IN THE UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE EIGHTH CIRCUIT

IN RE: RICHELLE A. PAGE, Debtor.	
RICHELLE ANGELA PAGE, Plaintiff-Appellant, v. JP MORGAN CHASE BANK Defendant NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-1 Defendant-Appellee.	BANKRUPTCY APPELLATE PANEL DOCKET NO. 18-6011 BANKRUPTCY CASE NO. 10-50203 ADVERSARY PROCEEDING NO. 17-04062

BRIEF OF APPELLEE NATIONAL COLLEGIATE TRUST

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CORPORATE DISCLOSURE STATEMENT

COMES NOW, National Collegiate Student Loan Trust 2006-1, by and through Counsel, Melinda J. Maune and the law firm of Martin Leigh P.C. and hereby advises the Court there are no entities that own 10% or more of any class of the Trust's equity interest .

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I. SUMMARY OF ARGUMENT

Beginning in 1978, Congress began a long series of amendments to severely restrict discharge of student loans in bankruptcy. With each amendment, more types of student loans were deemed nondischargeable. Today, most educational loans are nondischargeable absent a showing of undue hardship. This progression shows that Congress has a strong interest in restricting student loan discharge.

The student loan that is the subject of this case ("loan") is nondischargeable under § 523(a)(8)(A)(i) because it was made under a loan program, the Education One© program, The Education Resources Institute, Inc. ("TERI"), a nonprofit organization, guaranteed the loan, and TERI participated in processing loan applications under the program. Both TERI's guaranty and administrative role played a meaningful part in the program and constituted funding of the program.

The loan is clearly an educational loan on its face and by its terms. As an example, the loan documents require the proceeds of the loan be used only for school expenses and have multiple allusions to education -related matters.

The bankruptcy court did not draw an inference in Appellee's favor by inferring that TERI expended its resources by accepting loan applications. It could

only make an inference in Appellant's favor if it ignored that evidence, which it is not required to do.

Finally, because Congress intended to broadly restrict student loan dischargeability, because there is ample case law to support a finding that TERI's guaranty and administrative role funded the program, and because the loan fits squarely within the confines of §523(a)(8)(A)(i), the bankruptcy court properly construed the statute to determine the loan is nondischargeable.

II. ARGUMENT

A. A History of Student Loan Dischargeability Legislation

Prior to 1978, the Bankruptcy Code permitted discharge of all student loan debt. To remedy perceived abuse by students who filed bankruptcy immediately upon graduation and obtained a discharge of their student loan debt,[1] Congress enacted the first statute restricting discharge of student loans. Educational loans due less than five years before filing bankruptcy and made by a governmental unit or a nonprofit institution of higher education were nondischargeable.[2]

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[1] H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 466-75 reprinted in 1978 U.S. Code Cong. & Admin. News 5787.

[2] The Bankruptcy Reform Act of 1978 (P.L. 95-598 (1978).

"to a governmental unit, or a nonprofit institution of higher education, for an educational loan, unless

A. such loan first became due before five years before the date of the filing of the petition; or

In 1979, 11 U.S.C. §523(a)(8)[3] was amended to add loans made under programs funded "in whole or in part" by government or nonprofit institutions of higher learning (instead of "higher education").[4]

Appellant asserts that prior to the enactment of BAPCPA in 2005, only private loans that were guaranteed or insured by "the government" were dischargeable.[5] This is incorrect. In 1984, §523(a)(8) was amended to make educational loans nondischargeable if they were "made under any program funded in whole or in part by … a nonprofit institution",[6] making some for-profit loans nondischargeable.

B. excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents; "

3 All statutory references shall be to Title 11 of the United States Code unless otherwise designated.

4 Bankruptcy Act amendment, P.L. 96-56 (1979).

"for an educational 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 a nonprofit institution of higher education, unless

A. such loan first became due before five years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or

B. excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents; "

5 Appellant Brief, p. 13.

6 Bankruptcy Amendments and Federal Judgeship Act of 1984, P.L. 98-353 (1984).

"for an educational 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 a nonprofit institution, unless

A. such loan first became due before five years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or

B. excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents; "

In 1990, "educational benefit overpayments" were added and the time between the date of the first payment and the filing of the petition was increased from five to seven years before the loan could be discharged without any showing of undue hardship.[7]

In 1998, all educational loans defined in §523(a)(8) became nondischargeable, no matter when they first became due, and the nondischargeable loans were expanded to include "obligation[s] to repay funds received as an educational benefit, scholarship or stipend".[8]

Finally, in 2005, BAPCPA made all "qualified education loan[s], as defined in section 221(d)(1) of the Internal Revenue Code of 1986"[9] nondischargeable. For the first time, private for-profit student loans were made nondischargeable, as long as they met the requirements of a "qualified education loan", meaning that the loans must be for "qualified higher education expense[s]" as defined in 26 U.S.C. §221(d)(1), and be for the "costs of attendance" at an "eligible educational institution" (i.e., a Title IV school).[10] These loans do not have to be government

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7 Crime Control Act of 1990, P.L. 101-647 (1990).

8 Higher Education Amendments of 1998 (P.L. 105-244).
"for 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 for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents"

9 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, P.L. 109-8.

10 *Inst. of Imaginal Studies v. Christoff (In re Christoff)*, 527 B.R. 624, 632 (8th Cir. BAP 2015).

sponsored, or made under a loan program and funded by a nonprofit institution as required under § 523(a)(8)(A)(i). This amendment greatly expanded the number of student loans that are nondischargeable.

Through all of these amendments, Congress indicated it has a strong interest in restricting student loan discharge and has rendered most student loans nondischargeable, absent a showing of undue hardship.

B. TERI Funded the Education One© Loan Program by Processing Loan Applications and through its Guaranty

Appellee's loan is nondischargeable under § 523(a)(8)(A)(i) because it is an educational loan made under a program, guaranteed by TERI, a nonprofit institution, and TERI, at least in part, funded the program. The relevant section is as follows:

> (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;[11]

[11] §523(a)(8)(A)(i).

If a loan is not a governmental loan, it must have two qualities to be nondischargeable under this section: 1) it must be made under a program, and 2) the program must be funded in whole or in part by a nonprofit institution.[12]

Appellant's brief focuses on the second quality, funding, and defines funding as "the advance of money to an entity for a specific purpose."[13] This is the Black's Law Dictionary definition of funding used by the *Taratuska* Bankruptcy Court that was later overturned by the District Court of Massachusetts when it recognized that courts uniformly have found a nonprofit's guaranty of a loan program constitutes funding of the program[14]. A nonprofit need not exchange any money in order to fund a loan program.[15]

Funding is an elastic concept under §523(a)(8)(A)(i). "Congress intended to include within section 523(a)(8) all loans made under a program in which a nonprofit institution plays any meaningful part in providing funds".[16] Whether a nonprofit has played "any meaningful part" in a loan program has been interpreted according to the facts and evidence in each case, but there are common threads, which will be set forth herein.

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[12] *In re Hammarstrom*, 95 B.R. 160, 165 (Bankr. N.D. Cal. 1989).
[13] Appellant's Brief, p. 15, citing *Taratuska v. Educ. Res. Inst., Inc. (In re Taratuska)*, 374 B.R. 24, 26, (Bankr. D. Mass. 2008).
[14] *Taratuska v. Educ. Res. Inst., Inc. (In re Taratuska)*, 2010 Bankr. LEXIS 409, 63 Collier Bankr. Cas. 2d (MB) 403 (D. Ma. 2010).
[15] *Gakinya v. Columbia College (In re Gakinya)*, 364 B.R. 366, 367, 2007 Bankr. W.D. Mo.. 2007).
[16] *Hammarstrom*, at 165.

However, not all courts adhere to a "meaningful part" analysis to determine that a nonprofit funded a loan program.[17] For example, any participation by a nonprofit in a loan program is deemed to be funding.[18] Where a nonprofit acted a disburser, servicer and guarantor for a loan program, it was deemed to have funded it, without any further analysis.[19]

Appellant argues that the "meaningful part"[20] a nonprofit must play in a loan program must be "so absolute"[21] as to reduce a lender's participation to that of a "mere agent"[22] in order to satisfy the funding requirement of §523(a)(8)(A)(i). Case law does not support this argument.

To the contrary, there is ample case law expressly finding that TERI's guaranty or another nonprofit's guaranty did in fact fund student loan programs "in whole or in part", and none requires a nonprofit to step into a lender's role to be deemed a funder of a program. Certainly no court has found a loan dischargeable because a nonprofit did not overtake the lender's role.

Some courts had more or different evidence than is presented here when they decided that TERI or another nonprofit organization funded a loan program.

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[17] *HEMAR Service Corp., Inc. v. Pilcher, (In re Pilcher),* 149 B.R. 595, 600 (9th Cir. BAP 1993).
[18] *Id.*
[19] *Santa Fe Medical Servs. v. Segal (In re Segal)*, 57 F.3d 342, (3rd Cir. 1995).
[20] *Hammarstrom*, at 165.
[21] Appellant's Brief, pgs. 17 & 20.
[22] *Id.*

In *Hammarstrom*, the nonprofit purchased the notes once they were signed.[23] Another court found funding where a nonprofit acted as a disbursement agent, servicer and guarantor of program loans.[24]

While these cases showed a higher level of financial participation in the programs than is evident here, several courts have found either TERI's or another nonprofit's guaranty sufficient to fund a program. The Second Circuit found that TERI's guaranty in itself funded a loan program: "loans made pursuant to loan programs that are guaranteed by non-profit institutions" are nondischargeable[25] Where a nonprofit guaranteed a loan program, it played a meaningful part and funded the program.[26] The unspecified participation of two nonprofits in a loan program constituted funding of a program[27]. Finally, where a nonprofit participated in a loan program like TERI did here, and processed and submitted a lender's loan application to the lender it was found to have funded in part a loan program and so the loan nondischargeable.[28]

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[23] *Hammarstrom*, at 166.
[24] *Decker v. EduCap, Inc.,* 476 B.R. 463, 467-468 (W.D. Pa. 2012).
[25] *O'Brien v. First Marblehead Educ. Res., Inc. (In re O'Brien),* 419 F.3d 104, 107 (2d Cir. N.Y. 2005). See also *McClain v. American Student Assistance (In re McClain)*, 272 B.R. 42, 46 (Bankr. D.N.H. 2002).
[26] *Kidd v. Student Loan Xpress, Inc. (In re Kidd)*, 458 B.R. 612, 619 (Bankr. N.D. Ga.2011).
[27] *Pilcher*, at 600.
[28] *Andrews Univ. v. Merchant (In re Merchant)*, 958 F.2d 738, 740 (6th Cir. Mich. 1992).

TERI is a nonprofit institution.[29] In this case, the evidence shows that TERI guaranteed the loan program[30] and received and processed loan applications under the program.[31] The loan documentation verifies that the program purchased the guaranty and by signing the loan documents, Appellant/Debtor agreed the loan is nondischargeable in bankruptcy:

> I acknowledge that the requested loan is subject to the limitations on dischargeability in bankruptcy contained in Section 523(a)(8) of the United States Bankruptcy Code. Specifically, I understand that you have purchased a guaranty of this loan, and that this loan is guaranteed by The Education Resources Institute, Inc. ('TERI"), a non-profit institution.[32]

Appellant would reduce TERI's participation in this loan program to the role of a mail drop for Chase and argues that role was not enough to play a meaningful part in the program. While it is doubtful that TERI served only as a mailbox for Chase, by accepting all loan applications under the program, TERI spent monies for the facilities where the applications were housed and the employees who processed them. The bankruptcy court recognized this, found the administrative

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[29] Affidavit on Defendant National Collegiate Student Loan Trust 2006-1's Motion for Summary Judgment, para, 11.

[30] *Id*. See also *Law v. Educational Resources Inst. (In re Law)*, 159 B.R. 287, 289, (Bankr. S.D. Idaho 1993).

[31] Affidavit on Defendant National Collegiate Student Loan Trust 2006-1's Motion for Summary Judgment, filed Sept. 19, 2017, Exhibit p.3, and Bankruptcy Court's Memorandum Opinion and Order Granting Summary Judgment in Favor of Defendant NCSLT.

[32] Affidavit on Defendant National Collegiate Student Loan Trust 2006-1's Motion for Summary Judgment, filed Sept. 19, 2017, Exhibit p.6, para. 11.

work played a meaningful part in the program, and so found TERI funded the program.

TERI funded the loan program by guaranteeing the loan program and by processing loan applications under the program, and so the loan is nondischargeable under § 523(a)(8)(A)(i).

C. The Loan is an Educational Loan

Appellant cites a description of educational loans from a congressional record made forty years ago to argue that this loan is not an educational loan.[33] However, those comments only described federally guaranteed loans as they were then, not all student loans as they are now.[34] Moreover, this issue was not directly raised in the bankruptcy court and should not be heard.[35] Appellant's arguments in the lower court were that the loan is not the sort of loan that is nondischargeable under any of the sections of §523(a)(8), but the assertion that the loan is not an educational loan at all was not made.

Nevertheless, the loan is an educational loan on its face and by its terms. The Loan Request/Credit Agreement gives the Loan Program information as The Education One© Education One Undergraduate Loan Program; an academic

[33] Appellant's Brief, p. 20.
[34] *United States Dep't of Health & Human Services v. Smith*, 807 F.2d 122, 125 (8th Cir. 1986).
[35] *Universal Title Ins. Co. v. United States*, 942 F.2d 1311, 1314 (8th Cir. 1991).

period is listed; Saint Louis Community College is named as the school.[36] The terms and conditions defer the loan's repayment until graduation or when the student ceases to be "enrolled at least half-time in the School";[37] require the proceeds of the loan to be "used only for my educational expenses at the School";[38] the holder of the note has the right to any refund due the student from the "School" upon default;"[39] the loan states that Appellant is obligated to repay the loan even if she fails "to complete the educational program paid for with this loan;"[40] Appellant authorized the note holder to contact her school for "enrollment status"[41] and to give it a status on her loan application;[42] Appellant agreed she is responsible for repaying any funds not used for "educational expenses related to attendance at the School".[43] Finally, Appellant acknowledged it is an educational loan by agreeing that the loan is nondischargeable under §523(a)(8), which is the statute that deems most educational loans nondischargeable[44].

[36] Affidavit on Defendant National Collegiate Student Loan Trust 2006-1's Motion for Summary Judgment, filed Sept. 19, 2017, Exhibit p.1.
[37] *Id*., Exhibit p. 5, para. C.3.
[38] *Id*., Exhibit p. 6, para. L.2.
[39] *Id*., para. L.8
[40] *Id*., para. L.10
[41] *Id*., para. L.12
[42] *Id*., para. L.13
[43] *Id*., Exhibit p. 7, para. N.
[44] *Id*., Exhibit p. 6, para. L.11

There is no doubt that the purpose of the loan is educational. "[I]t is the purpose of a loan which determines whether it is "educational."[45] To the extent that Appellant argues that she did not use the loan for educational purposes, it is the purpose of a loan that decides its character, not its use.[46] The loan is clearly an educational loan.

D. The Bankruptcy Court Properly Inferred that TERI Expended Resources by Accepting Loan Applications on Behalf of the Program and so Funded the Loan Program

Appellant argues that the Bankruptcy Court failed to make an inference in Appellant's favor when it reviewed an exhibit to Appellee/Defendant's Affidavit and inferred that TERI expended resources by accepting loan applications and therefore funded the loan program.

The exhibit referred to is the instructions for final loan approval included in the loan application packet.[47] The instructions recite at the top that the loan is "conditionally approved for an Education One Loan" (the loan program).[48] In other words, all potential borrowers were conditionally approved when they reviewed the loan application packet. The instructions direct the applicant to, *inter*

[45] *Busson-Sokolik v. Milwaukee Sch. of Eng'g (In re Busson-Sokolik)*, 635 F.3d 261, 266 (7th Cir. 2011).
[46] *Murphy v. Pa. Higher Educ. Assistance Agency (In re Murphy),* 282 F.3d 868, 870 (5th Cir. 2002).
[47] Affidavit on Defendant National Collegiate Student Loan Trust 2006-1's Motion for Summary Judgment, filed Sept. 19, 2017, Exhibit p.3.
[48] *Id.*

alia, attach proof of income and school enrollment to the signed loan application and mail or overnight them to TERI. In that same section, it also states "[f]or faster loan processing you can" fax the application. It is reasonable to infer that TERI had a role in processing the loan applications. It is also reasonable to infer that TERI expended resources in processing the applications and so funded the program.

If applicants have questions, they are directed to a www.educationone.com website, which is presumably Education One's (the loan program's) website or a toll-free number. It is reasonable to infer that TERI was working closely with the Education One loan program in processing the loan applications and so funded the program. Chase Bank does not appear on the instructions page and so it is reasonable to infer that Chase had no role in processing the loan applications.

Appellant suggest two different inferences that could have been made: 1) TERI served as a post office box for Chase.[49] This is not a reasonable inference because Chase does not appear anywhere on the instructions page and the applications are to be sent to TERI, not Chase in care of TERI. It cannot be reasonably inferred that Chase engaged in processing the loans. Even if it could be believed that TERI was operating only as a mail box, it would have expended

[49] Appellant's Brief, p. 23

resources by setting up the box and handling the loan applications in some manner. 2) Chase hired TERI to review the applications and documents to determine if they sufficed to "disburse the loan", or in other words, give final approval of the loan.[50] This is not a reasonable inference because there is nothing in the instructions page or any other document to suggest that Chase hired TERI for this purpose. Even if this were so, the loans were made pursuant to a loan program, and by processing and approving loan applications, TERI would have contributed resources to the program and so funded the program.

The only inference that would have been in Appellant's favor would be to have ignored the instructions page, as Appellant suggests.[51] However, making inferences in favor of the nonmovant does not require a court to ignore evidence, even if that evidence appears to favor the movant.

The bankruptcy court made a reasonable inference that TERI, a nonprofit institution, served in a "plenary or near-plenary capacity as the sole entity to which loan documents were submitted to the Loan Program", [52] and that, by doing so, expended its resources and funded the program.

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[50] *Id.*
[51] *Id., at p. 24.*
[52] Memorandum and Opinion and Order Granting Summary Judgment in Favor of Defendant NCSLT, p. 10.

E. The History of §523(a)(8) Strongly Suggests that the Nondischargeability of Student Loans is Meant to be Broadly Construed

Congress steadily amended §523(a)(8) to render most student loans nondischargeable. Courts have recognized that Congress intended that the nondischargeability of student loans be broadly construed. "[T]he Court notes that the legislative history of the statute itself compels this Court to conclude that the types of loans and lenders covered by section 523(a)(8) is meant to be broad".[53]

The lower court properly found that this loan fits squarely within §523(a)(8)(A)(i). Case law, much of it circuit case law, amply supports a finding that by accepting and processing student loan applications, TERI played a meaningful part and so funded the Education One© loan program.[54] Even if this were not true, TERI's guaranty of the loan program in itself supports a finding of funding.[55]

Lastly, Appellant argues that the bankruptcy court "enlarged the definition of "educational loans" so that almost any loan made to a debtor while she was a student can be said to be an educational loan".[56] No explanation or discussion is

[53] *Hemar Ins. Corp. of Am. v. Cox (In re Cox),* 338 F.3d 1238, 1242-43 (11th Cir. 2003).
[54] See discussion in Parts B and D, *infra*.
[55] *O'Brien . infra.*
[56] Appellant's Brief, p. 25.

given for this assertion. The loan is clearly an educational loan.[57] The bankruptcy court properly construed §523(a)(8)(A)(i).

Respectfully submitted this 30th day of May, 2018,

MARTIN LEIGH PC

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[57] See discussion in Part C, *infra*.

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Certificate of Compliance Required by F.R.A.P. 32 (a)(7)(C)

The undersigned, counsel of record for National Collegiate Student Loan Trust, certifies that this brief complies with the type-volume limitation and contains 3,578 words.

/s/ Melinda J. Maune

Certification Required By L.R. BAP 8th Cir. 8014A(b)(1): Interested Parties

The undersigned, counsel of record for National Collegiate Student Loan Trust, certifies that the following listed party (or parties) has (have) an interest in the outcome of this appeal. These representations are made to enable the judges of the panel to evaluate possible disqualification or recusal.

None other than Richelle Page and National Collegiate Student Loan Trust

/s/ Melinda J. Maune

Certification Required By L.R. BAP 8th Cir. 8014A(b)(2): Related Cases

The undersigned, counsel of record for National Collegiate Student Loan Trust, certifies that there are no known related cases before a United States Court of Appeals, a United States District Court, a United States Bankruptcy Court, or a United States Bankruptcy Appellate Panel.

/s/ Melinda J. Maune

CERTIFICATE OF FILING

I hereby certify that on May 30, 2018, I filed the foregoing through the CM/ECF filing system.

/s/ Melinda J. Maune

CERTIFICATE OF SERVICE

The Undersigned hereby certifies that a true copy of this document was placed in the mailed on May 30, 2018, to the following party by depositing the same in the U.S. mail in a properly addressed envelope with adequate postage.

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