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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re:	]	Case No. 97-50524-ASW
	]	
BRETT PEEL,	]	
	]	
Debtor.	]	
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BRETT PEEL,	]	Adv. Pro. No. 97-5396
	]	
Plaintiff,	]	Chapter 7
	]	
vs.	]	
	]	
SALLIEMAE SERVICING-HEAL	]	
LOAN, SALLIEMAE SERVICING-	]	
SMART LOAN, and EDUCATIONAL	]	
CREDIT MANAGEMENT CORP.,	]	
	]	
Defendants.	]	
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**MEMORANDUM DECISION**

**I. BACKGROUND**

In this adversary proceeding, Plaintiff Brett Peel ("Debtor"), a Chapter 7 debtor, seeks to discharge a consolidated student loan pursuant to Section 523(a)(8) of the Bankruptcy Code.<sup>1</sup> Defendant Educational Credit Management Corp ("ECMC"), holder of the consolidated promissory note and real party in interest, was substituted as defendant on March 12, 1998.

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<sup>1</sup> Unless otherwise noted, all statutory references are to the Bankruptcy Code, 11 U.S.C. §101 et seq., and all "Rule" references are to the Federal Rules of Bankruptcy Procedure.

1 As originally filed, this adversary proceeding was to  
2 determine the dischargeability of two loans: a Health Education  
3 Assistance Loan ("HEAL loan") held by SallieMae and a SMART LOAN  
4 held by ECMC. Debtor failed to meet the test of 42 U.S.C. Section  
5 292f(g), which governs the discharge of HEAL loans in bankruptcy,  
6 and the Court ruled prior to trial that Debtor's Heal Loan  
7 obligation to Defendant SallieMae is non-dischargeable.<sup>2</sup> The only  
8 remaining claim was for discharge of the SMART LOAN obligation.

9 On June 16, 1999, this matter came before the Court for trial  
10 in San Jose, California. Heinz Binder, Esq. and Bethany N.  
11 Marshall, Esq. of the law firm of Binder & Malter represented  
12 Debtor and Miriam Hiser, Esq. represented ECMC. Debtor was the  
13 only witness called by the parties at the trial, submitting to  
14 direct and cross examination. The following represents the Court's  
15 findings of fact and conclusions of law, pursuant to Fed. R. Bankr.  
16 P. 7052.

## 17 18 II. Facts

19 Debtor is thirty-three years old, single and has no children.  
20 He is in good health with no physical or mental impairments that  
21 affect his ability to earn a living. Debtor began his higher  
22 education by attending Mission Junior College and its sister school  
23 West Valley Junior College. He focused on a "pre-med" curriculum  
24 with the aim of going on to chiropractic college. To support

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26 <sup>2</sup> Judgment was entered on April 19, 1999 in favor of SallieMae  
27 Servicing on the HEAL loan. As of trial in June 1999 regarding  
28 ECMC's SMART LOAN, the amount of the non-dischargeable HEAL loan  
was over \$31,000.

1 himself, Debtor worked part time while attending classes. Debtor  
2 earned an Associate of Science degree.

3 In 1989, Debtor enrolled in Palmer Chiropractic College. It  
4 was at this time that Debtor began accumulating student loans. By  
5 taking classes during the summer in addition to the fall and  
6 spring, Debtor graduated with a Doctor of Chiropractic degree in  
7 three years instead of the standard four. After graduation in  
8 December 1991, Debtor began searching for employment as a full time  
9 chiropractor. Debtor's student loans became due and payable on his  
10 graduation or, subject to deferments, shortly thereafter. As  
11 Debtor was unemployed immediately after graduation, he applied for  
12 forbearances on his loans and the same were granted by the lenders.

13 It was not until April 1992 that Debtor secured any employment  
14 in his new field. He was offered a position in the office of Alan  
15 Jacobsen, Chiropractor, whose office was located in Carmichael,  
16 California. Debtor relocated to Carmichael, incurring expenses in  
17 the move. During Debtor's tenure with Dr. Jacobsen, his Adjusted  
18 Gross Income ("AGI") was \$1,600 per month. Debtor testified that  
19 his income was insufficient to meet his expenses during this period  
20 let alone make payments on his student loans; he borrowed money  
21 from his mother to pay for the deficit. These circumstances  
22 continued until Dr. Jacobsen sold the practice in late 1993, at  
23 which time Debtor was terminated. Debtor had received a raise  
24 toward the end of his employment that increased his AGI to \$2,000  
25 per month, and he had begun making loan payments but discontinued  
26 them when he was terminated. He continued diligently to apply for  
27 forbearances, making payments during the application periods before  
28 the new forbearances were granted.

1           In late 1993, after sending out resumes to clinics in the  
2 Sacramento area, Debtor found work as a commission-only independent  
3 contractor, splitting his time between two offices. Debtor  
4 continued in this capacity throughout 1994. His AGI for the entire  
5 year was only \$3,403. Debtor testified that he worked forty-hour  
6 weeks but, as an independent contractor, he was only paid for those  
7 procedures done on his own patients. The remainder of his time was  
8 spent attempting to bring in new patients, so as to increase his  
9 future income. Debtor testified that factors which contributed to  
10 his inability to build a practice were the high numbers of  
11 practicing chiropractors at that time and the shift by insurance  
12 companies toward Preferred Provider Organizations ("PPOs") and  
13 Health Maintenance Organizations ("HMOs"), with the corresponding  
14 lack of coverage for chiropractic services in these plans. During  
15 1994, Debtor made no payments on his student loans, borrowed  
16 heavily from his mother to meet expenses, and continued to receive  
17 forbearances.

18           In February 1995, with no additional forbearances available on  
19 the original loans, Debtor consolidated his student loans into the  
20 HEAL loan and the SMART LOAN, which are at issue in this adversary  
21 proceeding. In exchange for further forbearances, Debtor agreed to  
22 a thirty year term with an interest rate of nine percent (9%) on  
23 the SallieMae SMART LOAN. He continued to work as an independent  
24 contractor throughout 1995 earning an AGI for the year of only  
25 \$6,113. In September 1995, Debtor made two payments on the  
26 consolidated SMART LOAN while waiting for the next forbearance, a  
27 total of \$576.00. Debtor testified that he borrowed from his  
28 mother to make these payments.

1 Leaving the chiropractic business, Debtor moved back into his  
2 mother's house in Santa Clara, California in 1996. He attempted to  
3 start a medical billing business from home and maintained a part-  
4 time job doing promotions for a soft drink company. His efforts  
5 failed. Debtor's AGI for the year 1996 was \$2,294, and he was  
6 unable to make payments on his loans. Debtor filed for bankruptcy  
7 under Chapter 7 on January 22, 1997, and discharge was granted  
8 April 25, 1997.

9 In his Chapter 7 petition, Debtor listed his income as \$500  
10 per month as a self-employed consultant and his expenses as  
11 follows:

12 Telephone	\$ 60.00
Home Maintenance	\$ 30.00
13 Food	\$150.00
Clothing	\$ 20.00
14 Laundry and Dry Cleaning	\$ 5.00
Transportation	\$120.00
15 Recreation, et al.	\$ 30.00
Charitable Contributions	\$ 5.00
16 Other (Seminars, bus expenses)	<u>\$ 85.00</u>
17 <b><u>Total Expenses</u></b>	\$505.00

18 At trial, these expenses were not directly challenged by ECMC.  
19 However, comparisons were made between these expenses and those  
20 later provided by Debtor under changed circumstances.

21 In March 1997, Debtor began working for Medical Business  
22 Automation Inc. ("MBA") as a technical support representative and  
23 was still working there at the time of trial. His function is to  
24 answer customer questions regarding the software MBA distributes.  
25 Debtor had no formal training in computers and qualified for his  
26 position based on his experience with similar software gained in  
27 the course of his failed medical billing business. Debtor had an  
28 AGI of \$25,675 for all of 1997. Upon obtaining his job with MBA,

1 Debtor began paying rent to his mother of six hundred dollars  
2 (\$600) per month. In addition to the rent payment, Debtor had  
3 expenses for food, gas, insurance, auto repairs, utilities,  
4 clothing, and others which consumed the balance of his net income.  
5 He made no payments on his student loans. Debtor filed the  
6 complaint in this Adversary Proceeding on August 8, 1997.

7 Debtor's evidence includes a list of his current (August 1998)  
8 living expenses, as follows:

9 Rent	\$ 750.00
Food	\$ 300.00
10 Clothes and Shoes	\$ 30.00
Laundry and Supplies	\$ 40.00
11 Telephone	\$ 40.00
Medical Insurance	\$ 42.00
12 Medical Expenses	\$ 10.00
Automobile Insurance	\$ 81.56
13 Automobile Maintenance	\$ 200.00
Automobile Gas and Fluids	\$ 130.00
14 Entertainment	\$ 60.00
Personal Items	\$ 40.00
15 Household Items	\$ 40.00
Household Repairs	\$ 20.00
16 Haircut	\$ 15.00
DMV Auto Fees (license/registration)	\$ 10.00
17 Payment to Mother for 1st/last Rent	\$ 50.00
Reserve/Unplanned Expenses	\$ 100.00
18	
19 <b><u>Total Expenses</u></b>	\$1,958.56

20 Debtor lives in a basement apartment with one bedroom and a  
21 living room. It has no kitchen and no laundry facilities. Debtor  
22 receives reduced rent in exchange for making repairs. Debtor  
23 testified that he has searched in the past and continues to search  
24 for other lodgings but that, even with a roommate, he would have to  
25 pay more. Debtor's testimony was highly credible on this issue.

26 Debtor also introduced into evidence an updated list of  
27 expenses with the explanation that the original list was based on  
28 approximately one month of independent living since Debtor moved

1 out of his mother's house. Many expenses, such as rent (\$750.00),  
2 auto insurance (\$81.56), auto gas and fluids (\$130.00), auto  
3 registration (\$10.00) and repayment to mother for first and last  
4 month's rent (\$50.00) remain the same. Other expenses increased:  
5 food (\$375.00, up \$75.00), laundry (\$50.00, up \$10.00), telephone  
6 (\$45.00, up \$5.00), medical expenses (\$47.00, up \$37.00), auto  
7 maintenance (\$250.00, up \$50.00), and household repairs (\$25.00, up  
8 \$5.00). Debtor decreased his expenses for clothing (\$10.00, down  
9 \$20.00) and for unplanned expenses (\$50.00, down \$50.00). Debtor  
10 also eliminated expenses for entertainment, haircuts and, by way of  
11 a stipulation, his medical insurance expense (\$42.00), which was  
12 included in error. Debtor's expenses are approximately \$1,953.56  
13 per month. It should be noted that this amount does not include  
14 monies borrowed from Debtor's mother for attorney's fees to  
15 prosecute this action nor does it include the substantial monthly  
16 payment which will be due on the non-dischargeable HEAL loan.

17 Many of these expenses were not challenged by ECMC. Those  
18 that were challenged, or otherwise scrutinized, are discussed in  
19 the section entitled "Analysis."

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### III. Applicable Law

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A debtor cannot be discharged from a government guaranteed  
student loan unless either: 1) seven years have passed from the  
due date of the first payment on the loan to the date the debtor's  
bankruptcy is filed or 2) the debtor can demonstrate that failure  
to discharge the debt "will impose an undue hardship on the debtor

1 and the debtor's dependents.", 11 U.S.C. § 523(a)(8).<sup>3</sup> In this  
2 case, the parties have stipulated that less than seven years have  
3 elapsed between the due date of Debtor's first student loan payment  
4 and the date Debtor filed bankruptcy. Debtor therefore seeks  
5 relief solely under the undue hardship exception.

6 "Undue Hardship" is not defined in the Bankruptcy Code, the  
7 legislative history, or case law. However, the courts have  
8 developed tests to determine when "undue hardship" exists. The  
9 Ninth Circuit recently adopted one such test from In re Brunner, 46  
10 B.R. 752 (S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2nd Cir.  
11 1987) ("Brunner"): United Student Aid Funds, Inc. v. Pena (In re  
12 Pena), 155 F.3d 1108 (9th Cir. 1998) ("Pena").

13 Brunner and Pena propound a three part test to determine  
14 whether undue hardship would result from the debt being non-  
15 dischargeable. The debtor has the burden of proving each element.  
16 The debtor must show that: (1) he "cannot maintain based on current  
17 income and expenses, a 'minimal' standard of living for [himself]  
18 and [his] dependents if forced to repay the loans." Brunner, 831  
19 F.2d at 396 *cited in* Pena, 155 F.3d at 1111; (2) "additional  
20 circumstances exist indicating that this state of affairs is likely  
21 to persist for a significant portion of the repayment period of the  
22 student loans." Id.; and (3) "the debtor has made good faith  
23 efforts to repay the loans." Id.

24 The Ninth Circuit Bankruptcy Appellate Panel ("BAP") has  
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26 <sup>3</sup> Section 523(a)(8) has been amended to eliminate the seven  
27 year repayment exclusion. Higher Education Amendments of 1998,  
28 Pub.L. No. 105-244, 112 Stat. 1581, 1837. The amendment only  
applies to bankruptcies filed on or after October 7, 1998 and  
therefore does not affect this case.

1 recently ruled that a partial discharge of a student loan debt is  
2 not permissible under Section 523(a)(8) and the trial court must  
3 hold that the entire loan is either dischargeable or non-  
4 dischargeable. The BAP in United Student Aid Funds, Inc. v. Taylor  
5 (In re Taylor), 223 B.R. 747 (9th Cir. BAP 1998) ("Taylor") opined  
6 that the plain language of Section 523(a)(8) precludes partial  
7 discharge of a student loan. The BAP "noted that Congress included  
8 the phrase, 'to the extent,' in three other subdivisions of the  
9 dischargeability statute, § 523(a)(2), (a)(5), and (a)(7)." Id. at  
10 753. Such language serves as a qualifier in the subdivisions  
11 excepting some part of the debt from discharge if certain  
12 circumstances are met, but "to the extent" is not used in Section  
13 523(a)(8). "Furthermore, where Congress has failed to include  
14 language in statutes, it is presumed to be intentional when the  
15 phrase is used elsewhere in the Code." Id.

#### 16 17 IV. Analysis

##### 18 A. Current Minimal Standard of Living

19 This Court must first calculate Debtor's current income and  
20 expenses to determine whether he can maintain a minimal standard of  
21 living if required to repay his SMART loan. This determination is  
22 left to the discretion of the bankruptcy court. Pena at 1112.

23 Debtor testified and the parties stipulated that, as of the  
24 date of trial, he has an AGI of \$3,000 per month (\$36,000 per  
25 year). After subtracting taxes, pre-tax health insurance premiums  
26 (\$42.00) and payments to his 401(k) (\$400 per month), Debtor has a  
27 net income of \$1,885 per month. ECMC questions the monthly pre-tax  
28 contributions to Debtor's company-sponsored 401(k) plan. At this

1 time, this is the Debtor's only vehicle for saving money. He has  
2 no savings accounts. He does have a separate Individual Retirement  
3 Account("IRA") with a current balance of approximately \$1,700 which  
4 he received as a gift from his parents on his sixteenth birthday  
5 (he has made no contributions to it himself).

6 Debtor has been contributing to his 401(k) since he became  
7 eligible three months after beginning his employment with MBA.<sup>4</sup>  
8 There is no authority binding on this Court which holds that a  
9 debtor may never make any contribution to a 401(k) plan and still  
10 qualify for a hardship discharge. The vast majority of cases this  
11 Court has found deal with the question of whether a Chapter 13 plan  
12 which provides for 401(k) contributions is confirmable. Most  
13 courts have engaged in a case by case analysis: In re Powers, 202  
14 B.R. 618, 620 (9th Cir. BAP 1996)(allowed contribution when  
15 calculating whether to increase Chapter 13 plan payments); In re  
16 Williams, 223 B.R. 423, 429 (Bankr.W.D.Mo 1999)(speaks of reducing  
17 but not eliminating contribution to make small payments on student  
18 loan debt); In re Brown, 227 B.R. 540, 543 (S.D.Cal. 1998)(did not  
19 allow contribution because debtor had begun contributions three  
20 months before trial and was already qualified to collect a military  
21 pension). This Court would not favor a rule that debtors  
22 attempting to discharge debts alleged to be unduly burdensome may  
23 never put any money aside for retirement. To do so would merely  
24 shift the burden on the taxpayer from the national level, by  
25 discharging the government guaranteed-student loan, to the local

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26  
27 <sup>4</sup> Debtor currently has approximately \$8,000 in his 401(k). He  
28 testified that he may use that money to pay a portion of the HEAL  
loan.

1 level if insufficient funds at retirement were to necessitate  
2 resort to welfare. Nearly everyone should save some money for old  
3 age and retirement. The Court is of the view that the line of  
4 cases allowing judicial discretion to permit some contribution is  
5 the better reasoned.

6 In the instant case, Debtor is thirty-three years old and has  
7 many years left in which to save for his retirement. On the other  
8 hand, he will likely have to repay the Heal loan over many years.  
9 Although Debtor certainly needs to save some money for his  
10 retirement, the 401(k) payroll deduction of \$400.00 will be added  
11 back into Debtor's gross income figure merely for the purpose of  
12 conducting an initial analysis. However, the whole \$400.00 cannot  
13 be applied, as the payroll deduction occurs pre-tax. Debtor  
14 testified and ECMC raised no objection to an after-tax figure for  
15 the 401(k) contribution of approximately \$260 per month. Adding  
16 this to the previous net income figure equals \$2,145.00. The Court  
17 will use this figure in its analysis.

18 The Court then examines the Debtor's monthly expenses. At  
19 trial, Debtor introduced into evidence a list of expenses totaling  
20 \$ 1,953.56. But the Court must also factor in the non-  
21 dischargeable HEAL loan payment. The parties stipulated to a  
22 payment amount of \$290.00 per month.<sup>5</sup> Adding this to Debtor's  
23 expenses raises the dollar amount to \$2,243.56. This figure is  
24 already greater than Debtor's monthly net income.

25 ECMC questioned the difference between Debtor's current  
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27 <sup>5</sup> The parties use a value of \$31,000; a loan term of fifteen  
28 years which began when the loan was consolidated in 1995; and an  
interest rate of 8%.

1 expense for food (\$375.00) and that listed on his prior declaration  
2 filed in August 1998 (\$300.00). Debtor explained his relatively  
3 high food costs by the fact that his apartment is not equipped with  
4 a kitchen. Therefore, his ability to cook for himself is limited  
5 to frozen pre-packaged foods which he can prepare in the microwave.  
6 The balance of Debtor's meals are eaten out or carried back in.  
7 Debtor additionally testified that he had only moved out of his  
8 mother's house the month before filing the August declaration and  
9 that it was based on his limited experience of living independently  
10 at that time. Considering Debtor's housing situation and the  
11 corresponding low rent (\$750.00 per month), the Court does not find  
12 this expense unreasonable. It does not exceed a minimum standard  
13 of living.

14 Debtor, in his testimony, elaborated on the reasons for other  
15 increases in expenses, specifically the automobile maintenance  
16 costs and the difference in Debtor's Schedule 'J' expenses as  
17 compared to his current expenses. Debtor testified that his car is  
18 a 1992 Chrysler LeBaron with 108,000 miles on the odometer. The  
19 car's convertible top has several long tears in it, the rear window  
20 is broken, and the suspension is deteriorating. Debtor further  
21 testified that, in the prior month, he paid \$300.00 to fix an oil  
22 leak. Taking into account the age and condition of Debtor's  
23 automobile, the Court does not find Debtor's estimated expenses of  
24 \$250.00 unreasonable. The Court also notes that Debtor has made no  
25 provision in his expenses for the potential failure of this  
26 automobile and the subsequent need to purchase another.

27 Debtor also explained the rather significant increase in his  
28 expenses from those filed in his Schedule "J" of the Chapter 7

1 bankruptcy (\$505.00 total). Debtor testified that at the time of  
2 filing, he was living rent-free in his mother's house. According  
3 to the Schedule, his expenses mainly consisted of food (\$150.00),  
4 transportation (\$120.00), and seminar and bus expenses categorized  
5 under "other" (\$85.00). He testified that his mother paid the  
6 utilities and for much of the food, and that he was borrowing money  
7 from her to meet his own expenses.

8       Were the analysis to end here, the Debtor's Income would be  
9 \$2,145.00 and his expenses would be \$2,243.56. The parties further  
10 stipulated that a hypothetical payment due under this SMART LOAN,  
11 assuming that it too were determined to be non-dischargeable, would  
12 be \$635.00 per month.<sup>6</sup> This further raises the expenses figure to  
13 \$2,878.56: over seven hundred dollars more than Debtor's monthly  
14 net income. Even without the SMART loan factored in, Debtor has no  
15 disposable income. All of Debtor's expenses are reasonable,  
16 providing a very modest lifestyle. Some of Debtor's budgeted  
17 expenses are extremely low. For example, Debtor has only budgeted  
18 ten dollars per month for clothing and shoes, although he has to  
19 dress appropriately for work every day. He will need more money  
20 for that category of expenses than he has projected to maintain  
21 even a minimal standard of living. Because Debtor is barely able  
22 to meet his expenses now and because his expenses are very modest,

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25       <sup>6</sup> This figure is based on paying off the balance of \$62,921.89  
26 over fifteen years(from 1995) at 9% interest. Defendant later  
27 stated that this is a thirty year loan but did not provide an  
28 adjustment for the \$635 per month figure. However, as noted above,  
even if the monthly payments were reduced to approximately \$300, or  
even less, Debtor would have no disposable income from which to pay  
this loan.

1 the Court finds that Debtor has met the first prong of the Brunner  
2 test.

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4 **B. Additional Continuing Circumstances**

5 The second prong of the Brunner test requires the Debtor to  
6 demonstrate "additional circumstances exist that this state of  
7 affairs is likely to persist for a significant portion of the  
8 repayment period of the student loan." Brunner at 396. Several  
9 factors in the Debtor's circumstances indicate to the Court that  
10 his financial straits are likely to continue for some time. "[A]s  
11 part of the second prong analysis, the value of [Debtor's]  
12 education is relevant to his future ability to pay off the student  
13 loans." Pena at 1114. Debtor tried diligently but could not make  
14 ends meet as a chiropractor, so that field appears not to be a  
15 realistic option for him in the future. Moreover, Debtor no longer  
16 has a chiropractor license to practice in California because he  
17 cannot afford to pay for the licensing requirements in his current  
18 financial situation. Without a license, the degree is, for all  
19 practical purposes, useless. In addition, Debtor testified that  
20 the chiropractic degree is not transferable to any other profession  
21 and that other professional schools would not accept the academic  
22 credits earned in its pursuit. This is not to say that Debtor has  
23 received no benefit from his education, but does show that it has  
24 no direct practical value outside of the narrow field.

25 Turning to Debtor's future earning potential, the Court notes  
26 that Debtor has worked for MBA since March 1997. Debtor described  
27 his duties as providing technical support over the phone for the  
28 software products that MBA creates and distributes. Debtor

1 testified that his position has limited growth potential and that  
2 he has received no promotions and only one raise since beginning  
3 work there. He further testified that his employer expects him to  
4 put in overtime for which he is not compensated. As noted above,  
5 Debtor received an Associate of Science degree from Mission Junior  
6 College before obtaining his chiropractic degree. Debtor testified  
7 that his course load there had a pre-med focus and did not include  
8 any computer classes. For Debtor to improve his situation in the  
9 computer industry, he will require additional education or  
10 training. Debtor testified that he is attempting to take  
11 additional junior college courses and "self-teach" himself on the  
12 Internet. The computer industry is highly competitive and level of  
13 education is often a significant factor in hiring.<sup>7</sup> The Court will  
14 not assume that the Debtor would be likely, or able, to incur  
15 additional student loan debt to obtain new skills in order to pay  
16 off his existing loans, nor did ECMC contend that Debtor would be  
17 likely to be able to obtain such funding.

18 Another circumstance affecting Debtor is his having to repay  
19 his non-dischargeable HEAL loan. That obligation was a fifteen  
20 year note entered into in 1995. There are eleven years remaining  
21 under that commitment unless the Debtor and that lender reach a  
22 different agreement.<sup>8</sup> Debtor has not been able to pay regularly on  
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24 <sup>7</sup> Debtor testified that he found a Bachelor Degree to be an  
25 absolute minimum requirement to obtaining employment which pays a  
26 decent salary.

26 <sup>8</sup> Debtor testified that he has been unable to come to an  
27 agreement with SallieMae regarding the HEAL loan. The lender has  
28 refused to discuss the matter until the outcome of this case is  
known.

1 the HEAL loan for the last four years, so he is now about four  
2 years behind on his payments, plus whatever interest has accrued.  
3 Debtor also has post-bankruptcy debts to his mother for attorney's  
4 fees totaling \$6,900.00 at time of trial. Some \$40,000 in  
5 additional unsecured debt to Debtor's mother was discharged in his  
6 Chapter 7 bankruptcy, and Debtor has no legal obligation to repay  
7 those monies.

8 For all the above reasons, this Court determines that Debtor's  
9 financial situation is likely to continue for all or at least a  
10 significant portion of the repayment period of this loan.  
11 Defendant offered no evidence that Debtor has any better options  
12 open to him to refute Debtor's testimony regarding the same. The  
13 Court therefore finds that Debtor has satisfied the second part of  
14 the Brunner test.

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### C. Good Faith

17 ECMC maintains that Debtor cannot meet the good faith  
18 requirement of the Brunner test because he only made two payments  
19 on its consolidated loan. The good faith standard under Brunner  
20 requires that a debtor must either make an effort to repay the  
21 loans or show "that the forces preventing repayment are truly  
22 beyond his or her reasonable control." Brunner at 755. Furthermore,  
23 "[s]ince a debtor's good faith is interpreted in light of his  
24 ability to pay, a complete failure to make even minimal payments on  
25 a student loan does not prevent a finding of good faith where the  
26 debtor never had the ability to make payments." In re Lebovits, 223  
27 B.R. 265, 275 (Bankr.E.D.N.Y. 1998); In re Rose, 215 B.R. 755, 765-  
28 66 (Bankr.W.D.Mo 1997); In re Clevenger, 212 B.R. 139, 146

1 (Bankr.W.D.Mo 1997); In re Rosen, 179 B.R. 935, 941 (Bankr.Or.  
2 1995).

3 In the present case, Debtor testified that he obtained the  
4 allowed forbearances upon graduation or as the loans became due.  
5 He further testified that he made some payments while awaiting  
6 subsequent forbearances, both prior to loan consolidation as well  
7 as after. Debtor also stated that he had begun making regular  
8 payments in 1993 after receiving a raise at his first chiropractic  
9 job. He ended the payments only after he was terminated. When  
10 Debtor could no longer obtain forbearances on his original loans,  
11 he consolidated them in 1995 into the two loans originally at issue  
12 in this adversary proceeding. Debtor testified that his reason for  
13 consolidating the loans and accepting a higher rate of interest was  
14 to obtain more forbearances so as not to default on his loans.  
15 Debtor testified, and ECMC concurs, that Debtor made two interest-  
16 only payments on his consolidated loan in September 1995, which  
17 monies were borrowed from Debtor's mother. When no more  
18 forbearances were available on Debtor's loans and his situation had  
19 not improved such that he could make payments (in fact it had  
20 deteriorated significantly), Debtor filed for Chapter 7 bankruptcy.

21 The fact that Debtor obtained forbearances and regularly and  
22 carefully made payments while his applications for forbearances  
23 were under consideration distinguishes this case from the facts of  
24 Brunner. The debtor in Brunner "filed for discharge within a month  
25 of the date for the first payment on her loans came due, .... made  
26 virtually no attempt to repay, [and never] requested a deferment of  
27 payment, a remedy available to those unable to pay because of  
28 prolonged unemployment." Pena at 1114 *citing Brunner* at 758.

1 In this case, Debtor was scrupulously diligent and attentive  
2 with respect to his student loans. He made payments when his  
3 circumstances permitted, borrowed money to make payments between  
4 forbearances even when his circumstances were dire, and applied for  
5 and was granted forbearances when he could not pay. Debtor was  
6 very careful to take whatever measures were necessary to prevent  
7 his loans from going into default. As a result, there is no  
8 evidence before this Court that any of his student loans (including  
9 the ECMC SMART LOAN) was ever in default. For all of these  
10 reasons, the Court finds that Debtor made a good faith effort to  
11 repay his ECMC student loan and therefore has met the third prong  
12 of the Brunner test.

13

14 **D. Discharge in Part or Discharge in Whole**

15 ECMC argued that, assuming undue hardship was found in this  
16 case, only a partial discharge for its loan should be granted,  
17 pointing out that the Debtor thereby would be relieved of what  
18 could potentially be a lifelong burden and the lender would see  
19 some return of its investment. However, the Ninth Circuit BAP has  
20 recently ruled in Taylor that a partial discharge is not  
21 permissible under Section 523(a)(8). As stated above, the BAP  
22 ruled that the failure to include the phrase "to the extent" in  
23 523(a)(8) when it does appear in other subsections of Section 523  
24 precluded a bankruptcy court from granting a partial discharge.

25 While some other Courts have reached the opposite conclusion  
26 in interpreting Section 523(a)(8), none of those decisions is  
27 binding on this Court. The Ninth Circuit BAP characterized these  
28 cases as follows: "[T]hese bankruptcy courts have either found

1 §523(a)(8) to be ambiguous, .... or have relied on equitable  
2 principles." see Taylor at 753 n.12. The BAP found the language of  
3 Section 523(a)(8) "to be clear and unambiguous." Id. at 754. The  
4 BAP also found that "Section 105(a) [governing equity powers]  
5 cannot be used to circumvent the clear and unambiguous language of  
6 § 523(a)(8)." Id. This Court does not reach the question of  
7 whether it is bound by decisions of the BAP, but chooses to follow  
8 Taylor in this case.

9       Regardless of the issue decided in Taylor, this Court would  
10 grant a total discharge in this case. Unlike those cases in which  
11 the debtors had enough disposable income to make partial payments  
12 on their loans, (see In re Brown, 227 B.R. 540 (Bankr.S.D.Cal 1998)  
13 and Matter of Rivers, 213 B.R. 616 (Bankr.S.D.Ga. 1997)), this case  
14 presents a situation where Debtor has no disposable income even  
15 before the SMART loan is factored into the equation. And while the  
16 Debtor and SallieMae may come to an agreement regarding a payment  
17 schedule for the HEAL loan, such an agreement will likely consume  
18 any disposable income that is or becomes available. Debtor's  
19 obligation to ECMC is \$62,921.89 now and would be significantly  
20 increased by the accrual of interest even if ECMC were to agree  
21 voluntarily to wait until the HEAL loan is satisfied to begin  
22 receiving payments on its loan. The Court has no evidence that  
23 ECMC would agree to such a deferral in any event (see p. 15 n.8).  
24 The Debtor will not likely have any disposable income during the  
25 duration of the ECMC loan. Debtor cannot repay the ECMC loan and  
26 maintain a minimum standard of living.

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V. Conclusion

For the foregoing reasons, Debtor's obligation to Educational Credit Management Corp will be discharged in full pursuant to 11 U.S.C. Section 523(a)(8). Failure to do so would place an undue hardship on Debtor for the present duration of the student loan and much longer. Debtor has no ability to repay this loan. Counsel for Debtor is directed to prepare a form of order and submit it to the Court after having presented it for review as to form and substance upon counsel for ECMC.

DATED:

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ARTHUR S. WEISSBRODT  
UNITED STATES BANKRUPTCY JUDGE