IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MISSOURI

In re:	§	**Case No. 10-50203-705**
	§	
Richelle Angela Page,	§	**Chapter 7**
	§	
Debtor.	§	
	§	
Richelle Angela Page,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	**Adv. Proc. No. 17-4062-705**
JP Morgan Chase Bank,	§	
	§	
Defendant,	§	**[Related to Doc. Nos. 30 & 31]**
	§	
and	§	
	§	
National Collegiate Student Loan Trust 2006-1,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER
GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT NCSLT
AND DIRECTING ADDITIONAL RELIEF

On April 18, 2017, the Plaintiff-Debtor (the "Debtor") commenced the above-referenced Adversary Proceeding by filing a Complaint to Determine Exception to Discharge (the "Complaint") [Adv. Proc. Doc. No. 2]. In her Complaint, she seeks a determination that a prepetition student loan debt (the "Loan Debt," as defined herein) is not excepted from discharge under any of the education loan discharge exceptions codified at § 523(a)(8) of title 11 of the United States Code (the "Bankruptcy Code"[1]). On August 29, 2017, Defendant National Collegiate Student Loan Trust 2006-1 ("NCSLT") filed a Motion for

[1] Hereinafter, any reference to "§[§]" or "section[s]" shall refer to the indicated section(s) of the Bankruptcy Code, unless otherwise stated.

Summary Judgment [Adv. Proc. Doc. No. 30], seeking summary judgment in its favor on the claims. On September 5, 2017, the Debtor filed her own Motion for Summary Judgment [Adv. Proc. Doc. No. 31] (each Motion for Summary Judgment, an "MSJ"), seeking summary judgment in her favor on her claims. The parties agree that there is no material fact in dispute, but disagree as to who is entitled to summary judgment based on the undisputed facts.

For reasons set forth, the Court will order summary judgment in favor of NCSLT, and will determine that the Loan Debt be excepted from discharge pursuant to § 523(a)(8)(A)(i). The Court also will order that Defendant JP Morgan Chase Bank ("Chase") be dismissed with prejudice, and that the Debtor's Motion to Strike [Adv. Proc. Doc. No. 33) the Affidavit of Bradley Luke (the "Luke Affidavit") [Adv. Proc. Doc. No. 30, attached thereto] be denied as moot.

I. PRELIMINARY MATTERS

A. Dismissal of Defendant Chase

The Debtor named two defendants in the Complaint: Chase and NCSLT. After Chase did not respond to the Complaint, the Clerk of Court entered a Clerk's Entry of Default [Adv. Proc. Doc. No. 19]. Nevertheless, the Debtor is not entitled to an Order of Default Judgment against Chase. The undisputed facts establish that NCSLT, not Chase, is the entity to which the Loan Debt is now owed. Accordingly, the Court will order that Chase be dismissed as a Defendant.

B. Denial for Mootness of the Motion to Strike the Luke Affidavit

NCSLT filed the Luke Affidavit in support of its MSJ. The Debtor filed a (limited) Motion to Strike, seeking to strike Paragraphs 11 and 12 of the Luke Affidavit. However, the Court does not rely on Paragraphs 11 and 12 of the Luke Affidavit to determine summary judgment. The Court relies on the other paragraphs of the Luke Affidavit and all other pleadings and exhibits filed by the parties in support of summary judgment. Accordingly, the Court will order that the Motion to Strike the Luke Affidavit be denied as moot.

II. FACTUAL BACKGROUND BASED ON THE UNDISPUTED FACTS

The Debtor attended St. Louis Community College as a part-time student in the spring semester of 2006. The cost for her attendance for that semester was $1,620.00. The Debtor paid that amount with grants and financial aid.

After the Debtor received notice of her financial aid award that covered her tuition costs, she received a loan "preapproval notice" from Chase. In response to Chase's offer, on January 11, 2006, the Debtor executed a "Loan Request/Credit Agreement" [Adv. Proc. Doc. No. 42 (Exhibit A)]. On Page 1 of the Loan Request/Credit Agreement, the Debtor requested a $30,000.00 loan (the "Loan") through the "Education One Undergraduate Loan" Program (the "Loan Program"). According to the Loan Request/Credit Agreement, the "Academic Period" for the Loan was January-May 2006, and the "School" to be attended was St. Louis Community College. Further, at Paragraph N of the Loan Request/Credit Agreement, the Debtor acknowledged that she would be responsible for "repaying immediately any funds that I receive which are not to be used or not used for educational expenses related to attendance at the School for the academic period stated."

Accompanying the Loan Request/Credit Agreement was a sheet captioned, "Education One Loan Agreement/Credit Agreement Instructions" (the "Instructions Sheet") [Adv. Proc. Doc. No. 42 (Exhibit A)]. The Instructions Sheet directed that the signed Loan Request/Credit Agreement and supporting documentation be submitted either by regular mail or expedited delivery to TERI ("TERI" is an acronym for "The Educational Resources Institute, Inc."), or by facsimile to an unidentified facsimile number. Although the record does not appear to reflect whether the Debtor submitted her Loan Request/Credit Agreement by regular mail, overnight delivery, or facsimile, the undisputed evidence establishes that her Loan Request/Credit Agreement was submitted.

On January 17, 2006, $30,000.00 in loan proceeds (the "Loan Proceeds") was disbursed to the Debtor. Pursuant to the Note Disclosure Statement [Adv. Proc. Doc. No. 42 (Exhibit A)], the "Principal Amount of the Note" was $33,149.17 ($30,000.00 in the amount financed and $3,149,17 in origination

fees) (the "Original Loan Debt"; the Original Loan Debt, along with accrued interest and costs, the "Loan Debt").

Despite the language in Paragraph N of the Loan Request/Credit Agreement requiring the return of any funds not used for educational expenses, the Debtor used the Loan Proceeds to pay for non-educational expenses, including house repairs, vehicle repairs, and personal sundries.

The Loan Debt was later sold to NCSLT. NCSLT now is the party owed the Loan Debt.

On September 7, 2010, the Debtor filed a petition for bankruptcy relief under chapter 7 of the Bankruptcy Code [Main Case Doc. No. 1], thereby commencing the above-referenced Main Case. On her Schedule F filed in the Main Case [Main Case Doc. No. 1], the Debtor scheduled several debts that she described as being for "student loans." The largest of these was in the amount of $33,149.17—the amount of the Original Loan Debt.[2]

On December 14, 2010, the Court entered an Order of Discharge [Main Case Doc. No. 15], discharging those debts that are dischargeable. The reverse side of the Order of Discharge provides that certain types of debts are not discharged in bankruptcy, including "[d]ebts for most student loans."

More than six years later, through a new attorney, the Debtor filed her Complaint, seeking a determination that the Loan Debt is not subject to the exception to discharge under § 523(a)(8). The MSJs were filed thereafter.

III. LAW

A. Law on Summary Judgment

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Federal Rule of Civil Procedure ("Rule") 56(c) (applicable to adversary proceeding pursuant to Federal Rule of Bankruptcy

[2] This debt was scheduled as being owed to "AES." AES is an entity that services private student loan products. Presumably, AES was servicing the Loan Debt at the time that the Debtor filed her petition for relief.

Procedure ("Bankruptcy Rule") 7056(c)); *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). The moving party has the initial burden of proving that there is no genuine issue as to any material fact. *Adickes v. S.H. Kress & Co*., 398 U.S. 144, 161 (1970). Once the movant has met this burden, the non-movant must set forth specific facts sufficient to raise a genuine issue for trial and may not rest on its pleadings or mere assertions of disputed facts. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 586-87 (1986). In determining whether a genuine issue of material fact exists, the facts must be viewed, and all reasonable inferences must be drawn, in a light most favorable to the non-movant. *Hayek v. City of St. Paul*, 488 F.3d 1049, 1054 (8th Cir. 2007); *Canada v. Union Elec. Co*., 135 F.3d 1211, 1212 (8th Cir. 1996).

B. Law on Exception to Discharge under § 523(a)(8)

Pursuant to § 727(b), the discharge operates to discharge a debtor of all debts that arose before the date of the order for relief, with limited exceptions. Section 523(a)(1-19) lists the types of debts that are excepted from discharge. Section 523(a)(8) provides that one type of debt excepted from discharge is a debt for an "educational loan." Specifically, the discharge does not discharge an individual debtor from any debt for:

> (A)
>
> (i) an educational . . . loan . . .made under any program funded in whole or in part by a . . . nonprofit institution; or
>
> (ii) an obligation to repay funds received as an educational benefit . . . ; or
>
> (B) any other educational loan that is a qualified 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)(in relevant part). Thus, there are three separate provisions under § 523(a)(8) for excepting an educational loan from discharge. If an educational loan satisfies the elements of any of the three provisions, the debt

will be determined to be excepted from discharge.[3] The Debtor asserts that the undisputed facts show that she is entitled as a matter of law to a determination that the Loan Debt is not subject to any of the three exceptions to discharge under § 523(a)(8). NCSLT asserts that the undisputed facts show that it is entitled as a matter of law to a determination that all three of the § 523(a)(8) exceptions to discharge apply to except the Loan Debt from discharge.

V. ANALYSIS

A. Summary Judgment on the Claim for a Determination of Dischargeability Under § 523(a)(8)(A)(i)

1. No genuine issue of material fact in dispute on "educational loan" element.

The Bankruptcy Code does not define "educational loan." Accordingly, the Court will employ general, well-established definitions.

The Loan is a "loan," by a general, well-established definition. Chase transferred the funds to the Debtor, not as a gift or bequest, but with the expectation of full repayment of the amount transferred along with payment of interest, on written, specific terms.

The Loan also is of an educational nature. First, on the Loan Request/Credit Agreement, the Loan is identified as an "Undergraduate Loan" made through the "Education One" Loan Program. The Loan is made for a specific "Academic Year," while the Debtor is enrolled at a specific "School." Second, at Paragraph C.3(a) of the Loan Request/Credit Agreement, the "Deferment End Date" is determined by the Debtor's graduation date or failure to be enrolled at least as a part-time student. Third, Paragraph N of the Loan Request/Credit Agreement, provides that the Debtor must repay immediately any funds not used for educational expenses. Fourth, at Paragraph 5 of the Luke Affidavit, the affiant attests that the Loan was "for educational purposes."

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[3] Section 523(a)(8) provides an "undue hardship" exception-to-the-discharge-exception. A debt for an educational loan that otherwise would be excepted from discharge will nevertheless be dischargeable if it is established that exception of the debt from discharge would impose an "undue hardship" on the debtor and the debtor's dependents. The Debtor does not seek an undue hardship finding.

The Debtor points to no alleged facts to put the "educational loan" element in dispute. To the degree that the Debtor argues that her use of the Loan Proceeds for non-educational purposes changed the educational nature of the Loan, the Court holds that such argument does not raise a genuine issue of material fact on the "educational loan" element. The loan documents establish the purpose of a loan, not the post-disbursement use of the loan proceeds. *Busson–Sokolik v. Milwaukee School of Engineering (In re Sololik)*, 635 F.3d 261, 266 (7th Cir. 2011)("[I]t is the purpose of a loan which determines whether it is 'educational.'" (citing *In re Murphy*, 282 F.3d 868 (5th Cir. 2002)); *Rizor v. Acapita Educ. Fin. Corp. (In re Rizor)*, 553 B.R. 144, 149-50 (Bankr. D. Ala. 2016)("The actual use of the loan proceeds is immaterial. Where the loan documents . . . establish they were premised on the debtor's status as a student and were for educational purposes, they qualify under § 523(a)(8)(A(i)."). This conclusion is consistent not only with persuasive case law precedent, but with equitable principles. The nature and purpose of a loan is determined at the time the loan is made. It cannot be unilaterally modified later, by one party's breach. Such an argument asks the Court to reward breach of contract and the misuse of loan proceeds.

To the degree that the Debtor argues that the Loan is not an "educational loan" because its principal significantly exceeded the amount necessary to attend a semester of community college, the Court again holds that such argument does not raise a genuine issue of material fact on the "educational loan" element. The contractual obligation to repay any funds not used for educational expenses is directly contrary to the contention that the Loan is not an educational loan. By its very terms, the Loan Proceeds could properly have been used only for educational expenses, regardless of the principal amount.

As such, there is no genuine issue of material fact in dispute as to whether the Loan was an "educational loan" for purposes of § 523(a)(8)(A)(i).

2. No genuine issue of material fact in dispute on "made" element.

The Bankruptcy Code does not define the term "made" for the purposes of § 523(a)(8)(A)(i). Therefore, the Court again applies a general, well-established

definition of "made" applicable in the context of a loan. A loan can be "made" when the loaned funds are transferred from the lender to the borrower. It uncontested that the Loan Proceeds were disbursed by Chase to the Debtor. The Debtor points to no alleged facts that would put the "made" element in dispute and does not suggest that she disputes that the Loan was "made."

As such, there is no genuine issue of material fact in dispute as to whether the Loan was "made" for purposes of § 523(a)(8)(A)(i).

3. No genuine issue of material fact in dispute on "program" element.

The Bankruptcy Code does not define the term "program" for purposes of § 523(a)(8)(A)(i). However, case law provides that a "program" is a voluntary, established practice, complete with guidelines specifying eligibility requirements. *Gakinya v. Columbia College* (*In re Gakinya)*, 364 B.R. 366, 373 (Bankr. W.D. Mo. 2007)(citing *DePasquale v. Boston Univ. Sch. of Dentistry,* 211 B.R. 439, 441 (Bankr. D. Mass.1997), *rev'd on other grounds,* 225 B.R. 830 (1st Cir. B.A.P. 1998)). The Loan Request/Credit Agreement states the Loan was made pursuant to the "Education One Undergraduate Program" and provides details of the voluntary nature of the program and its guidelines for eligibility. The Debtor points to no alleged facts that would put the "educational loan" element in dispute, and does not suggest that she disputes that the Loan was made under a "program."

As such, there is no genuine issue of material fact in dispute as to whether the Loan Program is a "program" for purposes of § 523(a)(8)(A)(i).

4. No genuine issue of material fact in dispute on "nonprofit institution" element.

At Paragraph L.11 of the Loan Request/Credit Agreement, the Debtor represents that she understands that TERI is a nonprofit institution. The Court also takes judicial notice of TERI's nonprofit status. *See also Law v. The Education Resources Institute, Inc. (In re Law)*, 159 B.R. 287, 289 (Bankr. D.S.D. 1993)(TERI is "a private, nonprofit corporation."). The Debtor points to no alleged facts that would put the "nonprofit institution" element in dispute, and does not suggest that she disputes TERI's status as a nonprofit institution. (The Debtor disputes the separate allegation that TERI funded the Loan Program, but that is not the same as disputing TERI's status as a non-profit institution.)

As such, there is no genuine issue of material fact in dispute as to whether TERI is a nonprofit institution for purposes of § 523(a)(8)(A)(i).

5. No genuine issue of material fact in dispute on "funded" element.

The Bankruptcy Code does not define the term "funded" for purposes of §523(a)(8)(A)(i). Case law, however, provides guidance.

The Court observes, as a threshold matter, that the statute requires that the nonprofit institution have "funded" the *program* by which the loan was made. *Kidd v. Student Loan Xpress, Inc.* (*In re Kidd)*, 458 B.R. 612, 620 (Bankr. N.D. Ga. 2011)(citing *In re Taratuska,* 2008 WL 4826279 (D. Mass. Aug. 25, 2008)(emphasis added)). The statute does not require that the nonprofit institution have "funded" the *loan itself*. *Id.*

The term "funded" is liberally construed. *O'Brien v. First Marblehead Education Resources, Inc. (In re O'Brien),* 299 B.R. 725, 730 (Bankr. S.D.N.Y. 2003)(citing *In re Hammarstrom,* 95 B.R. 160, 165 (Bankr. N.D. Cal. 1989)), *aff'd,* 419 F.3d 104 (2d Cir. 2005)). A program is "funded" by a nonprofit institution when the nonprofit institution plays "any meaningful part" in providing funds. *Id*. The nonprofit institution need not have actually transferred money to the program to have "funded" it. *Sears v. Educap, Inc. (In re Sears)*, 393 B.R. 678, 680–81 (Bankr. W.D. Mo. 2008)("If Congress had intended § 523(a)(8)(A) to require a nonprofit institution's actual funding of a loan—indirectly through its repurchase or by way of a guaranty—it could have simply said so; instead, it opted for the broader reference to loans made under programs funded by nonprofit institutions."); *In re Gakinya*, 364 B.R. at 374 (Bankr. W.D. Mo. 2007)(reasoning that "just as the definition of 'loan' should not require that actual money change hands, the definition of 'funded' should likewise not require that actual money be placed in some type of trust or account by the lender."). It is sufficient to show that the nonprofit institution "devot[ed] some of its financial resources to supporting the program." *O'Brien v. First Marblehead Education Resources, Inc. (In re O'Brien),* 419 F.3d 104, 106 (2d Cir. 2005). Some courts, in determining the "funded" element, "have placed more emphasis (correctly so, in this Court's opinion) on the nonprofit institution's degree of involvement in the

administrative functions of the program under which a loan is funded." *In re Sears*, 393 B.R. at 680-81.

In their briefing on the "funded" element, the Debtor and NCSLT focus on whether the undisputed facts establish that TERI guaranteed the Loan, and if so, what the legal consequence of that fact must be. However, the Court declines to determine whether it is an undisputed fact that TERI guaranteed the Loan. The Court can adjudicate summary judgment without making that determination. The undisputed facts show that TERI played a meaningful part in the Loan Program, regardless of whether it guaranteed the Loan.

The Instructions Sheet provides that, if the Loan Request/Credit Agreement is submitted by regular mail delivery or overnight delivery, it must be submitted to TERI. The Instructions Sheet does not provide for regular mail or overnight delivery to any other entity—just TERI. This establishes, as an undisputed fact, that TERI served in a plenary or near-plenary capacity as the sole entity to which loan documents were submitted to the Loan Program by regular mail or overnight delivery. And in doing so, TERI would have expended its resources on the Loan Program administration, thereby "playing any meaningful part" in the Loan Program, and partially funding the Loan Program.

Therefore, NCSLT has met its initial burden of proving that there is no genuine issue as to any material fact related to the "funded" element. In the face of this, the Debtor has not even made an allegation—much less pleaded a fact—that would raise a genuine issue of fact as to TERI's role in funding the Program by way of its plenary or near-plenary role in the loan submission process.

As such, there is no genuine issue of material fact in dispute as to whether TERI "funded" the Loan Program for purposes of § 523(a)(8)(A)(i).

B. Summary Judgment on the Claim for Determination of Dischargeability Under § 523(a)(8)(A)(ii) and on the Claim for Determination of Dischargeability Under § 523(a)(8)(B)

Because the Court has determined that there is no genuine issue of material fact on any of the elements of § 523(a)(8)(A)(i), and that NCSLT has established that it is entitled as a matter of law to summary judgment in its favor

on the claim brought under § 523(a)(8)(A)(i), the Court does not need to determine whether there is a genuine issue for trial on the elements of the other two discharge-exception provisions of § 523(a)(8). Regardless of whether summary judgment is proper on the Debtor's claims under § 523(a)(8)(A)(ii) and § 523(a)(8)(B), the Loan Debt will be excepted under § 523(a)(8)(A)(i).

VI. CONCLUSION

For these reasons, the Court **HOLDS** that:

(a) it is proper to dismiss with prejudice Chase as a defendant;

(b) it is proper to deny as moot the Motion to Strike the Luke Affidavit; and

(c) there are no genuine issues of material fact in dispute on any element of § 523(a)(8)(A)(i) and that each element has been established in favor of NCSLT's request for summary judgment;

and thus **ORDERS** that:

(i) Chase be dismissed with prejudice as a defendant;

(ii) the Motion to Strike the Luke Affidavit be denied as moot;

(iii) summary judgment on the § 523(a)(8)(A)(i) claim in favor of the NCSLT be granted;

(iv) summary judgment on the § 523(a)(8)(A)(i) claim in favor of the Debtor be denied;

(v) the Loan Debt be determined to be excepted from discharge pursuant to § 523(a)(8)(A)(i); and

(vi) summary judgment on the claims made pursuant to § 523(a)(8)(A)(i) and the § 523(a)(8)(B) be denied as moot; and

(vii) any other motion or matter that may still be pending in this Adversary Proceeding be denied as moot.

To the degree that a separate judgment is required, a separate judgment shall issue contemporaneously with this Memorandum Opinion and Order.

DATED: March 22, 2018
St. Louis, Missouri 63102
mtc

CHARLES E. RENDLEN, III
U.S. Bankruptcy Judge

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