UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

In re:

KENTON SCOTT OWENS

Debtor.
_____/

CASE NO.: 18-10211-KKS
CHAPTER: 13

KENTON SCOTT OWENS

Plaintiff,
v.

EDUCATIONAL CREDIT
MANAGEMENT CORPORATION

Defendant.
_____/

ADV. NO.: 20-01002-KKS

ORDER GRANTING *EDUCATIONAL CREDIT MANAGEMENT CORPORATION'S MOTION TO DISMISS COMPLAINT AND ADVERSARY PROCEEDING, OR IN THE ALTERNATIVE TO ABATE ADVERSARY PROCEEDING* (DOC. 4)

THIS MATTER is before the Court on *Educational Credit Management Corporation's Motion to Dismiss Complaint and Adversary Proceeding, or in the Alternative to Abate Adversary Proceeding* ("Motion to Dismiss," Doc. 4) to which Plaintiff, Kenton Scott Owens, filed a

response in opposition.[1] A duly scheduled hearing on the Motion to Dismiss was held May 12, 2020, at which counsel for both parties appeared.

Having considered the pleadings, the record, argument of counsel and applicable law, as announced at the conclusion of the hearing Defendant's Motion to Dismiss is due to be granted and Plaintiff's Complaint dismissed, without prejudice, for the reasons set forth below.

PROCEDURAL HISTORY

Plaintiff filed a Chapter 7 petition on August 9, 2018 and voluntarily converted to Chapter 13 in December 2019.[2] In February 2020, Plaintiff filed this adversary proceeding seeking a determination that his student loan debt is dischargeable due to undue hardship under 11 U.S.C. § 523(a)(8).[3] By agreement, Educational Credit Management Corporation ("ECMC") was substituted as Defendant.[4]

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[1] *Response to Educational Credit Management Corporation's Motion to Dismiss Complaint and Adversary Proceeding, or in the Alternative to Abate Adversary Proceeding (Doc. 4)*, Doc. 10.
[2] *In re Owens*, Case No.: 18-10211-KKS (Bankr. N.D. Fla), Docs. 1, 75.
[3] Doc. 1.
[4] *Agreed Order Granting Educational Credit Management Corporation's Agreed Motion to be Substituted as Party Defendant [D.E. 9]*, Doc. 11.

FACTUAL BACKGROUND

Between 2006 and 2008, Plaintiff incurred student loans ("Loans") in the aggregate principal amount of $225,480.43.[5] Plaintiff seeks a hardship discharge on the grounds that he has and will continue to have insufficient disposable income to cover even the interest on the Loans.[6] Plaintiff has not yet confirmed a Chapter 13 Plan. His third amended plan, filed May 12, 2020, contemplates a payment term of 84 months.[7]

Defendant ECMC seeks the dismissal, or alternatively abatement, of this adversary proceeding on the grounds that (1) it is not ripe for adjudication, and (2) Plaintiff has not set forth a cognizable basis for a hardship discharge of his student loans. Because the Court agrees that this action is not ripe for determination, ECMC's Motion to Dismiss is due to be granted, without prejudice to Plaintiff filing another adversary proceeding at some point in the future.

DISCUSSION

A motion to dismiss based on ripeness constitutes a challenge to the Court's subject matter jurisdiction pursuant to Fed R. Civ. P. 12(b)(1),

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[5] Doc. 1-1, Exhibit A.
[6] Doc. 1, pp. 3-4.
[7] *In re Owens*, Case No.: 18-10211-KKS, Doc. 126, *Chapter 13 Plan, Third Amended*.

made applicable by Fed. R. Bankr. P. 7012.[8] Ripeness arises from two limitations on a federal court's jurisdiction: constitutional and prudential. Constitutional ripeness derives from Article III, which limits "the power of the federal courts to 'cases' and 'controversies.'"[9] Even if constitutional ripeness is met, prudential concerns dictate that courts should "avoid wasting scarce judicial resources in attempts to resolve speculative or indeterminate factual issues."[10]

Prudential ripeness is subject to a two-part test developed by the Supreme Court: "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration."[11] The determination as to whether a case is prudentially ripe for judicial decision is made on a case-by-case basis, depending on the factual and

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[8] Fed. R. Bankr. P. 7012; *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010) (*citing St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir.1989)).

[9] U.S. Const. art III, § 2, cl. 1; *Club Madonna, Inc. v. City of Miami Beach*, 924 F.3d 1370, 1379 (11th Cir. 2019).

[10] *In re Bender*, 368 F.3d 846, 848 (8th Cir. 2004). *In re Brantley*, No. 15-81516-WRS, 2016 WL 3003429, at *2 (Bankr. M.D. Ala. May 17, 2016).

[11] *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977). *See, also. Club Madonna, Inc. v. City of Miami Beach*, 924 F.3d 1370, 1380 (11th Cir. 2019); *Nat'l Advert. Co. v. City of Miami*, 402 F.3d 1335, 1339 (11th Cir. 2005) (*citing Cheffer v. Reno*, 55 F.3d 1517, 1524 (11th Cir. 1995)); *I.A. Durbin, Inc. v. Jefferson Nat. Bank,* 793 F.2d 1541,1548 (11th Cir. 1986) (*quoting Thomazs v. Union Carbide Agr. Products Co.,* 473 U.S. 568, 581 (1985)).

legal characteristics of the dispute.[12] The Supreme Court has declined to decide the continuing vitality of the prudential ripeness doctrine.[13] Barring a Supreme Court decision abrogating that doctrine, it remains proper to consider dismissal based on prudential ripeness in appropriate cases.[14]

Prudential ripeness of undue hardship under 11 U.S.C. § 523(a)(8) in Chapter 13.

As it relates to § 523(a)(8), prudential ripeness dictates when bankruptcy courts should determine whether student loan debts "would impose an undue hardship on the debtor and the debtor's dependents."[15] The ripeness analysis of undue hardship in Chapter 13 cases is fundamentally different than in Chapter 7. In Chapter 7, the issue of undue hardship is ripe for consideration at any time because Chapter 7 cases are commonly short-lived and Chapter 7 debtors are entitled to a

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[12] *See Progressive Mountain Ins. Co. v. Middlebrooks*, No. 19-11439, 2020 WL 897590, at *2 (11th Cir. Feb. 25, 2020) (*quoting United States Fire Ins. Co. v. Caulkins Indiantown Citrus Co.*, 931 F.2d 744, 747 (11th Cir. 1991)); *Am. Petroleum Inst. v. E.P.A.*, 683 F.3d 382, 387 (D.C. Cir. 2012).

[13] *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167-68 (2014) (prudential ripeness doctrine is "in some tension with our recent reaffirmation of the principle that 'a federal court's obligation to hear and decide' cases within its jurisdiction 'is virtually unflagging.'") (*quoting Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014)).

[14] *See, e.g., In re Brantley*, No. 15-81516-WRS, 2016 WL 3003429, at *2 (Bankr. M.D. Ala. May 17, 2016); *Conference of State Bank Supervisors v. Office of Comptroller of Currency*, 313 F. Supp. 3d 285, 300 (D.D.C. 2018).

[15] 11 U.S.C. § 523(a)(8) (2020).

discharge shortly after filing the petition.[16] Conversely, Chapter 13 debtors are not entitled to a discharge unless and until they complete payments under a repayment plan that may last between three (3) and (7) seven years.[17] Further, Chapter 13 debtors, unlike those in Chapter 7, have the absolute right to dismiss their cases at any time.[18] If a Chapter 13 case is dismissed before a debtor finishes making plan payments, the debtor does not receive a discharge.[19] Because of long plan payment terms and the uncertainty of obtaining a discharge, numerous courts, including those in the Fifth and Eighth Circuits, have held that a Chapter 13 debtor's action to determine the dischargeability of student loans is not ripe for adjudication until plan payments are at or near completion.[20]

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[16] Generally, excluding cases that are dismissed or converted, individual debtors receive a discharge in more than 99 percent of chapter 7 cases. *Chapter 7 – Bankruptcy Basics*, U.S. Courts, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics (last visited May 28, 2020). In most cases, unless a party in interest files a complaint objecting to the discharge or a motion to extend the time to object, the bankruptcy court will issue a discharge order relatively early in the case – generally, 60 to 90 days after the date first set for the meeting of creditors. *Id. See also* Fed. R. Bankr. P. 4004(c).

[17] 11 U.S.C. § 1328(a) (2020) (permits 36 to 60 month plans); Coronavirus Aid, Relief, and Economic Stability Act, H.R. 748-30, 116th Cong. § 1113(b)(1)(C) (2020) (permits payment terms of up to seven (7) years in Chapter 13 cases with plans confirmed prior to March 27, 2020).

[18] 11 U.S.C. § 1307(b) (2020).

[19] *See* 11 U.S.C. § 1328(a), (b) (2020).

[20] *In re Bender*, 368 F.3d 846, 848 (8th Cir. 2004) ("the factual question is whether there is undue hardship at the time of discharge, not whether there is undue hardship at the time that a § 523(a)(8) proceeding is commenced. … Deferring a decision until the case is ripe will allow a court to make its undue hardship determination on the basis of real rather than

In the instant action Plaintiff, a Chapter 13 debtor, asks this Court to determine that his Loans are dischargeable based on undue hardship before he has confirmed, much less substantially consummated, a Chapter 13 plan. Considering pending objections, whether Plaintiff will be able to confirm a Chapter 13 plan remains to be seen.[21] Even if Plaintiff confirms a plan, it may be seven (7) or more years before he will be eligible to receive a discharge. Until Plaintiff completes most, if not all, payments under a confirmed plan, a ruling by this Court that Plaintiff is entitled to discharge his Loans will be, essentially, an advisory opinion.[22]

In opposition to the Motion to Dismiss, Plaintiff urges the Court to adopt the position of the Ninth Circuit in *In re Coleman.* [23] There, the court held that a § 523(a)(8) action was ripe for consideration one year into a Chapter 13 debtor's five-year plan.[24] Acknowledging a split among

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speculative circumstances."); *In re Rubarts,* 896 F.2d 107, 109 (5th Cir. 1990) (undue hardship determination is not ripe until plan completion because discharge is not available until plan completion.); *In re Walton*, 340 B.R. 892, 893 (Bankr. S.D. Ind. 2006) (providing summary of applicable caselaw); *In re Raisor*, 180 B.R. 163, 167 (Bankr. E.D. Tex. 1995); *In re Pair*, 269 B.R. 719, 721 (Bankr. N.D. Ala. 2001); *In re Vines*, No. 16-41808-PWB, 2017 WL 213806, at *2 (Bankr. N.D. Ga. Jan. 18, 2017).

[21] *In re Owens*, Case No.: 18-10211-KKS Docs. 138, 115.

[22] *Walton*, 340 B.R. at 894–95.

[23] *In re Coleman*, 560 F.3d 1000 (9th Cir. 2009).

[24] *Id.* at 1003, 1012.

the Circuits, the Ninth Circuit articulated three reasons for its ruling. First, it noted that Federal Rule of Bankruptcy Procedure 4007(b) permits a complaint to determine dischargeability of student loan debt to be filed "at any time."[25] Second, the court opined that the undue hardship analysis under § 523(a)(8) necessarily entails a projection of a debtor's finances "years into the future."[26] Third, it reasoned that postponing a decision on dischargeability of student loans could be a hardship on a debtor who could not afford to pay an attorney to litigate undue hardship in a Chapter 7.[27]

The Court declines Plaintiff's invitation to follow the Ninth Circuit, especially under the facts here.

Undue hardship is not presently ripe for judicial determination.

To demonstrate undue hardship in the Eleventh Circuit, Plaintiff must satisfy the test set forth in *Brunner v. New York State Higher Education Services Corp.*[28] The first prong of the *Brunner* test is met if the debtor can prove that he or she "cannot maintain . . . a 'minimal'

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[25] *Id.* at 1004, 1010.
[26] *Id.* at 1009.
[27] *Id.* at 1010 (because "the debtor apparently cannot finance the undue hardship litigation upfront, she would have to proceed with the undue hardship litigation pro se, if at all.").
[28] *In re Cox*, 338 F.3d 1238, 1242 (11th Cir. 2003); *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987); *see also In re Acosta-Conniff*, 686 F. App'x 647, 648 (11th Cir. 2017).

standard of living . . . if forced to repay the loans."[29] The second prong of the *Brunner* test requires courts to assess whether the debtor's financial "state of affairs is likely to persist for a significant portion of the repayment period."[30] Under both prongs, a debtor's current financial condition is relevant only as a basis from which to extrapolate the debtor's post-bankruptcy financial condition; if that condition won't materialize for more than three (3)—or in this case seven (7)—years, the factual issues are too indeterminate for adjudication and could render a ruling this early in the case premature and erroneous.[31]

The early dischargeability determination sought by Plaintiff implicates confounding procedural issues. As highlighted by the bankruptcy court in *In re Murray*:

> [I]f the Court were to find the absence of an undue hardship at a hearing held three to four years before discharge, would the debtor, if his or her circumstances changed, be entitled to another hearing on the same issue after completing all plan payments? On the other hand, if undue hardship were found but the debtor's circumstances changed before discharge, would the creditor be entitled to challenge the prior ruling?[32]

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[29] *Brunner*, 831 F.2d at 396.
[30] *Id.*
[31] *See In re Ekenasi*, 325 F.3d 541, 547 (4th Cir. 2003); *In re Brantley*, No. 15-81516-WRS, 2016 WL 3003429, at *2 (Bankr. M.D. Ala. May 17, 2016).
[32] *In re Murray*, No. 14-22253, 2015 WL 3929582, at *4 (Bankr. D. Kan. June 24, 2015).

Judicial efficiency also militates against an early ruling. As noted in *Brantley,* given the strong possibility that a Chapter 13 case will be dismissed long before discharge can occur, a determination of undue hardship early in the case would likely be rendered unnecessary and irrelevant.[33] That observation is particularly true in this district, where in 2018 sixty-two (62%) percent of the nonbusiness Chapter 13 cases were dismissed without discharge.[34] "It makes little sense to 'wast[e] scarce judicial resources in attempts to resolve speculative or indeterminate factual issues.'"[35]

At the hearing, Plaintiff cited *In re Hoffer* in support of his request for an immediate ruling.[36] That case is distinguishable. In *Hoffer*, the court determined that dischargeability under § 523(a)(8) was ripe for determination where the debtor filed the adversary proceeding only

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[33] *Brantley*, 2016 WL 3929582 at *3.

[34] *U.S. Bankruptcy Courts – Nonbusiness Bankruptcy Cases of Individual Debtors Terminated under Chapter 13 by Dismissal or Plan Completion During the 12-Month period Ending December 31, 2018, as Required by 28 U.S.C. 159(c)*, BAPCPA Report 2018, Table 6, https://www.uscourts.gov/sites/default/files/data_tables/bapcpa_6_1231.2018.pdf. (last visited May 27, 2020).

[35] *Brantley*, 2016 WL 3929582 at *3 (*quoting Bender v. Educ. Credit Mgmt. Corp.*, 368 F.3d 846, 848 (8th Cir. 2004)).

[36] *In re Hoffer*, 383 B.R. 78 (Bankr. S.D. Ohio 2008).

sixteen (16) months before completing payments under a confirmed 48-month plan.[37]

Delaying a resolution should not significantly prejudice Plaintiff.

Plaintiff urges this Court to exercise its "virtually unflagging" duty to hear this case now.[38] But Plaintiff fails to articulate any prejudice if the Court forgoes ruling until a more appropriate future time.[39] To paraphrase *Brantley*, while Plaintiff may want to know whether his proposed Chapter 13 payments will achieve a discharge of his Loans, this Court and Defendant, ECMC, have an equally compelling interest in avoiding potentially unnecessary litigation.[40]

CONCLUSION

Bankruptcy Rule 4007(b) permits a party to file a § 523(a)(8) adversary proceeding at any time but does not determine when a proceeding is ripe for adjudication. Rather, ripeness depends on whether 1) the relevant facts are sufficiently developed and 2) a ruling will produce a sufficiently definite result. The relevant facts before the Court

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[37] *Id.* at 83.
[38] Obviously referring to *Susan B. Anthony List v. Driehaus*, 573 U.S. at 167.
[39] When assessing prejudice, courts consider the "costs to the complaining party of delaying review until conditions for deciding the controversy are ideal." *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1258 (11th Cir. 2010) (*citing Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 535 (1st Cir.1995)).
[40] *Brantley*, 2016 WL 3003429, at *4.

are underdeveloped and the outcome of Plaintiff's Chapter 13 case is too uncertain. This adversary proceeding to determine dischargeability of Plaintiff's Loans is not ripe for determination.

For the reasons stated, it is

ORDERED:

1. Educational Credit Management Corporation's Motion to Dismiss (Doc. 4) is GRANTED; its request in that Motion to abate is DENIED.
2. This a*dversary proceeding* is DISMISSED, without prejudice to Plaintiff's right to refile a similar action no sooner than one year before Plaintiff completes payments under a confirmed Chapter 13 plan.
3. Defendant's right to raise prudential ripeness in defense of a future § 523(a)(8) action by Plaintiff is equally preserved.

DONE AND ORDERED on May 28. 2020.

KAREN K. SPECIE
Chief U. S. Bankruptcy Judge

Attorney for Educational Credit Management Corporation is directed to serve a copy of this Order on interested parties and to file a Proof of Service within three (3) days of this Order.