IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

In re **Jared W. Campbell,** Debtor.	Bankruptcy Number 03-23673 Chapter 13

MEMORANDUM DECISION DENYING DEBTOR'S MOTION TO CONFIRM BY CONSENT

Before the Court is the Debtor's Motion to Confirm by Consent ("Motion to Confirm"). A hearing was held before the Court on November 11, 2003, whereby Thomas Neeleman appeared for the Debtor and Kevin Anderson appeared for himself as Chapter 13 Trustee. The Court, having considered all of the pleadings, court papers, and counsel's oral arguments, and having conducted an independent review of applicable statutes and case law, hereby makes the following Memorandum Decision, which will constitute the Court's findings and conclusions as required by Rule 52 of the Federal Rules of Civil Procedure.[1]

JURISDICTION

The Court has jurisdiction over the parties and subject matter of this proceeding pursuant to 28 U.S.C. § 1334(b) and § 157(a). This is a core proceeding under 28 U.S.C. § 157(b)(2)(L), and as such the Court has authority to enter a final order. Venue is proper in the Central Division

[1] Incorporated into the Bankruptcy Code via Bankruptcy Rule 7052.

of the District of Utah under 28 U.S.C. § 1409.

FACTS

On March 5, 2003, the Debtor filed a Chapter 13 petition for relief. The Debtor's Plan, dated August 19, 2003, proposes plan payments of $330 for six months and $360 thereafter for thirty-six months to return 16% to non-priority, unsecured creditors. The Plan also provides for a $54 monthly payment to be made directly[2] to the Utah Higher Education Assistance Authority ("UHEAA") for outstanding student loans. By paying the student loan directly, UHEAA will receive 71% of the principal amount of its claim over the projected term of the plan. On October 27, 2003, the Chapter 13 Trustee ("Trustee") filed an Objection to Confirmation of Plan, alleging that the payments to UHEAA constitute to unfair discrimination as to the Debtor's other unsecured creditors. The Trustee contends that the student loan payments should be paid through the Trustee and paid pro rata with the other unsecured claims, thus returning 35% to all unsecured creditors.[3]

DISCUSSION

Section 1322(b)(5) states that a Debtor's Chapter 13 Plan may provide for "maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last

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[2] The parties sometimes refer to this treatment as "outside of the plan." The Court can find no definition of this. All payments to pre-petition creditors are part of a plan. Most payments are made to the Chapter 13 Trustee, while others may be made directly. Under either method, all must be disclosed and authorized pursuant to the Plan finally approved.

[3] This is calculated by adding the $54 UHEAA payment to the proposed Plan payments of $360, giving a total payment of $414 per month contributed into the Plan and distributed pro rata.

payment is due after the date on which the final payment under the plan is due."[4] This section, however, must be read in conjunction with § 1322(b)(1), which provides that while unsecured claims may be separately classified, the Plan "may not discriminate unfairly against" other similar classes.[5]

The Court notes that a minority of courts have ruled that student loan debt, which is properly treated as a direct payment in accordance with section 1322(b)(5), does not result in unfair discrimination in violation of section 1322(b)(1). Those courts reason that § 1322(b)(5) would be rendered largely ineffective with respect to unsecured debt if student loans could not be treated thereunder solely because the creditor would receive better treatment than other nonpriority unsecured creditors.[6] The majority of courts, however, find that if Congress had intended to preclude §1322(b)(5) from being read in conjunction with §1322(b)(1), it would have stated so explicitly.[7] This Court agrees with the reasoning of the majority and finds that a debtor may not discriminate unfairly against any class when effectuating §1322(b)(5) in his or her Plan. The question, therefore, is whether the Debtor's separate payment to UHEAA, returning 71% of its claim, "unfairly" discriminates against the other classes of unsecured creditors, which will receive 16% on their claims through the Plan.

A four-step test ("Wolff Test") has been delineated to determine whether separate

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[4] 11 U.S.C. § 1322(b)(5) (2004).

[5] 11 U.S.C. § 1322(b)(1) (2004).

[6] See In re Cox, 186 B.R. 744, 746-47 (Bankr. N.D. Fla.1995); In re Benner, 156 B.R. 631 (Bankr. D. Minn. 1993).

[7] See In re Labib-Kiyarash, 271 B.R. 189, 193 (B.A.P. 9th Cir. 2001); In re Colley, 260 B.R. 532, 535-38 (Bankr. M.D. Fla. 2000).

classification of unsecured claims is fair.[8] Pursuant to that test, different treatment and classification do not unfairly discriminate if: (1) the discrimination has a reasonable basis, (2) the debtor cannot carry out a plan without such discrimination; (3) the discrimination is proposed in good faith; and (4) the degree of discrimination is directly related to the basis or rationale for the discrimination.[9]

1. Reasonable Basis

Some courts have found that facilitation or improvement of a debtor's rehabilitation constitutes a reasonable basis for discrimination.[10] In this case the debtor has not alleged that he will need to borrow funds from UHEAA in the future. He alleges only that UHEAA may disfavor the Debtor if the student loan payments are not maintained at their current level. The Debtor failed, however, to present any evidence to support that contention and the Court declines to conjecture what may or may not happen in the future. Furthermore, favoring student loan creditors merely to effectuate a more favorable fresh start has not been found to constitute a reasonable basis for discriminating against other unsecured nonpriority creditors.[11] Additionally, the nondischargeable nature of student loan debt is not, by itself, a reasonable basis for

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[8] See In re Mason, 300 B.R. 379 (Bankr. D. Kan. 2003) citing In re Lesser, 393 F.2d 669 (8th Cir. 1991). See also In re Whitelock, 122 B.R. 582 (Bankr. D. Utah 1990) citing In re Wolff, 22 B.R. 510 (B.A.P. 9th Cir. 1982).

[9] In re Wolff, 22 B.R. 510 (B.A.P. 9th Cir. 1982).

[10] See, e.g., In re Terry, 78 B.R. 171 at 173 (Bankr. E.D. Tenn. 1987) (a debtor's rehabilitation may be improved as the result of higher payments to doctors, hospitals, merchants, or schools with whom the debtor may deal in the future); In re Furlow, 70 B.R. 973, 976 (Bankr. E.D. Pa.1987) (reasonable basis existed for favoring student loan obligations when payment was necessary to maintain eligibility to obtain further loans in order to finish school).

[11] In re Anderson, 173 B.R. 226, 230 (Bankr. D. Colo. 1993).

discrimination.[12] In this case, the Debtor has not proven any extraordinary or compelling circumstances for discrimination. In the absence of such, the Court finds and concludes that there is no reasonable basis for such.

2. The Debtor Can Carry out a Plan Without Such Discrimination

The Debtor has presented no evidence that he cannot maintain a Plan without the requested discrimination. Nor was evidence presented regarding whether UHEAA would consider forbearance or reduced payments by the Debtor. In addition, the Debtor has no relationship that would necessitate giving UHEAA preferential treatment over his other unsecured creditors. As such, the Court must find and conclude that the Debtor can carry out a plan without such discrimination.

3. The Discrimination Is Proposed in Good Faith

Courts have determined that this element is best determined by consideration of the totality of the circumstances. In this case the Debtor has argued that absent such discrimination, it is possible that he will emerge from the current bankruptcy only to file again to protect himself from a lawsuit by UHEAA for default on the loans. There was no such evidence presented regarding this allegation, and therefore the Court cannot determine its probability. However, the Court does find that such basis is plausible, and therefore the discrimination was proposed in good faith.

4. The Degree of Discrimination Is Not Directly Related to the Basis or Rationale for the Discrimination

No bright-line test is available regarding the percentage difference between classes

[12] In re Labib-Kiyarash, 271 B.R. 189 (B.A.P. 9th Cir. 2001).

required to prove a direct relationship. One court, however, found that "a grossly disproportionate percentage repayment . . . [is an indicium] of unfairness."[13] In this case, UHEAA will receive 71% of its claim over the life of the Plan while the rest of the non-priority, unsecured creditors will receive only 16% of their claims. Given that the Debtor has not produced any compelling reasons for this discrimination, the Court finds and concludes that a 55% difference is not directly related to the basis for the discrimination.

CONCLUSION

Because the Debtor fails to satisfy three of the four elements of the Wolff Test, separate classification of the unsecured claims is unfairly discriminatory. As a result, the Debtor's Plan fails to comply with §1322(b)(1) and therefore the Court must deny confirmation of the Plan in its present form. The Chapter 13 Trustee is directed to submit an order consistent with this Memorandum Decision.

DATED this 3rd day of March, 2004.

William T. Thurman
United States Bankruptcy Judge

[13] In re Whitelock, 122 B.R. 582 (Bankr. D. Utah 1990).

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I, the undersigned, hereby certify that I served a true and correct copy of the foregoing **MEMORANDUM DECISION DENYING DEBTOR'S MOTION TO CONFIRM BY CONSENT** by mailing the same, postage prepaid, to the following, on the 3rd day of March, 2004.

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