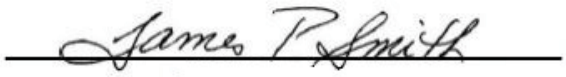
SO ORDERED.

SIGNED this 15 day of August, 2013.



James P. Smith
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

In the Matter of:	:	Chapter 13
	:	Case No. 13-50412-JPS
JOHN FRANKLIN ARNOLD,	:	
HOLLY R. ARNOLD,	:	
Debtors	:	

ORDER ON TRUSTEE'S AMENDED OBJECTION TO CONFIRMATION OF DEBTORS' CHAPTER 13 PLAN

This case presents the question of whether Debtors' plan, which separately classifies and pays in full an unsecured debt guaranteed by the father of one of the Debtors, is permissible under 11 U.S.C. § 1322(b)(1) where the plan does not provide for one hundred percent payment to Debtors' remaining unsecured creditors. This matter came on for hearing on June 24, 2013. The Court having considered the evidence presented, the argument of counsel and the applicable law, now enters this order.

The facts are not in dispute. Debtors John and Holly Arnold filed their joint petition under Chapter 13 on February 18, 2013. For purposes of 11 U.S.C. § 1325(b)(4), Debtors

are above-median debtors with an applicable commitment period of not less than five years. For the purpose of 11 U.S.C. § 1325(b)(1) and (2), Debtors' projected monthly disposable income is $713.22, meaning Debtors must pay the unsecured creditors a total of $42,793.20 over the life of their plan.

SunMark Community Bank holds an unsecured claim against John Arnold in the amount of $27,168. John's father has guaranteed this debt. The SunMark debt began as an approximately $20,000 loan in 2008 or 2009 for the payment of various household bills and medical expenses which had accumulated after John experienced financial setbacks due to the 2008 economic downturn. The loan was renewed in 2011, when John borrowed an additional $5,000 to pay his 2010 income taxes. The loan was renewed again in 2012, with John borrowing an additional $9,000 to pay his 2011 income taxes.

Debtors' Amended Chapter 13 Plan separately classifies the SunMark claim and proposes to pay it in full at the rate of $551 per month. Debtors' other unsecured creditors are to receive the balance of Debtors' monthly disposable income and will receive a dividend of approximately fourteen percent under the plan. If the SunMark claim was not separately classified but was lumped in with the other unsecured claims, and all of Debtors' disposable income was paid pro rata to the entire group, the unsecured creditors would receive a fifty-six percent distribution.

The Chapter 13 trustee objects to confirmation on several grounds. First, the trustee contends that Debtors' plan does not meet the disposable income test as required under 11 U.S.C. § 1325. Second, the trustee contends that the separate classification and payment of the SunMark debt unfairly discriminates against the other unsecured creditors in violation

of 11 U.S.C. § 1322(b)(1). Finally, the trustee argues that the plan is not proposed in good faith as required by 11 U.S.C. § 1325(a)(3).[1]

1. Does the plan comply with 11 U.S.C. § 1325(b)(1)?

11 U.S.C. § 1325(b)(1) provides:

> If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan-
>
> > (A) the value of the 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 the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to making payments to unsecured creditors under the plan.

Since the Debtors' plan does not propose to pay all unsecured claims in full, their plan must comply with the provisions of 11 U.S.C. § 1325(b)(1)(B). The trustee argues that the plan violates section 1325(b)(1)(B) because it allocates different portions of Debtors' disposable income to the SunMark claim and the other unsecured claims.

As this Court held in In re Pracht, 464 B.R. 486 (Bankr. M.D. Ga. 2012):

> This issue is straightforward and easily resolved. All that section 1325(b)(1)(B) requires is that all of the debtor's projected disposable income be paid "to unsecured creditors under the plan". In this case, the [separately classified] debt is an unsecured claim. All of the debtor's projected disposable income is being paid to the holders of the [separately classified] debt or the other unsecured claims. As held by the court in In re Knight, 370 B.R. 429 (Bankr. N.D. Ga. 2007),

[1] All other objections to confirmation were abandoned by the Chapter 13 trustee.

> section 1325(b)(1)(B) does not address how the debtor's projected disposable income is to be allocated. Allocation is addressed by other Code sections, such as sections 1322(b)(1) and (b)(5). As long as all of the debtor's projected disposable income is being paid to creditors with unsecured claims, as is the case here, the plan complies with section 1325(b)(1)(B).

Id. at 489. The SunMark claim is an unsecured claim. As in Pracht, although Debtors are allocating different portions of their disposable income between the SunMark claim and the other unsecured claims, all of their disposable income is being paid to unsecured claims. Accordingly, the plan complies with section 1325(b)(1)(B).

2. Does the plan comply with 11 U.S.C. § 1322(b)(1)?

Over the life of the plan, SunMark will be paid in full while the other unsecured claims will receive a dividend of only fourteen percent. The trustee contends that this disparity in treatment violates 11 U.S.C. § 1322(b)(1).

Section 1322(b)(1) provides that:

> [T]he plan may-
>
> > (1) designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated; however, such plan may treat claims for a consumer debt of the debtor if an individual is liable on such consumer debt with the debtor differently than other unsecured claims;

(emphasis supplied).

Debtors argue that the SunMark claim is a "consumer debt" whose separate classification and treatment does not have to meet the "discriminate unfairly" test. As both Debtors and the trustee acknowledge, courts have struggled with the interpretation of section

1322(b)(1). As the trustee explains:

> Section 1322 (b)(1)'s reference to classification of cosigned debts permits some classification based on cosigned debts but does not clearly allow payment in full to the detriment of other unsecured creditors in every case. There is no doubt the code section...has been the source of disputes in other courts, resulting in split opinions. Some courts believe the right to classify cosigned notes is completely exempt from the unfair discrimination section found before the "however:clause (sic)" because of a rule of statutory construction known as the "last antecedent". Carion v. Rivera (In re Rivera), 2013 Bankr. Lexis 1456 (1st Cir. BAP 2013). Other courts have held that the "however clause" does not entirely exempt codebtor consumer claims from unfair discrimination, including Judge James D. Walker of this Court, see In re Thompson, 191 B.R. 967 (Bankr. S.D. Ga. 1996). Other courts have found the section ambiguous, but decided that based on the issue before them, which did not include bad faith, the classification should be allowed. Meyer v. Renteria (In re Meyer), 470 B.R. 838, 844-46 (9th Cir. BAP 2012).

See Chapter 13 trustee's brief, Docket No. 30, p. 2. However, since nonconsumer debts are clearly subject to the unfair discrimination standard, resolution of this dispute is necessary only if this Court determines that the SunMark claim is a "consumer debt".

11 U.S.C. § 101(8) provides:

> The term "consumer debt" means debt incurred by an individual primarily for a personal, family, or household purpose.

The facts establish that John used $14,000 of the loan proceeds from SunMark to pay his income taxes. In the case of IRS v. Westberry (In re Westberry), 215 F.3d 589 (6th Cir. 2000), the court held:

> Almost without exception, the bankruptcy courts that have addressed this question have determined that tax debt should not be considered consumer debt for purposes of the codebtor

> stay. We find the weight of these opinions and their reasoning persuasive.
>
> First, a tax debt is "incurred" differently from a consumer debt. Although it is true that tax debts may be incurred under the Bankruptcy Code, this incurrence is not voluntary on the part of the taxpayer. We may at least hope to choose to incur consumer debts; its certainty being nothing like death and taxes. See Letter from Benjamin Franklin to Jean-Baptiste Le Roy (November 13, 1789).
>
> Second, consumer debt is incurred for personal or household purposes, as stated in the statute, while taxes are incurred for a public purpose. The Supreme Court has long noted, in other contexts, the public purpose of the imposition of taxes....
>
> Third, taxes arise from the earning of money, while consumer debt results from its consumption. Different events give rise to tax debt than to consumer debt—Westberry's obligation to the IRS arose from the earning of income, not from his expenditure on personal and family items.
>
> Finally, unlike taxes, consumer debt normally involves the extension of credit.

Id. at 591 (citations omitted).

Although the Westberry case dealt with 11 U.S.C. § 1301, the term "consumer debt" as used in 11 U.S.C. § 1322(b)(1) should be interpreted the same way. "A term appearing in several places in a statutory text is generally read the same way each time it appears." Ratzlaf v. U.S., 510 U.S. 135, 143, 114 S.Ct. 655, 660, 126 L.Ed 2d 615 (1994).

Relying on the case of In re Booth, 858 F.2d 1051 (5th Cir. 1988), Debtors argue that the SunMark claim was not incurred with an eye toward profit and therefore should be classified as a consumer debt. In Booth, the court had to determine the applicability of the "substantial abuse" provisions of section 707(b).

> A dismissal based on substantial abuse pursuant to section 707(b) must necessarily rest on a finding that the indebtedness consists primarily of consumer debts. The existence of consumer, rather than business-related, debts is a prerequisite to the application of this section. Therefore, it is necessary to classify the debts in question.

Id. at 1053. Considering the definition of "consumer debt" as defined in section 101(7)[2], the court held:

> The legislative history of this section indicates that the definition is adapted from the definitions used in various consumer protection laws. Cases decided under the Truth in Lending Act indicate that when the credit transaction involves a profit motive, it is outside the definition of consumer credit. Because we believe that the profit motive definition is a correct standard in light of the plain meaning of the statute and its legislative history, we also adopt that standard. Accordingly, the test for determining whether a debt should be classified as a business debt, rather than a debt acquired for personal, family or household purposes, is whether it was incurred with an eye toward profit.

Id. at 1054-55 (citations omitted). However, as the court in Westberry, supra, held:

> The profit motive analysis is used, and is clearly appropriate, to determine whether a debt falls outside the category of consumer debt. There is nothing inherent in this test, or direction from the Bankruptcy Code to suggest, that the test defines the only category of non-consumer debt. Therefore, while the profit motive analysis may assist in the determination of which debts are not consumer debt, it does not prohibit other debts from falling outside of the category of consumer debt.

215 F.3d at 593.

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[2] This subsection was redesignated section 101(8) by Pub. L. No. 101-647, Nov. 29, 1990.

This Court agrees with the majority of bankruptcy courts which have determined that a tax debt is not a consumer debt. Accordingly, that portion of the SunMark claim arising from the payment of income taxes is not "consumer debt" for purposes of section 1322(b)(1).

However, this does not end the inquiry. The total claim of SunMark is $27,168. The facts establish that the balance of the debt was incurred to pay household and medical expenses, debts which are clearly "consumer debt" under section 101(8). As the court in Swartz v. Strausbaugh (In re Strausbaugh), 376 B.R. 631 (Bankr. S.D. Ohio 2007) held:

> Section 101(8) requires the court consider the purpose for which the debt was incurred, and where the debt was incurred for more than one purpose, deems that the primary purpose of the debt will determine its nature. See 2 Collier on Bankruptcy ¶ 101.8, at 101-47 (Lawrence P. King ed., 15th ed. rev. 2004) ("If a debt is incurred partly for business purposes and partly for personal, family or household purposes, the term 'primarily' in the definition suggests that whether the debt is a 'consumer debt' should depend upon which purpose predominates. Presumably, this determination would normally turn on the purpose for which most of the funds were obtained." (footnote omitted)).

Id. at 639. "The majority of courts that have considered the issue have found that 'primarily' means more than half of the total dollar amount owed." In re Hoffner, 2007 WL 4868310 (Bankr. D.N.D. Nov. 21, 2007) at *3. Slightly more than 51.5 percent of the SunMark claim arises from loans used to pay income taxes. Accordingly, the SunMark claim is not a "consumer debt".[3]

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[3] Debtors' reliance on In re Victoria, 2011 WL 2580106 (Bankr. M.D. Ala. June 22, 2011) is misplaced. In Victoria, approximately 94 percent of the total debt was initially incurred as a mortgage on the debtor's personal residence, clearly a "consumer debt". The court rejected the debtor's argument that the debt's nature had changed because the property was no longer her

Since the SunMark claim is not a "consumer debt", the Court must now consider whether separately classifying the claim and paying it in full unfairly discriminates against the other unsecured claims who will only receive fourteen percent of their claims. The term "discriminate unfairly" as used in section 1322(b)(1) is not defined by the Bankruptcy Code. This Court has previously examined the difficulties which courts have had in developing tests to determine whether a plan discriminates unfairly. See Pracht, supra, at 490-93. The Eleventh Circuit has not addressed the issue. Id. at 492. However, in this case, it is not necessary to determine which set of factors or which test should be used. As the court held in In re Towler, 493 B.R. 239 (Bankr. D.Colo. 2013):

> Despite no statutory provision, there are other clear cases that no one would seriously question. If a debtor separately classified a creditor out of personal enmity, no one would dispute the unfairness of the plan. Likewise, if the debtor proposed more favorable treatment for family or friends, based only on a personal connection, the plan would never withstand attack.

Id. at 244. Because the Court has determined that the debt is not a consumer debt which may be separately classified under the last clause of section 1322(b)(1), the only remaining

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residence and because the repayment terms of the mortgage were modified.

> The fact that the mortgaged property is no longer used for consumer purposes, or that the payment terms were modified does not turn back the clock and change the purpose for which the debt was incurred. A debt is 'incurred' only once, and that is when the debtor becomes liable for its payment.

Id. at *4. In the case at bar, even though the initial loan was incurred for consumer purposes, when Debtors filed for bankruptcy, that portion of the loan represented less than 48.5 percent of the total debt. Nothing in Victoria rejects the majority view that the overall debt is characterized by looking at the purpose for which the majority of the debt was incurred. In this case, the majority of the debt was incurred to pay income taxes.

reason for separately classifying the claim is the fact that John's father has guaranteed the debt. This is simply not a sufficient reason to treat this claim more favorably than the other unsecured creditors. Accordingly, separately classifying the SunMark debt and paying it in full discriminates unfairly with respect to the other unsecured creditors. For this reason, the plan violates section 1322(b)(1) and the trustee's objection to confirmation is sustained.

Having ruled that the plan violates section 1322(b)(1), it is not necessary for the Court to consider the issue of good faith under 11 U.S.C. § 1325(a)(3).

For the reasons stated herein, the trustee's Amended Objection to Confirmation (Docket No. 25) is sustained and confirmation of the Debtors' Amended Chapter 13 Plan (Docket No. 21) is denied.

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