

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Modesto, California

November 21, 2019 at 2:00 p.m.

1. [18-90702-E-7](#)
[19-9011](#)

**MICHAEL EVANS AND
CHRISTINA SMITH**

**EVANS ET AL V. NAVIENT
SOLUTIONS, INC. ET AL**

**CONTINUED STATUS CONFERENCE RE:
COMPLAINT
6-26-19 [1]**

Plaintiff's Atty: Pro Se

Defendant's Atty:

Dennis Winters [Navient Solutions, Inc.]

Unknown [Internal Revenue Service]

Miriam Hiser [Educational Credit Management Corporation]

["ECMC is a guaranty agency under the Federal Family Education Loan program ("FFELP"). Pursuant to that role, it is receiving transfer of a consolidation loan on which debtor Christina Smith is liable. ECMC will file a formal motion to be added as a party defendant if needed when the transfer is complete."]

Adv. Filed: 6/26/19

Answer:

7/22/19 [Navient Solutions, Inc.]

7/25/19 [Educational Credit Management Corporation]

Nature of Action:

Dischargeability - student loan

Dischargeability - other

Notes:

Continued from 9/19/19

[MH-1] Motion of Educational Credit Management Corporation: (1) To Intervene; and (2) To Dismiss for Failure to State a Claim Upon Which Relief May be Granted or in the Alternative for Judgment on the Pleadings filed 11/11/19 [Dckt 28], set for hearing 12/19/19 at 10:30 a.m.

Status Conference Statement filed 11/14/19 [Dckt 33]

NOVEMBER 21, 2019 STATUS CONFERENCE

For this Adversary Proceeding, it appears that the real party defendants that Plaintiff-Debtor is seeking relief against are the Department of Treasury, Internal Revenue Service ECMC.

Plaintiff-Debtor Status Report

Plaintiff-Debtor has filed an Updated Status Conference Statement (Dckt. 35). The information in the Statement includes, as summarized by the court:

- A. Service has not been completed on the Internal Revenue Service.
- B. Plaintiff-Debtor is evaluating claims that may be asserted against the Internal Revenue Service and requests a sixty day continuance for Plaintiff-Debtor to complete research of possible claims and either amend the Complaint or dismiss the Internal Revenue Service.
- C. A Stipulation has been signed and filed to dismiss Navient from this Adversary Proceeding.
- D. ECMC has filed a motion to both intervene in this Adversary Proceeding and to dismiss the Complaint.

The Plaintiff-Debtor also includes a discussion that “administrative discovery requests” were served on ECMC (notwithstanding there being this federal court action). These included:

- Request for Affidavit Certifying Affirmation of Statutory Obligation under the Fair Debt Collection Practices Act
- Request for SEC Registration & Securitization Inquiry under the Truth in Lending Act
- Freedom of Information Act Request

Plaintiff-Debtor asserts that since ECMC did not comply with the “administrative discovery process,” such is a “tacit admission” in this federal court action that ECMC has no claim against Plaintiff-Debtor to be adjudicated in this Adversary Proceeding.

Plaintiff-Debtor states that a “notice of affirmation of cancellation of contract for failure to produce validation of debt claim upon request by Plaintiff-Smith, which was served on September 27, 2019” had been sent to ECMC.

The Status Report does not identify how such demands and notices are adjudication of the asserted rights and defenses. Attached to the Status Report (pages 6-7) is a document which title includes it being identified as “Request for Affidavit Certifying Affirmation of Statutory Obligation.” In it, demand is made that ECMC:

- 1) You produce the original contract (for Inspection), front and back pages, with my original signature (no copies) in respect to the alleged contract, and state for the record, who the alleged original creditor was or Current holder of Original Contract is based on the preceding law.
- 2) Provide an Affidavit Certifying that you did not breach any federal state contractual commercial or official oath or laws in carrying out the alleged contract and associated transactions.
- 3) Certify that you did not unlawfully without my consent use my signature to materially alter, falsely endorse, stamp or convert any contract bearing my name or signature, into a security, in order to convert my contract into assets, or gain assets from a third party. You MUST Certify and prove that, account #9461832523-1, was transferred from an actual LENDER and that you did not commit any action that would preclude that you used my identity in a fraudulent or illegal manner in Violation of Law and (FEDERAL TRADE COMMISSION (FTC) Policy, yourself or in collusion with a third party or additional parties.

Also attached is a “Request 2” for document of the status and securitization by ECMC. It demands an affidavit by EMCM “stating that you have enforceable payment interest in the contract account [number stated] based on § files. . . .” *Id.* at 8. It also demands an “affidavit” that ECMC did not “breach any federal, state, contractual, commercial oath or laws in carrying out the alleged contract and associated transactions.” *Id.*

Attached to the Status Report, beginning on page 13, is a document titled “ADMINISTRATIVE DEFAULT JUDGMENT.” This is stated to be an “Affidavit” to certify that a request for valuation of debt had been made to ECMC.

It then further states that by failing to provide such certifications, “ECMC, and their agents, have shown bad faith and default in their lawful duty of record to legally verify the alleged Claim as required by law, which obligate them to follow said applicable laws.” *Id.* at 13. The “Affidavit” then states a series of allegations by Plaintiff-Debtor Christine Smith.

Then, attached to the Status Report is a document titled “Identity Theft Report” in which Christina Smith asserts that ECMC stole her identity by failing to provide the verifications and demanding payment on the alleged obligation. She asserts that EMCM using her name and other personal information to assert that she owes the debt is identity theft. *Id.* at 17.

While making general references to “the law” and “legal obligatoins,” the court did not identify any in the Status Report or attached documents.

ECMC Status Report

ECMC filed its Status Report in this Adversary Proceeding. Dckt. 33. ECMC recounts discussions that Plaintiff-Debtor would seek administrative adjudication of the asserted obligation. Not seeing a Stipulation to Dismiss the Adversary Proceeding, ECMC filed its motion to intervene and dismiss Navient from the Adversary Proceeding.

The court notes that the Stipulation for Dismissal was filed on November 17, 2019, Dckt. 36.

Prosecution of Adversary Proceeding

Plaintiff-Debtor commenced this Adversary Proceeding on June 26, 2019, which is 148 days prior to the November 21, 2019 Status Conference. At this point, the Internal Revenue Service has not been served, Navient has been dismissed, and the substitution of ECMC in Navient's place is pending.

Additionally, Plaintiff-Debtor has presented the court with documents that it is proceeding "administratively," asserts an "administrative default," and that the rights and obligations at issue in this Adversary Proceeding are being and have been adjudicated outside of the federal courts.

The Supreme Court provides in Federal Rule of Civil Procedure 4(m), which is incorporated into Federal Rule of Bankruptcy Procedure 7004 for adversary proceedings, a hard deadline requirement for service of subpoena, providing:

(m) Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1), or to service of a notice under Rule 71.1(d)(3)(A).

The court, on its own initiative, "must" dismiss any defendant that is not served within 90 days of the complaint being filed. Here, no defendants have been served, notwithstanding 148 days having passed.

The Rule allows a court to order that service be made within a specific time period as an alternative to mandatory dismissal. Here, the court unequivocally addressed the service requirements on the Internal Revenue Service with the Debtor at the September 19, 2019 Status Conference, providing the Plaintiff-Debtor with the mail service addresses. During the sixty-one days that have passed since the prior Status Conference, no attempt has been made to serve the Internal Revenue Service. Though Plaintiff-Debtor would like to research possible theories and claims, the ninety day window has shut.

The documents attached to Plaintiff-Debtor's Status Report reflect the Plaintiff-Debtor pursuing adjudication of its dispute outside of this federal court. The Request #1, "Freedom of Information Request & Request for Affidavit Certifying Affirmation of Statutory Obligation" is dated September 27, 2019. Dckt. 35 at 7. Request #2, "Freedom of Information Request for SEC Registration Status and Securitization Inquiry" is also dated September 27, 2019. *Id.* at 9.

Then the "Affirmation of Cancellation of Contract by Grantor/Trustor/Primary Issuer & ADMINISTRATIVE DEFAULT JUDGMENT" is dated November 5, 2019. *Id.* at 16. On its face, Plaintiff-Debtor appears to be telling the court that a Administrative Default Judgment has been issued and that no issues remain to be adjudicated in this federal court.

It is relevant to this discussion that Plaintiff-Debtor has had many days, and months, to prosecute this Adversary Proceeding. As early as the August 29, 2019 Status Conference, the court attempted to shine the light of some issues and challenges with what Plaintiff-Debtor was putting in the Complaint and the related black letter law.

It is also relevant, as discussed above that Plaintiff-Debtor has made the conscious decision to proceed outside this court and obtain an “Administrative Default Judgment.” The court does not know what legal effect, if any, such has, but it appears that Plaintiff-Debtor believes that it resolves the matters.

Therefore, it appears that the mandatory dismissal without prejudice of the Internal Revenue Service is appropriate. With the “Administrative Default Judgment” which Plaintiff-Debtor asserts to exist, Plaintiff-Debtor does not appear to have standing - there being no claim or controversy as required by Article III of the United States Constitution - for this court to exercise federal court jurisdiction. Therefore, dismissal of the Adversary Proceeding without prejudice appears appropriate.

At the Status Conference, the Plaintiff-Debtor stated **XXXXXXXXXX**

SEPTEMBER 19, 2019 STATUS CONFERENCE

As scheduled by the Court, the Parties filed updated Status Conference Report. The Plaintiff-Debtor’s Status Report (Dckt. 21) includes the assertion that service against the United States was proper effectuated by service on:

Department of Treasury
Internal Revenue Service
P.O. Box 145566
Cincinnati, OH 45250-5566

Plaintiff-Debtors Status Report, p. 1:26.5-28.5; Dckt. 21.

Plaintiff-Debtors further assert that the Motion for Default Judgment had been served on the United States at the following address:

Internal Revenue Service
P.O. Box 7346
Philadelphia, PA 19101-7346,

which Plaintiff-Debtors state is the address listed on form EDC.002-785. *Id.*, p. 2:18-20.

The “form” EDC 002-785 is the Roster of Governmental Agencies. The information on the Roster of Governmental Agencies includes the following with respect to the Internal Revenue Service (emphasis added):

Internal Revenue Service

Notices and Service in Bankruptcy Cases, Adversary Proceedings, and Contested Matters Shall be Sent to:

Internal Revenue Service
PO Box 7346
Philadelphia, PA 19101-7346

Notices and Service in Adversary Proceedings and Contested Matters **Shall Additionally be Sent to:**

United States Department of Justice
Tax Division
Civil Trial Section Western Region
Box 683 Ben Franklin Station
Washington, DC 20044

AND

If Filed in the Sacramento Division to:

United States Attorney
(For Internal Revenue Service)
501 I St Ste 10-100
Sacramento, CA 95814

If Filed in the Modesto or Fresno Division to:

United States Attorney
(For Internal Revenue Service)
2500 Tulare St Ste 4401
Fresno, CA 93721

The Plaintiff-Debtors have hit one of the three required addresses for litigation with the Internal Revenue Service of the United States of America.

For federally insured student loan debt, the following information for service on the United States is included on the Roster:

Office of Education for Federally Insured Student Loans

US Department of Education
Bankruptcy Section
50 United Nations Plaza
Mail Box 1200
San Francisco, CA 94102

The Supreme Court has enacted Federal Rule of Bankruptcy Procedure 7004 addressing service in adversary proceedings. While incorporating substantial parts of Federal Rule of Civil Procedure 4, with respect to service by mail, Federal Rule of Bankruptcy Procedure 7004(b)(4) provides:

(b) Service by first class mail

Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e)-(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:

...

(4) Upon the United States, by mailing a copy of the summons and complaint addressed to the civil process clerk at the office of the United States attorney for the district in which the action is brought and by mailing a copy of the summons and complaint to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or an agency of the United States not made a party, by also mailing a copy of the summons

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and complaint to that officer or agency. The court shall allow a reasonable time for service pursuant to this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States.

This Rule is why the Roster provides the multiple addresses.

With respect to the above, the Bankruptcy Code provides in 11 U.S.C. § 523(a)(1) for the nondischargeability of certain taxes;

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--

(1) for a tax or a customs duty--

(A) of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, or equivalent report or notice, if required--

(i) was not filed or given; or

(ii) was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

As discussed below, the nondischargeability of tax obligations is not one for which the creditor is required to bring an action to have it determined nondischargeable. See 11 U.S.C. § 523(c)(1).

ECMC Status Report

ECMC states that it has guaranteed the student loan at issue, with Navient Solutions, LLC providing contract servicing. ECMC states that it is the real party in interest to be substituted in as the defendant in this Adversary Proceeding.

Navient, the servicer, goes further in its Status Report (Dckt. 23), stating that ECMC has already paid on the guaranty and is the sole holder of the student loan obligation. With ECMC having paid on the guaranty, Navient says that its work as a servicer has concluded. Navient asserts that since the student loan obligation is not automatically nondischargeable, then alleged violations of the discharge injunction against it cannot stand. ^{FN. 1.}

FN. 1. With respect to the assertion by Plaintiff-Debtors that the credit report information was updated to show that the obligation is \$0 was made either in error, or because of the guarantor paying the obligation, then Navient would show it in its system as \$0.

AUGUST 29, 2019 STATUS CONFERENCE

Continuance of Status Conference

As discussed below, there are substantial issues as to service of the summons and complaint, what is being asserted, and who the real parties to this Adversary Proceeding are and who needs to actually be substituted in.

Further, it is unclear the relief Plaintiff-Debtor is seeking and the basis. The statement that Congress has enacted no positive law that student loan debt is nondischargeable is contradicted by Plaintiff-Debtor's citation to 11 U.S.C. § 523(a)(8). While talking about rebutting the issue of undue burden, there are no allegations of and requests seeking such determination thereof.

Before the court blunders forward in this Adversary Proceeding, the real parties will be identified and substituted in, the Plaintiff-Debtor will confirm the relief sought and whether this is the actual complaint which states the claim upon which Plaintiff-Debtor's action will live or die, and documentation of sufficient service provided so that the court has a good faith belief that its orders and judgment are effective and not void for lack of personal jurisdiction.

SUMMARY OF COMPLAINT

The Plaintiff-Debtor, Michael Evans and Christina Smith ("Plaintiff-Debtor"), commenced this Adversary Proceeding with the filing of a complaint on June 26, 2019. Dckt. 1. The allegations in the Complaint include:

1. The Plaintiff-Debtor seeks relief from discharge of tax debt due to financial hardship and insolvency.
2. Taxes were assessed by the Internal Revenue Service.
3. Plaintiff-Debtor disputes an unsecured claim of defendant Navient in the amount of \$53,629.44. That debt was scheduled as a disputed debt by Plaintiff-Debtor in their Chapter 7 bankruptcy case.
4. The deadline for filing objections to discharge or for nondischargeability of debt expired, with no such relief sought by Navient.
5. After the discharge was entered in December 2018, it is alleged that Defendant Navient changed the information provided to consumer reporting agencies about the debt, with the changed information reporting the debt as paid and that the remaining balance was \$0.

6. Though reporting the debt as paid and the balance \$0 on Plaintiff-Debtor's consumer report, Defendant-Navient began in 2019 sending billing notices and attempting to collect the debt which was reported as paid, had a \$0 balance, and was discharged in the Chapter 7 bankruptcy case.
7. Plaintiff-Debtor listed on their schedules a debt in the amount of \$2,433.46 of the Internal Revenue Service for the 2016 tax year as disputed. The Internal Revenue Service did not object to Plaintiff-Debtor's discharge or that any such obligation should be nondischargeable.
8. On Plaintiff-Debtor's credit report the tax obligation for the 2016 tax year is show as being \$0 and it is noted to be that amount due to the Chapter 7 bankruptcy case.
9. In 2019, after entry of Debtor's discharge, the Internal Revenue Service began collection efforts on the alleged \$2,522.67 tax debt for 2016 which is stated to be \$0 on Plaintiff-Debtor's credit report.
10. Plaintiff-Debtor sent a dispute of the 2016 tax amount, made under penalty of perjury, and notified the Internal Revenue Service that unless it responded with a sufficient counter affidavit within thirty-days, Plaintiff-Debtor's dispute would stand.
11. The Internal Revenue Service did not respond with a counter affidavit, but continued in its attempts to collect that asserted obligation.
12. The relief requested by Plaintiff-Debtor is:

A. The court "make clear that the above-listed accounts. . .were discharged. . . and each of the Defendants are not entitled to collect on such discharged debt. . . ."

While providing some very detailed allegations, the Complaint includes some unusual statements of law. One is that while it might be asserted that the student loan obligation is nondischargeable pursuant to 11 U.S.C. § 523(a), which was enacted by Congress pursuant to Article I of the United States Constitution and is part of the supreme law of the law, second only to the United States Constitution,

Defendant Navient may argue that student loan debt is not dischargeable pursuant to 11 USC 523(a)(8), however,[t]his part of the code is not positive law. Current Statutory law written by Untied States Congress has no provision excepting discharge of student loans. Statutory text appearing in a nonpositive law title may be rebutted by showing that the wording in the underlying statute is different. In other words, any case law on "undue hardship" made as legal opinion expressed via judicial decisions on non-positive law (prima facie code) is rebuttable.

Complaint ¶ 16, Dckt. 1.

Going to the specific Bankruptcy Code section referenced by the Plaintiff-Debtor and the related provisions in said §523, Congress has provided therein, and the President signed into law, the following provision relating to the nondischargeability of student debt obligations:

§ 523. Exceptions to discharge

(a) A discharge under section 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 education loan**, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

...

11 U.S.C. § 523(a)(8). On its face, it appears that Congress has affirmatively, positively stated that a discharge in bankruptcy does not discharge the obligation to pay the above “student loan” obligations. However, such positive statement is qualified by the “impose undue hardship” language.

In 11 U.S.C. § 523(c)(1) Congress specifies the three grounds for nondischargeability for which the creditor must commence an adversary proceeding and seek an affirmative judicial determination that grounds exist for the debt to be non-dischargeable - 11 U.S.C. §§ 523 (a)(2) [fraud], (4) [breach of fiduciary duty/embezzlement/theft], and (6) [willful and malicious injury]. Those provision are not at play in this litigation as framed by Plaintiff-Debtor.

The Supreme Court provides in Federal Rule of Bankruptcy Procedure 4007(b) that a complaint, other than for the grounds stated in 11 U.S.C. § 523(c), may be filed at any time.

Here, Plaintiff-Debtor has now initiated such a complaint, though it does not appear to allege grounds that the nondischargeability pursuant to 11 U.S.C. § 523(a)(8) would impose an undue burden. As discussed in Collier on Bankruptcy, Sixteenth Ed, ¶ 523.14[3] (emphasis added):

[3] Discharge Based on Undue Hardship; §523(a)(8)

Section 523(a)(8) is the “hardship” provision, which allows the court to discharge an otherwise nondischargeable student loan if excepting the debt from discharge will impose an undue hardship on the debtor or the debtor's dependents. **This exemption from the exception to discharge requires the bankruptcy judge to determine whether payment of the debt will cause undue hardship on the debtor and his dependents**, thus defeating the “fresh start” concept of the bankruptcy laws. There may well be circumstances that justify failure to repay a student loan, such as illness

or incapacity. When the court finds that such circumstances exist, it may order the debt discharged.

The Supreme Court has stated that section 523(a)(8) is “self-executing” and that “[u]nless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt.”²¹In other words, **student loan debt remains due until there is a determination that the loan is dischargeable.**²²

FN. 21. *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 124 S. Ct. 1905, 1912, 158 L. Ed. 2d 764, 51 C.B.C.2d 627 (2004); *Ekenasi v. Educational Resources Inst. (In re Ekanasi)*, 325 F.3d 541 (4th Cir. 2003).

FN. 22. *Underwood v. United Student Aid Funds, Inc. (In re Underwood)*, 299 B.R. 471 (Bankr. S.D. Ohio 2003).

To assist the parties, the court provides the direct quote from the Supreme Court concerning the “self-executing” nature of the Congressional provision of nondischargeability.

But in 1976, Congress provided a significant benefit to the States by making it more difficult for debtors to discharge student loan debts guaranteed by States. Education Amendments of 1976, § 439A(a), 90 Stat 2141 (codified at 20 U.S.C. § 1087-3 (1976 ed.), repealed by Pub L 95-598, § 317, 92 Stat 2678). That benefit is currently governed by 11 U.S.C. § 523(a)(8), which provides that **student loan debts guaranteed by governmental units are not included in a general discharge order unless excepting the debt from the order would impose an “undue hardship” on the debtor.** See also § 727(b) (providing that a discharge under § 727(a) discharges the debtor from all prepetition debts except as listed in § 523(a)).

Section 523(a)(8) is “self-executing.” Norton § 47:52, at 47-137 to 47-138; see also S. Rep. No. 95-989, p 79 (1978). **Unless the debtor affirmatively secures a hardship determination, the discharge order will not include a student loan debt.** Norton § 47:52, at 47-137 to 47-138. Thus, the major difference between the discharge of a student loan debt and the discharge of most other debts is that governmental creditors, including States, that choose not to submit themselves to the court's jurisdiction might still receive some benefit: The debtor's personal liability on the loan may survive the discharge.

Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 449-450 (2004) (emphasis added).

A similar legal conclusion is stated with respect to an assertion that certain tax obligations are nondischargeable as Congress has provided in 11 U.S.C. § 523(a)(1).

It is unclear from the Complaint what is being asserted as, or if there is a determination requested, that the automatic nondischargeability of the student loan debt constitutes a statutory undue burden and the positive statutory nondischargeability provision of 11 U.S.C. § 523(a)(8) should be retroactively terminated by this court.

SUMMARY OF ANSWER

Navient Solutions, LLC, “Defendant Navient,” filed its answer on July 22, 2019. Dckt. 6. The responses in that answer include:

1. Defendant Navient is a loan servicer for loans guaranteed by the Education Credit Management Corporation (“ECMC”).
2. The filing of this Complaint by Plaintiff-Debtor triggered the guaranty and the asserted obligation serviced by Defendant Navient is being transferred to ECMC.
3. Defendant-Navient does not have the authority to litigate issues relating to the asserted discharge of the obligation. When the obligation is transferred to ECMC, Defendant-Navient will seek to be dismissed from this Adversary Proceeding.
4. The answer admits and denies specific allegations in the Complaint.
5. In the denials, Defendant Navient states that it is without information or knowledge sufficient to respond to the allegations in Paragraph 13 of the Complaint that allege:

“Defendant Navient had reported the aforementioned account [the one that Navient is alleged to have been collecting post-discharge having been entered] as, ‘100% of the student loan as paid’, balance was reported as ‘\$0’ remarks on the account stated, ‘Chapter 7 Bankruptcy’ and ‘Between August 31, 2018 and September 30, 2018, your NAVIENT student loan account balance decreased by \$53,516 from \$53,516 to \$0.’ (hereinafter incorporated and reference as Exhibit A).”

Complaint ¶ 13, Dckt. 1.

The above allegations are clear, alleging that Defendant Navient provided information for a consumer reporting agency. It is unclear to the court how Navient would lack knowledge and information in its records as to what information it provided and then affirmatively admit or deny the allegation - rather than saying its wants to deny because it cannot say what it did or did not do.

SUMMARY OF ANSWER

Though not a party, yet, to this Adversary Proceeding (not having been substituted in by order of the court or an amended complaint) Educational Credit Management Corporation (“ECMC”) has filed a pleading titled Answer. Dckt. 8. In this pleading, ECMC states:

1. ECMC is a guaranty agency and will be receiving, in the future, transfer of the loan for which liability against Defendant-Debtor is asserted. At some later date, ECMC will file a “formal” motion to be added as a party, if needed. Nothing in the documents states a basis how ECMC, based on some future acquisition can inject itself into this Adversary Proceeding. ^{FN. 1}

FN.1. The Court acknowledges that yes, ECMC guarantees student loans, ECMC commonly is substituted in by either order of the court or an amended complaint, and that after the court ordered or amended complaint substitution ECMC may prosecute such litigation. However, notwithstanding that there are “legal ways” to do something, there is not an excuse for ECMC cutting the corner and just inserting itself when and it how it deems convenient in federal judicial proceedings.

2. The document purports to admit and deny allegations in the Complaint to which ECMC is not a party.

SUMMARY OF ANSWER

No responsive pleading has been filed by the Internal Revenue Service.

SERVICE OF PLEADINGS

While this Adversary Proceeding was filed on June 26, 2019, no certificate of service was filed by Plaintiff-Debtor until August 7, 2019. Dckt. 11. The service purported to have been made by that Certificate is stated to be:

By First Class Mail to

Navient solutions, Inc.
P.O. Box 9533
Willkes Barre, PA 18773-8533

Department of the Treasury,
Internal Revenue Service
P.O Box 145566
Cincinnati, OH 45250-5566

This Certificate filed on August 7, 2019, is dated June 26, 2019 and states that service was made on June 26, 2019 (forty-two days after the stated service date).

Then on August 26, 2019, a second and third Certificate of Service was filed, this one also stating that it was signed on June 26, 2019 (sixty-one days before the filing with the court). Dckts. 15, 16. These Certificate contains a statement at the bottom that the “initial certificate of service is attached as the LAST PAGE to the actual adversary complaint. I’m filing this as a separate page so all can see that there is a record of service.” There is a Certificate of Service form, dated June 26, 2019, attached to the last page of the Complaint, which lists the two service addresses above. Dckt. 1 at 24.

Because the Summons and Complaint cannot be served until after the complaint is filed and the summons issued, one questions how a person can state that something has already been served when it clearly could not have been served. While Plaintiff-Debtor may well say something to the effect of “I knew I was going to do it right after I left the courthouse, I would not lie,” it had not occurred when Plaintiff-Debtor states under penalty of perjury that it had occurred.

Service by Mail

Service was sent to the two named defendants at Post Office Boxes. While Federal Rule of Bankruptcy Procedure 7004 allows for service by mail, merely sending something to a Post Office Box is not sufficient. *Beneficial Cal., Inc. v. Villar (In re Villar)*, 317 B.R. 88, 92-93 (B.A.P. 9th Cir. 2004) (holding that service upon a post office box does not comply with the requirement to serve a pleading to the attention of an officer or other agent authorized as provided in Federal Rule of Bankruptcy Procedure 7004(b)(3)); see also *Addison v. Gibson Equipment Co., Inc., (In re Pittman Mechanical Contractors, Inc.)*, 180 B.R. 453, 457 (Bankr. E.D. Va. 1995) (“Strict compliance with this notice provision in turn serves to protect due process rights as well as assure that bankruptcy matters proceed expeditiously.”).

For sufficient service by mail, the Supreme Court provides in Federal Rule of Bankruptcy Procedure 7004(b) the following as applicable to the two named defendants:

(b) Service by first class mail

Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e)-(j) F.R.Civ.P., service may be made within the United States by first class mail postage prepaid as follows:

...

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by mailing a copy of the summons and complaint addressed to the civil process clerk at the office of the United States attorney for the district in which the action is brought and by mailing a copy of the summons and complaint to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or an agency of the United States not made a party, by also mailing a copy of the summons and complaint to that officer or agency. The court shall allow a reasonable time for service pursuant to this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either to the civil process clerk at the office of the United States attorney or to the Attorney General of the United States.

(5) Upon any officer or agency of the United States, by mailing a copy of the summons and complaint to the United States as prescribed in paragraph (4) of this subdivision and also to the officer or agency. If the agency is a corporation, the mailing shall be as prescribed in paragraph (3) of this subdivision of this rule. The court shall allow a reasonable time for service pursuant to this subdivision for the purpose of curing the failure to mail a copy of the summons and complaint to multiple officers, agencies, or corporations of the United States if the plaintiff has mailed a copy of the summons and complaint either to the civil process clerk at the

office of the United States attorney or to the Attorney General of the United States. If the United States trustee is the trustee in the case and service is made upon the United States trustee solely as trustee, service may be made as prescribed in paragraph (10) of this subdivision of this rule.

....

While Defendant Navient has resolved the service issue as it by filing an answer, the United States has not responded with respect to it, the Internal Revenue Service, as a defendant. It is not uncommon when there is such defective service for a defendant to not respond and voluntarily submit to the jurisdiction of a court. If the court were to blindly go forward and purport to enter a judgment, that judgment would be void - a waste of the time for not only the plaintiff, but the court.

SEPTEMBER 19, 2019 STATUS CONFERENCE

At the Status Conference Plaintiffs agreed to the dismissal without prejudice of Navient from this Adversary Proceeding. Plaintiffs and ECMC will discuss whether this Adversary Proceeding can be dismissed without prejudice and the Parties attempt to address the issues through administrative proceedings.

Plaintiffs will review the non-dischargeability provisions of 11 U.S.C. § 523(a)(1) and the tax claims incorporated therein to consider whether the Complaint should be amended, dismissed, or served on the Internal Revenue Service.

2. [18-90428-E-11](#)

RANDHAWA TRUCKING, LLC

CONTINUED STATUS CONFERENCE RE:
VOLUNTARY PETITION
6-7-18 [\[1\]](#)

Final Ruling: No appearance at the November 21, 2019 Status Conference is required.

Continued to 12/19/19 at 10:30 am. by order of the court filed 11/12/19 [Dckt 141]

Debtor's Atty: Brian S. Haddix

Notes:

The Status Conference has been continued to 10:30 a.m. on December 19, 2019, pursuant to prior order (Dckt. 141).

3. [18-90428](#)-E-11 RANDHAWA TRUCKING, LLC PRE-EVIDENTIARY HEARING RE:
[BSH-3](#) MOTION FOR SANCTIONS FOR
4-29-19 [77]
VIOLATION OF STAY

Final Ruling: No appearance at the November 21, 2019 Hearing is required.

Pre-Evidentiary hearing vacated and scheduling conference set for 12/19/19 at 10:30 a.m. by order of the court filed 11/12/19 [Dckt 142]

Debtor's Atty: Brian S. Haddix

Notes:

The Status Conference has been continued to 10:30 a.m. on December 19, 2019, pursuant to prior order (Dckt. 142).

4. [19-90461](#)-E-7 LORRAINE ESCOBAR ORDER TO SHOW CAUSE
[19-9014](#) RHS-1

Final Ruling: No appearance at the November 21, 2019 hearing is required.

The hearing on the Order to Show Cause Why Adversary Proceeding Should Not Be Dismissed has been continued to 10:30 a.m. on December 19, 2019, by prior Order (Dckt. 39), to be heard in conjunction with the Order to Show Cause.

5. [19-90461](#)-E-7 LORRAINE ESCOBAR ORDER TO SHOW CAUSE
[RHS-1](#)

Final Ruling: No appearance at the November 21, 2019 hearing is required.

The hearing on the Order to Show Cause Why Bankruptcy Should Not Be Dismissed and Why Nicholas Wajda, Esq. Should Not Be Ordered To Disgorge Legal Fees has been continued to 10:30 a.m. on December 19, 2019, by prior Order (Dckt. 20), to be heard in conjunction with the Order to Show Cause in Adversary Proceeding 19-9014.

6. [17-90577-E-7](#) **WILSON SARHAD**
[17-9019](#)
GARCIA V. SARHAD

**CONTINUED PRE-TRIAL CONFERENCE
RE: COMPLAINT TO DETERMINE
DISCHARGEABILITY OF PARTICULAR
DEBT AND TO DETERMINE
DISCHARGEABILITY OF ALL DEBTS
11-6-17 [1]**

Plaintiff's Atty: Michael R. Dennis
Defendant's Atty: David C. Johnston

Adv. Filed: 11/6/17
Answer: 12/3/17
Nature of Action:
Dischargeability - willful and malicious injury
Objection/revocation of discharge

The Pre-Trial Conference is XXXXXXXXXXXX

N

otes:

Continued from 10/17/19 for one final time so that this matter may be set for trial. Parties to file new, complete Pre-Trial Conference Statements on or before 11/14/19. If a party fails to file a new Pre-Trial Conference Statement, the court shall order corrective sanctions of \$1,666.00.

[DCJ-3] Debtor's Motion for Authorization of Dismissal of Second Claim for Relief in Adversary Complaint filed 11/7/19 [Dckt 37]; set for hearing 11/21/19 at 10:30 a.m.

Defendant Wilson Sarhad's Pretrial Statement filed 11/14/19 [Dckt 42]

Pretrial Statement [Plaintiff] filed 11/14/19 [Dckt 44]

NOVEMBER 21, 2019 PRE-TRIAL CONFERENCE

In their respective Pre-Trial Conference Statements, both parties referenced the court to the existing State Court Judgment and the Doctrine of Res Judicata and the Sub-Doctrine of Collateral Estoppel. It is not clear how much, if any further "fact finding" the bankruptcy court is required to make and how much is "only" the necessary conclusions of law applied to the State Court Judgment.

At the Pre-Trial Conference the Parties addressed this issue, stating XXXXXXXXXXXX

SUMMARY OF COMPLAINT

Leonani Garcia ("Plaintiff") filed a Complaint (Dckt. 1) to have Plaintiff's debt determined nondischargeable pursuant to 11 U.S.C. § 523(a)(6). Plaintiff alleges that she obtained a state court judgment for failure to pay wages, harassment, and punitive damages. Further, Plaintiff alleges that an

abstract of judgment was recorded in Stanislaus County in May 14, 2014, and a Notice of Judgment Lien filed with the Secretary of State on July 9, 2014. It is further alleged that W.S. Towing, Inc., one of the two judgment debtors, was converted by Defendant-Debtor to a partnership two months before the commencement of a prior Chapter 13 bankruptcy case in 2014. The Complaint alleges further conduct relating to contentions that assets of W.S. Towing, Inc., one of Plaintiff's two state court judgment debtors (for which the judgment lien had been filed with the Secretary of State) were transferred into Defendant-Debtor's partnership or Defendant-Debtor.

The allegations continue, asserting that Defendant-Debtor purports to no longer have these business assets, but purports to have transferred them to his non-debtor wife.

SUMMARY OF ANSWER

Wilson Sarhad ("Defendant-Debtor") has filed an Answer (Dckt. 8) that admits and denies specific allegations in the Complaint. Defendant-Debtor also asserts seven affirmative defenses.

FINAL BANKRUPTCY COURT JUDGMENT

Plaintiff alleges in the Complaint that jurisdiction for this Adversary Proceeding exists pursuant to 28 U.S.C. § 1334 and 157(b)(2) and 11 U.S.C. § 523 and that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(1) and J. Complaint ¶ 1, Dckt. 1. In his Answer, Defendant-Debtor admits the allegations of jurisdiction and core proceedings, and consents to the bankruptcy judge issuing final orders and judgments. Answer ¶ 1, Dckt. 8. To the extent that any issues in the existing Complaint as of the Status Conference at which the Pre-Trial Conference Order was issued in this Adversary Proceeding are "related to" matters, the parties consented on the record to this bankruptcy court entering the final orders and judgment in this Adversary Proceeding as provided in 28 U.S.C. § 157(c)(2) for all issues and claims in this Adversary Proceeding referred to the bankruptcy court.

The court shall issue an Trial Setting in this Adversary Proceeding setting the following dates and deadlines:

- A. Evidence shall be presented pursuant to Local Bankruptcy Rule 9017-1.
- B. Plaintiff shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before -----, 2020.
- C. Defendant shall lodge with the court and serve their Direct Testimony Statements and Exhibits on or before -----, 2020.
- D. The Parties shall lodge with the court, file, and serve Hearing Briefs and Evidentiary Objections on or before -----, 2020.
- E. Oppositions to Evidentiary Objections, if any, shall be lodged with the court, filed, and served on or before -----, 2020.
- F. The Trial shall be conducted at ----x.m. on -----, 2020.

The Parties in their respective Pretrial Conference Statements, Dckts. 42, 44, and as stated on the record at the Pretrial Conference, have agreed to and establish for all purposes in this Adversary Proceeding the following facts and issues of law:

Plaintiff	Defendant-Debtor
<p>Jurisdiction and Venue:</p> <p>Plaintiff alleged jurisdiction existed pursuant to 28 U.S.C. §§1334 and 157(b)(2), and 11 U.S.C. §523 and §727, and that the matter was a core proceeding pursuant to 28 U.S.C. §157(b)(2)(I) and J. In his answer, defendant admitted the allegations of jurisdiction and core proceedings, and consented to the bankruptcy judge issuing final orders and judgments.</p>	
<p>Undisputed Facts:</p> <p>1. Detailed list provided that could be basis for stipulated facts.</p>	<p>Undisputed Facts:</p> <p>1. State Court Judgment for \$235,985 entered, including statutory attorneys' fees.</p>
<p>Disputed Facts:</p> <p>1. Defendant-Debtor denies the alleged inappropriate conduct.</p>	<p>Disputed Facts:</p> <p>1. Facts not in dispute with the dismissal of the Second Cause of Action.</p> <p>2. Asserts there to only be legal issues.</p>
<p>Disputed Evidentiary Issues:</p> <p>1. None Identified</p>	<p>Disputed Evidentiary Issues:</p> <p>1. None Identified</p>
<p>Relief Sought:</p> <p>1. Determination that debt is nondischARGEABLE.</p> <p>2. Claim for relief pursuant to 11 U.S.C. § 727 has been dismissed.</p>	<p>Relief Sought:</p> <p>1. Only a portion of the judgment would be for nondischARGEABLE grounds - asserts only hostile work environment damages nondischARGEABLE.</p>
<p>Points of Law:</p>	<p>Points of Law:</p>

<ol style="list-style-type: none"> 1. 11 U.S.C. § 523(a)(6) 2. <i>Kawaauhau v. Geiger</i>, 523 U.S. 57, 61-62 (1998). 3. <i>In Re Gee</i>, 173 B.R. 189 (B.A.P. 9th Cir. 1994). 4. <i>In Re Littleton</i>, 942 F.3d 551, 555 (9th Cir. 1991) 5. <i>In Re Britton</i>, 950 F.2d 602, (9th Cir. 1991) 605. 6. <i>In re Smith</i>, 270 B.R. 544, 550 (Bankr. D.Mass. 2001) 7. 	<ol style="list-style-type: none"> 1. Asserts that only the \$4,800 portion of the judgment for “past noneconomic loss, including physical pain/mental suffering” is the nondischargeable obligation. 2. <i>Barboza v. New Form, Inc. (In re Barboza)</i>, 545 F.3d 702 (9th Cir. 2008). 3. <i>Peklar v Ikerd (In re Peklar)</i>, 260 F.3d 1035 (9th Cir. 2001) 4. <i>United States Credit Bureau, Inc., v. Digoras</i>, 169 Cal.App.2d 673, (1959) 5. <i>In re Niles</i>, 106 F.3d 1456 (9th Cir. 1997)
<p>Abandoned Issues:</p> <ol style="list-style-type: none"> 1. Second Cause of Action for relief pursuant to 11 U.S.C. § 727. 	<p>Abandoned Issues:</p> <ol style="list-style-type: none"> 1. Second Cause of Action for relief pursuant to 11 U.S.C. § 727.
<p>Witnesses:</p> <ol style="list-style-type: none"> 1. Leonani Garcia 2. Wilson Sarhad 3. Avelain Sarhad 4. Rochelle Barker 5. Melissa Hunter 6. Rafid Khoshaba 7. Melissa Etchinson 	<p>Witnesses:</p> <ol style="list-style-type: none"> 1. Leonani Garcia 2. Wilson Sarhad
<p>Exhibits:</p> <ol style="list-style-type: none"> 1. Court Reporter's Transcript from civil trial; 2. Clerk's Record from civil trial; 	<p>Exhibits:</p> <ol style="list-style-type: none"> 1. The state court complaint. 2. The jury’s verdicts.

<p>3. Judgment on Verdict in Jury Trial entered by the Stanislaus County Superior Court on May 6, 2014. The amount of the judgment is \$234,985.48; debtor Wilson Sarhad and his business, W.S. Towing, Inc., were held jointly and severally liable to Plaintiff for the entire amount.</p> <p>4. Abstract of Judgment filed with the Stanislaus County Clerk and recorded on May 14, 2014.</p> <p>5. Notice of Judgment Lien, No. 14-7419688775, filed on July 9, 2014, with the California Secretary of State.</p> <p>6. Financial records and disclosures filed by Wilson Sarhad in the underlying bankruptcy action.</p> <p>7. Copies of Fictitious Business Name filings for W.S. Towing and Wilson Sarhad with the Stanislaus County Clerk.</p> <p>8. Copies of Corporate Status for W.S. Towing, Inc.</p>	<p>3. The state court judgment</p>
<p>Discovery Documents:</p> <p>1. Plaintiffs deposition was taken in the civil court action.</p>	<p>Discovery Documents:</p> <p>1. None</p>
<p>Further Discovery or Motions:</p> <p>1. None anticipated</p>	<p>Further Discovery or Motions:</p> <p>1. None anticipated</p>
<p>Stipulations:</p> <p>1. None</p>	<p>Stipulations:</p> <p>1. None</p>
<p>Amendments:</p> <p>1. None</p>	<p>Amendments:</p> <p>1. None</p>

Dismissals: 1. Second Cause of Action for 11 U.S.C. § 727 relief dismissed.	Dismissals: 1. Second Cause of Action
Agreed Statement of Facts: 1. Possible	Agreed Statement of Facts: 1. Possible
Attorneys' Fees Basis: 1. Statutory - Fair Employment and Housing Act	Attorneys' Fees Basis: 1. No claim stated in Complaint for attorneys' fees. 2. No basis for attorneys' fees for action under 11 U.S.C. § 523(d) for Defendant-Debtor
Additional Items 1. None identified	Additional Items 1. None
Trial Time Estimation: One to Two Days	Trial Time Estimation: One-Half Day

7. [15-90680-E-7](#) **JO GIBSON**
[18-9001](#)
GIBSON V. NATIONAL RECOVERIES
ET AL

CONTINUED STATUS CONFERENCE RE:
AMENDED COMPLAINT
6-21-18 [29]

Final Ruling: No appearance at the November 21, 2019 Status Conference is required.

Adversary Proceeding Closed 9/24/19

Plaintiff's Atty: David Foyil

Defendant's Atty:

unknown [Direct Loans; National Recoveries]

Robert S. Lampl [Navient Solutions, Inc. (Navient Corporation)]

Jeffrey J. Lodge [United States Department of Education]

Adv. Filed: 4/5/18

Answer: 5/10/18 [United States Department of Education]

Amd. Cmplt. Filed: 6/21/18

Answer: 7/26/18 [United States Department of Education]

11/19/18 [Educational Credit Management Corporation]

Nature of Action:

Dischargeability - student loan

The Adversary Proceeding having been dismissed by Order of the Court (Dckt. 92), the Status Conference is concluded and removed from the Calendar.

The Clerk of the Court may close the file for this Adversary Proceeding.

Notes:

Continued from 10/17/19

Joint *Ex Parte* Motion to Dismiss Adversary Proceeding Without Prejudice filed 11/14/19 [Dckt 91]; order pending

November 21, 2019 at 2:00 p.m.

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