IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

In re:	)	
	)	**Chapter 7**
KATHERINE ELIZABETH RUTH AYERS	)	
	)	**Case No. 17-70928**
Debtor.	)	

KATHERINE ELIZABETH RUTH AYERS	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Adv. Proc. No. 17-07035**
	)	
UNITED STATES DEPARTMENT OF DEFENSE and	)	
UNITED STATES DEPARTMENT OF THE TREASURY	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This Adversary Proceeding was filed by the Debtor, Katherine Elizabeth Ruth Ayers ("Debtor"), against the United States Department of Defense ("Defense") and the United States Department of the Treasury ("Treasury")(collectively "Defendants") seeking a declaration that her debt to the Defense listed on Schedule F of her petition is dischargeable under 11 U.S.C. § 727 or alternatively that any such debt excepted from discharge under 11 U.S.C. § 523(a)(8) constitutes an undue hardship on the Debtor and should be discharged. The Debtor also asserts that the Defendants' actions are arbitrary and capricious and that no reason exists for disparate treatment of the Debtor and seeks declaratory judgment that the Defendants' decision to recoup certain expenses is in violation of 5 U.S.C. § 706(2) and her right to due process and equal protection under the Fifth Amendment of the Constitution. In response, the Defendants filed a

Motion to Dismiss Complaint pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The Debtor filed a response to the Motion to Dismiss as well as a Motion to Amend Complaint. The Court conducted a hearing on these motions on December 4, 2017, the parties fully briefed the issues and the matter is ripe for resolution. For the reasons stated below, the Court will grant the Defendants' Motion to Dismiss in part and deny the Debtor's Motion to Amend the Complaint.

FACTUAL BACKGROUND

The Debtor enlisted in the United States Air Force ("USAF" or "Air Force") in July 2002. Complaint ¶ 6. She was stationed at Minot Air Force Base from December 2002 until August 2005, during which time she began an intimate relationship with another woman. *Id.* at ¶ 7-8. Prior to 1993, the Defense prohibited homosexual persons from serving on active duty, but in 1993 a new policy was adopted into law called "Don't Ask, Don't Tell" ("DADT") which directed that the military not seek out information about a member's sexual preference. *Id.* at ¶ 10, 11. On May 17, 1994, Deputy Defense Secretary John Deutch issued a directive that Service secretaries could seek recoupment of Reserve Officer Training Corps ("ROTC") scholarships when there were violations of military law, but would not seek recoupment from those disenrolled for homosexuality. *Id.* at ¶ 12. In 2005, the Debtor applied for and was selected to participate in a scholarship program ("SOAR") to become a commissioned officer. *Id.* at ¶ 13-14. Under that program, she enrolled at Miami University in Ohio and was assigned to Detachment 640 of USAF ROTC. Upon entering this program, she signed an agreement setting out the terms and conditions of her participation in SOAR. *Id.* at ¶ 16. The Air Force Reserve Officer Training Corps Contract ("AFROTC") provides as follows:

> Unless otherwise indicated . . . , disenrollment from AFROTC for failure to meet any of the below-listed standards may subject me . . . to recoupment by the Air Force of funds expended on my education to the maximum extent permitted by law. In the event of my disenrollment, the decision to . . . pursue recoupment, or release me from my obligations under this contract is within the sole discretion of the Secretary of the Air Force. . . .
>
> a. . . . I understand that in order to remain in the AFROTC program, I must meet or exceed all military, academic, and medical retention standards prescribed by law and Air Force instructions. Failure to meet applicable retention standards may result in my dismissal from the AFROTC program. . . .
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> e. . . . I understand that homosexual conduct is grounds for disenrollment from AFROTC. . . . I further understand that if I, at any time, am disenrolled from the AFROTC program as a result of homosexual conduct, as defined above, I will be required to repay all educational expenses expended on my behalf to the maximum extent permitted by law.

AFROTC, Complaint, Attachment 4, pp. 2-3.

While at Miami University, the Debtor began a relationship with a woman that turned into a long-term relationship. *Id.* at ¶ 17. By memorandum dated April 2, 2008, the Debtor advised the Commander of Detachment 640 that she was a lesbian and requested to continue in the ROTC program. *Id.* at ¶ 19. The Debtor was then disenrolled from ROTC, effective June 11, 2008, for "failure to maintain military retention standards when she admitted to homosexual ideations." *Id.* at ¶ 21. The USAF then initiated recoupment procedures against the Debtor to recover funds expended under the ROTC/SOAR program because of her disenrollment. *Id.* at ¶ 23. The Debtor appealed that decision, but the USAF turned down her appeal. *Id.* at ¶ 24, 25. The Debtor remained at Miami University after she was disenrolled from ROTC and obtained her Bachelor's degree in 2009. She later obtained a Master's Degree from the University of North Carolina-Greensboro in 2011 and in 2014 enrolled in graduate school at Virginia Polytechnic Institute and State University ("Virginia Tech"). *Id.* at ¶ 26-28.

On October 14, 2014, the Treasury, on behalf of the Defense, issued a Wage Garnishment Order against the Debtor's wages from Virginia Tech for a total debt of $45,000.00. *Id.* at ¶ 33.

In August 2015, the Debtor applied for a loan from USAA Federal Savings Bank in the amount of $21,345.00, which she intended to use to pay part of the ROTC/SOAR debt, but was declined. *Id.* at ¶ 36. The Debtor then requested debt forgiveness because of financial hardship, but this was not granted. *Id.* at ¶ 37. After receiving assistance from Senator Tim Kaine in December 2015, the Debtor received a letter from the Defense Finance and Accounting Service stating that $7,117.03 had been paid on the debt directly by the Debtor, plus other payments of $133.00 from the Treasury Offset Program and $2,176.03 from a private collection agency, leaving her with a current balance due of $32,756.67. *Id.* at ¶ 40; Complaint, Attachment 21. A second Wage Garnishment Order was issued to Virginia Tech on February 29, 2016 and under the tax refund offset program, the Debtor's tax refund of $742.00 was withheld and applied to the ROTC/SOAR debt. *Id.* at ¶ 41-42. The Debtor asserts that she has no current or anticipated income to continue payments on this debt as her sole income is her salary as a graduate teaching assistant, which she asserts barely suffices to provide the bare necessities of life. *Id.* at ¶ 43.

On July 13, 2017, the Debtor filed a petition under Chapter 7 of the Bankruptcy Code in this Court. The Debtor filed an amended Schedule E/F on August 16, 2017 listing three debts: a contractual debt to the Defense in the amount of $45,565.91; a student loan debt to the Department of Education in the amount of $107,818.00; and a credit card debt to USAA Savings Bank in the amount of $2,869.00. The Debtor then filed this Adversary Proceeding on September 13, 2017 asserting that the Defendants' decision to recoup the debt owed to the Defense because of her disenrollment based solely on her sexual preference was arbitrary and capricious, that she was treated differently than other similarly situated persons in violation of her rights to due process and equal protection, and that the debt should be discharged.

Specifically, in Count One of the Complaint, the Debtor alleges that she was involuntarily disenrolled from ROTC because she was a lesbian, that the Defendants are pursuing recoupment against her for her ROTC/SOAR expenses and that no reason exists for the differing treatment of the Debtor and those disenrolled ROTC participants against whom recoupment was not pursued. Therefore, the Debtor alleges that the Defendants' actions are arbitrary, capricious or otherwise not in accordance with the law under 5 U.S.C. § 706(2) and asks the Court to enter declaratory judgment stating that the Defendants' decision to recoup the expenses is in violation of Section 706(2), that she is being treated differently than other similarly situated former ROTC participants with no articulated reason; permanently enjoin the Defendants from attempting to recoup these expenses and award costs and attorney's fees under 28 U.S.C. § 2412. In Count Two, the Debtor asks the Court to find that her disenrollment from ROTC and recoupment of expenses are based solely on her sexual preference and in violation of her right to due process and equal protection under the Fifth Amendment to the Constitution. Count Three seeks a declaratory judgment discharging the ROTC/SOAR expenses under Section 727 and that the Defendants be permanently enjoined from recoupment of the expenses, plus an award of costs and attorney's fees. Count Four states that the Debtor has attempted to repay the expenses, that she has no current or anticipated income with which to pay the recoupment of expenses, that such recoupment will cause great hardship to her and asks the Court to hold those expenses dischargeable under Section 523(a)(8).

The Defendants filed a Motion to Dismiss the Debtor's Complaint under Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6), incorporated into adversary proceedings by Federal Rule of Bankruptcy Procedure 7012(b). The Defendants assert that Counts One and Two of the Complaint should be dismissed under Rule 12(b)(1) because the Court lacks subject matter

jurisdiction to hear these claims as they are barred by the statute of limitations under 28 U.S.C. § 2401 and are personal injury torts under 28 U.S.C. § 157(b)(5). The Defendants then assert that Counts Three and Four should be dismissed under Rule 12(b)(6) because the Debtor has not demonstrated an undue hardship that would except her debt from discharge under Section 523(a)(8).

CONCLUSIONS OF LAW

I. The Applicable Legal Standard

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(1) challenges a court's subject matter jurisdiction. Absent subject matter jurisdiction, a court must dismiss the action. *Evans v. B.F. Perkins Co., a Div. of Standex Int'l Corp.*, 166 F.3d 642, 653 (4th Cir. 1999). "Although subject matter jurisdiction and sovereign immunity do not coincide perfectly, there is a recent trend among the district courts within the Fourth Circuit to consider sovereign immunity under Rule 12(b)(1)." *Trantham v. Henry County Sheriff's Office*, No. 4:10-CV-00058, 2011 WL 863498, at *3 (W.D. Va. Mar. 10, 2011) (collecting cases), *aff'd*, 435 Fed.Appx. 230 (4th Cir. 2011); *see also Hendy v. Bello*, 555 Fed.Appx. 224, 227 (4th Cir. 2014) (affirming use of Rule 12(b)(1) to dismiss claims on sovereign immunity grounds). When a defendant raises substantive challenges to a court's jurisdiction under Rule 12(b)(1), the court need not accept the complaint's allegations as true and may consider facts outside the complaint to determine if it can properly exercise subject matter jurisdiction. *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009). At all times, "[t]he plaintiff has the burden of proving that subject matter jurisdiction exists." *Evans*, 166 F.3d at 647.

In contrast, to survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint need only contain sufficient factual matter which, if accepted as true,

"state[s] a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937 (2009) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955 (2007)). A complaint is "facially plausible" when the facts alleged "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. This "standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. When ruling on a motion to dismiss, the court must "accept the well-pled allegations of the complaint as true" and "construe the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff." *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997). *See Cadmus v. Williamson*, No. 5:15-CV-045, 2016 WL 1047087, at *3 (W.D. Va. Mar. 10, 2016). It is with this guidance in mind the Court considers the parties' arguments.

II. Subject Matter Jurisdiction

The Court's jurisdiction to hear certain aspects of this case has been challenged, and the Court will address that issue first before it moves to the other issues in the case. The existence of subject matter jurisdiction is a threshold issue and accordingly must be addressed prior to the merits of the underlying claims. *Jones v. Am. Postal Workers Union*, 192 F.3d 417, 422 (4th Cir. 1999) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 118 S.Ct. 1003 (1998)). Lack of subject matter jurisdiction may be raised as a defense at any stage of the proceedings. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506, 126 S.Ct. 1235 (2006). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3) (incorporated into adversary proceedings by Fed. R. Bankr. P. 7012(b)); *see also*

Young v. U.S. Dep't of Veterans Affairs (In re Young), No. 16-60353, Adv. No. 16-06007, 2017 WL 3190576, at *3 (Bankr. W.D. Va. July 26, 2017).

In this case, the question of subject matter jurisdiction is a thorny one. As this Court recently stated in *Brooks v. U.S. Dep't of Housing & Urban Development (In re Brooks*), No. 17-70665, Adv. No. 17-07031, 2017 WL 6016297 (Bankr. W.D. Va. Dec. 4, 2017),

> 28 U.S.C. § 1334(b) provides that "[n]otwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). 28 U.S.C. § 157(b) further provides that "[e]ach district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district," and further that "[b]ankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11. . . . " 28 U.S.C. § 157(b). The District Court for the Western District of Virginia has referred all of the types of proceedings listed in § 157 to this Court. *See O*rder from the District Court on December 6, 1994, and Rule 3 of the Local Rules of the United States District Court for the Western District of Virginia.
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> While jurisdiction is proper under § 1334(b), this proceeding must be a "core" proceeding "arising under" or "arising in" a case under title 11 in order for this Court to be able to enter dispositive orders in the adversary proceeding; otherwise, this Court may make only proposed findings of fact and conclusions of law to the district court, absent the parties' consent. *See* 28 U.S.C. §§ 157(b)(1), (c)(1). A proceeding arises under the Bankruptcy Code only if the Bankruptcy Code creates the cause of action or provides the substantive right invoked. *In re Fruit of the Loom, Inc.*, 409 B.R. 593, 601 (Bankr. D. Del. 2009).

In re Brooks, at *2.

"Core" proceedings which a bankruptcy judge may hear and determine include "determinations as to the dischargeability of particular debts." *Kozec v. Murphy (In re Murphy)*, 569 B.R. 402, 418 (Bankr. E.D. N.C. 2017) (citing 28 U.S.C. § 157(b)(2)(I)). However, Section 157 is not jurisdictional in terms of subject matter, but rather allocates the statutory authority to enter final judgments between the bankruptcy court and district court. *Stern v. Marshall*, 564

U.S. 462, 131 S.Ct. 2594 (2011); *In re Dambowsky*, 526 B.R. 590, 595 (Bankr. M.D. N.C. 2015).[1] Despite its broad reference of bankruptcy authority under Section 157, a bankruptcy court does not have authority over all types of bankruptcy proceedings. An important reservation prohibits the bankruptcy court from adjudicating personal injury tort and wrongful death claims.[2] Specifically, Section 157(b)(5) provides that

> [t]he district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

28 U.S.C. § 157(b)(5).

Here, the Complaint and the proposed Amended Complaint challenge the Debtor's underlying liability for the repayment obligation to the Defendants, and asks that the Court declare that her debt is dischargeable under 11 U.S.C. §§ 727(b) and 523(a)(8). The Debtor, in essence, asks this Court to rule (1) that she does not owe the debt, and (2) if she does owe the debt, it is dischargeable as an undue hardship. The Defendants argue that the Court is without jurisdiction to hear Counts One and Two of the Complaint, as well as Count Five in the proposed Amended Complaint. The Defendants contend that "because Plaintiff asserts 'that she is being treated differently than other similarly situated former ROTC participants,' her discrimination claim constitutes a 'personal injury tort' which must be heard by the district court." Defendants' Memorandum of Law in Support of Motion to Dismiss Complaint, p.12.

[1] *Dambowsky* provides a scholarly and well-reasoned examination of a bankruptcy court's subject matter jurisdiction, as well as its statutory and constitutional authority.

[2] The Fourth Circuit has not ruled on this issue. However, further muddying the matter, at least one Court within the Fourth Circuit, *Kozec v. Murphy (In re Murphy)*, 569 B.R. 402 (Bankr. E.D. N.C. 2017), has held that notwithstanding a plain reading of the statute, "[i]f the bankruptcy judges obtain subject matter jurisdiction over a personal injury tort or wrongful death claim through referral under 28 U.S.C. § 157(a), then the term 'district court' within 28 U.S.C. § 157(b)(5) logically encompasses the 'bankruptcy court.'"

As stated in *Grimes v. First-Citizens Bank & Trust Co. (In re Grimes)*, 388 B.R. 195 (Bankr. N.D. W. Va. 2008), there are different views on what constitutes a "personal injury tort" within the scope of Section 157(b)(5). Specifically, *Grimes* observed that:

> Cases delineating the scope of "personal injury tort" have generally fallen within one of three categories. First, some courts have adopted a narrow view of the term, which would require that the complaining party actually suffer a physical bodily injury. *Massey Energy Co. v. West Virginia Consumers for Justice*, 351 B.R. 348, 351 (E.D. Va. 2006) (finding that a claim for defamation did not fall within the purview of a personal injury tort); *In re Atron Inc. of Michigan*, 172 B.R. 541, 545 (Bankr. W.D. Mich. 1994) (finding that a wrongful discharge claim is not a personal injury tort within the scope of § 157). Second, some court[s] have taken a more expansive view of the term to include any injury that invades a personal right. *Thomas v. Adams* (*In re Gary Brew Enterprises, Ltd.*), 198 B.R. 616, 620 (Bankr. S.D. Cal. 1996) (finding that the scope of "personal injury tort" in § 157 encompasses civil rights actions). The third approach adopts a more moderate view that looks to whether the complaint falls within the purview of a personal injury tort under the expansive view, but retains bankruptcy court jurisdiction over the claim if it has the "earmarks of a financial, business or property tort claim, or a contract claim." *Stranz v. Ice Cream Liquidation, Inc.* (*In re Ice Cream Liquidation, Inc.*), 281 B.R. 154, 161 (Bankr. D. Conn. 2002).

Grimes, 388 B.R. at 199. In the years since *Grimes* was decided, the issue has gotten even cloudier, with courts continuing to struggle with identifying the proper test. *See, e.g.*, *In re Gawker Media, LLC*, 571 B.R. 612 (Bankr. S.D. N.Y. 2017) (recently adopting the more restrictive test).

The Defendants refer the Court principally to *In re White*, 410 B.R. 195 (Bankr. W.D. Va. 2008), a case alleging violations of the Fair Housing Act, among other things, in which former Chief Judge Stone of this Court found that the bankruptcy court was not empowered to hear causes of actions against the debtor that involved "invasions of personal rights." *Id.* at 203-204. *White* found that "[s]uch an interpretation further serves the purpose of construing broadly the limitation on bankruptcy court jurisdiction which Congress sought to effect in that statute" and is consistent with the notion that "[b]ankruptcy courts are courts of limited jurisdiction." *Id*. at 204 (citing *Sea Hawk Seafoods, Inc. v. Alaska (In re Valdez Fisheries Dev. Ass'n)*, 439 F.3d

545 (9th Cir. 2006), and *Binder v. Price Waterhouse & Co., LLP (In re Resorts Int'l, Inc.)*, 372 F.3d 154 (3rd Cir. 2004)).

The Court finds guidance in its jurisdiction determination from *Hoffman v. Educational Credit Mgmt. Corp. (In re Hoffman)*, 557 B.R. 177, 183 (Bankr. D. Colo. 2016). In that case, a debtor challenged his underlying liability for student loans to the Educational Credit Management Corporation ("ECMC"). Although inartfully presented, the gist of the debtor's complaint was that he sought a ruling that he did not owe a debt to the ECMC that was non-dischargeable under Section 523(a)(8). In addressing the threshold issue of jurisdiction, *Hoffman* held as follows:

> The Court looks beyond Debtor's description of his cause of action to its substance. It finds that Debtor's complaint states a cause of action that lies within 28 U.S.C. § 1334(b)'s grant of federal bankruptcy jurisdiction. Debtor seeks a declaration that he owes no debt to ECMC. The education debt ECMC claims Debtor owes to it is, by its very nature, a debt that is nondischargeable under § 523(a)(8) absent a court finding—based on undue hardship—that the debt may be discharged. Therefore, the essence of Debtor's cause of action is his request for a determination whether or not he owes a debt to ECMC that is nondischargeable under § 523(a)(8). The determination of whether or not the debt exists in the first instance is a necessary issue—the foundational issue—to the ultimate determination of whether the Debtor owes ECMC a nondischargeable debt. Thus, the Court may exercise jurisdiction under § 1334(b) over this matter because it is a matter that arises under title 11. *In re Liburd–Chow*, 434 B.R. 863, 867 (Bankr. N.D. Ill. 2010) ("The jurisdiction of a bankruptcy judge comprises, and is limited to, matters 'arising in,' 'arising under,' or 'related to' a case under Title 11, the Bankruptcy Code. . . . A case 'arises under' Title 11 when the action is based on a right or remedy explicitly provided in it.")[4] (citing 28 U.S.C. §§ 1334(b) & 157(a); *Celotex Corp. v. Edwards*, 514 U.S. 300, 307, 115 S.Ct. 1493, 131 L.Ed.2d 403 (1995); *Conseco, Inc. v. Schwartz (In re Conseco, Inc.)*, 330 B.R. 673, 681 (Bankr. N.D. Ill. 2005)).

Hoffman, 557 B.R. at 183.

Hoffman is consistent with a prior ruling of Chief Judge Connelly of this Court in *Voegler v. Myrtle (In re Myrtle)*, 500 B.R. 441 (Bankr. W.D. Va. 2013), where the Court held that the determination of dischargeability is a two-step process. First, the debt must be

established, and second, the nature of the debt — dischargeable or nondischargeable — must be determined. *Id.* at 449. Granted, this question usually arises when the debt is contingent or unliquidated, which is not the case here. The Debtor's obligation to the Defendants in this case is in a fixed and known amount. However, notwithstanding the known amount of the debt, the Court finds the basis of the Debtor's dispute as to liability is both bona fide and asserted in good faith.

Considering all of the above factors, the Court finds it does have jurisdiction to hear the Debtor's Complaint. Initially, subject matter jurisdiction lies in this Court within 28 U.S.C. § 1334(a). This Court is a unit of the District Court and its jurisdiction is derivative of that Court. This Court also has statutory authority to hear this case within the referral of 28 U.S.C. § 157(a). This Court is being asked to determine whether a particular debt is dischargeable, and an express grant of authority exists within 28 U.S.C. § 157(b)(2)(I).[3] Further, the Court rejects the strict assessment of personal injury torts as ones only involving bodily injury.

The Court has previously followed *White* and held that invasions of personal rights, such as sexual harassment claims, can fall within the "personal injury tort" penumbra. *In re Xinergy*, No. 15-70444, 2015 WL 3643418 (Bankr. W.D. Va. June 11, 2015). However, in this case other factors are present, and this Court will follow the third approach discussed in *Grimes* which reviews a personal injury tort under the more expansive view, but retains bankruptcy court jurisdiction over the claim if it has the "earmarks of a financial, business or property tort claim,

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[3] (b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to-- . . .
(I) determinations as to the dischargeability of particular debts;

28 U.S.C. § 157.

or a contract claim." Here, there is no doubt a personal right is involved. Indeed, the Court can think of few rights more personal and intimate than the ones involved in this case. However, more than personal rights are involved here. Those rights blend into contractual and financial arrangements made by the parties which specifically contemplated when made the exact circumstances that might result in the Debtor being both discharged from the ROTC program and having to pay back the stipend she received. The contractual arrangements are inextricably intertwined with the personal rights, so much so that the Court finds this case has sufficient "earmarks" of a contract claim to be heard in this Court rather than the district court. For these reasons, the Court finds the limitation of authority in Section 157(b)(5) does not apply and it will deny the Motion to Dismiss for lack of subject matter jurisdiction.

III. Statute of Limitations

The Defendants assert that Counts One and Two of the Complaint (and Count Five of the proposed Amended Complaint) fall outside the six-year statute of limitations contained in 28 U.S.C. § 2401, and accordingly the United States has not waived sovereign immunity. Section 2401 states that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401. "A claim accrues for purposes of the statute of limitations 'when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action.'" *Carrington Gardens Assocs. v. United States*, 49 Fed.Appx. 427, 431 (4th Cir. 2002) (quoting *Brown Park Estates–Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1455 (Fed. Cir. 1997)). As the United States District Court for the Eastern District of Virginia stated in *In re Carrington Gardens Associates*:

> The United States' waiver of immunity is expressly conditioned upon the imposition of a six-year statute of limitations. *See* 28 U.S.C. § 2401(a) (providing that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues"). Moreover, "[u]nlike an ordinary statute of limitations, § 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity." *Spannaus v. United States Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987). Because the statute of limitations is an express limitation on the government's waiver of sovereign immunity, it must be strictly construed. *See Brown Park Estates–Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1454 (Fed. Cir. 1997).

258 B.R. 622, 630–31 (E.D. Va. 2001); *See also*, *In re Young*, 2017 WL 3190576, at *3.

In Counts One and Two, the Debtor seeks declaratory and injunctive relief under the APA. She claims that the Defendants' "decision to recoup the ROTC/SOAR expenses from [her] is in violation of 5 U.S.C. § 706(2)." Complaint, ¶¶ 44-49, 50-56. Count One is based principally on the allegation "that she is being treated differently than other similarly situated former ROTC participants; and that [the Defendants] have articulated no reason for the difference in treatment," whereas Count Two is based principally on the allegation that the Debtor's "disenrollment from ROTC and recoupment of the ROTC/SOAR expenses are base[d] solely on her sexual preference and in violation of her rights to due process and equal protection under the 5th Amendment to the Constitution." Complaint, ¶¶ 49, 56. With regard to Count One, the Debtor advises she does not challenge the decision to disenroll her from the ROTC, but rather the Defendants' "continuing decisions . . . to seek recoupment from her, when similarly situated persons are not being so treated. " Debtor's Response to Defendants' Rule 12(b)(1) and 12(b)(6) Motions, p. 7 (hereafter "Debtor's Response"). Alternatively, she asserts that pursuant to the "continuing violation doctrine," all events are brought forward and not even her disenrollment is time barred. Debtor's Response, p. 9, n.3.

In Count Two, the Debtor also seeks relief under Section 706(a)(2) of the APA, but bases her request on the allegedly unconstitutional disenrollment from the USAF and the subsequent

recoupment of the debt. The Debtor asserts that the limitations period as to Count Two is "a closer call than that of Count One" because when "[c]oupled together disenrollment and recoupment present a more difficult analysis." Debtor's Response, p. 8.

The APA waives sovereign immunity as to the United States in suits against administrative agencies by individuals who have been adversely affected by agency action. 5 U.S.C. § 702. After an agency has taken final agency action, judicial review may be taken to determine whether the agency's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "A claim first accrues within the meaning of the statute of limitations when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action." *Carrington Gardens*, 258 B.R. at 631. On June 4, 2008, the Department of the Air Force ("Air Force") issued its decision to initiate scholarship recoupment from the Debtor. She appealed the decision on September 9, 2008, and requested that her prior enlisted time count as recoupment. Finding that the decision to disenroll the Debtor and recoup her scholarship money was appropriate and consistent with similar actions throughout the Air Force ROTC, the Air Force denied her appeal on October 15, 2008. The Air Force also focused on the language of the contract she signed at the time, stating as follows:

> The decision to seek recoupment of your AFROTC scholarship is simply an activation of the voluntary commitment you signed on your AF Form 1056 (AFROTC Contract). Part I, paragraph 10 of the AFROTC contract states that the decision to pursue recoupment or to call you to active duty is within the sole discretion of the Secretary of the Air Force (or designee) unless otherwise indicated in subparagraphs. Paragraph 10. e. of the contract clearly states the action to take for homosexual conduct: ". . . I further understand that if I, at any time am disenrolled from the AFROTC program as a result of homosexual conduct . . . I will be required to repay all educational expenses expended on my behalf to the maximum extent possible by law."

Complaint, Attachment 11.[4] That action of the Air Force is the "final agency action" and October 15, 2008 was the date on which the Debtor's claim accrued for sovereign immunity purposes. The Defendants are correct in stating that the agency action after that date was an attempt to collect a debt, or an effect of the final agency decision. The subsequent collection activity neither constituted separate and distinct final agency actions, nor established continuing violations. "The continuing claims doctrine does not apply, however, to a claim based on a single distinct event which has ill effects that continue to accumulate over time." *Gaither v. United States*, No. 5:11-953-CMC-KDW, 2012 WL 3065524, at *7 (D. S.C. July 17, 2012) (citing 54 C.J.S. *Limitations of Actions* § 132 (2012)). *See also Ramsey*, 2017 WL 1086761, at *5.

The Debtor's principal contention in Count One is this: "[w]hat is being challenged in Count One is the continuing decisions by the Defendants to seek recoupment from her, when similarly situated persons are not being so treated." Debtor's Response, p. 7. Citing *Etelson v. Office of Personnel Management*, 684 F.2d 918, 926 (D.C. Cir. 1982), and other cases, the Debtor contends "[d]iffering treatment of similarly situated persons by a government agency is on its face arbitrary, capricious, and not in accordance with law, unless some legitimate reason has been articulated by the government agency for the differing treatment." Debtor's Response, p. 7.

This argument is not sufficient to evade the statute of limitations. Existing case law and her own arguments reflect that the Debtor knew or should have known that other persons were

[4] Normally, if matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment. However, "a court may consider official public records, documents central to plaintiff's claim, and documents sufficiently referred to in the complaint [without converting a Rule 12(b)(6) motion into one for summary judgment] so long as the authenticity of these documents is not disputed." *Ramsey v. Branch Banking and Trust Company*, No. 3:15cv165, 2017 WL 1086761, at *1 (E.D. Va. March 20, 2017).

being treated disparately well within the six years her cause of action accrued. Thus, she could have filed suit to challenge the agency action within the six year limitations period of 28 U.S.C. § 2401. For example, in *Hensala v, Department of the Air Force*, 343 F.3d 951 (9th Cir. 2002), John Hensala was discharged from the Air Force based on sexual preference. The Air Force contended that Hensala "came out" in an effort to be excused from active duty after the Air Force had funded his medical school education. After the Air Force sought recoupment of his educational debt, Hensala alleged that the recoupment order violated the APA, procedural due process under the Fifth Amendment, equal protection under the Fourteenth Amendment, and free speech under the First Amendment. The facts of that case, a published opinion, reflected that some – but not all – recipients of Air Force ROTC stipends were being pursued for collection. *Id*. at 957.[5]

Moreover, on May 17, 1994, Deputy Secretary of Defense John M. Deutch issued a memorandum ("the Deutch Memo") interpreting 10 U.S.C. § 2005 in light of the "Don't Ask, Don't Tell" policy. The Deutch Memo provided that although a service member's statement of sexual orientation, sometimes referred to as a "coming out statement," when not offset by evidence of celibacy, is sufficient for grounds of separation from the armed forces, such a statement is insufficient to constitute a basis for recoupment. However, the Deutch Memo indicated that recoupment would be appropriate "where, based on the circumstances, it is determined that the member made the statement for the purpose of seeking separation." *Hensala*, 343 F.3d at 953. In other words, it was readily apparent as far back as 1994 that some, but not

[5] In *Hensala*, the Court observed that "[a]s applied to other service members, the record demonstrates that in an approximate six year window, the Air Force ordered recoupment in 23 of the 28 cases that involved a service member who announced his or her sexual orientation. The district court analyzed the findings of these cases, as characterized by each of the parties, and concluded that the Air Force made individualized determinations with respect to each service member's intent to separate." *Hensala*, 343 F.3d at 957.

all, award recipients may be subject to recoupment. Nevertheless, it appears from the record in this case that the Debtor did not assert the Deutch Memo policy as a basis for her appeal to the Air Force to excuse recoupment. Instead, in her appeal, she only sought credit for time served as an enlisted Airman against her recoupment obligation, which the Air Force denied. A claim of arbitrary and capricious treatment could have been made long before the expiration of the limitations period.

The continuing claim doctrine also provides the Debtor no relief. *Carrington Gardens* observed that "a continuing claim arises in cases where no administrative agency has been set up to decide the claim, so that the court decides the issues involved *de novo*; and there is no condition precedent to the accrual of the cause of action that an agency make a factual determination or that the plaintiff exhaust some special procedure or remedy." *Carrington Gardens,* 258 F.3d at 633 (citing *Friedman v. United States*, 159 Ct.Cl. 1, 310 F.2d 381, 384-85 (1962)). Such has not been alleged here. Instead, the Debtor alleges that in the aftermath of the final agency action, the Defendants have sought collection from her, whereas they have not sought collection or recoupment from other similarly situated persons.

Carrington Gardens also observed that a continuing claim stems from a series of wrongful acts, where each act is independent of the other wrongful acts. The plaintiff in that case identified HUD's denials of financial requests as the wrongs for which it sought redress, but those wrongs were not independent of the allegedly wrongful act of HUD declaring the plaintiff's loan in default. Rather, "these later allegedly wrongful acts are only wrongful if the declaration of default was wrongful." *Carrington Gardens*, 253 F.3d at 633, n.11. A similar result flows in this case. The decision to recoup the Debtor's ROTC funds stems from the earlier decision to disenroll her from the ROTC program and recoup those funds in October 2008. The

final agency action from which she could have asserted was wrongful in Court accrued at that time. The subsequent actions taken to collect on that debt were wrongful only if the initial decision of the Air Force was wrongful.

Nat'l Advert. Co. v. City of Raleigh, 947 F.2d 1158 (4th Cir. 1991), is consistent with this approach. In *National Advertising*, an advertising company brought suit alleging that a 1983 city ordinance restricting off-premises outdoor advertising resulted in an unconstitutional taking of its property, contending that its cause of action did not accrue until 1989 when it faced the city's demands that non-conforming signs be removed. *Id.* at 1163.

> National points to a January 1989 letter from Raleigh, informing it that its nonconforming signs would have to be removed by April 1989, as a later wrongful act committed by the City within three years of National's suit. This argument misses the mark. The letter was not a new wrongful act, but merely a reminder of the restriction placed on National's signs in 1983. It caused National no additional injury, and is not itself the source of the alleged taking. The fact that National's signs ultimately were required to be removed or brought into conformity by April 1989 was one of the *effects* of their being deemed nonconforming upon enactment of the ordinance, not a separate violation. *Compare Delaware State College v. Ricks*, 449 U.S. 250, 258, 101 S.Ct. 498, 504, 66 L.Ed.2d 431 (1980) (plaintiff's loss of teaching position was merely "one of the *effects*" of alleged discriminatory denial of tenure; no "continuing violation" shown); *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir.1979) ("[t]he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful"). This is not an instance of a statute's repeated enforcement against different individuals or even the same parties, but of a statute applied once to a discrete set of individuals with a foreseeable, ascertainable impact. In sum, an examination of the "nature of the wrongful conduct and harm alleged," *Ocean Acres*, 707 F.2d at 106, points persuasively to the absence of a continuing wrong.

Id. at 1167–68 (4th Cir. 1991). Here, the agency action complained of is the 2008 final ruling of the Air Force, and the subsequent action taken to seek recoupment flows from that action. Recoupment is an effect of the original action, not a continuing wrong.

The main complaint the Debtor seems to make is that the "government," i.e. the Air Force, has not attempted to recoup education expenses from some ROTC participants who were involuntarily disenrolled both before and after DADT was repealed in 2010. Because only some,

but not all, recipients of ROTC educational funds were subject to recoupment, differing treatment of similarly situated persons is occurring and is thus "arbitrary, capricious, or otherwise not in accordance with the law." Other than citing to general principals of APA law, the Debtor has cited no authority to the Court that uneven enforcement actions taken on a final agency determination made more than six years prior to the current litigation give rise to a new cause of action for statute of limitations purposes.

The Court believes that (1) because the Debtor did not challenge her recoupment obligation on appeal under any grounds available to her other than her status as an enlisted Airman, and (2) because she sought no court relief within the six years following final agency action on her appeal, the current litigation is in reality a back door attempt to reopen the prior proceeding and raise issues that could have been raised in the first instance. Collection activity was permitted against her. The fact that the Defendants pursued that activity because she failed to adequately pursue her appeal rights or initiate court action should not give the Debtor a "reset" button, because, for whatever reason, the Defendants did not pursue action against someone else in a similar situation.[6] For these reasons, Counts One and Two will be dismissed as barred by the statute of limitations under 28 U.S.C. § 2401.[7]

[6] The Court is not unsympathetic to the Debtor's situation. By all accounts in the record, she was an exemplary member of the Air Force, with glowing reviews from her superiors. See Complaint, Attachment 3, pp. 4-5. Indeed, were she not exceptional, she would not have been selected to the SOAR program for officer training as an enlisted person.

[7] Because the Debtor's motion to amend her complaint would not change the result as to Counts One or Two, or allow new Count Five to proceed, it will be denied as futile. *Edell & Assocs., P.C. v. Law Offices of Peter G. Angelos*, 264 F.3d 424, 446 (4th Cir. 2001).

IV. Count Three will be Dismissed

"The purpose of declaratory judgment is to afford an added remedy to one who is uncertain of his rights and who desires an early adjudication thereof without having to wait until his adversary should decide to bring suit, and to act at his peril in the interim." *Riley v. Dozier Internet Law, PC,* 371 Fed.Appx. 399, 409, 2010 WL 1141079, at *9 (4th Cir. Mar. 24, 2010) (unpublished opinion) (quoting J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 32:50 (4th ed. 2010)). If a request for a declaratory judgment adds nothing to an existing lawsuit, it need not be permitted. *See Madry v. Fina Oil & Chem. Co.,* 44 F.3d 1004, 1994 WL 733494, at *2 (5th Cir. Dec. 27, 1994) (unpublished opinion) (reversing award of declaratory relief where "[t]he declaratory judgment does not declare any significant rights not already at issue in the contract dispute"); *Merritt Hawkins & Assocs., LLC v. Gresham,* No. 3:13–CV–00312–P, 2014 WL 685557, at *3 (N.D. Tex. Feb. 21, 2014) (slip copy) ("Defendants' counterclaims merely seek declaratory judgment on issues already pending before the Court—namely, the enforceability of the non-competition, non-disclosure, and non-interference provisions in Defendants' employment contracts."); *Metra Indus., Inc. v. Rivanna Water & Sewer Auth.,* No. 3:12CV00049, 2014 WL 652253, at *2, 3 (W.D. Va. Feb. 19, 2014) (concluding that when a declaratory judgment claim is duplicative and "seeks the resolution of legal issues that will, of necessity, be resolved in the course of the litigation of the other causes of action," permitting a declaratory relief claim to proceed serves no useful purpose). *In re Alexander*, No. 11-74515-SCS, 2014 WL 3511499, at *5 (Bankr. E.D. Va. July 16, 2014), *aff'd*, 524 B.R. 82 (E.D. Va. 2014).

In the context of Federal Rule of Civil Procedure 12(b)(6), courts regularly reject declaratory judgment claims that seek resolution of matters that will already be resolved as part

of the claims in the lawsuit. *See, e.g., Metra Indus.*, 2014 WL 652253, at *2 (dismissing declaratory judgment claim where an existing breach of contract claim sought duplicative relief). Here, Count Three requests that the Court "[e]nter a declaratory judgment stating that the ROTC/SOAR expenses are discharged under 11 U.S.C. § 727; [and] permanently enjoin DOD and DOT from recoupment of Plaintiff's ROTC/SOAR expenses," along with requesting costs and attorney's fees under 28 U.S.C. § 2412. Complaint, ¶ 60.

The dischargeability of educational expenses are expressly addressed in 11 U.S.C. § 523(a)(8). Section 523(a)(8) provides, in pertinent part, as follows:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt . . . (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—
>
> (A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or
>
> (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
>
> (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

11 U.S.C. § 523. Count Four of the Complaint is a cause of action brought under Section 523(a)(8). There is no question the debt at issue is an obligation "to repay funds received as an educational benefit, scholarship, or stipend" within the scope of Section 523(a)(8) such that the dischargeability of this debt can be fully addressed within the scope of Count Four. The validity of the debt challenged in Counts One and Two is established with the dismissal of those Counts. Count Three adds nothing to the case. Accordingly, there being no basis for the grant of declaratory relief, Count Three of the Complaint must be dismissed.

V. The Debtor will be Permitted to Amend Count Four

In *Educational Credit Mgmt. Corp. v. Frushour (In re Frushour),* 433 F.3d 393, 400 (4th Cir. 2005), the Fourth Circuit adopted the three part test established in *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987) to determine whether an educational loan can be discharged as an undue hardship. In order to prove an undue hardship within the meaning of the statute, the *Brunner* test requires the Debtor to demonstrate: (1) that she cannot maintain a minimal standard of living if forced to repay the loans given her current income and expenses; (2) that additional circumstances indicate that this situation is likely to persist throughout the student loan repayment period; and (3) that she has made good faith efforts to repay the loans. *In re Spence,* 541 F.3d 538, 544 (4th Cir. 2008). The Debtor seeking a discharge bears the burden of proving that she meets all three factors of the undue hardship test by a preponderance of the evidence. *Educational Credit Mgmt. Corp. v. Mosko (In re Mosko),* 515 F.3d 319, 324 (4th Cir. 2008); *Frushour,* 433 F.3d at 400. *In re Spence,* 541 F.3d at 543–44.

In *Spence,* the Fourth Circuit addressed a fact scenario with some similarities to the Debtor's situation here. Specifically, the Debtor in this case is highly educated, currently working on a Ph.D. degree at a prominent state educational institution. In affirming the District Court's finding that the debtor had not established the requisite hardship for discharge of her student loan, *Spence* made the following observation about the debtor in that case:

> She is now in her late 60s and has a low-paying job, but she is by all accounts a reliable, diligent worker with a master's degree along with completed Ph.D. course work. Her grades were excellent, and her education is not so outdated that higher-paying alternatives would be unreachable. Ms. Spence suffers from diabetes and high blood pressure, but neither these ailments nor any other age-related health problems affect her ability to work full-time. She has had difficulty obtaining a higher paying position, but she has not actively sought other employment or even updated her resume since obtaining the full-time job at E*trade. We have said that "[h]aving a low-paying job . . . does not in itself provide undue hardship, especially where the debtor is satisfied with the job, has not actively sought higher-paying

> employment, and has earned a larger income in previous jobs." (citation omitted). We are not unsympathetic to the disadvantages of her current circumstances, but the facts point to no "additional circumstances," outside of the normal hardships faced by bankruptcy petitioners, that would render her situation hopeless.

In re Spence, 541 F.3d at 544. Compared to the debtor in *Spence*, the Debtor here is relatively young. She is only 33 and has alleged no physical ailments such as those alleged by the debtor in *Spence*.[8]

Aside from the allegations about her disenrollment from the ROTC/SOAR based on her sexual preference, the Debtor has made only the thinnest of undue hardship allegations, stating only that "Plaintiff has attempted to repay the expenses incurred in the ROTC/SOAR program, [and] Plaintiff has no current or anticipated income with which to pay the recoupment of the ROTC/SOAR expenses. Recoupment of the expenses will cause great hardship to the Plaintiff." Complaint, ¶¶ 64-65. Further, the Debtor asks the Court to find that the Plaintiff has "no current or anticipated income or resources with which to pay the ROTC/SOAR expenses." Complaint, ¶ 66. The Debtor will be given twenty-one days to file an amended complaint specifying in further detail the facts she contends that would meet the *Brunner* test as implemented by *Spence*.[9]

A separate Order will issue.

Enter this 8th day of January, 2018.

UNITED STATES BANKRUPTCY JUDGE

[8] The Debtor's date of birth is reflected in Attachment 3 to the Complaint.

[9] The Debtor has only three creditors, two of which hold debt related to educational expenses. The Court is not unmindful that the Debtor has only sought to have one such creditor's debt declared an undue hardship, but not the other.