Dated: December 05, 2022
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
RYAN ARTHUR BAKKEN,
Debtor.

Case No. 22-21886-L
Chapter 7

ERIN CRESSMAN BAKKEN and
FREDERICK W. CRESSMAN,
Plaintiffs,
v.
RYAN ARTHUR BAKKEN,
Defendant.

Adv. Proc. No. 22-00072

ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT
AND GRANTING COUNTER MOTION FOR PARTIAL SUMMARY JUDGMENT

BEFORE THE COURT is the Plaintiffs' *Motion for Partial Summary Judgment*, filed October 24, 2022, seeking summary judgment as to Count III of the *Complaint. See* ECF No. 23. The Defendant filed his *Response* on November 29, 2022, asking that the Court grant summary

judgment for him. ECF No. 27. For the following reasons, the Court will deny the motion of the Plaintiffs and grant the motion of the Defendant.

In a prior order, the Court denied the Plaintiffs' *Motion for Partial Judgment on the Pleadings or, in the Alternative, for a Comfort Order* [ECF No. 21]. The Plaintiffs have now added a *Statement of Undisputed Facts*, which includes an Affidavit of Plaintiff Erin Cressman Bakken, a copy of a *Loan Agreement*, a copy of a *Marital Dissolution Agreement*, and a copy of a *Final Decree of Divorce* [ECF No. 24]. Ms. Bakken did not authenticate the other documents in her Affidavit, but Mr. Bakken did not raise a question concerning their authenticity. Mr. Bakken filed his two-page *Response* but did not file an affidavit. In the *Response*, counsel asserts that:

> Defendant *does* object to paragraphs 11 and 12 in the list of undisputed facts as these statements are unsubstantiated testimony from both Plaintiffs that were never incorporated within the original Complaint, never agreed to in the Answer, not submitted under oath or cross examination, and simply added to the record in this improper fashion.

[*Response*, ECF No. 27, p. 1]. The two paragraphs referenced by Mr. Bakken are these:

> 11. This term ["All other terms of the promissory note … will remain in full force and effect] was negotiated along with the other terms outlined in the MDA. Specifically, Ms. Bakken agreed to seek less child support because Debtor agreed to repay the loan to her father or that she would be entitled to judgment. Had Debtor not agreed to this term, Ms. Bakken would have sought additional child support. Bakken Aff. at ¶ 7.
>
> 12. The paragraph regarding repayment of the Loan Agreement was a vital component of the divorce between Ms. Bakken and Debtor. Mr. Cressman uses the money received from Debtor to help Ms. Cressman with her living expenses, particularly with the costs related to supporting her children. Without such aid, her financial situation would be worse. This is why this agreement was included in the MDA. Bakken Aff. ¶ 8.

[*Undisputed Facts*, ECF No. 24, pp. 2-3]. These two paragraphs were in fact submitted under oath by Ms. Bakken in her affidavit at paragraphs 7 and 8. Mr. Bakken did not raise any other potential factual disputes in his *Response*. He asks that the Court decide the legal question of the

dischargeability of the debt owed to Mr. Cressman, and he points out that Ms. Bakken could seek modification of child support or their parenting plan in the appropriate state court if necessary.

BACKGROUND FACTS

The Defendant, Ryan Arthur Bakken, filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on May 12, 2022. [Answer, ECF No. 3, ¶ 21].

The Plaintiffs, Erin Cressman Bakken and Frederick W. Cressman, commenced this adversary proceeding by filing their *Complaint Objecting to Discharge and Dischargeability of Debt* on July 6, 2022. [ECF No. 1]. Plaintiff Cressman is the father of Plaintiff Bakken. [Answer, ¶ 9]. Although he is named a Plaintiff in the *Complaint*, no relief is requested on his behalf, and his testimony concerning the disputed facts is not before the Court. The Defendant filed his *Answer* on August 2, 2022. [ECF No. 3].

The Defendant and Plaintiff Bakken were married June 25, 2011. [Answer, ¶ 8]. In October 2014, Plaintiff Cressman loaned the Defendant $41,400 to pay off student loans he obtained to attend culinary school. [Answer, ¶ 9].

On September 11, 2019, the Defendant memorialized his agreement to repay Plaintiff Cressman $28,985 at half a percent (.5%) annual interest by signing the *Loan Agreement*, a copy of which appears as Exhibit 1 to the *Complaint* and Exhibit 2 to the *Statement of Undisputed Facts* [Answer, ¶ 10].

The parties agree that the Defendant and Plaintiff Bakken entered into a *Marital Dissolution Agreement* and were divorced in November of 2020. [Answer, ¶ 12]. A copy of the *Marital Dissolution Agreement* appears as Exhibit 3 to the *Statement of Undisputed Facts*. The Defendant does not dispute that this is a copy of the parties' agreement.

The *Marital Dissolution Agreement* deals with the *Loan Agreement* at pages 7 and 8. It incorrectly states that the Defendant agreed to repay Plaintiff Bakken's *parents* when the *Loan Agreement* only calls for repayment to Plaintiff Cressman. It further states that "Husband shall pay the and be responsible for said indebtedness and he shall indemnify, defend and hold Wife harmless for said indebtedness." The *Marital Dissolution Agreement* provides for a repayment schedule that differs from that of the *Loan Agreement*. It contemplates that the loan will be repaid on or before February 28, 2027, while the *Loan Agreement* calls for repayment on or before September 1, 2024. Mr. Cressman is not a party to the *Marital Dissolution Agreement*.

Critically for Plaintiffs' argument, the *Marital Dissolution Agreement* provides:

> Should Husband fail to make any monthly payment as set forth herein on said loan, any amount remaining due and owing on said loan shall be considered a judgment against Husband in favor of Wife for which Wife may execute and collect and said amount shall draw judgment interest from the date of the entry of the Final Decree of Divorce in this cause until said amount is paid in full. All other terms of the promissory note [sic] between Husband and Wife's parents, Rick and Diane Cressman [sic], will remain in full force and effect.

[*Marital Dissolution Agreement*, p. 8]. The Final Decree of Divorce, dated November 18, 2020, simply incorporates the parties' *Permanent Parenting Plan* and *Marital Dissolution Agreement*. It makes no specific mention of the possibility that a "judgment" could result from failure of Mr. Bakken to pay his debt to Mr. Cressman. The *Permanent Parenting Plan*, which the Court assumes deals with the obligation to pay child support for the parties' minor children, does not appear in the record.

The *Complaint* seeks, inter alia, a declaration that the debt evidenced by the promissory note is nondischargeable as to Plaintiff Bakken pursuant to 11 U.S.C. § 523(a)(15).

JURSIDICTION, VENUE, AND AUTHORITY

Jurisdiction over a complaint arising under the Bankruptcy Code lies with the district court. 28 U.S.C. § 1334(b). Pursuant to authority granted to the district courts at 28 U.S.C. § 157(a), the district court for the Western District of Tennessee has referred to the bankruptcy judges of this district all cases arising under title 11 and all proceedings arising under title 11 or arising in or related to a case under title 11. *In re Jurisdiction and Proceedings Under the Bankruptcy Amendments Act of 1984*, Misc. No. 81-30 (W.D. Tenn. July 10, 1984). The determination of the dischargeability of particular debts is a core proceeding arising under the Bankruptcy Code. *See* 28 U.S.C. § 157(b)(2)(I). Questions about whether a debt has been or will be discharged likewise are core proceedings arising under the Bankruptcy Code. The bankruptcy court has authority to enter a final order determining the dischargeability of a particular debt subject only to appellate review. *See* 28 U.S.C. § 157(b)(1). Venue of this adversary proceeding is proper in the Western District of Tennessee because this proceeding is related to a bankruptcy case pending in this district. *See* 28 U.S.C. § 1409(a).

SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56 made applicable in bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7056 provides that summary judgment is appropriate if the movant can show that there is no genuine dispute as to any material fact and thus, the movant is entitled to judgment as a matter of law. Substantive law will identify which facts are material and a genuine issue of material fact exists only when, "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). When deciding a motion for summary judgment, the court does not weigh the evidence to determine the truth of the matter asserted but to determine

whether a genuine issue for trial exists. *Id.* In reaching its decision, the court views the evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986).

The moving party bears the initial burden of proof that there are no genuine issues that might affect the outcome of the action under governing law. *In re Oliver*, 414 B.R. 361, 367 (Bankr. E.D. Tenn. 2009), citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 106 S. Ct. 2505, 2510 (1986); Fed. R. Civ. P. 56(a), incorporated at Fed. R. Bankr. P. 7056.

The Court of Appeals for the Sixth Circuit has described the standards for granting summary judgment as follows:

> A genuine issue of material fact exists when, "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). In deciding whether this burden has been met by the movant, this court views the evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986). However, to survive summary judgment, the Plaintiff must present affirmative evidence sufficient to show a genuine issue for trial. *Anderson*, 477 U.S. at 249, 106 S. Ct. 2505. Therefore, "[i]f evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id*. at 249-50, 106 S. Ct. 2505.

White v. Wyndham Vacation Ownership, Inc., 617 F.3d 472, 475-76 (6th Cir. 2010).

Only disputes over facts that might affect the outcome of the suit under governing law will preclude the entry of summary judgment. *Id*. "'Summary judgment is proper if the evidence, taken in the light most favorable to the nonmoving party, shows that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.'" *Pazdzierz v. First American Title Ins. Co. (In re Pazdzierz)*, 718 F.3d 582, 586 (6th Cir. 2013), quoting *Mazur v. Young*, 507 F.3d 1013, 1016 (6th Cir.2007). When cross motions for summary judgment are filed, the court must consider each motion in turn to determine whether it may be granted.

Westfield Ins. Co. v. Tech Dry, Inc., 336 F.3d 503, 506 (6th Cir. 2003); *Taft Broadcasting Co. v. U.S.*, 929 F.2d 240, 248 (6th Cir. 1991).

The only disputes of fact raised by the Defendant concern two paragraphs in the Affidavit of Ms. Bakken, paragraphs 7 and 8, which attempt to describe reasons for including language concerning the Student Loans in the *Marital Dissolution Agreement. See Response*, p. 1. The Defendant's *Response*, however, was not accompanied by a supporting affidavit. The Court will discuss below whether the Plaintiff's statements are admissible and, if so, whether they are material.

DISCUSSION

The Plaintiffs seek partial summary judgment with respect to their claim that a contingent debt described in the *Marital Dissolution Agreement* is a non-support spousal debt excepted from discharge pursuant section 523(a)(15) of the Bankruptcy Code. That section excepts from discharge in a Chapter 7 case any debt:

> to a spouse, former spouse, or child of the debtor and not of a kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, or a determination made in accordance with State or territorial law by a governmental unit.

11 U.S.C. § 523(a)(15). Exceptions to discharge are construed strictly against the plaintiff and liberally in favor of the Debtor. *Grogan v. Garner*, 498 U.S. 279, 291, 111 S. Ct. 654, 112 (1991); *Rembert v. AT&T Universal Card Servs., Inc. (In re Rembert)*, 141 F.3d 277, 281 (6th Cir. 1998). The creditor must prove the elements of the exception by a preponderance of the evidence. *Id*. In order to prevail, the Plaintiffs must show that there exists (1) a debt to a spouse, former spouse, or child of the debtor; (2) not of a kind described in section 523(a)(5); (3) that was incurred by the debtor in a separation agreement, divorce decree or other order of a court of record. See *In re*

Williams, 398 B.R. 464, 468 (Bankr. N. D. Ohio 2008). The Plaintiffs assert that elements 2 and 3 are clearly met (this Court does not agree with respect to element 3 for reasons that will be discussed) and thus that the only issue is whether Mr. Bakken owes a debt to Ms. Bakken. The Court will discuss each of these elements in turn.

A. Is There a Debt Owed to Plaintiff Bakken?

The Defendant does not dispute that he is indebted to his former father-in-law, Plaintiff Cressen, by virtue of the *Loan Agreement*. Ms. Bakken is not a party to the *Loan Agreement*, and she has not alleged or shown that she is indebted to her father as the result of the loan made to her husband. Nevertheless, the Plaintiffs assert that the Defendant is indebted to his former spouse, Ms. Bakken, as the result of the *Marital Dissolution Agreement* even though the debt to Mr. Cressman was always the obligation of Mr. Bakken alone.

In support of their position that the Debtor owes a debt to Ms. Bakken, the Plaintiffs rely upon *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195 (6th Cir. BAP 1998), and *In re Johnson*, No. 07-50187, 2007 WL 3129951 (Bankr. N.D. Ohio 2007). Both cases differ from the present case because both involve the apportionment of *joint* debts in the course of divorce proceedings.

In *Gibson*, husband and wife were jointly indebted to the husband's stepfather. In their separation agreement, husband agreed to "pay any and all debts to his parents, if any." *Gibson*, 219 B.R. at 198. Husband filed a bankruptcy petition and included his former spouse and his stepfather in his list of creditors. The stepfather sued the former spouse for her failure to pay the debt, and the former spouse filed an adversary proceeding to determine whether the obligation was dischargeable under section 523(a)(5) or 523(a)(15). The bankruptcy court granted the debtor's motion for summary judgment and dismissed the complaint. The appellate panel affirmed the bankruptcy court's decision concerning the section 523(a)(5) claim because there was no evidence

that the assumption of indebtedness was intended as support. With respect to the section 523(a)(15) claim, the bankruptcy court granted summary judgment because the debt was owed to someone other than the debtor's former spouse and the agreement contained no hold harmless language. The panel reversed, holding that under applicable Ohio law, the incorporation of the separation agreement into the final decree of divorce gave rise to a new obligation of the debtor to his former wife to pay the debt owed to his stepfather. This new obligation, they said, once incorporated into the final decree, was no longer imposed by contract, but by decree. Specifically, the panel held that "[A]ll causes of action under the separation agreement are extinguished and replaced by post judgment remedies to enforce the decree." *Id*. at 204.

Gibson is distinguishable from the present case in at least three ways. *Gibson* was decided in 1997 under a prior iteration of section 523(a)(15) which excepted from discharge a debt "not of a kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation."[1] Section 523(a)(15) was amended in 2005 "to clarify that this exception only applies to debts owed 'to a spouse, former spouse, or child of the debtor.'" *Sherman v. Proyect (In re Proyect)*, 503 B.R. 765, 773 (Bankr. N.D. Ga. 2013), citing H.R. Rep No. 103-835, at 54 (Oct. 4,

[1] As recounted in the opinion, in pertinent part, § 523(a)(15) provided:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

....

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless—

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor [.]

11 U.S.C. § 523(a)(15).

Gibson, 219 B.R. at 200–01.

1994), reprinted in 1994 U.S.C.C.A.N. 3340, 3363; Pub.L. No. 109-8 (2005). Also, *Gibson* was decided under Ohio rather than Tennessee law. Under Tennessee law, a marital dissolution agreement is a contract, which is incorporated into the decree of divorce when granted but only as to those provisions, such as child support and alimony, governed by statute:

> A marital dissolution agreement ("MDA") is a contract entered into by a husband and wife in contemplation of divorce. As a contract, an MDA generally is subject to the rules governing construction of contracts. If approved by the trial court, the MDA is incorporated into the decree of divorce …. See Tenn. Code Ann. § 36–4–103(b). Once incorporated, issues in the MDA that are governed by statutes, such as child support during minority and alimony, lose their contractual nature and become a judgment of the court. The trial court retains the power and discretion to modify terms contained in the MDA relating to these statutory issues upon sufficient changes in the parties' factual circumstances. However, on issues other than child support during minority and alimony, the MDA retains its contractual nature.

Eberbach v. Eberbach, 535 S.W.3d 467, 474 (Tenn. 2017) (internal citations omitted). The provision of the *Marital Dissolution Agreement* related to the Debtor's student loan is not related to child support or alimony[2]; thus, it retains its contractual nature. *See Long v. McAllister-Long*, 221 S.W.3d 1, (Tenn. Ct. App. 2006) ("With two notable exceptions [child support and alimony], the agreements in a marital dissolution agreement are enforceable contract obligations."). Finally, *Gibson* differs from the present case in that in *Gibson* the debt in question was a joint debt rather than the debt of the debtor spouse only. As a result, the non-debtor spouse could have been pursued for payment and in fact was pursued for payment after the bankruptcy case was filed. In this case, Ms. Bakken is not jointly obligated to repay her father.

In the second case relied upon by the Plaintiffs, *In re Johnson*, the bankruptcy court, relying on *Gibson*, held that the debtor had a legal obligation to his former spouse to pay one-half of the

[2] The Court relies upon the Plaintiffs' own characterization of the purported debt as non-support obligation. *See Complaint*, ¶ 35. Interestingly, as discussed below, in her recently filed affidavit, Ms. Bakken attempts to tie the provision for repayment of the student loan to the parties' agreement concerning child support.

joint debt owed to certain credit card issuers notwithstanding the absence of a specific hold harmless agreement with respect to assumed debt. 2007 WL 3129951, at *6. The Court relied heavily upon the idea that the divorce decree itself created an enforceable obligation and thus a debt that was incurred in the course of a divorce. *Id*. As stated previously, Tennessee law dictates a different result. The *Johnson* court also was impressed by a number of cases holding that the apportionment of third-party debt to one spouse gives rise to an obligation to indemnify the obligee-spouse if the obligor-spouse fails to pay. *Id*. Again, these are not the facts presented by the case before this Court.

None of the cases that this Court has been able to discover suggest that a former spouse with no possibility of adverse consequence may compel a debtor to repay an otherwise nondischargeable debt. The case that comes closest to suggesting a different result is *Scarlett v. Scarlett (In re Scarlett)*, 70 Collier Bankr. Cas. 2d 881, 2013 WL 5550634 (Bankr. C.D. Ill. 2013), in which the bankruptcy judge found nondischargeable an obligation of the debtor to his former spouse to pay a credit-card obligation for which the debtor was the sole account holder. The former spouse proved that she was an authorized user of the card and that the card appeared on her credit report. Even though the credit card issuer had not attempted to collect the debt from the former spouse, the bankruptcy court found that the possibility that the non-debtor spouse would be adversely affected by non-payment of the obligation gave rise to the debtor's obligation to his former spouse to indemnify and hold her harmless. This liability, the court said, was excepted from discharge pursuant to section 523(a)(15).

The *Scarlett* case relied heavily upon a prior decision, *Jacobs v. Jaeger-Jacobs (In re Jaeger-Jacobs (In re Jaeger-Jacobs)*, 490 B.R. 352 (Bankr. E.D. Wis. 2013), which is instructive. In *Jaeger-Jacobs* the debtor spouse agreed to hold harmless her former spouse with respect to

certain credit card obligations, which the parties agreed were recoverable from either spouse, one because the spouse was a joint account holder, and two others because Wisconsin law treated them as marital debts. *Id*. at 355, citing Wis. Stat. § 766.55(2m). The marital dissolution agreement, which became incorporated into the final decree for all purposes pursuant to Wisconsin law, specified that the agreement to hold each other harmless concerning certain obligations was intended to constitute a domestic support obligation for purposes of the Bankruptcy Code. *Id*. The court, however, said that it was not clear whether the debts to the former spouse were or were not domestic support obligations but that the distinction was immaterial to the outcome because "[t]he debtor incurred [a] 'new debt' when the judgment incorporating the MSAs was granted." *Id.* The court continued:

> The liability of the plaintiff on any joint debts or debts subject to recovery under marital property law continued to exist as to him, even though she assigned payment of those debts in the decree. Since he was legally liable, his payments to Wells Fargo were not 'voluntary.' … The payments made by the plaintiff were to pay his liability, and he had already experienced a negative impact on account of the existence of this unpaid liability.

Id. at 357-58. The court focused upon the potential for negative impact upon the non-debtor spouse in deciding that the debtor's obligation to indemnify him was indeed a nondischargeable debt.

In contrast to *Jaeger-Jacobs*, Ms. Bakken is not indebted to her father. She has not alleged that she has been called upon to pay that liability, or that there is any possibility that she will be called upon to pay it. She has not suggested that any other negative impact will arise with respect to her on account of the potential discharge of the debt owed to Mr. Cressman, except that she has suggested that her father has been providing her with the money paid by Mr. Bakken, and she has used these funds to pay her living expenses. If Mr. Cressman has routinely provided Ms. Bakken with these funds, he is doing so as a volunteer. He has no legal obligation to support his adult daughter. The *Scarlett* case is factually closest to the Bakken case, but it relies upon evidence of

an adverse impact of the failure of the debtor to pay an obligation he had promised in the parties' marital dissolution agreement to pay. Language in the Bakkens' *Marital Dissolution Agreement* to the effect that the Debtor "shall indemnify, defend, and hold Wife harmless for said indebtedness" is meaningless surplusage because Ms. Bakken could never be negatively impacted by the Debtor's failure to pay his debt to Mr. Cressman. The Court is not naïve to the very real possibility that the Debtor's bankruptcy filing and potential discharge of the debt to Mr. Cressman has caused additional strain on the parties' already fractured relationship. The Court must focus here, however, on legal detriment. The Plaintiff has failed to show that she has suffered or will suffer any legal detriment as the result of the discharge of the debt to her father, a circumstance that is critical to the finding that Mr. Bakken is indebted to her to pay the debt he owes to Mr. Cressman.

B. Is the Student Loan Debt Not of a Kind Described in Section 523(a)(5)?

Notwithstanding the fact that Plaintiffs' counsel concedes that the Debtor's student loan debt is not of a kind described in section 523(a)(5), the Affidavit of Ms. Bakken attempts to describe it as an obligation created in lieu of child support. Specifically, Ms. Bakken asserts:

> 7. This term was negotiated along with the other terms outlined in the Marital Dissolution Agreement. Specifically, I agreed to seek less child support because Ryan agreed to repay the loan to my father or that I would be entitled to judgment. Without his agreeing to this term, I would have sought additional child support.
>
> 8. The paragraph regarding payment of the loan to my father was a vital aspect of our divorce. My father uses the money received from Ryan to help me with my living expenses, particularly with the costs related to supporting my children. Without such aid, my financial situation would be worse. This is why the agreement was included in the Marital Dissolution Agreement.

Affidavit of Bakken, ¶¶ 7 -8.

A marital dissolution agreement is a contract entered into by a husband and wife in contemplation of divorce. *Eberbach*, 535 S.W.3d 467 at 474. This particular *Marital Dissolution*

Agreement contains the not uncommon statement that "[t]his agreement contains the entire understanding and agreement between the parties." *Marital Dissolution Agreement*, p. 3. Ms. Bakken seeks to explain certain matters she alleges were discussed in the negotiation of the agreement that are not addressed by the agreement itself. Tennessee law concerning the admissibility of parol or extrinsic evidence is codified at Tennessee Code Annotated § 47-2-202, which provides:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:
>
> (a) By course of performance, course of dealing or usage of trade, pursuant to § 47-1-303; and
>
> (b) By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

In general, parol evidence "'is inadmissible to contradict, vary, or alter a written contract where the written instrument is valid, complete, and unambiguous, absent fraud or mistake or any claim or allegations thereof.'" *Bradford v. Sell*, 240 S.W.3d 834, 838 (Tenn. Ct. App. 2007), quoting *Airline Const. Inc. v. Barr*, 801 S.W.2d 247, 259 (Tenn. Ct. App. 1990). The parties stated their intention that the *Marital Dissolution Agreement* express their entire agreement. Even if the Court were to accept Ms. Bakken's statements as true, the *Marital Dissolution Agreement* cannot be contradicted by evidence of a contemporaneous oral agreement, and the *Marital Dissolution Agreement* is silent with respect to child support. No mention of child support is made in the section dealing with the *Loan Agreement* or anywhere else in the agreement. With respect to alimony, the agreement specifies that "[n]either party shall pay alimony to the other, and each waives any request for alimony." *Marital Dissolution Agreement*, p. 10. The Court assumes that the parties'

agreement concerning child support is contained in the *Permanent Parenting Plan*, but this agreement was not made part of the record in this proceeding. Counsel for the Defendant correctly states that the Shelby County Circuit Court retains jurisdiction to make adjustments to child support if needed. *See Eberbach*, 535 S.W.3d at 474. If, as Ms. Bakken suggests, the discharge of the Debtor's obligation to her father leaves her in need of additional support for the parties' children, that fact should be made known to the Circuit Court, the court with special expertise in domestic matters.

Ms. Bakken will not be allowed to supplement the terms of the *Marital Dissolution Agreement* on an issue that it does not address. Thus, the Court accepts as true the Plaintiffs' statement that the provisions of the *Marital Dissolution Agreement* concerning the student loan debt attempt to create a non-support debt rather than a debt for spousal or child support.

C. Is the Student Loan Debt One That was Incurred by the Debtor in a Separation Agreement, Divorce Decree, or Other Court of Record?

For reasons previously stated, the Court concludes that there is no debt owed to Ms. Bakken arising from the *Marital Dissolution Agreement* or *Final Decree of Divorce*. The parties attempted to create a contingent obligation, the contingency for which had not occurred when the bankruptcy petition was filed. Instead, the Plaintiffs assert that the obligation will arise as the result of the discharge of the Debtor's debt to Mr. Cressman. The Court finds that this attempt to create a debt to Ms. Bakken failed because she is not jointly liable to her father with Mr. Bakken, and she has failed to show that there will by any negative impact to her in the event that the debt is discharged. Therefore, the final element of section 523(a)(15) is not present. The debt owed to Mr. Cressman predates the *Marital Dissolution Agreement* and thus was not incurred by the Debtor in connection with a separation agreement, divorce decree, or other court of record.

D. The Attempt to Avoid Dischargeability of the Debt to Mr. Cressman is Void

The Court is concerned about the attempted agreement between the Bakkens for another reason. There is no doubt that in the course of dividing their marital property and marital debts, one spouse may agree to pay another spouse a sum of money. Agreements to pay a spouse a sum certain pursuant a division of property may be enforced by contempt or breach of contract. *Long*, 221 S.W.3d at 9-10 ("Contempt and breach of contract are proper remedies for the breach of provisions that have been approved and incorporated but not merged into a final decree."). This particular agreement, however, was contingent upon the failure of Mr. Bakken to pay Mr. Cressman. If Mr. Bakken had paid the obligation in full, or if he had not sought bankruptcy relief, there would be no question of an obligation to Ms. Bakken. And because Ms. Bakken is not indebted to Mr. Cressman, there is no question of the agreement having the effect of protecting Ms. Bakken in the event that Mr. Bakken fails to pay. Counsel has argued, but the Plaintiffs have not alleged that the Debtor failed to make payments prior to the filing of the bankruptcy petition.[3] Nor have they alleged that a debt to Ms. Bakken was reduced to judgment by the Circuit Court prior to the filing of the bankruptcy petition. Instead, the Plaintiffs suggest that discharge of the obligation to Mr. Cressman will satisfy the condition that gives rise to his obligation to Ms. Bakken. In substance, the Plaintiffs assert that the Debtor has contractually waived his right to discharge of his obligation to Mr. Cressman. This is the aspect of this arrangement that is most troubling to the Court. Attempted prepetition waivers of the right to discharge in bankruptcy violate public policy and are unenforceable. *Lichtenstein v. Barbanel*, 161 Fed.Appx. 461, 468

[3] The *Motion for Partial Summary Judgment* and the *Statement of Undisputed Facts* contain the statement that "Because Debtor has failed to make payments under the Loan Agreement and has shown a clear intent to discharge the note, Ms. Bakken is entitled to a judgment under the terms of the MDA." *Motion*, p. 10; *Statement*, ¶ 14. Nowhere in the record, however, does it appear that Mr. Bakken failed to make payments prior to the filing of his bankruptcy petition. The *Complaint* merely alleges "Should Debtor be granted a discharge as to the Promissory Note, then Ms. Bakken would be entitled to a judgment under the terms of the MDA." ¶ 37. The Affidavit of Ms. Bakken makes no statement concerning the failure to make payments.

(6th Cir. 2005) ("A pre-petition stipulation in a state-court action waiving a debtor's right to obtain a discharge of a specific debt in a future bankruptcy case is void because it offends the public policy of promoting a fresh start for individual debtors."). The purpose of the provision appears to be to protect Mr. Cressman by preventing the discharge of the debt; Ms. Bakken has no need of protection because she has no liability for the debt. If Ms. Bakken is in need of additional child support, she would be well within her rights to seek a modification of support from the Circuit Court. The Court therefore finds that it would violate public policy to enforce the purported agreement between these parties which operates as a prepetition waiver of discharge.

CONCLUSION

The parties have failed to raise any disputed issue of material fact requiring trial of Count III of the *Complaint*. The Plaintiffs bear the burden of proving three elements necessary to establish that a debt is excepted from discharge pursuant to section 523(a)(15). The Plaintiffs have failed to prove elements (1) and (3). In addition, the Court has found that the parties' attempt to assign the obligation owed to Mr. Cressman to Ms. Bakken in the event of bankruptcy in order to avoid discharge is void. For these reasons, the Plaintiffs' *Motion for Partial Summary Judgment* is DENIED. The Defendant's counter motion for summary judgment is GRANTED.

cc: Debtor/Defendant
Attorney for Debtor/Defendant
Plaintiffs
Attorney for Plaintiffs
Chapter 7 Trustee
United States Trustee