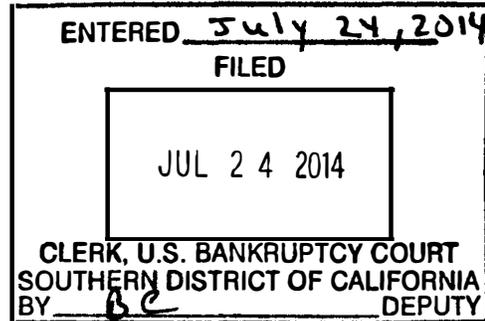


1 WRITTEN DECISION - NOT FOR PUBLICATION



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6 UNITED STATES BANKRUPTCY COURT
7 SOUTHERN DISTRICT OF CALIFORNIA

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11 In re) Case No. 11-08757-PB7
12 ZXELAN RICHARD BONN,) Adv. No. 11-90413-PB
13) ORDER ON ECMC'S MOTION
14 Debtor,) TO DISMISS
15)
16 ZXELAN RICHARD BONN,)
17 Plaintiff,)
18 v.)
19 SALLIE MAE, INC.,)
20 NATIONAL UNIVERSITY, and)
21 EDUCATIONAL CREDIT MANAGEMENT)
22 CORPORATION, et al,)
23 Defendants.)
24)
25)
26)

27 Debtor commenced this adversary proceeding under § 523(a)(8)
28 seeking to discharge his student loan debt. Educational Credit
29 Management Corporation (ECMC), the purported holder of the debt,
30 seeks dismissal on the ground that it has written-off the
31 obligation, and Debtor no longer owes ECMC any student loan debt,

1 so the complaint is moot. Because the legal impact of ECMC's
2 write-off of the debt is unclear, the Court denies the motion
3 without prejudice.

4 **BACKGROUND**

5 Debtor, Zxelan Richard Bonn (Debtor) was the obligor of a
6 consolidated loan made through the Federal Family Education Loan
7 Program (FFELP), in the original amount of \$67,698.56 which was
8 disbursed on March 15, 2002 (Consolidated Note). The
9 Consolidated was guaranteed by United Student Aid Funds (USAF).
10 Sallie Mae, Inc. (Sallie Mae) was the original servicing agent on
11 the Consolidated.

12 Debtor filed the complaint commencing this adversary
13 proceeding on August 22, 2011, and an amended complaint on
14 September 7, 2011 (Complaint). The Complaint contained several
15 causes of action including a request for discharge of his student
16 loan under Bankruptcy Code § 523(a)(8).

17 Upon the filing of the Complaint, pursuant to the Code of
18 Federal Regulations and the terms of the loan's guaranty, Sallie
19 Mae, as servicing agent, transferred all servicing of the
20 Consolidated Note to USAF, the guarantor. ECMC contends that by
21 an agreement triggered by the filing of the adversary, USAF
22 assigned all right, title and interest in the Consolidated Note
23 to ECMC.

24 ECMC filed an answer on October 19, 2011, and on December
25 12, 2011 the Court granted its motion to intervene.

26 \\

1 Title 34, Section 682.100 et. seq. of the Code of Federal
2 Regulations governs the Federal Family Education Loan programs.
3 Section 682.102 is entitled "Repaying a loan." Subsection (a)
4 provides:

5 (a) General. Generally, the borrower is obligated to
6 repay the full amount of the loan, late fees,
7 collection costs chargeable to the borrower, and any
8 interest not payable by the Secretary. The borrower's
9 obligation to repay is cancelled if the borrower dies,
10 becomes totally and permanently disabled, or has that
11 obligation discharged in bankruptcy. A parent
12 borrower's obligation to repay a PLUS loan is cancelled
13 if the student, on whose behalf the parent borrowed,
dies. The borrower's or student's obligation to repay
all or a portion of his or her loan may be cancelled if
the student is unable to complete his or her program of
study because the school closed or the borrower's or
student's eligibility to borrow was falsely certified
by the school. The obligation to repay all or a portion
of a loan may be forgiven for Stafford Loan borrowers
who enter certain areas of the teaching profession.

14 ECMC does not contend that Debtor has died, become disabled, nor
15 that his school closed or his eligibility was falsely certified.
16 The debt has not been discharged. Rather, ECMC contends that
17 they wrote the Consolidated Note off under 34 C.F.R. §
18 682.402(i). However, the Court finds neither express
19 authorization for write-off under that section, nor an
20 explanation of what happens to a loan written off from the
21 perspective of ECMC.

22 Section 682.402(i) provides:

23 (i) Guaranty agency participation in bankruptcy
24 proceedings--

25 (1) Undue hardship claims.
26 (i) In response to a petition filed prior to
October 8, 1998 with regard to any bankruptcy
proceeding by the borrower for discharge

1 under 11 U.S.C. 523(a)(8) on the grounds of
2 undue hardship, the guaranty agency must, on
3 the basis of reasonably available
4 information, determine whether the first
5 payment on the loan was due more than 7 years
6 (exclusive of any applicable suspension of
7 the repayment period) before the filing of
8 that petition and, if so, process the claim.

9 (ii) In all other cases, the guaranty agency
10 must determine whether repayment under either
11 the current repayment schedule or any
12 adjusted schedule authorized under this part
13 would impose an undue hardship on the
14 borrower and his or her dependents.

15 (iii) If the guaranty agency determines that
16 repayment would not constitute an undue
17 hardship, the guaranty agency must then
18 determine whether the expected costs of
19 opposing the discharge petition would exceed
20 one-third of the total amount owed on the
21 loan, including principal, interest, late
22 charges, and collection costs. If the
23 guaranty agency has determined that the
24 expected costs of opposing the discharge
25 petition will exceed one-third of the total
26 amount of the loan, it may, but is not
required to, engage in the activities
described in paragraph (i)(1)(iv) of this
section.

(iv) The guaranty agency must use diligence
and may assert any defense consistent with
its status under applicable law to avoid
discharge of the loan. Unless discharge would
be more effectively opposed by not taking the
following actions, the agency must-

(A) Oppose the borrower's petition for a
determination of dischargeability; and
(B) If the borrower is in default on the
loan, seek a judgment for the amount owed on
the loan.

(v) In opposing a petition for a
determination of dischargeability on the
grounds of undue hardship, a guaranty agency
may agree to discharge of a portion of the
amount owed on a loan if it reasonably
determines that the agreement is necessary in
order to obtain a judgment on the remainder
of the loan.

(2) Response by a guaranty agency to plans

1 proposed under Chapters 11, 12, and 13. The
2 guaranty agency shall take the following
3 actions when a petition for relief in
4 bankruptcy under Chapters 11, 12, or 13 is
5 filed:

(i) The agency is not required to respond to
a proposed plan that--

(A) Provides for repayment of the full
outstanding balance of the loan;

(B) Makes no provision with regard to the
loan or to general unsecured claims.

ii) In any other case, the agency shall
determine, based on a review of its own
records and documents filed by the debtor in
the bankruptcy proceeding--

(A) What part of the loan obligation will be
discharged under the plan as proposed;

(B) Whether the plan itself or the
classification of the loan under the plan
meets the requirements of 11 U.S.C. 1129,
1225, or 1325, as applicable; and

(C) Whether grounds exist under 11 U.S.C.
1112, 1208, or 1307, as applicable, to move
for conversion or dismissal of the case.

(iii) If the agency determines that grounds
exist to challenge the proposed plan, the
agency shall, as appropriate, object to the
plan or move to dismiss the case, if--

(A) The costs of litigation of these actions
are not reasonably expected to exceed one-
third of the amount of the loan to be
discharged under the plan; and

(B) With respect to an objection under 11
U.S.C. 1325, the additional amount that may
be recovered under the plan if an objection
is successful can reasonably be expected to
equal or exceed the cost of litigating the
objection.

(iv) The agency shall monitor the debtor's
performance under a confirmed plan. If the
debtor fails to make payments required under
the plan or seeks but does not demonstrate
entitlement to discharge under 11 U.S.C.
1328(b), the agency shall oppose any
requested discharge or move to dismiss the
case if the costs of litigation together with
the costs incurred for objections to the plan
are not reasonably expected to exceed one-
third of the amount of the loan to be
discharged under the plan.

1 The Court sees no express authority to write-off a student loan
2 claim under this section, and ECMC has pointed out no specific
3 authority. As the Court reads this section, a guaranty agency is
4 required to "use diligence" to "avoid a discharge of the loan"
5 unless it finds undue hardship or that the costs of opposing
6 discharge would likely exceed one-third of the total amount of
7 the loan. However, the section does not, so far as the Court can
8 determine, spell out what the guaranty agency may or must do if
9 it does find undue hardship or that the costs of opposing
10 discharge would likely exceed one-third of the total amount of
11 the loan. That is, the Court finds no express authority for the
12 voluntary write-off alleged by ECMC.

13 On the other hand, the Debtor did provide, albeit at the
14 hearing, a copy of a letter dated November 7, 1993, which
15 includes an approval by Robert W. Evans, Director of Policy and
16 Program Development of the DOE, of "the attached Standardized
17 Compromise and Write-Off Procedures for use by guaranty agencies
18 in the Federal Family Education Loan Program." Under the heading
19 "DISCRETIONARY WRITE-OFF" the attached Standardized Compromise
20 and Write-Off Procedures provides in part:

21 Write-off of a reinsured loan(s) is intended only for
22 the purpose of the guaranty agency's ceasing required
23 collection activity as described in 34 C.F.R.
24 682.410(b)(6) and (7). The write-off of the loan does
25 not relieve the debtor of the debt. Once an agency has
26 "written off" a loan(s), it will insure that the
account is permanently assigned to the U.S. Department
of Education under 34 C.F.R. 682.409 et seq.

1 Since the Debtor only provided the letter at the hearing, ECMC
2 has not had a chance to investigate and inform the Court whether
3 the Standardized Compromise applies or is even still in effect.
4 Nevertheless, as the record stands before the Court there is not
5 sufficient evidence or authority that ECMC's write-off completely
6 relieves Debtor's student loan obligation such that no action can
7 lie under § 523(a)(8).

8 ECMC as movant bears the burden of establishing that the
9 debt upon which Debtor's action is based has been extinguished.
10 Even without the doubt cast by Debtor's letter, which was not
11 properly submitted into evidence and to which, as noted, ECMC had
12 not been afforded an adequate opportunity to respond, the record
13 does not support such a finding.

14 Accordingly the motion is denied without prejudice. If ECMC
15 wishes to renew its motion, it should be prepared to provide
16 evidence and or authority that its write-off or waiver of the
17 Consolidated Note provides complete relief to the Debtor, and
18 assurances to the Court that no other entity will have rights to
19 enforce the Consolidated Note. This should also include evidence
20 that all rights under the Consolidated Note were properly
21 transferred from the original holder to the entity that purports
22 to forgive the obligation.

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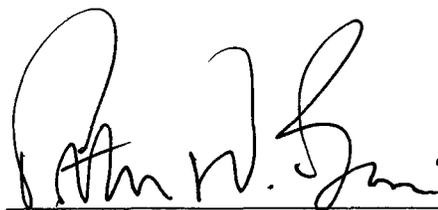
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CONCLUSION

For the reasons set forth above, ECMC's motion to dismiss is denied without prejudice.

IT IS SO ORDERED.

DATED: JUL 24 2014



PETER W. BOWIE, Judge

United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
325 West F Street, San Diego, California 92101-6991

In re Bankruptcy Case No(s): 11-08757-PB7 ZXELAN RICHARD BONN
Adversary No(s), if any: 11-90413-PB ZXELAN RICHARD BONN V. SALLIE MAE, INC., ET AL.

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

ORDER ON ECMC'S MOTION TO DISMISS

was enclosed in a sealed envelope bearing the lawful frank of the bankruptcy judges and mailed to each of the parties at their respective addresses listed below:

Zxelan Richard Bonn
475 Chestnut Ave. #C
Carlsbad, CA 92008

Timothy P. Burke
1136 Fremont Ave., Ste. 108
South Pasadena, CA 91030

Said envelope(s) containing such document was deposited by me in a regular United States Mail Box in the City of San Diego, in said District on July 24, 2014.



Lisa Cruz, Deputy Clerk