

1 **WO**

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT

7

FOR THE DISTRICT OF ARIZONA

8

9

United States of America,

)

No. CV-01-317-PHX-LOA

10

Plaintiff,

)

ORDER

11

vs.

)

12

Ted G. McFerran,

)

13

Defendant.

)

14

15

This matter is before the Court on Defendant’s two Petitions to Quash

16

Subpoena. (dockets # 27, # 32) The Petitions are substantively the same. Defendant

17

seeks an order quashing a subpoena which the Government issued scheduling Plaintiff’s

18

deposition. Defendant also seeks a protective order directing the Government to cease

19

collection efforts on a student-loan obligation which Defendant claims was discharged in

20

his Chapter 7 bankruptcy. The Government opposes Plaintiff’s petitions. (docket # 29)

21

Additionally, in response to the Court’s order, docket # 31, the parties have submitted

22

briefing regarding the applicability of *Espinosa v. United Student Aid Funds*, ___ F.3d

23

___, 2008 WL 4426634 (9th Cir., Oct. 2, 2008) to this case. (dockets ## 33, 34)

24

I. Background

25

On February 20, 2001, the Government commenced this recovery action

26

pursuant to 28 U.S.C. § 1345 based on Defendant’s alleged default on a student loan.

27

(docket # 1) The parties consented to magistrate-judge jurisdiction pursuant to 28 U.S.C.

28

§ 636(c). (docket # 7) The Government subsequently filed a Motion for Summary

1 Judgment. (docket # 10) Defendant did not file a response. On March 1, 2002, the
2 Court granted summary judgment in favor of the Government. (docket # 14) On March
3 28, 2002, the Government made a demand for payment. (docket # 29 at 2) Thereafter, on
4 July 27, 2004, on the Government's motion, the Court scheduled a judgment-debtor exam
5 and ordered Defendant to bring any financial records to disclose his ability to satisfy the
6 judgment entered March 1, 2002. (docket # 16) The Judgment-Debtor exam was held
7 on September 9, 2004. (docket # 18)

8 On October 14, 2005, Defendant, proceeding *pro se*, filed a voluntary
9 petition under Chapter 7 of the Bankruptcy Code¹ in the U.S. Bankruptcy Court, District
10 of Arizona. *See*, Bankruptcy Petition # 2:05-bk-27427-RJH.² On October 31, 2005, the
11 Bankruptcy Court sent Defendant a "Corrected³ Notice to Debtor Not Represented by an
12 Attorney" which included the following statement regarding student loans:

13 **STUDENT LOANS**

14 Student loans made, insured, or guaranteed by a governmental unit or
15 under any program funded by a governmental unit or a non-profit
16 institution, are generally not discharged by your bankruptcy unless it
17 would impose an undue hardship on you and your dependents. In order
to have a student loan discharged for undue hardship, you must file a
complaint naming the student loan creditor as a defendant. The clerk's

18 ¹ Because Defendant's bankruptcy proceeding was commenced before the October
19 17, 2005 effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act
20 of 2005 ("BAPCPA"), it is considered a pre-BAPCPA case.

21 ² A district court "may take notice of proceedings in other courts, both within and
22 without the federal judicial system, if those proceedings have a direct relation to matters at
23 issue." *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248
24 (9th Cir. 1992) (citations and internal quotation marks omitted). A district court may take
25 judicial notice of matters of public record, *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th
26 Cir. 2001), including the fact that a document that has been filed in another court proceeding.
27 *Id.* at 689-90.

28 ³ The docket in 2:05-bk-27427-RJH reflects that on October 18, 2005, the Bankruptcy
Court sent Defendant a "Notice to Debtor Not Represented by An Attorney." (2:05-bk-
27427-RJH, docket # 4) On October 31, 2005, a "Corrected" notice was sent to Defendant.
(2:05-bk-27427-RJH, docket # 9) The record does not indicate what type of correction was
made on the October 31, 2005 notice.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

office will issue the summons and return it to you. Please provide a stamped, self-addressed envelope for this purpose.

It is your responsibility to serve the summons and a copy of the complaint upon the defendant. An affidavit of service must be filed after you have made service. Service may be made by first class mail, postage prepaid. If the defendant fails to file an answer, an affidavit, and entry of default must be filed before a default judgment will be signed. You must also provide the form of judgment. If an answer is filed, the matter will be set for trial before the judge. If your bankruptcy packet includes the form of complaint to discharge a student loan, DO NOT attach it to your petition. It must be filed separately.

(docket # 29, Exh. A) (emphasis in original)..

The docket sheet for Defendant’s bankruptcy proceeding reflects that he did not file a complaint in the Bankruptcy Court, seeking discharge of a student loan prior to the conclusion of his bankruptcy case. (docket # 29, Exh. B, docket sheet for 2:05-bk-27427-RJH) Likewise, the Bankruptcy Court’s records indicate that there are “no associated cases.” (docket # 29, Exh. B) The list of “Creditors Holding Unsecured Nonpriority Claims” filed in Defendant’s Chapter 7 proceeding included the United States Department of Education as such a creditor. (docket # 27 at 5)

On February 23, 2006, Defendant was granted a discharge under Title 11 § 727 of the Bankruptcy Code. (docket # 27 at 4; docket # 29, Exh. C) Attached to the discharge order was an “**EXPLANATION OF BANKRUPTCY DISCHARGE IN A CHAPTER 7 CASE**” which included the following statement:

Debts that are Not Discharged

Some of the common types of debts which are not discharged in a chapter 7 bankruptcy case are:

- a. Debts for most taxes;
- * * *
- d. Debts for most student loans.

(docket # 29, Exh. C) (emphasis in original)

1 On August 20, 2007, the Government sent a demand letter to Defendant,
2 advising him that the Government contended that his student-loan obligation had not been
3 discharged in his Chapter 7 bankruptcy proceeding. (docket # 29, Exh. D) In an April 4,
4 2008 letter to Defendant, the Government further explained its position stating that:

5 Student loans are an exception to dischargeability of debts in
6 bankruptcy. To discharge a student loan obligation, the debtor must prove
7 that repayment of the student loan would cause ‘undue hardship’ to the
8 debtor and the debtor’s dependents. The Bankruptcy Code and Rules
9 require that a separate action, an adversary proceeding, be filed to
10 determine whether repayment of the student loan imposes an undue
11 hardship and should therefore be discharged under 11 U.S.C. § 523(a)(8).
12 An adversary proceeding requires the filing of a complaint and service of notice and a
summons upon the relevant student loan creditor. This office did not
receive notice of the bankruptcy and has not been served with a complaint
to determine dischargeability. In addition, the docket for your bankruptcy
case reveals that no complaint has been filed. Accordingly, the student
loan debt has not been discharged, as you state.

13 (docket # 29, Exh. E)

14 In response to that letter, Defendant contacted the U.S. Attorney’s office,
15 claiming that his debt had been discharged in the bankruptcy proceeding. (docket # 27 at
16 3)

17 Thereafter, on April 14, 2008, the Government filed an Application for Writ
18 of Garnishment, docket # 20, in this Court, which was granted. (dockets # 21, # 22) The
19 Government unsuccessfully attempted to serve the Writ of Garnishment on Defendant.
20 (docket # 23) On August 18, 2008, the Government issued a notice of deposition and a
21 *subpoena duces tecum* to Defendant ordering him to appear for his deposition on
22 September 22, 2008. (dockets # 25, # 26) Defendant subsequently moved to quash the
23 subpoena and claimed the Government’s post-discharge actions violate the discharge
24 injunction. Defendant also seeks an order directing the Government to cease collections
25 activities. Defendant contends that the student loan which forms the basis of this
26 recovery action was discharged by the Bankruptcy Court.

27 Defendant also argues that he repaid the loan and that the Government has
28 “a history of misplacing” payments and “a history of questionable and bad accounting

1 practices.” (docket # 27 at 2; docket # 32 at 3) To the extent that Defendant argues that
2 he repaid the loan, such arguments are not properly before the Court in the present
3 posture of the case. Defendant had the opportunity to raise such arguments in 2001 in
4 response to the Government’s Motion for Summary Judgment. (docket # 10) Defendant,
5 however, did not oppose the Motion for Summary Judgment. Judgment was entered in
6 the Government’s favor. (docket # 14) Defendant never filed a timely motion to recon-
7 sider or for relief from the Judgment. *See*, Fed.R.Civ.P. 60. Accordingly, the Court will
8 only consider those arguments pertinent to Defendant’s claim that his student loan obliga-
9 tion was discharged in his Chapter 7 bankruptcy proceeding.

10 On September 9, 2008, this Court stayed Defendant’s September 22, 2008
11 deposition and the Government’s related *subpoena duces tecum* until the Court resolved
12 the pending issue of Defendant’s alleged discharge of his student loans in his 2005-2006
13 Chapter 7 bankruptcy proceedings. (docket # 28)

14 **II. Analysis**

15 Prior to the enactment of the Education Amendments of 1976, student loans
16 were dischargeable under the former Bankruptcy Act. Alan M. Ahart, *Discharging*
17 *Student Loans in Bankruptcy*, 52 Am. Bankr.L.J. 201 (1978). A loophole in the
18 Bankruptcy Code of 1978 created a situation where student loans were nondischargeable
19 in Chapter 7 for the first five-years of repayment unless it would constitute an “undue
20 hardship,” but were dischargeable in Chapter 13. Bankruptcy Reform Act of 1978,
21 Pub.L. No. 95-598, § 523(a)(8), 92 Stat. 2549, 2591 (1978). In 1990, this period of
22 nondischargeability was extended to seven years. The Federal Debt Collection
23 Procedures Act of 1990, Pub.L. No. 101-647, § 3621(2), 104 Stat. 4933, 4965 (1990);
24 *Rifino v. United States (In re Rifino)*, 245 F.3d 1083, 1087 n. 3 (9th Cir. 2001). Also in
25 1990, Congress extended the restrictions on discharging student loans to bankruptcy
26 proceedings filed under Chapter 13. The Student Loan Default Prevention Initiative Act
27 of 1990, Pub.L. No. 101-508, § 3007, 104 Stat. 1388, 1388-28 (1990).

28

1 Thereafter, in 1998, Congress amended § 523 of the Bankruptcy Code to
2 eliminate the option for a student-loan discharge after seven years. The Higher Education
3 Amendments of 1998, Pub.L. No. 105-244, Title IX, § 971(a), 112 Stat. 1581, 1837
4 (1998). Accordingly, in either Chapter 7 or Chapter 13 cases, “student loan obligations
5 are presumed to be nondischargeable in bankruptcy pursuant to 11 U.S.C. § 523(a)(8).” *In*
6 *re Rifino*, 245 F.3d 1083, 1087 (9th Cir. 2001). One narrow exception exists when
7 “excepting such debt from discharge . . . will impose an undue hardship on the debtor and
8 the debtor’s dependents.” 11 U.S.C. § 523(a)(8).

9 The provisions of § 523(a)(8) are not “self-executing.” In other words,
10 student loans are presumed to be nondischargeable and a creditor need not take any
11 affirmative action to establish nondischargeability of a student loan. *Tenn. Student*
12 *Assistance Corp. v. Hood*, 541 U.S. 440, 450 (2004). Rather, the burden is on the debtor
13 to commence an adversary proceeding to determine dischargeability of a student loan. 11
14 U.S.C. § 523(a)(8); Fed. R. Bankr. P. 7001(6).

15 The Bankruptcy Rules provide that the debtor bears the burden of proving
16 the elements of undue hardship⁴ in an adversary proceeding. *Rifino*, 245 F.3d at 1087-88;
17 Fed. R. Bankr. P. 7001(6) (defining a “proceeding to determine the dischargeability of a
18 debt” as an adversary proceeding). An adversary proceeding is a “subpart of a
19 bankruptcy case that has all the trappings of civil litigation.” *In re Mersmann*, 505 F.3d
20

21 ⁴ To determine whether excepting student loans from discharge will create an undue
22 hardship, the Ninth Circuit has adopted the three-part test developed by the Second Circuit
23 in *In re Brunner*, 46 B.R. 752, 753 (Bankr.S.D.N.Y. 1985), *aff’d by*, 831 F.2d 395 (2nd Cir.
1987). *Rifino*, 245 F.3d at 1087.

24 To obtain discharge of a student loan, the debtor must prove: (1) that the debtor cannot
25 maintain, based on current income and expenses, a “minimal” standard of living for himself
26 and his dependents if required to repay the loan; (2) that additional circumstances exist
27 indicating that this state of affairs is likely to persist for a significant portion of the repayment
28 period of the student loan; and (3) that the debtor has made good faith efforts to repay the
loan. *Brunner*, 831 F.2d 396. If the debtor fails to establish any one of these requirements,
“the bankruptcy court’s inquiry must end there, with a finding of no dischargeability.”
Rifino, 245 F.3d at 1088 (internal quotation marks omitted).

1 1033, 1043 (10th Cir. 2007). The notice requirements to initiate an adversary proceeding
2 are more stringent than the notice requirements for confirmation of a Chapter 13 plan. *Id.*
3 To initiate an adversary proceeding, a debtor must comply with the exacting requirements
4 of the Bankruptcy Rules. Fed. R. Bankr. P. 7001(6). The debtor must first file a com-
5 plaint, which must be served along with a summons on the creditor-defendant. *Id.* Rules
6 7003 and 7004. Service of the complaint is governed by Fed. R. Bankr. P. 7004 which
7 provides that service on the United States shall be made by mailing a copy of the
8 summons and complaint to the United States Attorney's Office for the district where the
9 action is brought and to the Attorney General of the United States. Fed. R. Bankr. P.
10 7004(b)(4). There is no obligation to answer an adversary complaint until the complaint
11 is "duly served." Rule 7012(a). Absent proper service, the creditor-defendant cannot be
12 deemed to have "failed to plead or otherwise defend[.]" Fed.R.Civ.P. 55(a), incorporated
13 by Fed. R. Bankr. P. 7055.

14 The Bankruptcy Court's record reflects that Defendant in this case did not
15 file an adversary complaint or otherwise seek a ruling from the Bankruptcy Court that his
16 student loan should be discharged because of undue hardship. *See, Tennessee Student*
17 *Assistance Corp. v. Hood*, 541 U.S. 440, 451-52 (2004) (noting that a student-loan debtor
18 is required to file an adversary proceeding by service of a summons and complaint).
19 Moreover, Defendant's notice attached to the Bankruptcy Court's discharge order
20 specifically indicated that student loans are generally not dischargeable pursuant to §
21 523(a)(8). (docket # 29, Exh. C) Because Defendant did not commence an adversary
22 proceeding to determine whether his student loan was dischargeable prior to the closing
23 of his bankruptcy case, Defendant's student loan was not discharged in the bankruptcy
24 case and the Government may pursue its collection activities. *See, Miller v. United States*
25 *Department of Education (In re Miller)*, 2006 WL 2361819, * 3 (Bkrcty. W.D.Pa. 2006).

26 The Ninth Circuit's recent decision in *Espinosa v. United Student Aid*
27 *Funds (In re Espinosa)*, ___ F.3d ___, 2008 WL 4426634 (9th Cir., Oct. 2, 2008) does not
28 require a different result. In *Espinosa*, the debtor filed a Chapter 13 bankruptcy plan that

1 provided for repayment of \$13,250.00, the principal balance owed on his student loan,
2 and for discharge of any unpaid interest. *Espinosa v. United Student Aid Funds, Inc.*, 530
3 F.3d 895, 896 (9th Cir. 2008).⁵ The only creditor, United Student Aid Funds, Inc., was
4 notified of the debtor’s plan and filed a proof of claim in the amount of \$17,832.15 which
5 included the principal balance of the student loan plus unpaid accrued interest and fees.
6 *Id.* at 896. Despite the discrepancy between the debtor’s proposed plan and the creditor’s
7 proof of claim, the creditor filed no objections to the proposed plan. *Id.* In the absence of
8 any objections, the bankruptcy court confirmed the plan which included the provision
9 discharging the unpaid balance of the student loan. 530 F.3d at 896.

10 After the debtor completed the Chapter 13 plan, the bankruptcy court issued
11 a discharge order. *Espinosa*, 530 F.3d at 896. Generally, a Chapter 13 discharge
12 releases a debtor from all debts provided by the plan. 11 U.S.C. § 1328(a)(2) (stating that
13 if a chapter 13 debtor successfully completes all payments under a confirmed plan, the
14 indebtedness is discharged.). There is an exception to a Chapter 13 discharge for
15 guaranteed educational loans. 11 U.S.C. § 1328, § 523(a)(8). However, because the
16 debtor’s Chapter 13 plan in *Espinosa* provided that the unpaid balance of the student loan
17 would be discharged upon completion of the plan, and the bankruptcy court had
18 confirmed that unopposed plan, the discharge order included the unpaid balance of the
19 debtor’s student loan. 530 F.3d at 896-97.

20 Several years after the Chapter 13 discharge was entered, the creditor began
21 “offsetting” or “intercepting” the debtor’s income tax refunds to satisfy the unpaid
22 balance of the student loan. 530 F.3d at 896. The debtor sought relief in the bankruptcy
23 court on the ground that his student loan was discharged in his Chapter 13 plan. *Id.* The
24 creditor argued that the student loan could not have been discharged in the Chapter 13
25 plan, because the debtor had not received a judicial determination of hardship in an
26

27 ⁵ *Espinosa v. United Student Aid Funds, Inc.*, 530 F.3d 895, 896 (9th Cir. 2008), is the
28 June 24, 2008 opinion before remand to the Bankruptcy Court.

1 adversary proceeding, as required by the Bankruptcy Code and Rules. 530 F.3d at 896-
2 97; § 523(a)(8); Fed.R.Bankr.P. 7001(6). The Bankruptcy Court held that the creditor’s
3 actions violated the discharge injunction⁶ and ordered the creditor to cease all collection
4 activity. *Id.* at 897. The creditor appealed to the District Court which reversed, finding
5 that the creditor had been denied due process because it was not properly served, and thus
6 no adversary proceeding had been commenced, as required by the Bankruptcy Code and
7 Rules. *Id.* The debtor appealed.

8 After remand for a limited purpose, the Ninth Circuit reversed. *Espinosa v.*
9 *United Student Aid Funds (In re Espinosa)*, ___ F.3d ___, 2008 WL 4426634, * 8 (9th
10 Cir., Oct. 2, 2008). Relying on Ninth Circuit precedent, the Court affirmed that “student
11 loan debts can be discharged by way of a chapter 13 plan if the creditor does not object,
12 after receiving notice of the proposed plan[.]” *Id.* at * 8 (citing *Great Lakes Higher Educ.*
13 *Corp. v. Pardee (In re Pardee)*, 193 F.3d 1083, 1086 (9th Cir. 1999)). The Court held that
14 a Chapter 13 discharge order is a final judgment that cannot be set aside merely because it
15 contains “illegal provisions.” 2008 WL 4426634, * 3 (citing *Pardee*, 193 F.3d at 1086).
16 The Ninth Circuit explained that a discharge order can only be reconsidered and set aside
17 pursuant to Fed.R.Civ.P. 60(b) and then, only based on a lack of adequate notice. *Id.* at *
18 3-5. The Court concluded that because the creditor had received actual notice of the
19 Chapter 13 plan and its discharge, and, therefore, was provided a full and fair opportunity
20 to object to the treatment of the student loan in the Chapter 13 plan, the creditor had
21 received adequate notice for purposes of Rule 60(b). *Id.* at * 6.

22 The Ninth Circuit’s fact-specific holding in *Espinosa* is inapplicable to this
23 case. *Espinosa* holds that a student-loan debtor may obtain discharge of a student loan by
24 including it in a Chapter 13 plan if the creditor fails to object after receiving notice of the
25 proposed plan. 2008 WL 4426634, * 8. Unlike *Espinosa*, Defendant in this case filed a
26

27 ⁶ See 11 U.S.C. § 524(a)(2) (stating that “[a] discharge in a case under this title. . .
28 operates as an injunction against the commencement or continuation of an action, the
employment of process, or an act, to collect, recover or offset any such debt as a personal
liability of the debtor, whether or not discharge of such debt is waived[.]”).

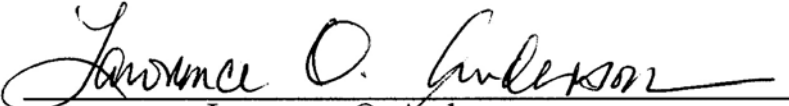
1 Chapter 7 bankruptcy. A Chapter 7 debtor does not file a plan for repayment of his debts.
2 Thus, unlike *Espinosa*, Defendant did not file a repayment plan in this case. In this
3 bankruptcy case, because Defendant did not commence an adversary proceeding
4 regarding his student loan, the Government had no notice of Defendant's intent to seek
5 discharge of that loan and had no obligation to take any action to protect its rights. *See*,
6 11 U.S.C. § 523(a)(8). Additionally, the discharge order entered in this case on February
7 23, 2006 stated that student loans were excepted from discharge. (docket # 29, Exh. C)

8 In summary, because Defendant's student-loan debt was not discharged in
9 his Chapter 7 bankruptcy, that loan obligation remains outstanding. There is no statute of
10 limitations that bars collection of defaulted student loans. *See, United States v. Phillips*,
11 20 F.3d 1005, 1007 (9th Cir.1994) (citing 20 U.S.C. § 1091a(a)). Accordingly, the
12 Government may pursue its collection activities to recover Defendant's student-loan debt
13 and Defendant's Petition to Quash the Subpoena will be denied.

14 Accordingly,

15 **IT IS HEREBY ORDERED** that Defendant's two Petitions to Quash
16 Subpoena. (dockets # 27, # 32) are **DENIED**. The *sua sponte* stay of the Government's
17 collection efforts is hereby lifted. Defendant shall comply with the Government's formal
18 post-judgment collection proceedings.

19 DATED this 14th day of November, 2008.

20
21
22 
23 Lawrence O. Anderson
24 United States Magistrate Judge
25
26
27
28