Stephen L. Johnson
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re Debtor. – Debtor, Plaintiff, v. **AMERICAN EDUCATION SERVICES** *et al*, Defendants.	Case No. Chapter 7 Adv. Proc. No. 17

ORDER DENYING MOTIONS FOR SUMMARY JUDGMENT

This order resolves four related motions for summary judgment filed by defendants in this adversary proceeding to determine the nondischargeability of student loans. The filing defendants argue Plaintiff [redacted] cannot show any facts that would allow a reasonable trier of fact to find it would be an undue hardship to except her student loans from discharge. Plaintiff disputes this, arguing her age, poor health, and inability to reduce

her expenses enough to make all monthly student loan payments show a trial is necessary to determine whether she overcomes the § 523(a)(8)[1] presumption of nondischargeability.

I find Plaintiff shows there are genuine disputes of material fact here, and that the moving parties fail to show they are entitled to judgment as a matter of law. Accordingly, I will deny all four motions for summary judgment. At their core, the motions ask me to ignore Plaintiff's evidence or find her incredible. Plaintiff's evidence may not be enough to obtain a discharge but it is enough to require a trial.

I. BACKGROUND

Plaintiff is [redacted] who lives in [redacted], California. She is married to [redacted]. Plaintiff seeks to discharge over $500,000 in student loans in this adversary proceeding ("AP"), under § 523(a)(8). Plaintiff estimates her household's monthly income is $8,918, her household's monthly expenses are $7,496, and her household's monthly disposable income is $1,422.10. ECF 153-3. The moving creditors object to certain expenses Plaintiff incurs, but do not argue these figures are broadly incorrect.

A. The Bankruptcy Case

Plaintiff filed the underlying Chapter 7 bankruptcy case on [redacted]. BK ECF 1. She received a discharge on [redacted]. BK ECF 16.

Plaintiff scheduled a total of $541,281.8 in student loans. BK ECF 1, p. 38. That amount was split among several loans and lenders: (1) one loan of $46,492.67 from ACS, (2) six loans of $33,308.54, $30,970.53, $23,204.97, $17,015.06, $36,599.33, and $36,035.36 from American Education Services; (3) three loans of $29,676.13, $18,661.68, and $46,326.17 from Chase Student Loans; (4) one loan of $8,051.26 to Firstmark Services; (5) one loan of

[1] Unless specified otherwise, all chapter and code references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532. All "Civil Rule" references are to the Federal Rules of Civil Procedure and all "Bankruptcy Rule" references are to the Federal Rules of Bankruptcy Procedure. "Civil L.R." and "B.L.R." references refer to the applicable Civil Local Rules and Bankruptcy Local Rules.

$12,881.61 from Navient; (6) one loan of $200,019.57 from Nelnet; and (7) one loan of $2,038.40 from the University of [redacted]. BK ECF 1, p. 22 –37. As noted below, some of these loans were serviced or transferred so the identity of the creditors changes over time.

Plaintiff stated her household's combined monthly income was $8,918.10, her household's monthly expenses were $7,496.00, and her household's monthly net income was $1,422.10. ECF 153-3. Her monthly expenses include $2,950 in rent, $730 in utilities, $800 in food and housekeeping supplies, $130 for clothes and laundry, $125 in personal care products and services, $150 in medical and dental costs, $300 in transportation costs, $170 in entertainment expenses, $194 for health and vehicle insurance, $125 in California back taxes, a $620 car payment, $101 in costs related to her profession, $1,000 in attorney fees, and $84 in pet expenses. *Id.*

B. The Adversary Proceeding

Plaintiff filed this AP on [redacted]. ECF 1. The complaint asserted a single claim seeking a declaration that some or all of Plaintiff's student loans were discharged, and named the following defendants: ACS, American Education Services, Firstmark Services, Navient, Nelnet, and the University of Washington. Then, on April 16, 2018, Plaintiff filed a motion for leave to amend the complaint to drop American Education Services as a defendant because it serviced but did not hold Plaintiff loans, and to add the United States Department of Education ("DOE") the ultimate owner of some loans once maintained by American Education Services serviced. ECF 14. I granted that motion on May 16, 2018.

Plaintiff's amended complaint filed May 22, 2018, named these defendants: Chase Student Loans, Citizen's Bank, First Financial Asset Management, Firstmark Services, EduCap Inc. DBA Loan to Learn ("EduCap"), National Collegiate Trust, DOE, Transworld Systems, Inc., Navient, Nelnet, the University of Washington, Suntrust Bank, HSBC Bank, Educational Credit Management Corporation ("ECMC"), and American Credit Assistance. ECF 19.

On June 19, 2018, Plaintiff and Navient filed a stipulation to dismiss Navient from this AP, in exchange for Navient agreeing to a discharge of a $13,299.04 student loan held by Navient. ECF 26. I approved that stipulation on June 20, 2018. ECF 27.

Then, on November 9, 2018, Plaintiff and Suntrust Bank filed a stipulation agreeing to dismiss Suntrust Bank from this AP in exchange for the discharge of $14,167.61 of its $32,163.11 loan. That left an undischarged balance of $18,000 due to Suntrust Bank. ECF 64. I approved that stipulation on November 16, 2018. ECF 66.

Next, on March 14, 2019, Plaintiff dismissed Chase Student Loans from this AP without prejudice. ECF 88.

On June 27, 2019, I dismissed defendants American Education Services, American Student Assistance, Firstmark Services and Nelnet without prejudice.

The Clerk has entered the default of the following defendants: the University of [redacted] on February 5, 2019, ECF 76; Citizen's Bank on March 8, 2019, ECF 83; HSBC Bank on March 8, 2019, ECF 84; and Nelnet on March 18, 2019, ECF 94. The remaining defendants for whom a default has not been entered are: First Financial Asset Management, EduCap Inc. DBA Loan to Learn, National Collegiate Trust, DOE, Transworld Systems, Inc., and ECMC. Of those defendants, all have filed an answer, except for First Financial Asset Management. *See* ECF 28, 29, 48, 63.

C. The NCSLT Motion for Summary Judgment

On September 21, 2020, Defendants National Collegiate Student Loan Trust ("NCSLT") 2005-2, 2005-3, 2006-1, 2007-2, 2007-4, and Transworld Systems Inc. (taken together, "NCSLT Defendants") filed their motion for summary judgment ("NCSLT Motion"). ECF 140. The NCSLT Defendants allege Plaintiff owes $139,063.12 for five loans Plaintiff executed to fund her education at the University of Washington. They argue Plaintiff cannot show that excepting these loans from discharge would impose an undue hardship. Specifically, the NCSLT Defendants argue: (1) Plaintiff's current finances places her above a minimal standard of living; (2) Plaintiff's education and salary means she cannot

show her financial condition, even if poor, will remain so through the payment period; and (3) Plaintiff's failure to enter into a repayment plan with the NCSLT Defendants or make payments in the last three years precludes a finding she made a good faith effort to repay her loans.

D. The EduCap Motion for Summary Judgment

Defendant EduCap filed its motion for summary judgment on October 13, 2020. ECF 142. EduCap states Plaintiff owes $10,228.33 plus fees and costs, for loans she took out in 2005 to pursue an undergraduate degree at [redacted] University. Those loans were for $14,700 and $14,000. EduCap makes arguments similar to the NCSLT Defendants: Plaintiff's monthly income is far above what is needed to provide a minimally necessary standard of living, Plaintiff "arbitrarily deciding to retire" does not show a continuing circumstance of poor financial condition, and Plaintiff's failure to enter into a repayment plan with EduCap or make a payment in three years precludes a finding she made good faith efforts to pay.

E. The ECMC Motion for Summary Judgment

Defendant ECMC filed its motion for summary judgment on October 13, 2020. ECF 144. ECMC states Plaintiff owes $54,135.06 for a disbursement made to Plaintiff on October 19, 2006. ECMC further states Plaintiff made no payments on this loan from 2006 to 2010, made 8 payments of $258 and one payment of $257 in 2010, 11 payments of $258 in 2011, and no payments since January 4, 2012. ECMC also notes that it offers several repayment plans, which would allow Plaintiff to pay between $312.52 per month, on a 25-year repayment plan, to $570.86 on a 10-year repayment plan. ECMC first points to Plaintiff's monthly disposable income of over $1,000 as conclusive evidence it would not be an undue hardship to except her student loans from discharge. ECMC next argues Plaintiff cannot show an additional circumstance that defeats the presumption that her financial condition will improve by arbitrarily setting a date for her retirement. Finally, ECMC argues

Plaintiff cannot show good faith because she has not made a payment on her loan with ECMC since 2012.

F. DOE Motion for Summary Judgment

Defendant DOE filed its motion for summary judgment on October 13, 2020. ECF 146. ("DOE Motion"). DOE states Plaintiff owes $230,005.01 for disbursements between September 2006 through July 2009. ECF 146-1, p. 5–6. As with the other moving parties, DOE points primarily to Plaintiff's above-average income, and her admission that she could likely reduce expenses, as showing it would not be an undue hardship to except her loans from discharge. DOE also notes that Plaintiff has made only one payment of $864.55 on these loans in the last ten years, has obtained multiple forbearances, and has not tried to enter into an income-based repayment plan or consolidate her student loans. In addition, DOE states that, under a Revised Pay as You Earn repayment plan, the monthly payment for a family of four with an Adjusted Gross Income of $170,000 would be $1,089.17.[2]

G. Plaintiff's Responses to the Motions for Summary Judgment

Plaintiff's substantive oppositions to the motions for summary judgment are contained in her responses to DOE's Motion and the NCSLT Motion. Plaintiff filed her response to DOE Motion on October 26, 2020. ECF 153. She provides a variety of possible schemes for paying her student loans, and argues that because all of them require monthly payments significantly in excess of her monthly disposable income, there is at least a genuine dispute of material fact whether she could maintain a minimal standard of living if forced to pay her student loans. Plaintiff concedes her household earns significant income but asserts that income earning potential has now peaked. She notes that she and her husband have numerous health issues that will preclude them from continuing to earn the same amount in the near future.

[2] This appears to be based on a family of four but the record shows Plaintiff and her husband do not have dependents at home.

Plaintiff provided an additional response to the NCSLT Motion on October 26, 2020. ECF 150. She argues the NCSLT Motion should be denied because none of the NCSLT Defendants have "standing"; that is, none of the NCSLT Defendants present evidence showing they acquired the student loan debt Plaintiff seeks to discharge. These loans were originally made to Plaintiff under either Charter One Bank's Astrive Education Loan Program, or JPMorgan Chase Bank N.A.'s Educate One Graduate Loan Program. But, Plaintiff argues, the Pool Supplement and Deposit and Sale Agreements provided by the NCSLT Defendants do not list either of those loan programs as ones they purchased loans from. Plaintiff also attacks the admissibility of the NCSLT Defendants' declaration as incredible and unauthenticated, and requests I take judicial notice of a New York Times article discussing alleged difficulties the NCSLT Defendants have in producing documents to show it owns the student loans they say they own. *See* ECF 150-1, p. 4–7.

II. LEGAL STANDARDS

A motion for summary judgment shall be granted only if (1) there is no genuine issue as to any material fact, and (2) the movant is entitled to judgment as a matter of law. Civil Rule 56(a), as incorporated by Bankruptcy Rule 7056. An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the non-moving party, and a dispute is "material" only if it could affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party has the burden of showing the absence of a genuine issue of material fact. *Id.* at 256-57. The court must view all of the evidence in the light most favorable to the non-moving party. *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001). In a summary judgment motion, the question is not whether that proof will ultimately be found convincing or persuasive, but whether the parties have proof for their claims and defenses such that a trial is needed. 11 MOORE'S FEDERAL PRACTICE § 56.02 (Matthew Bender 3d ed.).

Section 523(a)(8)(A)(i) states a § 727 discharge does not discharge student loans "unless excepting such debt from discharge . . . would impose an undue hardship on the

debtor and the debtor's dependents[.]" "Under § 523(a)(8), the lender has the initial burden to establish the existence of the debt and that the debt is an educational loan within the statute's parameters." *In re Roth*, 490 B.R. 908, 916 (B.A.P. 9th Cir. 2013) (citation omitted). "The burden then shifts to the debtor to prove" under hardship "by a preponderance of the evidence." *Id.* at 916–17 (citations omitted). The debtor must show: "(1) that the debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans." *In re Rifino*, 245 F.3d 1083, 1087 (9th Cir. 2001) (quoting *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987)). If the debtor cannot meet one prong of the test, the bankruptcy court may not consider the others. *See Rifino*, 245 F.3d at 1089 n.4 (citing *In re Faish*, 72 F.3d 298, 306 (3d Cir. 1995)).

III. DISCUSSION

I discuss each prong of the *Brunner* test below. I find Plaintiff shows genuine disputes of material fact on each prong, and so deny summary judgment.

A. Genuine Disputes of Material Fact Exists on the First *Brunner* Prong

1. The Propriety of Considering each Lender's Loans in Isolation from the Other Loans

The moving parties appear to contend that I should consider each of their situations in isolation from the other lender's obligations. In other words, Creditor A asks that I evaluate Plaintiff's ability to pay Creditor A as if there were no Creditor B, C, or D. This argument ignores the plain fact that Creditors B, C, and D are all vying for payment from Plaintiff's acknowledged surplus. Even Plaintiff admits that she has disposable income each month. But Plaintiff argues that if one tallies up all the loan payments that would be due, it would far surpass the disposable income she has.

The moving parties did not supply controlling law on the question of whether must consider the § 523(a)(8) question for each creditor in isolation from other creditors. And, I

was not able to find any such law. That said, I find persuasive the reasoning of *In re Raimondo*, 183 B.R. 677 (Bankr. W.D.N.Y. 1995), which found considering student loans in aggregate to be a more logical approach. In the *Raimondo* court's view, "one can assess undue hardship only in the context of all of the debtor's postpetition financial obligations. It is impossible to consider the dischargeability of any one loan in isolation from the effect of this adversary proceeding upon all of the other loans." *Id.* at 680. True, nothing in § 523(a)(8) precludes analyzing student loans individually, but it does not mandate that approach either. And viewing the loans individually would, as *Raimondo* discussed, cause the size of a student loan to determine its dischargeability. *Id.* That is, a single large student loan would much more likely be an undue hardship than numerous smaller loans adding up to the same amount, even though there is nothing in the Code that compels such a result.

I conclude that analyzing Plaintiff's student loans in aggregate provides a more accurate picture of her financial status and would help me ascertain whether requiring Plaintiff to pay her student loans is an undue hardship. Obviously, I must reserve for later determinations of whether certain loans are more deserving of protection from the discharge and how I might apportion partial discharges among the creditors. *See In re Sequeira*, 278 B.R. 861 (Bankr. D. Or. 2001) (collecting cases showing how bankruptcy courts have diverged in structuring partial discharges).

2. Ability to Pay while Maintaining Minimal Standard of Living

"The first prong of the *Brunner* test requires [Plaintiff] prove that she cannot maintain, based on current income and expenses, a minimal standard of living for herself and her dependents if forced to repay the loans." *In re Rifino*, 245 F.3d 1083, 1088 (9th Cir. 2001) (citation and internal quotation marks omitted). "To meet this requirement, [Plaintiff] must demonstrate more than simply tight finances[,]" "more than temporary financial adversity," but "utter hopelessness" is not required. *Id.* (citations omitted). The question is "whether it would be 'unconscionable' to require [Plaintiff] to take steps to earn more income or reduce her expenses." *In re Nascimento*, 241 B.R. 440, 446 (B.A.P. 9th Cir. 1999)

(citation omitted). Because the arguments on this prong boil down to whether, and to what extent, Plaintiff can economize her expenses, I necessarily find there are genuine disputes of material fact here, meaning I cannot grant summary judgment on this prong.

I also note that it is difficult to determine with precision how much Plaintiff is required to pay on her loans each month. Some of the movants provide current figures, while others do not. My inability to determine from the record Plaintiff's actual current monthly obligations to the moving parties would likely be a sufficient basis for denying summary judgment. However, because Plaintiff provides baseline estimates of both her income and payments that the moving parties do not challenge, I will use such estimates in my analysis.

Turning to the arguments presented, the movants assert Plaintiff cannot meet the first *Brunner* prong because she has admitted her household has at least $1,000 a month in disposable income, ECF 153, p. 5, and that she could reduce her expenses, ECF 140-3, p. 46. The movants also note Plaintiff and her husband earn significant income and incur expenses exceeding the IRS's housing and utility standards for Monterey County, which estimates $2,501 in monthly expenses.[3]

Plaintiff argues she cannot reduce her expenses enough to allow her to both repay her student loans and maintain a minimal standard of living. She states her household's monthly disposable income is $1,422.19. ECF 153, p. 5. Plaintiff also provides calculations of her monthly payments under a variety of possible payment plans were her student loans excepted from discharge. According to Plaintiff, the least amount she could pay monthly on her student loans would be if she accepted both ECMC and DOE's 25-year repayment plan proposals. Were she to accept them, Plaintiff would still need to cut monthly expenses by at least $1,850 to make all her payments. *Id.* at 5–8. In Plaintiff's view, the moving parties have

[3] *See* California – Local Standards: Housing and Utilities, (Mar. 19, 2020), https://www.irs.gov/businesses/small-businesses-self-employed/california-local-standards-housing-and-utilities. The United States Trustee uses the same figure in for means testing. *See* https://www.justice.gov/ust/eo/bapcpa/20201101/bci_data/median_income_table.htm.

the burden of showing how she can cut $1,850 while still maintaining a minimal standard of living. Plaintiff is mistaken on the burden of proof, *see Roth*, 490 B.R. at 916–17, but I nevertheless find she raises a genuine dispute of material fact whether she can maintain a minimal standard of living if she is forced to make all her student loan payments.

The moving parties first point to the difference between Plaintiff's monthly housing and utility costs – $3,680 – and the IRS's standards on such costs for Monterey County – $2,501. But they do not explain why I am required to accept, as a matter of law, that Plaintiff must conform her expenses to the IRS's standards. Moreover, by stating her $2,950 monthly rent is for a "modest, two-bedroom home," ECF 153-2, p. 4, Plaintiff at least implicitly disputes she could reduce her monthly rent to meet the IRS's guidelines. The parties therefore dispute whether, and to what extent, Plaintiff can reduce her housing and utility costs while maintaining a minimal standard of living.

Even accepting that Plaintiff could reduce her housing and utility expenses to $2,501 – something I cannot do on summary judgment, as I must view facts in the light most favorable to Plaintiff, the non-moving party – Plaintiff would still have to reduce her expenses by at least $671, which is the difference between $1,850 and $1,179 (itself the difference between $3,680 and $2,501). The moving parties note several expenses that Plaintiff could eliminate to bridge this gap: a $155 a month herbal immersion therapy program, a different recurring monthly charge of $109 for "Aromatic Medicine," and $47 a month in meal planning services. ECF 144-3, p. 6. But first, eliminating these expenses does not bridge the $671 gap. Second, the moving parties do not explain why a minimal standard of living precludes Plaintiff from spending at least some of her income that helps with her pain—pain the moving parties do not dispute she has. *Id.* at 5. Nor could they at this stage.

The moving parties also suggest Plaintiff could reduce expenses by not shopping at Whole Foods for groceries, and by trading in her 2017 RAV4 for a vehicle with monthly payments that are less than $620 a month. Starting with the RAV4, Plaintiff states this was the best vehicle available to her given her poor credit, and a reliable vehicle was "a necessity,

not a luxury," because she would need to drive it extensively for her work. ECF 153-2, p. 4. Plaintiff also notes she bought the vehicle at the end of 2017, which allowed her to get "a better deal" on it. ECF 140-3, p. 42–43. So while Plaintiff could have bought a less expensive vehicle, she argues instead that this newer car, given the demands her work schedule would place on it, was necessary for her to continue earning income at the level she does. The question of whether Plaintiff's car is suitable or not is one of fact and I cannot make that determination on this mixed record.

The question of Plaintiff's grocery bill is also subject to material dispute. Assuming for the sake of argument that Whole Foods is more expensive than other grocery outlets, it seems reasonable that the bill might be too high. I cannot find in the record even a reasonable estimate of savings that could be achieved by shopping elsewhere. Moreover, Plaintiff states Whole Foods is "the most cost-efficient for the food [she] buy[s]," ECF 144-3, p. 6. It is unclear from the record why that is the case, but if nothing else this statement shows Plaintiff disputes that shopping at Whole Foods is not part of a minimal standard of living for her and her husband.

Finally, the moving parties note that Plaintiff will soon be relieved of her $125 monthly payment to the Franchise Tax Board. I will set aside for now that Plaintiff states she may have to make further payments to the Franchise Tax Board for her 2018 tax returns, ECF 144-3, p. 4, and that her State and federal income tax withholdings will increase in 2021, ECF 153-, p. 4. What matters here is that, in light of the factual disputes described above, I cannot find this $125 drop in expenses enough to bridge the gap between her disposable income and student loan payments.

The moving parties are correct that Plaintiff's household earns significant income, and even has disposable income each month. But by objecting to certain of Plaintiff's expenses they essentially admit there are genuine disputes of material fact here. Because I cannot decide whether Plaintiff could make all her student loan payments while maintain a

minimal standard of living at this stage, I cannot grant the moving parties summary judgment on the first *Brunner* prong.

B. Genuine Disputes of Material Fact Exists on the Second *Brunner* Prong

The second prong of the *Brunner* test requires Plaintiff show she "will not be able to maintain a minimal standard of living . . . in the future if forced to pay her student loans." *In re Nys*, 446 F.3d 938, 946 (9th Cir. 2006). The Ninth Circuit presumes Plaintiff's "income will increase to a point where she can make payments and maintain a minimal standard of living; however, [Plaintiff] may rebut that presumption with 'additional circumstances' indicating that her income cannot reasonably be expected to increase and that her inability to make payments will likely persist throughout a substantial portion of the loan's repayment period." *Id.* Factors I may consider to determine whether such circumstances exist include:

> (1) Serious mental or physical disability of [Plaintiff] or [her] dependents which prevents employment or advancement; (2) [Plaintiff's] obligations to care for dependents; (3) Lack of, or severely limited education; (4) Poor quality of education; (5) Lack of usable or marketable job skills; (6) Underemployment; (7) Maximized income potential in the chosen educational field, and no other more lucrative job skills; (8) Limited number of years remaining in[Plaintiff's] work life to allow payment of the loan; (9) Age or other factors that prevent retraining or relocation as a means for payment of the loan; (10) Lack of assets, whether or not exempt, which could be used to pay the loan; (11) Potentially increasing expenses that outweigh any potential appreciation in the value of the debtor's assets and/or likely increases in the debtor's income; (12) Lack of better financial options elsewhere.

Id. at 947 (citation and alterations omitted). I find that granting summary judgment on this prong would require ignoring or finding incredible Plaintiff's claims of health issues that will preclude her from working through the repayment period of her loans, as well as her claims that both she and her husband earn as much income as they ever will. This means there are genuine disputes of material fact, which preclude me from granting summary judgment.

At base, Plaintiff's arguments against summary judgment are that she and her husband have maximized their income, are growing older and will thus be unable to work through the entire repayment period, and their future earning potential is further impaired by

physical and mental illnesses. Beginning with illness, Plaintiff states she has "suffer[ed] from chronic health issues for several years," including shingles, asthma, chronic pain, and respiratory illness. ECF 153-2, p. 8. She further states these conditions have worsened with age, and may result in her needing an oxygen tank to manage her respiratory issues. *Id.* at 8–9. The moving parties argue these health issues are not an "additional circumstance" capable of rebutting the presumption of increasing income. That is, they argue these health issues will not actually prevent Plaintiff from working in the future. I find this shows a genuine dispute of material fact whether these issues, combined with the others discussed below, will prevent her income from increasing in the future, or indeed cause it to decrease.

Turning to the future earning potential of Plaintiff's household, Plaintiff states that the companies likely to hire her have instituted pay freezes, meaning her pay is unlikely to increase in the near future. *Id.* at 7. Even were that not the case, I note from her wage history it is at least plausible that her hourly rate has either capped out, or will not increase significantly in the future. In 2011 she made $50 an hour; in 2012 her pay fluctuated from $35 to $44 an hour; in 2013 her pay increased to $50 an hour; and from in 2015 through 2016, her pay per hour increased to $51, and then $52, where it has remained to the present. *Id.* Viewing this progression in the light most favorable to Plaintiff, a reasonable trier of fact could conclude that her rate of pay has either peaked, or is close to doing so. Plaintiff's evidence shows a similar progression for her husband's pay per hour: since 2015, his pay per hour has fluctuated from $28 to $30 an hour. *Id.* One could reasonably conclude Plaintiff's husband will not achieve much more than $30 an hour in his remaining working life. To conclusively find otherwise would require me to find Plaintiff's representations incredible, which I cannot do at this stage.

As for Plaintiff's age, Plaintiff states both she and her husband intend to work as long as they are able. However, she also states her health problems make it unlikely she will be able to continue working past age 62. *Id.* at 9. EduCap describes this statement as Plaintiff "arbitrarily deciding to retire[.]" ECF 142-1, p. 12. While her stated retirement age may in

fact be arbitrary, EduCap's argument essentially admits there is a dispute of fact on this point. That is, EduCap believes Plaintiff *can* work past 62, and asks me to disregard her statements and evidence to the contrary. The moving parties premise their arguments on Plaintiff maintaining her current level of income through decades of repayment. Setting aside that Plaintiff states "her position does not guarantee regular hours[,]" ECF 153-3, p. 2., if she in fact cannot continue working full time through the decades of repayment necessary, then not only will Plaintiff's financial situation not improve—it will worsen.

The moving parties make much of Plaintiff's income exceeding the federal poverty line and Monterey County averages. But given "the heavy debt burden many students are now shouldering, the mere fact that a debtor earns above the poverty level is not itself a basis for finding that there are no additional circumstances showing that the inability to pay will persist." *In re Nys*, 308 B.R. 436, 446 (B.A.P. 9th Cir. 2004).

As discussed above, Plaintiff presents evidence that would allow a reasonable trier of fact to find multiple additional circumstances showing Plaintiff's inability to make all her student loan payments in the future will either persist, or possibly even get worse. The moving parties implicitly ask me to disregard or find incredible Plaintiff's evidence. That is impossible in the context of summary judgment. I conclude at this stage there are genuine disputes of fact in this *Brunner* prong.

C. Genuine Disputes of Material Fact Exists on the Third *Brunner* Prong

The third prong of the *Brunner* test requires Plaintiff show she made "good faith efforts to repay [her] student loans." *Roth*, 490 B.R. at 917. "Good faith is measured by the debtor's efforts to obtain employment, maximize income, and minimize expenses," as well as whether the debtor tried to negotiate a repayment plan. *Id.* (citations omitted). Other factors bankruptcy courts consider include whether a debtor "made payments on the loan prior to filing for discharge"; whether a debtor "has sought deferments or forbearances"; "the timing of the debtor's attempt to have the loan discharged"; and "whether the debtor's financial condition resulted from factors beyond her reasonable control[.]" *Id.* (internal

citations omitted). None of these factors are dispositive. *Id.* "The 'good faith' obligation continues even after an adversary proceeding is filed to determine the dischargeability of the student loan debt." *Id.* (citation omitted).

The moving parties point primarily to Plaintiff's failure to make payments on her student loans over many years. In response, Plaintiff points to her grueling work schedule, historically positive income progression, and struggles with her health to demonstrate she has tried in good faith to repay her loans when possible. I find genuine disputes of material fact here that preclude me from granting the moving parties judgment as a matter of law.

First, the evidence presented could allow a reasonable fact finder to determine Plaintiff has worked diligently to obtain employment and maximize her income. When her position in Pennsylvania was eliminated, she moved across the country to California to find new employment. Since 2012, she has been transferred three times, each time receiving a pay raise. Moreover, Plaintiff states she works 10–14-hour days, often works from home on weekends, and has not had a true day off in 8 years. ECF 153-2, p. 5, 9. Given her long hours and the significant distance she drives to work, it seems unlikely she could, for instance, get a second job to increase her income.

Plaintiff states she has economized expenses to some degree, ECF 144-3, p. 9, but admits she could economize further. *Id.* These points do not count in Plaintiff's favor. But I cannot determine how much they weigh against her because they are all questions of fact on which there is disputed evidence. Is a RAV-4 extravagant? Is it extravagant if it has additional options? Is it extravagant if it was once new? Plaintiff raises these points and I cannot overlook (or, overrule) them in the context of summary judgment.

The moving parties all state Plaintiff has not attempted to negotiate a repayment plan with them. Plaintiff counters that she asked her lenders for debt consolidation but has been turned down for a variety of reasons. ECF 153-2, p. 6. DOE admits Plaintiff requested, and was granted, forbearance on several occasions. The effect these facts have on the good faith inquiry is similarly equivocal.

Movants suggest that Plaintiff's failure to enter into an income-based repayment plan is dispositive as against a finding of good faith. They provided no controlling authority and I was not able to find any. At most, this is just an element of good faith and not a litmus test. By example, in *In re Birrane*, 287 B.R. 490, 499 (B.A.P. 9th Cir. 2002), the BAP stated that whether, and to what extent, a debtor made the effort "to negotiate a repayment plan is an important indicator of good faith." (quoting *In re Wallace*, 259 B.R. 170, 174 (C.D. Cal. 2000)). And in *In re Mason*, 464 F.3d 878, 885 (9th Cir. 2006), the Ninth Circuit cited *Birrane* in holding a debtor did not act in good faith by failing to pursue an income-based repayment plan "with diligence." The BAP put it another way in *In re Carnduff*, 367 B.R. 120, 136 (B.A.P. 9th Cir. 2007): "We believe that it was proper for the bankruptcy court to assume that they will restructure their loans to the extent they can do so. That is consistent with their obligation to act in good faith and with the Ninth Circuit's instruction that, under *Brunner*'s second prong, 'the debtor cannot have a reasonable opportunity to improve her financial situation, yet choose not to do so.'" (internal citations omitted). I read these cases to hold that a debtor who has options to renegotiate the payment schedules of her student loans should diligently pursue them, as failure to do so will weigh heavily on whether she has acted in good faith. Plaintiff states she has asked her lenders for debt consolidation in the past, and been turned down. The moving parties have not shown this statement to be false. So the question is whether Plaintiff has acted diligently in pursuing debt consolidation, or other renegotiated repayment plans. I find determining Plaintiff's diligence would require a weighing of both the evidence and her credibility, neither of which I can do at this stage.

Turning to Plaintiff's history of repayment, Plaintiff admits she has not made significant payments on her student loans in recent years. Plaintiff's last payment on the EduCap loans, for instance, was on May 10, 2017. ECF 142-1, p. 2. The NCSLT Defendants state Plaintiff has not made a payment on any of the NCSLT loans in the past 3 years. ECF 140-1, p. 18. ECMC, in turn, states Plaintiff has not made a payment since January 2012. ECF 144, p. 6. As for DOE, it states Plaintiff has only made one payment of $864.55 in the

last ten years. ECF 146-1, p. 16. In response, Plaintiff states she made significant payments in the past, pointing to her paying EduCap a total of $35,027.07 across two loans which were originally for $14,700 and $14,000. ECF 153-2, p. 6. As for her other loans, Plaintiff has paid ECMC $5,159 over 14 years, ECF 144, p. 2, and paid DOE $864.55 over 14 years, ECF 146-1, p. 6. It is unclear from the record how much Plaintiff has paid the NCSLT Defendants. This is a checkered history of repayment, to be sure, but to grant summary judgment on that basis alone I would have to weigh evidence in favor of the moving parties and ignore the evidence of good faith Plaintiff has presented.

The timing of Plaintiff seeking discharge of her student loans is at least some evidence of good faith. Plaintiff filed this AP on December 19, 2017, eight years from the most recent student loan she took out, and twelve years out from the earliest. This means Plaintiff sought to discharge her loans outside the 5-year bar provided in an earlier iteration of § 523(a)(8). *Roth*, 490 B.R. 908 (Pappas, Bankr. J., concurring). While § 523(a)(8) no longer allows individuals to discharge student loans solely because they were taken out more than five years after the filing of the bankruptcy case, I still find it relevant that Plaintiff did not attempt to discharge her student loans until many years after she took them out.

Finally, I note at least some of Plaintiff's financial condition appears outside her control. For one, Plaintiff's husband permanently having to pay $850 monthly in child support is something she cannot control. ECF 153-2, p. 4. And to the extent her health issues may prevent her from working past 62, nothing in the record allows me to find she is responsible for such issues.

What the above discussion shows is the facts presented do not conclusively show whether Plaintiff has acted in good faith with regard to repaying her student loans. To grant these motions for summary judgment, I would have to find the evidence against good faith outweighs the evidence for, which is precisely what I cannot do at this stage. The moving parties may be correct that their evidence of bad faith is stronger than Plaintiff's evidence of

good faith. But what matters is that Plaintiff shows sufficient evidence of good faith that a reasonable trier of fact could find for her on the third *Brunner* prong.

IV. CONCLUSION

I find Plaintiff shows either genuine disputes of material fact, or that the moving parties are not entitled to judgment as a matter of law, on each prong of the *Brunner* test. The motions for summary judgment must therefore be denied.

Since I am denying the motions on substantive grounds, I decline to address Plaintiff's alternative argument that, because the NCSLT Defendants cannot prove they actually own the loans they claim to, they do not have "standing" to file the NCSLT Motion.

IT IS SO ORDERED.

END OF ORDER

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

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