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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	**CASE NUMBER:**
	§	
JANUS J. DE CUNAE	§	**12-37424-H2-7**
	§	**(Chapter 7)**
	§	
	§	**Hearing Date:**
DEBTOR	§	**July 31, 2013 at 9:00 a.m.**

MEMORANDUM OF POINTS AND AUTHORITIES OF THE UNITED STATES TRUSTEE IN SUPPORT OF MOTION TO DISMISS CHAPTER 7 CASE UNDER 11 U.S.C. § 707(b)

TO THE HONORABLE DAVID R. JONES
UNITED STATES BANKRUPTCY JUDGE:

COMES NOW the United States Trustee for the Southern District of Texas ("UST"), by and through the undersigned counsel, who respectfully submits this Memorandum of Points and Authorities of the United States Trustee In Support of Motion to Dismiss Chapter 7 Case Under 11 U.S.C. § 707(b), and represents as follows:

I. Classification of Debts

A. General Standards

The threshold prerequisite in determining whether an individual debtor's case should be dismissed under section 707(b) is whether the individual's debts are "primarily consumer debts."

11 U.S.C. § 707(b)(1). The term "consumer debt" is defined as "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8). A "debt" is defined as "liability on a claim." 11 U.S.C. § 101(12). A "claim" means a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured. 11 U.S.C. § 101(5)(A).

The profit motive test determines that a debt should not be classified as a consumer debt if it was "incurred with an eye toward profit." *In re Booth*, 858 F.2d 1051, 1055 (5th Cir. 1988). "Primarily" means "an overall ratio of consumer to nonconsumer debts of over fifty percent." *Id.*

B. Debts Reported by Debtor

The Debtor asserts that he is an individual whose indebtedness consists primarily of non-consumer debts. In the schedules of liabilities, the Debtor reported secured debts of $266,784.16, priority debts of $9,700.00, and general unsecured debts of $624,131.66. The Debtor's debts total $900,615.82.

1. Debts Secured by Real Property

On Schedule D, the Debtor reported the following secured debts:

Creditor	Collateral	Amount of Claim	Unsecured
Wells Fargo Bank	New Mexico Property	$ 201,307.00	$ 0.00
Wells Fargo Bank	New Mexico Property	$ 62,427.00	$58,734.00
Bernalillo County	New Mexico Property	$ 3,050.16	$ 0.00

The Parties stipulated that all debts in connection with the New Mexico Property, including the mortgage, home equity loan and property taxes in the aggregate totaling $266,784.16, should be

classified as consumer debts.

2. Income Tax Debt

On Schedule E, the Debtor reported a priority debt of $9,700.00 owed to the Internal Revenue Service for individual federal income taxes. The Parties stipulated that the tax debt of $9,700.00 should be classified as a non-consumer debt.

3. General Unsecured Debts

a. General Unsecured Debts Reported As Consumer Debts

On Schedule F, the Debtor reported the following general unsecured debts:

Creditor	Nature of Claim	Amount of Claim
American Express	Credit Card Acct. No. 1463	$27,340.00
Capital One, N.A.	Credit Card Acct. No. 0437	$ 9,966.00
Financial Recovery Services	Acct. No. 1157; Collecting for CACH; Originally MBNA America	$16,369.31
Financial Recovery Services	Acct. No. 1158; Collecting for CACH; Originally MBNA America	$17,658.00
Pay Pal Credit	Credit Card Acct. No. 7232	$ 1,733.00
US Bank	Credit Card Acct. No. 3429	$11,588.56

The Parties stipulated that these six (6) debts totaling $84,654.87 should be classified as consumer debts.

b. General Unsecured Debts Reported as Non-Consumer Debts

On Schedule F, the Debtor also reported the following general unsecured debts:

Creditor	Nature of Claim	Amount of Claim
ADT	Services	$ 2,300.00
American Express	Credit Card Acct. No. 4823	$ 21,006.00
Automated Recovery Systems	Collecting for Rio Grande Publishing	$ 1,097.43
AWA Collections	Collecting for Pacific Edge Dental	$ 1,211.75
Bank of America	Charge Acct. No. 4444	$ 31,405.00
Bank of America	Business Loan; Acct. No. 9001	$223,052.23
Carestream Dental	Service	$ 114.09
New Mexico Gas Company	Utilities	$ 113.24
P&G Oral Health	Service	$ 449.58
PNM	Utilities	$ 169.47
Triwest Management, L.L.C.	Lease Deficiency	$ 7,500.00

The Parties stipulate that these eleven (11) debts totaling $288,418.79 should be classified as non-consumer debts.

c. Other General Unsecured Debts Reported As Non-Consumer Debts

On Schedule F, the Debtor also reported the following debts:

Creditor	Nature of Claim	Amount of Claim
Department of Education	Loan; Acct. No. 0002	$176,479.00
Department of Education	Loan; Acct. No. 0001	$ 74,579.00

These two (2) general unsecured debts totaling $251,058.00 relate to student loans incurred by the Debtor in connection with his education at the New York University College of Dentistry.

The classification of these student loan debts is in dispute, except for twelve percent (12%), or the sum of $30,126.96, which the Parties stipulate is a consumer debt. The UST contends that the student loan debts should be classified as consumer debts. The Debtor contends that they should be classified as non-consumer debts. The Parties agree that the classification of the Debtor's student loan debts will determine whether their debts are primarily consumer debts or primarily non-consumer debts.

D. Student Loan Debts

1. Stewart

The *Stewart* line of cases provide an analysis as to the proper classification of student loan debt for purposes of § 707(b). In *In re Stewart*, 201 B.R. 996 (Bankr. N.D. Okl. 1996) ("*Stewart I*"), the debtor scheduled debts exceeding $2.6 million. His student loan debts totaled about $520,000.00, of which $320,000.00 came from intra-family loans and $200,000.00 from institutional loans. The proceeds from these student loans were used to a large degree to pay living expenses and to some lesser degree to pay for the direct educational costs of college and medical school. The bankruptcy court concluded that the intra-family loans and institutional loans should be classified as consumer debts, "whether or not they were incurred for an indirect, incidental or ultimate profit motive." *Stewart I* at 1005. The court stated that:

> It makes little difference whether student loan funds are used "directly" to pay tuition or "indirectly" to pay living expenses during a period of schooling: either way, the money is used to enable the debtor to acquire further education. No one forces a debtor to incur student loans; such debts are incurred on debtor's own initiative, at his option, in hopes of enhancing those most personal of qualities, the functioning of his own mind and his own hands, and thereby benefiting himself, his family and his household for the rest of his life. Such intangible benefits, acquired with creditors' money, are assimilated to the debtor's own person, and cannot be conserved as security for payment of the debt. But if the debtor's higher education gains him a higher salary, he can keep that benefit to himself, especially if he uses bankruptcy to cancel his creditors' right to use *in personam* debt collection methods. In effect, the student borrower gets "personal" benefits while

> avoiding "personal" payment. This scenario differs from the credit-card binge only in incidental details. Intra-family loans for educational purposes are also indistinguishable in principle. The only difference is that in such instances, easy credit results from personal relationship.

Id. at 1004. The court went on to state:

> Nothing is more intimately "personal" than the debtor's own education—what goes, so to speak, between the debtor's own ears. Debts for loans which further that "personal" endeavor, whether the source of the money be institutional or intra-family, come within the literal terms of "consumer debt" as defined in § 101(8), and within probable Congressional intent in employing such term(s) in § 707(b).

Id at 1005. As a result, the court dismissed the bankruptcy case under § 707(b).

On appeal, the Tenth Circuit Bankruptcy Appellate Panel affirmed the bankruptcy court's decision. *In re Stewart*, 215 B.R. 456 (10th Cir. B.A.P. 1997) ("*Stewart II*"). The Panel had no difficulty in concluding that the intra-family loans were consumer debts because the debtor had borrowed the money mostly for living expenses. *Stewart II* at 465. However, with regard to the institutional loans, the Panel stated:

> The record on the institutional student loans is not as clear. The debtor testified that his original student loans, commencing in 1976 before he was married, were used solely for tuition and room and board. However, he further testified that from the fall of 1990 to the spring of 1991, he obtained $51,515 in student loans. Of this amount, $30,000 was paid to Barbara for support obligations, $11,000 was used for tuition, and Stewart lived on the remainder (about $7,000). The next year, he obtained $52,404, with $30,000 again going to Barbara for support obligations, another $3,000 going towards the children's medical expenses, and the remaining $18,000 going towards tuition and Stewart's living expenses. It thus appears that the debts to the institutional lenders had a dual use and a dual purpose, i.e. educational costs and living expenses. Moreover, Stewart testified that he was motivated to pursue a medical education for humanitarian reasons and that he was not motivated by an immediate high income. Indeed, he has delayed high income to pursue a fellowship. Given this, the record demonstrates that the debt to the institutional lenders was used in part for family living expenses and incurred in part for personal reasons. Although the record is not clear as to their primary use and purpose, there was no clear error in the finding that these loans were consumer debts as well.

Id. at 465-66 (citations omitted). As a result, the Panel concluded "that student loans are not consumer debts per se. The primary purpose for which the debt was incurred must be

determinative. There may be circumstances in which the debtor can demonstrate that the student loan was incurred purely or primarily as a business investment, albeit an investment in herself or himself, much like a loan incurred for a new business." *Id.* at 465.

On appeal, the Tenth Circuit affirmed the Panel. *In re Stewart*, 175 F.3d 796 (10th Cir. 1999) (*"Stewart III"*). The Tenth Circuit "comfortably conclude[d] a substantial portion of Dr. Stewart's student loan debt is indeed 'consumer debt'" because it was used for family expenses and noted that there was nothing in the record that reflected "the actual cost of Dr. Stewart's tuition, books, or other direct educational expenses as compared to the portion of student loans used for personal, family, and household expenses." *Stewart III* at 807. Significantly, the Tenth Circuit stated that "little or no binding or persuasive authority exists to help us determine the characterization of educational expenses such as books, tuition, and room and board as either consumer or business debt." *Id.* The Tenth Circuit was unwilling to classify all the institutional loans as consumer debts because there was enough evidence in the record to conclude that a substantial portion of the student loan debt was used for family expenses and therefore consumer debt.

2. Millikan

In *In re Millikan,* 2007 WL 6260855 (Bankr. S.D. Ind. 2007), the debtor, a dentist, contended that $192,200.00 of his total student loan debt of $307,038.77 was a non-consumer debt because it was used for direct educational expenses, such as tuition, books and fees. The bankruptcy court found the profit-motive test to be unworkable when applied to student loans because it would require the court "to analyze the utility of every class taken and every book purchased," would permit a debtor to "tailor his or her testimony" to classify a student loan debt as either a consumer debt or a non-consumer debt, and would work "to the benefit of those who

are most likely to have the ability to pay their creditors and to the disadvantage of those who are least able to pay their creditors." *Millikan* at 5. Relying heavily on *Stewart I,* the bankruptcy court concluded that the student loan debt was "in the nature of consumer debt." *Id.* at 6.

3. Vianese

In *In re Vianese,* 192 B.R. 61 (Bankr. N.D.N.Y. 1996), the bankruptcy court found that "student loans made in furtherance of the Debtors' sons' education were for 'family purposes' and should be considered consumer debt." *Vianese* at 68.

4. Rucker

In *In re Rucker,* 454 B.R. 554 (Bankr. M.D.Ga. 2011), the debtor contended that student loan debt of $189,960.00 incurred for a medical education was a non-consumer debt. The bankruptcy court, after considering the *Stewart* line of cases and *Millikan*, held that student loan debt was not a consumer debt nor a non-consumer debt per se. Instead, the classification of student loan debt would be determined after consideration of all evidence relevant to its purpose.

II. Dismissal for Abuse Under Section 707(b)

If the Court finds that his debts are primarily consumer debts, then the Parties stipulate to the dismissal of this chapter 7 bankruptcy case. If the Court does not, then the UST withdraws the Motion to Dismiss Under 11 U.S.C. § 707(b).

The Court should determine the Debtor's primary purpose for incurring the student loan debt and how the proceeds were used. Ultimately, the student loan debt was incurred for the primary purpose of benefitting the Debtor personally. As such, the student loan debt should be classified as a consumer debt. If so, then the Debtor's debts are primarily consumer debts and the case should be dismissed.

Dated: July 30, 2013

Respectfully Submitted,

JUDY A. ROBBINS
UNITED STATES TRUSTEE

By: /s/ Hector Duran
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon the following by United States Mail, first class, postage prepaid, or by ECF transmission or BNC noticing, on the 30th day of July, 2013.

/s/ Hector Duran
Hector Duran

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