Dated: February 11, 2025
The following is SO ORDERED:

Jimmy L. Croom
Jimmy L. Croom
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

In re:

KYLE DYLAN WEEMS,
Debtor.

Case No. 23-10576
Chapter 7

Kyle Dylan Weems,
Plaintiff,

v.

Adv. Proc. No. 24-5017

State of North Dakota d/b/a Bank of North Dakota by and through Student Loans of North Dakota,
Defendant.

MEMORANDUM OPINION RE: MOTION TO DISMISS COMPLAINT (ECF No. 11)

Kyle Dylan Weems ("Debtor") filed a dischargeability complaint against the State of North Dakota d/b/a Bank of North Dakota by and through Student Loans of North Dakota ("Defendant") on May 3, 2024. The Debtor asserts that repayment of the private student loan creates an undue hardship and, thus, renders the loan dischargeable under 11 U.S.C. § 523(a)(8).

On December 30, 2024, the Defendant filed a motion to dismiss the adversary complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Dismissal Motion"). The Defendant asserts that Debtor's

complaint fails to state a claim for which relief may be granted because it insufficiently sets forth the required facts, information, and grounds for relief as required by 11 U.S.C. § 523(a)(8).

The Debtor filed an objection to the Dismissal Motion on January 27, 2025. The Debtor asserts the Defendant's motion is untimely and that his complaint adequately states a claim for relief that satisfies the standards set forth in the Supreme Court decisions in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007).

The Court conducted a hearing on the Dismissal Motion and the Debtor's objection thereto on February 6, 2025, at which time it took the matter under advisement.

JURISDICTION

This proceeding arises in a case referred to this Court by the Standing Order of Reference, Misc. Order No. 84-30 in the United States District Court for the Western District of Tennessee, Western and Eastern Divisions, and is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). This Court has jurisdiction over core proceedings pursuant to 28 U.S.C. §§ 157(b)(1) and 1334 and, thus, may hear and enter a final order in this matter. This memorandum opinion and order shall serve as the Court's findings of facts and conclusions of law. Fed. R. Bankr. P. 7052.

FACTS

In his complaint, the Debtor alleges as follows. Two years after graduating from high school, the Debtor enrolled in an automotive repair program at WyoTech University in Laramie, Wyoming. (Compl., ECF No. 1 at ¶ 8.) The Debtor attended the school from June 2013 to May 2014. (*Id.*) He took out both federal and private student loans to attend WyoTech. (*Id.* at ¶ 22.) The Debtor obtained the private student loan at issue in this adversary proceeding ("ND Loan") in May 2013. (*Id.* at ¶ 33.)

The owner of WyoTech, Corinthian Colleges, Inc. ("CCI"), was fined $30 million by the U.S. Department of Education ("Department") for predatory practices. (*Id.* at ¶¶ 13-17.) In May 2018, a federal judge ordered the Department to cease all collections of federal student loans related to CCI. (*Id.* at ¶ 20.) In June 2022, the Department forgave all federal loans owed by CCI students, including Debtor's federal loan. (*Id.* at ¶ 21.)

The Debtor states he had one job in the automotive field after graduating from WyoTech, but the pay was so low, he returned to management in the fast-food industry. (*Id.* at ¶ 26.) Because of his experience with WyoTech, the Debtor asserts that he is wary of attempting any other educational

program. (*Id.* at ¶ 29.) He also asserts that because of WyoTech's reputation, he cannot list the school on his resume and his credits are not transferrable to any other school. Accordingly, the Debtor states that he "received no value for the" the ND Loan. (Id. at ¶ 32.)

The Debtor asserts that he made payments on the ND Loan from 2014 to 2018 "when the payments became unaffordable." (*Id.* at ¶ 34.)

Upon default, the Defendant filed suit against the Debtor in state court to collect the full balance owed on the ND Loan. (*Id.* at ¶ 36.) The Debtor asserts that at the time the lawsuit was filed, the balance of the ND Loan was $45,962.20 which did not include pre-judgment interest. (*Id.*) He states that the approximate balance as of the filing of his dischargeability complaint was $48,120.00. (*Id.* at ¶ 37.) He alleges that the Defendant is seeking pre- and post- judgment interest, fees, and costs in its state court complaint and that any judgment awarded thereunder would take him more than a decade to satisfy. (*Id.* at ¶¶ 52-53.) The Debtor asserts that he would have to live "a life of destitution" in order to pay the judgment prayed for in the complaint. (*Id.* at ¶ 53.)

The Debtor alleges that "he is certain to face post-judgement remedies" in the state court lawsuit including wage garnishment. (*Id*. at ¶ 47.) He states that it would take more than nine years to repay the full amount of the ND Loan under a garnishment and that is only if the Defendant were to waive future interest. (*Id*. at ¶ 51.) The Debtor also claims that a garnishment would "force" him "into serial chapter 13 bankruptcies just to keep the garnishment at bay." (*Id.* at ¶ 47.)

Because the ND Loan has been accelerated, the Debtor asserts that the full amount of the ND Loan is due immediately. (*Id.* at ¶ 38.) He states that the ND Loan does not allow him to cure the default. (*Id.* at ¶ 41.) He also alleges that the loan does not offer an income-driven repayment plan or provide for any type of forgiveness after a certain number of payments. (*Id*. at ¶¶ 39-40.) He states that the ND Loan does not offer a discharge for attending fraudulent schools. (*Id.* at ¶ 42.) He asserts that he will never be able to earn enough to repay the entire accelerated balance at once. (*Id.* at ¶ 46.)

The Debtor contends that he does not have the education or experience to pursue a job that would make repayment of the ND Loan affordable. (*Id*. at ¶ 28.) He also asserts that he has maximized his income as much as possible, but that he has never made more than $25,000.00 a year. (*Id.* at ¶¶ 27 & 45.) The Debtor claims that these facts, coupled with the "economic climate," demonstrate that "there is not much hope of his income growing in any significant way." (*Id.* at ¶ 45.) He asserts that he has

minimized his expenses as much as possible and he does not have any dependents. (*Id.* at ¶¶ 25 & 44.) Thus, he contends he will never be able to afford repayment of the ND Loan. (*Id.* at ¶ 46.)

The Debtor alleges that his low income and low earning capacity make repayment of the ND Loan difficult. Thus, he argues that repayment of the loan constitutes an undue hardship. He asks the Court to discharge his liability on the ND Loan pursuant to 11 U.S.C. § 523(a)(8).

The Debtor did not attach any exhibits to his complaint nor did he reference any other documents or pleadings within the complaint.

ANALYSIS

A. Timeliness of the Dismissal Motion

The Debtor asserts that the Dismissal Motion was untimely because it was filed after the answer. Although that is technically true, the Defendant raised the failure to state a claim upon which relief may be granted as an affirmative defense in its answer and sought dismissal of the adversary on that basis therein. (*See* Answer, ECF No. 5 at 2.) Through inadvertence, the Court did not set the Defendant's dismissal request for a hearing. Since the Defendant complied with Federal Rule of Civil Procedure 12(b) and included the affirmative defense in its answer, the Court deems its Dismissal Motion timely.

B. Merits of the Dismissal Motion

Pursuant to Federal Rule of Civil Procedure 8(a)(2), made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7008, "[a] pleading that states a claim for relief must contain … a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). If, in the eyes of the defendant, the plaintiff has not satisfied this pleading requirement, the defendant may seek dismissal of the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7012. When considering a Rule 12(b)(6) motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff, accept the factual allegations of the complaint as true, and draw all reasonable inferences in favor of the plaintiff. *Tam Travel, Inc. v. Delta Airlines, Inc*. (*In re Travel Agent Com'n Antitrust Litig.*), 583 F.3d 896, 903 (6th Cir. 2009). The court need not, however, "accept as true legal conclusions or unwarranted factual inferences, and conclusory allegations or legal conclusions masquerading as factual allegations will not suffice." *Id*. (citations omitted) (internal quotation marks omitted.) "[O]n a 12(b)(6) motion, the moving party bears the burden of demonstrating that the plaintiff

failed to state a claim" for relief. *Bangura v. Hansen*, 434 F.3d 487, 498 (6th Cir. 2006) (citation omitted).

In the case of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007), the Supreme Court concluded that in the face of a Rule 12(b)(6) motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Id*. at 570. Two years later in the case of *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009), the Supreme Court further explained this pleading requirement:

> A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Id. at 678 (citing *Twombl*y, 550 U.S. at 556-57). "[T]o survive a [Rule 12(b)(6)] motion to dismiss, the complaint must contain either direct or inferential allegations respecting *all* material elements to sustain a recovery under some viable legal theory." *Tam Travel*, 583 at 903 (emphasis added) (citation omitted). Although the allegations as to each element of a claim need not be detailed, a plaintiff's obligation to provide the "grounds" of his entitlement to relief requires more than "labels and conclusions," and "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citations omitted). "On a Rule 12(b)(6) motion, the Court considers not whether the plaintiff will ultimately prevail, but whether the facts permit the court to infer 'more than the mere possibility of misconduct.'" *J.G. by & through C.G. v. Knox Cnty.*, No. 1:19-CV-63, 2019 WL 4451203, at *2 (E.D. Tenn. Sept. 17, 2019) (citing *Iqbal*, 556 U.S. at 679); *see also*, *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683 (1974) ("Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.")

In reviewing a Rule 12(b)(6) motion, a "court cannot consider matters beyond the complaint." *Trustees of Detroit Carpenters Fringe Benefit Funds v. Patrie Const. Co*., 618 F. App'x 246, 255 (6th Cir. 2015) (citation omitted). If it does so, "it effectively converts the motion to dismiss to a motion for summary judgment." *Id.* (citation omitted). A court may [however] consider items appearing in the record of the case, including exhibits, without converting a Rule 12(b)(6) motion into a motion for summary judgment, but only so long as they are *referred to in the complaint* and are central to the claims contained therein." *Id.* (cleaned up) (emphasis added) (citations omitted). A court may also take

"judicial notice of the record and prior proceedings in [a] case" without converting the motion into one for summary judgment. *Flex Homes, Inc. v. Ritz-Craft Corp. of Michigan*, 721 F. Supp. 2d 663, 668 (N.D. Ohio 2010). "A 'dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a 'judgment on the merits,' and is therefore done with prejudice." *Pratt v. Ventas, Inc.*, 365 F.3d 514, 522 (6th Cir. 2004) (quoting *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n. 3, 101 S. Ct. 2424 (1981)); *see also*, *Crone-Schierloh v. Hammock*, No. 2:12-CV-410, 2013 WL 12123903, at *3 (S.D. Ohio May 22, 2013) ("[A] dismissal under Rule 12(b)(6) generally operates as a dismissal with prejudice, unless the district court in its discretion finds that the circumstances warrant otherwise.").

Section 523(a)(8) of the Bankruptcy Code provides that qualifying student loans are not excepted from a debtor's discharge "unless excepting such debt . . . would impose an undue hardship on the debtor and the debtor's dependents[.]" 11 U.S.C. § 523(a)(8). The Sixth Circuit, along with most other circuit courts, has adopted a three-part test to use when analyzing whether an "undue hardship" exists in a particular case. This test, commonly known as the *Brunner* test, requires a debtor to establish three elements when seeking to discharge a student loan. These elements are:

> "(1) that the debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans."

Oyler v. ECMC (*In re Oyler*), 397 F.3d 382, 385 (6th Cir. 2005) (quoting *Brunner v. New York State Higher Educ. Serv. Corp.*, 831 F.2d 395 (2d Cir. 1987)). When considering a student loan dischargeability complaint in the context of Rule 12(b)(6), a court must determine whether the complaint states "sufficient facts which, when taken as true, could plausibly establish each of these elements." *Chenault v. Great Lakes Higher Educ. Corp.* (*In re Chenault*), 586 B.R. 414, 419 (B.A.P. 6th Cir. 2018). Failure to adequately plead one of the *Brunner* elements defeats a sufficiency determination under Rule 12(b)(6). *Murrell v. Edsouth* (*In re Murrell*), 605 B.R. 464, 469 (Bankr. N.D. Ohio 2019) (stating that "[b]ecause the debtor bears the burden of establishing dischargeability under section 528(a)(8), the party opposing dischargeability need only prevail on any one of the three elements of the *Brunner* test in order to dispose of the debtor's claim.").

The Defendant contends that the Debtor's complaint fails to satisfy the second prong of the *Brunner* test. This prong asks whether any "additional circumstances" exist which "indicate that the Debtor's current financial circumstances are beyond his control and will continue into the future."

Looper v. U.S. Dep't of Educ. (*In re Looper*), No. 05-38187, 2007 WL 1231700, at *6 (Bankr. E.D. Tenn. Apr. 25, 2007). "Such circumstances must be indicative of a certainty of hopelessness, not merely a present inability to fulfill financial commitment." *In re Oyler*, 397 F.3d at 386 (citation omitted). "Such circumstances may include, but are not limited to, illness, disability, a lack of useable job skills, or the existence of a large number of dependents[.]" *In re Nixon*, 453 B.R. at 330 (citation omitted). "Additional circumstances" also include "age or other factors that would prevent retraining or relocation in order to increase her income;" a "lack of assets;" and the "number of years remaining in the Debtor's work life to allow repayment of the loan." *Hastings v. U.S. Dep't of Educ.* (*In re Hastings*), 643 B.R. 470, 478 (Bankr. S.D. Ohio 2022) (citation omitted). "The Debtor must establish that his distressed state of financial affairs is the result of events which are clearly out of the debtor's control; ... that he has done everything within his power to improve his financial situation, and that the hardship he is experiencing is actually 'undue,' as opposed to the garden variety financial hardship experienced by all debtors who file for bankruptcy relief." *In re Looper*, 2007 WL 1231700, at *6 (cleaned up) (citation omitted); *see also*, *In re Oyler*, 397 F.3d at 386 (citations omitted) ("[M]ost importantly, [the "additional circumstances"] must be beyond the debtor's control, not borne of free choice. Choosing a low-paying job cannot merit undue hardship relief.")

In the case at bar, the closest the Debtor gets to asserting that any qualifying additional circumstances exist is when he states he "does not have the education or experience to pursue a job in any way that would make the [ND] Loan affordable." (Compl. at ¶ 28.) The Debtor fails to offer any facts in support of this unaffordability assertion (and completely ignores the fact that "affordability" is not the standard under § 523(a)(8)). He states that he had one job in the field he was trained for at WyoTech and that he made more as a fast-food manager, but he does not set forth any facts that indicate why he has not, or cannot, move up in the fast-food industry. He does not state whether he has looked for other jobs in the automotive field nor does he assert that his training at WyoTech was in any way deficient. He also fails to state what his current job is, how much he earns at that job, or whether he works full-time or part-time. He does not assert he has any mental or physical disabilities that make it impossible for him to earn more now or in the future. The Debtor does not address the fact that he is relatively young and has a number of years remaining in his working life. Nowhere in his complaint does he indicate what efforts, if any, he has made to improve his employment prospects in any career. He does not state why or how his present financial condition will continue into the future. Although he states that he cannot list the WyoTech program on his resume because of the school's reputation, he ignores the fact that a "lack of usable job skills" is not limited to his career in the automotive repair

business. It means a lack of usable job skills for ANY job. The Debtor made no allegations about a lack of usable skills for other areas of employment.

In his objection to the Dismissal Motion and at the hearing thereon, the Debtor asserted that his pre-petition default and the Defendant's acceleration of the ND Loan balance constitute an "additional circumstance" in and of themselves. A handful of courts, all outside the Sixth Circuit, have held that, as a matter of law, these circumstances satisfy *Brunner*'s second prong. *Longo v. Discover Bank* (*In re Longo*), 654 B.R. 1, 18 (Bankr. D. Conn. 2023), reconsideration denied, No. 21-20909 (JJT), 2023 WL 6474099 (Bankr. D. Conn. Aug. 4, 2023); *Barron v. Tex. Guaranteed Student Loan Corp.* (*In re Barron*), 264 B.R. 833 (Bankr. E.D. Tex. 2001). These courts reason that because the repayment period for accelerated student loans expires upon default, the "state of affairs is likely to persist for a significant portion of the repayment period." *In re Barron*, 264 B.R. at 842; *see also In re Longo*, 654 B.R. at 16; *In re Rosenberg*, 610 B.R. at 461. Other courts have disagreed with these decisions. *See, e.g., Grawey v. Ill. Student Assistance Comm'n* (*In re Grawey*), No. 00-83643, 2001 WL 34076376 (Bankr. C.D. Ill. Oct. 11, 2001). The *Grawey* court reasoned as follows:

> The fact that the student loan lender obtained judgment before bankruptcy should not give the debtor a free pass on Brunner's second prong. Almost all debtors who seek a hardship discharge of a student loan are in default, thereby enabling the lender to accelerate the loan and sue for judgment after bankruptcy, if not before.
>
> This Court is of the opinion that the proper application of Brunner's second prong requires a debtor to prove that a present inability to make payments on the student loan is likely to continue for the reasonably foreseeable future. What stage of the collection process the lender reached before the bankruptcy filing has little to do with that inquiry.

Id. at *4.

The Court finds the *Grawey* reasoning more persuasive and holds that pre-petition default and acceleration of a student loan balance do not, on their own, satisfy *Brunner*'s second prong as a matter of law. They are certainly factors to consider when determining whether a debtor has sufficiently plead the existence of "additional circumstances;" however, when they are the *only* facts plead in support of the second prong, the § 523(a)(8) complaint does not adequately state a claim for relief. This conclusion is bolstered by the fact that in this case the Debtor acknowledged that he could repay the ND Loan over a certain number of years and/or through a chapter 13 plan. (See Compl., ECF No. 1 at ¶¶ 47, 51, 53.) Thus, the Debtor admits his current and future financial circumstances would allow for repayment of the

ND Loan either through a payment plan (which the Defendant offered as a solution at the hearing on the Dismissal Motion) or through a chapter 13 bankruptcy.

Because the Court has concluded that the Debtor's complaint fails to adequately state a claim for relief under the second *Brunner* prong, the Court need not consider whether the complaint is sufficient under the other two prongs of the analysis. *In re Murrell*, 605 B.R. at 469.

CONCLUSION

A court needs facts in determining whether a student loan dischargeability complaint adequately states a claim for relief. The Debtor in this case has failed to set forth sufficient facts that make relief seem plausible in this adversary proceeding. This failure is especially concerning given that the Court dismissed the Debtor's prior complaint for the same reason—failure to state a claim upon which relief can be granted. The Court granted that dismissal without prejudice to give the Debtor an opportunity to draft and file a new complaint that would sufficiently plead his § 523(a)(8) claim. The Debtor did not do this.

The Court will grant the Defendant's Dismissal Motion and dismiss this complaint with prejudice. An order will be entered in accordance herewith.

Mailing list

Plaintiff
Joshua Cohen, attorney for Plaintiff
Defendant
Eileen M. Love, attorney for Defendant

Dated: February 11, 2025
The following is SO ORDERED:

Jimmy L. Croom
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

In re:

KYLE DYLAN WEEMS,
Debtor.

Case No. 23-10576
Chapter 7

Kyle Dylan Weems,
Plaintiff,

v.

Adv. Proc. No. 24-5017

State of North Dakota d/b/a Bank of North Dakota by and through Student Loans of North Dakota,
Defendant.

ORDER GRANTING MOTION TO DISMISS COMPLAINT (ECF No. 11)

For the reasons set forth in the Memorandum Opinion entered in accordance herewith, the Court **GRANTS** the Defendant's Motion to Dismiss Complaint (ECF No. 11). The Debtor's objection to the motion (ECF No. 17) is **OVERRULED.**

The Complaint in this adversary proceeding is hereby **DISMISSED WITH PREJUDICE**.

Mailing list

Plaintiff
Joshua Cohen, attorney for Plaintiff
Defendant
Eileen M. Love, attorney for Defendant