SO ORDERED.

SIGNED this 19th day of October, 2017.

Catharine R Aron

UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

In re:	)	
Suzanne Ruby Hotchkiss-Price and Defhaun Edward Price,	)	Case No. 17-10488
Debtors.	)	

OPINION AND ORDER

THIS CASE came before the Court on September 19, 2017, for hearing on the Notice and Proposed Order of Confirmation [Doc. #13] (the "Proposed Plan") filed on June 8, 2017. The Chapter 13 Trustee (the "Trustee") filed a Brief in Support of Confirmation of Plan [Doc. #25], while the United States Bankruptcy Administrator (the "Bankruptcy Administrator") filed a Limited Objection to Confirmation of Debtors' Plan [Doc. #26] (the "Limited Objection to Confirmation"), along with a Memorandum of Law in Support of Limited Objection to Confirmation of Chapter 13 Plan [Doc. #27]. At the hearing, Jennifer Harris appeared on behalf of the Trustee, Anita Jo Kinlaw Troxler, who was also present. Sarah Bruce appeared on behalf of the Bankruptcy Administrator. William Pete Ray Bradley appeared on behalf of the Debtors. After considering the Proposed Plan, the briefs of the parties, the Limited Objection to Confirmation, the arguments of the parties, and the record in this case, the Court finds that the

Limited Objection to Confirmation should be sustained and confirmation of the Proposed Plan should be denied for the reasons which follow.

BACKGROUND

The Debtors filed for relief under Chapter 13 of the United States Bankruptcy Code on April 24, 2017. On their petition, they disclosed income in the amount of $4,104 per month and expenses in the amount of $2,287[1] per month, leaving them with net monthly income in the amount of $1,817. The Debtors have a household of three and are above median income debtors. Their Official Form 122C-2 [Doc. #1] reflects disposable income in the amount of -$482.72 per month. While the Debtors own both real and personal property, no equity remains in their estate after exemptions.

The Debtors filed a proposed plan of repayment to creditors, the Proposed Plan, on June 8, 2017. The Proposed Plan provides for monthly payments of $1,802 beginning May 24, 2017, decreasing to $1,700 per month effective June 2017, with an estimated dividend of 0% to general unsecured creditors. The Debtors are to pay the greater of the amount necessary to pay all allowed costs of administration, priority, and secured claims in full, with the exception of continuing long-term debts, or a minimum of 60 monthly plan payments.

Although no party in interest timely objected to confirmation of the Proposed Plan, the Court scheduled a hearing on the plan to consider a special provision which purports to separately classify the general unsecured claim of Navient Solutions, LLC, on behalf of PHEAA, in the amount of $10,463.48 (the "Navient Claim"). Under Paragraph F of the Proposed Plan,

[1] Schedule J includes $25 per month for home maintenance, repair, and upkeep expenses; $271 per month for electricity, heat, and natural gas expenses; $84 per month for water, sewer, and garbage collection expenses; $314 per month for telephone, cell phone, internet, satellite and cable service expenses; $595 per month for food and housekeeping supply expenses; $100 per month for childcare and children's education expenses; $30 per month for clothing, laundry, and dry cleaning expenses; $67 per month for medical and dental expenses; $416 per month for transportation expenses; $207 per month for vehicle insurance expenses; and $178 per month for school expenses for the female Debtor.

the Navient Claim "is classified as an unsecured continuing long term debt claim[,] to be paid in the amount of $178.02 per month beginning with a payment for July 2017 forward." *Id.*

After the Court set the Proposed Plan for hearing, the Trustee filed her Brief in Support of Confirmation of Plan. The Trustee asserts in her brief that separate classification of the Navient Claim conforms with 11 U.S.C. §§ 1322(b)(1) and (b)(5). Specifically, the Trustee argues that § 1322(b)(1) is inapplicable to the treatment of a continuing long-term student loan debt under § 1322(b)(5). In the alternative, the Trustee argues that treatment of the Navient Claim does not constitute unfair discrimination under § 1322(b)(1), because: (1) the Debtors propose to provide general unsecured creditors with more funds in this case than they would receive in a Chapter 7 case, particularly given that, based on claims filed, general unsecured creditors are in fact estimated to receive a 15% dividend under the Proposed Plan; (2) there is no disposable income requirement in this case under Official Forms 122C-1 and 122C-2, such that the Navient Claim will not take disposable income from other creditors; and (3) the Debtors propose to make payments on the Navient Claim by reducing their already minimal living expenses.

After the Trustee filed her Brief in Support of Confirmation of Plan, the Bankruptcy Administrator filed his Limited Objection to Confirmation of Plan and Memorandum of Law in Support of Limited Objection to Confirmation of Chapter 13 Plan. The Bankruptcy Administrator argues that any claim separately classified under § 1322(b)(5) must still comply with § 1322(b)(1). The Bankruptcy Administrator also advocates that, in considering whether a plan unfairly discriminates against general unsecured creditors, the Court should consider the totality of the circumstances of each individual case. Ultimately, the Bankruptcy Administrator

concludes that while certain factors in this case indicate that the proposed treatment of the Navient Claim is not unfairly discriminatory,

> testimony is needed regarding these Debtors' specific reasons for treating the Navient [Claim] differently from other unsecured claims—whether the loan is in default and whether the Debtors' are suffering any negative consequences from such default, the consequences to the Debtors if payments on the Navient debt are not maintained during the pendency of the Debtors' chapter 13 case, and any other relevant facts that would help to establish a basis for the separate classification of the Navient [Claim].

Memorandum of Law in Support of Limited Objection to Confirmation of Chapter 13 Plan 7.

At the hearing on the Proposed Plan, the Debtors were not present. The Court did not receive any testimony. At the conclusion of the hearing, the Court stated that it would sustain the Limited Objection to Confirmation and deny confirmation of the plan. This Opinion and Order confirms and explains the Court's ruling.

ANALYSIS

The Proposed Plan presents two issues for the Court: (1) whether 11 U.S.C. § 1322(b)(1) applies to a student loan debt separately classified under 11 U.S.C. § 1322(b)(5), and, if so, (2) whether the separate classification of the Navient Claim unfairly discriminates against general unsecured creditors. The Court will address each issue in turn.

A. Section 1322(b)(1) Applies to Debts Separately Classified Under § 1322(b)(5)

Section 1322 establishes guidelines for the contents of a Chapter 13 plan. Under § 1322(b), a Chapter 13 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; [and]

. . .

> (5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due[.]

Id.

There is a split of authority and no controlling precedent in the Fourth Circuit on the issue of whether a debtor who uses § 1322(b)(5) to separately classify a long-term, unsecured debt must also ensure that the classification does not discriminate unfairly against other unsecured creditors under § 1322(b)(1). *Compare, e.g.*, *In re Truss*, 404 B.R. 329, 334 (Bankr. E.D. Wis. 2009) ("If the plan provides for the cure of a default and maintenance of payments on a debt, the terms of which extend beyond the term of the plan, it is not for the court to determine whether this is fair to the other creditors or not. Such a provision is authorized by statute."), *with*, *e.g.*, *In re Harding*, 423 B.R. 568, 571 (Bankr. S.D. Fla. 2010) (finding that "§ 1322(b)(5) cannot be read in isolation"). The majority of courts which have addressed this issue have concluded that, under the plain language of the statute, such classifications remain subject to analysis under § 1322(b)(1). *E.g.*, *In re Belton*, No. 16-03040-JW, 2016 WL 7011570, at *4 (Bankr. D.S.C. Oct. 13, 2016) (summarizing the majority and minority positions). Only a minority of courts have instead concluded that § 1322(b)(5) is more specific than § 1322(b)(1), and is, therefore, controlling. *See Truss*, 404 B.R. at 334.

This Court agrees with the majority approach. While § 1322(b)(5) explicitly trumps § 1322(b)(2), it neither refers to nor directly conflicts with § 1322(b)(1). If Congress had wanted § 1322(b)(5) to override § 1322(b)(1), it could have said so. As the Bankruptcy Court for the Northern District of Georgia noted in *In re Freeman*, No. 06-

10651, 2006 WL 6589023 (Bankr. N.D. Ga. Dec. 22, 2006), provisions in the Bankruptcy Code are "'interlocking'" and must be "'read to be consistent whenever possible." *Id.* at *2 (quoting *In re Bateman*, 331 F.3d 821, 825 (11th Cir. 2003)). *See generally Smith v. United States*, 508 U.S. 223, 233 (1993) ("'Statutory construction . . . is a holistic endeavor.'" (quoting *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)). "Requiring [a] separate . . . classification to be scrutinized for unfair discrimination under § 1322(b)(1) allows §[§] 1322(b)(1) and (b)(5) to be read in a consistent manner. The statute allows for discrimination, just not unfair discrimination." *In re Brown*, 500 B.R. 255, 265 (Bankr. S.D. Ga. 2013); *see also In re Jordahl*, 516 B.R. 573, 577 (Bankr. D. Minn. 2014) ("[R]eading the two provisions in conjunction with each other furthers the bankruptcy code's goal of balancing the rights of creditors to equal treatment with the rights of debtors to a fresh start.").

While the Trustee accurately explains in her Brief in Support of Confirmation of Plan that "each of the eleven subparagraphs under subsection (b) are joined by the conjunctive 'and[,]' allowing each of the possible plan options subject to the requirements stated therein[,]" *id.* at 5, she ignores a key point. Section 1322(b)(1) also contains a mandate: in the event a debtor chooses to separately classify an unsecured claim, the classification cannot discriminate unfairly against other unsecured creditors. The only exception to this mandate is that a debtor 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." *Id.* Therefore, in this case, the Court concludes that the separate classification of the Navient Claim should be analyzed under § 1322(b)(1).

B. The Debtors Have Not Met Their Burden of Proving that the Proposed Plan Does Not Unfairly Discriminate Against General Unsecured Creditors

When a debtor proposes a special classification under § 1322(b)(1), he or she also carries the burden of proof to demonstrate, by a preponderance of the evidence, that the classification does not discriminate unfairly against other unsecured creditors. *Belton*, 2016 WL at *5. The Bankruptcy Code does not define unfair discrimination. Nor has the Fourth Circuit established guidelines for determining whether unfair discrimination exists under § 1322(b)(1).[2] Many other courts have, however, developed tests to aid in the § 1322(b)(1) analysis. One of the most often cited tests considers:

> (1) whether the discrimination has a reasonable basis; (2) whether the debtor can carry out a plan without the discrimination; (3) whether the discrimination is proposed in good faith; and (4) whether the degree of discrimination is directly related to the basis or rationale for the discrimination.

In re Wolff, 22 B.R. 510, 512 (B.A.P. 9th Cir. 1982).[3] A variation on this test adds a fifth factor, "[t]he difference between what the creditors being discriminated against will receive as the plan is proposed, and the amount they would receive if there was no separate classification," *In re Husted*, 142 B.R. 72, 74 (Bankr. W.D.N.Y. 1992).

Courts have also placed reliance in the § 1322(b)(1) analysis on factors such as whether the discrimination benefits the creditors being discriminated against, *e.g.*, *In re Kalfayan*, 415 B.R. 907, 910 (Bankr. S.D. Fla. 2009) (finding that separate classification of a student loan debt did not discriminate unfairly against other creditors, because if the debtor did not remain current on her student loan debt, she could have her license to practice optometry suspended or revoked

[2] In an unpublished opinion, *Ownby v. Jim Beck, Inc. (In re Jim Beck, Inc.)*, 162 F.3d 1155 (4th Cir. 1998), the Fourth Circuit found no reversible error with the United States District Court for the Western District of Virginia's analysis of the meaning of unfair discrimination in the context of a Chapter 11 case and § 1129(b)(1).

[3] These factors were adopted by the Eighth Circuit in *Mickelson v. Leser (In re Leser)*, 939 F.2d 669 (8th Cir. 1991). The factors considered by the lower court in *Ownby v. Jim Beck, Inc. (In re Jim Beck, Inc.)*, 214 B.R. 305, 307 (W.D. Va. 1997) track those in *Wolff* and *Leser*, with the exception of the last factor. The last factor considered by the Court in *Ownby* was the treatment of the creditors being discriminated against.

under Florida statute); and whether payments to those separately classified will derive from disposable or discretionary income, *e.g.*, *In re Abaunza*, 452 B.R. 866 (Bankr. S.D. Fla. 2011) (holding that above median debtors who had discretionary income in excess of their projected disposable income could use this discretionary income to repay student loan debt without discriminating unfairly against other unsecured creditors).

This Court does not believe that a single factor or test adequately accounts for the specific inquiry which must be made under § 1322(b)(1).[4] Instead, as the Seventh Circuit indicated in *In re Crawford*, 324 F.3d 539 (7th Cir. 2003), the unfair discrimination determination should be made on a case by case basis, considering the totality of the circumstances. *Id.* at 542 (finding that the *Wolff* test seems largely "empty except for point 2," outlining criticisms of other tests, and ultimately concluding that "this is one of those areas of the law in which it is not possible to do better than to instruct the first-line decision maker, the bankruptcy judge, to seek a result that is reasonable in light of the purposes of . . . Chapter 13 of the Bankruptcy Code; and to uphold his determination unless it is unreasonable"); *see also In re Mason*, 456 B.R. 245, 251 (Bankr. N.D. W.Va. 2011) ("[B]ecause 'unfairness' is ultimately a discretionary determination, subject to individual judgment that is informed by the nature and purpose of the Bankruptcy Code, articulated multifactor tests applicable to all cases are not helpful and are incongruous with the nature of the required judicial process.").

Therefore, when assessing classifications under § 1322(b)(1), the Court will engage in a factually intensive analysis. The Court will consider those factors of significance which have previously been articulated, but will also seek to exercise its discretion in light of the main policies underlying the Bankruptcy Code: (1) to provide a "fresh start" to the honest but

[4] The Court has "wide discretion" in assessing unfair discrimination under § 1322(b)(1). *Labib-Kiyarash v. McDonald (In re Labib-Kiyarash)*, 271 B.R. 189, 196 (B.A.P. 9th Cir. 2001).

unfortunate debtor and (2) to allow creditors to equitably share in a distribution of the debtor's assets.

In this case, the Debtors propose to pay Navient $10,681.20, or an estimated 90% of its claim over the life of the plan. Conversely, as a result of the expiration of the claims deadline, the Proposed Plan is estimated to result in a 15% dividend to general unsecured creditors. All allowed general unsecured debt in the case, including the Navient Claim in the amount of $10,463.48, totals $20,825.14. Thus, general unsecured creditors are to receive roughly $1,554.25 under the Proposed Plan. Standing alone, this significantly disparate treatment appears unfair.

While the Bankruptcy Administrator and the Trustee agree that separate classification of a student loan debt cannot solely be based upon non-dischargeability, *see generally Bentley v. Boyajian (In re Bentley)*, 266 B.R. 229, 235-36, 241 (B.A.P. 1st Cir. 2001) (explaining that student loan obligations are not priority debts and that nothing in their nature warrants or justifies special treatment), the Trustee believes the Proposed Plan satisfies § 1322(b)(1). She bases this conclusion upon the facts that: (1) the Debtors propose to pay the Navient Claim not with disposable but with discretionary income (which they have reduced to afford the student loan payments), and (2) general unsecured creditors would receive more under the Proposed Plan than they would in a Chapter 7 liquidation. In essence, the Trustee asserts that the circumstances of this case justify special treatment of the debt in order to provide the Debtors with their "fresh start."

The Court agrees that the factors underscored by the Trustee could weigh in favor of the fairness of the Proposed Plan. However, the Court does not believe that a "fresh start" can only be obtained in this case via 90% payment of a student loan debt, even if payments on the debt

derive from discretionary income. In practical effect, the Debtors propose to allocate a significantly greater proportion of their resources to the student loan debt than to other non-priority unsecured creditors because of its non-dischargeable nature. They did not provide the Court with any extenuating factors justifying the separate classification of the student loan debt, and the Court cannot find that almost complete repayment of a debt which Congress purposefully excepted from discharge is necessary for the Debtors to emerge anew from bankruptcy. This sentiment is particularly true given that the Proposed Plan is estimated to result in only a 15% dividend to general unsecured creditors, who would not be paid monthly, but rather, consistent with customary practices in this district, would receive payments towards the end of the plan. As a result, the Debtors not only propose to provide significantly less funds to general unsecured creditors, but also to allocate the risks of an unsuccessful plan to those creditors. Indeed, while the Debtors propose to pay the Navient Claim from their discretionary income, they might otherwise use that income for food and other necessary living expenses, expenses which: (1) generally contribute towards the successful completion of a Chapter 13 plan and (2) were, as the Trustee noted, minimally scheduled in the amount of $2,287[5] per month.

Nothing in the language of § 1322(b)(1) limits application of the unfair discrimination analysis to funds which must be paid into a plan under §§ 1325(a)(4) and 1325(b). In this case, the Court has no evidence before it as to the fairness of the Debtors' proposed use of their discretionary income. Therefore, considering the totality of the circumstances, the Court cannot find that the Debtors have met their burden of proof to demonstrate, by a preponderance of the

[5] It appears this sum already includes student loan payments; Schedule J notes that $178 of this figure is attributable to school expenses for the female Debtor. Thus, in actuality, the Debtors' monthly expenses, exclusive of student loan, housing, and car payments costs (the latter two of which are separately provided for under the Proposed Plan), total $2,109 per month. With the exception of non-mortgage housing and utilities expenses, figures listed by the Debtors on Schedule J are low as compared to the Internal Revenue Service's National and Local Standards for certain expense amounts. Moreover, the Debtors have not included a line item for emergency or miscellaneous expenses.

evidence, that the classification does not discriminate unfairly against general unsecured creditors. Because the Debtors have not met their burden under § 1322(b)(1), the Court cannot confirm the Proposed Plan under § 1325(a)(1).[6]

NOW, THEREFORE, FOR THE ABOVE STATED REASONS, THE COURT HEREBY ORDERS THAT the Limited Objection to Confirmation is SUSTAINED and Confirmation of the Proposed Plan is DENIED.

[END OF DOCUMENT]

[6] The Court makes no ruling herein as to whether a debtor can ever separately classify a student loan debt under § 1322(b)(1). This opinion and order is, as advised, heavily dependent upon the specific facts and circumstances of the case.

SERVICE LIST

ALL PARTIES OF RECORD AS OF THE DATE OF THE ORDER SHALL BE SERVED BY THE BANKRUPTCY NOTICING CENTER