IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

IN RE: PATRICK N. & DENA A. BOSCACCY	**CASE NO: 10-11764**
WHITNEY GEORGE	**CASE NO: 10-11795**
DEBTORS	**CHAPTER 13**

MEMORANDUM BRIEF IN SUPPORT OF
DEBTORS' RESPONSE TO TRUSTEE'S OBJECTION TO CONFIRMATION

COME NOW the Debtors named above, by and through their attorney of record in this case, William L. Fava, and submit this Memorandum Brief in Support of Debtors' Response to the Chapter 13 Trustee's Objection to Confirmation.

A. TREATMENT OF STUDENT LOANS AS LONG TERM DEBT IS EXPRESSLY ALLOWED BY THE CODE.

11 U.S.C. § 1322(b)(5) clearly allows for a plan to provide for the maintenance of payments for a long-term debt. Trustee's argument that student loan debts should not be treated as long term debts and maintained pursuant to 1322(b)(5) is based almost solely on *In re Harding*, 423 B.R. 568 (Bankr.S.D. Fla. 2010).

The Court in *Harding* states that 1322(b)(5) "was inserted to preempt a foreseeable argument by banks that (b)(2) prevents curing mortgage defaults on a debtor's principal residence." *Harding* at 572. One problem with this analysis is the fact that 1322(b)(5) states that a plan may, "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." (emphasis added). To view (b)(5) as only applying to mortgage defaults would completely read out the words "unsecured claim" because it is impossible to have a "mortgage default on a debtor's principal residence" that is an unsecured claim.

Further, had Congress meant for (b)(5) to only apply to mortgage defaults on a debtor's principal residence they would have specified just as they did in 1322(b)(2). The fact that they did not specifically state that (b)(5) only applies to such debts proves this was not Congress' intent and that (b)(5) should not be read as narrowly as it is in *Harding.*

Lastly, many other courts have allowed long-term student loan debt to be treated as is proposed by the debtors because it is expressly allowed by the Code. See *In re Sullivan*, 195 B.R. 649 (Bankr. W.D. Tex., 1996); *In re Cox*, 186 B.R. 744 (Bankr. N.D. Fla., 1995); *In re Truss*, 404 B.R. 329 (Bankr. E.D. Wis., 2009); *In re Saulter*, 133 B.R. 148 (Bankr. W.D. Mo., 1991); *In re Benner*, 156 B.R. 631 (Bankr.Minn., 1993).

B. THE PROPOSED TREATMENT OF THE LONG TERM STUDENT LOAN DEBT IS NOT UNFAIR DISCRIMINATION.

As explained above the proposed treatment of the long-term student loan debt in debtors' plans is expressly allowed and should not be considered unfair discrimination. However, should it be determined that 1322(b)(5) only applies to mortgage defaults on debtor's principal residence, debtors argue that the special protections given student loans allow these debts to be treated differently than other general unsecured debts.

Congress clearly indicated that student loans should be treated differently than other general unsecured debts by making them nondischargeable. One of the primary purposes of the Bankruptcy Code is to provide a fresh start to the debtors. If they are not allowed to maintain their student loan debts through a Chapter 13 case this will significantly frustrate any potential fresh start. A debtor could potentially come out of a Chapter 13 case facing more debt than they did when they filed due to the continuing accrual of interest on their student loans. Several other courts have determined that separate treatment of student loans and other general unsecured debts is not unfair discrimination. See *In re Orawsky*, 387 B.R. 128 (Bankr. E.D. Penn., 2008); *In re Willis*, 189 B.R. 203, 205 (Bankr.N.D.Okla. 1995); *In re Tucker*, 159 B.R. 325 (Bankr. Mont., 1993); *Matter of Foreman*, 136 B.R. 532 (Bankr. S.D. Iowa, 1992); *In re Boggan*, 125 B.R. 533 (Bankr. N.D. Ill., 1991); *In re Freshley*, 69 B.R. 96 (Bankr. N.D. Ga., 1987); *In re Gregg*, 179 B.R. 828 (Bankr. E.D. Tex., 1995).

Many of the above courts look to what the general unsecured creditors would have received in a hypothetical Chapter 7 liquidation. In the two current cases the debtors have no non-exempt assets and the general unsecured creditors would have received no distribution had debtors filed for relief under Chapter 7.

Finally, our present cases are distinguishable from some of the cases cited by the Trustee to support her argument that the debtors' treatment of their student loans unfairly discriminates against other unsecured creditors. In many of the cases cited by the Trustee the debtors proposed to pay their student loan debts in full over the life of the plan. The Boscassys and Mrs. George are simply maintaining their ongoing student loan payments outside the Chapter 13 plan, a practice specifically allowed by 1322(b)(5).

As set out above, the proposed treatment of debtors' long-term student loan debt should not be considered unfair discrimination and the proposed plan in both cases should be confirmed.

WHEREFORE, the debtors pray that the Court overrule the Objection to Confirmation and for such other and further relief as the Court may deem just and proper under the circumstances.

This the 9th day of August 2010.

Respectfully submitted,

__/s/William L. Fava_____
WILLIAM L. FAVA (MSB# 101348)
Attorney for Debtors

MITCHELL, CUNNINGHAM & FAVA, INC.
7165 Swinnea Rd., Bldg. A Ste. 1
P.O. Box 783
Southaven, MS 38671
(662) 536-1116

CERTIFICATE OF SERVICE

I, William L. Fava, hereby certifies to the Court that to the extent any party was not served by the CM/ECF System, I have this day served a copy of the foregoing Brief on all parties in interest by placing the same in an envelope, first-class mail, postage prepaid, and addressed to each person at the place where he or she regularly conducts his business or profession as follows:

Locke D. Barkley
Via ECF at sbeasley@barkley13.com

U.S. Trustee
Via ECF at USTPRegion05.AB.ECF@usdoj.gov

DATED: August 9, 2010

/s/William L. Fava
WILLIAM L. FAVA
Attorney at Law

MITCHELL, CUNNINGHAM & FAVA, INC.
7165 Swinnea Rd., Bldg. A Ste. 1
P.O. Box 783
Southaven, MS 38671
(662) 536-1116
MS Bar No. 101348