 Paragraph 17. The court allowed the parties until January 20, 2006, to
9 file their memoranda to make a further record with respect to the
10 court's rulings. The court stated that a written opinion elaborating on
11 the court's rationale for disallowing Paragraphs 14 and 17 in the Amended
12 Plan would be issued thereafter. See Docket No. 22.

13 On January 6, 2006, the chapter 13 trustee filed his Memorandum
14 ("Memorandum") concerning his objections to the Amended Plan and joined
15 in the objection of Mr. Thomas to Paragraph 17. See Docket No. 28.

16 On January 16, 2006, Mr. Schiffman filed a second Notice of
17 Pre-Confirmation Modification of Plan, with a proposed further amended
18 plan (the "Second Amended Plan"), dated January 13, 2006, attached. See
19 Docket No. 31. In the Second Amended Plan, the Paragraphs 14 and 17
20 provisions of the Amended Plan that I disapproved are deleted. On
21 January 20, 2006, Mr. Schiffman filed his Memorandum in Support of
22 Confirmation of Chapter 13 Plan Dated December 1, 2005 ("Supporting
23 Memorandum"). Attached to the Supporting Memorandum was the Affidavit of
24 Robert J. Vanden Bos ("Vanden Bos Affidavit"), Mr. Schiffman's counsel.
25 See Docket No. 32. In addition, on January 20, 2006, Mr. Schiffman filed
26 his Objection ("Objection") to certain provisions of Paragraph 1 of the

1 Chapter 13 Plan Form. See Docket No. 33.

2 At the adjourned confirmation hearing on January 30, 2006,
3 counsel for Mr. Schiffman reported that a settlement had been negotiated
4 with Mr. Thomas that might result in the dismissal of Mr. Schiffman's
5 chapter 13 case.

6 Discussion

7 Authority has been delegated to the United States district
8 courts and bankruptcy courts to adopt local rules and forms for the
9 conduct of proceedings before them, but such rules and forms must be
10 consistent with the substantive provisions of the federal Bankruptcy Code
11 and the Federal Rules of Bankruptcy Procedure. See Fed. R. Bankr. P.
12 9029; In re Sunahara, 326 B.R. 768, 782 (9th Cir. BAP 2005); and In re
13 Bersher Invs., 95 B.R. 126, 129 (9th Cir. BAP 1988).²

14 The target of the paragraphs in the Amended Plan that I have
15 disallowed, as confirmed in the Objection (see Docket No. 33, p. 2) and
16 in the Supporting Memorandum (see Docket No. 32, p. 4), is Paragraph 1
17 ("Paragraph 1") of the Chapter 13 Plan Form, which reads as follows:

18 1. The debtor shall pay to the trustee; (a) a
19 periodic payment of \$_____ every _____
20 (insert either month or quarter); (b) all proceeds
21 from avoided transfers; (c) upon receipt by the
22 debtor, all tax refunds attributable to prepetition
23 tax years and net tax refunds attributable to
24 postpetition tax years (i.e., tax refunds not included
25 on Schedule I, less tax paid by debtor for a

23 ² LBR 1001-1.C., entitled "SCOPE OF THE RULES; CONSTRUCTION,"
24 provides: "These LBRs supplement the [Federal Rules of Bankruptcy
25 Procedure ("FRBPs")], and any amendments thereto; must be used in
26 conjunction with, not exclusive from, the FRBPs; and shall be construed
so as to be consistent with the FRBPs and to promote the just, speedy,
and inexpensive determination of every case and proceeding."

1 deficiency shown on any tax return for that same tax
2 year or tax paid by setoff by a tax agency for a
3 postpetition tax year) for: ___ the life of the plan,
4 or ___ 36 months from the date the first plan payment
5 is due (*Check the applicable provision; if neither is
6 checked, "for the life of the plan" applies*); (d) a
7 lump sum payment of \$_____ on _____ date; and (e)
8 _____. [*Italics in original.*]

9 Paragraph 1 was drafted consistent with provisions of Sections
10 1322(a)(1) and (b)(10), 1306(a), and 1327(b) and (c) of the Bankruptcy
11 Code.³

12 Section 1322(a)(1), dealing with the content of chapter 13
13 plans, states that, "The plan shall...provide for the submission of all
14 or such portion of future earnings or other future income of the debtor
15 to the supervision and control of the trustee as is necessary for the
16 execution of the plan...." Section 1322(b)(10) provides that, "[s]ubject
17 to subsections (a) and (c) of this section, the [chapter 13] plan
18 may...include any other appropriate provision not inconsistent
19 with...title [11]."

20 The terms "future income" and "future earnings" are not defined
21 in the Bankruptcy Code. Paragraph 1 includes in subpart (a) a blank to
22 insert the debtor's income, net of expenses, reflected in Schedules I and
23 J of the debtor's schedules. However, future income and future earnings
24 are not necessarily coextensive with the "excess" or net disposable

25 ³ Unless otherwise noted, all section references are to provisions
26 of the federal Bankruptcy Code, 11 U.S.C. §§ 101 et seq., as they existed
27 prior to the October 17, 2005 effective date ("BAPCPA Effective Date") of
28 most provisions of the Bankruptcy Abuse Prevention and Consumer
29 Protection Act of 2005 ("BAPCPA"). Since Mr. Schiffman's chapter 13
30 petition was filed prior to the BAPCPA Effective Date, BAPCPA provisions
31 generally do not apply to this case.

1 income reported on those schedules.

2 Section 1306(a) provides that:

3 Property of the estate includes, in addition to the
4 property specified in section 541 of this title (1)
5 all property of the kind specified in such section
6 that the debtor acquires after the commencement of the
7 case but before the case is closed, dismissed, or
8 converted to a case under chapter 7, 11, or 12 of this
9 title, whichever occurs first; and (2) earnings from
10 services performed by the debtor after the commence-
11 ment of the case but before the case is closed,
12 dismissed, or converted to a case under chapter 7, 11,
13 or 12 of this title, whichever occurs first.

9 Section 1327(b) and (c), dealing with the effects of
10 confirmation of a chapter 13 plan, provide that:

11 (b) Except as otherwise provided in the plan or the
12 order confirming the plan, the confirmation of a plan
13 vests all of the property of the estate in the debtor.
14 (c) Except as otherwise provided in the plan or in the
15 order confirming the plan, the property vesting in the
16 debtor under subsection (b) of this section is free
17 and clear of any claim or interest of any creditor
18 provided for by the plan. [Emphasis added.]

16 In Paragraph 1, two categories of chapter 13 estate assets are
17 not revested in the debtor and are treated as future earnings or income
18 and committed to funding the plan: 1) avoided transfers, including
19 fraudulent conveyances of the debtor, that are recovered during the life
20 of the plan; and 2) prepetition and postpetition tax refunds that are
21 received by the debtor during the life of the plan.

22 The Bankruptcy Code allows and fairness concerns strongly
23 recommend that the debtor's fraudulent conveyances and other avoided
24 transfers recovered during the life of the plan be included as future
25 income submitted to the chapter 13 trustee for distribution under the
26 plan. Indeed, any debtor opposed to coughing up fraudulent conveyance

1 recoveries arguably would have a difficult time satisfying the Section
2 1325(a)(3) requirement that the plan be proposed in good faith. The
3 Paragraph 1 provision concerning avoided transfers is not in issue in
4 this case and has not been objected to by Mr. Schiffman, even though it
5 arguably requires payment of "actual" as opposed to "projected" future
6 income.

7 The rationale for including tax refunds received by the debtor
8 during the life of the plan as future earnings is if a debtor is
9 regularly receiving substantial tax refunds, the debtor probably is
10 overwithholding, and consequently underestimating future income. This
11 assumption is subject to rebuttal based upon an appropriate evidentiary
12 showing.

13 The tax refund provisions of Paragraph 1(c) of the Chapter 13
14 Plan Form serve the administrative convenience of debtors and the chapter
15 13 trustee. In their absence, alternative measures would be needed to
16 insure that potential future income from tax refunds is adequately
17 disclosed by debtors and included in their disposable income
18 calculations, since tax refunds generally do not appear on Schedule I. I
19 do not buy the idea that the chapter 13 trustee should be burdened with
20 the responsibility for burrowing into the debtor's tax records to
21 determine whether the debtor's withholdings are appropriate and
22 presenting evidence in support of an objection to confirmation in order
23 to require the debtor to alter his or her withholdings to minimize or
24 eliminate future tax refunds. It is debtors' responsibility at the
25 commencement of their bankruptcy cases to make full and accurate
26 disclosures of their financial affairs.

1 [T]he very purpose of certain sections of the
2 [Bankruptcy Code]...is to make certain that those who
3 seek the shelter of [bankruptcy] do not play fast and
4 loose with their assets or with the reality of their
5 affairs. The statutes are designed to insure that
6 complete, truthful, and reliable information is put
7 forward at the outset of the proceedings, so that
8 decisions can be made by the parties in interest based
9 on fact rather than fiction. Boroff v. Tully, 818
10 F.2d 106, 110 (1st Cir. 1987).

11 Of course, the court could require debtors to provide evidence
12 1) as to how many dependents are claimed on their W-4 forms, and that the
13 number of dependents claimed results in appropriate withholdings and will
14 not result in material refunds, with appropriate updates during the time
15 that their chapter 13 cases are pending, and 2) report every change in
16 their income during the lives of their chapter 13 cases. Prior
17 experience tends to indicate that debtors would regularly default in the
18 performance of such reporting obligations with the potential consequence
19 that their cases would be dismissed upon motion of the chapter 13
20 trustee.

21 In this case, the record establishes that for the three
22 prepetition tax years of 2002, 2003, and 2004, Mr. Schiffman received the
23 following refunds:

<u>Agency</u>	<u>2002</u>	<u>2003</u>	<u>2004</u>	<u>Total</u>
Federal	\$4,328	\$4,513	\$3,078	\$11,919
State	\$1,113	\$1,289	\$1,248	\$ 3,650
Totals:	\$5,441	\$5,802	\$4,326	\$15,569

24 See Vanden Bos Affidavit, Docket No. 32, p. 5. Accordingly, for the
25 three year period prior to 2005, the year in which Mr. Schiffman filed
26 his chapter 13 petition, Mr. Schiffman's federal and state tax refunds

1 combined averaged \$5,189.67 per year.

2 If a debtor's tax withholdings from payroll are appropriate,
3 the debtor likely will receive negligible or no tax refunds during the
4 life of the chapter 13 plan, and the provision of the Chapter 13 Plan
5 Form including tax refunds received during the life of the plan as future
6 income or earnings will not have much, if any impact. However, the
7 impact of including tax refunds as future earnings in each individual
8 case is a fact-based determination over the life of each chapter 13 plan,
9 and the history of Mr. Schiffman's tax refunds for the years preceding
10 his bankruptcy filing tend to indicate that Mr. Schiffman's tax refunds
11 during the life of his chapter 13 plan will be significant.

12 In the Objection, Mr. Schiffman objects to the inclusion of the
13 tax refund provision in Paragraph 1 because it requires "the payment of
14 'actual' future income as opposed to 'projected' income." Leaving aside
15 for the moment the ultimate absurdity of insisting that only a plan that
16 uses fictional projections rather than real numbers in defining the
17 boundaries of future income is confirmable, Mr. Schiffman relies
18 primarily on the decision of the Ninth Circuit in In re Anderson, 21 F.3d
19 355 (9th Cir. 1994), to support his Objection.

20 In Anderson, the Ninth Circuit held that a chapter 13 trustee
21 could not require as a condition to confirmation of the debtors' chapter
22 13 plan that the debtors sign a "Best Efforts Certification," that in
23 effect, required the debtors to agree, as a covenant independent of their
24 chapter 13 plan, to pay all of their actual disposable income to the
25 trustee during the life of the plan. Section 1325(b)(1)(B) provides that

26 [i]f the trustee or the holder of an allowed unsecured

1 claim objects to the confirmation of the plan, then
2 the court may not approve the plan unless, as of the
3 effective date of the plan...the plan provides that
4 all of the debtor's projected disposable income to be
5 received in the three-year period beginning on the
6 date that the first payment is due under the plan will
7 be applied to make payments under the plan. [Emphasis
8 added.]

6 In light of the plain language of the statute, the Ninth Circuit
7 determined that the condition pressed by the trustee was inconsistent
8 with the condition to confirmation that Congress actually put in the
9 Bankruptcy Code in Section 1325(b)(1)(B). See Id. at 357-58.

10 In addition, the Ninth Circuit pointed out that the trustee's
11 proposed Certification requirement would allow the trustee to effect plan
12 modifications in terms of periodic adjustments to plan payments, without
13 following the procedures for plan modification set forth in Section 1329
14 and without a court order. The Ninth Circuit held that the trustee could
15 not cut off the statutory rights of the debtors to request the court to
16 disapprove plan modifications proposed by the trustee, based on the
17 axiom, "We may not construe a statute so to make any part of it mere
18 surplusage." Id. at 358; United States v. Mehrmanesh, 689 F.2d 822, 829
19 (9th Cir. 1982).

20 "Mere surplusage" is precisely what Mr. Schiffman would have
21 the court make of Section 1306(a), which includes pre- and postpetition
22 tax refunds as property of the chapter 13 estate, and Section 1327(b),
23 which reverts all property of the estate in the debtor "except as
24 otherwise provided in the plan." Mr. Schiffman cites In re Heath, 182
25 B.R. 557 (9th Cir. BAP 1995), and In re Kuehn, 177 B.R. 671 (Bankr. D.
26 Ariz. 1995), for the argument that the language of Paragraph 1 including

1 tax refunds received during the life of the plan as plan payments, must
2 be stricken.

3 In Heath, the Bankruptcy Appellate Panel confronted two cases
4 in which the chapter 13 plan form did not require the submission of tax
5 refunds received by the debtors during the lives of their respective
6 plans to the trustee for distribution to creditors. The trustee argued
7 that all income tax refunds received during the first 36 months of the
8 debtors' plans should be paid over to the trustee for distribution,
9 without submitting any evidence in either case that future tax refunds
10 could be projected or that the debtors were overwithholding. In re
11 Heath, 182 B.R. at 559 and 560. Citing Anderson, the Bankruptcy
12 Appellate Panel held that in the absence of some evidentiary showing as
13 to projected tax refunds, Section 1325(b) did not require the inclusion
14 of tax refunds received by the debtors as projected disposable income.
15 Id. at 560-61.

16 In Kuehn, the bankruptcy court held that the trustee could not
17 require the debtors to pay over all tax refunds received by the debtors
18 during the life of their chapter 13 plan without projecting whether there
19 would be any tax refunds. Again, the language of the form chapter 13
20 plan in Kuehn did not require the submission of tax refunds received by
21 the debtors as plan payments, and the bankruptcy court, citing Anderson,
22 determined that in the absence of evidence of projected tax refunds,
23 requiring the submission of actual tax refunds received as a condition to
24 confirmation would be inconsistent with the Section 1325(b)(1)(B)
25 condition of submission of projected disposable income. In re Kuehn, 177
26 B.R. at 672-73.

1 In this case, as noted above, the record reflects that
2 Mr. Schiffman received federal and state tax refunds for the tax years
3 2002 through 2004 totaling \$15,569. Based on that record, Mr. Schiffman
4 projects tax refunds of \$15,569 for the first 36 months of his chapter 13
5 plan. See Vanden Bos Affidavit, Docket No. 32, p. 6. No future income
6 from projected tax refunds is disclosed in Mr. Schiffman's Schedules I
7 and J. See Schedules I and J, Docket No. 1.

8 As opposed to the chapter 13 plan forms considered in Heath and
9 Kuehn, the Chapter 13 Plan Form adopted in the District of Oregon
10 generally requires that pre- and postpetition tax refunds received by the
11 debtor during the life of the plan be included among the payments
12 submitted to the trustee for distribution to creditors. As stated above,
13 that provision is based on the assumption that if the debtor receives
14 substantial tax refunds during the life of a chapter 13 plan, absent
15 contrary evidence, the debtor likely is overwithholding, and such
16 receipts should be included in future income or earnings dedicated to the
17 plan under Section 1322(a)(1). Such refunds are property of the estate,
18 as defined in Section 1306(a), and Section 1327 allows such property not
19 to be revested in the debtor, if the plan so provides. This provision of
20 the Chapter 13 Plan Form exists whether the trustee or any unsecured
21 creditor with an allowed claim objects to confirmation or not.
22 Consequently, Section 1325(b)(1)(B) may or may not be relevant to its
23 consideration. It is consistent with the provisions of the Bankruptcy
24 Code and is not inconsistent with the Ninth Circuit's decision in
25 Anderson, which disapproved a condition to confirmation that was
26 inconsistent with the plain language of the Bankruptcy Code but did not

1 hold that a confirmable chapter 13 plan cannot be based on anything but
2 the debtor's projected fantasies. Nothing in Anderson says that reality
3 can never intrude on the confirmation process in chapter 13.

4 The Disallowed Provisions

5 A. Paragraph 14

6 Paragraph 14 of the Amended Plan reads as follows:

7 At the time of any proposed payoff of debtor's plan
8 prior to 36 months after the first payment is due,
9 Debtor(s') obligation under Paragraph 1 of the Plan to
10 pay their projected disposable income tax refunds to
11 the Trustee can and shall be deemed satisfied upon
12 payment to the Trustee of an amount equivalent to the
13 annual average of Debtor(s') tax refunds for the three
14 calendar years immediately preceding the petition
15 date, multiplied by three, less the amounts of tax
16 refunds for postpetition tax years actually paid by
17 the Debtor(s) to the Trustee.

18 I sustained the objections of the chapter 13 trustee and
19 Mr. Thomas to Paragraph 14 because it would allow a premature and
20 arbitrary determination of future income or earnings of Mr. Schiffman in
21 terms of tax refunds, both for prepetition and postpetition periods, to
22 be received over the life of his chapter 13 plan. It likewise is
23 objectionable in that it introduces an undefined term, "projected
24 disposable income tax refunds," that is not defined in the Bankruptcy
25 Code, the FRBPs or the court's Chapter 13 Plan Form and consequently adds
26 inappropriate ambiguity to the plan.

27 In his Memorandum, the chapter 13 trustee advises that "until
28 now [he] has not sought to strictly limit withholding on debtor's pay
29 stubs, unless the withholding was clearly excessive, to help the debtor
30 avoid incurring additional tax liability post-petition." Memorandum,
31 Docket No. 28, p. 2. If the provisions of Paragraph 1 relating to

1 payment of tax refunds received during the lives of debtors' chapter 13
2 plans are deleted or altered as proposed by Mr. Schiffman, two results
3 are likely: The court would require greater disclosures by debtors as to
4 their tax withholdings and changes in income and/or withholdings during
5 the lives of their chapter 13 plans, and it is logical to assume that the
6 chapter 13 trustee would scrutinize more carefully and raise objections
7 more frequently concerning debtors' tax withholdings. These results
8 would increase administrative expenses in almost all chapter 13 cases.

9 B. Paragraph 17

10 Paragraph 17 of the Amended Plan provides:

11 Without prejudice to the trustee's rights to assert
12 that a payoff can not occur in the first 36 months of
13 the plan without payment of 100% of claims, the
14 trustee shall provide, if Debtor so requests, the
15 amount of the payoff required to pay the plan base at
16 the time of the intended payoff. The Trustee shall
17 provide a payoff amount within a reasonable time after
18 receipt of a written request from Debtor or Debtor's
19 counsel.

20 I sustained Mr. Thomas' objection to Paragraph 17 for two
21 reasons. At the time of the initial confirmation hearing in this case,
22 the court was unaware that there were outstanding complaints that the
23 chapter 13 trustee was not responding to reasonable requests of debtors
24 or their counsel for information as to the status of plan payments. In
25 fact, Mr. Schiffman's counsel confirms that:

26 The standard policy of the Chapter 13 trustee's office
in Portland, Oregon is that request for payoffs will
be responded to in approximately 2 weeks time. My
experience is that the trustee's office makes good on
its policy and routinely processes payoff requests in
two weeks or less. Vanden Bos Affidavit, Docket No.
32, pp. 3-4.

If the purpose of Paragraph 17 is to require the chapter 13

1 trustee to do what he already is doing, I find that it is useless
2 surplusage. However, Mr. Schiffman's counsel complains that if a chapter
3 13 plan has run less than 36 months, the chapter 13 trustee does not
4 provide payoff information without including the amount necessary to pay
5 off 100% of allowed unsecured claims. See Vanden Bos Affidavit, Docket
6 No. 32, p. 4. Mr. Schiffman's counsel concedes that under Paragraph 1,
7 as it currently stands, there may be "no way to calculate the amount
8 which may be owed for future 'actual' tax refunds...." See Supporting
9 Memorandum, Docket No. 32, p. 7. If Paragraph 17 would require the
10 chapter 13 trustee to provide plan payoff calculations at the beck and
11 call of debtors and their counsel that are subject to challenge as
12 incorrect or imprecise, it places an inappropriate burden on the chapter
13 13 trustee that I decline to impose.

14 Paragraph 17 further introduces the term "plan base" without
15 definition in the Amended Plan. "Plan base" is not used or defined in
16 the Bankruptcy Code, the FRBPs or the court's Chapter 13 Plan Form. I do
17 not know what it means in relation to the payments of future income and
18 earnings provided for in Paragraph 1. In his Memorandum, the chapter 13
19 trustee objected to the term "plan base" as unnecessary and ambiguous,
20 and I find that it adds inappropriate ambiguity to the Amended Plan.⁴

21
22 ⁴ In the Supporting Memorandum and in the Vanden Bos Affidavit, Mr.
23 Schiffman argues that the term "plan base" is in common use among
24 bankruptcy professionals and indeed, is used by the chapter 13 trustee
25 in this district. See Supporting Memorandum, Docket No. 32, pp. 15-16,
26 and Vanden Bos Affidavit, Docket No. 32, pp. 2-3. A proposed chapter 13
plan provision that both uses and defines the term "plan base" was not
before me when I sustained Mr. Thomas' objection to Paragraph 17.

Nothing in the Supporting Memorandum or the Vanden Bos Affidavit explains
(continued...)

1 C. What This Really is About

2 The issues I confront in this case arise as fallout from the
3 decision of the Ninth Circuit Bankruptcy Appellate Panel in In re
4 Sunahara, 326 B.R. 768 (9th Cir. BAP 2005). The panel in Sunahara
5 answered two questions: First, does the Bankruptcy Code permit payment of
6 a chapter 13 plan in fewer than 36 months where debtor is not paying 100%
7 of all allowed unsecured claims? Id. at 772.

8 The chapter 13 plan form in issue in Sunahara included a
9 provision requiring that “[u]nless all allowed claims are paid in full,
10 this Plan shall not be completed in fewer than 36 months from the first
11 payment date.” Id. at 770.⁵ This language builds on the terms of
12 Section 1325(b)(1), which provides:

13 If the trustee or the holder of an allowed unsecured
14 claim objects to the confirmation of the plan, then
15 the court may not approve the plan unless, as of the
16 effective date of the plan-(A) the value of the
17 property to be distributed under the plan on account
of such claim is not less than the amount of such
claim; or (B) the plan provides that all of the
debtor’s projected disposable income to be received in

18 ⁴(...continued)

19 exactly what the term “plan base” is supposed to mean when used in
20 conjunction with Paragraph 1 in the Chapter 13 Plan Form.

21 ⁵ In contrast, Paragraph 8 of the Chapter 13 Plan Form provides in
22 part as follows:

23 Except as otherwise explicitly provided by ¶ 10 [included for
24 the debtor to insert nonform provisions to fit his or her
25 particular plan circumstances], the debtor shall make plan
26 payments for the longer of either: (a) 36 months from the date
the first payment is due under the original plan, unless the
debtor pays 100% of all claims with interest if required; or
(b) the time necessary to complete required payments to
creditors.

1 the three-year period beginning on the date that the
2 first payment is due under the plan will be applied to
3 make payments under the plan.

4 The plan form considered in Sunahara, in effect, treated the
5 "three-year" language of Section 1325(b)(1) as imposing a temporal
6 requirement that chapter 13 plans last for a minimum term of three years,
7 unless the debtor pays all allowed unsecured claims in full earlier.

8 The general provision of the Bankruptcy Code dealing with
9 chapter 13 plan duration is Section 1322(d), which provides:

10 The plan may not provide for payments over a period
11 that is longer than three years, unless the court, for
12 cause, approves a longer period, but the court may not
13 approve a period that is longer than five years.

14 The language of Section 1322(d) compromises competing concerns
15 reflected in the legislative history of the Bankruptcy Code: Chapter 13
16 was designed to allow individual debtors, with regular income, "to
17 develop and perform under a plan for the repayment of...debts over an
18 extended period." H.R. Rep. No. 95-595 to accompany H.R. 8200, 95th
19 Cong., 1st Sess. at p. 118 (1977). [Emphasis added.] However, Congress
20 was concerned that wage earner plans in some cases under the Bankruptcy
21 Act had been allowed to drag on for "seven to ten years. This has become
22 the closest thing there is to indentured servitude...." Id. at p. 117.

23 Accordingly, Section 1322(d) hedges its duration language. It
24 discusses plan periods of from three to five years, but it does not
25 impose them. See K. Lundin, Chapter 13 Bankruptcy § 199.1, at 199-1 (3d
26 ed. 2000 and 2004 Supp.). In practice, and considering the above cited
Section 1325(b)(1), added in the 1984 amendments to the Bankruptcy Code,

1 most Chapter 13 debtors propose plans that are 36
2 months long. A plan shorter than 36 months will
3 likely face an objection to confirmation unless the
4 plan proposes to pay all claim holders in full. If
5 the debtor is able to pay all claims in less than 36
6 months, there is no duration objection to confirmation
7 of a shorter plan. Id.

8 In Sunahara, the Bankruptcy Appellate Panel held that the
9 Bankruptcy Code allows a debtor to modify a confirmed chapter 13 plan to
10 complete the plan in less than 36 months without paying all claims in
11 full, so long as the Bankruptcy Code requirements for plan modification
12 are satisfied. In re Sunahara, 326 B.R. at 783-84. The Bankruptcy
13 Appellate Panel further held that even if the chapter 13 trustee or an
14 unsecured creditor objects to a debtor's proposed plan modification, the
15 alternative three years of disposable income or 100% payment of allowed
16 unsecured claims conditions of Section 1325(b)(1) do not apply.

17 Section 1329 governs chapter 13 plan modifications, and the
18 Bankruptcy Appellate Panel held that "Section 1329(b) expressly applies
19 certain specific Code sections to plan modifications but does not apply
20 § 1325(b). Period." Id. at 781. [Emphasis in original.]⁶

21 The second question asked by the Bankruptcy Appellate Panel in
22 Sunahara was: Does the bankruptcy court's local rule mandating use of a

23 ⁶ The position of the Bankruptcy Appellate Panel in Sunahara that
24 Section 1329 unambiguously excludes consideration of Section 1325(b) in
25 the context of plan modification is not universally accepted, including a
26 contrary decision of the bankruptcy court for the District of Oregon.
See, e.g., In re Keller, 329 B.R. 697 (Bankr. E.D. CA 2005); and In re
McKinney, 191 B.R. 866, 869 (Bankr. D. OR 1996). However, that issue is
not before me in this case. For purposes of this decision, I assume that
the Bankruptcy Appellate Panel correctly determined in Sunahara that
Section 1325(b) potentially applies conditions to confirmation that do
not apply in the context of plan modification.

1 model plan including payment requirements not found in the Bankruptcy
2 Code impermissibly abridge the debtor's rights? In re Sunahara, 326 B.R.
3 at 782. The question virtually answers itself. The requirements of the
4 plan form considered in Sunahara, that the plan continue for a minimum
5 duration of 36 months unless all allowed claims are paid in full,
6 conflicted with the nonmandatory plan length provisions of Section
7 1322(d). The debtor could seek a waiver of the form plan provision
8 through a post-confirmation plan modification. The Bankruptcy Appellate
9 Panel reversed the decision of the bankruptcy court and remanded for a
10 determination as to whether the plan modifications proposed by the debtor
11 satisfied the requirements of Section 1329, as interpreted in the panel's
12 decision. Id. at 783-84.

13 It is important in this case not to lose sight of the context
14 in Sunahara. Sunahara was before the Bankruptcy Appellate Panel to
15 review a post-confirmation plan modification decision. As noted in the
16 dissenting opinion in Sunahara, FRBP 3015(g) requires that not less than
17 20 days notice of proposed plan modifications be sent to the debtor, the
18 chapter 13 trustee and all creditors. See Fed. R. Bankr. P. 3015(g); In
19 re Sunahara, 326 B.R. at 784. Moreover, as noted by the Sunahara
20 majority:

21 In determining whether to authorize a modification
22 that reduces a [chapter 13] plan term to less than 36
23 months without full payment of allowed claims, the
24 bankruptcy court should carefully consider whether the
25 modification has been proposed in good faith. See
26 § 1325(a)(3). Such a determination necessarily
requires an assessment of a debtor's overall financial
condition including, without limitation, the debtor's
current disposable income, the likelihood that the
debtor's disposable income will significantly increase
due to increased income or decreased expenses over the

1 remaining term of the original plan, the proximity of
2 time between confirmation of the original plan and the
3 filing of the modification motion, and the risk of
4 default over the remaining term of the plan versus the
5 certainty of immediate payment to creditors. Id. at
6 781-82.

7 Mr. Schiffman and his counsel want to run with the Sunahara
8 decision to make a further point: They want the right to pay off
9 Mr. Schiffman's chapter 13 plan at any time after confirmation without
10 having to go through the plan modification process and without having to
11 pay allowed unsecured claims in full. That is the underlying objective
12 of the provisions that I have disapproved, as admitted by counsel for
13 Mr. Schiffman at the initial confirmation hearing and in the Supporting
14 Memorandum. See Supporting Memorandum, Docket No. 32, pp. 5, 10.

15 Proposals to pay off chapter 13 plans early are relatively
16 uncommon. It is a sad reality of chapter 13 experience that most chapter
17 13 plans fail, with the associated cases being dismissed or converted to
18 chapter 7. However, early payoffs can occur in chapter 13, generally in
19 three circumstances: First, in light of postpetition appreciation of the
20 debtor's real property, it may be possible to sell or refinance the
21 property to allow for early completion of chapter 13 plan payments. See,
22 e.g., In re Sounakhene, 249 B.R. 801 (Bankr. S.D. CA 2000).⁷

23 ⁷ A concern in such cases is whether the debtor has placed an
24 unreasonably low value on real estate in the schedules and chapter 13
25 plan at the commencement of the case to allow for an early refinance at
26 the higher true value in order to obtain a discharge. While the record
as stated by the Sunahara panel does not discuss the issue of good faith,
one might reasonably question the value Mr. Sunahara placed on his real
property at the outset of his chapter 13 case, when he proposed a
refinance to pay off his chapter 13 plan within eight months after his

(continued...)

1 Second, a debtor may propose an early payoff based upon an
2 inheritance, gift or loan from friends or relatives. See, e.g., In re
3 Smith, 237 B.R. 621 (Bankr. E.D. TX 1999), aff'd, 252 B.R. 107 (E.D. TX
4 2000); and In re Easley, 205 B.R. 334 (Bankr. M.D. FL 1996).

5 Finally, a debtor may propose to pay off his or her chapter 13
6 plan with funds obtained from a source not disclosed in the debtor's
7 schedules or original chapter 13 plan. See, e.g., In re Profit, 283 B.R.
8 567, 571 (9th Cir. BAP 2002); and In re Forbes, 215 B.R. 183, 186 (8th
9 Cir. BAP 1997).

10 In each of the foregoing situations, an early payoff of the
11 chapter 13 plan may offer substantial advantages to creditors as well as
12 the debtor, even if all allowed claims are not being paid in full. All
13 risks of a plan default and failure are avoided with an early payoff, and
14 the return to creditors may be greater. See e.g., In re Miller, 325 B.R.
15 539, 542 (Bankr. W.D. PA 2005). However, early payoff proposals also
16 present opportunities for abuse by the less than forthcoming debtor.

17 Cases in which an early payoff of a chapter 13 plan has been
18 approved outside of the context of a plan modification over the objection
19 of the chapter 13 trustee or a concerned creditor(s) appear to involve
20 chapter 13 plans with fixed payments over a fixed term, or fixed payment
21 percentages to classes of creditors. The rationale for these decisions
22 is that plan payments do not have to continue in the amounts and for the
23 duration provided for in the plan so long as the total amount of payments
24

25 ⁷(...continued)
26 case was filed and even before his chapter 13 plan was confirmed. See In
re Sunahara, 326 B.R. at 770-71.

1 provided for in the plan and/or the fixed percentage to be paid each
2 class of creditors is paid. See, e.g., In re Smith, 237 B.R. at 625 n.8
3 and 626; and Matter of Casper, 154 B.R. 243, 246 (N.D. IL 1993). In
4 other words, interpreting the confirmed chapter 13 plan as the debtor's
5 contract with creditors, a deal is a deal. See In re Miller, 325 B.R. at
6 543; and In re Pancurak, 316 B.R. 173, 176 (Bankr. W.D. PA 2004).

7 The District of Oregon Chapter 13 Plan Form does not
8 definitively fix the total amount of plan payments at the outset of the
9 case, and advisedly so. Paragraph 1 payments are not fixed at
10 confirmation. Over time, the total to be paid under an Oregon debtor's
11 plan is dependent upon a number of factors, including the debtor's future
12 tax refunds and proceeds from avoided debtor transfers. With the element
13 of indefiniteness as to the total of covenanted plan payments, if the
14 debtor wants to pay off the chapter 13 plan early, a plan modification
15 generally is required, as the early payoff usually will alter the total
16 amount to be paid to creditors under the plan. See, e.g., Massachusetts
17 Housing Finance Agency v. Evora, 255 B.R. 336, 342 (D. Mass. 2000).⁸

18 Mr. Schiffman and his counsel would have it otherwise, but
19 there is nothing inequitable or contrary to the Bankruptcy Code in

20
21 ⁸ Nothing prevents a debtor from proposing a plan modification,
22 even if the term proposed to be modified is a "form" provision of the
Chapter 13 Plan Form. As stated by the Panel majority in Sunahara:

23 Nothing in § 1329 prohibits a debtor from seeking the
24 modification of *any* plan term affecting the amount of payments
25 on claims, the time for making such payments, or the amount of
26 distributions to creditors. That the term to be modified
involves a form provision in a court-mandated model plan should
be of no consequence. In re Sunahara, 326 B.R. at 771 n 4.
[Italics in original.]

1 requiring that debtors go through the plan modification process in order
2 to pay their chapter 13 plans off early without paying allowed creditor
3 claims in full. Indeed, it is ironic that Mr. Schiffman relies so
4 heavily on the Ninth Circuit's decision in In re Anderson to support his
5 assault on the provisions of Paragraph 1. In Anderson, the Ninth Circuit
6 held that the trustee could not require the debtors to sign a covenant
7 that would cut off their rights to object to plan modifications imposed
8 by the trustee without complying with the procedural requirements of
9 Section 1329 and without obtaining a court order. In re Anderson, 21
10 F.3d at 358. Yet, Mr. Schiffman wants the right to truncate his chapter
11 13 plan without notice to the trustee or concerned creditors and without
12 otherwise complying with the plan modification provisions of Section
13 1329.

14 Plan modification requires that notice and an opportunity to be
15 heard be provided to the chapter 13 trustee and all concerned creditors.
16 Fed. R. Bankr. P. 3015(g). The plan modification process also allows for
17 the court to consider the debtor's good faith in proposing early payoff
18 modifications, as well as issues as to the debtor's overall financial
19 circumstances, future earnings and income, and the elimination of future
20 risks of nonperformance. In re Sunahara, 326 B.R. at 781-82. What it
21 does not allow is for the debtor to pay off a chapter 13 plan in a lump
22 sum and present the trustee and creditors with the payoff as fait
23 accompli, with no notice or opportunity for hearing.⁹

24
25 ⁹ Is it really "better" and more consistent with the provisions of
26 the Bankruptcy Code to have the issue of an early plan payoff resolved by
(continued...)

1 Paragraphs 14 and 17 proposed by Mr. Schiffman in the Amended
2 Plan would subvert the procedures the court has adopted consistent with
3 provisions of the Bankruptcy Code and the FRBPs for implementation of
4 chapter 13, considering the interests of all parties concerned in chapter
5 13 proceedings, including but not exclusively, the debtor. For the
6 foregoing reasons, I will overrule Mr. Schiffman's Objection to
7 provisions of Paragraph 1 of the Chapter 13 Plan Form, and I have
8 sustained the chapter 13 trustee's and Mr. Thomas' objections to
9 Paragraph 14, and Mr. Thomas' objection to Paragraph 17, in which the
10 trustee joined, of the Amended Plan. I will require that Paragraphs 14
11 and 17 of the Amended Plan be stricken before I will confirm a chapter 13
12 plan in this case. Since those provisions have been eliminated in
13 Mr. Schiffman's Second Amended Plan, the court's concerns in that regard
14 have been addressed. A separate Order consistent with this Memorandum
15 Opinion will be entered.

16 ###

17 cc: Robert J Vanden Bos
18 Bradley O. Baker
19 Brian D. Lynch, Trustee
20
21
22
23

24 ⁹(...continued)
25 "the proverbial race to the courthouse" between the debtor and the
26 chapter 13 trustee and/or interested creditors, as recently determined by
the bankruptcy court in In re Drew, 325 B.R. 765, 774 (Bankr. N.D. IL
2005)?