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Appellant

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Paul Hupp, Plaintiff/Appellant, v. Educational Credit Management Corporation, Defendant/Appellee, United States of America, Intervener/Appellee.	9th Circuit Case No.: 08-56403 D.C. Case No.: CV-08-0414- (H) [Huff] Southern District of California, San Diego BK Case No.: 06-00198JM7 [Meyers] Adv. Pro. No.: 06-90127JM7 [Meyers] **PLAINTIFF PAUL HUPP'S MOTION TO AUGMENT THE RECORD WITH EXPERT WITNESS ALAN COLLINGE'S SUBMISSION OF NEW EVIDENCE-PUBLISHED ON NOVEMBER 29, 2009**

I
Introduction

TO THE HONORABLE UNITED STATES COURT OF APPEALS FOR THE 9TH CIRCUIT, EDUCATIONAL CREDIT MANAGEMENT CORPORATION ("ECMC"), UNITED STATES OF AMERICA ("USA") AND COUNSEL OF RECORD[1]:

Plaintiff Paul Hupp ("Plaintiff/Mr. Hupp") hereby requests to augment the record on appeal. Mr. Hupp is hereby submitting expert witness Alan Colling's sworn and verified expert witness report dated May 11, 2010. Attached to, made a part of and by this reference incorporated into this motion as "Exhibit A". This expert witness report is based on newly released evidence that was published by defendant ECMC on their own website in October 2009, and on November 29, 2009 in "The Chronicle of Higher Education"[2], as well as numerous other sources.

II
Summary Of Expert Witness Report

The essential fact regarding the number of student loans being discharged in bankruptcy under the "undue hardship" standard (11 U.S.C. § 523(a)(8)) is that there were only 29 student loans discharged out of a total of 72,000. Just *one* student loan discharged in bankruptcy out of every 2,483 bankruptcy cases involving student loans. Those 29 discharges include *partial* discharges; the number of full discharges is less than 29.

This evidence/fact did not originate with me or my expert witness, but from the defendant itself in this case -ECMC- as published on their very own website in October 2009, which was then repeated numerous times in various publications throughout the nation.

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[1] Defendant's ECMC and USA were notified yesterday, 05-10-10, by telephone and email of this motion and their right to cross examine the expert witness and testimony with the proper notification, should they wish to file a response.

[2] "*Supreme Court Hears Case About Excusing Student Debt Through Bankruptcy*" by Eric Kelderman, The Chronicle of Higher Education, published November 29, 2009: http://forums.chronicle.com/article/Supreme-Court-Considers-Case/49281/

As my expert witness states, this "undue hardship" test is not a test at all, but a *vague, ambiguous and overly broad law* that can be bent and shaped into any form a bankruptcy, district or appellate judge wants to shape it. There is no end to the way a judge can manipulate this law to reach the desired outcome of denying discharge, and ECMC's very own evidence proves that beyond any doubt.

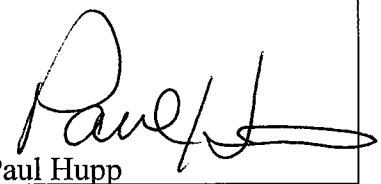
III
Conclusion

Although Plaintiff regrets having to make numerous requests to augment the record, the fact of the matter is the student loan industry, and the governments statutory scheme dealing with student loans at every level, not just bankruptcy, is rampant with Constitutional violations (with numerous violations evident in this case).

Plaintiff owes a duty to the court to bring these abuses, and facts supporting the abuses such as just 29 discharges under 11 U.S.C 523(a)(8), to the courts attention.

Since this is highly relevant evidence that can assist in the finding of facts addressing the issues, it should be admitted.

Respectfully submitted this 11th day of May, 2010



/s/ Paul Hupp
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Exhibit "A"

Tuesday, May 11, 2010

Mr. Paul Hupp
965 Hidden Oaks Drive
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RE: Expert Witness Opinion, Documents and Testimony
Hupp v. Educational Credit Management Corporation
9th Circuit Case # 08-56403

Dear Mr. Hupp:

F.R.C.P. 26(a)(2) Disclosures

In preparation and support of my proffered expert witness testimony in the above referenced case I am submitting the following evidence (which recently became available to me and relates directly to this case and the issues involved with it) that supports my expert witness opinion and testimony.

The item is:

1) "*Supreme Court Hears Case About Excusing Student Debt Through Bankruptcy*" by Eric Kelderman, The Chronicle of Higher Education, published November 29, 2009 (attached to, made a part of and incorporated into this testimony as "Exhibit #1")

These above-listed item, "*Supreme Court Hears Case About Excusing Student Debt Through Bankruptcy*" ("BK Case"), was published November 29, 2009, five (5) months ago, but the source of the information I am submitting, referenced in the article and here regarding the actual number of student loans discharged in bankruptcy was first published by the defendant, Educational Credit Management Corporation, on their website in October of 2009. When I read it I knew it would be a useful addition to your case and will allow the court of appeal judges to get a more complete and well rounded view of the issues in student loans today, especially as they relate to

discharge in bankruptcy-or a better way to describe the issue is the *lack* of discharge in bankruptcy no matter what the circumstances may be.

I have personally worked with "The Chronicle of Higher Education" for a number of years and have found their organization to be one of the leading experts on student loan law, research and policy in the United States, having researched and written about student loan frauds and scams extensively the last 10 years. Their reporters, expertise and research are unmatched in this area.

I run Student Loan Justice, a 5,000+ member grass roots organization I founded in 2005 that deals exclusively with student loan policy. I have appeared on numerous television and radio programs addressing student loan policy, including Columbia Broadcasting System's top rated news program "60 Minutes". In addition I make frequent public appearances at colleges and universities all over the United States regarding student loan policy.

In addition I am the author of best selling book in America which deals with student loan related issues-including the lack of constitutional, consumer, due process and bankruptcy protections- and of course the rampant fraud that occurs due to these lack of protections (which in turn encourages and promotes more fraud): "*The Student Loan Scam: The Most Oppressive Debt In U.S. History- and How We Can Fight Back*" Publisher: Beacon Press (2009), Language: English, ISBN-10: 0807042315, ISBN-13: 978-080704231.

I have testified as an expert witness four (4) times in the past, all in your case, in 2007 (twice), 2009 (once) and once in 2010 (2010 includes this testimony).

I am not being compensated in any manner for this expert witness testimony, but am providing it *pro bono* in an effort to change and improve student loan policy and laws which are harming the public, especially the poor and minorities.

Expert Witness Opinion And Testimony

Summary of Argument

The Department of Education ("DoE") funds the defendant in your case, Educational Credit Management Corporation ("ECMC") through the Federal Family Education Loan Program ("FFELP"). That essentially makes the Doe and ECMC alter egos of each other.

When a student loan is listed in bankruptcy proceedings ECMC takes the student loan from whoever is the current loan holder, so ECMC absorbs all the costs of the litigation, not the companies who are profiting from the loans such as Sallie Mae or NelNet.

ECMC has their own website where they publish various pieces of information regarding their company and student loans (*see* www.ecmc.org). In October of 2009 ECMC published data on their website that related to the number of student loan borrowers who were in bankruptcy proceedings, 72,000. In 2008, just 276 borrowers out of that total of 72,000 (0.383%, or just one in every 260 borrowers) asked a judge to dismiss their student loan debt. Out of those 276 borrowers, 134 have been resolved, with just 29 borrowers getting a *partial* or full discharge of their student loan debt (0.04%, or just one in every 2,483 borrowers). 29 total discharges-including *partial* discharges, out of 72,000 student loan holders.

The above referenced numbers speak for themselves. In the worst economic downturn in over 80 years, just 29 borrowers (*including* borrowers who only received *partial* discharges) received some sort of relief from the courts.

Many of the above cases were appealed all the way up to the federal court of appeals in their respective circuits because it is the policy of ECMC to appeal all successful student loan discharges in the bankruptcy courts to the district courts, and if unsuccessful in the district court, then to the court of appeals- no matter what the amount in controversy is. The instant case is a perfect example, a loan of just $6,500 has been in the court system for close to five (5) years, there is a docket count of over 500 entries, the plaintiff has no money to pay a lawyer and has spent in excess of 5,000 hours on the case

in a *pro se* capacity, and it is likely that the defendant ECMC has spent hundreds of hours and tens of thousands of dollars in litigation costs. This is without even adding in the hours and costs of the Department of Justice, which are certain to be substantial.

Conclusion

The "undue hardship" test is not a test at all, it is simply a vague, ambiguous and overly broad statute that a bankruptcy, district or appellate judge can bend, shape and manipulate into any form they want to.

"Undue hardship" is incapable of being defined, and that abstract vagueness is why the "undue hardship" test must be declared unconstitutional. Otherwise you will continue to have judges bend and manipulate the statute so only one borrower out of every 2,483 gets *some* sort of relief-no matter how dire or destitute the circumstances.

VERIFICATION

I declare under penalty of perjury of the laws of the United States and California that the above facts are within my personal knowledge; that if called to testify in a court of competent jurisdiction, I would and could competently testify to the same; that the attached exhibits, if any, are true and correct copies of the originals which are in my personal possession; that the foregoing is true and correct and that this declaration was executed on May 11, 2010.

Sincerely,

/s/ Alan Collinge

Alan Collinge
Student Loan Justice
2123 Mt. View, University Place, WA. 98466
justice@studentloanjustice.org

Attached: Exhibit #1- "*Supreme Court Hears Case About Excusing Student Debt Through Bankruptcy*" by Eric Kelderman, The Chronicle of Higher Education, published November 29, 2009

EX. # 1

THE CHRONICLE
of Higher Education

Government

November 29, 2009

Supreme Court Considers Case About Excusing Student Debt Through Bankruptcy

By Eric Kelderman

The U.S. Supreme Court is scheduled to hear arguments in a case this week that weighs federal rules for dismissing student debt in bankruptcy proceedings against the authority of a judge's final court orders.

The case, *United Student Aid Funds Inc. v. Espinosa,* highlights the complex and sometimes contradictory nature of bankruptcy law that makes student loans as difficult to excuse as court-ordered child support. To dismiss student loans in bankruptcy, borrowers must show that repaying the loans would be an "undue hardship," a legal standard that has been applied inconsistently over time.

Higher-education and legal experts do not expect the Supreme Court's decision to broadly change how student loans are treated in most bankruptcies. Instead, the court is more likely to narrowly rule on the question of whether a final bankruptcy-court decision should stand if errors were made in the process.

In the case before the Supreme Court, United Student Aid Funds Inc., a student-loan guarantor, is asking the court to reverse a ruling by the U.S. Court of Appeals for the Ninth Circuit, which allowed a borrower to excuse a portion of his student loans without a special court proceeding to show that paying the debt would have caused "undue hardship." United Student Aid Funds argues that if the Supreme Court does not rule in its favor, lenders will be swamped with efforts to circumvent the normal rules, cheating them out of money they are due.

The borrower in the lawsuit, Francisco J. Espinosa, argues that the guarantor is barred from collecting money after his bankruptcy was finalized and most of his student loan repaid.

Missed Opportunity?

Mr. Espinosa filed for bankruptcy under Chapter 13 in 1992, owing nearly $18,000 in principal and interest to United Student Aid Funds, the guarantor of his federally backed student loans.

In his repayment plans, Mr. Espinosa proposed to pay back just the principal of his loans, $13,250, over a five-year period. The

guarantor was notified of the plan and filed a claim for an amount $4,000 higher, including interest, but the judge approved the borrower's plans. United Student Aid Funds was again notified of the plan and given 30 days to dispute the amount they would receive, but the company raised no objections.

After Mr. Espinosa had fully repaid the principal, a bankruptcy judge declared the case closed. But three years later, United Student Aid Funds began efforts to collect the unpaid interest on the loan, and the two sides went back to court.

Lower federal courts split on whether Mr. Espinosa should pay the extra amount, and the case landed in the Ninth Circuit Court of Appeals. There, Judge Alex Kozinski ruled that the guarantor had missed its opportunity to challenge the terms of repayment and that the bankruptcy order was indeed final.

"It makes a mockery of the English language and common sense to say that Funds wasn't given notice, or was somehow ambushed or taken advantage of," Judge Kozinski wrote.

But United Student Aid Funds says the final discharge order is invalid because Mr. Espinosa failed to show that repaying the loans would cause him an "undue hardship." In order to pass that test, debtors must initiate a separate legal action, called an adversary proceeding, that demonstrates their good-faith effort either to pay the loans or defer them on time and have little likelihood of earning enough in the future to make payments.

Richard Lieb, a professor at St. John's University School of Law, said he was concerned about the precedent that could be set if the Supreme Court overturns the Ninth Circuit's decision. Weakening the finality of court orders, he said, could undermine confidence in the entire legal system and give parties less reason to settle their disputes with student-loan companies or any entities at all.

If the Supreme Court overturns the Ninth Circuit's decision, creditors would be given the opportunity to continue to pursue debts even after a borrower's slate has been wiped clean by the bankruptcy process, said Mr. Lieb, who wrote a brief on behalf of a group of law professors supporting the Ninth Circuit ruling.

Unclear Meaning of 'Undue Hardship'

Although the court's ruling in *Espinosa* is expected to be focused largely on procedural issues, the broader question of how courts should apply the "undue hardship" standard also needs to be revisited, some higher-education experts say.

Mark Kantrowitz, publisher of FinAid, a Web site about student aid, says Congress should either better define "undue hardship" or remove it from the law.

"The problem is that Congress did not define what it meant by 'undue hardship,' and even the most commonly accepted principles are not widely used," Mr. Kantrowitz said.

Congress first applied the "undue hardship" standard to federally guaranteed student loans in the 1970s. At the time, lawmakers were responding to anecdotes of wealthy professionals filing for bankruptcy to avoid paying off debts for law and medical degrees.

In 2005, Congress applied the same standard to private student loans, including them in the categories of debt that are not automatically discharged in bankruptcy. By comparison, mortgages, credit-card balances, and even gambling debts can be excused without showing undue hardship.

Rafael I. Pardo, an associate professor at Seattle University School of Law, has researched how courts apply the "undue hardship" standard and says the problem is not just that there is a stringent standard, but also that the standard is applied inconsistently. "It's a crapshoot whether you get relief or not," he said.

In addition, the process of proving "undue hardship" is difficult and costly, requiring a lawyer and adding to the financial burden of people already in dire straits, he said.

Decisions in two recent bankruptcy cases illustrate how the student-loan debt of people in similarly difficult situations can be treated differently by the courts.

Larry D. Gaylord earned college credits at 10 institutions, completing two degrees. He holds a bachelor's degree in philosophy and religion from Friends University, which he received in 1996, and a graduate degree from Texas Chiropractic College, earned in 2002. But he struggled with mental and physical health problems and was unable to successfully complete the state-licensing tests to work as a chiropractor.

At the time of his bankruptcy trial in November 2005, Mr. Gaylord was 51 years old, had accrued nearly $162,000 in student loans, and was living on Social Security, with an income of about $10,500 a year. He had not been employed since the mid-1980s, was divorced, and was living with his mother.

The bankruptcy judge dismissed all but $12,000 of Mr. Gaylord's loans, but the guarantor appealed. The U.S. District Court in Houston reversed the lower court's ruling, even though the federal

judge found that his expenses of $942 a month exceeded his Social Security income of $882.

"Gaylord has an extensive education and several degrees," Judge Melinda Harmon concluded in her 2007 ruling. "As the bankruptcy court noted, he presents himself well and speaks well and moves well."

Stephen L. Halverson also faced a series of personal calamities but eventually had better luck than Mr. Gaylord in dismissing most of his student debt.

As the single parent of two sons, he racked up about $132,000 in student loans between 1988 and 1994 earning master's degrees in both special and vocational education from the University of Minnesota. In 1995 he went back to work full-time as a teacher in the Minnesota public schools, but was laid off two years later.

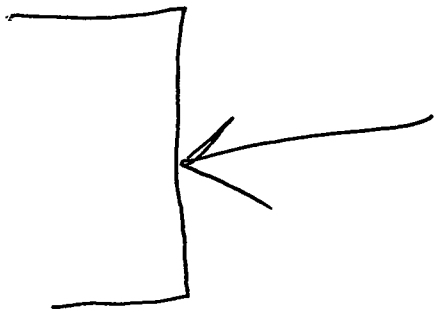
While substitute teaching and taking care of his widowed mother and his two children, Mr. Halverson managed to pay off $26,000 of his loans. But he deferred payments often, accruing fees that increased his total debt to nearly $300,000.

Last February, Judge Robert J. Kressel, of the U.S. Bankruptcy Court for the District of Minnesota, dismissed all but $11,000 of Mr. Halverson's debts. In doing so, the judge said that "unlike the high-earning potential graduates whom Congress sought to rein in, Halverson is a teacher who has simply been unable to make much money."

Varied Statistics on Borrowers

Estimates on the number and amount of student loans discharged through bankruptcy vary. In one study of 115 student-loan bankruptcy proceedings in Western Washington, Mr. Pardo found that as many as half of borrowers who sought to have their loans discharged because of "undue hardship" got at least a portion of their debts dismissed. But those decisions, Mr. Pardo found, were often based more on the particular judge in the case or the experience of the lawyer representing the debtor rather than on any calculation about a person's ability to repay the loans.

However, figures from Educational Credit Management Corporation, which services bankrupt loans for 25 lenders and the U.S. Department of Education, show that a much smaller proportion of borrowers are able to prove undue hardship. The company holds the loans of 72,000 student borrowers in bankruptcy. In 2008, just 276 borrowers asked a judge to dismiss their debts; 134 of those cases have been resolved, and 29 had all or part of their loans excused by the courts.



Bobbie J. Sweeney, chief of business operations for Educational Credit Management, said it should be tough to excuse student loans in bankruptcy because college students who get federally backed loans have a responsibility to taxpayers.

"I hate to be cynical, but some of these people are going to be abusing the system," Ms. Sweeney said. "It may be that some of these people, their intention is not to repay."

DECLARATION OF SERVICE

I, Aristea Hupp, declare the following;

1. I am over 18 years of age,
2. I am not a party to this action,
3. My address is P.O. Box 91 Solana Beach, CA. 92075
4. I served a true and correct copy of THE FOLLOWING;

Plaintiff Paul Hupp's

1. PLAINTIFF PAUL HUPP'S MOTION TO AUGMENT THE RECORD WITH EXPERT WITNESS ALAN COLLINGE'S SUBMISSION OF NEW EVIDENCE-PUBLISHED ON NOVEMBER 29, 2009

ADDRESSED TO;

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U.S. Department of Justice-Civil Division
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By placing said document into the United States Postal Service at Beaumont, CA. with the postage fully prepaid on;
Tuesday, May 11, 2010

EXECUTED ON:
Tuesday, May 11, 2010
I declare under penalty of perjury of the laws of the State of California and the United States that the forgoing is true and correct.

Declarant-Aristea Hupp_____/s/ Aristea Hupp