UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:	C/A No. 20-01758-HB
Marlena Joy Pizzo,	Chapter 13
Debtor(s).	**ORDER DENYING CONFIRMATION**

THIS MATTER is before the Court to consider confirmation of the plan filed by Debtor Marlena Joy Pizzo.[1] An Objection was filed by Creditor Renee S. Siegan.[2] Present at the confirmation hearing were Pizzo and her counsel, F. Lee O'Steen, and Gretchen D. Holland, Chapter 13 Trustee. By agreement of the parties, Siegan participated by telephone. After consideration of the evidence and testimony presented, the parties' arguments, and applicable law, the Court enters the following findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a)(1),[3] denying plan confirmation.

FINDINGS OF FACT

For the past three years, Pizzo has been employed by Trinity Health Corporation. Prior to working at Trinity, Pizzo completed a dual masters' degree program and accumulated $180,000.00 in student loans. Pizzo testified that she is participating in a loan forgiveness program where the balance of her student loan debt will be forgiven after she has made qualified monthly payments for ten years while working for a qualified employer such as Trinity.

Pizzo's ex-spouse is Siegan's son. While married, the couple purchased a home in Michigan. To assist with the down payment, they borrowed $44,000.00 from Siegan around July 2018. Siegan and Pizzo signed an affidavit stating this was a gift so Pizzo could obtain financing

[1] ECF No. 42, filed Dec. 3, 2020.
[2] ECF No. 48, filed Jan. 7, 2021.
[3] Made applicable to this contested matter pursuant to Fed. R. Bankr. P. 7052 and 9014.

from a third party. However, Siegan's credible testimony and the parties' written communications indicate they intended this to be a loan and repaid.

Pizzo and Siegan's son divorced in May 2019. Pizzo was awarded the home and assumed associated liabilities. Thereafter, Pizzo sold the home and moved to South Carolina, where she teleworks for Trinity. Due to unexpected repairs, the net sales proceeds were less than Pizzo anticipated and Siegan was not paid any amount from the sale of the home. Siegan initiated a collection action in the state court in Michigan.

Pizzo filed a petition for Chapter 13 relief on April 9, 2020. Her Schedule E/F filed with the petition lists Siegan's claim as "disputed" with the description "collection on gift of $44,000.00." Her Statement of Financial Affairs discloses the pending lawsuit. In addition to Siegan's claim and Pizzo's substantial student loan debt, which was scheduled at $229,516.00, she scheduled $67,418.55 in general unsecured debts, comprised almost entirely of credit card debt.

Pizzo's initial Schedule J included expenses for a "fiancé" and "stepdaughter" (age 9), who she represented were her dependents who lived with her. Pizzo's Schedule J calculated $936.17 in net monthly income. Included in her expenses were $300.00 for childcare and children's education costs and $184.00 for child support, but no line item for any direct payment of a student loan. Approximately one month after this document was filed, Pizzo married her fiancé. The stepdaughter is from that spouse's prior marriage. Her spouse is a homemaker who has not worked outside the home for at least 15 years.

Pizzo claimed a household size of three on her Official Form 122C-1 (Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period). Because her annual income of $92,936.52 was above the median family income for a household size of three in South Carolina ($66,595.00), Pizzo was required to complete Official Form 122C-2

(Chapter 13 Calculation of Disposable Income). Using the Internal Revenue Service's standard deductions for a household of three, Pizzo completed Official Form 122C-2 and calculated $6,738.92 in total monthly deductions under 11 U.S.C. § 707(b)(2)(A). Pizzo's deductions included her spouse's $184.00 child support payments, $200.00 for childcare, and $100.00 for education expenses for dependent children. As a result, her monthly disposable income under § 1325(b)(2) was calculated to be $267.18.

Pizzo's initial plan, filed with her petition, proposed monthly payments of $900.00 for 60 months with less than 100% distribution to general unsecured claims. Of that amount, $457.00 or more would be disbursed by the Trustee to Capital One Auto Finance for its claim secured by Pizzo's vehicle. Further, attorney's fees of $4,000.00[4] and the priority claims under § 507(a)(8) would be paid before any distribution to general unsecured creditors. The initial plan did not separately classify student loan debt. Creditors have filed claims as follows:

- Siegan - $44,000.00
- Consumers Credit Union - $13,300.20
- Discover Bank - $14,571.89
- Nargiz Nesimova - $4,091.55
- South Carolina Department of Revenue - $171.00 ($166.00 asserted as priority under § 507(a)(8))
- Internal Revenue Service - $4,522.45 ($4,495.65 asserted as priority under § 507(a)(8))
- Capital One Bank, N.A. - $5,452.75
- American Express National Bank - $11,815.16
- JPMorgan Chase Bank, N.A. - $15,201.42
- Verizon - $277.81
- Jefferson Capital Systems LLC - $444.81
- Capital One Auto Finance - $23,969.27 (secured)

[4] In addition to any supplemental amounts awarded. *See* ECF No. 17, filed Jun. 15, 2020 (requesting supplemental attorney's fees of $300.00 to be paid through the plan).

Based on these claims, Siegan's claim is 40% of the class of unsecured creditors.

Pizzo objected to Siegan's claim on June 15, 2020, asserting it was a gift instead of a loan, and specifically alleging:

> [Pizzo] was not aware that the gift was anything other than a gift to her which was to benefit [Siegan] and her son by providing a home in the area close to [Siegan]. It was later when [Siegan's] son and [Siegan] decided that the gift was a loan and not a gift that [Siegan] requested a note be signed for the gift. [Pizzo] was never told that [Siegan] expected the gift to be repaid prior to the purchase of the home.
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> . . . .
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> Three months prior to Ms. Pizzo . . . filing for divorce from [Siegan's] son, [Siegan] notified [Pizzo] the gift was a loan and wanted her money back.[5]

Siegan filed a detailed response on July 2, 2020,[6] which included objections to Pizzo's initial plan. Siegan argued the transaction was a loan and included great detail contradicting the assertions in Pizzo's claim objection, including the couple's intentions for relocating and that the discussions regarding repayment terms occurred several months earlier than represented by Pizzo. Siegan also questioned certain expenses of Pizzo's household and pointed out that court documents from the spouse's divorce ordered that Pizzo be restrained from any contact whatsoever with the stepchild she claims as a dependent and member of her household. Thereafter, Pizzo withdrew her objection to Siegan's claim on September 8, 2020.

Pizzo altered her strategy by filing an amended plan and schedules on December 3, 2020. She proposes payments of $900.00 for 7 months and $850.00 for 53 months, with less than 100% distribution to general unsecured creditors, and again Siegan objected. The student loan creditor did not file a proof of claim in this case and at that point the claims bar date had passed. Although Pizzo's original plan did not separately classify this debt, the amended plan proposes the student loan debt be paid outside the plan rather than within the general pool of unsecured claims and

[5] ECF No. 16.
[6] ECF No. 18.

Pizzo maintain her direct payments to that creditor of $557.72 per month, which is more than $33,000.00 over the life of the plan. The general unsecured creditors, including Siegan, will receive a pro rata distribution of less than $9,582.00, which is less than $160.00 per month if divided equally.

Pizzo's amended Schedule J filed in support of confirmation still includes her spouse and the stepchild as dependents, but clarified the latter does not live with her. She removed certain expenses associated with the stepchild for childcare, education, and medical expenses, and made other adjustments resulting in net monthly income on her amended Schedule J of $1,411.15. However, she then added an expense of $557.72 for the student loan payment, reducing her net monthly income to $853.43. Pizzo's amended Forms 122C-1 and 122C-2 still claim a household size of three but made certain changes, including removing the childcare expense and reducing the education expense for dependent children that were incorrectly included previously. The changes resulted in $211.82 as her monthly disposable income under § 1325(b)(2).

Pizzo, age 36, has retirement savings, contributes generously to her health savings account and her employer's retirement savings plan, and is repaying a loan from that retirement plan. Cumulatively, these deductions result in a lower disposable income calculation on relevant forms. The evidence indicated that some of these deductions are beyond amounts reasonably necessary.

At the hearing, Pizzo and Siegan testified. Pizzo offered explanations as to expenses and visitation arrangements for the stepchild. Pizzo is prohibited from being in the stepchild's presence; however, her spouse has visits on two afternoons each week and every other weekend that typically last a couple hours and are not overnight. She also testified as to the benefits of separately classifying the student loan debt. Pizzo's testimony and position that the $44,000.00

was a gift from Siegan were opportunistic and not credible, while Siegan's testimony that it was a loan was credible and supported by other evidence.

Although the Trustee did not file a written objection, she participated in the hearing in opposition to confirmation of the plan.

APPLICABLE LAW

This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (L) and this Court may enter a final order.

I. PROJECTED DISPOSABLE INCOME

If a trustee or an unsecured creditor objects to the debtor's proposed Chapter 13 plan, § 1325(b)(1)(B) requires the debtor to devote all of her "projected disposable income" to pay unsecured creditors during the applicable commitment period. 11 U.S.C. § 1325(b)(1). "Projected disposable income" is calculated based on "disposable income" using a "forward-looking approach" where "courts may take into account known or virtually certain changes to debtors' income or expenses when projecting disposable income." *Hamilton v. Lanning*, 560 U.S. 505, 517, 130 S. Ct. 2464, 2474, 177 L. Ed. 2d 23 (2010). In the Chapter 13 context, "disposable income" "means current monthly income received by the debtor . . . less amounts reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependent of the debtor . . ." 11 U.S.C. § 1325(b)(2). For debtors with an above-median current monthly income, the "amounts reasonably necessary to be expended" under § 1325(b)(2) are determined in accordance with the "means test" set forth in § 707(b)(2) utilizing the standardized expenditure figures in lieu of the debtor's actual monthly living expenses. *See* 11 U.S.C. § 707(b)(2)(A)(ii)(I). Above-median debtors may also deduct their:

> actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides, as in effect on the date of the order for relief, for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent. Such expenses shall include ***reasonably necessary*** health insurance, disability insurance, and health savings account expenses for the debtor, the spouse of the debtor, or the dependents of the debtor.

11 U.S.C. § 707(b)(2)(A)(ii)(I) (emphasis added). The Court may also take into consideration additional expenses or a reduction in current monthly income if the debtor demonstrates special circumstances. 11 U.S.C. § 707(b)(2)(B).

II. HOUSEHOLD SIZE

The Fourth Circuit addressed household size in detail in *Johnson v. Zimmer*, 686 F.3d 224 (4th Cir. 2012), and concluded the "economic unit" approach, which recognizes the modern reality that support and maintenance of many households consists of more than a nuclear family or dependents claimed on federal income tax returns, "is consistent with § 1325(b), the BAPCPA, and the Code as a whole." *Id.* at 237. The appropriate determination for household size is whether a person's "income or expenses are inter-mingled or interdependent with [the] debtor's and whether the individuals 'are acting as a single economic unit.'" *Id.* at 237-38 (quoting *In re Morrison*, 443 B.R. 378, 386 (Bankr. M.D.N.C. 2011)).

III. SEPARATE CLASSIFICATION

Section 1322(b)(1) allows a plan to "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." Any separate classification of claims under § 1322(b) is "discrimination." *In re Kindle*, 580 B.R. 443, 446 (Bankr. D.S.C. 2017). The following factors are examined to determine if the discrimination is "unfair":

(1) whether there is a reasonable basis for the classification;

(2) whether the classification is necessary to the debtor's rehabilitation under Chapter 13;

(3) whether the discriminatory classification is proposed in good faith;

(4) whether there is a meaningful payment to the class discriminated against; and

(5) the difference between what the creditors discriminated against will receive as the plan is proposed, and the amount they would receive if there was no separate classification.

Kindle, 580 B.R. at 450 (citing *In re Belton*, C/A No. 16-03040-JW, 2016 WL 7011570, at *6 (Bankr. D.S.C. Oct. 13, 2016) (reducing the five-factor test to three factors because the difference in a payment percentage has been unduly emphasized)). "Although courts employ a variety of different tests and approaches in considering what constitutes unfair discrimination, nearly all tests involve considering the totality of the circumstances in each case . . . for determining whether a classification unfairly discriminates against other creditors." *Id.* at 451.

IV. GOOD FAITH

A Chapter 13 plan may be confirmed only if the Court finds the petition was filed, and the plan was proposed, in good faith. 11 U.S.C. § 1325(a)(3), (7). In determining whether a plan has been proposed in good faith, courts in the Fourth Circuit examine the totality of the circumstances. *Deans v. O'Donnell (In re Deans)*, 692 F.2d 968, 972 (4th Cir. 1982).

> The relevant factors include the percentage of proposed repayment, the debtor's financial situation, the period of time payment will be made, the employment history and prospects of a debtor, the nature and amount of unsecured claims, a debtor's past bankruptcy filings, the debtor's honesty in representing facts, any unusual or exceptional problems, the debtor's pre-filing conduct and the possibility of non-dischargeability in a chapter 7 proceeding . . . The object is to determine whether there has been "an abuse of the provisions, purpose, or spirit" of Chapter 13 in the proposal or plan.

In re Anstett, 383 B.R. 380, 385 (Bankr. D.S.C. 2008) (quoting *Deans*, 692 F.2d at 972). "These factors are not exhaustive and are not intended to be a 'check-list,' as a 'court's discretion in making the good faith determination is necessarily a broad one' and should be based on an

examination of the totality of the circumstances on a case by case basis." *In re Martellini*, 482 B.R. 537, 542 (Bankr. D.S.C. 2012) (quoting *Deans*, 692 F.2d at 972).

V. BURDEN OF PROOF

There is a shifting burden of proof for an objection to confirmation under § 1325(b). The initial burden falls on the objecting party to articulate a *prima facie* objection. Objecting parties are "initially required to produce satisfactory evidence that Debtor is not devoting his 'projected disposable income' to his Plan." *Id.* at 541 (quoting *In re Barnes*, 378 B.R. 774, 777 (Bankr. D.S.C. 2007)). Once this burden is met, however, the ultimate burden is on the debtor to prove by a preponderance of the evidence that the plan complies with the confirmation requirements, including the good faith requirement. *Id.* at 541-42 (quoting *In re Bridges*, 326 B.R. 345, 349 (Bankr. D.S.C. 2005)).

CONCLUSIONS

From the totality of the evidence and considering the burden of proof, the Court concludes Pizzo's amended plan should not be confirmed. Siegan articulated a *prima facie* objection pointing to Pizzo's inflated deductions and expenses to reduce her disposable income, inaccurate representation of her household size, and proposal of a plan that projects Pizzo can afford to pay $557.00 per month directly to the student loan debt while giving little to other unsecured creditors that filed timely claims. Pizzo did not meet her burden of proof thereafter.

Although the Fourth Circuit has adopted the flexible economic unit approach to determine household size, there is no indication it should be stretched so far as to include a minor child: with limited daytime visitation with only the debtor's spouse; whom the debtor is not legally obliged to support; and with whom the debtor is not allowed to interact. Pizzo's attempt to expand her household size and her lack of candor to the Court do not support a finding of good faith.

Although Pizzo offered legitimate reasons to separately classify her substantial student loan debt, she must show the separate classification is in good faith and does not discriminate unfairly. Comparing Pizzo's treatment of other creditors' claims, particularly Siegan's, to that of the student loan creditor that did not file a claim, the Court cannot find good faith and a lack of unfair discrimination on this record. Most concerning are Pizzo's misrepresentations regarding Siegan's debt. The evidence shows Pizzo knows she owes a debt to Siegan yet continually misrepresented this fact to the Court in her schedules, pleadings, and at the hearing under oath. This fact, together with the minimal payment to that creditor under the plan compared to the student loan debt, indicate a lack of good faith. While the Court is hopeful Siegan, Pizzo, and the Trustee may reach some resolution that will allow Pizzo to reorganize adequately, Pizzo has not met her burden for confirmation of the plan currently proposed.

IT IS, THEREFORE, ORDERED that for the reasons set forth above, confirmation of the Chapter 13 plan filed on December 3, 2020, is denied. Pizzo shall file an amended plan in accordance with SC LBR 3015-2 within fourteen **(14) days** from the issuance of this Order.

FILED BY THE COURT
03/08/2021

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

Chief US Bankruptcy Judge
District of South Carolina

Entered: 03/08/2021