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JAN 16 2018

CLERK U.S. BANKRUPTCY COURT
Central District of California
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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
NORTHERN DIVISION

In re:
CHRISTOPHER OLE MUNCH,

Debtor.

CHRISTOPHER OLE MUNCH,

Plaintiff,

v.

EDUCATION CREDIT MANAGEMENT
CORP. and U.S. DEPARTMENT OF
EDUCATION,

Defendants.

Case. No. 9:16-bk-12162-PC

Adversary No. 9:17-ap-01008-PC

Chapter 7

**MEMORANDUM REGARDING
UNITED STATES DEPARTMENT
OF EDUCATION'S AND
EDUCATIONAL CREDIT
MANAGEMENT CORPORATION'S
MOTION FOR SUMMARY
JUDGMENT OR PARTIAL
SUMMARY ADJUDICATION; AND
PLAINTIFF'S CROSS-MOTION FOR
SUMMARY JUDGMENT**

Date: December 14, 2017

Time: 10:00 a.m.

Place: United States Bankruptcy Court
Courtroom # 201
1415 State Street
Santa Barbara, CA 93101

At the above captioned date and time, the court considered the United States Department of Education's and Educational Credit Management Corporation's Motion for Summary Judgment or Partial Summary Adjudication and Plaintiff's Cross-Motion for Summary

Judgment. Having considered the papers, the summary judgment evidence,¹ and argument of the parties, the court will grant the Motion and deny the Munch Cross-Motion based upon the

¹ The summary judgment evidence includes: (1) United States Department of Education's and Educational Credit Management Corporation's Notice of Motion and Motion for Summary Judgment or Partial Summary Adjudication; Memorandum of Points and Authorities; Declarations of Lola Hom, Kerry Klisch; Elan S. Levey and Scott A Schiff; and Request for Judicial Notice in Support Thereof ("Motion"), Dkt. # 37, filed on October 26, 2017; (2) United States Department of Education's and Educational Credit Management Corporation's Proposed Statement of Uncontroverted Facts and Conclusions of Law, Dkt. # 38, filed on October 26, 2017; (3) Deposition of Christopher Ole Munch dated June 28, 2017 ("Munch Depo."); (4) Plaintiff's Opposition to Defendants Motion for Summary Judgment or Partial Summary Adjudication; Memorandum of Points and Authorities; Declaration of Christopher Munch; Request for Judicial Notice; and Plaintiffs Notice of Cross-Motion and Cross-Motion for Summary Judgment ("Munch Cross-Motion"), Dkt. # 43, filed on November 1, 2017; (5) Plaintiffs Opposition to Defendant United States Department of Education and Education Credit Management Corp. Proposed Statement of Uncontroverted Facts and Conclusions of Law, Dkt. # 44, filed on November 1, 2017; (6) Plaintiffs Proposed Statement of Uncontroverted Facts and Conclusion of Law for Cross-Motion for Summary Judgment, Dkt. # 45, filed on November 1, 2017; (7) United States Department of Education's and Educational Credit Management Corporation's Omnibus (1) Reply to Plaintiff's Opposition to Notice of Motion and Motion for Summary Judgment or Partial Summary Adjudication; and (2) Opposition to Plaintiff's Notice of Cross-Motion and Cross-Motion for Summary Judgment; Memorandum of Points and Authorities; and Supplemental Declarations of Lola Hom and Elan S. Levey in Support Thereof ("Omnibus Reply"), Dkt. # 61, filed on November 21, 2017; (8) United States Department of Education's and Educational Credit Management Corporation's Separate Concise Statement of Genuine Issues With Respect to Plaintiff's Proposed Statement of Uncontroverted Facts and Conclusions of Law for Cross-Motion for Summary Judgment, Dkt. # 62, filed on November 21, 2017; (9) Plaintiffs Reply to Defendant United States Department of Education's and Educational Credit Management Corporation's Omnibus (1) Reply to Plaintiff's Opposition to Notice of Motion and Motion for Summary Judgment or Partial Summary Adjudication; and (2) Opposition to Plaintiff's Notice of Cross-Motion and Cross-Motion for Summary Judgment; United States Department of Education's and Education Credit Management Corporation's Separate Concise Statement of Genuine Issue With Respect to Plaintiff's Proposed Statement of Uncontroverted Facts and Conclusions of Law for Cross-Motion for Summary Judgment; Memorandum of Points and Authorities; Supplemental Declaration of Christopher Munch; Declaration of Andrea Camacho; and Declaration of Georgia Adams, Dkt. # 67, filed on November 27, 2017; (10) Plaintiffs Request for Judicial Notice on Plaintiffs Opposition to Defendant's Motion for Summary Judgment and Plaintiff's Cross-Motion for Summary Judgment, Dkt. # 68, filed on November 27, 2017; and (11) Plaintiffs Additional Request for Judicial Notice; Second Supplemental Declaration of Christopher Munch, Dkt. # 71, filed on November 29, 2017.

The evidentiary objections contained in the Munch Cross-Motion are overruled. See Munch Cross-Motion, at 3:12-4:12. Plaintiffs Motion in Limine to Exclude Evidence in

1 following findings of fact and conclusions of law made pursuant to F.R.Civ.P. 52(a), as
2 incorporated into FRBP 7052 and applied to adversary proceedings.²

3 I. STATEMENT OF FACTS

4 Plaintiff, Christopher Ole Munch (“Munch”) is 33 years old and resides at his girlfriend’s
5 home in Newbury Park, California. Munch is not married and has no dependents. In 2003, at
6 age 18, Munch was convicted of a felony and imprisoned for 18 months. He was released in
7 2004.

8 A. Education and Employment.

9 In February 2008, Munch graduated from Le Cordon Bleu (“LCB”) in Pasadena,
10 California with an associate degree in occupational studies. Munch then attended Pasadena City
11 College until December 2009, when he transferred to California Lutheran University (“CLU”).

12
13 Defendant’s Motion for Summary Judgment and Admit Evidence for Plaintiffs Opposition to
14 Defendant’s Motion for Summary Judgment and Plaintiffs Cross-Motion for Summary
Judgment, Dkt. # 69, is denied.

15 The court sustains the United States Department of Education’s and Educational Credit
16 Management Corporation’s Objection to Plaintiff’s Request for Judicial Notice on Plaintiff’s
17 Opposition to Defendants’ Motion for Summary Judgment and Plaintiff’s Cross-Motion for
18 Summary Judgment, Dkt. # 73, filed on November 30, 2017. The court also sustains United
19 States Department of Education’s and Educational Credit Management Corporation’s
20 Evidentiary Objections to the Supplemental Declaration of Christopher Munch Exhibits in
21 Support of Plaintiffs Reply to Defendant United States Department of Education and Educational
22 Credit Management Corporation’s Omnibus (1) Reply to Plaintiff’s Opposition to Notice of
23 Motion and Motion for Summary Judgment or Partial Summary Adjudication; and (2)
24 Opposition to Plaintiff’s Notice of Cross-Motion and Cross-Motion for Summary Judgment, Dkt.
25 # 75, filed on November 30, 2017, and United States Department of Education’s and Educational
Credit Management Corporation’s Evidentiary Objections to the Declaration of Andrea Camacho
in Support of Plaintiffs Reply to Defendant United States Department of Education and
Educational Credit Management Corporation’s Omnibus (1) Reply to Plaintiff’s Opposition to
Notice of Motion and Motion for Summary Judgment or Partial Summary Adjudication; and (2)
Opposition to Plaintiff’s Notice of Cross-Motion and Cross-Motion for Summary Judgment, Dkt.
76, filed on November 30, 2017.

26 ² Unless otherwise indicated, all “Code,” “chapter” and “section” references are to the
27 Bankruptcy Code, 11 U.S.C. §§ 101-1330. “Rule” references are to the Federal Rules of
28 Bankruptcy Procedure (“FRBP”), which make applicable certain Federal Rules of Civil
Procedure (“F.R.Civ.P.”). “LBR” references are to the Local Bankruptcy Rules of the United
States Bankruptcy Court for the Central District of California (“LBR”).

1 Munch studied political science and religion at CLU, where he earned a Bachelor of Arts degree
2 in December 2011. During his last year at CLU, Munch was concurrently enrolled in a graduate
3 program in public policy, but he withdrew before completing the program to pursue a Master's
4 degree in social work. In the fall of 2012, Munch enrolled in a part-time program in social work
5 at the University of Southern California ("USC"). Munch graduated from USC with a Master's
6 degree in social work on May 13, 2015, with a cumulative grade point average of 3.73.

7 From February 2012 to January 2013, Munch was employed as a Logistics Coordinator at
8 the Educare Foundation in Van Nuys, California, where he earned \$13 per hour working about
9 30 hours each week. From January 2013 to September 2013, Munch was employed as a
10 Behaviorist at the Autism Center for Treatment ("ACT") in Agoura Hills, California, where he
11 earned \$20 per hour and worked between 16 and 22 hours each week. From January 2013 to
12 April 2013, while working at ACT, Munch held a temporary second job at UCLA Pathways,
13 where he helped teach adults with special needs. After he was "let go" from his position at ACT
14 in September 2013 for being "not a good fit,"³ Munch obtained a position as a Program Manager
15 at Reid's Gift in Van Nuys, California, where he earned \$25 per hour and worked between 25
16 and 40 hours each week. Munch quit his job at Reid's Gift after working there for about one
17 year.

18 During his final academic year at USC, from 2014 to 2015, Munch completed his non-
19 clinical placement at the Center for Innovation and Research for Veterans and Military Family
20 ("CIR"), for which he received a \$6,000.00 stipend. At his deposition, Munch testified that there
21 was a part-time job at CIR that he "could have taken" had he decided to stay with CIR upon
22 graduation from USC in May 2015; but he "wasn't willing to commute from Thousand Oaks to
23 downtown L.A. every day for less money than what [he] would have been making had [he]
24 found a job up closer to home."⁴

25
26
27 ³ Motion, Exhibit 12, at 9.

28 ⁴ Munch Depo., at 99:15-100:3.

1 In July 2015, approximately three months after graduating from USC, Munch accepted
2 employment as a Case Manager at Casa Pacifica Centers for Children (“Casa Pacifica”), where
3 he earned an annual salary of over \$43,000.00 per year. In December 2015, Munch received a
4 bonus of \$808.00 from Casa Pacifica. Between December 2015 and January 2017, Munch
5 contributed over \$2,600.00 to a 401(k) retirement plan sponsored by Casa Pacifica. At his
6 deposition, Munch testified that he quit his job at Casa Pacifica on December 22, 2016 because
7 he “was being discriminated against, retaliated against and harassed ... by management.”⁵

8 Munch testified that he spends between half an hour and 2-3 hours every day, depending
9 on his physical condition, looking for new employment. Munch testified that he is checking all
10 available on-line platforms and maintains an on-line resume through the State Board of
11 Employment, but admitted that he has not sought job counseling or advice from career
12 counselors at his colleges or university for assistance in finding a job.⁶ Prior to his current period
13 of unemployment, Munch had been employed almost continuously for the last 5 years (with the
14 exception of his final academic year at USC from 2014 to 2015) and had increased his earnings
15 each time he changed jobs.⁷ According to his federal income tax returns, Munch earned adjusted
16 gross income of \$21,701 in 2014, \$23,758 in 2015, and \$43,524 in 2016. While employed,
17 Munch financed the purchase of a 2013 Victory motorcycle and made loan payments from his
18 income until the vehicle was sold prior to bankruptcy.

19 **B. Student Loans.**

20 Munch financed his education with loans from the U.S. Department of Education
21 (“United States”), Educational Credit Management Corporation (“ECMC”), and Navient
22 Solutions, LLC (“Navient”).⁸

24 ⁵ Id. at 30:18-31:7.

25 ⁶ Id. at 118:12-19.

26 ⁷ Motion, Exhibit 12, at 9.

27 ⁸ Plaintiff also obtained educational loans from Navient Solutions, LLC (“Navient”), who was
28 originally a defendant in this adversary proceeding. When the adversary proceeding was
commenced, Munch’s debt to Navient attributable to educational loans was \$118,572.94, which

1 1. Loans From United States

2 Munch's educational loans with the United States are evidenced by the following
3 promissory notes (the "U.S. Loans"):

4 02/11/10: Master Promissory Note Federal Stafford Loan FFEL
5 02/12/10: Master Promissory Note Federal Stafford Loan FFEL
6 08/25/08: Master Promissory Note Federal William D. Ford Direct Loan
7 08/11/09: Master Promissory Note Federal William D. Ford Direct Loan
8 07/31/12: Master Promissory Note Federal William D. Ford Direct PLUS Loan

9 Munch made only two payments on the U.S. Loans (\$50.00 on February 14, 2009 and \$97.05 on
10 September 3, 2009), totaling \$147.05.⁹ No other payments have been made by Munch on any of
11 the U.S. Loans.

12 Following graduation from USC on May 13, 2015, Munch received a six-month grace
13 period (automatic deferment) until November 15, 2015, which prevented the U.S. Loans from
14 entering repayment status. Munch then secured a one-year forbearance of payments, which
15 deferred payments on the U.S. Loans until November 16, 2016. Five days later, Munch filed his
16 voluntary petition under chapter 7 in the above referenced case. The balance due by Munch to
17 the United States on the U.S. Loans as of October 5, 2017, is \$278,484.15 in principal, plus
18 accrued interest of \$25,847.15, for a total of \$304,331.29.

19 2. Loans From ECMC

20 Munch's educational loans with ECMC are evidenced by a Federal Stafford Loan Master
21 Promissory Note executed by Munch dated August 24, 2006. Pursuant to the note, three loans
22 were made to Munch pursuant to the Federal Family Education Loan Program ("FFELP") and
23 disbursed on December 13, 2006, April 20, 2007, July 17, 2007, and October 23, 2007,
24 respectively. ECMC is the owner and holder of the Federal Stafford Loan Master Promissory

25 included principal, interest and fees. On March 2, 2017, the court approved a stipulation
26 between Munch and Navient which provided, among other things, that the balance due and
27 owing by Munch on his educational loans with Navient was dischargeable. Order Approving
28 Stipulation Between Plaintiff and Navient Solutions, LLC, Discharging Educational Loan Debt
and Dismissing Certain Defendants in this Adversary Proceeding, Dkt. # 22, entered on March 2,
2017.

⁹ Omnibus Reply, at 3:18-23.

1 Note and all right, title and interest in the loans made pursuant to the note (the “ECMC Loans”).
2 The total amount paid by Munch to ECMC on the ECMC Loans since their inception is \$53.64.

3 Following graduation from USC on May 13, 2015, Munch received a six-month
4 automatic deferment of his ECMC Loans until November 15, 2015. On or about November 14,
5 2015, Munch enrolled the ECMC Loans in an Income Based Repayment (“IBR”) program with
6 his loan servicer and the ECMC Loans entered forbearance status on November 16, 2015. When
7 the ECMC Loans again entered repayment status on March 16, 2016, at Munch’s request, the
8 ECMC Loans were again placed in forbearance status until July 12, 2016. Four months later,
9 Munch commenced his bankruptcy case. The balance due by Munch to ECMC on the ECMC
10 Loans, principal and interest, as of October 19, 2017, is \$13,781.54.

11 C. Munch’s Bankruptcy

12 On November 21, 2016, Munch filed his voluntary chapter 7 bankruptcy petition in the
13 above referenced case. On January 9, 2017, Munch filed his complaint against the United States
14 and ECMC seeking to discharge the U.S. Loans and the ECMC Loans pursuant to § 523(a)(8).
15 On October 26, 2017, the United States and ECMC filed the Motion to which Munch responded
16 with the Munch Cross-Motion on November 1, 2017. At the hearing on December 14, 2017, the
17 matter was taken under submission.

18 II. DISCUSSION

19 This court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§
20 157(b) and 1334(b). This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B), (I)
21 and (O). Venue is appropriate in this court. 28 U.S.C. § 1409(a).

22 A. Standard for Motion for Summary Judgment

23 Rule 56(a) authorizes a party to “move for summary judgment, identifying each claim or
24 defense – or the part of each claim or defense – on which summary judgment is sought.”
25 F.R.Civ.P. 56(a). Summary judgment must be granted “if the movant shows that there is no
26 genuine dispute as to any material fact and the movant is entitled to judgment as a matter of
27 law.” Id. In determining whether a genuine factual issue exists, “a trial judge must bear in mind
28 the actual quantum and quality of proof necessary to support liability” Anderson v. Liberty

1 Lobby, Inc., 477 U.S. 242, 254 (1986). “[T]he judge’s function is not himself to weigh the
2 evidence and determine the truth of the matter but to determine whether there is a genuine issue
3 for trial If the evidence is merely colorable, or is not significantly probative, . . . summary
4 judgment may be granted. Id. at 249–250. However, the court’s function on a motion for
5 summary judgment is “issue-finding, not issue-resolution.” U.S. v. One Tintoretto Painting
6 Entitled “The Holy Catholic Family With Saint Catherine and Honored Donor,” 691 F.2d 603,
7 606 (2d Cir. 1982).

8 Rule 56 does not permit “trial on affidavits. Credibility determinations, the weighing of
9 the evidence, and the drawing of legitimate inferences from the facts are [fact finder] functions . .
10 . .” Anderson, 477 U.S. at 255. Rule 56(c), which identifies the procedures the court and parties
11 must follow in conjunction with motions for summary judgment, states:

12 (1) **Supporting Factual Positions.** A party asserting that a fact cannot be or is
13 genuinely disputed must support the assertion by:

14 (A) citing to particular parts of materials in the record, including
15 depositions, documents, electronically stored information,
16 affidavits or declarations, stipulations (including those made for
17 purposes of the motion only), admissions, interrogatory answers,
or other materials; or

18 (B) showing that the materials cited do not establish the absence or
19 presence of a genuine dispute, or that an adverse party cannot
produce admissible evidence to support the fact.

20 (2) **Objection That a Fact Is Not Supported by Admissible Evidence.** A party
21 may object that the material cited to support or dispute a fact cannot be presented
22 in a form that would be admissible in evidence.

23 (3) **Materials Not Cited.** The court need consider only the cited materials, but it
may consider other materials in the record.

24 (4) **Affidavits or Declarations.** An affidavit or declaration used to support or
25 oppose a motion must be made on personal knowledge, set out facts that would be
26 admissible in evidence, and show that the affiant or declarant is competent to
27 testify on the matters stated.
28

1 F.R.Civ.P. 56(c). The court may grant summary judgment “[i]f a party fails to properly support
2 an assertion of fact or fails to properly address another party’s assertion of fact as required by
3 Rule 56(c).” See F.R.Civ.P. 56(e)(3).

4 The moving party has the burden of establishing the absence of a genuine issue of
5 material fact. Celotex v. Catrett, 477 U.S. 317, 323 (1986). “Once the moving party carries its
6 initial burden, the adverse party ‘may not rest upon the mere allegations or denials of the adverse
7 party’s pleading,’ but must provide affidavits or other sources of evidence that ‘set forth specific
8 facts showing that there is a genuine issue for trial.’ ” Devereaux v. Abbey, 263 F.3d 1070, 1076
9 (9th Cir. 2001) (quoting former F.R.Civ.P. 56(e)); see Celotex, 477 U.S. at 323-24.

10 When the nonmoving party has the burden of proof at trial, the moving party need only
11 point out “that there is an absence of evidence to support the nonmoving party’s case.” Celotex,
12 477 U.S. at 325; see Fairbank v. Wunderman Cato Johnson, 212 F.3d 528, 532 (9th Cir. 2000)
13 (stating that the Celotex showing can be made by “pointing out through argument-the absence of
14 evidence to support plaintiff’s claim”). If the nonmoving party fails to establish a triable issue
15 “on an essential element of her case with respect to which she has the burden of proof,” the
16 moving party is entitled to judgment as a matter of law. Celotex, 477 U.S. at 323.

17 “If the court does not grant all the relief requested by the motion, it may enter an order
18 stating that any material fact – including an item of damages or other relief – that is not
19 genuinely in dispute and treating the fact as established in the case.” F.R.Civ.P. 56(g).
20 Furthermore, the court may, after notice and a reasonable opportunity to respond, grant summary
21 judgment on its own after identifying for the parties material facts that may not be genuinely in
22 dispute. F.R.Civ.P. 56(f)(3).

23 B. Nondischargeability under Section 523(a)(8).

24 Section 523(a)(8) of the Code makes “[s]tudent loan obligations . . . presumptively
25 nondischargeable in bankruptcy absent a showing of ‘undue hardship.’ ” Hedlund v. Educational
26 Resources Institute, Inc., 718 F.3d 848 (9th Cir. 2013). The purpose of § 523(a)(8) is to ensure
27 “that student loans, which are typically extended solely on the basis of the student’s future
28 earnings potential, cannot be discharged by recent graduates who then pocket all of the future

benefits derived from their education.” Zygarewicz v. Educational Credit Mg’t Corp. (In re Zygarewicz), 423 B.R. 909, 911 (Bankr. E.D. Cal. 2010). “Undue hardship is something more than ‘garden-variety’ hardship[,]” and requires proof of “‘real and substantial’ hardship [to] merit [a] discharge[.]” Id.

Bankruptcy courts in the Ninth Circuit must apply a three-part test, first enunciated in Brunner v. New York State Higher Education Services Corp., 831 F.2d 395 (2d Cir. 1987), to determine if a debtor has established undue discharge. Hedlund, 718 F.3d at 851. The debtor must establish by a preponderance of the evidence that:

(1) He cannot maintain, based on current income and expenses, a “minimal” standard of living for himself and his dependents if required to repay the loans;

(2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period; and

(3) the debtor has made good faith efforts to repay the loans.

Id. (citing Educational Credit Mg’t Corp. v. Mason (In re Mason), 464 F.3d 878, 882 (9th Cir. 2006)).¹⁰ “[T]he burden of proving undue hardship is on the debtor, and the debtor must prove all three elements before discharge can be granted.” Rifino v. United States (In re Rifino), 245 F.3d 1083, 1087-88 (9th Cir. 2001). “If the debtor fails to satisfy any one of these elements, ‘the bankruptcy court’s inquiry must end there, with a finding of no dischargeability.’” Id. at 1088 (citation omitted).

1. Minimal Standard of Living.

“The first prong of the Brunner test requires that [Munch] prove that he cannot maintain a minimal standard of living if he were required to repay the loans.” Mason, 464 F.3d at 882. “To meet this requirement, the debtor must demonstrate more than simply tight finances.” Rifino,

¹⁰ Munch asks that the court determine undue hardship under a “totality of circumstances” test rather than the Brunner test, citing the concurring opinion in Roth v. Educational Credit Mg’t Corp. (In re Roth), 490 B.R. 908, 920 (9th Cir. BAP 2013). Munch Cross-Motion, 2:16-3:10. The court declines to do so. Roth does not stand for the proposition that the Ninth Circuit no longer applies Brunner. Judge Pappas wrote separately in Roth only to express his view that “[t]he Ninth Circuit should reconsider its adherence to Brunner.” Id. at 923.

245 F.3d at 1088. “In defining undue hardship, courts require more than temporary financial adversity, but typically stop short of utter hopelessness.” Id. (quoting In re Nascimento, 241 B.R. 440, 445 (9th Cir. BAP 1999)).

On November 21, 2016, Munch filed his voluntary chapter 7 petition in this case. On the petition date, Munch was employed as a Case Manager with Casa Pacifica Centers for Children (“Casa Pacifica”) earning an annual salary of over \$43,000. Munch’s Schedule I filed on November 21, 2016, reflects monthly income from his employment at Casa Pacifica of \$2,501.90, after payroll deductions which included a monthly payroll deduction of \$180.25 for voluntary contributions to a retirement plan. In response to Schedule I’s Question 13 regarding an expected increase or decrease in income, Munch responded that there was a “potential 1%-3% cost of living increase on my annual salary (performance based and funding availability).” Munch’s Schedule J revealed monthly expenses of \$2,765, which included \$1,500 for rent and \$1,265 for utilities, transportation, food, clothing, medical and dental expenses, clothing, animal food and care, vehicle insurance, and entertainment.

Munch voluntarily quit his job at Casa Pacifica on December 22, 2016. Before working at Casa Pacifica, Munch had been employed almost continuously for a period of five years. According to his federal income tax returns, Munch earned adjusted gross income of \$21,701, \$23,758, and \$43,524 for the calendar years 2014, 2015 and 2016, respectively.

On January 9, 2017, Munch amended his Schedules I and J. Munch’s amended Schedule I reflects no income and includes the following statement: “It is my hope to gain meaningful employment, I have already applied to six jobs without any luck.” The expenses listed in Munch’s amended Schedule J are identical to those described in his original Schedule J. Munch received unemployment benefits averaging about \$1,668 per month from February 10, 2017 to July 2, 2017, totaling \$10,845.¹¹ The unemployment benefits have been exhausted. Based upon the amended Schedules I and J, Munch testified that “I am unable to maintain a minimum standard of living.”¹²

¹¹ Munch Cross-Motion, at Exhibit R.

1 In sum, Munch has no regular source of income at this time to meet his modest monthly
2 expenses of \$2,765 listed in amended Schedule J. Munch's monthly income was never higher
3 than \$2,682.15, i.e., Munch's gross month salary at Casa Pacifica on the petition date, less
4 payroll deductions (excluding the voluntary retirement plan contribution). That amount still was
5 insufficient to cover Munch's monthly expenses of \$2,765, excluding his student loan payments.
6 Accordingly, the court concludes that Munch has satisfied the first prong of the Brunner test
7 because he cannot maintain, based on current income and expenses, a minimal standard of living
8 if required to repay the loans.

9 2. Additional Circumstances.

10 Brunner's second prong requires Munch to establish that "additional circumstances exist
11 indicating that this state of affairs is likely to persist for a significant portion of the repayment
12 period of the student loans." Mason, 464 F.3d at 882 (quoting Brunner, 831 F.2d at 396). "We
13 will presume that the debtor's income will increase to a point where [he] can make payments and
14 maintain a minimal standard of living; however, a debtor may rebut that presumption with
15 'additional circumstances' indicating that [his] income cannot reasonably be expected to increase
16 and that [his] inability to make payments will likely to persist throughout a substantial portion of
17 the loan's repayment period." Educational Credit Mg'mt Corp. v. Nys (In re Nys), 446 F.3d 938,
18 945 (9th Cir. 2006). "Bankruptcy courts may look to the unexhaustive list of 'additional
19 circumstances' [which] include, but are not limited to:

20 [(1)] Serious mental or physical disability of the debtor or the debtor's dependents
21 which prevents unemployment or advancement; [(2)] The debtor's obligations to
22 care for dependents; [(3)] Lack of, or severely limited education; [(4)] Poor
23 quality of education; [(5)] Lack of usable or marketable job skills; [(6)]
24 Underemployment; [(7)] Maximized income potential in the chosen educational
25 field, and no other more lucrative job skills; [(8)] Limited number of years
26 remaining in [the debtor's] work life to allow payment of the loan; [(9)] Age or
27 other factors that prevent retraining or relocation as a means for payment of the
28 loan; [(10)] Lack of assets, whether or not exempt, which could be used to pay the
loan; [(11)] Potentially increasing expenses that outweigh any appreciation in the

¹² Id. at 26:19-20.

1 value of the debtor's assets and/or likely increases in the debtor's income; [(12)]
2 Lack of better financial options elsewhere.

3 Id. (quoting Nys v. Educational Credit Mg'mt Corp. (In re Nys), 308 B.R. 436, 446-47 (9th Cir.
4 BAP 2004), aff'd, 446 F.3d 938 (9th Cir. 2006).

5 Despite regular employment while in school and doubling his adjusted gross income
6 between 2014 and 2016, Munch claims that his medical condition, felony conviction, and the
7 quality of his education are "additional circumstances" which prevent his situation from
8 improving in the future. Munch testified that he has physical and mental disabilities that "have
9 lasted for the majority of [his] adult life, and are expected to sustain for the duration of [his]
10 adult life."¹³ Munch testified that he (1) broke his back twice and has "ongoing back problems
11 that affect [his] daily life functions;" (2) underwent knee surgery and "continue[s] to have pain
12 management and stability difficulties with [his] knee;" (3) suffered multiple concussions and
13 traumatic brain injuries throughout the course of [his] life, which affect [his] daily functions;" (4)
14 has a "punctured and collapsed lung, after sustaining several broken ribs, which remain
15 disfigured and at times causes [him] pain;" (5) "suffer[s] from paralyzing migraines that are, at
16 times, triggered by the amount of screen time [he] sustain[s] on a daily basis;" (6) has been
17 "diagnosed with depression;" (7) has been "diagnosed with anxiety disorder" and (8) has been
18 diagnosed with "post-traumatic stress disorder, severe depression, and attention deficient
19 disorder."¹⁴ Munch's testimony is not, however, corroborated by the testimony of any physician
20 or other medical professional familiar with his conditions nor otherwise supported by competent
21 medical or psychological evidence. See Burton v. Educational Credit Mg'mt Corp. (In re
22 Burton), 339 B.R. 856, 874 (Bankr. E.D. Va. 2006) ("The majority rule is that substantial and
23 credible evidence, such as corroborating evidence, must be presented for the debtor to sustain his
24 burden of proof regarding his medical condition."). The only medical evidence offered by
25 Munch are the unauthenticated copies of documents purporting to be medical reports attached to
26 the Munch Cross-Motion as Exhibits D, E, F, I, J, K and L which are inadmissible as hearsay.

27 ¹³ Id. at 28:12-13; 22-23.

28 ¹⁴ Id. at 27:20-28:23.

1 Even accepting Munch's testimony regarding his current ailments as true, Munch fails to
2 explain how he was able to work with these conditions in the past but will be unable to do so in
3 the future. More importantly, Munch fails to provide significantly probative evidence of (1) the
4 exact nature of his physical and mental infirmities; (2) the prognosis for recovery; (3) the long-
5 term deleterious effects, if any, of his present physical and mental conditions on his ability to be
6 gainfully employed in the future, and (4) whether his present physical and mental conditions will
7 persist for a significant portion of the repayment period rendering it unlikely that he would ever
8 be able to honor his obligations to the United States and ECMC.¹⁵

9 With regard to his felony conviction, Munch claims that his criminal record caused the
10 California Board of Behavior Sciences to not allow him to work for the Department of Social
11 Services.¹⁶ Despite his criminal record, however, Munch successfully obtained a
12 waiver/exemption of the Board's denial and did work in the field of social work.¹⁷ Munch also
13 claims that he has been routinely denied employment based on his inferior education, training
14 and skills.¹⁸ However, the rejection letters offered by Munch to support this assertion make no
15 reference to Munch's education and training as a reason for denial of employment. Furthermore,
16 Munch has been employed almost continuously for the past five years and there is no
17 significantly probative evidence that his medical condition, alleged criminal stigma, or the
18 quality of his education have prevented him from earning a living.

19 Munch is 33 years old and holds a Master's degree in social work. He has no
20 dependents. There is no evidence that Munch has either maximized his income potential in his
21

22 ¹⁵ Indeed, the unauthenticated report of Mohan Nair, M.D. dated May 17, 2017, attached as
23 Exhibit E states that "Mr. Munch may resume modified duty with standing and walking
24 restricted to limits of pain initially. These can be stretched over time as his muscles become
25 stronger and develop stamina." Id. at Exhibit E. The unauthenticated report of Alison Magoun
Moreno, Ph.D. dated October 17, 2017, attached as Exhibit J states that Munch "can return to
his/her usual and customary work." Id. at Exhibit J.

26 ¹⁶ Id. at 29:4-8 & Exhibit N.

27 ¹⁷ Munch Depo., at 89:2-90:18.

28 ¹⁸ Munch Cross-Motion, at 30:11-16 & Exhibits O, P & Q.

1 chosen field or that he lacks usable or marketable job skills. His age does not prevent retraining
2 or relocation as a means for repayment of the loans. In sum, Munch has not established by
3 significantly probative evidence a triable issue regarding the second prong of the Brunner test.
4 The summary judgment supports a finding that Munch's inability to repay will not likely persist
5 throughout a substantial portion of the repayment period due to "additional circumstances."

6 3. Good Faith.

7 Brunner's third prong "requires that the debtor exhibit good faith in his efforts to repay
8 the student loans." Mason, 464 F.3d at 884. "Good faith is measured by the debtor's efforts to
9 obtain employment, maximize income, and minimize expenses." Id. (quoting In re Birrane, 287
10 B.R. 490, 499 (9th Cir. BAP 2002) (citation omitted)). "[T]he fact that debtor has made no
11 payments or has made some payments on the loan is not dispositive." Birrane, 287 B.R. at 499.
12 "[A] debtor's effort – or lack thereof – to negotiate a repayment plan is an important indicator of
13 good faith." Id. (quoting In re Wallace, 259 B.R. 170, 185 (C.D. Cal. 2000)). "The 'good faith'
14 obligation continues even after an adversary proceeding is filed to determine the dischargeability
15 of student loan debt." Educational Credit Mg't Corp. v. Roth (In re Roth), 490 B.R. 908, 917
16 (9th Cir. BAP 2013).

17 a. *Munch's Efforts to Obtain Employment, Maximize Income, and Minimize Expenses*

18 Munch has taken steps to minimize his expenses, as shown by his amended Schedule J.
19 With respect to his efforts to maximize income, Munch testified that he has not found "viable
20 work" since leaving his job at Casa Pacifica, stating:

21 40. I have made every effort within my ability to advance my career and
22 employability, seek employment that would afford me the ability to sustain a
23 minimal standard of living, maximize my income, and reduce my expenses.

24 41. I have continued to look for, and applied for viable work, across the
25 array of my academic degrees, prior to filing for Chapter 7 bankruptcy, and
subsequently this adversary proceeding.

26 42. I have continued to look for, and applied for viable work, across an
27 array of my academic degrees, throughout the course of this bankruptcy, and
28 subsequently this adversary proceeding. . .

1 57. I do not believe that the education I sustained at LCB was of an
2 “education benefit.”

3 58. I do not believe that the education I sustained in my Bachelors decree
4 was of “education benefit”, as I have never obtained a single job in which those
5 credentials qualified me for a position, or afforded me the position due to its
6 obtainment.

7 59. The education I received in my masters of social work program is
8 questionable, and likely not an “education benefit”, as I left school lacking even
9 basic entry-level skills needed to obtain employment as a licensed clinical mental
10 health professional; school staff were aware of my criminal record upon applying
11 to the program, yet never assisted notified, or even warned me that my criminal
12 record could impose limitations on my ability to work as a professional in the
13 field of human services. . . .

14 63. I have applied to over one-hundred (100) jobs in the past year, and
15 have not even proceeded to an initial interview. . . .

16 73. I utilize all available online platforms to look for jobs and explore
17 opportunities for employment, include those available to me through my previous
18 universities; when I have contacted my former universities career development
19 departments, I have always been guided to explore the possibilities online; with
20 respect to resume building, I do not need help constructing a resume, and in fact
21 have several versions of a resume online and out in the marketplace. . . .

22 75. I recently failed my social work licensing test, and cannot afford to
23 take the classes necessary to retake the test, and this will limit my ability to
24 become a licensed clinical social work¹⁹

25 Munch does not explain what he means by “viable work” and provides few facts
26 regarding the specific efforts undertaken to secure full or part-time employment and the specific
27 positions for which he has applied. About three months after graduating from USC, Munch was
28 earning more than \$43,000 a year as a Case Manager at Casa Pacifica. He quit the job on
December 22, 2016, due to discrimination, harassment, and retaliation by Casa Pacifica which
entitled him to collect unemployment benefits. Munch has been unemployed ever since and has
exhausted his unemployment benefits.

¹⁹ Munch Cross-Motion, 31:7-38:2.

1 Munch is skilled, capable and articulate. He has no dependents. Prior to his current
2 period of unemployment, Munch had been employed almost continuously for the past five years
3 (with the exception of his final academic year at USC from 2014 to 2015) and had increased his
4 earnings each time he changed jobs. His federal income tax returns reveal adjusted gross income
5 of \$21,701 in 2014, \$23,758 in 2015, and \$43,524 in 2016.

6 At his deposition on June 28, 2017, Munch testified that he is trained as an associate
7 clinical social worker; and that it would cost about \$300 to take the classes necessary to become
8 a licensed clinical social worker.²⁰ While it appears that securing the appropriate license would
9 vastly improve his employment prospects, Munch testified that he cannot afford the \$300
10 investment in his future and feels uncomfortable borrowing the money from his girlfriend or
11 family.²¹ In response to questions regarding the efforts made and time spent looking for
12 employment, Munch testified that (1) he looks “at all of the available on-line platforms, Monster,
13 Indeed, Craig’s List;” (2) “[m]y universities all have a career services component that . . .
14 provide updates on jobs; (3) he has “an on-line resume through the State Board of Employment;”
15 and (4) he keeps his “options open locally within the community.”²² When asked how much
16 time he spends a week looking for jobs, Munch responded a “half hour every day at least, at
17 minimum,” and “two, three hours a day” maximum.²³

18 However, Munch admitted in his deposition that he has not sought job counseling or
19 advice from career counselors at his colleges or university for assistance in finding a job.²⁴ He
20 also testified that there are probably jobs available to him outside his licensed field, but he
21 apparently had not investigated the opportunities because he did not know what jobs those would
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24 ²⁰ Munch Depo, 102:2-3; 103:24-104:1.

25 ²¹ Id. at 104:12-23.

26 ²² Id. at 109:9-18.

27 ²³ Id. at 109:24-110:1.

28 ²⁴ Id. at 108:16-19.

1 be.²⁵ There is no evidence indicating a total foreclosure of job prospects in Munch's area of
2 training. Moreover, the resume produced by Munch during discovery had not been updated
3 since 2014 and was incomplete.²⁶ Munch admittedly spends a maximum of three hours a day
4 online looking for employment. There is ample time remaining each day for Munch to maximize
5 income by engaging in a more exhaustive job search or obtaining employment outside his field
6 that would assist in meeting his student loan obligations, or both.

7 *b. Munch's History of Voluntary Payments*

8 It is undisputed that Munch made only \$147.05 in payments to the United States on debt
9 attributable to the U.S. Loans exceeding \$304,331, and \$53.64 in payments to ECMC on debt
10 attributable to the ECMC Loans exceeding \$13,781. There is no evidence that Munch has made
11 any other payments on either the U.S. Loans or the ECMC Loans that have not been accounted
12 for by United States or ECMC.²⁷ However, any payment would have been modest given the
13 history of Munch's income and expenses.

14 *c. Munch's Failure to Pursue Alternative Payment Plans.*

15 Munch has not produced significantly probative evidence that he has pursued income-
16 based repayment options with diligence. The evidence, in fact, supports a conclusion to the
17 contrary. Munch's U.S. Loans and ECMC Loans are eligible for the Revised Pay as You Earn
18 ("REPAYE") program,²⁸ the IBR program,²⁹ and the Income Contingent Repayment Plan
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20 ²⁵ *Id.* at 116:7-14.

21 ²⁶ Omnibus Reply, 32:14, Exhibit 26.

22 ²⁷ Munch claims that he has made more payments on account of his educational loans, but the
23 only evidence provided by Munch on this issue consists of printouts from Munch's Navient
24 student loan which are irrelevant. Munch Cross-Motion, 32:1-8, Exhibits S, T & U.

25 ²⁸ "Under the REPAYE program, a borrower is required to pay 10% of his discretionary income
26 each month (*i.e.*, 10% of adjusted gross income that exceeds the federal poverty guidelines by
27 150%). After 20 years of qualifying payments for undergraduate loans and 25 years of
28 qualifying payments for graduate loans, a borrower's entire remaining loan balance is
extinguished." Motion, 7:8-12. "If a borrower's income falls below 150% of the poverty level, a
borrower pays zero." *Id.* at 27:8-9.

1 (IRCP”).³⁰ Munch enrolled his ECMC loans in IBR on November 14, 2015, but requested loan
2 forbearance immediately thereafter and subsequently filed bankruptcy. Although aware that his
3 monthly payment under each of the plans would be zero given his current income, Munch
4 testified at his deposition that he would not be willing to pursue such an option, stating: “I would
5 have to make more money than I’ve ever made annually to be able to even consider that as an
6 option ... I would minimally have to make, I think, \$60,000 to afford [an income-driven
7 repayment plan].”³¹ Munch also reasons that any benefit derived from enrolling in an income-
8 based repayment program would be outweighed by adverse tax consequences due to imputed
9 income at the end of the payment term when any remaining balance of his educational loans may
10 be forgiven.

11 Munch’s refusal to enroll in an income-driven repayment plan, particularly when his
12 payment would be zero until he secures gainful employment, weighs heavily against a finding of
13 good faith. It is undisputed that Munch qualifies for REPAYE, IBR and ICRP, but he has
14 refused to pursue these options with diligence. There is no evidence to support Munch’s
15 assertion that the REPAYE, IBR or ICRP will result in disastrous tax consequences attributable
16 to forgiveness of debt upon completion of the program.

17 d. *Timing of Munch’s Attempt to Discharge the Student Loans.*
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20 ²⁹ “Under the IBR program, a borrower is required to pay 15% of his or her discretionary income
21 each month. After 25 years of qualifying payments, a borrower’s entire remaining loan balance
22 is extinguished.” Id. at 7:15-17. “If a borrower earns less than 150% of the poverty level for a
23 borrower’s family size, the IBR payment is zero.” Id. at 28:19-20.

24 ³⁰ “The ICRP is available to any borrower, whereas the IBR is only available to borrowers who
25 can make a showing of partial financial hardship” and “the payment is based on the borrower’s
26 household AGI and family size – not on the loan balance. If a borrower’s income changes, the
27 monthly payment is increased or decreased accordingly. If a borrower’s income falls below the
28 poverty level, the required monthly obligation will be zero, but a borrower will still be
considered current on the student loan obligation. The Direct Loan Program recalculates the
ICRP payment annually based on a borrower’s prior year’s AGI. For most borrowers, the
repayment period is 25 years. At the end of the payment term, [United States] cancels any
remaining balance.” Id. at 29:15-24.

³¹ Dep. 150:19-151:1; 153:16-18; 154:2-4.

1 The timing of Munch's attempt to discharge his student loans weighs against a finding of
2 good faith. Munch filed bankruptcy less than one week after his U.S. Loans entered repayment
3 status. He filed this adversary proceeding approximately two months after his U.S. Loans
4 entered repayment status and four months after his ECMC Loans entered repayment status.
5 Based on this timeline, Munch cannot show a good faith effort to repay his U.S. Loans or ECMC
6 Loans. See Brunner, 831 F.2d at 397 (holding that one of the reasons good faith was lacking was
7 that the debtor had filed for discharge within a month of the date the first payment of her loans
8 came due).

9 In sum, Munch is young, skilled, capable and articulate. He has no dependents. There is
10 no evidence that Munch has either maximized his income potential in his chosen field or that he
11 lacks usable or marketable job skills. His age does not prevent retraining or relocation as a
12 means for repayment of the loans. Because he currently devotes no more than three hours a day
13 looking for work, Munch has ample time remaining each day to maximize income by engaging
14 in a more exhaustive job search or obtaining employment outside his field that would assist in
15 meeting his student loan obligations, or both. It is undisputed that Munch qualifies for
16 REPAYE, IBR and ICRP, but he has refused to seriously consider these alternatives. There is no
17 evidence to support Munch's assertion that the REPAYE, IBR or ICRP will result in disastrous
18 tax consequences attributable to forgiveness of debt upon completion of the program, and the
19 timing of Munch's attempt to discharge his student loans weighs against a finding of good faith.
20 Accordingly, the court finds that Munch has failed to establish by significantly probative
21 evidence a triable issue regarding good faith in his effort to repay the U.S. Loans and the ECMC
22 Loans. The summary judgment supports a finding that Munch has not exhibited good faith in his
23 efforts to repay the loans.

24 III. CONCLUSION


25 Munch has failed to produce significantly probative evidence regarding the second and
26 third prongs of the Brunner test to establish a genuine issue for trial. Therefore, the court will
27 grant the Motion and enter summary judgment in favor of the United States and ECMC and
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1 against Munch declaring that the U.S. Loans and ECMC Loans are nondischargeable under §
2 523(a)(8). The Munch Cross-Motion will be denied.

3 Separate orders and a judgment will be entered consistent with this memorandum.
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24 Date: January 16, 2018

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26 Peter H. Carroll
27 United States Bankruptcy Judge
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