



IT IS ORDERED as set forth below:

Date: February 7, 2012

Mary Grace Diehl

**Mary Grace Diehl
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

In re:	:	Case No. 09-74412-MGD
	:	
Christina Fawn Kidd,	:	Chapter 7
	:	
Debtor.	:	Judge Mary Grace Diehl
	:	
Christina Fawn Kidd,	:	
	:	
Plaintiff,	:	
v.	:	Lead Adversary Proceeding No. 09-6507
	:	Consolidated Proceedings
Student Loan Xpress, Inc. and	:	
Xpress Loan Servicing,	:	
	:	
Defendants.	:	

**ORDER DENYING PLAINTIFF'S MOTION TO AMEND COMPLAINT
AND NOTICE OF HEARING ON DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

This consolidated action is before the Court on Plaintiff's Motion to Amend the Complaint.
(Docket No. 66). The procedure of this case is somewhat unusual, as is Plaintiff's request. Plaintiff

seeks permission under Federal Rules of Civil Procedure 15(a)(2) and 15(d) to file a fourth amended complaint.

This adversary action was originally initiated to determine the dischargeability of a debt. Plaintiff's request for leave to amend the complaint follows the Court's entry of a partial summary judgment order in Defendants' favor, finding that 11 U.S.C. § 523(a)(8)'s non-dischargeability provision applied to the debt. Plaintiff bases its leave to amend the complaint on purported new facts, yet the proposed amendments do not present viable claims. Plaintiff seeks improper relief and the facts are merely repackaged without offering any relevant basis for a different outcome. Defendants oppose Plaintiff's request. For the reasons set forth below, Plaintiff's request for leave to amend the complaint is denied.

I. Procedural History

Plaintiff initiated this adversary proceeding to determine the dischargeability of a debt. This adversary proceeding has been designated the lead case in a consolidated group of adversary proceedings that raise the same legal issues and fact patterns.¹ (Docket No. 50). After Plaintiff survived a motion to dismiss (Docket No. 39), Defendants Student Loan Xpress, Inc. and Xpress Loan Servicing ("Defendants") filed a Motion for Partial Summary Judgment. (Docket No. 46). A Response and Reply were filed, and, at Plaintiff's request, oral argument was held on the summary

¹ The consolidation order included the following cases: *Bui*, 09-6503; *Clark*, 09-6504; *Farmer*, 09-6505; *Furletti*, 09-6506; *Murdock*, 09-6508; *Richard Lee Thomas*, 09-6509; *Randy Scott Thomas*, 09-6762; and *Barr*, 10-6141. (Docket No. 50). Two cases have been dismissed since the filing of Plaintiff's motion for leave to amend: *Clark*, 09-6504 (Docket No. 33) and *Barr*, 10-6141 (09-6507; Docket No. 86). The underlying facts of this litigation are fully described in the summary judgment order (Docket No. 61), and this Order only sets forth the factual information necessary to address the procedural issue. See Docket No. 61 for a full recitation of the facts of this consolidated case.

judgment motion. (Docket Nos. 54, 57, 59 & 60). Defendants sought summary judgment as to two legal issues. Judgment was awarded to Defendants, finding (1) that the debt was governed by § 523(a)(8)(A)(i) and (2) Plaintiff's undue hardship defense is limited to facts relevant under the *Brunner*² test ("Summary Judgment Order"). (Docket No. 61). Accordingly, after the summary judgment ruling, the only remaining issue in this consolidated action was whether each Plaintiff could satisfy the undue hardship exception governed by the *Brunner* test in this circuit. Defendants have two pending summary judgment motions regarding whether certain remaining Plaintiffs can show an undue hardship defense. (Docket Nos. 71 & 76).

Jurisdiction over this action is set forth in 28 U.S.C. §§ 157(b) and 1334(b). The matter is a core proceeding under 28 U.S.C. § 157(b)(2)(I) and venue is proper. The Court's ruling on this Motion will be the law of the case for all the remaining consolidated adversary proceedings³.

II. Relevant Facts

Plaintiff has already amended her complaint three times,⁴ and the basis for this motion for leave to amend is that "an event occurring after the date of the existing Complaint in this matter that

² The applicable standard for asserting an undue hardship defense in the Eleventh Circuit is the three-part test provided first in *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987). *Hemar Ins. Corp. of Am. v. Cox (In re Cox)*, 338 F.3d 1238, 1240 (11th Cir. 2003) (adopting the *Brunner* test for undue hardship). The requirements under *Brunner* require a debtor to prove: (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 loan. *Id.* at 1241.

³ *Bui*, 09-6503; *Farmer*, 09-6505; *Furletti*, 09-6506; *Murdock*, 09-6508; *Richard Lee Thomas*, 09-6509; and *Randy Scott Thomas*, 09-6762.

⁴ Docket Nos. 3, 5 & 18.

materially changes Debtors' financial obligations to Defendants and the circumstances of the case.” (Plaintiff's Motion to Amend; Docket No. 66, p. 1-2). Plaintiff submits a proposed amended complaint along with the Motion and proposes to make two substantive changes to the Third Amended Complaint. First, Plaintiff requests a determination as to the amount of the student loan owed. Second, Plaintiff adds the following claims: (1) for judgment either enforcing the original terms of the state Settlement Agreement or determining the amount of the debt owed Defendants and the terms of repayment; and (2) for judgment declaring that under the facts and circumstances of this case, application of the *Brunner* test for “undue hardship” is unjust.

The purported new facts asserted by Plaintiff that give rise to this Motion are the contents of a selected email allegedly between counsel dated September 8, 2011. The email includes a discussion of the process by which the parties want to proceed in adjudicating the remaining issue in this consolidated action. The email also includes a discussion regarding the amount owing on the debts at issue. Plaintiff characterizes Defendants' counsel's statement regarding the value of the debt and possibility of settlement as “disavowing” the Confidential Settlement Agreement.⁵ The email does not include a dollar amount or percentage with respect to the debt. Plaintiff uses this email as the basis for her request for leave to amend and supplement, asserting that email correspondence

⁵ Students, including all consolidated Plaintiffs with the exception of Randy Scott Thomas (who was not a student, but a co-obligor on a student's note), filed a lawsuit against Defendants and other parties in the State Court of Cobb County ("State Court Suit") in 2008. The plaintiffs in the State Court Suit asserted claims relating to the operation and closure of Silver State Helicopters, LLC, including claims for fraudulent misrepresentation, constructive fraud, Georgia RICO, and negligent misrepresentation. (Civil Case No. 08-A-10868-1). The parties executed a confidential settlement agreement ("Confidential Settlement Agreement") to settle all claims in the State Court Suit on December 15, 2008. The Confidential Settlement Agreement was filed under seal in this action. (Docket No. 28).

from Defendants' counsel constitutes new facts occurring after the third amended complaint was filed.

Defendants correctly question the propriety of submitting the email correspondence between the parties to the Court. Local Rule 9003-2 states, in relevant part: "Parties and their counsel shall not provide the Bankruptcy Court with copies of correspondence among themselves relating to matters that are or may be in dispute." BLR 9003-2, N.D. Ga. Plaintiff's characterization of the email correspondence is overreaching and does not constitute new facts that warrant granting leave to amend the complaint for the purposes proposed by Plaintiff.

II. Legal Standard for Amended and Supplemental Pleadings: Federal Rule of Civil Procedure 15

Rule 15 of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7015, provides a liberal and permissive standard for amending a complaint. "The court should freely give leave when justice so requires." FED. R. CIV. P. 15(a)(2). However, there are limits to the liberal standard of favoring amendments to allow the merits of the claim to be tested.

There must be a "justifying reason" for a court to deny leave. *Foman v. Davis*, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962); *see also Halliburton & Assoc. v. Henderson*, 774 F.2d 441, 443 (11th Cir. 1985) ("substantial reason" needed). The following factors may serve as a basis to deny a motion to amend: (1) where there has been undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies by amendments previously allowed; (2) where allowing amendment would cause undue prejudice to the opposing party; or (3) where amendment would be

futile. *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001) (citing *Foman v. Davis*, 371 U.S. at 182).

The standard by which an amended complaint is deemed futile considers the stage of the proceeding. *Milanese v. Rust-Oleum Corp.*, 244 F.3d 104, 110 (2d Cir. 2001). When the motion to amend is in response to a motion for summary judgment, “the court may deny the amendment as futile when the evidence in support of the plaintiff’s proposed new claim creates no triable issue of fact and the defendant would be entitled to judgment as a matter of law under Fed. R. Civ. P. 56(c).” *Id.* “Leave to amend a complaint is futile when the complaint as amended would still be properly dismissed or be immediately subject to summary judgment for the defendant.” *Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007); *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001) (noting that a district court need not allow an amendment where the amendment would be futile).

Judicial economy and the plaintiff’s previous opportunity to amend the complaint can serve as additional factors to be evaluated with a motion requesting leave to amend the complaint. *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 454 (9th Cir. 2011); *Corsello v. Lincare, Inc.*, 428 F.3d 1008, 1012 (11th Cir. 2005).

Under Rule 15(d), the court may permit a party to file a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. *See* FED. R. CIV. P. 15(d); *Burns v. Exxon Corp.*, 158 F.3d 336, 343 (5th Cir. 1998). The Eleventh Circuit recognizes that “[a] supplemental pleading is an appropriate vehicle by which to set forth new facts in order to update the earlier pleading, or change the amount or nature of the relief requested in the original pleading.” *Alabama v. United States Army Corps of Eng’rs*, 382

F. Supp. 2d 1301, 1309 (N.D. Ala. 2005) (quoting *Lussier v. Dugger*, 904 F.2d 661, 670 (11th Cir. 1990)).

III. Discussion

Plaintiff's request to amend the complaint will be denied because the amended complaint is futile. Plaintiff asserts new allegations that do not create a triable issue of fact of whether § 523(a)(8)(A)(i) and the *Brunner* undue hardship test apply to this debt. *Milanese v. Rust-Oleum Corp.*, 244 F.3d at 110; *Cockrell v. Sparks*, 510 F.3d at 1310. Additional factors considered in denying Plaintiff's motion to amend include Plaintiff's prior amendments and the timing of Plaintiff's request.

Plaintiff uses a flawed legal theory in support of her Motion, improperly elevating the terms of the Confidential Settlement Agreement and the Court's reference to it in the Summary Judgment Order. The Summary Judgment Order ruled that the debt was of the non-dischargeable variety captured by § 523(a)(8)(A)(i) because the loan program was funded in part by a nonprofit. (Docket No. 61, p. 9-12). The undisputed facts showed that the non-profit's guarantee to the loan program was meaningful and satisfied the statutory requirement of funding the loan program. *Id.* Plaintiff's proposed amendments do not relate to the structure of the loan program or the non-profit guarantee. Therefore, Plaintiff's proposed amendments will be denied as futile because the proposed material facts do not place these or other material facts in dispute. *Milanese v. Rust-Oleum Corp.*, 244 F.3d at 110.

The liberal standard allowing amendments is based on the premise that a party should have the opportunity to test the merits of their claim. *See, e.g., Scott Timber Co. v. U.S.*, 44 Fed. Cl. 170 (1999). Here, Plaintiff has already had ample opportunity to test the merits of her claim that this debt

should not be treated under § 523(a)(8) and that application of the *Brunner* test is unjust. Plaintiff's insistence on this position, through an amended complaint or otherwise, doesn't alter the viability of the claim. "Where it appears that granting leave to amend is unlikely to be productive, however, it is not an abuse of discretion to deny leave to amend." *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993) (citations omitted).

Plaintiff's request that the Court enter judgment enforcing the Confidential Settlement Agreement is also a futile claim. This Court has no jurisdiction over the parties with respect to their performance under the Confidential Settlement Agreement. The Confidential Settlement Agreement resolved a class action filed in the State Court of Cobb County and there is no basis for jurisdiction in this Court. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 114 S. Ct. 1673, 128 L.Ed.2d 391 (1994) (holding that jurisdiction over settlements requires its own jurisdictional basis; there is no inherent ancillary jurisdiction over settlements of actions). Enforcing the state court settlement agreement does not come within the meaning of 28 U.S.C. § 1334(a) & (b).

Although Plaintiff cites new facts following the Summary Judgment Order as the basis for her request to amend the complaint, the purported new facts merely provide Plaintiff an opportunity to repackage her prior legal theory - that the application of *Brunner*'s undue hardship test is unjust. Although the federal rules generally favor a liberal amendment policy, justice does not demand that leave to amend be granted at any stage in the proceedings. *Coleman v. Ramada Hotel Operating Co.*, 933 F.2d 470, 473 (7th Cir. 1991). In *Coleman v. Ramada Hotel Operating Co.*, the Seventh Circuit affirmed the denial of the plaintiff's motion to amend because the motion was made one month after the defendant filed for summary judgment "and the insubstantial character of the new allegations." The Seventh Circuit further explained that the "additional allegations merely reiterate

and embroider the claims [plaintiff] already presented in her original complaint, adding little, if anything, of substance to her case.” *Id.* Here, Plaintiff’s prior amendments in conjunction with these proposed futile amendments provide no basis to grant the request.

The current posture of this case includes two pending summary judgment motions filed by Defendants against the remaining Plaintiffs. The undisputed material facts, as presented, largely rely on stipulations or deposition testimony to argue that the undue hardship standard under *Brunner* has not been satisfied. (Docket Nos. 71 & 76). As previously ruled in the Summary Judgment Order, Plaintiff is not barred from asserting any facts relevant to the *Brunner* test. Should Plaintiff demonstrate why the amount of the debt owing is relevant within the context of the three-pronged *Brunner* test for a showing of undue hardship, the Court will consider the amount as a factor in its analysis.

Accordingly, it is

ORDERED that Plaintiff’s motion for leave to amend the complaint is hereby **DENIED**.

It is **FURTHER ORDERED** that Plaintiffs’ requests for hearing on Defendants’ Motion for Summary Judgment is **GRANTED**.

It is **FURTHER ORDERED and NOTICE IS HEREBY GIVEN** that oral argument on Defendants’ Motions for Summary Judgment will be held before the undersigned on **March 27, 2012 at 2:30p.m.**, Room 1201, United States Courthouse, 75 Spring Street, S.W., Atlanta, GA 30303.

The Clerk is directed to mail a copy of this Order to the parties on the attached distribution list.

END OF DOCUMENT

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