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2 UNITED STATES BANKRUPTCY COURT
3 EASTERN DISTRICT OF CALIFORNIA
4 FRESNO DIVISION

5 In re) Case No. 96-13738-A-7
6 Gary D. Hatcher,)
7 Jacqueline J. Hatcher,)
8 Debtors.)
9 _____)
10 Gary D. Hatcher,) Adversary Proc. No. 03-1565-B
11 Plaintiff,)
12 v.)
13 The United States of America,)
14 Department of Health and Human)
15 Services,)
16 Defendant.)
17 _____)

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MEMORANDUM DECISION

David R. Jenkins, Esq., appeared on behalf of the debtor/plaintiff, Gary D. Hatcher.

Ana Maria Martel, Esq., Assistant United States Attorney, appeared for the United States of America, Department of Health and Human Services ("USA").

In this adversary proceeding, Gary D. Hatcher, D.O., MPH ("Dr. Hatcher") seeks to discharge his remaining obligation under a judgment in favor of the National Health Service Corps ("NHSC"). The judgment was entered in 1989 by the United States District Court for the Southern District of California (the "1989 Judgment") after Dr. Hatcher failed to perform his service obligation under the NHSC Scholarship Program (42 U.S.C. §§ 254d - 254t). Dr. Hatcher was subsequently permitted to perform service for the NHSC in satisfaction of the 1989 Judgment, but he failed to complete that commitment as well. Dr. Hatcher now wants to satisfy the remaining 1989 Judgment by performing further service for the NHSC in lieu of actually paying the balance due under the 1989 Judgment. The NHSC has so far declined to accept Dr. Hatcher's offer of service. Based thereon, Dr. Hatcher seeks a determination that the 1989 Judgment was

1 discharged in this bankruptcy. Alternatively, Dr. Hatcher seeks an accounting of the
2 amount still due under the 1989 Judgment.

3 The court has jurisdiction over this matter under 28 U.S.C. § 1334, 11 U.S.C. §
4 523, and 42 U.S.C. § 254o(d)(3)(A). This is a core proceeding pursuant to 28 U.S.C. §
5 157(b)(2)(I). This memorandum decision sets forth the court's findings of fact and
6 conclusions of law. For the reasons set forth below, judgment shall be entered in favor of
7 the USA with respect to the discharge issue. The accounting issue will require a further
8 evidentiary hearing.

9 **The NHSC Scholarship Program.**

10 Congress enacted the National Health Service Corps Scholarship Program (the
11 "NHSC Program") in 1976 in response to the maldistribution of health care professionals
12 in the United States. H.R. REP. NO. 94-266(I), 94th Cong. (2d Sess. 1976), *reprinted in*
13 1976 U.S.C.C.A.N. 4947, 4964. Qualified physicians were desperately needed in remote
14 rural areas and the poorest sections of the inner cities and the NHSC Program was
15 designed to alleviate the problem. Under the NHSC Program, medical students and other
16 related professionals receive financial assistance to pay for tuition and living expenses at
17 medical school. In exchange for this financial assistance, recipients agree to serve after
18 medical school in a "health professional shortage area" determined by the Secretary of
19 the Department of Health and Human Services (the "Secretary"). 42 U.S.C. § 254e.
20 Participating students sign a contract in which they agree to serve in a shortage area for a
21 term equal to the number of years they receive scholarship funding. 42 U.S.C. § 254l(f).

22 It is important to note here that the NHSC Program is not a traditional "student
23 loan" program in which the participant has the right, and the obligation, to simply repay
24 with interest the benefits to the funding agency after graduation. Under the NHSC
25 Program, the participant receives financial assistance in exchange for an agreement to
26 provide medical services. The NHSC contracts for the medical services, not for
27 repayment of the money.

28 Under the statute, the NHSC can bring an action for damages in the event of

1 default. 42 U.S.C. § 254o(b)(1)(A). Defaulting participants can be liable for liquidated
2 damages equal to three times the amount of the financial assistance, plus interest
3 compounded annually at 8.85% until paid in full. 42 U.S.C. § 254o(b)(1)(A). The
4 purpose of the treble damages provision is not only to compensate the Government for its
5 losses, but also to convey to applicants the serious nature of their service obligation and
6 to deter students from accepting the benefits of the NHSC Program and then reneging on
7 their service commitment. *See U.S. v. Kephart*, 170 B.R. 787, 791 (W.D.N.Y. 1994).
8 Courts have uniformly upheld this treble damages provision against challenges that the
9 provision is a penalty. *See Buongiorno v. Sullivan*, 912 F.2d 504, 510 n.5 (D.C. Cir.
10 1990) *citing, inter alia, U.S. v. Padavano*, 664 F.Supp. 28, 30 (D.Me. 1987).

11 Congress severely restricted the conditions under which a participant's obligation
12 to the NHSC can be discharged in bankruptcy. Pursuant to 42 U.S.C. § 254o(d)(3)(A), a
13 debt to the NHSC may be discharged in bankruptcy only after the passage of seven years
14 from the time the first payment is due, and "only if the bankruptcy court finds that
15 nondischarge of the obligation would be unconscionable." In this case, the record shows
16 that the seven-year requirement is not an issue.

17 **Facts.**

18 In 1980, Dr. Hatcher entered medical school at the College of Osteopathic
19 Medicine of the Pacific in Pomona, California. He signed a contract with NHSC
20 whereby the NHSC paid for his tuition and living expenses for four years. *U.S. v.*
21 *Hatcher*, 922 F.2d 1402, 1405 (9th Cir. 1991).¹ In exchange for this financial assistance,
22 Dr. Hatcher was required to perform four years of service at a location designated by the
23 Secretary. *Id.* at 1405. The contract advised Dr. Hatcher of the consequences of default.
24 *Id.* at 1405.

25 In 1985, following graduation from medical school and a one-year internship in
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27 ¹ Where indicated, the facts are taken from the opinion of the United States Court
28 of Appeals for the Ninth Circuit affirming the 1989 Judgment which Hatcher now seeks
to discharge.

1 San Diego, Dr. Hatcher applied for a service placement with the NHSC. However, Dr.
2 Hatcher refused to accept the assignment he was given by the NHSC. *Id.* at 1405.
3 Instead, he continued his education and practiced medicine in the private sector in San
4 Diego and Modesto. In 1991, he obtained a Master of Public Health degree from the
5 University of California at Berkeley.

6 In 1987, the United States brought an action against Dr. Hatcher on behalf of the
7 NHSC for breach of contract and damages. Dr. Hatcher tried to excuse his service
8 obligation, arguing, *inter alia*, that the NHSC was arbitrary, capricious, and abused its
9 discretion in selecting his service placement. The District Court granted summary
10 judgment in favor of the United States. *U.S. v. Hatcher*, 716 F. Supp. 447, 450 (S.D. Cal.
11 1989). In June 1989, the 1989 Judgment was entered against Dr. Hatcher in the amount
12 of \$502,580.46 together with interest at the “rate of 8.85 percent per annum, compounded
13 annually until paid in full.” The 1989 Judgment was affirmed on appeal.

14 In 1992, Dr. Hatcher requested permission to perform service for the NHSC in
15 lieu of paying the (now affirmed) 1989 Judgment. The NHSC consented and assigned
16 him to serve with the Federal Bureau of Prisons in El Reno, Oklahoma. By that time, the
17 amount due on the 1989 Judgment was more than \$638,897. Dr. Hatcher served at El
18 Reno for two and one-half years until January 1995, whereupon he was reassigned to
19 serve at the Federal Prisoner Transfer Center in Oklahoma City.

20 Dr. Hatcher's assignment at the Prison Transfer Center did not go well and in
21 March 1995, Dr. Hatcher was removed from his post. The Bureau of Prisons placed him
22 on “home duty” for six months pending administrative review of his case. Dr. Hatcher
23 was paid and given service credit for his home duty. In September 1995, the Bureau of
24 Prisons formally terminated Dr. Hatcher’s employment for cause. By that time, Dr.
25 Hatcher had served 1128 of the 1461 days (approximately 77%) he was required to serve
26 to fully satisfy the 1989 Judgment. The NHSC subsequently gave Dr. Hatcher a pro-
27 tanto credit against the 1989 Judgment based on the time he served, however, the manner
28 in which that credit was calculated and applied is unclear and is not resolved in this

1 ruling.

2 In an effort to return to NHSC service, Dr. Hatcher subsequently submitted an
3 incomplete application to the NHSC requesting an assignment to the Indian Health
4 Service in Lawton, Oklahoma. In February 1996, before he received a response from the
5 NHSC, Dr. Hatcher and his family relocated to Auberry, California. In August of that
6 year, the NHSC responded to Dr. Hatcher indicating that he could complete his service as
7 requested in Lawton conditioned upon the submission of additional information with his
8 application. Dr. Hatcher failed to respond to the NHSC. He contends that he was not fit
9 to move back to Oklahoma due to mental health problems. He made no apparent effort to
10 complete the application or to request a deferral of the Lawton assignment pending
11 treatment and recovery.

12 Instead, Dr. Hatcher filed for bankruptcy protection on June 4, 1996. Three
13 months later, he received a discharge of all dischargeable debts which did not include his
14 remaining obligation to the NHSC under the 1989 Judgment. At about the same time,
15 Dr. Hatcher applied to the NHSC to have the remaining debt waived based on his
16 medical condition. That request was denied. Dr. Hatcher continues to practice
17 occupational medicine in Fresno, California.

18 Dr. Hatcher has been less than diligent with regard to making payments on the
19 1989 Judgment, despite enjoying a relatively high income. For example, he reported an
20 income of \$190,692.00 on his federal tax return for 1997, yet he did not make a single
21 payment that year to the NHSC. Dr. Hatcher's wife made some payments for him and
22 the NHSC has collected some money through garnishment and attachment proceedings.
23 However, the sum of all payments made by or for Dr. Hatcher since he returned to
24 California in 1996 has been less than the interest accrual. The debt continues to grow.

25 Dr. Hatcher failed to complete approximately eleven months (333 of 1,461 days)
26 or 22.8% of his 1992 service assignment. In 2000, Dr. Hatcher again requested an NHSC
27 service assignment to satisfy the 1989 Judgment, but the NHSC informed him that he did
28 not qualify for any of the available positions. On August 12, 2003, Dr. Hatcher reopened

1 his Chapter 7 bankruptcy case and filed this adversary proceeding to determine whether
2 the debt should be deemed discharged.

3 **Issue.**

4 The first amended complaint states two claims for relief. The ultimate issue
5 presented in the first claim for relief is whether the NHSC's refusal to accept additional
6 service from Dr. Hatcher in lieu of money is "unconscionable" within the meaning of 42
7 U.S.C. § 254o(d)(3)(A) such that the remaining 1989 Judgment should be deemed
8 discharged in this bankruptcy case. However, the threshold issue raised in the pleadings
9 is whether the bankruptcy court can order the NHSC to accept 333 days of service from
10 Dr. Hatcher in satisfaction of that debt.

11 In the second claim for relief, Dr. Hatcher has requested an accounting of the
12 amount still due on the 1989 Judgment. The evidence presented on that issue is
13 inconclusive and will require a further evidentiary hearing.

14 **Analysis and Conclusions of Law.**

15 **The Bankruptcy Court Cannot Order the NHSC to Accept Service from a Defaulted**
16 **Participant.**

17 Dr. Hatcher first asks this court to order the NHSC to accept additional service,
18 in lieu of money, in satisfaction of the 1989 Judgment. He contends that he is qualified
19 and ready to serve and that the Secretary has the authority and the discretion to accept his
20 offer of service. Ergo, he concludes that the Secretary's failure to accept his offer of
21 service is an abuse of discretion. The court is not so persuaded. There is no basis upon
22 which this court could order the NHSC to accept service from Dr. Hatcher. Neither is
23 there any basis upon which this court can find any error in the NHSC's decision not to do
24 so.

25 Dr. Hatcher concedes that the decision (to accept his offer of service) is subject to
26 the discretion of the Secretary. However, his argument is based on the premise that the
27 NHSC has some duty or obligation to exercise that discretion in a certain way. The court
28 cannot find that the NHSC abused its discretion unless there is some rule or other

1 standard against which to measure the NHSC's actions. The problem here is that there is
2 no statute, regulation, or judicial precedent which requires the NHSC to give Dr. Hatcher
3 another service assignment. In fact, it is clear that the law provides no right to a
4 defaulted NHSC participant to satisfy his or her debt through service. 42 U.S.C. §
5 254o(b)(1); *U.S. v. Fowler*, 659 F. Supp. 624, 625 (N.D. Cal. 1987), *aff'd*, 849 F.2d 1476
6 (9th Cir. 1988) (holding that a service obligation terminates upon default and converts to
7 a financial obligation). Dr. Hatcher is asking this court to engage in the most blatant
8 form of judicial legislation, to fabricate out of whole cloth some new standard by which
9 the Secretary must conduct the affairs of the Department of Health and Human Services.
10 The relief which Dr. Hatcher seeks cannot be granted.

11 **Nondischarge of the 1989 Judgment is not Unconscionable.**

12 Dr. Hatcher contends that his debt to the NHSC should be discharged if the
13 NHSC will not voluntarily accept (or comply with the court's mandate to accept) his
14 offer to perform additional service. The dischargability issue is defined by 42 U.S.C. §
15 254o(d)(3)(A) (2002), which provides:

16 Any obligation of an individual under the Scholarship Program (or a contract
17 thereunder) . . . for payment of damages may be released by a discharge in
18 bankruptcy under Title 11 only if such discharge is granted after the expiration of
19 the 7-year period beginning on the first date that payment of such damages is
20 required, and *only if the bankruptcy court finds that nondischarge of the*
obligation would be unconscionable. (Emphasis added.)

21 Although Congress did not define the term "unconscionable," the courts have
22 construed the term to mean "shockingly unfair, harsh or unjust" or "outrageous."
23 *Matthews v. Pineo*, 19 F.3d 121, 124 (3d Cir. 1994), *cert. denied*, 513 U.S. 820 (1994). It
24 is well established that the burden of proving unconscionability is on the debtor. *U.S. v.*
Ascue (In re Ascue), 268 B.R. 739, 744 (Bankr. W.D. Va. 2001).

25 Bankruptcy courts dealing with this issue have examined the totality of the
26 circumstances and looked to such objective factors as the debtor's (1) income, (2)
27 earning ability, (3) health, (4) educational background, (5) dependents, (6) age, (7)
28 accumulated wealth, and (8) professional degree. *Ascue*, 268 B.R. at 744-745.

1 Bankruptcy courts essentially equate the term "unconscionable" in § 254o(d)(3)(A) with
2 the term "undue hardship" found in comparable discharge provisions in the Bankruptcy
3 Code (see 11 U.S.C. § 523(a)(8) relating to discharge of student loans). *Id.* at 744.
4 However, some courts have construed the standard for “unconscionable” as more limited
5 than that for undue hardship under § 523(a)(8). *Pineo*, 19 F.3d at 124; *U.S. v. Kephart*,
6 170 B.R. 787, 791-792 (W.D.N.Y. 1994).

7 As the case law makes clear, it is only in the “shockingly unfair, harsh or unjust”
8 circumstances that discharge of a debt to the NHSC is appropriate. For instance, the
9 Third Circuit found that nondischarge of a \$400,000 debt to the NHSC would not be
10 unconscionable for a defaulting NHSC recipient who had a license to practice medicine
11 and was in good health, but whose current income was insufficient to pay off the debt.
12 The Third Circuit held the debtor's current income and current expenses should not be
13 regarded as unalterable and that it would not be necessarily unconscionable to require the
14 debtor to take available steps to earn more income or to reduce expenses. *Pineo*, 19 F.3d
15 at 124.

16 The U.S. District Court for the Western District of New York held it would not be
17 unconscionable to deny discharge of a \$625,000 NHSC debt where “the substantial size
18 of the debt [was] due to [debtor’s] conduct.” *Kephart*, 170 B.R. at 792. The debtor in
19 *Kephart* was a physician and in good health.

20 On the other hand, a bankruptcy court in Virginia held that it would be
21 unconscionable to require a debtor to pay more than \$500,000 to the NHSC where the
22 debtor/physician sustained an on-the-job injury resulting in a cervical disc herniation
23 with radiculopathy, the condition did not improve over time and it severely limited his
24 income earning ability. *Ascue, supra*, 268 B.R. at 745. The court in *Ascue* ordered a
25 partial discharge. *Id.* at 748-49. Again, all of these courts applied an “undue hardship”
26 type of analysis to evaluate the unconscionability issue.

27 What sets this case apart from the others is that Dr. Hatcher is not claiming undue
28 hardship in any form. Dr. Hatcher makes a good income and he is in good health. He

1 acknowledges that he is “ready and able to serve.” Dr. Hatcher is attacking the NHSC
2 from a different angle; he acknowledged on the record at trial, and again in his post-trial
3 brief, that he is asking the court to make new law in its application of the term
4 “unconscionable” in § 254o(d)(3)(A). Dr. Hatcher contends that the unconscionability in
5 this case stems from the NHSC’s refusal to accept his offer of service. He contends that
6 payment of the 1989 Judgment is unconscionable simply because the NHSC has the
7 discretion and ability to give him another service assignment, but won’t do it.

8 Dr. Hatcher points out in his post-trial brief, that the courts in *Pineo* and *Kephart*
9 looked to the NHSC’s willingness to accept service from a defaulted participant as a
10 “significant factor” militating against the discharge.² It does not follow, however, that
11 the NHSC’s refusal to accept service from Dr. Hatcher should militate in favor of a
12 discharge. If the NHSC offers to accept service from a defaulted participant, that is a
13 laudable concession. On the other hand, if the NHSC should choose to decline an offer
14 of service for some reason, it is not necessarily acting improperly or unfairly. As
15 discussed above, that decision is at the Secretary’s discretion and there is no standard
16 applicable here that defines or constrains the exercise of that discretion.

17 Dr. Hatcher’s “unconscionable” argument is undermined by the fact that the
18 NHSC has already provided him with three separate opportunities to serve. In 1986, Dr.
19 Hatcher flat refused to accept the service assignment he was given. Indeed, he
20 challenged the NHSC in court and sought to be excused from all service. That effort
21 resulted in the 1989 Judgment. In that regard, Dr. Hatcher’s present situation initiated as
22 a direct result of his own conduct. In 1992, Dr. Hatcher was offered a service assignment
23 with the Federal Bureau of Prisons in Oklahoma, but his conduct resulted in an early
24 termination of that assignment. In 1996, Dr. Hatcher refused to accept the service
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27 ²The court notes that in both *Matthews v. Pineo* and *Kephart*, the discharge was
28 denied under 42 U.S.C. § 254o(d)(3)(A). *Matthews v. Pineo*, 19 F.3d 121, 124 (3d Cir.
1994); *U.S. v. Kephart*, 170 B.R. 787, 793 (W.D.N.Y. 1994).

1 assignment he had

2 requested in Lawton, Oklahoma - indeed, he failed to even respond to the NHSC after
3 the assignment was provisionally offered. Instead, he tried unsuccessfully to discharge
4 the obligation in bankruptcy. Again, Dr. Hatcher's situation is the direct result of his
5 own conduct.

6 Dr. Hatcher claims that his termination from service in Oklahoma, and his refusal
7 to accept the Lawton assignment in 1996, were attributable to mental health problems.
8 Indeed, he was diagnosed with personality disorders and maladaptive disorders in 1996.
9 In his post-trial brief, Dr. Hatcher likens his medical condition to that of the debtor in
10 *Ascue*. This court rejects this comparison. The partial discharge given in *Ascue* was
11 based on a "hardship" analysis. The issue in *Ascue* dealt with the debtor's inability to
12 repay the total debt, not the performance of service in lieu of the debt. The debtor in
13 *Ascue* suffered from chronic physical problems, and was not improving. These physical
14 problems severely hindered Dr. Ascue's ability to work and earn a living. Even then, the
15 court only partially discharged the debt to bring it in line with the debtor's ability to pay.
16 By contrast, Dr. Hatcher does not rely on "hardship" and does not contend that he cannot
17 repay the debt. He contends that he is now fully recovered and able to work. The
18 evidence shows that he does have the ability to repay the debt over a reasonable number
19 of years. Even a partial discharge of the 1989 Judgment would not be warranted under
20 the *Ascue* rationale.

21 **Accounting.**

22 Finally, Dr. Hatcher requests an accounting of the amount still due under the 1989
23 Judgement after credit for the time he did serve in Oklahoma. At trial, the NHSC
24 provided an accounting which showed that \$305,360.60 was due as of March 30, 2005.
25 Dr. Hatcher did not object to the proposed accounting. The court questioned the NHSC's
26 accounting because it did not give Dr. Hatcher any service credit until August 1, 1998,
27 approximately three years after his service with the Bureau of Prisons was terminated.
28 The proposed accounting included interest on the full obligation during this time even

1 though most of the obligation was satisfied. The court asked the NHSC to submit a
2 revised accounting in which the service credit was given at the time the service was
3 rendered.

4 With its post-trial brief, the NHSC provided a revised accounting showing that
5 \$635,669 is due. In the revised accounting, the NHSC calculated and applied a pro-tanto
6 credit for each year of service. However, the amount of each credit given in the revised
7 accounting after the first year of service does not appear to be properly calculated.
8 Accordingly, the court is not persuaded that the NHSC has given Dr. Hatcher the correct
9 amount of service credit for the time he did serve with the Bureau of Prisons. If the
10 parties cannot agree upon an accounting which accurately reflects Dr. Hatcher's
11 remaining obligation to the NHSC, that issue will require a further evidentiary hearing.

12 **Conclusion.**

13 Based on the foregoing, the court is not persuaded that nondischarge of the
14 NHSC's 1989 Judgment against Dr. Hatcher would be "unconscionable" as that term is
15 used in 42 U.S.C. § 254o(d)(3)(A). Accordingly, judgment shall be entered in favor of
16 the United States of America, Department of Health and Human Services. The USA
17 shall be awarded its costs.

18 Pursuant to Fed.R.Civ.P. 54(b) (made applicable to this adversary proceeding by
19 Fed.R.Bankr.P. 7054), there is no just reason that judgment cannot be entered at this time
20 on the dischargeability issue. Accordingly, the second claim for relief on the accounting
21 issue shall be bifurcated and set for further evidentiary hearing.

22 Dated: June _____, 2005

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25 /s/ W. Richard Lee
26 W. Richard Lee
27 United States Bankruptcy Judge
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