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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA (RIVERSIDE)

Laura Michelle Devereaux Debtors,	Case No. 6:12-bk-26811-SY Chapter 7 Honorable Scott H. Yun
Laura Michelle Devereaux Plaintiffs, vs. National Collegiate Student Loan Trust 2005-2, Defendant.	Adversary No. 6:15-ap-01251-SY **DEFENDANT'S MOTION TO DISMISS PURSUANT TO F.R.C.P. RULE (12)(b)(6)** **Hearing** **Date:** October 29, 2015 **Time:** 10:00 a.m. **Location: 3420 Twelfth St., Courtroom 302 Riverside, CA 92501**

Defendant National Collegiate Student Loan Trust 2005-2 hereby submits the following Motion to Dismiss pursuant to Federal Rule of Civil Procedure Rule 12(b)(6), made applicable through Federal Rule of Bankruptcy Procedure Rule 7012. Specifically, Plaintiff's claim fails to meet the "plausibility" pleading standard set forth in Ashcroft v. Iqbal, 556 U.S. 662 (2009) and Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007). In addition, Plaintiff fails to address that her student loan is not dischargeable based upon 11 U.S.C. Section 523(a)(8)(A)(i) and (ii).

INTRODUCTION

Plaintiff, Laura Michelle Devereaux (hereinafter "Plaintiff"), filed her Chapter 7 bankruptcy petition in this Court on July 17, 2012, case number 12-26811. This Court then entered an order discharging the Plaintiff on October 29, 2012.

On August 26, 2015, Plaintiff filed her Adversary Complaint seeking to discharge Defendant, National Collegiate Student Loan Trust 2005-2 (hereinafter "NCT") to her bankruptcy case, claiming that NCT's "loan was a private student loan that was not a qualified educational loan and was not funded by a non-profit institution" and that the "loan proceeds were used to pay expenses outside the scope of a qualified educational loan … as the funds were not used to pay educational expenses to an eligible institution within the meaning of 26 U.S.C. § 221(d)(1) and (2). See paragraph 10 of Plaintiff's complaint. Plaintiff only attempts to address 11 U.S.C. § 523(a)(8)(B). Defendant asserts its loan can be non-dischargeable under 11 U.S.C. § 523(a)(8)(A)(ii). Even if Plaintiff is successful in arguing that 11 U.S.C. § 523(a)(8)(B) is applicable, the loan is still non-dischargeable under 11 U.S.C. § 523(a)(8)(A)(ii).

ARGUMENT

I. Standard of Review

The purpose of a Rule 12(b)(6) motion is to test the formal sufficiency of the claims made in a complaint. To properly state a claim, a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Bell Atlantic v. Twombly, 550 U.S. 544, 570 (2007). A complaint will be dismissed under Rule 12(b)(6) if the claim is not

supported by law, the facts alleged are insufficient to state a claim or the face of the complaint presents an insurmountable bar to relief. Id. at 561-64. Furthermore, courts analyze the allegations of a complaint using the plausibility pleading standard, under which the factual allegations in the complaint must state a plausible claim for relief in order to survive a motion to dismiss. Ashcroft v. Iqbal, 556 U.S. 662 (2009); Twombly, 550 U.S. 544.

In this case, the allegations in Plaintiff's Complaint fall short of the plausibility standard. Accordingly, Plaintiff's Complaint should be dismissed.

II. Plaintiff's Complaint fails to satisfy the Iqbal/Twombly plausibility pleading standard.

Plaintiff's Complaint should be dismissed because it fails to satisfy the heightened "plausibility" pleading standard enunciated by the U.S. Supreme Court in Ashcroft v. Iqbal, 556 U.S. 662 (2009) and Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

In Twombly, the Supreme Court first heightened the pleading standard in antitrust cases, requiring that a complaint set forth facts "plausibly suggesting" and not merely "consistent with" a plaintiff's claim. Twombly, 556 U.S. at 557. Twombly thus overruled the old pleading standard of Conley v. Gibson, 355 U.S. 41, 45-46 (1957) which stated that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

In Iqbal, the Supreme Court further clarified the scope of the Court's decision in Twombly, extending the plausibility standard to all civil actions and not just antitrust cases. Iqbal, 556 U.S. at 684. The Court announced the plausibility standard as follows:

> [T]he pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. **A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Nor**

> **does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement."**
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> ***
>
> Two working principles underlie our decision in Twombly. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a factual allegation." Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. **But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but it has not "show[n]"—"that the pleader is entitled to relief."**

Id. at 678-79 (emphasis added).

Applying the standard espoused by the Supreme Court in Iqbal, Plaintiff's Adversary Complaint must be dismissed because Plaintiff has not stated a plausible claim for relief. Plaintiff merely alleges that NCT's loan should be discharged because the "loan was a private student loan that was not a qualified educational loan and was not funded by a non-profit

institution" and that the "loan proceeds were used to pay expenses outside the scope of a qualified educational loan ... as the funds were not used to pay educational expenses to an eligible institution within the meaning of 26 U.S.C. § 221(d)(1) and (2). See paragraph 10 of Plaintiff's complaint. Plaintiff's Complaint thus offers merely a legal conclusion devoid of any factual enhancement. It is this sort of pleading, which states only "labels and conclusions," that the Court in Twombly stated "will not do." Plaintiff has thus "alleged," but not "shown," that she is entitled to relief. Because Plaintiff's Complaint fails to meet the plausibility standard, this Court should dismiss Plaintiff's Complaint.

III. Plaintiff's Complaint fails to satisfy address 11 U.S.C. § 523(a)(8)(A).

Section 523(a)(8) provides that a discharge under §§ 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt ...

> (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for –
>
> (A)(i) an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit or made under any program funded in whole or in part by a governmental unit or nonprofit institution; **or**
>
> (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; **or**
>
> (B) any other educational loan that is a qualified educational loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual...

See 11 U.S.C. § 523(a)(8) (emphasis added). Courts have recognized that "[s]ection 523(a)(8) protects four categories of educational loans from discharge: (1) loans made, insured or guaranteed by a governmental unit; (2) loans made under any program partially or fully

funded by a government unit or nonprofit institution; (3) loans received as an education benefit, scholarship, or stipend; and (4) any 'qualified educational loan' as that term is defined in the Internal Revenue Code." *See Liberty Bay Credit Union,* 2012 WL 4620987 at *13-14 citing *Rumer v. Am. Educ. Servs. (In re Rumer),* 469 B.R. 553, 561 (Bankr. M.D. Pa. 2012). In this case, Plaintiff only addressed 11 U.S.C. § 523(a)(8)(B). The Court must determine whether Plaintiffs' student loans were made under a program funded by a nonprofit institution for purposes of § 523(a)(8)(A)(i), or whether the debtor incurred an obligation to repay funds received as an educational benefit for purposes of § 523(a)(8)(A)(ii). If said loans do not fall into one of the aforesaid categories under § 523(a)(8)(A), then this Court must determine whether Plaintiffs' student loans are qualified education loans for the purposes of § 523(a)(8)(B).

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") separated § 523(a)(8) into two independent clauses, i.e., (A)(i) and (A)(ii) and added subsection (B). BAPCPA's separation between the phrase "obligation to repay funds received as an educational benefit" from the phrases "loan made, insured or guaranteed by a governmental unit" and "program funded in whole or in part by a nonprofit institution" in § 523(a)(8)(A)(i), must be read as encompassing a broader range of educational benefit obligations, such as those in the instant case. *See In re Belforte*, 2012 WL 4620987 at *19 *citing Sensient Techs. Corp. v. Baiocchi (In re Baiocchi)*, 389 B.R. 828, 831-32 (Bankr. E.D. Wis. 2008). The relevant inquiry into the applicability of §523(a)(8)(ii) is the purpose of the loan, not the beneficiary of the education. *In re Belforte*, 2012 WL 4620987 *24 *citing In re Pelkowski*, 900 F.2d 737, 747 (3d Cir. 1993)(*quoting The Educ. Resources Inst., Inc. v. Varma (In re Varma)*, 149 B.R. 817, 818 (Bankr. N.D.Tex. 1992)). An additional purpose does not remove

a loan from the educational benefit category so long as there is an educational purpose. *Id. at *25 citing Baiocchi*, 389 B.R. at 831-32.

Sections 523(a)(8)(A)(i) and (ii) both apply to "educational benefit" loans, a term that is not defined in the Bankruptcy Code, so courts have turned to legislative history of § 523(a)(8) for guidance. "Educational loans are different from most loans. They are made without business considerations, without security...and relying for repayment solely on the debtor's future increased income resulting from the education." *See In re Belforte*, 2012 WL 4620987 at *17; *see also Tift County Hosp. Auth. V. Nies (In re Nies)*, 334 B.R. 495 (Bankr. D. Mass. 2005) *citing* H.R. Rep. No. 595, 95th Cong., 2d Sess. 133, reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 6094. Although the breadth of the term "educational benefit" has been the subject of some debate, a majority of courts determine whether a loan qualifies as an "educational benefit" by focusing on the stated purpose for the loan when it was obtained, rather than on how the loan proceeds were actually used. *See Busson-Sokolik v. Milwaukee School of Eng'g (In re Sokolik)*, 635 F.3d 261, 266 (7th Cir. 2011) ("[W]e hold that it is the purpose of a loan which determines whether it is 'educational.'"), *cert. denied*, 131 S. Ct. 3039, 180 L. Ed. 2d 848 (2011); *Murphy v. Penn. Higher Educ. Assistance Agency (In re Murphy)*, 282 F.3d 868, 870 (5th Cir. 2002) (citing cases and concluding that "it is the purpose, not the use, of the loan that controls" the dischargeability determination under § 523(a)(8)); *Tift County Hospital Authority v. Nies (In re Nies)*, 334 B.R. 495, 501 (Bankr. D. Mass. 2005) (explaining that a "majority of courts has adopted a test that determines the educational nature of the loan by focusing on the substance of the transaction which resulted in the obligation" but holding that a loan made under a physician recruitment program was not for educational purposes) (citations omitted); *contra In re Ealy,* 78 B.R. 897, 898 (Bankr. C.D. Ill. 1987)

(holding, under a prior version of § 523(a)(8), that the "test for determining whether a loan is a student loan is whether the proceeds of the loan were used for 'educational purposes'"). Focusing the analysis on the purpose of the loan, rather than the use of the proceeds, also avoids potential inequities that could result from application of a "use" test. *See In re Sokolik*, 635 F.3d at 266.

Various bankruptcy courts have found loans processed for something other than a qualified education loan are dischargeable if they provided the debtor with an educational benefit. For example, a loan for a plumbing apprenticeship is nondischargeable under §523(a)(8)(A)(ii) because it provided an educational benefit. *In re Rosen*, 179 B.R. 935, 939 (Bankr. D. Or. 1995). In *In re Rosen*, the Bankruptcy Court for the District of Oregon explained that §523(a)(8) "is not limited to obligations pertaining to education received at institutions of higher or post-secondary education." *Id.* at 938. The court reasoned that "the apprenticeship training program at issue in this case is an educational program." *Id.* It substantiated its position by explaining that the program "offered apprentices the opportunity to expand their knowledge of matters pertaining to the plumbing profession, enhance their professional capabilities, obtain the qualifications and experience necessary for a professional license, and obtain college credits." *Id.*

Similarly, a loan for a sheet metal worker's apprenticeship is nondischargeable under §523(a)(8)(A)(ii) because it provided an educational benefit. *In re Dressel*, 212 B.R. 611, 615 (Bankr. E.D. Mo. 1997). In *In re Dressel*, the Bankruptcy Court for the Eastern District of Missouri agreed with the reasoning of the Bankruptcy Court for the District of Oregon in *In re Rosen* in that a loan for an apprenticeship is a nondischargeable education loan under §523(a)(8(A)(ii) because it provides an educational benefit. *Id.* The court explained that,

"through his participation in the Apprenticeship Program, Dressel learned the skills necessary to a sheet metal worker." *Id.*

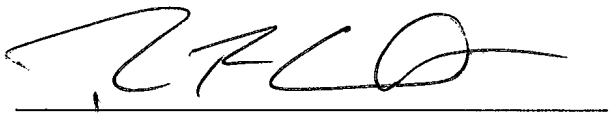
Likewise, a loan for private tutoring is nondischargeable under §523(a)(8)(A)(ii) because it provided an educational benefit. *In re Roy*, 2010 Bankr. LEXIS 1218 (Bankr. D.N.J. Apr. 8, 2010). In *In re Roy*, the Bankruptcy Court for the District of New Jersey stated that, for a loan to be considered a nondischargeable education loan under §523(a)(8)(A)(ii), "it is enough that the debt at issue be an obligation to repay funds received as an educational benefit." *Id.* at 2. It is irrelevant whether the educational institution is "government supported, a school, or a for-profit institution." *Id.* The court explained there is "no requirement under §523(a)(8)(A)(ii) that the student have been enrolled full time or be seeking a degree." *Id.* at 2-3.

Analogously, a loan for a private day school is nondischargeable under §523(a)(8)(A)(ii) because it provided an educational benefit. *In re Goldstein,* 2012 Bankr. LEXIS 6034 (Bankr. N.D. Ga. Nov. 26, 2012). In *In re Goldstein,* the Bankruptcy Court for the Northern District of Georgia agreed with the reasoning from the Bankruptcy Court for the District of New Jersey *In re Roy* in that "it is enough that the debt at issue be an obligation to repay funds received as an educational benefit." *Id.* at 10 (quoting *In re Roy*, 2010 Bankr. LEXIS 1218 (Bankr. D.N.J. Apr. 8, 2010)). The court explained that §523(a)(8)(A) "exempts from discharge all educational loans, not just loans for higher education." *Id.* at 8.

In the case at bar, Plaintiff only alleges that the "loan was a private student loan that was not a qualified educational loan and was not funded by a non-profit institution." See paragraph 10 of Plaintiff's complaint. No other facts are provided regarding the "student loan" other than Plaintiff borrowed funds under a "Private Education Undergraduate Loan

program" which infers that the loan was used for educational purposes. See paragraph 3 of Plaintiff's complaint.

Dated: September 28, 2015



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