SO ORDERED.

SIGNED this 2nd day of February, 2012.

Janice Miller Karlin
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:
Tammie Sue Sims,

Debtor.

Case No. 10-23942
Chapter 7

Tammie Sims,

Plaintiff,

vs.

American Education Services, United States Department of Education, and Educational Credit Management Corporation,

Defendants.

Adversary No. 11-6146

Order Granting Motion to Dismiss Without Prejudice, With Conditions

On May 6, 2011, Plaintiff/Debtor filed a complaint to discharge her student loan debts under 11 U.S.C. § 523(a)(8)(B). The Court set discovery deadlines, which expired December 27, 2011, after one extension. During the discovery phase of the

proceeding, the United States Department of Education ("United States") timely propounded discovery. Plaintiff refused to respond to Interrogatory Nos. 24 and 25, and Request for Production No. 40, on the grounds that they were not relevant to the proceedings. All of these requests sought information about whether Plaintiff had ever been convicted of, or pled guilty or nolo contendere to, a crime involving dishonesty or false statements, and if so, asked her to identify and produce the documents relating to such crimes.

As a result of Plaintiff's refusal, the United States properly, pursuant to Fed. R. Bankr. P. 7037, Fed. R. Civ. P. 37(a)(3)(B)(iii), and D. Kan. LBR 7026.1(1), filed a Motion to Compel. After a hearing, I found that Plaintiff's failure to respond to the interrogatories was unjustified and granted the Motion to Compel. I ordered Plaintiff to fully respond to Interrogatory Nos. 24 and 25 and Request for Production No. 40, within five business days and also to pay the reasonable expenses the government incurred in obtaining compliance by Plaintiff in responding to the discovery.[1]

Instead of obeying my order, Plaintiff moved to dismiss her Adversary Proceeding, without prejudice.[2] In response, the United States asked that I condition dismissal on Plaintiff's payment of the $2,433.50 in attorney's fees it incurred as a result of Plaintiff's refusal to answer the interrogatories and request

[1] Doc. 49.

[2] Doc. 55.

for production of documents. Similarly, Defendant Educational Credit Management Corporation ("ECMC")[3] agreed to dismissal without prejudice, but because the lengthy period of discovery allowed in this case had expired, it requested that dismissal be conditioned such that it would not be subject to additional discovery in the event Plaintiff refiled her complaint, absent a significant change in Plaintiff's circumstances.

Federal Rule of Civil Procedure 41(a)(2), as incorporated into bankruptcy practice by Federal Rule of Bankruptcy Procedure 7041, governs voluntary dismissals after an opposing party has filed an answer or motion for summary judgment. Dismissal at this stage of the proceedings is within the sound discretion of the court.[4] In exercising my discretion, I must consider the purpose of Rule 41(a)(2), which is "primarily to prevent voluntary dismissals which unfairly affect the other side, and to permit the imposition of curative conditions."[5] Courts should normally grant dismissal without prejudice unless it will result in "legal prejudice"

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[3] When Plaintiff amended her complaint on July 15, 2011 (Doc. 22), she did not name ECMC as a defendant. ECMC had earlier moved to intervene, and that intervention was granted (Doc. 7), but technically ECMC is not a party to this litigation because the amended complaint superseded the pleadings. It is clear, however, that Ms. Sims and ECMC believe ECMC is a party, that Ms. Sims intended for ECMC to be a party, and that they have conducted themselves throughout these proceedings as if ECMC is a party. ECMC even answered the amended complaint that did not name it as a defendant. To clean up the record, I will *sua sponte* add ECMC as a party-defendant.

[4] *Clark v. Tansy*, 13 F.3d 1407, 1411 (10th Cir. 1993) (citing 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2364 at 161 (1971)).

[5] *Id.* (citing Wright & Miller, § 2364 at 165).

against the opposing party.[6]

Courts typically consider five factors to evaluate if legal prejudice exists: the opposing party's effort and expense in preparing for trial, evidence of excessive delay or lack of diligence by the movant, insufficient justification for dismissal, the present stage of litigation, and any other relevant considerations.[7] Based on my consideration of all these factors, including the admission by both Defendants that they do not oppose dismissal, I find that Defendants will not be legally prejudiced if this case is dismissed without prejudice.

First, although trial would have been set at a Pretrial Conference scheduled for January 20, 2012, no trial date had been set, and Defendants do not claim that they had ramped up to try the case. Second, cutting the other way, there appears to be some lack of diligence by Plaintiff in waiting until just a few weeks before the Pretrial Conference—and eight months after she filed suit—to file her Motion to Dismiss. Plaintiff explains that she realized after the Court's Order granting the United States' Motion to Compel that she needed to hire counsel, but there is no sign she has done so even though more than a month has passed since that Order. Third, there appears to be a sufficient justification for dismissal: Plaintiff wants to hire counsel, which I always encourage. Fourth, weighing against dismissal is the stage of the litigation. The case is literally weeks from when I expected to try it,

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[6] *Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997).

[7] *Id.*

and the discovery period has expired. Finally, although opposing counsel do not claim to have been preparing for trial, I know, as a former trial lawyer, that it will be highly inefficient to gear back up to defend this suit in a few months or even later, depending on when Plaintiff elects to refile.

The consideration of these factors weighs in favor of granting the motion to dismiss without prejudice, but with conditions. Rule 41(a)(2) permits the imposition of curative conditions so as not to prejudice the parties. One such condition is payment of the opposing party's fees that will not otherwise be recovered.[8] This condition recognizes that when a plaintiff dismisses his or her case without prejudice, the defendant "faces a risk that the plaintiff will refile the suit and impose duplicative expenses upon him."[9] The likelihood of duplicative expenses is particularly high in this case because Plaintiff has already indicated she intends to refile this suit after she retains counsel.

Another problem here is the timing of the Motion to Dismiss. The case was merely days away from a final Pretrial Conference when the motion was filed. Because student loan dischargeability complaints are typically fact-intensive, it is highly likely the case would have gone to trial within the next two months.

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[8] "Typically, a court imposes as a condition of dismissal without prejudice that the plaintiff pay the defendant's expenses incurred in defending the lawsuit, which usually include a reasonable attorney's fee." *Kansas Waste Water, Inc. v. Alliant Techsystems, Inc.*, No. 01-2236-JWL, 2002 WL 1634362, at *2 (D. Kan. May 31, 2002) (citing *United States v. Rockwell Int'l Corp.*, 282 F.3d 787, 810 (10th Cir. 2002)). Neither defendant has sought fees except those relating to the Motion to Compel by the United States.

[9] *Aerotech, Inc. v. Estes*, 110 F.3d 1523, 1528 (10th Cir. 1997).

Experienced trial attorneys, like those opposing Plaintiff in this case, have likely expended numerous hours thinking about trial strategy, and in formulating discovery and case theories. Much of that will have to be repeated if the case is refiled, and counsel will have to get back up to speed some time in the unknown future, which is frankly not fair.

In light of the foregoing problems and the need to provide "substantial justice to all parties,"[10] this Court imposes the following conditions on its grant of Plaintiff's Motion to Dismiss Without Prejudice. First, Plaintiff's unjustified failure to respond completely to the United States' first set of discovery resulted in attorney's fees of $2,433.50. The Court finds that, although based on a lodestar analysis these damages were reasonably incurred, the Court will reduce the damages. Because Plaintiff is pro se, and may not have the skills or means to fully research what was effectively an unreasonable basis for refusing to respond to discovery, and because the government was gracious in earlier offering to reduce its fee, I order Plaintiff to pay the government's damages in prosecuting the Motion to Compel in the amount of $750.[11] If she fails to pay those damages within fourteen days, this will constitute a judgment against her, with interest accruing from the date of this order at the rate set forth in 28 U.S.C. § 1961. Because I do not know

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[10] *Brown v. Baeke*, 413 F.3d 1121, 1124 (10th Cir. 2005) (stating that the Court must insure that "substantial justice is accorded to both parties" when ruling on a Rule 41(a)(2) motion to dismiss without prejudice).

[11] I do not separately award $29.36 in expenses sought, as they do not appear to relate to the underlying discovery dispute.

Plaintiff's financial position, other than her own protestations that she cannot afford to pay any fees, I will not condition refiling of the Complaint upon having paid this attorney fee award.[12]

Second, if Plaintiff does refile her suit against any of these Defendants, Plaintiff shall consent to the use, in any refiled action, of any material resulting from any discovery already conducted in this case.[13] In addition, because I have already ruled that Plaintiff must answer the missing discovery, she will be required in any refiled suit to serve her full and complete answers (and documents, if any) to the discovery that was the subject of the Order Granting Motion to Compel within 40 days of the refiling. Any additional discovery by or against Defendants will be determined by the court handling the matter, after input via a Report of Parties' Planning Meeting.

IT IS, THEREFORE, ORDERED that Plaintiff's Motion to Dismiss Without

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[12] The fact that this case is dismissed without prejudice should not be read as a holding that Plaintiff will have the never-ending right to refile an action under 11 U.S.C. § 523(a)(8) arising out of this bankruptcy proceeding. *See, e.g. In re Kapsin*, 265 B.R. 778, 781 (Bankr. N.D. Ohio 2001) (change of circumstances is insufficient reason to reopen case one and one-half years post discharge; would undermine finality of bankruptcy and permit perpetual Chapter 7 cases); *In re Root*, 318 B.R. 851 (Bankr. W.D. Mo. 2004) (motion to reopen denied due to unexplained delay of thirteen years post discharge); *Bugos v. MIT Bursar's Office (In re Bugos)*, 288 B.R. 435 (Bankr. E.D. Va. 2003) (not appropriate to reopen bankruptcy case two and one-half years post discharge based on change of circumstances; present conditions did not relate to facts/circumstances of bankruptcy case). *See also Watson v. Parker (In re Parker)*, 264 B.R. 685 (10th Cir. BAP 2001) (no limit on motion to reopen, but can apply doctrine of laches to determine discretionary reopening). Because Debtor received her discharge almost a year ago, I caution her that she should immediately seek advice of counsel if she hopes to refile.

[13] *See Kansas Waste Water*, 2002 WL 1634362, at *2 (requiring that discovery produced in the action dismissed under Rule 41(a)(2) shall "be used in a subsequent action").

Prejudice is granted, with conditions.[14] Plaintiff shall pay the United States the sum of $750 to compensate it for having to prosecute the Motion to Compel, but payment of that sum will not be a condition to refiling. If Plaintiff fails to pay that sum, however, it does constitute a post-petition judgment against her, with interest to accrue at the rate dictated by 28 U.S.C. § 1961. If Plaintiff elects to refile this suit against any of the Defendants, Plaintiff shall consent to the use, in any refiled action, of any material resulting from discovery already conducted in this case. If Plaintiff elects to refile this suit against any of the Defendants, she shall comply with the Order Granting Motion to Compel[15] entered in this case within 40 days of such refiling.

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[14] This dismissal also includes dismissal of the complaint against Defendant American Education Services, which did not answer. Plaintiff did file a Motion for Default Judgment against that defendant (Doc. 25), but did not properly serve the amended complaint on it, so that motion was denied (Doc. 49).

[15] Doc. 49. Although that order did not set the amount of attorney fees for the United States, it indicated fees would be awarded after further proceedings. Those fees have been set in this Order, but as noted earlier the Court does not require Plaintiff to have paid those fees as a condition to refiling.