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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

In re)	Case No. 11-10636-B-13
Amanda Kay Renteria,)	DC No. MHM-1
Debtor.)	

**MEMORANDUM DECISION REGARDING TRUSTEE’S
OBJECTION TO CONFIRMATION OF CHAPTER 13 PLAN**

Kristen M. Gates, Esq., appeared on behalf of the chapter 13 trustee,
Michael H. Meyer, Esq.

Geoffrey M. Adalian, Esq., appeared on behalf of the debtor, Amanda Kay
Renteria.

Before the court is an objection by the chapter 13 trustee, Michael H.
Meyer, Esq. (the “Trustee”) to confirmation of a chapter 13 plan (the
“Plan”) filed by the debtor, Amanda Kay Renteria (the “Debtor”). The
Trustee’s objection arises from the fact that the proposed Plan separately
classifies and gives preferential treatment to a substantial unsecured claim
for which the Debtor’s mother is a co-debtor (the “Objection”). The
Trustee contends that the Plan unfairly discriminates against the other
unsecured creditors in violation of 11 U.S.C. § 1322(b)(1).¹ For the reasons

¹Unless otherwise indicated, all chapter, section and rule references are to
the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of
Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated *after*

1 set forth below, the Objection will be overruled.

2 This memorandum decision contains the court's findings of fact and
3 conclusions of law required by Federal Rule of Civil Procedure 52(a), made
4 applicable to this contested matter by Federal Rule of Bankruptcy
5 Procedure 7052. The court has jurisdiction over this matter under 28 U.S.C.
6 § 1334, 11 U.S.C. § 1325 and General Orders 182 and 330 of the U.S.
7 District Court for the Eastern District of California. This is a core
8 proceeding as defined in 28 U.S.C. §§ 157(b)(2)(L).

9 **Background and Findings of Fact.**

10 The underlying facts here are not in dispute. This bankruptcy
11 petition was filed under chapter 13 on January 20, 2011. Prior to the
12 bankruptcy, in June 2009, the Debtor retained the services of attorney
13 James B. Preston, Esq. ("Preston") to represent the Debtor in some family
14 law litigation involving alleged domestic violence and paternity, pending in
15 the state court. The Debtor's mother, Nellie Reser, co-signed and
16 guaranteed a written fee agreement with Preston. In September 2010,
17 Preston filed a civil action against the Debtor and her mother to enforce the
18 fee agreement and collect his legal fees. After the Debtor sought
19 bankruptcy protection, in March 2011, Preston filed pleadings in the state
20 court to obtain a default judgment against Ms. Reser. It is not clear from
21 the record whether the default judgment was actually entered or whether
22 Present started collection proceedings.² Preston filed a proof of claim in

23 _____
24 October 17, 2005, the effective date of The Bankruptcy Abuse Prevention and
25 Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

26 ²Presumably, Ms. Reser is protected by the co-debtor stay under
27 § 1301(a). Preston has never sought relief from the co-debtor stay and the Debtor
has not taken any action in this court to enforce the co-debtor stay.

1 this bankruptcy for \$20,499.07 (the “Preston Claim”). The Debtor has not
2 objected to the Preston Claim.

3 According to the Debtor’s schedules, she owns no real property and
4 all of her personal property is either fully encumbered or exempt. The
5 Debtor and her non-filing spouse are below the “median income” applicable
6 to their family so her current monthly income is determined from schedules
7 I and J. The Debtor’s monthly net income is reported to be \$709.60. The
8 Plan proposes to pay the full amount of the Debtor’s net income to the
9 Trustee for a period of 36 months. With that money, the Plan provides for
10 full payment of the Preston Claim with interest at the annual rate of 10%.
11 The Plan does not provide for any distribution to the other unsecured
12 creditors.³

13 **Applicable Law.**

14 The Bankruptcy Code allows a chapter 13 debtor to classify
15 unsecured claims for different treatment in the same manner authorized for
16 chapter 11 claims, subject to a restraint on “unfair discrimination.” The
17 applicable law is § 1322(b)(1) which provides:

18 (b) . . . the plan may–

19 (1) designate a class or classes of unsecured claims, as
20 provided in section 1122 of this title, but may not discriminate unfairly
21 against any class so designated; *however, such plan may treat claims for a*
22 *consumer debt of the debtor if an individual is liable on such consumer debt*
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24
25 ³The Debtor states in her declaration that she made an agreement with the
26 Trustee to increase her Plan payment and provide an additional \$7,196.06 (less
27 the Trustee’s compensation) for the general unsecured creditors. That Plan
modification does not appear in the record and was not mentioned by the Trustee
in his Objection.

1 *with the debtor differently than other unsecured claims.* (Emphasis added,
2 hereafter, the “However Clause”).

3 The term “consumer debt” used in § 1322(b)(1) appears throughout
4 the Bankruptcy Code in different contexts. The term “consumer debt” is
5 defined in § 101(8) as follows: The term “consumer debt” means debt
6 incurred by an individual primarily for a personal, family, or household
7 purpose.

8 The Debtor has the burden of proof to establish, by a preponderance
9 of the evidence, that her Plan complies with the provisions of the
10 Bankruptcy Code. *U.S. v. Arnold and Baker Farms (In re Arnold and*
11 *Baker Farms)*, 177 B.R. 648, 654 (9th Cir. BAP 1994) (judg’ t aff’ d 85 F.3d
12 1415 (9th C.A. 1996), *cert. denied* 519 U.S. 1054 (1997).)

13 **Issues Presented.**

14 The Trustee objects to confirmation of the Plan because of the
15 disparate treatment given to the Preston Claim, full payment with interest to
16 the complete exclusion of all other unsecured claims. The Trustee contends
17 that the Plan discriminates unfairly against the other unsecured creditors
18 and therefore fails to comply with § 1322(b)(1). In response, the Debtor
19 argues that the “However Clause” in the second half of § 1322(b)(1)
20 exempts the Preston Claim from the “unfair discrimination” test in the first
21 half.⁴

22 There is no dispute that the Preston Claim is unsecured and that
23 another individual, Ms. Reser, is liable with the Debtor for payment of the

25 ⁴The Debtor contends in a separate argument that the Plan does satisfy the
26 “unfair discrimination” test. Because the court concludes that the “unfair
27 discrimination” test is not applicable to the Preston Claim, the Debtor’s
28 alternative argument will not be considered.

1 Preston Claim. The Trustee asks the court to rule solely on the application
2 of § 1322(b)(1) to the facts. The Trustee does not contend that either the
3 bankruptcy, or the Plan were filed in bad faith. Therefore, the issues
4 presented here are: (1) is the Preston Claim a “consumer debt”; and (2) does
5 the “unfair discrimination” test in § 1322(b)(1) apply to the Plan’s treatment
6 of the Preston Claim?

7 **Analysis and Conclusions of Law.**

8 **The Preston Claim is a “Consumer Debt.”** In his original
9 objection, the Trustee argued that the Preston Claim, for attorney’s fees
10 incurred in the prosecution of family law litigation, is not a “consumer
11 debt.” The Trustee has since withdrawn that issue in his supplemental
12 statement of issues. However, the question was raised, and it must be
13 addressed as a predicate to the application of § 1322(b)(1).

14 The Ninth Circuit has already addressed this issue in the context of a
15 motion to dismiss for substantial abuse under § 707(b).⁵ See *Zolg v. Kelly*
16 (*In re Kelly*), 841 F.2d 908, 913 (9th Cir. 1988). In deciding what kind of
17 debts the debtors brought to the case, the court concluded that legal fees
18 incurred as a result of litigation for family-related matters (litigation to
19 recover fees overpaid in the purchase of the family home) are in the nature
20 of a “consumer debt” within the meaning of §§ 101(8) and 707(b). The
21 court observed, “[t]he litigation thus served primarily a ‘family’ or
22 ‘household’ purpose within the meaning of [section 101(8)]. A debt for
23 attorney’s fees incurred in attempting to further this purpose, like any other
24 debt so incurred, qualified as a consumer debt.” *Kelly*, 841 F.2d at 913.

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26 ⁵Section 707(b) applicable at the time, permitted the U.S. Trustee to seek
27 dismissal of a case, filed by an individual whose debts are *primarily consumer*
28 *debts* upon a showing that the granting of relief would be an abuse of chapter 7.

1 The Preston Claim is a debt incurred for the purpose of representing
2 the Debtor in a family law dispute, the nature of which is described by the
3 Debtor as “an action for domestic violence and paternity.” It strikes this
4 court that few matters could be more “personal and family” related than a
5 dispute over alleged domestic violence and paternity. The Court
6 established in *Kelly* that the legal fees incurred in connection with litigation
7 over a debtor’s home can be a “consumer debt.” This court can find no
8 reason to reach a different result with regard to the legal fees reflected in the
9 Preston Claim.

10 **The “Unfair Discrimination” Test in § 1322(b)(1) is Not**

11 **Applicable to the Preston Claim.** The second issue relates to application
12 of the “However Clause” in § 1322(b)(1). The Ninth Circuit Bankruptcy
13 Appellate Panel long ago adopted from prior case law a four-part inquiry
14 for determining whether a chapter 13 plan unfairly discriminates against
15 certain classes of claims. *Wolff v. AMFAC Distribution Corporation (In re*
16 *Wolff)*, 22 B.R. 510, 512 (9th Cir. BAP 1982) (citations omitted).⁶ The
17 Trustee contends, without citation to any authority, that the four-part *Wolff*
18 test still applies to the classification of a co-debtor-consumer claim,
19 notwithstanding the seemingly clear language of the However Clause.⁷

21 ⁶The “unfair discrimination” test adopted in *Wolff* requires the court to
22 consider the following questions: (1) whether the discrimination has a reasonable
23 basis; (2) whether the debtor can carry out a plan without the discrimination; (3)
24 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.

25 ⁷The Trustee cites the Ninth Circuit BAP’s decision in *Meyer v. Hill (In re*
26 *Hill)*, 268 B.R. 548 (9th Cir. BAP 2001) as “indicating” support for his position.
27 However, the *Hill* decision has no application here. “We do not reach this
interesting question because the record indicates that the § 1332(b)(1) ‘however
28 clause’ does not apply.” *Hill*, 268 B.R. at 550.

1 discrimination” test in the classification of co-debtor claims. Those courts
2 that still apply the “unfair discrimination” test tend to construe the language
3 of § 1322(b)(1) to be “awkward” and the legislative history to be “sparse”
4 and ambiguous. *See In re Applegarth*, 221, B.R. 914-15 (Bankr. M.D. Fla.
5 1998). Nonetheless, the wording of the However Clause is not ambiguous.
6 By giving effect to the plain meaning of the statute, this court is persuaded
7 that Congress added the However Clause to § 1322(b)(1) specifically to
8 carve out an exception to the “unfair discrimination” test, an exception that
9 only applies to co-debtor-consumer claims. The court adopts as persuasive
10 the discussion of this issue in the case of *In re Thompson*, supra, 191 B.R.
11 967.

12 The Court finds [the four-part *Wolff*] test to be of little
13 help in the present case. The difficulty lies in the fact
14 that this test does not account for the special treatment
15 Congress allowed in the case of cosigned debts. . . .
*Discrimination in favor of codebtor claims is now a
per se reasonable basis for separate classification.*

16 *Thompson*, 191 B.R. 967 at 971 (emphasis added).

17 That being said, the court notes that the “classification of claims”
18 question is not the end of the confirmation inquiry. As noted by the
19 *Thompson* court, the Debtor must still show that her Plan satisfies the other
20 requirements for confirmation, including, but not limited to, the good faith
21 test (§ 1325(a)(3)), the chapter 7 liquidation test (§ 1325(a)(4)) and, when
22 applicable, the disposable income test (§ 1325(b)).

23 The ability of a debtor to separately classify debts does
24 not eclipse other applicable confirmation requirements.
25 . . . If the result of a debtor’s classification scheme is
26 that the debtor is unable, for example, to provide all
27 unsecured creditors with at least as much as they
28 would have received under Chapter 7, the plan is not
confirmable with the separate classification. The Court
must consider whether the plan would be feasible with

1 the separate classification, and whether the debtor has
2 committed his available disposable income to
repayment of his debts.

3 Of particular importance is the requirement that the
4 debtor pursue the separate classification in a good faith
5 effort to reorganize and not simply as a means of
preferring certain creditors at the expense of others. 11
U.S.C. § 1325(a)(3).

6 *Thompson*, 191 B.R. at 972.

7 In *Thompson*, the court ultimately denied confirmation of the
8 debtor's chapter 13 plan because on the facts of the case, it was not
9 persuaded that full payment of the co-debtor-claim, with 0% to the other
10 unsecured creditors, satisfied the good faith required by § 1325(a)(3).
11 *Thompson*, 191 B.R. at 974-75. Good faith is absolutely essential to
12 confirmation of a chapter 13 plan. *Chinichian v. Campolongo* (*In re*
13 *Campolongo*), 784 F.2d 1440, 1442-44 (9th Cir. 1986). The court must
14 consider the totality of the circumstances when making the "good faith"
15 determination. "[T]he court must make its good faith determination in the
16 light of *all* militating factors." *Goeb v. Heid* (*In re Goeb*), 675 F.2d 1386,
17 1390 (9th Cir. 1982) (emphasis added).

18 Here, the Trustee did not raise any of the above objections. Indeed,
19 the Trustee has asked the court to decide only the "unfair discrimination"
20 issue discussed above, but that does not excuse the court from its duty to
21 make sure the Plan complies with the applicable provisions of the
22 Bankruptcy Code. § 1325(a); *United Student Aid Funds, Inc. v. Espinosa*,
23 ___U.S.___, 130 S.Ct 1367, 1381 (2010). With regard to the chapter 7
24 liquidation test, it does not appear from the schedules that unsecured
25 creditors would receive anything if this were a chapter 7. The Debtor is
26 paying all of her "net monthly income" to fund the Plan. Neither the

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1 Trustee, nor any creditor objected to the “disposable income” issue so §
2 1325(b) is not applicable. Finally, the Trustee did not object to the Debtor’s
3 good faith under § 1325(a)(3) so the court can make that finding without
4 evidence. Rule 3015(f). Indeed, the Trustee states affirmatively in his
5 opening brief his belief that the Plan was filed in good faith. Upon
6 consideration of the facts of this case, the nature of the Preston Claim, the
7 relationship between the Debtor and the co-signer, her mother, and the
8 legislative history which explains the reasons for enactment of the However
9 Clause, the court agrees with the Trustee, the Debtor’s petition and Plan
10 were filed in good faith.

11 **Conclusion.**

12 In conclusion, the Debtor clearly has a motivation, and presumably a
13 compelling need, to make sure that the Preston claim is paid. The co-
14 debtor, Ms. Reser, guaranteed Preston’s fee agreement as an
15 accommodation to her daughter in a difficult season. There is no evidence
16 to suggest that Ms. Reser received any direct benefit from Preston’s legal
17 services. If confirmation of the Plan were denied, that would put the
18 Debtor’s mother in a position where she too might be forced to seek
19 bankruptcy relief. If confirmation of the Plan were denied, the Debtor
20 could simply choose to liquidate and pay the Preston Claim directly.
21 Congress added the However Clause to the Bankruptcy Code to address
22 “the reality of a debtor’s motivations” and to “encourage a debtor to choose
23 reorganization” over liquidation. *Thompson*, 191 B.R. at 971. Denial of
24 confirmation here would not serve any practical purpose and would not
25 result in a better outcome for anyone.

26 Based on the foregoing, the court finds and concludes that the
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1 Preston Claim is a “consumer debt” within the meaning of the Bankruptcy
2 Code. Based on the However Clause in § 1322(b)(1), the Debtor is not
3 required to satisfy the “unfair discrimination” test with regard to
4 classification of the Preston Claim. The court is satisfied that the
5 bankruptcy petition and the Plan were both filed in good faith and that the
6 other essential requirements for confirmation have been satisfied.
7 Accordingly, the Trustee’s objection is overruled. The Plan will be
8 confirmed. The Debtor’s attorney shall submit a proposed confirmation
9 order to the chapter 13 trustee.

10 Dated: August 1, 2011

11 /s/ W. Richard Lee
12 W. Richard Lee
13 United States Bankruptcy Judge
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