THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 02-10476
	)	
WILLIAM T. (SKEETER) WHOLF,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	
WILLIAM T. (SKEETER) WHOLF,	)	Adversary Proceeding No. 03-1370
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
AMY D. WHOLF nka POREMBA, et al.,	)	**MEMORANDUM OF OPINION**
	)	
Defendants.	)	

The debtor William Wholf brought this action seeking a judgment that his student loan debt to Sallie Mae Servicing is discharged under bankruptcy code § 523(a)(8) and that the agreement that he entered into with his former wife Amy Poremba, as reflected in their divorce decree, to pay 40% of their consolidated student loan is discharged under bankruptcy code §§ 523(a)(5) and (15).[1] Ms. Poremba filed a counterclaim with two counts: one, that the debtor negligently failed to schedule her as a creditor in his chapter 7 case which caused her damage in an undetermined amount; and two, that Ms. Poremba has been paying the entire amount owed on the student loans despite the divorce decree directing the debtor to pay 40%. As a result, Ms. Poremba alleges that the debtor owes her the amount she paid on his behalf and that the

[1] The amended complaint also names Texas Guaranteed Student Loan Corporation, but there is nothing in the record to show service on that entity and the parties did not address its relationship to this dispute. Sallie Mae states in its answer that "said debt [is] due and owing to Sallie Mae Servicing . . . ." (Answer at 2). The court assumes, therefore, that Sallie Mae is both the loan servicer and the authorized agent for the loan holder for purposes of this opinion.

obligation in the divorce decree is not dischargeable under bankruptcy code § 523(a)(15). Sallie Mae answered and denied that the loan is dischargeable. (Docket 13, 14, 19).

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I).

FACTS[2]

The Individual Loans and the Consolidated Loan

William Wholf (now the debtor) and Amy Poremba individually took out student loans from various lenders to help finance their education at Heidelberg College. They got married in 1993, a few years after each had graduated. Ms. Poremba was responsible for the family's finances, including paying the bills from their joint account. The loans went into pay status in late 1992 or early 1993. Because the debtor and Ms. Poremba did not have enough income to pay the loans, they applied for and received deferments. In 1996, they consolidated their loans with Sallie Mae Servicing (the lender). Under the new agreement, they agreed to pay $400.00 a month. They made a few payments under that agreement.

The debtor and Ms. Poremba separated in February 1999. Their September 21, 2000 divorce decree provided that:

> IT IS FURTHER ORDERED that the parties take whatever steps are necessary to split the joint Sallie Mae loan according to their individual obligations at which time each shall assume and pay their individual loans.

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[2] The trial was held on May 19, 2004. The debtor and Ms. Poremba testified and introduced documents into evidence. Sallie Mae presented its case through examination of these witnesses and documents.

> IT IS FURTHER ORDERED that until such time as said student loans are split the Wife shall pay sixty percent (60%) and the Husband shall pay forty percent (40%) of the total obligation to Sallie Mae.

(Poremba Exh. B). The 60/40 split represented the ratio that each of their individual loan amounts held to the consolidated loan amount. After the divorce, Ms. Poremba made some payments on the loan; the debtor did not make any payments. At some point, Ms. Poremba entered into another forebearance agreement with the lender. When that period ended, Ms. Poremba attempted to enter into a revised payment plan. The debtor made some attempt to contact the lender, but was told that Ms. Poremba as the "primary borrower" was the only person authorized to deal with the consolidated loan. Ms. Poremba asked the debtor to sign a document related to the loan, but he refused to do so because it appeared to him to be a reaffirmation agreement rather than a deferment request. He would have signed a deferment request, as he had in the past. There was no testimony that either party tried to re-convert the consolidated loan into individual loans or that the lender would have permitted this in any event. The parties agree that the current loan balance is $50,188.76.

The parties' child

The debtor and Ms. Poremba have one child, Chance, who was born in 1997. Chance lives with Ms. Poremba during the school week. He spends some weekends and will spend this summer with the debtor. The debtor pays child support to Ms. Poremba.

Ms. Poremba's financial situation

Ms. Poremba, who remarried, is now separated from her second husband. She lives alone, other than the times her child is with her. She works as a claims adjuster at Victoria Insurance. Her net monthly pay is $3,001.93. Her total monthly expenses are $2,997.00, including a monthly payment to the lender of $250.00. She does not have any significant health

problems. She has in the past worked as a waitress, interior designer, and restaurant manager. Her expenses are reasonable. (Poremba Exh. D). From her earnings, she can pay her bills and her allocated $250.00 of the monthly loan payment, but she does not have enough disposable income to pay the entire amount.

The debtor's financial situation

The debtor also remarried. He lives with his second wife Missy Wholf and their daughter, Hannah. Ms. Wholf's two daughters from a prior marriage live with them every other week. The rest of the time they live with their father. Ms. Wholf does not have a child support order for these children and their father does not pay child support. The debtor did not offer any explanation for this lack of support.

Neither Missy Wholf nor the debtor has any significant health problems.

The debtor lost his job in 2000 and was unemployed for a total of about nine months from that time to the present. He now works at Office Max as a computer technician and earns $48,000.00 gross a year. The debtor is not qualified for any of the promotions that have been available at Office Max because he lacks the required certification; he cannot get the certification because of the time that is required to get it. He has looked for a second job to supplement his income, but has had problems finding one that meshes with his Office Max hours. He has been working at Grand River Academy in the evening, temporarily filling in for a teacher on leave. He has been told that the school is fully staffed for next year.

The lender and Ms. Poremba question three of the debtor's monthly expenses as too high: broadband computer services, vehicles, and child care. With respect to the computer, the debtor is required to be on call from home at certain hours and he maintains broadband computer

services at home to carry out these responsibilities. This is a reasonable expense. The debtor's budget includes two vehicles: a 1999 Ford Windstar van and a 2001 Ford Focus. He bought the Windstar after receiving his chapter 7 discharge. He pays $165.00 a month for the Focus and $336.00 a month for the Windstar. The car insurance is $113.00 a month and gasoline and oil are $100.00 a month. The debtor drives the Focus to work, which is several miles from his house. The Windstar is for Missy Wholf so that she has transportation in case of an emergency when the debtor is at work. The vehicles are discussed further below, as are the child care expenses.

Ms. Wholf, age 36, is not employed. She worked at an animal facility until she was laid off in 2002. When she was employed, she made just a little more than their child care expenses and that was before Hannah was born. She has looked for a job without success.

The debtor's budget shows that his income is insufficient to pay his expenses. He testified that his wife's grandmother provides some assistance. If the debtor were to pay his 40% of the student loans, it would require a monthly payment of about $167.00.

THE POSITIONS OF THE PARTIES

The debtor asks that his student loan debt be discharged under bankruptcy code § 523(a)(8) because he would suffer undue hardship if required to pay it. The lender opposes that request. The debtor also seeks to discharge his obligation under the divorce decree to pay 40% of the debt, relying on bankruptcy code § 523(a)(15).[3] Ms. Poremba opposes that request and by counterclaim asks for a determination that the debt is not discharged under that section. She also asks for damages based on the debtor's negligent failure to list her as a creditor in his bankruptcy.

[3] The debtor also alleged in his complaint that the debt was dischargeable under § 523(a)(5), but did not pursue that at trial. (*See* Debtor's trial brief. (Docket 26)).

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DISCUSSION

I. The Student Loan Debt to Sallie Mae

Under bankruptcy code § 523(a)(8), a chapter 7 debtor must still pay his educational loan debt unless doing so "will impose an undue hardship on the debtor and the debtor's dependents[.]" 11 U.S.C. § 523(a)(8). This provision was enacted to "prevent indebted college or graduate students from filing for bankruptcy immediately upon graduation, thereby absolving themselves of the obligation to repay their student loans." *Tennessee Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433, 436-37 (6th Cir. 1998). "Congress has not defined 'undue hardship,' leaving the task to the courts. Courts universally require more than temporary financial adversity and typically stop short of utter hopelessness." *Id.* at 437. The parties agree that the debtor's obligation to the lender is a debt for an educational loan within the meaning of § 523(a)(8), but they dispute whether the debt should be excepted from discharge under the undue hardship standard. The debtor has the burden of proving that he qualifies for a discharge under this section. *See Dolph v. Penn. Higher Educ. Assistance Agency (In re Dolph)*, 215 B.R. 832, 836 (B.A.P. 6th Cir. 1998).

Although the Sixth Circuit has declined to adopt a single test to determine whether undue hardship exists, it has applied a three factor test to make that determination. *See Hornsby,* 144 F.3d at 437; and *Cheesman v. Tenn. Student Assistance Corp.(In re Cheesman)*, 25 F.3d 356, 359 (6th Cir. 1994) (both citing *Brunner v. New York State Higher Educ. Serv. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987)). The three factors which the debtor must prove under that test are that: (1) the debtor cannot maintain a minimal standard of living (based on current income and expenses) if forced to repay the loan; (2) there are additional circumstances which indicate that the present state of affairs is likely to persist for a significant portion of the repayment period; and (3) the

debtor has made good faith efforts to repay the loans. *Id.* In addition, the Sixth Circuit has noted other relevant considerations, including the amount of the debt, the rate of interest which is accruing, and whether the debtor has attempted to minimize expenses. *Hornsby*, 144 F.3d at 437.

If a debtor's circumstances do not rise to the level of undue hardship, a bankruptcy court may employ bankruptcy code § 105(a) to fashion a remedy which will allow the debtor to ultimately satisfy his educational loan debt "while at the same time providing [him] some of the benefits that bankruptcy brings in the form of relief from oppressive financial circumstances." *Hornsby*, 144 F.3d at 440. *See also* 11 U.S.C. § 105(a). In *Hornsby*, the Sixth Circuit found that these equitable remedies are available: partial discharge of student loans by discharging an arbitrary amount of the principal, accrued interest or attorney fees; a repayment schedule; deferment of repayment; or acknowledgment that the debtor may reopen the bankruptcy case to revisit the dischargeability issue. *Hornsby*, 144 F.3d at 440.

In this case, the debtor proved that he made good faith efforts to repay the loan, as the payments made by Ms. Poremba during their marriage were from their joint funds and with his consent. He also proved that he cannot maintain a minimal standard of living if required to pay the entire loan at $400.00 a month. His budget is relatively lean and there is no room for an additional payment of that size. He did not, however, prove that the present state of affairs is likely to persist for a significant portion of the repayment period. First, there was no evidence as to the exact length of the repayment period but it seems to be at least 10 years. The debtor and Missy Wholf are healthy and relatively young; presumably at some point in the next several years Ms. Wholf will be able to find a job and their concomitant child care expenses will be lower because the children will be in school. Also, the debtor did not offer a satisfactory explanation for why Missy Wholf does not receive any child support from the father of her two children.

While the debtor did not prove that he is entitled to discharge the entire student loan, he is entitled to some relief because he clearly cannot afford to make the entire $400.00 payment each month. At the same time, his budget does have some leeway. In particular, the debtor did not prove that it is necessary to have a second vehicle which costs $336.00 a month plus insurance and gasoline. If the debtor sells the second vehicle, he will have enough money to pay his proportionate share of the student loan. The court will, therefore, discharge the 60% of the debt that is attributable to Ms. Poremba's loans, leaving the debtor responsible for his 40%. As the total loan amount is $50,188.76, the debtor is discharged as to $30,113.26 (which is 60% of that amount) and remains responsible to Sallie Mae for the remaining $20,075.50.

II. The Debt to Ms. Poremba under the Divorce Decree

Both the debtor and Ms. Poremba ask for a determination under § 523(a)(15) with respect to the debtor's obligation under the divorce decree to pay 40% of the student loan. This section does not, however, apply because the debtor failed to list or schedule Ms. Poremba as a creditor in his bankruptcy filing. And as the Sixth Circuit has noted, "[s]ection 523(a)(3) contains the only exceptions for unlisted and unscheduled debts." *Zirnhelt v. Madaj (In re Madaj)*, 149 F.3d 467, 469 (6th Cir. 1998). The issue is actually whether the debtor's obligation to Ms. Poremba is dischargeable under § 523(a)(3). Ms. Poremba has the burden of proof. *See Jones v. Warren Constr. (In re Jones)*, 296 B.R. 447, 450-51 (Bankr. M.D. Tenn. 2003).

Section 523(a)(3) states that:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt –
>
> * * *
>
> (3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit--

> (A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or
>
> (B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request[.]

11 U.S.C.A. § 523(a)(3). Section 523(a)(3)(A) protects a creditor's right to file a timely proof of claim and § 523(a)(3)(B) protects a creditor's right to request a determination of dischargeability under §§ 523(a)(2), (4), and (6). As discussed below, the protection provided by § 523(a)(3)(B) does not extend to a creditor holding a claim that is not dischargeable under § 523(a)(15).

A.

The Sixth Circuit has held that "[section] 523(a)(3)(A) excepts a debt from discharge if the debt was not scheduled in time for a timely filing of the proof of claim, *but not if,* despite the debt's not having been scheduled, the creditor nevertheless received notice of the bankruptcy in time to file a timely proof of claim." *Madaj,* 149 F.3d at 469 (emphasis in original). Creditors are charged with notice of the bankruptcy if they know facts that would cause a reasonably prudent person to make further inquiry. *See Summers v. Anderson (In re Summers),* 213 B.R. 825 (Bankr. N.D. Ohio 1996).

The debtor filed his case on January 16, 2002. Scheduled creditors got notice that proofs of claim were due by July 17, 2002. Ms. Poremba did not get this notice because she was not scheduled. The debtor testified that his parents told Ms. Poremba about the bankruptcy within one week after he filed. Ms. Poremba's testimony was equivocal on when she found out that the debtor had filed. The court credits the debtor's testimony on this point and finds that Ms.

Poremba had notice of the bankruptcy in time to file a proof of claim. Section 523(a)(3)(A) does not, therefore, preclude the discharge of this claim.

B.

Section 523(a)(3)(B) by its terms only protects a creditor's right to request a determination of dischargeability under §§ 523(a)(2), (4) and (6). The section does not protect an unscheduled creditor's right to assert the non-dischargeability of marital debt under § 523(a)(15). Consequently, whether a marital debt would have been nondischargeable under § 523(a)(15) had it been scheduled has no significance under § 523(a)(3)(B). Therefore, although the parties have argued that § 523(a)(15) applies to their controversy, it does not.[4] Ms. Poremba has not argued that the debtor's obligation to pay a portion of their joint student loan debt is a kind of debt specified in §§ 523(a)(2), (4), or (6). The debt may, therefore, be discharged under § 523(a)(3)(B).

C.

Ms. Poremba filed a counterclaim for damages based on the debtor's failure to list her in his bankruptcy. This claim is without merit because: (1) § 523(a)(3) provides the statutory

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[4] Generally, the bankruptcy code and rules require a creditor to file a timely complaint to determine the dischargeability of debts under § 523(a)(15), as well as under § 523(a)(2), (4) and (6). *See* 11 U.S.C. § 523(c) and FED. R. BANKR. P. 4007(c) (which require that a complaint to determine the dischargeability of debt under those sections be filed no later than 60 days after the first date of the meeting of creditors). Courts have, therefore, suggested that the omission of § 523(a)(15) from § 523(a)(3)(B) was inadvertent because it does not protect an unscheduled creditor's right to assert § 523(a)(15) nondischargeability. *See Herman v. Bateman (In re Bateman)*, 254 B.R. 866, 870 at n. 5 (Bankr. D. Md. 2000); *In re Harrison*, 206 B.R. 910, 912 at n. 1 (Bankr. E.D. Tenn. 1997). However, statutory text must be given its plain meaning unless doing so leads to an absurd result. *See Lamie v. United States Trustee*, 124 S. Ct. 1023 (2004). The plain meaning of § 523(a)(3)(B) is clear and does not lead to an absurd result. Consequently, § 523(a)(3)(B) cannot be read to protect unlisted § 523(a)(15) debts from discharge. *See Dixon v. Dixon (In re Dixon)*, 280 B.R. 755, 759 at n. 7 (Bankr. M.D. Ga. 2002).

consequence for that failure; and (2) Ms. Poremba has not provided any factual or legal support for her claim for damages.

CONCLUSION

For the reasons stated, the debtor-plaintiff is granted judgment on count I of his amended complaint and his obligation to Ms. Poremba under their divorce decree to pay 40% of their student loan debt is determined to be dischargeable under § 523(a)(3). The debtor-plaintiff is also granted judgment in part on count II of his amended complaint and $30,113.26 of his student loan debt to the lender is determined to be dischargeable. Additionally, judgment will be entered in favor of the debtor-plaintiff on Ms. Poremba's counterclaim. A separate judgment will be entered in accordance with this memorandum of opinion.

Date: 25 June 2004

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:

Mary Ann Rabin, Esq.
Glenn Forbes, Esq.
Kathryn Williams, Esq.

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NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 02-10476
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WILLIAM T. (SKEETER) WHOLF,	)	Chapter 7
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Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	
WILLIAM T. (SKEETER) WHOLF,	)	Adversary Proceeding No. 03-1370
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
AMY D. WHOLF nka POREMBA, et al.,	)	**JUDGMENT**
	)	
Defendants.	)	

For the reasons stated in the memorandum of opinion filed this same date,

IT IS ORDERED that the plaintiff is granted judgment on count I of his amended complaint against Amy Poremba and his obligation to her under their divorce decree to pay 40% of their student loan debt is determined to be dischargeable. (Docket 13). IT IS FURTHER ORDERED that the plaintiff is granted judgment in part on count II of his amended complaint against Sallie Mae Servicing and $30,113.26 of his student loan debt to Sallie Mae Servicing is determined to be dischargeable. (Docket 13). Finally, IT IS ORDERED that judgment is entered in favor of the plaintiff on Amy Poremba's counterclaim. (Docket 14).

Date: 25 June 2004

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

To be served by clerk's office email and the Bankruptcy Noticing Center on:
Mary Ann Rabin, Esq.
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