IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

IN RE:	)	
	)	
JONATHAN WAYNE DUNNAM,	)	Case No. 15-3870
	)	
Debtor.	)	

ORDER SUSTAINING OBJECTION TO PLAN

This matter is before the Court on the Chapter 13 trustee's oral objection to confirmation of the debtor's plan as amended. The question is whether the debtor can pay a potentially nondischargeable unsecured claim (or part of it) 100% through his plan while paying less (actually, nothing) on other unsecured claims. The Court finds that the debtor can, but -- since the proposed discrimination is not required for his performance under the plan -- only if the other unsecured creditors will receive at least what they would have gotten if there were no such special treatment.

Debtor took out a loan from creditor First Heritage of Alabama ("First Heritage") in the amount of $1,202.86 on August 24, 2015 before filing Chapter 13 on November 24, 2015. The creditor contends that the debt is nondischargeable pursuant to Bankruptcy Code § 523(a)(2) and objected to debtor's original plan (doc. 15). In settlement of First Heritage's objection and potential nondischargeability complaint, debtor has proposed a plan amendment (doc. 22) to pay $600 of First Heritage's claim at 100% through the plan while paying zero percent to other unsecured creditors and on the remaining balance of First Heritage's claim.

Bankruptcy Code § 1322(a)(3) specifies that a Chapter 13 plan shall provide the same treatment for each claim within a particular class. Bankruptcy Code § 1322(b)(1) provides that the plan may designate a class or classes of unsecured claims but may not "discriminate unfairly"

against any class so designated. The subsection contains an exception for consumer debt with co-debtors which is not applicable here.

An initial issue here is whether the potential or actual nondischargeability of a debt is sufficient in itself to justify a separate classification and more favorable treatment in a Chapter 13 plan. In general, the answer is no; separate classification and treatment of nondischargeable unsecured debt is "unfair" unless there is some other reason related to performance of the plan. Courts use various tests which can probably be summarized this way: "[I]f without classification the debtor is unlikely to be able to fulfill a Chapter 13 plan and the result will be to make his creditors as a whole worse off than they would be with classification, then classification will be a win-win outcome" and thus is allowable under § 1322(b)(1). In re Crawford, 324 F.3d 539, 543 (7th Cir. 2003). See also Keith M. Lundin and William H. Brown, Chapter 13 Bankruptcy § 149.1 (4th ed. 2004). For example, criminal restitution cannot be classified separately and paid more favorably when its non-payment would not cause debtor to be incarcerated or affect plan performance. In re Williams, 231 B.R. 280 (Bankr. S.D. Ohio 1999). Nondischargeable traffic fines which would cause a debtor's driver's license to be revoked and failure of the plan can be classified separately, but not shoplifting fines which would not affect plan performance. In re Gallipo, 282 B.R. 917 (Bankr. E.D. Wash. 2002). And nondischargeable worthless check debt can be classified separately and paid more than other unsecured debt where non-payment would cause a conviction that would result in debtor's unemployment and failure of her Chapter 13 plan. In re Etheridge, 297 B.R. 810 (Bankr. M.D. Ala. 2003).

In this case, the debtor has not offered any reason why paying First Heritage in the same class as other unsecured creditors would impair performance of his Chapter 13 plan. Debtor simply wants to resolve the dispute with First Heritage and get the potentially nondischargeable

debt paid through the plan so there will not be any unpaid nondischargeable debt at the end of the case.

This Court previously held in In re Korbe, Case No. 15-1540 (Bankr. S.D. Ala. 7/24/15) that a Chapter 13 plan could provide for nondischargeable unsecured student loan debt to be paid "direct" when other unsecured creditors were being paid 100% through the trustee, since that direct payment did not lower the percentage to general unsecured creditors and thus the discrimination was not "unfair." However, here, in a less-than-100% plan, the $600 to be paid at 100% to First Heritage comes at the expense of other unsecured creditors who would otherwise get those funds. The proposed separate classification and more favorable treatment of a portion of First Heritage's unsecured debt is thus "unfair" under § 1322(b)(1). If debtor wants to discriminate in favor of First Heritage, he needs to pay the general unsecured creditors through the plan at least what they would have received in the absence of the different, more favorable treatment for First Heritage. But the plan cannot be confirmed as currently proposed, and the trustee's oral objection to confirmation is sustained.

Dated: April 7, 2016

HENRY A. CALLAWAY
CHIEF U.S. BANKRUPTCY JUDGE