SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: January 29, 2019

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

ANGELA T. ADAMS, **CASE NO. 18-04045-NPO**

DEBTOR. **CHAPTER 13**

ORDER GRANTING IN PART TRUSTEE'S MOTION TO DISMISS AND DISMISSING ORDER TO SHOW CAUSE AS MOOT

This matter came before the Court for hearing on January 7, 2019 (the "Hearing"), on the Trustee's Motion to Dismiss (the "Motion to Dismiss") (Dkt. 22) filed by Harold J. Barkley, Jr., chapter 13 trustee (the "Trustee") and the Debtor's Response to Trustee's Motion to Dismiss (the "Response") (Dkt. 25) filed by the debtor, Angela T. Adams (the "Debtor"), in the above-referenced bankruptcy case (the "Bankruptcy Case"). At the Hearing, Justin B. Jones represented the Trustee and Bryant D. Guy represented the Debtor. Having considered the matter and being fully advised in the premises, the Court finds as follows:[1]

[1] The following constitutes the findings of fact and conclusions of law of the Court pursuant to Rules 7052 and 9014 of the Federal Rules of Bankruptcy Procedure.

Jurisdiction

This Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). Notice of the Motion to Dismiss was proper under the circumstances.

Facts

On October 18, 2018, the Debtor filed a petition for relief (the Petition") (Dkt. 1) under chapter 13 of the U.S. Bankruptcy Code (the "Code"). In Schedule E/F: Creditors Who Have Unsecured Claims ("Schedule E/F") (Dkt. 8), the Debtor listed $439,657.89 in general unsecured debt, consisting of $424,390.62 in student loans and $15,267.27 in credit card purchases, medical bills, and other loans owed to various creditors. According to Schedule E/F, the Debtor owed $419,475.00 to the U.S. Department of Education and $4,915.62 to Sunrise Credit Services, Inc. (Dkt. 8 at 15, 19) in student loans as of the date of the Petition. The Debtor designated the student-loan debt as "liquidated" and "noncontingent." Nelnet, Inc., a loan servicer, filed a proof of claim ("POC 5") (Cl. #5-1) on behalf of the U.S. Department of Education in the amount of $421,838.99. Attached to POC 5 are computer print-outs of a summary of the Debtor's loan. The Debtor has not objected to POC 5. Sunrise Credit Services, Inc. has not filed a proof of claim.

On November 1, 2018, the Debtor filed a Chapter 13 Plan and Motions for Valuation and Lien Avoidance (the "Plan") (Dkt. 9). In the Plan, the Debtor proposed to pay none of the general, unsecured debt. The deadline for filing an objection to the Plan was set for December 18, 2018, and a hearing on any objection to confirmation of the Plan was set for January 7, 2019. (Dkt. 18).

The meeting of creditors under 11 U.S.C. § 341(a)[2] was scheduled to occur on December 4, 2018 (Dkt. 11), but the Debtor failed to appear (Dkt. 20). The Court issued an Order to Show Cause (the "Show Cause Order") (Dkt. 21), requiring the Debtor, counsel for the Debtor, and the Trustee to appear at a hearing on January 7, 2019, to explain why the Bankruptcy Case should not be dismissed because of the Debtor's failure to attend the creditors' meeting.

On December 7, 2018, the Trustee filed the Motion to Dismiss, asking the Court to dismiss the Bankruptcy Case on the ground the Debtor owed unsecured debts in excess of the limit established by § 109(e) for an individual to be eligible for chapter 13 relief. The Debtor filed the Response, asserting that the student loans are in deferment until 2024, but providing no documentary evidence of the alleged deferment and no legal analysis regarding the application of deferred debt toward the unsecured debt limit in § 109(e). The Hearing on the Motion to Dismiss occurred contemporaneously with the hearing on the confirmation of the Plan and the Show Cause Order.

Because resolution of the Motion to Dismiss could render the confirmation hearing unnecessary and the Show Cause Order moot, the Court limited the legal arguments by counsel at the Hearing to the Motion to Dismiss. After considering the arguments of counsel at the Hearing, the Court instructed counsel for both parties to file briefs addressing the eligibility issue within fourteen (14) days. On January 18, 2019, the Trustee filed the Trustee's Memorandum Brief (the "Trustee's Brief") (Dkt. 30), and the Debtor filed the Debtor's Memorandum Brief (the "Debtor's Brief") (Dkt. 31). The Court informed the parties that upon resolution of the Motion to Dismiss, the hearing on the confirmation of the Plan and the Show Cause Order would be reset, if necessary.

[2] From this point forward, all section references are to the Code found at title 11 of the U.S. Code unless otherwise noted.

Discussion

Section 109 "serve[s] an important gatekeeping role" by specifying "who qualifies—and who does not qualify—as a debtor under the various chapters of the Code." *Puerto Rico v. Franklin Calif. Tax-Free Tr.*, 136 S. Ct. 1938, 1947 (2016) (quotation & citation omitted). Section 109(e) creates a "gateway" into the chapter 13 bankruptcy process for those who are eligible.

> Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $394,725 and noncontingent, liquidated, secured debts of less than $1,184,200, or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $394,725 and noncontingent, liquidated, secured debts of less than $1,184,200 may be a debtor under chapter 13 of this title.[3]

11 U.S.C. § 109(e). In summary, to be eligible for chapter 13 relief, the debtor must be an "individual," must have "regular income," and must not have debts that exceed the statutory limits. The issue raised by the Trustee in the Motion to Dismiss requires the Court to construe § 109(e)'s limitation for noncontingent, liquidated, unsecured debts.[4]

"The Bankruptcy Code standardizes an expansive (and sometimes unruly) area of law, and it is our obligation to interpret the Code clearly and predictably using well established principles of statutory construction." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 649 (2012). According to such principles, "courts must give effect to the clear meaning of statutes as written." *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) (quotation

[3] The debt limits in § 109(e) are automatically adjusted every three (3) years. 11 U.S.C. § 104. The most recent adjustment became effective April 1, 2016, and is reflected in the current version of the statute.

[4] The dischargeability of the Debtor's student-loan debt is not an issue before the Court. *See* 11 U.S.C. § 523(a)(8).

& citation omitted). "We thus begin and end our inquiry with the text, giving each word its 'ordinary, contemporary, common meaning.'" *Id.* (citation omitted).

The student loans are "debts" within the meaning of the Code. "Debt" is defined in the Code as "liability on a claim," and "claim" is defined as 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(12), 101(5)(A). Although the statutory definition of a "claim" explicitly includes debts that are contingent and unliquidated, § 109(e) excludes such claims from the chapter 13 eligibility computation.

The starting point in the Court's § 109(e) inquiry as to whether the student loans are "contingent" is the Debtor's bankruptcy schedules. In Schedule E/F, the Debtor designated the student-loan debt as noncontingent. *See Scovis v. Henrichsen (In re Scovis)*, 249 F.3d 975, 982 (9th Cir. 2001) (holding that chapter 13 eligibility under § 109(e) normally should be determined by the debtor's schedules). Based on Schedule E/F, the text of § 109(e) unambiguously prevents the Debtor, who owed a noncontingent, liquidated, unsecured debt of $439,657.89, from proceeding under chapter 13. *See Hammers v. IRS (In re Hammers)*, 988 F.2d 32, 34 (5th Cir. 1993) (finding no ambiguity, latent or otherwise, in the debt limitation on individual eligibility for relief under chapter 13 in § 109(e)).

The Debtor suggests in the Response that the student loans she owes to the U.S. Department of Education in the amount of $419,475.00 should not be counted in determining her eligibility for chapter 13 relief under § 109(e) because they are in deferment. (Resp. at 1). For purposes of § 109(e), the Debtor appears to equate deferred with contingent, notwithstanding her designation of the student-loan debt as "noncontingent" in Schedule E/F. If these student loans are excluded from the calculation, the Debtor's unsecured debt totals only $20,182.89 and, therefore, does not

exceed the statutory debt ceiling for eligibility. The Court addresses the Debtor's argument without deciding the extent to which it may look beyond Schedule E/F because the outcome under either analysis is the same; the record as a whole demonstrates that the student-loan debt, even if deferred, is noncontingent as reflected in Schedule E/F. *See In re Schilling*, No. 16-13153-JDW, 2017 WL 4676244, at *3 (Bankr. N.D. Miss. Oct. 16, 2017) (discussing the split of authority as to whether courts are bound by the face of the debtor's schedules in determining a debtor's eligibility for chapter 13 relief and deciding to compute the debtor's eligibility based on the parties' stipulation as to the amount owed although there was no evidence that the debtor filed the schedules in bad faith).

Although the Code does not define the term "contingent" for purposes of § 109(e) eligibility, the Fifth Circuit Court of Appeals has defined the term for other sections of the Code. A debt is contingent as to liability "if the debt is one which the debtor will be called upon to pay *only upon the occurrence or happening of an extrinsic event* which will trigger the liability of the debtor to the alleged creditor." *First City Beaumont v. Durkay (In re Ford)*, 967 F.2d 1047, 1051 (5th Cir. 1992) (quoting *In re All Media Props., Inc.*, 5 B.R. 126, 133 (Bankr. S.D. Tex. 1980)).

Here, the student-loan debt is a current legal obligation of the Debtor. Her liability to the U.S. Department of Education will not be triggered by a future event but came into existence immediately when she borrowed the funds. Her student-loan debt clearly does not fall within the traditional definition of contingent debt, and the Debtor properly designated it as noncontingent in Schedule E/F. Moreover, the alleged deferment did not create a condition precedent to her liability to the U.S. Department of Education.

The Debtor did not disclose the precise terms of the purported deferment and, as mentioned previously, did not present the Court with any document evidencing the alleged deferment. In

addition, the U.S. Department of Education did not attach any such document to POC 5. Deferment is defined, in general, as "[t]he act of delaying; postponement." BLACK'S LAW DICTIONARY at 514 (10th ed. 2009). The Court presumes that the purported deferment of the Debtor's student loans either allowed her to temporarily stop making payments or to temporarily reduce her loan payments. Regardless, the alleged deferment did not render her legal obligation contingent. The question of contingency does not depend on whether the U.S. Department of Education may extract full repayment immediately from the Debtor but whether the student-loan debt is a present legal obligation of the Debtor.

The Fifth Circuit, moreover, has embraced a narrow reading of § 109. In *In re Hammers*, the Fifth Circuit rejected a debtor's argument that § 109(e)'s unsecured debt limit should not apply to her because that limit "was intended only 'to prevent large business from utilizing Chapter 13, not to thwart or inhibit the small proprietor or individual whose debt may stretch those limits.'" *In re Hammers*, 988 F.2d at 34. Mindful of *In re Hammers*, the Court notes that § 109(e) contains no reference to deferred debt or the effect of a deferment on a debtor's eligibility to file a petition under chapter 13. The statute says only that an individual with a regular income, owing less than the limits for unsecured and secured debt may be a chapter 13 debtor. *See* 2 COLLIER ON BANKRUPTCY ¶ 109.06[1] (16th ed. 2018) ("The eligibility criteria set forth in section 109(e) are specific and restrictive, with monetary amounts established to govern eligibility so as to ensure that those persons for whose benefit the chapter is directed are those who employ its provisions.").

Both the Trustee and the Debtor acknowledged in their respective briefs that their legal research yielded no published case addressing whether deferred debt should be counted toward the § 109(e) debt limit. In the Trustee's Brief, however, the Trustee cited two decisions from other jurisdictions that he believes supports his Motion to Dismiss. (Trustee's Br. at 1). In *Stearns v.*

Pratola (In re Pratola), 589 B.R. 779 (N.D. Ill. 2018), the debtor listed $591,223.00 in general unsecured debt in his bankruptcy schedules and designated $374,108.00 of this amount as contingent. *Id.* at 782. The debt he designated as "contingent" consisted of student loans that were subject to an Income-Based Repayment ("IBR") agreement. Once the debtor completed making monthly payments on the student-loan debt equal to ten percent (10%) of his discretionary income for twenty-five (25) years, the remaining balance would be forgiven. If the debtor defaulted in his monthly payments, however, the entire remaining balance would become due.

The chapter 13 trustee in *In re Pratola* moved to dismiss the bankruptcy case because the debtor owed unsecured debts in excess of § 109(e)'s unsecured debt limit. In response, the debtor argued that his student-loan debt of $374,108.00 was contingent because there was a possibility that a portion of it could be forgiven under the IBR plan and, therefore, his student-loan debt should be excluded in determining his chapter 13 eligibility.

The bankruptcy court denied the motion to dismiss. First, the bankruptcy court found that the student-loan debt came into existence when the debtor received the funds to pay for his college education. "There is no future event that needs to occur before the debt comes into existence—it already exists." *In re Pratola*, 578 B.R. 414, 418 (Bankr. N.D. Ill. 2017). It was the possibility of forgiveness that was contingent, not the debt itself. Because the debtor had a presently-existing duty to repay the student loans on the date of the filing of his petition, the bankruptcy court concluded that the educational debt was noncontingent for purposes of the § 109(e) debt limit. *Id.* at 418-19; *see In re All Media Props., Inc.*, 5 B.R. at 133 (holding that a legal obligation to pay that is subject to being avoided by some future event or occurrence is not a contingent debt). Second, the bankruptcy court found that although the debtor was ineligible for relief under chapter 13 due to the large amount of unsecured debt, there were numerous policy arguments in favor of

allowing the debtor to proceed with his chapter 13 case. *In re Pratola*, 578 B.R. at 419-22 ("Congress simply could not have intended to exclude otherwise eligible individuals from being chapter 13 debtors solely because of educational debt that exceeds the limit.").

The chapter 13 trustee appealed the bankruptcy court's denial of his motion to dismiss. *Stearns*, 589 B.R. at 784. The debtor, however, did not appeal the bankruptcy court's finding that the student-loan debt was noncontingent. On appeal, the district court reversed, finding that the power to create an exception in § 109(e) for educational debt lay with Congress and instructing the bankruptcy court either to convert or to dismiss the debtor's chapter 13 bankruptcy case. *Stearns*, 589 B.R. at 790.

The Court finds the bankruptcy court's analysis persuasive with respect to its characterization of the debtor's student-loan debt as noncontingent. Applying that analysis to the facts here, the Court concludes that deferment, like the possibility of forgiveness, does not transform existing student-loan debt into contingent debt. The Court also agrees with the district court's conclusion that a bankruptcy court may not ignore a debtor's ineligibility for chapter 13 relief, regardless of policy considerations.

The second case cited by the Trustee in the Trustee's Brief, *In re Petty*, No. 18-40258, 2018 WL 1956187 (Bankr. E.D. Tex. Apr. 24, 2018), did not involve either the possibility of forgiveness or the deferment of student-loan debt. There, the bankruptcy court found that the debtor was ineligible for chapter 13 relief because of student loans in excess of $394,725.00 that the debtor had stipulated were noncontingent and liquidated. The Court finds that the ruling in *In re Petty* is consistent with a finding that the Debtor may not remain in the Bankruptcy Case as a chapter 13 debtor.

Conclusion

The Court is not unsympathetic to the plight of the Debtor. Like many other college graduates, the Debtor is burdened with large amounts of educational debt. It is clear, however, that the Debtor's student loans render her ineligible for chapter 13 relief. *See Nikoloutsos v. Nikoloutsos (In re Nikoloutsos)*, 199 F.3d 233, 237 (5th Cir. 2000) ("Ineligible for the protections of Chapter 13, [the debtor] should not have been allowed to convert [from Chapter 7 to Chapter 13.]").

The Trustee asks the Court to dismiss the Bankruptcy Case. The Fifth Circuit has cited § 105(a) as authority for dismissing or converting a case because of the debtor's failure to meet the eligibility requirements of § 109(e). *In re Hammers*, 988 F.2d at 34-35. Courts also have deemed ineligibility under § 109(e) to constitute "cause" under § 1307(c) to dismiss or to convert a chapter 13 case. *See, e.g.*, *In re Petty*, 2018 WL 1956187, at *2. The Court finds that it has the discretion under both § 105(a) and § 1307(c) to dismiss or to convert the Bankruptcy Case. In the Debtor's Brief, the Debtor asks the Court for an opportunity to convert the Bankruptcy Case but does not specify which chapter. Under these circumstances where it appears that other creditors and the estate might benefit from the continuation of the Bankruptcy Case under another chapter, the Court finds that conversion rather than dismissal may be the better alternative.

IT IS, THEREFORE, ORDERED that the Motion to Dismiss is hereby granted in part. The Debtor has fourteen (14) days from entry of this Order to file a motion to convert the Bankruptcy Case to a chapter under which she is eligible for relief or the Court will dismiss the Bankruptcy Case without further notice or hearing.

IT IS FURTHER ORDERED that the Show Cause Order is hereby dismissed as moot.

IT IS FURTHER ORDERED that the hearing on the confirmation of the Plan will not be reset.

##END OF ORDER##