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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:)	BAP No. OR-11-1342-JuMkH
)	
7	SHEILA NOEL CAMPBELL,)	Bk. No. 08-65172
)	
8	Debtor.)	Adv. No. 11-06051
)	
9	_____)	
)	
10	SHEILA NOEL CAMPBELL,)	
)	
11	Appellant,)	
)	
12	v.)	MEMORANDUM*
)	
13	SOUTHERN OREGON UNIVERSITY;)	
	OREGON DEPARTMENT OF REVENUE,)	
)	
14	Appellees.)	
)	

Argued and Submitted on June 14, 2012
at Boise, Idaho

Filed - August 15, 2012

Appeal from the United States Bankruptcy Court
for the District of Oregon

Hon. Frank R. Alley, III, Chief Bankruptcy Judge, Presiding

Appearances: G. Jefferson Campbell, Jr., Esq. argued for
appellant Sheila Noel Campbell; Stephen T. Tweet,
Esq. of Albert & Tweet, LLP, argued for appellees
Southern Oregon University and Oregon Department
of Revenue.

Before: JURY, MARKELL, and HOLLOWELL, Bankruptcy Judges.

* This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8013-1.

1 Discharged chapter 7¹ debtor, Sheila Noel Campbell,
2 reopened her bankruptcy case and filed an adversary proceeding
3 against appellees, Southern Oregon University ("SOU") and Oregon
4 Department of Revenue ("ODR") (collectively, "Defendants"),
5 seeking declaratory relief and asserting violations of the
6 discharge injunction under § 524(a). Defendants counterclaimed
7 for their attorneys' fees and costs.

8 On cross motions for summary judgment, the question
9 presented was whether the debt for room and board charges and
10 miscellaneous fees² that debtor incurred while living in the
11 dormitory at SOU and attending classes at nearby Rogue Community
12 College ("RCC") fell within the scope of the "qualified
13 education loan" exception to discharge under § 523(a)(8)(B).
14 The bankruptcy court granted summary judgment in favor of
15 Defendants, concluding that the debt in the amount of \$15,610.99
16 was presumptively nondischargeable under § 523(a)(8)(B) and,
17 therefore, not included in the discharge order. The bankruptcy
18 court also awarded SOU attorneys' fees and costs in the amount
19 of \$14,227.97.

20 For the reasons discussed below, we AFFIRM the bankruptcy
21 court's decision granting summary judgment for Defendants but
22

23 ¹ Unless otherwise indicated, all chapter and section
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
25 "Rule" references are to the Federal Rules of Bankruptcy
26 Procedure and "Civil Rule" references are to the Federal Rules
27 of Civil Procedure.

28 ² The miscellaneous fees included parking tickets, library
29 fines, health insurance charges, printing and copying fees,
30 student conduct fines, "social fees", "PE Jazz" fees, and fees
31 to cover the cost of replacing several laundry and meal cards.

1 REVERSE the award of attorneys' fees and costs.

2 **I. FACTS**

3 The facts relevant to the underlying controversy are
4 undisputed.

5 **Academic Year 2004-2005**

6 Debtor was a full-time enrolled student at SOU for the
7 academic school year 2004-2005, lived on the SOU campus, and
8 participated in a meal plan provided by SOU. When debtor
9 enrolled as a student, SOU automatically established a Revolving
10 Charge Account Plan (the "RCA") for debtor that allowed her to
11 pay tuition and other charges with more flexibility than if
12 payment were required upon registration or receipt of services.
13 The RCA provided that "any credit extended . . . is an
14 educational benefit or loan" and defined a student as "[a]ny
15 person who is currently or has in the past been enrolled at
16 [SOU]." Debtor signed the RCA agreement on October 17, 2004.

17 At the end of the 2004-2005 school year, SOU placed debtor
18 on academic suspension because of poor grades. As a result,
19 debtor could take no further classes at SOU.

20 **Academic Year 2005-2006**

21 Debtor then enrolled at RCC in Medford, Oregon, for the
22 Fall and Winter terms for the academic year of 2005-2006.
23 Pursuant to a Memorandum Of Understanding ("MOU") between RCC
24 and SOU, RCC students "who are dual enrolled at SOU can live on
25 the SOU campus . . ." if there was available space. Under this
26 policy as implemented, debtor sought to live in the dormitory on
27 the SOU campus and participate in a meal plan so that she could
28 stay near her friends while attending RCC.

1 On September 24, 2005, debtor signed a Residence Hall
2 Contract for the 2005-2006 school year for room and board at SOU
3 (the "Residence Hall Contract"). By signing the Residence Hall
4 Contract, debtor agreed that if she owed money for room and
5 board, damages or other charges, she would not be able to
6 receive her transcripts. Debtor also agreed that if she owed
7 money for room and board, damages or other charges, she would
8 pay, and SOU reserved the legal right for recovery of,
9 reasonable attorneys' fees, court costs, and other reasonable
10 collections costs. The room and board charges were billed to
11 debtor under the RCA.

12 As a condition for living on the SOU campus, debtor was
13 required to provide verification of her full-time enrollment at
14 SOU or RCC. Debtor provided verification that she was a full-
15 time student at RCC for the Fall term on October 14, 2005.

16 Debtor attended RCC as a full-time student during the Fall
17 and Winter terms of the academic year 2005-2006, but decided to
18 take a break from her studies for the Spring term of 2006. Due
19 to the fact that she was no longer taking classes at either RCC
20 or SOU, SOU's housing office manager advised debtor that she was
21 to vacate her room by April 24, 2006. Debtor moved out of the
22 SOU dormitory on that date.

23 Debtor did not pay her billed room and board and
24 miscellaneous charges from September 8, 2005 to June 20, 2006.
25 As of March 15, 2011, debtor owed SOU \$15,610.99, consisting of
26 a principal amount of \$9,581.03 plus interest due in the amount
27
28

1 of \$6,029.96.³ On December 1, 2005, SOU sent debtor's debt to
2 the ODR for collection.

3 **The Bankruptcy Proceedings**

4 On December 29, 2008, debtor filed her chapter 7 bankruptcy
5 petition. In Schedule F, debtor listed the debt owed to SOU for
6 the various charges. At no time did debtor file an adversary
7 proceeding regarding the dischargeability of the debt owed to
8 SOU. On April 3, 2009, debtor obtained her discharge.

9 Following discharge, ODR sent debtor a demand for payment
10 of SOU's delinquent student loan account on June 2, 2010.
11 Debtor requested her transcript from SOU which SOU refused to
12 release due to her outstanding bill.

13 On February 23, 2011, debtor moved to reopen her bankruptcy
14 case for the purpose of filing the declaratory relief adversary
15 proceeding. The bankruptcy court granted her motion by order
16 entered on February 24, 2011.

17 On March 4, 2011, debtor filed an adversary proceeding
18 against Defendants. In her complaint, debtor sought a
19 declaration that (1) the scheduled unsecured debt owed to SOU
20 for room and board charges⁴ in the amount of approximately

21
22 ³ Debtor maintains that her room and board charges should
23 only be for the period of September 2005 to April 2006 when she
24 moved out of the dormitory. Debtor points to no provision in
25 the Residence Hall Contract that shows she was entitled to a
26 refund for the room and board charges incurred when she left
27 prior to the end of the semester. Our independent review of the
28 contract shows that under Section XVIII ¶ C debtor was not
relieved of her liabilities in the event the contract was
terminated. The bankruptcy court did not address this issue.

⁴ Debtor's complaint did not differentiate between the
(continued...)

1 \$10,000 was discharged; (2) the § 523(a)(8) exception to
2 discharge did not apply to the charges because there was no
3 evidence of a "loan"; and (3) the collection actions taken by
4 Defendants violated § 524(a). In connection with her contempt
5 claim, debtor further sought the release of her transcript,
6 actual damages and reasonable attorneys' fees.

7 On April 4, 2011, Defendants answered the complaint and
8 counterclaimed for attorneys' fees and costs as authorized under
9 the SOU Residence Hall Contract. On the same day, Defendants
10 filed their motion for summary judgment ("MSJ"). Defendants
11 argued, among other things, that the debt owed to SOU for room
12 and board and miscellaneous charges was a "loan" within the
13 scope of § 523(a)(8)(B) due to debtor's signature on the RCA and
14 Residence Hall Contract. Defendants maintained that the MOU
15 supported an interpretation of the RCA and Residence Hall
16 Contract as applicable to debtor. Therefore, they argued, the
17 debt was not subject to the discharge order.⁵ According to
18 Defendants, under these circumstances, they did not violate the
19 discharge injunction under § 524(a) when they sought to collect
20 the debt post-discharge.

21 Debtor responded, arguing that the debt for the various
22 charges did not meet the requirements for a "qualified education
23 loan" under § 523(a)(8)(B). Relying primarily on McKay v.

24
25 ⁴ (...continued)
26 charges for room and board and other fees incurred while she was
living on the SOU campus.

27 ⁵ Defendants also asserted that amounts for tuition and
28 related fees were past due, but these amounts are not at issue
in this appeal.

1 Ingleson, 558 F.3d 888 (9th Cir. 2009) for her argument, debtor
2 maintained that the terms of the RCA and the Residence Hall
3 Contract were inconsistent with a "loan" because those
4 agreements applied only to students who were enrolled at SOU.⁶

5 On May 12, 2011, debtor moved for partial summary judgment,
6 incorporating the substance of her response and contending that
7 she was entitled to recover compensatory damages, reasonable
8 attorneys' fees and costs for Defendants' willful violation of
9 the discharge injunction under § 524(a). Debtor also sought a
10 partial summary judgment ruling that Defendant SOU be required
11 to immediately release her transcript for classes previously
12 taken at SOU.

13 On June 7, 2011, the bankruptcy court granted the
14 Defendants' MSJ and denied debtor's motion for partial summary
15 judgment at the hearing. On June 20, 2011, Defendants filed
16 their "Statement of Attorney Fees, Costs and Disbursements" in
17 the bankruptcy court, with a supporting declaration and time
18 sheets describing the work by date.

19 On June 22, 2011, the bankruptcy court entered an order and
20 judgment in favor of Defendants: (1) declaring the debt to SOU
21 to be a qualified educational loan, nondischargeable under
22 § 523(a)(8); (2) finding that SOU's and ODR's actions to collect
23 the SOU debt did not violate § 524(a); (3) declaring that SOU's
24 actions in withholding the transcripts was proper, and
25 (4) awarding SOU its attorneys' fees, costs and disbursements

26
27 ⁶ At issue in McKay was whether a deferment agreement
28 signed by the debtor while she was attending Vanderbilt
University constituted a loan under § 523(a)(8)(A).

1 incurred in the adversary proceeding. Debtor timely appealed
2 the judgment.

3 **II. JURISDICTION**

4 The bankruptcy court had jurisdiction over this proceeding
5 under 28 U.S.C. §§ 1334 and 157(b)(2)(I). We have jurisdiction
6 under 28 U.S.C. § 158.

7 **III. ISSUES**

8 A. Whether the revolving credit agreement extended by SOU
9 to debtor constitutes a "qualified education loan" under
10 § 523(a)(8)(B); and

11 B. Whether SOU is entitled to an award of its attorneys'
12 fees and costs in defending the adversary proceeding.

13 **IV. STANDARDS OF REVIEW**

14 The granting of summary judgment is reviewed de novo,
15 making all reasonable inferences in favor of the non-movant to
16 determine whether there exists any genuine issue of material
17 fact precluding judgment in favor of the movant as a matter of
18 law. Valdez v. Rosenbaum, 302 F.3d 1039, 1043 (9th Cir. 2002).
19 We may affirm a summary judgment on any ground that has support
20 in the record, whether or not relied upon by the bankruptcy
21 court. Id.

22 Where the bankruptcy court grants summary judgment based on
23 its interpretation of a contract, we review the bankruptcy
24 court's interpretation and meaning of contract provisions de
25 novo. See U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc., 281
26 F.3d 929, 934 (9th Cir. 2002). The determination as to whether
27 contract language is ambiguous and whether the written contract
28 is reasonably susceptible of a proffered meaning is also a

1 question of law reviewed de novo. Id.

2 Where the bankruptcy court grants summary judgment based on
3 its interpretation of a statute, we also use the de novo review
4 standard. Simpson v. Burkart (In re Simpson), 557 F.3d 1010,
5 1014 (9th Cir. 2009).

6 "Awards of attorney's fees are generally reviewed for an
7 abuse of discretion. However, we only arrive at discretionary
8 review if we are satisfied that the correct legal standard was
9 applied and that none of the [bankruptcy court's] findings of
10 fact were clearly erroneous. We review questions of law de
11 novo." Rickley v. County of L.A., 654 F.3d 950, 953 (9th Cir.
12 2011). To the extent the issue is whether Oregon law allows the
13 award of attorneys' fees, our review is de novo. Fry v. Dinan
14 (In re Dinan), 448 B.R. 775, 783 (9th Cir. BAP 2011).

15 V. DISCUSSION

16 Under § 523(a)(8), student loan obligations are
17 presumptively nondischargeable in bankruptcy. "Unless the
18 debtor affirmatively secures a hardship determination, the
19 discharge order will not include a student loan debt." Tenn.
20 Student Assistance Corp. v. Hood, 541 U.S. 440, 450 (2004).
21 Therefore, an action to collect on a nondischargeable student
22 loan by a creditor after the debtor has been granted a discharge
23 cannot be a violation of the discharge injunction. McKay, 558
24 F.3d at 891.

25 However, to be nondischargeable, the debt at issue must
26 meet the requirements for a "qualified education loan" within
27 the meaning of § 523(a)(8)(B). The creditor/defendant in
28 student loan dischargeability proceedings bears the burden of

1 proof on this issue. Plumbers Joint Apprenticeship & Journeyman
2 Training Comm. v. Rosen (In re Rosen), 179 B.R. 935, 938 (Bankr.
3 D. Or. 1995).

4 **A. Section 523(a)(8)(B)**

5 Section 523(a)(8)(B), which was added to the student loan
6 exception to discharge provision in 2005 with the enactment of
7 the Bankruptcy Abuse Prevention and Consumer Protection Act,
8 provides:

9 (a) A discharge under section 727 . . . of this title
10 does not discharge an individual debtor from any debt-
11 . . .

12 (8) unless excepting such debt from discharge under
13 this paragraph would impose an undue hardship on the
14 debtor and the debtor's dependents, for -
15 . . .

16 (B) any other educational loan that is a qualified
17 education loan, as defined in section 221(d)(1) of the
18 Internal Revenue Code of 1986, incurred by a debtor
19 who is an individual[.]

20 Section 523(a)(8)(B) expressly provides a cross reference
21 to the Internal Revenue Code ("IRC") of 1986 which supplies the
22 definition of a "qualified education loan" for purposes of the
23 "any other educational loan" exception to discharge. This cross
24 reference to IRC § 221(d)(1) leads us down a statutory
25 definitional path.

26 IRC § 221(d)(1)⁷ defines a "qualified education loan":

27 (1) Qualified education loan.--The term 'qualified

28 ⁷ In computing taxable income, IRC § 221 authorizes individual taxpayers an itemized deduction for interest paid by the taxpayer for the taxable year on any qualified educational loan. 26 U.S.C. § 221(a). A taxpayer is entitled to a deduction under § 221 only if the taxpayer has a legal obligation to make interest payments under the terms of the qualified education loan. Treas. Reg. § 1.221-1.

1 education loan' means any indebtedness incurred by the
2 taxpayer solely to pay qualified higher education
expenses-

3 . . .
4 (C) which are attributable to education furnished
5 during a period during which the recipient was an
6 eligible student.

7 IRC § 221(d) (2) defines "qualified higher education
8 expenses":

9 (2) Qualified Higher Education Expense.--The term
10 'qualified higher education expenses' means the cost
11 of attendance (as defined in section 472 of the Higher
12 Education Act of 1965, 20 U.S.C. 108711, as in effect
13 on the day before the date of the enactment of the
14 Taxpayer Relief Act of 1997) at an eligible
15 educational institution . . .

16 In turn, 20 U.S.C. § 108711, defines "cost of attendance":

17 (1) tuition and fees normally assessed a student
18 carrying the same academic workload as determined by
19 the institution, and including costs for rental or
20 purchase of any equipment, materials, or supplies
21 required of all students in the same course of study;

22 (2) an allowance for books, supplies, transportation,
23 and miscellaneous personal expenses, including a
24 reasonable allowance for the documented rental or
25 purchase of a personal computer . . . , as determined
26 by the institution;

27 (3) an allowance (as determined by the institution)
28 for room and board costs incurred by the student
. . . .⁸

Finally, an "eligible student" within the meaning of IRC
§ 221(d) (1) (C) is one who carries at least a one-half time
student workload (IRC § 25A(b) (3)) and who is enrolled in a
program of study at an institution of higher education (20

⁸ See also, McKay, 558 F.3d at 890 (concluding that
arrangements for payment of tuition, and room and board,
constitute student loans for purposes of § 523(a) (8) (A)).

1 U.S.C. § 1091(a)(1)).⁹

2 These detailed definitions inform us whether the elements
3 for a "qualified education loan" have been met in this case.

4 When Congress has enacted a definition with "detailed and
5 unyielding provisions," as it has with the above mentioned
6 statutes, we must give effect to those definitions even when
7 "'it could be argued that the line should have been drawn at a
8 different point.'" INS v. Hector, 479 U.S. 85, 88-89 (1986)

9 (per curiam). Given the cross references to the numerous
10 statutes cited above, a "qualified education loan" under

11 § 523(a)(8)(B) is comprised of the following elements:

12 (1) indebtedness; (2) used by the taxpayer; (3) solely for
13 "qualified educational expenses" (defined as "cost of
14 attendance" which means, among other things, an allowance for
15 transportation, room and board, and miscellaneous personal
16 expenses under 20 U.S.C. § 108711); and (4) that are
17 attributable to education furnished during a period during which
18 the recipient was an "eligible student" – (a) "eligible student"
19 means one who carries at least a one-half time student workload
20 and (b) who is enrolled in a program of study at an institution
21 of higher education.

22 Debtor's primary argument on appeal is that the terms of
23 the RCA and Residence Hall Contract are inconsistent with a
24

25 ⁹ Debtor cannot seriously contend that she was not an
26 "eligible student" within the meaning of § 221(d)(1)(C) at the
27 time she incurred the room and board and other charges at SOU.
28 The record shows that she was enrolled at RCC in a full time
course of study. Therefore, she was an "eligible student"
within the meaning of IRC § 221(d)(1)(C).

1 "loan" because those agreements only applied to students who
2 were enrolled at SOU. Debtor's argument thus raises the issue
3 of whether she was legally obligated under the agreements when
4 she was not a student at SOU at the time she incurred the
5 expenses.

6 The term "indebtedness" as used in the Revenue Act has been
7 construed to mean an "unconditional and legally enforceable
8 obligation for the payment of money." Investors Ins. Agency,
9 Inc. v. Comm'r, 677 F.2d 1328, 1333 (9th Cir. 1982). There is
10 no requirement that money change hands, as revolving lines of
11 credit may constitute a "qualified education loan" so long as
12 the student uses the line of credit solely to pay qualifying
13 educational expenses. 34 AM. JUR. 2D Fed. Taxation ¶ 18410
14 (2012); see also McKay, 558 F.3d at 890 (revolving credit
15 accounts are considered loans for purposes of § 523(a)(8)). We
16 therefore consider whether the various agreements which
17 Defendants rely upon show that debtor legally incurred liability
18 for the debt, as a matter of law.¹⁰

19 Here, the RCA and Residence Hall Contract are the two
20 agreements signed by debtor. Debtor established and signed the
21 RCA when she was enrolled at SOU as a student and later signed
22 the Residence Hall Contract when she was enrolled at RCC.
23 Because Oregon is the relevant jurisdiction, we look to Oregon
24 law for the interpretative rules pertaining to contracts.

25
26 ¹⁰ Both the Revolving Charge Account Program and the
27 Residence Hall Contract are governed by the Or. Admin. Rules
28 promulgated by the Oregon State Board of Education at Or. Admin.
R. 571-060-0040 and 573-070-0011, respectively.

1 Oregon follows the objective theory of contracts; that is, the
2 existence of a contract does not depend on the parties'
3 uncommunicated subjective understanding but on their objective
4 manifestations of intent to agree to the same express terms.
5 Dalton v. Robert Jahn Corp., 146 P.3d 399, 406 (Or. Ct. App.
6 2006).

7 In a dispute over the meaning of a contract, a party is
8 entitled to summary judgment only if the terms of the contract
9 are unambiguous. Milne v. Milne Constr. Co., 142 P.3d 475, 479
10 (Or. Ct. App. 2006). A term in a contract is ambiguous if, when
11 examined in the context of the contract as a whole, including
12 the circumstances in which the agreement was made, it is
13 susceptible to more than one plausible interpretation. Batzer
14 Constr., Inc. v. Boyer, 129 P.3d 773, 779 (Or. Ct. App. 2006).
15 If the term or provision is unambiguous, the court construes it
16 as a matter of law, and the analysis ends. Yogman v. Parrot,
17 937 P.2d 1019, 1021 (Or. 1994).

18 Debtor has couched the interpretative problem as centering
19 on whether the RCA and Residence Hall Contract apply only to
20 registered SOU students rather than to registered SOU and RCC
21 students, such as herself. In doing so, debtor would have us
22 ignore the circumstances surrounding her signature on the
23 agreements and instead rely exclusively on the select language
24 in the agreements attributed to her interpretation. However,
25 our interpretation of the agreements involves more than the mere
26 construction of terms and ordinary words. In determining
27 whether debtor is legally bound by the agreements, we also
28 consider the surrounding circumstances at the time of

1 contracting and the positions and actions of the parties.

2 We cannot ignore the factual circumstances under which
3 debtor signed the Residence Hall Contract. Debtor could no
4 longer attend SOU because of her grades; she enrolled at the
5 nearby community college, RCC; and she took advantage of the
6 consortium agreement between SOU and RCC that allowed her to
7 live in the dormitory on the SOU campus and participate in a
8 meal plan. These undisputed facts show that debtor used the RCA
9 for living and other miscellaneous expenses as part of her
10 broader effort to obtain an education at RCC.

11 Moreover, on these facts, debtor's reading of the Residence
12 Hall Contract as applying only to registered SOU students leads
13 to an unreasonable result. The Residence Hall Contract cannot
14 plausibly be read to apply only to registered SOU students when
15 the MOU between SOU and RCC contemplates collaboration between
16 the two institutions for the benefit of students in the Medford
17 area, including the use of the SOU dormitories by RCC students -
18 a benefit which debtor took advantage of.

19 Debtor's proposed interpretation is not only inconsistent
20 with the MOU, but also inconsistent with the enrollment
21 verification letters sent to her. The first letter sent dated
22 October 11, 2005 stated in part: "In order to live in the
23 residence halls, you must be a registered student" The
24 letter then required verification of the "Fall term class
25 schedule from either SOU or RCC" to remain in the residence
26 halls. Debtor responded to the letter by verifying that she was
27 a registered student at RCC so that she could continue living in
28 the SOU dormitory.

1 Likewise, we cannot interpret the RCA as applying only to
2 registered SOU students. The RCA mentions the consortium
3 agreement between SOU and RCC in ¶ 8. Moreover, the purpose and
4 structure of the RCA is set forth by Or. Admin. R. 573-015-0010.
5 Paragraph 2(b) of that rule provides:

6 (2) The following are eligible to participate in the
7 Revolving Charge Account program:

8 (a) Students enrolled at Southern Oregon University;

9 (b) Any person who incurs charges, fines, or penalties
10 at Southern Oregon University, including, but not
11 limited to library fines, parking tickets, facilities
12 rental charges, program user charges, and lease
13 agreements.

14 When debtor incurred the room and board charges pursuant to
15 the Residence Hall Contract, she fell into category (2) (b); she
16 was "any person" (a registered RCC student) who incurred charges
17 at SOU. Furthermore, the RCA defines a "student" as "[a]ny
18 person who is currently or has in the past been enrolled at
19 Southern Oregon University." Debtor would fit into this
20 definition as well because she was a person who "in the past"
21 was enrolled at SOU.

22 After a thorough examination of the RCA, the Residence Hall
23 Contract, the MOU and the verification letters, and giving due
24 consideration to the circumstances under which the agreements
25 were made, we conclude there is no ambiguity in any of the
26 documents. Debtor's proposed interpretation of the various
27 agreements is neither sensible nor reasonable. Deerfield
28 Commodities v. Nerco, Inc., 696 P.2d 1096, 1105 (Or. Ct. App.
1985) ("A contract provision is ambiguous if . . . it is capable
of more than one sensible and reasonable interpretation; it is

1 unambiguous if its meaning is so clear as to preclude doubt by a
2 reasonable person."). Accordingly, we hold the RCA and Resident
3 Hall Contract were legally enforceable against debtor for the
4 room and board and other listed charges.

5 Even so, IRC § 221(d)(1) requires that debtor use the
6 credit extended by SOU solely to pay for qualified education
7 expenses. We do not find any genuine dispute that debtor used
8 the credit extended by SOU for costs associated with her
9 attendance at RCC. There is no dispute that the room and board
10 charges fall squarely within the scope of 20 U.S.C. § 108711(3).
11 Moreover, as more fully discussed below, we conclude that the
12 miscellaneous charges debtor incurred also qualify as costs of
13 attendance because those charges were associated with debtor's
14 living in the dormitory at SOU and attendance at school.
15 Accordingly, the revolving line of credit established by SOU was
16 used to fund debtor's "cost of attendance." As such, these
17 costs were "qualified higher education expenses" within the
18 meaning of IRC § 221(d)(2).

19 The dissent disagrees with our conclusion, contending that
20 the parking and other fines, medical costs, and "recreational"
21 Jazzercise classes were not a "cost of attendance". Thus, the
22 dissent argues that the RCA was not a "qualified education loan"
23 for purposes of § 523(a)(8)(B). Relying on Treas. Reg. § 1.221-
24 1(e)(4), Example 6, the dissent concludes that the revolving
25 line of credit offered by SOU is a "mixed use loan" which is not
26 considered a qualified education loan. Example 6 states:

27 Mixed-use loans. Student J signs a promissory note
28 for a loan secured by Student J's personal residence.
Student J will use part of the loan proceeds to pay

1 for certain improvements to Student J's residence and
2 part of the loan proceeds to pay qualified higher
3 education expenses of Student J's spouse. Because
4 Student J obtains the loan not solely to pay qualified
5 higher education expenses, the loan is not a qualified
6 education loan.¹¹

7 However, the facts of this case do not fall close to those in
8 the example. Moreover, although a revolving credit agreement
9 offered by an eligible education institution may include a
10 variety of charges, that does not transform every revolving
11 credit agreement into a "mixed use loan". In the end, the
12 example cited by the dissent provides little guidance as to
13 whether the revolving line of credit here is a qualified
14 education loan.

15 Moreover, the dissent's analysis regarding "mixed use
16 loans" ignores the fact that the term "cost of attendance" which
17 qualifies as a "higher education expense" encompasses more than
18 room and board. 20 U.S.C. § 108711 defines the "cost of
19 attendance" with a broad list of items to include tuition and
20 fees and an allowance for books, supplies, transportation and
21 miscellaneous personal expenses. Read together, all the items
22 listed have a relationship to the student's attendance at school
23 (home improvements do not).

24 Here, we conclude that the miscellaneous charges have the
25 necessary relationship to debtor's attendance at school. She
26 would have had no need to use the library (and incur the fines),
27 copy or print items at SOU (and incur the fees), or replace meal

28 ¹¹ Nonetheless, under this example the borrower may still be
eligible to take a deduction on interest paid when the "loan"
was secured by his or her personal residence.

1 and laundry cards (and incur the fees for doing so) had she not
2 been attending school.¹² If Congress included certain allowances
3 for expenses as serving an educational purpose in the student
4 loan tax statutes, we should assume it also interpreted those
5 allowances as having an educational purpose in the Bankruptcy
6 Code. See Murphy v. Pa. Higher Educ. Assistance Agency (In re
7 Murphy), 282 F.3d 868, 872-73 (5th Cir. 2002). Because the
8 various expenses were incidental to debtor's education, the
9 revolving line of credit was not a "mixed use loan" so as to
10 take it outside the definition of a "qualified educational
11 loan".

12 We also find support for our interpretation in the case
13 law. Those Courts of Appeal which have addressed a similar
14 issue have found that the educational nature of the loan should
15 be determined by focusing on the substance of the transaction
16 creating the obligation. See Dustin Busson-Sokolik v. Milwaukee
17 School of Eng'g (In re Sokolik), 635 F.3d 261, 266 (7th Cir.
18 2011) (holding that it is the "purpose of the loan which
19 determines whether it is 'educational'."); In re Murphy, 282
20 F.3d at 870 (same); McKay v. Ingleson, 366 B.R. 144, 147 (D. Or.
21 2007) aff'd 558 F.3d 888 (9th Cir. 2009) (in determining whether
22 a "loan" falls within the scope of § 523(a)(8)(A), the nature of
23 the debt, if for some clear educational benefit to the debtor,
24

25 ¹² While the dissent places emphasis on the Jazzercise
26 charges, from what we can tell out of a total of three charges,
27 two were credited back to the debtor. At most, there is one \$80
28 charge associated with the "PE Jazz" entry. Further, the PE
indicates that perhaps the class was not simply "optional" or
"recreational".

1 should be the principal focus). Although these cases
2 interpreted § 523(a)(8)(A), we extrapolate from them to
3 incorporate a compatible standard for interpreting
4 § 523(a)(8)(B). Bankruptcy courts have followed a similar
5 approach when determining whether a "loan" is a "qualified
6 education loan" for purposes of § 523(a)(8)(B).

7 In Rumer v. Am. Educ. Servs. (In re Rumer), 469 B.R. 553
8 (Bankr. M.D. Penn. 2012), the debtors maintained they were
9 entitled to summary judgment in their favor because the lenders
10 had not offered proof that the proceeds of the loans were used
11 by them to pay for "costs of attendance" such as tuition, books,
12 room and board, etc. Relying on In re Sokolik, 634 F.3d 261,
13 and In re Murphy, 282 F.3d 868, the bankruptcy court rejected
14 the debtors' "narrow construction" of the term "costs of
15 attendance". In analyzing whether a loan is a qualified
16 educational loan, the Rumer court observed that the focus under
17 § 523(a)(8) was on the stated purpose for the loan when it was
18 obtained, rather than how the proceeds were actually used by the
19 borrower. Id. at 562. The bankruptcy court found that the
20 loans in question were "educational loans" for purposes of
21 § 523(a)(8) because the lenders were providers of educational
22 loans, debtors applied to each lender in its capacity as a
23 student loan provider; and each loan was entered into when
24 debtors were college students. Id. at 562-3.

25 In Noland v. Iowa Student Loan Liquidity Corp. (In re
26 Noland), 2010 WL 1416788 (Bankr. D. Neb. 2010), the debtor
27 certified on each promissory note that he would use the proceeds
28 for qualified higher education expenses or for costs associated

1 with his attendance at school. The debtor moved for summary
2 judgment, arguing that because some of the funds were used for
3 dining out, purchasing gifts, paying for expenses including
4 travel, car insurance, and gas, and for mental health treatment
5 and medication, the loans were not "qualified education loans"
6 and therefore were dischargeable. Id. at *4. The bankruptcy
7 court rejected the debtor's interpretation because such an
8 interpretation would subvert the intent of [§ 523(a)(8)]:

9 Permitting students to discharge student loans in
10 bankruptcy because the student spent the money on
11 social uses, alcohol, or even drugs would create an
12 absurd result. Students who used the loan proceeds to
13 finance an education would retain the burden of paying
14 them even after a chapter 7 discharge; irresponsible
15 students who abused the loans would gain the benefits
16 of discharge.

17 Id. at *4 (quoting In re Murphy, 282 F.3d at 873).

18 Although none of the above cited cases are directly on
19 point, collectively they support a broad interpretation of what
20 constitutes a "qualified educational loan" under § 523(a)(8)(B).
21 Here, as in Rumer, SOU provided the revolving line of credit to
22 debtor because – at least initially – she was an registered
23 student at SOU. Moreover, she could not live at the dormitory
24 at SOU unless she was a registered student at SOU or RCC. Her
25 room and board charges and other charges incurred under the RCA
26 related to her attendance at school. In addition, because the
27 miscellaneous charges involved fines and other penalties, our
28 broad interpretation also avoids the absurd result illustrated
29 by the Murphy court.

30 For all these reasons, we conclude that the bankruptcy
31 court did not err in finding that, as a matter of law, the debt

1 owed to SOU fell within the scope of § 523(a)(8)(B) and was
2 therefore presumptively nondischargeable.

3 **B. Attorneys' Fees And Costs**

4 Under Cohen v. de la Cruz, 523 U.S. 213, 118 S. Ct. 1212,
5 140 L. Ed. 2d 341 (1998) attorneys' fees may be awarded and
6 declared nondischargeable in an action to determine
7 dischargeability of debt. However, this Panel's prior decisions
8 clarify that: (1) an underlying contract or nonbankruptcy law
9 must provide a right to recover attorneys' fees, and (2) the
10 issues litigated in the dischargeability action must fall within
11 the scope of the contractual or statutory attorneys' fees
12 provision. See In re Dinan, 448 B.R. at 785 (9th Cir. BAP 2011)
13 ("under Cohen, the determinative question for awarding
14 attorneys' fees is whether the creditor would be able to recover
15 the fee outside of bankruptcy under state or federal law").
16 Accord, Bertola v. N. Wis. Produce Co. (In re Bertola), 317 B.R.
17 95, 99-100 (9th Cir. BAP 2004); AT&T Universal Card Servs. Corp.
18 v. Pham (In re Pham), 250 B.R. 93, 98-99 (9th Cir. BAP 2000);
19 see also Kilborn v. Haun (In re Haun), 396 B.R. 522, 528 (Bankr.
20 D. Idaho 2008) (holding that, in light of Cohen, Pham and
21 Bertola, bankruptcy court should inquire whether creditor "would
22 be entitled to fees in state court for establishing those
23 elements of the claim which the bankruptcy court finds support a
24 conclusion of nondischargeability."), cited with approval in
25 In re Dinan, 448 B.R. at 785.

26 In Oregon, absent an applicable statutory or contractual
27 provision, attorneys' fees will not be awarded. Mattiza v.
28 Foster, 803 P.2d 723, 725 (Or. 1990). A party seeking to

1 recover attorneys' fees must plead the grounds that would permit
2 their recovery. Mulier v. Johnson, 29 P.3d 1104, 1108 (Or. Ct.
3 App. 2001). Here, in their counterclaim, Defendants referred to
4 the terms of ¶¶ XII and XXI in the Residence Hall Contract,
5 which entitled them to recover fees incurred as "collection
6 costs" or incurred in an action brought by SOU to recover
7 possession of student housing or to enforce the terms of the
8 Residence Hall Contract. Paragraph XII, entitled "Payments"
9 provides in relevant part:

10 E. . . . SOU also reserves the legal right for
11 recovery of reasonable attorney fees, courts costs,
and other reasonable collection costs

12 Paragraph XXI, entitled "Legal Costs" provides in relevant part:

13 I understand that I shall pay all costs of proceedings
14 by SOU to recovery [sic] of the possession of the
15 premises, or for the enforcement of any of the terms
and conditions of this lease, including reasonable
attorney's fees.

16 The scope of these attorneys' fees provisions is a matter
17 of contract interpretation, which in turn depends upon the
18 parties' intent. Quality Contractors, Inc. v. Jacobsen, 911
19 P.2d 1268, 1271-72 (Or. Ct. App. 1996). To determine the
20 parties' intent, the court must look to the language of the
21 contract, and also may look to the surrounding circumstances.
22 Id. The court also might construe an ambiguous contract term
23 against the drafter. Id.

24 We conclude that the issue addressed in Campbell's
25 adversary proceeding was not within the scope of the Residence
26 Hall Contract's attorneys' fees provisions. Campbell did not
27 dispute that she was liable under the Residence Hall Contract or
28 the amount of that liability. Rather, the dispute centered on

1 whether her obligations under the Residence Hall Contract
2 constituted a "qualified education loan" for purposes of
3 § 523(a)(8)(B).

4 Accordingly, the adversary proceeding was an action to
5 determine the status of the loan, not to collect it. As this is
6 merely an action to declare the status of the loan, it is not a
7 "collection action" or within the scope of an action to enforce
8 the terms of the Residence Hall Contract. Under In re Haun, 396
9 B.R. 522, Defendants would not have been entitled to contractual
10 attorneys' fees for establishing in state court that Campbell's
11 Residence Hall Contract obligations constituted a "qualified
12 education loan" within the meaning of § 523(a)(8)(B).

13 Our view is consistent with Oregon case law. Under Oregon
14 law, contracting parties are free to limit the right of the
15 prevailing parties to recover attorneys' fees to certain
16 instances. Harris v. Cantwell, 614 P.2d 124, 126-27 (Or. Ct.
17 App. 1980). Consequently, Oregon courts will deny attorneys'
18 fees claims when the claim is based upon an action that is
19 beyond the scope of the subject contractual fees provision.
20 See, e.g., Greenwade v. Citizens Bank of Or., 624 P.2d 610, 615
21 (Or. Ct. App. 1981); Harris, 614 P.2d at 126-27.

22 Nor does citation to Or. Rev. Stat. § 20.096.(1)¹³ advance
23

24 ¹³ Or. Rev. Stat. § 20.096(1) states:

25 In any action or suit in which a claim is made based
26 on a contract that specifically provides that attorney
27 fees and costs incurred to enforce the provisions of
28 the contract shall be awarded to one of the parties,
the party that prevails on the claim shall be entitled

(continued...)

1 the attorneys' fees claim, because that statute does not provide
2 an independent basis on which to claim attorneys' fees; rather,
3 it simply makes certain unilateral attorneys' fees clauses
4 reciprocal. See Jacobsen, 911 P.2d at 1270; Bliss v. Anderson,
5 585 P.2d 29, 31 (Or. Ct. App. 1978).

6 The parties here could have set forth in their Residence
7 Hall Contract a broad-based right to attorneys' fees by
8 providing for the recovery of attorneys' fees in any litigation
9 arising out of the Residence Hall Contract, or by using any
10 other similarly-broad language. Instead, the contract uses much
11 narrower language, limited to collection actions and actions to
12 enforce the terms of the contract. No where is litigation over
13 the status or characterization of the loan mentioned.
14 Especially given the summary judgment setting, this factual
15 issue as to the intent and meaning of the attorneys' fees clause
16 requires further development. See Jacobsen, 911 P.2d at 1271.

17 In sum, Campbell's adversary proceeding did not contest her
18 liability, but rather only asserted that her obligations under
19 the Residence Hall Contract had been discharged in her
20 bankruptcy case because they did not constitute a
21 nondischargeable student loan within the meaning of the
22 Bankruptcy Code. Moreover, the only issue addressed on summary
23 judgment was whether Campbell's debt to Defendants was a
24

25 ¹³(...continued)

26 to reasonable attorney fees in addition to costs and
27 disbursements, without regard to whether the
28 prevailing party is the party specified in the
contract and without regard to whether the prevailing
party is a party to the contract.

1 "qualified education loan" under § 523(a)(8)(B). Under these
2 circumstances, we conclude that Defendants were not entitled to
3 their reasonable attorneys' fees and costs.

4 **VI. CONCLUSION**

5 For the reasons stated, we AFFIRM the bankruptcy court's
6 decision granting summary judgment for Defendants but REVERSE
7 the award of attorneys' fees and costs.

8
9 MARKELL, Bankruptcy Judge, dissenting:

10
11 I respectfully dissent. I disagree with the majority's
12 conclusion that the debt Campbell incurred under both the RCA
13 and the Residence Hall Contract was a "qualified education loan"
14 within the meaning of § 523(a)(8)(B).¹

15 The majority indicates that Campbell's debt arose from a
16 combination of two contracts Campbell signed: (1) the RCA, and
17 (2) the Residence Hall Contract. Opinion at pp. 3-6. The
18 Defendants' memorandum filed in the bankruptcy court in support
19 of their summary judgment motion confirms this point.²

20 As the majority acknowledges, to be nondischargeable under
21

22 ¹ I adopt the definitions used in the majority opinion.

23
24 ² The identification of the agreements from which the
25 indebtedness arose is essential to establishing that a "loan"
26 has been made for purposes of § 523(a)(8), especially when, as
27 here, no money actually changed hands. See McKay v. Ingleson,
28 558 F.3d 888, 890 (9th Cir. 2009); see 4 COLLIER ON BANKRUPTCY
§ 523.14[1] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed.
2012) ("To constitute a 'loan,' the creditor must have actually
transferred funds to the debtor or the parties must have entered
into an agreement for the extension of credit.").

1 § 523(a)(8)(B), the debt must constitute a "qualified education
2 loan, as defined in section 221(d)(1) of the Internal Revenue
3 Code of 1986." § 523(a)(8)(B).³ In turn, IRC § 221(d)(1)
4 provides in relevant part that "[t]he term 'qualified education
5 loan' means any indebtedness incurred by the taxpayer solely to
6 pay qualified higher education expenses." 26 U.S.C. § 221(d)(1)
7 (emphasis added).

8 In my view, the majority trivializes this statutory
9 restriction; instead of honoring Congress' use of a strict nexus
10 test - signaled by the use of "solely" - it develops its own
11 relatedness test to see if credit extended qualifies as
12 nondischargeable debt. It exacerbates this error by evaluating
13 its relatedness test as a matter of law, rather than of fact.

14 My review begins by noting that the RCA is broader than
15 required by the relevant statutes; that is, it picks up expenses
16 other than qualified higher education expenses. As a result,
17 the indebtedness incurred under it should not fall within IRC
18 § 221(d)(1)'s definition, as such debt is not incurred "solely"
19 to pay qualified higher education expenses." Even a cursory
20 glance at the RCA confirms this point. The RCA provides that
21 essentially any "student" who incurs charges, fines and
22 penalties at SOU can and does establish a revolving charge

23
24 ³ Section 523(a)(8)(B) was added to the Bankruptcy Code in
25 2005 to extend the nondischargeability of student loans to such
26 loans when made by private, for-profit lenders. Bankruptcy
27 Abuse Prevention and Consumer Protection Act of 2005, Pub. L.
28 No. 109-8, § 220, 119 Stat. 23, 59 (2005); see also Rafael I.
Pardo & Michelle R. Lacey, The Real Student-loan Scandal: Undue
Hardship Discharge Litigation, 83 AM. BANKR. L.J. 179, 181 & n.12
(2009).

1 account. RCA at ¶¶ 1-2. The RCA also defines the term
2 "student" very broadly, to include: "[a]ny person who is
3 currently or has in the past been enrolled at [SOU]." Id. at
4 ¶ 9 (emphasis supplied).

5 The RCA is also overbroad in a further, fatal, way. It
6 provides: "As a student, any credit extended to you is an
7 educational benefit or loan." Id. at ¶ 1. But saying an
8 extension of credit is a educational benefit or an education
9 loan doesn't make it so.⁴ Campbell's student loan invoices
10 covered not only room and board, but parking tickets, library
11 fines, health insurance charges, medical care, "social fees,"
12 printing fees, copying fees, Jazzercise courses,⁵ student
13 conduct fines, and fees to cover the cost of replacing several
14 laundry and meal cards. In short, SOU maintained a revolving
15 credit account for Campbell.

16 In creating this revolving type of credit, the RCA covers
17 far more debt than is included in IRC § 221(d)(1)'s definition
18 of "qualified educational loan." Such arrangements are not
19 uncommon, and are called "mixed use loans." The relevance of
20 that classification here is that such mixed use loans do not

21
22 ⁴ Much like the colloquy often posed by Abraham Lincoln; he
23 would relate a story about a "boy who, when asked how many legs
24 his calf would have if he called its tail a leg, replied,
25 'Five,' to which the prompt response was made that calling the
26 tail a leg would not make it a leg." REMINISCENCES OF ABRAHAM LINCOLN
27 BY DISTINGUISHED MEN OF HIS TIME 242 (Allen Thorndike Rice, ed., new
28 and rev. ed. 1909), available at
<http://quod.lib.umich.edu/l/lincoln2/BCC9571.0001.001/262?rgn=full+text;view=image>.

⁵ At least, that's what I think they are. The invoice
entry merely reads "PE Jazz."

1 meet the requirements to be a "qualified educational loan."
2 Treas. Reg. § 1.221-1(e)(4) (Ex. 6) (2004); id. § 1.221-2(f)
3 (Ex. 6). See also 69 Fed. Reg. 25489, 25491 (May 7, 2004); T.D.
4 9125, 2004-1 C.B. 1012 (2004). The reason that such loans
5 cannot qualify is that if the loan is for a "mixed" use, its
6 proceeds cannot be used "solely" for educational purposes. As a
7 consequence, any debt incurred under such a loan is
8 dischargeable.

9 As one treatise explains:

10 Mixed use loans aren't qualified education loans.

11 **Illustration** Student signs a promissory note for
12 a loan secured by student's personal residence. Part
13 of the loan proceeds will be used to pay for certain
14 improvements to student's residence and part of the
15 loan proceeds will be used to pay qualified higher
16 education expenses of student's spouse. Since the
17 loan isn't incurred by student solely to pay qualified
18 higher education expenses, the loan isn't a qualified
19 education loan.

20 Similarly, revolving lines of credit generally aren't
21 qualified education loans, unless the borrower uses
22 the line of credit solely to pay qualifying education
23 expenses. Such revolving lines of credit include, for
24 example, credit card debt and a university's in-house
25 deferred payment plan which is a revolving credit
26 account that can include a variety of expenditures in
27 addition to qualified higher education expenses.

28 34 AM. JUR. 2D, Fed. Taxation, at ¶ 18410 (2012) (footnotes
omitted and emphasis added) (citing Treas. Reg. § 1.221-1(e)(4),
Ex (6)).

Defendants cannot seriously contend that Campbell used the
RCA solely to pay "qualified education expenses." Nor can they
seriously contend that the scope of the RCA was restricted
"solely" to qualified educational expenses. While the Internal
Revenue Code defines "qualified education expenses" broadly, see

1 26 U.S.C. § 221(d)(2) and 20 U.S.C. § 108711, it would defy
2 credulity for Defendants to claim that, for example, Campbell's
3 parking fines or her medical expenses or her Jazzercise classes
4 were a "cost of attendance" under 20 U.S.C. § 108711, or
5 otherwise were a "qualified education expense" under
6 § 221(d)(2).

7 The majority explains this difference away by sweeping
8 these unrelated expenses into the category of miscellaneous
9 expenses related to the cost of allowable "miscellaneous
10 personal expenses." In this regard, the majority seems to
11 substitute a requirement that the expenses merely be related for
12 the statutory requirement that such expenses be incurred
13 "solely" for educational purposes. Opinion at 19-20.

14 The simple response is that this is not the statutory test.
15 But its use raises another problem for this appeal. The
16 bankruptcy court granted summary judgment, meaning that there
17 were no contested material issues of fact. But whether medical
18 expenses, Jazzercise classes and parking fines are allowable
19 "miscellaneous personal expenses" seems to be an issue of
20 determining whether Campbell's and the Defendants' actions
21 qualify or satisfy certain legal standards, a classic factual
22 inquiry. As such, I am doubly perplexed as to how the majority
23 can sustain the summary judgment on appeal.

24 Under these circumstances, it was error to find that
25 Campbell's debt was nondischargeable under § 523(a)(8)(B).
26
27
28