NOT FOR PUBLICATION

# UNITED STATES BANKRUPTCY COURT
# CENTRAL DISTRICT OF CALIFORNIA

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| In re:<br><br>William Franc Bryant,<br><br>Debtor(s),<br><br>William Franc Bryant<br><br>Plaintiff(s),<br><br>Vs.<br><br>Educational Credit Management Corporation (ECMC),[1] U.S. Department of Education<br><br>Defendant(s). | Case No.: 1:08-bk-20649-MT<br><br>Adversary No.: 1:10-ap-01035-MT<br><br>Chapter: 7<br><br>**MEMORANDUM OF DECISION AFTER TRIAL**<br><br>Date: December 6, 2010<br>Time: 9:30 a.m.<br>Location: Courtroom 302 |

## I. BACKGROUND:

On December 28, 2008, William F. Bryant ("Bryant") filed a voluntary chapter 7 bankruptcy petition. On February 2, 2010, Bryant, representing himself, filed an adversary proceeding against Great Lakes Higher Education ("Great Lakes") and U.S. Department of Education ("USDE"), seeking to discharge certain student loan

[1] ECMC substituted in as a real party in interest on behalf of Great Lakes Higher Education, which was originally named as a defendant.

debt pursuant to 11 U.S.C. § 523(a)(8). ECMC substituted in as a real party in interest on behalf of Great Lakes on April 12, 2010.

On March 1, 2010, ECMC filed an Answer to Bryant's adversary proceeding. On April 20, 2010, USDE filed a Motion to Dismiss the adversary proceeding. The Court denied that motion on May 27, 2010, and USDE filed an Answer on June 23, 2010. The Court held a daylong trial on this matter on December 6, 2010.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW:

These findings of fact and conclusions of law are rendered pursuant to Rule 52 of the Federal Rules of Civil Procedure, made applicable to bankruptcy proceedings by Rule 7052 of the Federal Rules of Bankruptcy Procedure. William F. Bryant testified on his own behalf. Kerry Klisch and Sheryl Davis testified by declaration on behalf of ECMC and USDE. Upon consideration and review of the pleadings, counsels' oral arguments, the twenty-four exhibits admitted into evidence, and the oral testimony at trial, the Court makes the following findings of fact and conclusions of law detailed below.[2]

### A. Findings of Fact:

Bryant is a thirty-two-year-old male with no known significant physical or mental disabilities and no dependents. Bryant obtained a bachelor's degree in mathematics from the University of St. Thomas in Minnesota in 2001, after attending two other colleges. He graduated with a 2.4 grade point average and has found this, along with the lack of a graduate degree, has made it difficult to find a job in the mathmatics field. Bryant financed his undergraduate and graduate education using loans he obtained from USDE and Wells Fargo. The loans obtained from Wells Fargo were guaranteed by Great Lakes, ECMC's predecessor in interest in this adversary proceeding. As of the petition date, Bryant owed approximately $40,000 in student loan debt to both ECMC and USDE. There appears to have been a third student loan which was paid off some time ago.

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[2] To the extent any findings of fact constitute conclusions of law, they are adopted as such. To the extent that any of the conclusions of law constitute findings of fact, they are adopted as such.

Bryant's Work History

Bryant has been employed on and off since his graduation from college in 2001 and through the present. Between 2001 and 2002, Bryant obtained several positions in the finance sector in Minnesota that paid a minimal hourly wage—between $9 and $10—and that did not enable him to fully meet his student loan obligations. In 2002, he enrolled in graduate school in Minnesota to study mathematics, failed several classes, and ultimately dropped out in 2004 when he was told he could no longer continue as a Teaching Assistant. He has been on unemployment twice for extended periods in the past five years.

In 2005, Bryant moved to California. During that time, Bryant took on several tutoring jobs as well as management-level jobs in the service and retail industries, but did not keep any particular job for an extended period of time. His departure from at least three of his employers was not voluntary. For example, he was hired at Starbucks but was released during the training classes when found doodling instead of taking notes. He obtained various math tutoring jobs but said he was regularly replaced because he was not a very effective tutor.

Bryant's work history since arriving in California is not limited to the service and retail industries. Bryant has also had a part-time modeling and acting career that began in Minnesota in 2004. At that time, Bryant worked at Abercrombie & Fitch in Minneapolis. He was approached by talent and modeling agents and was told about a modeling competition in Florida, which he ultimately won and for which he received a $5,000 prize.

Since that time, Bryant has expended significant time and money—over $15,000 (see USDE's Exs. 213, 349, 357)—to promote and enhance his entertainment career. Bryant has appeared in several commercials, including a promotional series for the National Hockey League, as well as television shows and has auditioned consistently for new jobs every few months. Bryant has also been represented by a talent agent since arriving in California, and has joined AFTRA (the American Federation of Television and Radio Artists), a national actors/performers union. He is eligible for SAG membership due to some earlier work but has not been able to pay the $2600 to $3,000 fee required. Since 2008, he has also written and produced numerous short films and music videos with friends and other acquaintances. Bryant is credited for several films on the website "Internet Movie Database," http://www.imdb.com. (USDE's Ex. 465). He also maintains his own website, http://www.williamfrancbryant.com (USDE's Ex. 464), in which he describes himself as a "well versed actor who is driven by an incredible passion for entertainment." When pressed about his "incredible passion for entertainment," Bryant played down his acting career and became increasingly defensive. He is, however, limited

in what he can apply for because he does not have the $1200 to $3,000 required for good "head shots" to send out and post or the money to join acting workshops where he could meet employment prospects.

Bryant has been working at Blockbuster since 2007, earning $12 per hour. Prior to Blockbuster's own bankruptcy filing, Bryant worked approximately thirty hours per week. Since then, however, his weekly hours have been reduced to approximately twenty-two. Currently, Bryant earns an average of $950 per month and has average expenses of about $517 per month, not including housing. When asked about obtaining a second job in the food industry, Bryant testified that he is unable to work as a waiter because of his inability to support weight on one of his shoulders due to a separated shoulder injury received playing rugby years ago. He has not sought any disability benefits for that injured shoulder. He stated that a second job has not been possible because Blockbuster requires him to have "open availability." He has no set schedule there and must take any hours offered. Although he has applied at Taco Bell, McDonald's and other places anyway, Bryant's efforts to find a second part-time job have been unsuccessful.

Housing Situation

In late 2005, he began to live in his car which currently has over 225,000 miles on it. All of his self-grooming took place at the gym, and all of his personal belongings were kept either in the trunk of the car or in a rented storage space. He checks his email and uses the computer at the public library. His living situation did not enable him to work in any jobs that required him to wear formal or quasi-formal attire. He lost one job at an upscale steakhouse because he could not keep the required formal suit in pressed and clean condition.

He has seen the rooms for rent on Craigslist and elsewhere but does not think he could find one to live in for $400. He was rejected years ago due to his credit rating and has not tried since, as he assumes his credit rating is still a problem. He also seemed concerned about his personal security and getting along with other people if he rented a room. He also stated that he could not sign a lease promising regular rent because his hours fluctuate so much at Blockbuster.

It appears moving back to Minnesota to live with family is not an option. Bryant's mother lives in a one bedroom apartment and cares for a brother. She has told him she cannot take him in. He has a second brother, but this also does not appear to be an option.

While a roommate situation would be possible on Bryant's salary, he is working within some very limited options for housing. Staying in his car and using his extremely limited funds to try and find another employment avenue appears to be a rational choice.

Bryant's Attempts to Repay the Student Loans in Question

The USDE and ECMC loans in question have been in default status for approximately three to five years. Between 2005 and 2007—when both of the loans in question were declared in default—Bryant was successful in obtaining numerous deferments and forebearances. In 2009, shortly before the filing of this adversary proceeding, USDE began to garnish Bryant's wages. (USDE's Exs. 266-67). Bryant estimates that approximately 15% of his wages were garnished by ECMC and USDE. (Pl.'s Ex. 13). This amount was ultimately refunded to Bryant upon his filing of the adversary proceeding.[3]

Bryant testified that, between 2005 and 2009—when the loans were in default—he was not aware of any repayment plans or consolidation options for which he was eligible. However, in May 2010, Bryant received a letter from ECMC's counsel (ECMC's Ex. 102) informing him of his eligibility for a student loan consolidation program known as the William D. Ford Federal Direct Loan Program (the "Ford Program").[4] The letter explained that, under the Ford Program, Bryant could choose to repay his student loans through a Standard Repayment Plan, Graduated Repayment Plan, Income-Contingent Repayment Plan ("ICRP"), and Income-Based Repayment Plan ("IBRP"). Under the ICRP and IBRP, a borrower's repayment amount is adjusted annually, based on that borrower's adjusted gross income and the poverty level for that borrower's family size from the previous year. The maximum repayment period for both ICRP and IBRP is twenty-five years, at the conclusion of which the entire remaining balance would be forgiven or discharged. The letter, as well as a printout of the Ford Program's "online calculator," (ECMC's Exs. 103 & 104) made clear that under IBRP, Bryant's monthly payments would be zero based on his current income.

Bryant did not apply to the Ford Program or any other similar consolidation programs that have been or are currently available. He did not acknowledge that it is likely that his payment would be zero if he does not have a salary increase.

Bryant's Credibility

Bryant was a credible witness. He was candid and was able to articulate himself quite well. His ability to put together a full trial without the aid of an attorney shows his capabilities. In addition, Bryant was largely calm

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[3] A portion—about $188— of the garnished funds was not refunded and was instead applied to the USDE loan balance.

[4] See generally 34 C.F.R. § 685.100 et seq.

and collected on the witness stand, but became defensive and agitated when questioned about his entertainment career.

**B. Conclusions of Law:**

An educational loan is dischargeable in bankruptcy only if "excepting such debt from discharge . . . would impose an undue hardship on the debtor and the debtor's dependents." 11 U.S.C. § 523(a)(8). To determine whether excepting student debt from discharge will impose an undue hardship, the Ninth Circuit applies the three-part test first enunciated in In re Brunner, 831 F.2d 395, 396 (2d Cir. 1987). See Educ. Credit Mgmt. Corp. v. Mason (In re Mason), 464 F.3d 878, 882 (9th Cir. 2006); United Student Aid Funds, Inc. v. Pena (In re Pena), 155 F.3d 1108, 1112 (9th Cir. 1998) (adopting the Brunner test).

Under the Brunner test, the debtor must prove 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. Pena, 155 F.3d at 1111; Brunner, 831 F.2d at 396. "[T]he burden of proving undue hardship is on the debtor, and the debtor must prove all three elements before discharge can be granted." In re Rifino, 245 F.3d 1083, 1087-88 (9th Cir. 2001) (citation omitted). If the debtor fails to prove one of the elements, the loan is nondischargeable. Nys v. Educ. Credit Mgmt. Corp. (In re Nys), 308 B.R. 436, 441-42 (B.A.P. 9th Cir. 2004) ("Nys I"), *aff'd*, 446 F.3d 938 (9th Cir. 2006) ("Nys II"). "Dischargeability should be based upon the certainty of hopelessness, not simply a present inability to fulfill financial commitment." In re Robertson, 999 F.2d 1132, 1136 (7th Cir. 1993).

1. *Minimal Standard of Living*:

The first element of the Brunner test requires that a debtor prove that he or she cannot maintain a minimal standard of living if he or she is required to repay the loans. Mason, 464 F.3d 878, 882 (9th Cir. 2006); see also Saxman v. Educ. Credit Mgmt. Corp. (In re Saxman), 325 F.3d 1168, 1173 (9th Cir.2003)). This can be proven by showing the debtor's inability to pay for necessary average monthly expenses, excluding the loan payments. Mason, 464 F.3d at 882. This requires "an examination of [the debtor's] current income and expenses to see if payments of the loan would cause [the debtor's] standard of living to fall below that minimally necessary." Pa. Higher Educ. Assistance Agency v. Birrane (In re Birrane), 287 B.R. 490, 495 (B.A.P. 9th Cir. 2002).

Bryant did establish that he would be unable to maintain a minimal standard of living if he is required to repay the loans to ECMC and USDE. His testimony was corroborated by his bank statements. Presently, Bryant

earns only $950 per month and spends an average of $517 per month, all while living in his car. Notwithstanding the availability of adequate and comfortable housing for $400 per month, Bryant could not maintain that standard of living if required to repay the loans. He is not required to live in his car to repay his loans.

While he did spend money attempting to break in to modeling or acting, the amount was not excessive and some amounts could really be considered normal living expenses such as car repair and eating out. He has shown actuarial science is not a career option, and he has not been successful in maintaining a retail or financial position, so exploring another career choice is reasonable, especially since it appears he forfeited proper housing in order to spend limited funds on acting and modeling related expenses.

Both ECMC and USDE argue that some of Bryant's expenses are not necessary for a "minimal standard of living," under Brunner, but there is no doubt that Bryant's current financial condition is anything but enviable: he lives in his car by the freeway and showers in a public gym. Requiring him to repay the student loan debt under these conditions would cause his standard of living to fall below that which is minimally necessary. As such, Bryant has met his burden of proof on the first Brunner element.

2. *Additional Circumstances*:

To meet the second element of the Brunner test, a debtor must prove 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." Mason, 464 F.3d at 882 (quoting Brunner, 831 F.2d at 396). This generally requires a showing of a "certainty of hopelessness, not simply a present inability to fulfill financial commitment." Nys I, 308 B.R. at 443 (quoting Brunner, 46 B.R. at 755). In other words, the debtor must show an inability to pay in the present and a likely inability to pay in the future. Mason, 464 F.3d at 883. The circumstances need be "exceptional" in the sense that they "demonstrate insurmountable barriers to the debtor's financial recovery and ability to pay." Nys II, 446 F.3d at 946 (9th Cir. 2006). In addition, bankruptcy courts may look to the nonexhaustive list of "additional circumstances" provided by the Bankruptcy Appellate Panel in Nys I. Id. at 947. The factors a court may consider include, but are not limited to:

> [ (1) ] Serious mental or physical disability of the debtor or the debtor's dependents which prevents employment or advancement; [ (2) ] The debtor'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 [the debtor'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. (citing Nys I, 308 B.R. at 446-47).

Applying the above analysis to Bryant, the second Brunner element has not been established. Bryant does not have any serious physical or mental disability which prevents employment or advancement. At only thirty-two years of age, he has many years remaining in his work life and no dependents or other increasing expenses. While Bryant possesses a present inability to pay, he is not hopeless. In fact, Bryant appears ambitious and intent on pursuing a career in the entertainment field, and has achieved at least some success in so doing. Continued success is not guaranteed, but Bryant has not shown that he is hopeless in the sense that there are "insurmountable barriers" to his financial recovery. Taking into account Bryant's aggressive pursuit of an entertainment career, it simply cannot be said that there is a "certainty of hopelessness" to Bryant's future and his ability to pay. Accordingly, Bryant has not established the second Brunner element.

While he has had difficulty maintaining a full time job, and appears to be in a very bad situation right now, this is a temporary status. He has taken classes at the Community College to try and switch into cinematography and TV editing. He is clearly a smart young man with many avenues still to explore. While actuarial science did not work out, math skills can still be the foundation for other areas of employment. He is understandably despondent and stated that he does not know how he will dig himself out of this. The law requires an objective view of his situation, however, and a 32 year old with his talents still has many options to explore in life before his financial future is declared hopeless.

3. *Good Faith Efforts to Repay*:

To meet the third element of the Brunner test for discharge, the debtor must show that he or she has made a good faith effort to repay the loan. The debtor's good faith is measured by his or her efforts to obtain employment, maximize income, minimize expenses, and negotiate repayment of the student loan by exploring his or her options. Mason, 464 F.3d at 884; see also Pa. Higher Educ. Assistance Agency v. Birrane (In re Birrane), 287 B.R. 490, 499 (B.A.P. 9th Cir. 2002) (finding that a debtor's failure to explore the ICRP option weighed against a finding of good faith). In Mason, the Ninth Circuit affirmed the finding of a debtor's lack of good faith where that debtor failed to renegotiate repayment of his student loans under the ICRP option. Mason, 464 F.3d at 885.

The legislative history of the 1998 changes to 523(a)(8), which extended the "undue hardship" requirement to all student loan bankruptcies, makes it clear that Congress intended undue hardship claims to be measured in light of "the availability of various options to increase the affordability of student loan debt, including deferment, forbearance, cancellation and extended, graduated, income-contingent and income-sensitive repayment options." H. Rep. No. 759, 105th Cong. 2d Sess. 408 (1998). Because the Department of Education's repayment options allow student loan debt burden to be tailored to accommodate reasonable expenses and varying earning capacity, it is highly unlikely that repayment under available options will impose an "undue hardship" on a debtor and his dependents.

Bryant's initial failure to inquire about his various loan consolidation options and his subsequent failure to apply for the Ford Program suggest a lack of good faith effort to repay the loans to ECMC and USDE. Bryant testified that he did not know of the availability of several consolidation options when the loans went into default status. Even assuming that to be true, Bryant was required to make a diligent inquiry about potential repayment options. That he did not do. Furthermore, the letter sent to Bryant by ECMC's counsel in May 2010 put Bryant on actual notice that he was eligible for IBRP under the Ford Program, which would require him to pay nothing so long as his income remained at its current level. If Bryant were sure that his financial woes would continue indefinitely—a showing required under the second Brunner element—then his payment under IBRP would remain at zero until the loans are forgiven. Instead, Bryant ignored the Ford Program. His failure to explore the Ford Program weighs heavily against a finding of a good faith effort to repay the loans under Mason and Birrane. As such, Bryant has failed to establish the third Brunner element.

## III. CONCLUSION:

The "undue hardship" standard for discharge of student loan debts under 11 U.S.C. § 523(a)(8) is a difficult standard for debtors to meet. Here, Bryant has failed to establish two of the three required elements under Brunner. Specifically, Bryant has failed to show 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 that he has made a good faith effort to repay the loans. While Bryant is currently unable to repay the loans, he has employment prospects in the future and is eligible for various favorable repayment options under the Ford Program. His failure to pursue the Ford Program and his prior failure to inquire about similar

consolidation/repayment programs weigh heavily against a finding of good faith effort to repay. Although Bryant currently cannot pay his loans, all elements of the Brunner test must be met to discharge a student loan.

Judgment will be entered in favor of ECMC and USDE. The student loan debts in question will remain nondischargeable pursuant to 11 U.S.C. §523(a)(8).

DATED: January 4, 2011

United States Bankruptcy Judge

**NOTE TO USERS OF THIS FORM**:

**1)** Attach this form to the last page of a proposed Order or Judgment. Do not file as a separate document.
**2)** The title of the judgment or order and all service information must be filled in by the party lodging the order.
**3) Category I.** below: The United States trustee and case trustee (if any) will always be in this category.
**4**) **Category II.** below: List ONLY addresses for debtor (and attorney), movant (or attorney) and person/entity (or attorney) who filed an opposition to the requested relief. DO NOT list an address if person/entity is listed in category I.

# NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*) **MEMORANDUM OF DECISION AFTER TRIAL** was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

**I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of January 4, 2011, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

- Brad D Krasnoff (TR) mcdaniel@lbbslaw.com, bkrasnoff@ecf.epiqsystems.com
- Scott A Schiff sas@soukup-schiff.com
- United States Trustee (SV) ustpregion16.wh.ecf@usdoj.gov
- Brent A Whittlesey brent.whittlesey@usdoj.gov

☐ Service information continued on attached page

**II. SERVED BY THE COURT VIA U.S. MAIL:** A copy of this notice and a true copy of this judgment or order was sent by U.S. Mail to the following person(s) and/or entity(ies) at the address(es) indicated below:

William Franc Bryant
PO Box 56933
Sherman Oaks, CA 91413

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**III. TO BE SERVED BY THE LODGING PARTY**: Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s) and/or email address(es) indicated below:

☐ Service information continued on attached page