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UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MICHIGAN
GRAND RAPIDS DIVISION

IN RE:	.	Case No. 07-02212-jtg
	.	Chapter 7
RYAN GOODACRE,	.	
	.	One Division Avenue North
Debtor.	.	Grand Rapids, MI 49503
	.	
	.	November 8, 2017
.	
	.	
RYAN LANCASTER, formerly	.	Case No. 16-80315-jtg
known as RYAN GOODACRE,	.	Adversary Proceeding
	.	
Plaintiff,	.	
	.	
vs.	.	
	.	
EDUCATIONAL FINANCIAL	.	
SERVICES, a division of	.	
WELLS FARGO BANK, N.A.,	.	
	.	
Defendant.	.	
	.	
.	

**TRANSCRIPT OF TELEPHONIC BENCH OPINION
BEFORE THE HONORABLE JOHN T. GREGG
UNITED STATES BANKRUPTCY JUDGE**

APPEARANCES:

For the Plaintiff:	Smith Law Group
	By: Austin C. Smith
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	New York, NY 10017
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For Educational Financial	Miller Canfield Paddock &
Services, a division of	Stone, PLC
Wells Fargo Bank, N.A.:	By: Ronald A. Spinner
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	(313) 496-7829

1 Appearances continued:

2 For Educational Financial
3 Services, a division of
4 Wells Fargo Bank, N.A.:

Miller Canfield Paddock &
Stone, PLC
By: Emily C. Palacios
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(734) 668-7784

6 Also Present:

Crystal Lee
Ryan Lancaster

7
8 Court Recorder:

Clerk's Office
U.S. Bankruptcy Court
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10 Transcription Service:

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13 Proceedings recorded by electronic sound recording;
14 transcript produced by transcription service.

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1 (Time Not Noted)

2 THE COURT: Good morning. This is a telephonic
3 bench opinion in the case of Lancaster versus Educational
4 Financial Services, adversary proceeding number 16-80315.

5 A transcript will be available upon request to the
6 Clerk's Office.

7 Could I have the appearances, please?

8 MR. SPINNER: Yes, Your Honor. Ron Spinner from
9 Miller Canfield, for Educational Financial Services, a
10 division of Wells Fargo Bank.

11 MS. PALACIOS: Yes, Your Honor. Emily Palacios,
12 also appearing on behalf of Educational Financial Services, a
13 division of Wells Fargo Bank, N.A.

14 Also, Your Honor, so you may be aware, we have a
15 representative of Wells Fargo Bank on the line this morning,
16 as well. It's Crystal Lee.

17 THE COURT: Okay, thank you.

18 MR. SMITH: Your Honor, Austin Smith for the
19 Plaintiff-Debtor, Ryan Lancaster, formerly known as Ryan
20 Goodacre.

21 MR. LANCASTER: And Ryan Lancaster. I'm here.

22 THE COURT: Okay, thank you. Before the Court is
23 a motion to dismiss the second amended complaint.

24 In the motion, the Defendant, Educational
25 Financial Services, a division of Wells Fargo Bank, National

1 Association, first contends that the complaint must be
2 dismissed under Federal Rule of Civil Procedure 12(b)(1),
3 because this Court lacks subject matter jurisdiction.

4 Second, even if the Court had subject matter
5 jurisdiction, the Defendant argues that the Plaintiff, Ryan
6 Lancaster, has failed to state a claim upon which relief can
7 be granted under Federal Rule of Civil Procedure 12(b)(6).

8 The facts presented in the second amended
9 complaint are fairly straightforward.

10 The Plaintiff borrowed \$10,500.00 from the Federal
11 government on May 17, 2004, to assist him with his education
12 at an on-line university.

13 Later that year, the Plaintiff borrowed \$15,000.00
14 from Wells Fargo in the form of two private non-certified,
15 non-qualified, credit-based, direct-to-consumer loans.

16 The second amended complaint further states that
17 the loans from Wells Fargo had nothing to do with his
18 education at the on-line university, or anywhere else, for
19 that matter.

20 In March of 2007, the Plaintiff filed a Petition
21 for relief under Chapter 7 of the Bankruptcy Code in this
22 Court.

23 On Schedule F, the Plaintiff identified the
24 Defendant as having a general unsecured claim in the amount
25 of \$9,892.00.

1 Schedule F further described the debt he owed to
2 the Defendant as a student loan, and "indicated that he was
3 indebted to Wells Fargo for educational loans."

4 The Defendant's claim was never liquidated or
5 otherwise adjudicated in the Plaintiff's bankruptcy, which
6 was a no-asset case.

7 Likewise, neither the Plaintiff nor the Defendant
8 commenced an adversary proceeding seeking a determination as
9 to the dischargeability of the debt under Section 523(a)(8)
10 during the pendency of the Plaintiff's bankruptcy case, or at
11 any other time, for that matter, until the commencement of
12 this adversary proceeding.

13 Less than a year after filing his bankruptcy
14 Petition, the Plaintiff received a discharge of his debts.

15 The order granting the Plaintiff a discharge
16 states that the Plaintiff is granted a discharge under
17 Section 727 of the Bankruptcy Code. The discharge order
18 includes a rider entitled "explanation of bankruptcy
19 discharge in a Chapter 7 case."

20 Under a sub-heading entitled "debts that are not
21 discharged," the rider generally explains that "some of the
22 common types of debts which are not discharged" are "debts
23 for most student loans."

24 The discharge order makes no mention of the
25 specific debt owed to the Defendant, however.

1 In 2007, and after the entry of the discharge
2 order, the Defendant commenced a civil action against the
3 Plaintiff in Michigan State Court to collect the debt related
4 to the two loans.

5 According to the second amended complaint, the
6 State Court complaint made no mention of the Plaintiff's
7 previous bankruptcy or resulting discharge.

8 Neither the State Court complaint, nor any other
9 pre-judgment pleadings, are attached to the second amended
10 complaint in this adversary proceeding.

11 The second amended complaint states that "Wells
12 Fargo forced the Plaintiff into a consent judgment on October
13 23, 2008."

14 Moreover, the second amended complaint states that
15 "after inducing the Plaintiff into the consent judgment,
16 Wells Fargo then proceeded to collect on this discharged debt
17 in monthly installments of \$150.00 for the next seven years."

18 In 2015, the Plaintiff "was forced to borrow
19 \$8,000.00 to repay the consent judgment in full."

20 The Plaintiff alleges that because he is still
21 repaying this new debt today, he is "continuing to suffer
22 injury-in-fact resulting from Wells Fargo's actions."

23 The Plaintiff further alleges that he has suffered
24 harm from the illegal collection efforts of the Defendant.

25 On November 16, 2016, and after the Court re-

1 opened the underlying bankruptcy case, the Plaintiff
2 commenced this adversary proceeding against the Defendant and
3 Thomas Alward, the latter of whom has been voluntarily
4 dismissed.

5 The Court subsequently granted the Defendant's
6 motion to dismiss the first amended complaint on April 18,
7 2017, because the Plaintiff had failed to state a claim upon
8 which relief could be granted.

9 However, the Court granted the Plaintiff leave to
10 file an amended complaint.

11 In his second amended complaint, the Plaintiff
12 asserts two claims for declaratory judgment under one count.

13 First, at paragraph 64, the Plaintiff requests a
14 "declaratory judgment that the loans from Wells Fargo were
15 discharged by operation of law on November 29, 2007, because
16 the loans were not a student debt protected by any sub-
17 section of Section 523(a)(8)."

18 Alternatively, the Plaintiff requests "a
19 declaratory judgment that the loans are dischargeable because
20 they are not protected by any sub-section of Section
21 523(a)(8)."

22 In lieu of an answer to the second amended
23 complaint, the Defendant filed its motion to dismiss, and
24 brief in support thereof.

25 The Defendant advances five arguments in its

1 motion:

2 First, the *Rooker-Feldman* doctrine deprives this
3 Court of jurisdiction.

4 Second, the adversary proceeding is moot because
5 there is no debt.

6 Third, the doctrine of *res judicata*, or claim
7 preclusion, bars any litigation as to the dischargeability of
8 the debt under Section 523(a)(8).

9 Fourth, the doctrine of laches bars further
10 pursuit of the claims.

11 Fifth, the second amended complaint fails to plead
12 a claim for which relief can be granted with respect to one
13 of the two loans from Wells Fargo.

14 In his response, the Plaintiff, of course,
15 disagrees with the Defendant's position on all issues, other
16 than perhaps the failure to state a claim regarding the first
17 loan. The Plaintiff's response is silent in this regard.

18 The Defendant filed a reply brief, and thereafter
19 the Court held a hearing on the motion.

20 After carefully considering the parties'
21 arguments, the Court shall deny the motion to dismiss.

22 The Court shall first address the jurisdictional
23 issues.

24 Article III of the Constitution limits Federal
25 Court jurisdiction to actual cases and controversies. See

1 *Chafin v. Chafin*, 133 S. Ct. 1017, at page 1023.

2 To invoke the jurisdiction of a Federal Court, a
3 litigant must have suffered or been threatened with an actual
4 injury traceable to the defendant, and likely to be redressed
5 by a favorable judicial decision. See *Lewis v. Continental*
6 *Bank Corporation*, 494 U.S. Rptr. 472, at page 477, a decision
7 from the United States Supreme Court in 1990.

8 The case for controversy must exist through all
9 stages of the case, from the filing of the complaint in the
10 first instance, through final adjudication, and ultimately
11 through any review by an appellate tribunal.

12 Upon review of the allegations in the second
13 amended complaint, the Court concludes that this adversary
14 proceeding is not moot. Although the debt has been
15 satisfied, the Plaintiff seeks a declaration that the
16 Defendant's actions were taken in violation of the discharge
17 injunction pursuant to Section 524(a), and that Section
18 523(a)(8) affords no relief to the Defendant.

19 The State Court determined that the Plaintiff is
20 liable to the Defendant for the repayment of the loans. In
21 the second amended complaint, the Plaintiff argued that it
22 suffered an actual injury because the Defendant violated the
23 discharge, the scope of which has yet to be determined by
24 this Court or the State Court.

25 Simply put, if this Court finds that the discharge

1 has been violated because the loans were not student loans
2 under Section 523(a)(8), the Defendant will have been injured
3 by being forced to satisfy the State Court judgment
4 notwithstanding the discharged nature of the debt.

5 The Court, therefore, concludes that the adversary
6 proceeding is not moot at this time.

7 The Defendant also argues that the *Rooker-Feldman*
8 doctrine precludes this Court from exercising subject matter
9 jurisdiction.

10 As the Sixth Circuit Bankruptcy Appellate Panel
11 recently observed, the *Rooker-Feldman* doctrine frequently
12 raises thorny issues, particularly where the discharge
13 injunction is invoked. See, *In Re Isaacs*, 569 B.R. 135, at
14 page 142, a decision from the Bankruptcy Appellate Panel for
15 the Sixth Circuit in 2017.

16 The *Rooker-Feldman* doctrine is derived from two
17 decisions from the United States Supreme Court: *Rooker v.*
18 *Fidelity Trust Company*, 263 U.S. Rptr. 413, a decision in
19 1923; and *District of Columbia Court of Appeals v. Feldman*,
20 460 U.S. 462, a decision from the Supreme Court in 1983.

21 The doctrine involves a situation where the losing
22 party in State Court files a suit in Federal Court, after the
23 State Court proceedings have ended, complaining of an injury
24 caused by the State Court judgment, and seeking review in
25 rejection of that judgment. See, *ExxonMobil Corporation v.*

1 *Saudi Basic Industries Corporation*, 544 U.S. 280, at page
2 291, a decision from the United States Supreme Court in 2005.

3 In other words, it prohibits cases brought by
4 State Court losers complaining of injuries caused by State
5 Court judgments. See, *In Re Hamilton*, 540 F. 3d 367, at page
6 372, a decision from the Sixth Circuit Court of Appeals in
7 2008.

8 In a case favorably cited by *Isaccs*, the Seventh
9 Circuit Court of Appeals explained that: "The *Rooker-Feldman*
10 doctrine asks: Is the federal plaintiff seeking to set aside
11 a state court judgment, or does he present some independent
12 claim, albeit one that denies a legal conclusion that a state
13 court has reached in a case to which he was a party? If the
14 former, then the district court lacks jurisdiction; if the
15 latter, then there is jurisdiction and state law determines
16 whether the defendant prevails under principles of
17 preclusion." That's a cite to *Gash Associates v. The Village*
18 *of Rosemont, Illinois*, 995 F. 2d 726, at page 728, a decision
19 from the Seventh Circuit Court of Appeals in 1993.

20 The parties in this adversary proceeding devote
21 significant portions of their briefs to the *Rooker-Feldman*
22 doctrine, focusing, in large part, on the Sixth Circuit's
23 decision in *Hamilton*.

24 In *Hamilton*, after the debtor filed for
25 bankruptcy, the Bankruptcy Court held that the debtor's debt

1 to his ex-wife was dischargeable, and thus subject to the
2 discharge order.

3 Later, the ex-wife filed a third party complaint
4 against the debtor for indemnification relating to a debt
5 upon which they had been jointly liable.

6 For whatever reason, the debtor did not raise his
7 discharge in bankruptcy as an affirmative defense.

8 After the State Court entered a judgment against
9 the debtor, the debtor commenced an adversary proceeding in
10 the Bankruptcy Court to enjoin any collection attempts by his
11 ex-wife.

12 The Sixth Circuit held that although state courts
13 have jurisdiction to construe or interpret a discharge order,
14 they do not have jurisdiction to modify a discharge order by
15 construing it incorrectly.

16 According to the Sixth Circuit, the State Court
17 judgment improperly modified the discharge order, because it
18 awarded money damages on a pre-petition debt, even though the
19 discharge order had clearly extinguished the debtor's
20 personal liability for such debt.

21 In the instant matter, the Plaintiff argues that
22 the State Court impermissibly modified the discharge
23 injunction entered by this Court, because the loans from the
24 Defendant were not student loans.

25 As such, the Plaintiff asserts the debts of the

1 Plaintiff to the Defendant were discharged.

2 Defendant contends that the Plaintiff's failure to
3 raise Section 523(a)(8) and the discharge injunction in the
4 State Court resulted in an implicit determination by the
5 State Court that the debt was non-dischargeable.

6 The Defendant, therefore, posits that the State
7 Court did not modify the discharge order. Instead, the State
8 Court implicitly construed the discharge order.

9 It is important to keep in mind what the discharge
10 order does and does not say. It provides that certain debts
11 could be non-dischargeable, but makes no specific declaration
12 regarding any one debt in particular.

13 And because Section 523(a)(8) is self-executing, a
14 student loan debt is non-dischargeable absent a
15 determination.

16 However, the self-executing nature of Section
17 523(a)(8) is premised on the debt actually being one for a
18 student loan, a determination that was not previously made by
19 this Court or the State Court which had concurrent
20 jurisdiction to do so.

21 And although the Plaintiff's Schedules seemed to
22 indicate that the Plaintiff believed the loans were for
23 scholastic pursuits, the Schedules are matters of fact, not
24 law.

25 While the first amended complaint failed to state

1 a claim, the second amended complaint does not suffer from
2 the same defects.

3 It is clear that the primary issue is whether the
4 two loans are student loans for purposes of Section
5 523(a)(8).

6 In the State Court action, neither party requested
7 that the State Court affirmatively decide whether the debt
8 was subject to the discharge, including whether the debt was
9 even a student loan debt excepted from discharged under
10 Section 523(a)(8).

11 As a result, the State Court never considered the
12 issue.

13 According to *Hamilton*, if the State Court had made
14 such a determination, and assuming that the determination did
15 not conflict with the discharge injunction entered by this
16 Court in 2007, the *Rooker-Feldman* doctrine would apply to bar
17 the Court from considering whether the debt was subject to
18 discharge.

19 But that is not the case here. As previously
20 noted, when a State Court construes a discharge, the State
21 Court must do so correctly.

22 Here, the State Court did not construe the
23 discharge correctly, nor did it construe the discharge
24 incorrectly. Instead, it simply made no determination on the
25 claim of non-dischargeability or the affirmative defense of

1 the discharge under Section 524(a).

2 Because the issue has yet to be decided, this
3 Court is now tasked with determining whether the debt was
4 subject to the discharge, or was otherwise non-dischargeable.

5 *Hamilton* and the decisions cited therein recognize
6 as much. *Hamilton* places great emphasis on the inability of
7 a debtor to waive the discharge.

8 In the event that this Court concluded that the
9 *Rooker-Feldman* doctrine applies, such a decision would be
10 tantamount to endorsing a waiver of the discharge. By doing
11 so, creditors like the Defendant would be incentivized to
12 commence suit in State Court to circumvent *Hamilton's*
13 holding.

14 *Hamilton* relies in part on, and the Defendant
15 cites favorably to, a decision from the Bankruptcy Appellate
16 Panel for the Ninth Circuit. See *In Re Pavelich*, 229 B.R.
17 777, again a decision from the Ninth Circuit Bankruptcy
18 Appellate Panel in 1999.

19 In *Pavelich*, the Court explained the concept of
20 construing the discharge only to the extent that it is
21 construed correctly.

22 As noted by the Defendant in its brief, *Pavelich*
23 held: "*Rooker-Feldman* applies to exceptions to discharge
24 that are determined by state courts that have concurrent
25 jurisdiction over the specific non-dischargeability issue."

1 The key is that the exception to discharge must be
2 determined, which, as previously noted, was not in this
3 adversary proceeding.

4 The Defendant improperly attempts to stretch
5 *Pavelich's* pronouncements regarding concurrent jurisdiction
6 to situations where the State Court has not determined, but
7 is instead silent on, whether a specific debt was discharged.

8 According to the Defendant, silence on the issue
9 is tantamount to an implicit determination that the debt is
10 non-dischargeable.

11 The Court disagrees.

12 It is clear from *Pavelich* that it is not enough
13 for the State Court to remain silent. It must make an actual
14 determination regarding the discharge; something lacking in
15 the present adversary proceeding.

16 A review of *Singleton*, another decision relied on
17 by *Hamilton*, yields the same conclusion. See *In Re*
18 *Singleton*, 230 B.R. 533, a decision from the Bankruptcy
19 Appellate Panel for the Sixth Circuit in 1999.

20 In *Singleton*, a state court decided that the
21 automatic stay did not apply to the sale of certain real
22 estate because it was property of a third party, not the
23 debtor.

24 On appeal by the debtor, after the adversary
25 proceeding was dismissed for failure to state a claim, the

1 Bankruptcy Appellate Panel for the Sixth Circuit held that
2 the *Rooker-Feldman* doctrine barred review of the State
3 Court's decision.

4 Paramount to the Panel's decision was the fact
5 that the State Court actually considered whether the
6 automatic stay applied to the sale, and did so correctly.

7 Again, the facts here are significantly different,
8 because the State Court never made any such determination.

9 In sum, because neither the Bankruptcy Court nor
10 the State Court ever affirmatively determined whether the
11 loans were subject to the discharge, the *Rooker-Feldman*
12 doctrine does not apply.

13 Although the claims in this Court might
14 effectively deny a legal conclusion of the State Court, *i.e.*,
15 an award of damages for breach of contract, they are
16 nonetheless independent from the State Court judgment.

17 This Court, therefore, has subject matter
18 jurisdiction to consider whether the two loans were non-
19 dischargeable under Section 523(a)(8), or subject to the
20 discharge under Section 524(a).

21 Having disposed of the jurisdictional issues, the
22 Court turns to the Plaintiff's arguments that the second
23 amended complaint fails to state -- excuse me, the
24 Defendant's arguments that the second amended complaint fails
25 to state a claim upon which relief can be granted.

1 This Court has previously set forth the standard
2 for a motion to dismiss in *In Re Perkins*, 533 B.R. 242, at
3 page 252, a decision, again, from this Court in 2015, which
4 the Court shall incorporate by reference into this Bench
5 Opinion.

6 The Court turns to the Defendant's argument that
7 *res judicata*, or claim preclusion, precludes the Plaintiff
8 from pursuing its claims.

9 In *ExxonMobil*, the United States Supreme Court
10 explained that *Rooker-Feldman* does not otherwise override or
11 supplant preclusion doctrine or augment the circumscribed
12 doctrines that allow Federal Courts to stay or dismiss
13 proceedings in deference to State Court actions.

14 If a federal plaintiff presents some independent
15 claim, albeit one that denies a legal conclusion that a state
16 court has reached in a case to which he was a party, then
17 there is jurisdiction, and state law determines whether the
18 defendant prevails under principles of preclusion. That is,
19 again, a quote from *In Re ExxonMobil*, which has previously
20 been cited.

21 As such, even though *Rooker-Feldman* does not apply
22 in this adversary proceeding, such a determination does not
23 foreclose application of principles of preclusion, such as
24 *res judicata*.

25 Pursuant to the United States Constitution and

1 Federal Statute, each state must give full faith and credit
2 to the judicial proceedings of every other state; *citing*
3 United States Constitution, Article IV, Section I, as well as
4 28 U.S.C. sec. 1738.

5 Thus, a Federal Court must give a State Court
6 judgment the same preclusive effect as would be given that
7 judgment under the law of the state in which the judgment was
8 rendered. See *In Re Bursack*, 65 F. 3d 51, a decision from
9 the Sixth Circuit Court of Appeals in 1995.

10 Under Michigan law, *res judicata* precludes
11 multiple suits alleging the same cause of action. See *Adair*
12 *v. State of Michigan*, 470 Mich. Rptr. 105, at page 121, a
13 decision from the Michigan Supreme Court in 2004.

14 The doctrine bars a second subsequent action where
15 the prior action was decided on the merits, both actions
16 involved the same parties or their privies, and the matter in
17 the second case was, or could have been, resolved in the
18 first.

19 To be accorded the conclusive effect of *res*
20 *judicata*, the judgment must ordinarily be a firm and stable
21 one, the last word of the rendering court. See *Kosiel v.*
22 *Arrow Liquors Corporation*, 446 Mich. Rptr. 374, at page 381,
23 a decision from the Michigan Supreme Court in 1994.

24 Michigan Courts have applied the doctrine of *res*
25 *judicata* broadly, prohibiting not only claims already

1 litigated, but every claim arising from the same transaction
2 that the parties exercising reasonable diligence could have
3 raised, but did not. See *Sewell v. Clean Cut Management,*
4 *Inc.*, 463 Mich. Rptr. 569, at page 575, a decision from the
5 Michigan Supreme Court in 2001.

6 It is well established in Michigan that *res*
7 *judicata* applies to consent judgments. See, e.g., *Barraga*
8 *Company v. State Tax Commission*, 243 Mich. Ct. App. Rptr.
9 452, at pages 455 through 456, a decision from the year 2000.

10 In this case, the State Court action was decided
11 on the merits, and the parties were the same.

12 However, the Defendant argues that because the
13 Plaintiff did not raise the discharge in State Court, he is
14 now barred from doing so. This Court must disagree.

15 As the Sixth Circuit noted in *Hamilton*, Section
16 524(a)(2) makes it wholly unnecessary to assert the discharge
17 injunction as an affirmative defense in a subsequent State
18 Court action.

19 Here, that is precisely what the Defendant was
20 arguing the Plaintiff was required to do.

21 Although *res judicata* could generally apply where
22 a party has failed to raise an issue that could have been
23 litigated, *Hamilton* recognizes an exception when the effect
24 would be a waiver in contravention of Section 524(a).

25 The Court next considers whether the second

1 amended complaint fails to state a claim upon which relief
2 can be granted for the first of the two loans.

3 As the Defendant notes in its motion, the second
4 amended complaint states that the first of two loans from the
5 Defendant to the Plaintiff occurred prior to the loan from
6 the Federal government.

7 Taken in isolation, the second amended complaint
8 might be viewed as not stating a claim, because the
9 allegations are inconsistent with the documents attached to
10 the complaint.

11 However, the second amended complaint also states
12 that both loans were not for any educational purpose, and
13 were thus not student loans that could be deemed non-
14 dischargeable.

15 Taking the allegations in the complaint as true
16 for purposes of a motion to dismiss under 12(b)(6), the
17 second amended complaint plausibly states a claim upon which
18 relief can be granted. *See Bell Atlantic Corporation v.*
19 *Twombly*, 550 U.S. 544, at page 570, a decision from the U.S.
20 Supreme Court in 2007; as well as *Ashcroft v. Iqbal*, 556 U.S.
21 662, at page 678, a decision from the Supreme Court in 2009.

22 Ultimately, of course, the Court may determine
23 that the facts do not support the allegations that form the
24 basis for the cause of action. However, on its face, the
25 complaint properly alleges a cause of action for non-

1 dischargeability in violation of the discharge, regardless of
2 whether it involves the first or the second loan.

3 Finally, the Defendant argues that the doctrine of
4 laches provides an equitable defense to the Plaintiff's
5 claims.

6 The Sixth Circuit has described laches as "a
7 negligent and unintentional failure to protect one's rights."
8 *See Elvis Presley Enterprises, Inc. v. Elvisly Yours, Inc.*,
9 936 F. 2d 889, at page 894, again a decision from the Sixth
10 Circuit in 1991.

11 A party asserting laches must show lack of
12 diligence by the party against whom the defense is asserted,
13 and prejudice to the party asserting it. *See Herman Miller,*
14 *Inc. v. Palazzetti Imports and Exports, Inc.*, 270 F. 3d 298,
15 at page 320, a decision from the Sixth Circuit in 2001.

16 The Sixth Circuit has further explained that
17 "laches does not result from a mere lapse of time, but from
18 the fact that during the lapse of time changed circumstances
19 inequitably worked to the disadvantage or prejudice of
20 another, if the claim is now to be enforced."

21 "By his negligent delay, the Plaintiff may have
22 misled the Defendant, or others, into acting on the
23 assumption that the Plaintiff has abandoned his claim, or
24 that he acquiesces in the situation, or changed circumstances
25 may make it more difficult to defend against the claim." *See*

1 *Chirco v. Crosswinds Communities, Inc.*, 474 F. 3d 227, at
2 page 231, a decision from the Sixth Circuit in 2007.

3 The Court can consider an affirmative defense as
4 part of a motion to dismiss, including the affirmative
5 defense of laches. *See, e.g., Stein v. Regions Morgan Keegan*
6 *Select High Income Fund*, 821 F. 3d 780, at page 786, a
7 decision from the Sixth Circuit in 2016, where the Court
8 noted that the basis for the defense must be shown by the
9 facts in the complaint.

10 *See also Lennon v. Seaman*, 63 F. Supp. 2d 428, at
11 page 439, a decision from the District Court for the Southern
12 District of New York in 1999, where the Court required laches
13 to be clear on the face of the complaint, and found that the
14 plaintiff could not demonstrate any facts to counter the
15 defense.

16 In the instant matter, the Defendant contends that
17 laches should apply because the Defendant incurred legal fees
18 and other administrative costs after entry of the State Court
19 judgment, that record retention, witness availability issues,
20 are a concern, as well.

21 As the Defendant concedes in its motion, however,
22 none of these facts are addressed in the complaint.
23 Therefore, insofar as the Defendant seeks dismissal due to
24 laches, the motion is denied.

25 Of course, the Defendant may raise laches at

CERTIFICATE

I, RANDEL RAISON, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, to the best of my ability.



November 10, 2017

Randel Raison

From Article at GetOutOfDebt.org

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