ORDERED.

Dated: September 09, 2024

Tiffany P. Geyer
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re

Tammy Lyn Durr,

Debtor.
______________________________/

Case No. 6:23-bk-02756-TPG
Chapter 13

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

THIS CASE comes before the Court upon the "Trustee's Amended Objection to Confirmation of Chapter 13 Plan" (the "Objection") (Doc. No. 19) and the Debtor's response thereto (the "Response") (Doc. No. 21). The Trustee argues that the Debtor's Amended Chapter 13 Plan (the "Plan") (Doc. No. 16) unfairly discriminates against a designated class in violation of 11 U.S.C. § 1322(b)(1) and therefore cannot be confirmed. Following a hearing on the issues, and after analyzing the arguments of the parties and the law, the Court concludes the Plan does not unfairly discriminate against a designated class. Accordingly, the Objection is overruled.

I. BACKGROUND

The Trustee argues the Plan violates 11 U.S.C. § 1322(b)(1) and cannot be confirmed because it effectively designates, and discriminates unfairly among, classes of unsecured claims. Specifically, the Trustee's argument concerns a settlement agreement the Debtor and her non-filing (non-debtor) spouse ("NFS") executed with the Internal Revenue Service (the "IRS") providing for payment of their delinquent income taxes (the "Settlement Agreement"). (Doc. No. 19 ¶ 2.) Under the Settlement Agreement, the couple agreed to remit to the IRS $435 per month to pay off the delinquent taxes. (*Id.* at 4.) The Debtor included this obligation as part of her expenses on Schedule J, with the notation "NFS Agreement with IRS," explaining that her NFS was covering the monthly payments. (Doc. No. 12 at 6.) The Debtor's income is above median, as her current monthly income exceeds the median family income for a household of two in Florida (*id.* at 9-11), and her Plan spans sixty-months (Doc. No. 16 at 1).

As filed, the Debtor's unsecured claims total $122,150.28, which sum includes the IRS's $23,926.32 non-priority general unsecured claim (Claim 2-1). Under the Plan, all unsecured creditors, including the IRS, are paid in a single unsecured class on a pro rata basis. (Doc. No. 21 ¶ 4.) The Trustee does not object to the Debtor including the monthly IRS payment under the Settlement Agreement as an expense on Schedule J and does not argue that the Debtor miscalculated her projected disposable income ("PDI") or that the Debtor is contributing less to the Plan than what the statutory guidelines require. (Doc. No. 19.)

But the Trustee does argue that continuing to pay the IRS pursuant to the Settlement Agreement, while the IRS also receives pro rata distributions under the Plan, "will result in the [IRS] being paid in full, with interest, while the other general[] unsecured creditors will receive only pro-rata distributions." (*Id.* ¶ 5.) The Trustee argues that although the Plan itself does not

create two separate classes of unsecured creditors, it does so "in its operation and application" (*id.* ¶ 7), since the IRS receives monthly payments from the Debtor's NFS outside the Plan in addition to what it receives from the Debtor, pro rata, as a member of the unsecured class inside the Plan. But the Debtor argues that paying a creditor *outside* the Plan does not constitute a separate classification of claims *inside* the Plan.[1] (Doc. No. 21 ¶ 3.)

II. ANALYSIS

There is no prohibition against separate classification of unsecured claims in a Chapter 13 plan, provided there is no unfair discrimination among such classes, as set forth in Section 1322(b)(1), which relevantly provides as follows:

> [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 . . . .

Here, the Trustee argues, and the Debtor does not counter otherwise, that the IRS Claim is not a consumer debt. (Doc. No. 19 ¶ 6.) *See In re Westberry*, 215 F.3d 589 (6th Cir. 2000) (income taxes are not consumer debt for purposes of the § 1301 codebtor stay because taxes arise from earning money and are incurred for a public purpose, not from voluntary spending on personal and family items); *compare In re Gentri*, 185 B.R. 368, 372–73 (Bankr. M.D. Fla. 1995) ("The debt to the IRS arises from the forgiveness of a debt incurred to purchase a personal residence in Connecticut and is also a consumer debt."). As such, the Court's analysis is limited to whether

[1] The Debtor does not argue that the IRS claim falls under § 1322(b)(5) as an "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 . . . ." (Doc. No. 21.)

the payments to the IRS outside the Plan by the NFS results in unfair discrimination prohibited by § 1322(b)(1).

By expressly providing that a plan may not discriminate among classes unfairly, § 1322(b)(1) implicitly permits discrimination among classes. *In re Abaunza*, 452 B.R. 866, 869-70 (Bankr. S.D. Fla. 2011) (a plan may discriminate against a class; it just may not do so unfairly). "The Bankruptcy Code does not define 'unfair discrimination.'" *Id.* at 871. When unfair discrimination is alleged, the Debtor must demonstrate by a preponderance of the evidence that this is not true, and the Court has wide discretion in making this determination. *In re Sharp*, 415 B.R. 803, 808 (Bankr. D. Colo. 2009); *In re Abaunza*, 452 B.R. at 876 n.15.

Two cases are particularly instructive to the Court in this matter, *In re Copeland*, 742 F.3d 811 (8th Cir. 2014), involving tax debt, and *In re Abaunza*, 452 B.R. 866, involving student loan debt. In *Copeland*, above-median income codebtor spouses filed a joint Chapter 13 case in 2011 and proposed a sixty-month plan. 742 F.3d at 812. The debtors' back taxes were unsecured non-priority claims, and they proposed a plan that would pay this debt in full from their disposable income, leaving nothing for other unsecured creditors. *Id.* The bankruptcy court rejected the plan as unfairly discriminatory, and the Bankruptcy Appellate Panel for the Eighth Circuit agreed. *Id.* The debtors appealed the decision to the Eighth Circuit. *Id.* at 811.

To evaluate whether the debtors' plan was unfairly discriminatory, the Eighth Circuit employed the *Leser/Wolff* test. *Id.* at 813. Under this test, a court considers four elements: "'(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.'" *Id.* (quoting *In re Leser*, 939 F.2d 669, 672 (8th Cir. 1991)).

Under the first prong of the test, the debtors argued that the nondischargeability of the tax debt supplied a reasonable basis to discriminate in favor of this unsecured class due to the "strong public policy in favor of full tax collection." *Id.* at 814. The Eighth Circuit rejected this argument. *Id.* ("Nondischargeability alone does not justify special classification . . . ."). In particular, the public policy argument failed to persuade since it was the debtors' delinquency rendering the tax debt nondischargeable in the first instance; the Eighth Circuit expressly observed that had the debtors "filed pre-petition tax returns on time, the tax debts would largely be dischargeable." *Id.*

Regarding the second prong— whether a debtor can carry out a plan without discriminating— the debtors argued that construing this prong too stringently would result in a rule that "'the Debtor always loses'" and render an appeal of the discrimination determination difficult, but the court concluded there were other ways for the debtors to appeal the decision. *Id.* ("A debtor may, [for example] simply refuse to file a plan without the special classification [of the tax debt separately from other unsecured creditors]. The bankruptcy court would then dismiss the case, which could be appealed."). Alternatively, a debtor could simply "'formulate a plan which pays [the nondischargeable debts] pro rata with other unsecured creditors during the life of the plan and as a continuing obligation thereafter.'" *Id.* (quoting *In re Groves*, 39 F.3d 212, 215 (8th Cir.1994)). A debtor need not fully pay a nondischargeable obligation during the life of the plan. *Id.*

As to the third prong, whether the discrimination is proposed in good faith, the Eighth Circuit also sided against the debtors, concluding that their plan lacked good faith because it "propose[d] to pay off as much nondischargeable debt as possible, leaving other creditors with

nothing at the close of bankruptcy." *Id.* at 814-15. In sum, the debtors proposed "to 'protect' those creditors least in need of protection, at the expense of the most vulnerable." *Id.* at 815.

Having already rejected the debtors' rationale for their proposed discrimination, the Eighth Circuit did not consider the debtors' arguments as to the fourth prong— whether the degree of discrimination is directly related to the rationale for the discrimination. *Id.* As such, the Eighth Circuit's analysis of the *Leser/Wolff* factors led it to affirm the bankruptcy court's decision rejecting the debtors' proposed plan for unfairly discriminating in favor of the tax debt. *Id.* at 814-15.

Although, like the instant case, *Copeland* involved Chapter 13 above-median income debtors treating a tax debt differently from other unsecured debt, there are important distinctions between the two cases. In *Copeland*, the plan proposed to pay the tax debt in full from disposable income. *Id.* at 812. Here, however, the money being paid to the IRS that the Trustee objects to is being paid outside the Plan by the NFS, a non-debtor, and there is no contention that not all the Debtor's PDI will be distributed pro rata among the unsecured creditors. These differences make this case more similar to *In re Abaunza*, 452 B.R. 866, 869-70 (Bankr. S.D. Fla. 2011).

In *Abaunza*, above-median income Chapter 13 debtors listed student loan debt among their unsecured claims and included their ongoing monthly student loan payments as an expense on Schedule J. 452 B.R. 868. The debtors' plan proposed paying all their PDI to unsecured creditors, except for the student loan creditors, which they proposed to pay each month outside the plan with their excess income. *Id.* This would result in the unsecured creditors receiving a projected dividend of .86% and the student loan debt being kept current and ultimately paid in full. *Id.* The debtors had the extra money to make the student loan payments outside the plan

"because their actual expenses [were] less than their expenses as calculated under the means test for purposes of determining PDI." *Id.* at 868-69 (footnote omitted).

The Chapter 13 Trustee objected to the plan, arguing that the payments made directly to the student loan creditors discriminated unfairly against the other unsecured creditors. *Id.* at 869. The bankruptcy court separated the analysis into two issues: first, "whether, if a debtor pays a creditor 'outside' a Chapter 13 bankruptcy plan, such payment outside the plan constitutes de facto separate classification of such creditor[,]" and second, if so, "whether, when a debtor proposes to pay a creditor with funds in excess of that which the Bankruptcy Code requires such debtor pay to his or her unsecured creditors, such use of the excess funds constitutes unfair discrimination." *Id.* at 870.

On the first issue, the court concluded that payment to an unsecured creditor outside a Chapter 13 plan does constitute a separate classification of the claim apart from the claims of other unsecured creditors. *Id.* at 870-71 (agreeing with the analysis of *In re Sharp*, 415 B.R. 803 (Bankr D. Colo. 2009) noting that "a payment to a creditor 'outside the plan' can amount to an implicit classification even though not specifically referenced in the plan".) The court then discussed whether the plan unfairly discriminated against the other unsecured creditors. *Id.* at 871-76. The court did not use any of the tests that other courts used to determine whether the discrimination is unfair, *id.* at 876, observing that the Eleventh Circuit has not endorsed a test and that "[t]here is no clear 'majority' approach . . . ." *Id.* at 872, 875-76. Instead, the court held "that where the sole allegation for unfair discrimination is payment of a separately classified creditor from an above-median debtor's 'discretionary funds,' the plan does not discriminate unfairly." *Id.* at 876.

The court went on to explain that Congress addressed what is "fair" in establishing a formula for above-median debtors to calculate PDI. *Id.* If all the debtor's PDI is used to fund the plan, then "what the debtor chooses to do with his or her discretionary income—whether it is to pay back 'more' to an unsecured creditor either within or outside the chapter 13 plan, to go on a vacation, or to pay a previously discharged debt, is within the debtor's discretion." *Id.* Indeed, concluding otherwise would "'subvert the disposable income test.'" *Id.* (quoting *In re Sharp*, 415 B.R. at 812). Because the debtors' plan proposed to pay all PDI to unsecured creditors (other than the student loan creditors), and the debtors would be using their excess income to pay the student loan debt outside the plan, the plan was not unfairly discriminatory. *Id.*; *see also In re Knowles*, 501 B.R. 409 (Bankr. D. Kan. 2013) (finding no unfair discrimination when unsecured creditors would receive nothing under the plan, and the student loan creditors were paid outside of the plan with the debtors' discretionary income, where the debtors followed the statutory formula in computing their PDI).

Although *Copeland* involved a separate classification of tax debt and *Abaunza* involved a separate classification of student loan debt, the instant case is otherwise more factually similar to *Abaunza*. Here, like in *Abaunza*, there is no contention that anything less than all the Debtor's PDI will be contributed to unsecured creditors, and the Debtor's NFS is paying the IRS separately outside the Plan, apart from the Debtor's PDI, unlike in *Copeland*, where the plan allocated all PDI to the tax debt, and nothing to the other unsecured creditors. *In re Copeland*, 742 F.3d at 812. Although in the instant case the IRS will be receiving payments from the Debtor's PDI as an unsecured claimant and additional payments outside the Plan, the *Abaunza* court stated such fact would not likely change its analysis "so long as the Debtors were directing their full PDI to pay unsecured claims as required by the Bankruptcy Code." *In re Abaunza*, 452

B.R. at 868 n.18; *see also In re Sharp*, 415 B.R. at 813 ("Debtors' student loan and non-student loan creditors are receiving exactly what the Code requires Debtors to pay them—a pro rata payment of PDI. The fact that the student loan creditors are also receiving a discretionary payment from Debtors does not entitle the remaining unsecured creditors to additional moneys, nor 'dis-entitle' student loan creditors from receiving a pro rata payment.").

Although *Copeland* is helpful in its thoughtful discussion of issues concerning delinquent tax indebtedness and when the separate classification of such claims apart from other unsecured creditors is unfairly discriminatory, *Abaunza* is more factually similar and on point. As in *Abaunza*, the Debtor here is fully contributing all statutorily required funds to the Plan, and the payments to the IRS are being made by the Debtor's NFS outside the Plan with funds the Debtor's unsecured creditors would not be entitled to receive. Therefore, the Debtor's unsecured creditors are receiving exactly what they should. Under these facts, the Debtor's plan does not unfairly discriminate.

III. CONCLUSION

The IRS claim is not a consumer debt, and the Debtor's proposal for her spouse to continuing paying the IRS outside the Plan constitutes separate classification of the IRS claim. This separate classification is not unfair discrimination as prohibited by § 1322(b)(1) because the unsecured creditors are not receiving less than they would otherwise be entitled to in Chapter 13.

Accordingly, it is

ORDERED that the Objection (Doc. No. 19) is **OVERRULED**. The Trustee is directed to reset this matter for confirmation.

# # #

The Trustee is directed to serve a copy of this Order on interested parties who are non-CM/ECF users and file a proof of service within three days of entry of the Order.