

15

MAY -7 2015

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

In re: ) Case No. 11-26042-B-7  
 )  
 TANGERIE M. SHELLS, ) Adversary No. 14-2111  
 )  
 ) DC No. USA-2  
 Debtor(s). )

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TANGERIE M. SHELLS, )  
 )  
 Plaintiff(s), )

v. )  
 )  
 UNITED STATES DEPARTMENT OF )  
 EDUCATION, )  
 )  
 Defendant(s). )

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**MEMORANDUM DECISION ON MOTION FOR SUMMARY JUDGMENT**

**INTRODUCTION**

The defendant, the United States acting on behalf of its agency - the United States Department of Education, seeks summary judgment on plaintiff Tangerie Shells' 11 U.S.C. § 523(a)(8) claim seeking to discharge a student loan. Plaintiff has filed a response to the motion for summary judgment.

Plaintiff is a 47 year-old social worker. She has a bachelor's and a master's degree in social work which she financed with the subject student loan. Plaintiff filed a chapter 7 bankruptcy on March 11, 2011. She received a discharge on June 27, 2011. Plaintiff's student loan was not discharged under § 523(a)(8). Plaintiff reopened her chapter 7

1 case on April 8, 2014. She filed this adversary proceeding on  
2 April 24, 2014.

3 Because the material facts are not in dispute and because  
4 under those undisputed facts plaintiff cannot establish an  
5 "undue hardship" as a matter of law, the defendant's motion for  
6 summary judgment will be granted.

7

8 **STATEMENT OF FACTS**

9 The subject of this action is a student loan that plaintiff  
10 used to finance her education and obtain a bachelor's and  
11 master's degree in social work. In March of 2007, plaintiff  
12 consolidated private loans into one new \$96,205.59 loan at 7.375  
13 percent, from the United States Department of Education.  
14 Plaintiff's student loan has now grown to \$137,545.82. The loan  
15 continues to accrue interest at 7.375 percent (\$25.72) per day.

16 Plaintiff requested and received an Income Contingent  
17 Repayment ("ICR") plan with an initial monthly payment of  
18 \$772.33 beginning in December of 2008. The ICR payment plan  
19 required plaintiff to make loan payments based upon her income,  
20 family size, and total amount borrowed for a period of 25 years  
21 at which point any remaining balance would be forgiven.  
22 Plaintiff defaulted on her first payment, obtained a series of  
23 forbearances, and defaulted again.

24 Plaintiff made no payments between December 2008 and March  
25 of 2011. Plaintiff filed a chapter 7 bankruptcy on March 11,  
26 2011. Plaintiff also made no student loan payments between  
27 March 11, 2011, to the time she received a discharge on June 27,  
28 2011. It was not until March 13, 2013, that plaintiff requested

1 and received an Income Based Repayment ("IBR") plan. The IBR  
2 plan required plaintiff to make loan payments based solely upon  
3 her income over 25 years at which time the balance of the loan  
4 would be forgiven. Plaintiff's initial monthly payment was  
5 either \$316.62 or \$321, but the difference is not material.  
6 Plaintiff made four payments totaling \$1,266.48. She then  
7 stopped paying and defaulted again.

8 Plaintiff is married with three children. Her husband is  
9 disabled. Plaintiff is employed full-time by the County of  
10 Sacramento, Children's Protective Services, and has been since  
11 April 20, 1998. After taxes, plaintiff reports net monthly  
12 income of \$5,902 - or \$70,824 annually. She receives retirement  
13 and health benefits from her employer. As a county employee,  
14 plaintiff may also be eligible for a public service loan  
15 forgiveness program which would result in the forgiveness of her  
16 student loan in 10 years with no tax consequences.

17 Plaintiff reports monthly expenses of \$5,861. Of those,  
18 the court takes special note of the following: a car payment of  
19 \$568, cable/tv of \$140, cell phone of \$240, a children's savings  
20 deposit of \$50, "meals out" of \$175, "entertainment" of \$150,  
21 and "vacation" of \$121. Together these monthly expenses total  
22 \$1,444 and equal approximately 25 percent of plaintiff's  
23 reported monthly expenses. The reported monthly expenses for  
24 "children's savings," "meals out," "entertainment," and  
25 "vacation" alone total \$496.

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1 **JURISDICTION, VENUE, AND NOTICE**

2 Federal subject-matter jurisdiction is founded on 28 U.S.C.  
3 § 1334. This matter is a core proceeding that a bankruptcy  
4 judge may hear and determine. 28 U.S.C. §§ 157(b)(2)(A), (I),  
5 and (O). To the extent it may ever be determined to be a matter  
6 that a bankruptcy judge may not hear and determine without  
7 consent, the parties nevertheless consent to such determination  
8 by a bankruptcy judge. 28 U.S.C. § 157(c)(2). Venue is proper  
9 under 28 U.S.C. § 1409.

10 Notice of the motion and the hearing on the motion was  
11 given to required parties. Plaintiff responded on May 4, 2015.  
12 The matter was heard on May 5, 2015. Jeffrey J. Lodge, Esq.,  
13 appeared telephonically for the defendant. Plaintiff did not  
14 appear.

15  
16 **APPLICABLE LEGAL STANDARD**

17 Federal Rule of Civil Procedure 56, made applicable to this  
18 proceeding by Federal Rule of Bankruptcy Procedure 7056,  
19 provides that summary judgment is appropriate if documents,  
20 depositions, answers to interrogatories, admissions on file, and  
21 declarations, if any, show that there is "no genuine issue of  
22 fact and that the moving party is entitled to judgment as a  
23 matter of law." Fed. R. Civ. P. 56(a), (c); see also *Celotex*  
24 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). All reasonable  
25 inferences to be drawn from the underlying facts must be viewed  
26 in the light most favorable to the nonmoving party. *Matsushita*  
27 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)  
28 (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655

1 (1962)).

2 "The initial burden of showing the absence of a material  
3 factual issue is on the moving party. Once that burden is met,  
4 the opposing party must present specific facts, and not  
5 allegations, to show that a genuine factual issue remains for  
6 trial." *DeHorney v. Bank of America N.T.&S.A.*, 879 F.2d 459,  
7 464 (9th Cir. 1989); see also *Celotex*, 477 U.S. at 324-325.  
8 Additionally, when the moving party does not bear the burden of  
9 proof of trial it may discharge its summary judgment burden of  
10 showing no genuine issue of material fact remains by  
11 demonstrating "there is an absence of evidence to support the  
12 nonmoving party's case." *Celotex*, 477 U.S. at 325. Summary  
13 judgment is appropriate if the nonmoving party fails to make a  
14 sufficient showing of an element of its case with respect to  
15 which it has the burden of proof. *Nissan Fire & Marine Ins. Co.*  
16 *v. Fritz Cos.*, 210 F.3d 1099, 1106 (9th Cir. 2000).

17 Student loan obligations are presumptively nondischargeable  
18 in bankruptcy absent a showing of "undue hardship." 11 U.S.C.  
19 § 523(a)(8); *Hedlund v. Educ. Resources Inst., Inc.*, 718 F.3d,  
20 848, 851 (9th Cir. 2013). Section 523(a)(8) states:

21 A discharge under section 727 . . . does not discharge  
22 an individual debtor from any debt-- unless excepting  
23 such debt from discharge under this paragraph would  
24 impose an undue hardship on the debtor and the  
25 debtor's dependents, for (i) an educational benefit  
26 overpayment or loan made, insured, or guaranteed by a  
27 governmental unit, or made under any program funded in  
28 whole or in part by a governmental unit or nonprofit  
institution; or (ii) an obligation to repay funds  
received as an educational benefit, scholarship, or  
stipend.

11 U.S.C. § 523(a)(8).

Under § 523(a)(8), the lender has the initial burden to

1 establish the existence of the debt and that the debt is an  
2 educational loan within the statute's parameters. *Roth v. Educ.*  
3 *Credit Mgmt. Corp.*, 490 B.R. 908, 916-17 (9th Cir. BAP 2013)  
4 (citation omitted). Defendant has met that burden inasmuch as  
5 plaintiff admitted that the student loan at issue here is a  
6 student loan within the meaning of § 523(a)(8), owed to the  
7 United States, with a balance of \$137,890.29, and accrues  
8 interest at the rate of 7.375 percent (\$25.72 per day).

9 Once the lender meets its burden, the burden shifts to the  
10 debtor - here the plaintiff - to prove "undue hardship."  
11 *Hedlund*, 718 F.3d at 851; *Rifino v. United States (In re*  
12 *Rifino)*, 245 F.3d 1083, 1087-88 (9th Cir. 2001); *Roth*, 490 B.R.  
13 at 916-17. To show of "undue hardship," the plaintiff must  
14 prove that:

15 (1) she cannot maintain, based on current income and  
16 expenses, a "minimal" standard of living for herself  
and her dependents if obligated to repay the loan;

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

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

21 *Hedlund*, 718 F.3d at 851 (citing *Brunner v. New York Higher*  
22 *Educ. Serv. Corp.*, 831 F.2d 395 (2d Cir. 1987));<sup>1</sup> *Educ. Credit*  
23 *Mgmt. Corp. v. Mason (In re Mason)*, 464 F.3d 878, 882 (9th Cir.  
24 2006). "[T]he burden of proving undue hardship is on the debtor,  
25 and the debtor must prove all three elements before discharge  
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27 <sup>1</sup>The Circuit adopted the *Brunner* test in *United Student Aid*  
28 *Funds, Inc. v. Pena (In re Pena)*, 155 F.3d 1108, 1111-12 (9th Cir.  
1998).

1 can be granted." *Rifino*, 245 F.3d at 1087-88. The plaintiff  
2 has not satisfied - and cannot satisfy - her burden as to any of  
3 the *Brunner* elements.

4  
5 **DISCUSSION**

6 **PLAINTIFF'S REQUEST FOR A CONTINUANCE**

7 Plaintiff filed an untimely "rebuttal" to the defendant's  
8 summary judgment motion on the day before the defendant's motion  
9 was set to be heard. Plaintiff requested a continuance so that  
10 she could prepare another "rebuttal" to the defendant's summary  
11 judgment motion. Because plaintiff's response does not  
12 demonstrate (by affidavit, declaration, or otherwise) what, if  
13 any, additional facts exist and/or how any such additional  
14 facts, if any, preclude summary judgment plaintiff's request for  
15 a continuance will be denied. *Chance v. Pac-Tel Teletrac Inc.*,  
16 242 F.3d 1151, 1161 n. 6 (9th Cir. 2001).

17 The court also notes that plaintiff filed this adversary  
18 proceeding over a year ago - on April 14, 2014. She was  
19 permitted to amend several times. A scheduling allowed  
20 plaintiff to conduct discovery through March 30, 2015.  
21 Plaintiff cannot now complain if she failed to take advantage of  
22 the opportunity to conduct discovery. *Solis v. McKesson*, 2010  
23 WL 3504807 at \*2 (E.D. Cal. 2010). Accordingly, the court will  
24 consider defendant's motion for summary judgment.

25  
26 **DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

27 The defendant maintains that the plaintiff cannot show  
28 undue hardship and that there are no triable issues of fact.

1 All facts referenced above and stated and discussed below are  
2 undisputed. The facts are based on the plaintiff's documents,  
3 admissions, and bankruptcy schedules which the court also treats  
4 as admissions since the schedules are signed under oath.

5 First Prong

6 There is no genuine issue of material fact that the  
7 plaintiff can maintain - based on current income and expenses -  
8 a "minimal" standard of living for herself and her dependents if  
9 she is obligated to repay her student loan. When analyzing  
10 whether a "minimal" standard of living can be maintained, "the  
11 debtor must demonstrate more than simply tight finances."  
12 *Rifino*, 245 F.3d at 1088 (citation omitted).

13 Plaintiff has a steady job which she has had for over  
14 sixteen years. She is a county employ who reports a *net* monthly  
15 income of \$5,902. Her employer provides benefits. According to  
16 the schedules plaintiff filed in her chapter 7 bankruptcy case,  
17 during the period when she was not making monthly student loan  
18 payments, plaintiff still managed to contribute \$482 per month  
19 to a pension and 457B retirement plan. Plaintiff also concedes  
20 that, as a county employee engaged in public service, she may be  
21 eligible for loan forgiveness after only ten years of repayment.  
22 As noted above and discussed below, plaintiff also has a  
23 significant amount of disposable income that she is able to  
24 divert to defendant to repay her student.

25 Some courts have declined to discharge student loan debt  
26 where the debtor's budget included a cable television, high car  
27 payments, high clothing expenses, and extravagant food expenses.  
28 *See United Student Aid Funds, Inc. v. Nascimento (In re*

1 Nascimento), 241 B.R. 440, 445-446 (9th Cir. BAP 1999) (holding  
2 that a debtor's expenses were not minimal because they included  
3 a hairdresser, chiropractor, and \$544 car payment); *Chapelle v.*  
4 *Educ. Credit Mgmt. Corp. (In re Chapelle)*, 328 B.R. 565, 570  
5 (Bankr. C.D. Cal. 2005) (finding debtor's \$100 recreation and  
6 \$100 clothing expenses unreasonable). A significant number of  
7 the monthly expenses reported by the plaintiff appear excessive,  
8 unreasonable, and not necessary to allow the plaintiff to  
9 maintain a "minimal" standard of living.

10 Plaintiff reports that she allocates \$50 per month to her  
11 children for "savings," \$150 per month for "entertainment," \$175  
12 per month for "meals out," and \$121 per month for "vacation."  
13 Combined, these allocations total \$496. That amount exceeds  
14 plaintiff's last monthly student loan payment - even at \$321 -  
15 by at least \$175 per month. Diverting a portion of these  
16 "expenses" which total \$496 to the defendant would still allow  
17 plaintiff to make a monthly student loan payment of \$321,  
18 maintain her current standard of living, retain a reasonable  
19 monthly entertainment budget of \$125, and permit the plaintiff  
20 to continue to contribute \$50 per month towards her childrens'  
21 savings.<sup>2</sup>

22 In short, plaintiff cannot establish that she is unable to  
23 maintain a "minimal" standard of living for herself and her  
24 dependents if she is obligated to repay her student loan to the  
25 defendant. The undisputed facts show that minor adjustments to  
26 the plaintiff's monthly expenses would allow her to make monthly

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27 <sup>2</sup>It would also leave untouched plaintiff's significant car  
28 payment, cell phone, and cable TV expenses.

1 student loan payments of \$321 under the last IBR plan, retain  
2 money for monthly "entertainment" expenses, and continue to  
3 contribute to her childrens' savings all while maintaining her  
4 current above-minimal standard of living which is well-above  
5 federal poverty standards for a family of five.<sup>3</sup> Because "[i]t  
6 is the [d]ebtor's duty to adjust her lifestyle to allow her to  
7 make the payments on her student loan[,]" *Nascimento*, 241 B.R.  
8 at 446, the court does not consider it unconscionable to require  
9 the debtor to redirect her income as outlined above so that she  
10 can repay her student loan obligation. *Id.* at 445.

11 Second Prong

12 In order to satisfy the "additional circumstances" element  
13 of the second prong, the debtor must show circumstances beyond  
14 the mere current inability to pay that are likely to persist  
15 throughout the repayment period. *Educ. Credit Mgmt. Corp v. Nys*  
16 (*In re Nys*, 446 F.3d 938, 945-947 (9th Cir. 2006). "The  
17 circumstances need be 'exceptional' only in the sense that they  
18 demonstrate insurmountable barriers to the debtor's financial  
19 recovery and ability to pay." *Id.* at 946; *Pennsylvania Higher*  
20 *Education Assistance Agency v. Birrane (In re Birrane)*, 287 B.R.  
21 490, 497 (9th Cir. BAP 2002). Additionally, this prong looks to  
22 the future and, to some extent, requires the court to speculate  
23 as to whether the debtor's financial condition will improve  
24 sufficiently to permit the repayment of her student loan  
25 obligations. *Birrane*, 287 B.R. at 498-99.

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27 <sup>3</sup>The 2015 poverty guideline for a family of five is \$28,410.  
28 U.S. Department of Health & Human Services 2015 Poverty  
Guidelines.

1 Plaintiff has produced no evidence that she faces  
2 insurmountable barriers to repayment of her student loan  
3 obligation, and the court can find none in the record.  
4 Plaintiff is 47 years old, holds a master's degree, is steadily  
5 employed, and will remain employed and employable for the  
6 foreseeable future. Plaintiff does not suffer from any mental  
7 or physical disability and, with her degree, nothing prevents  
8 her from seeking and obtaining higher-paying employment in the  
9 education or social work field. The court notes that  
10 plaintiff's husband is disabled; however, the court finds that  
11 alone is not an insurmountable barrier given the amount of  
12 income available to the plaintiff and the plaintiff's ability to  
13 adjust how she spends her monthly income without any impact on  
14 her present lifestyle.

15 The court similarly cannot find any evidence in the record  
16 that plaintiff's current inability to repay her student loan  
17 obligation is likely to persist throughout the loan repayment  
18 period for at least two additional reasons. First, the monthly  
19 adjustments noted above would result in an immediate realization  
20 of sufficient monthly income to allow the plaintiff to make a  
21 \$321 monthly payment towards her student loan obligation under  
22 the IBR repayment plan. In other words, a simple adjustment by  
23 the plaintiff and a reassignment of her priorities would result  
24 in an immediate realization of sufficient income to repay her  
25 student loan debt. Second, as a government employee engaged in  
26 a public service occupation, plaintiff will be eligible for  
27 total loan forgiveness in ten years.

28 In short, plaintiff's financial situation is a product of

1 choice in spending the monthly paycheck rather than ill health,  
2 lack of education, or some other circumstance beyond her  
3 control. In that respect, because plaintiff's purported  
4 financial woes are self-inflicted, and because plaintiff created  
5 her own current inability to pay by allocating funds that could  
6 be used for repayment to non-essential items, she is unable to  
7 prove that she has adverse financial conditions that are likely  
8 to persist during a significant portion of the repayment period.  
9 See *Furneri v. Graduate Loan Center, et al.*, 266 B.R. 447 (D.  
10 Alaska 2001).

11 Third Prong

12 The undisputed facts in the record further demonstrate that  
13 plaintiff cannot establish that she has made good faith efforts  
14 to repay her student loan. Good faith is measured by the  
15 debtor's efforts to obtain employment, maximize income, and  
16 minimize expenses. *Hedlund*, 718 F.3d at 852; *Birrane*, 287 B.R.  
17 at 499. Courts also consider whether the debtor has made any  
18 payments on the loan prior to filing for discharge, *Jorgensen v.*  
19 *Educ. Credit Mgmt. Corp.*, 479 B.R. 79, 89 (9th Cir. BAP 2012),  
20 whether the debtor has sought deferments or forbearances, *East*  
21 *v. Educ. Credit Mgmt. Corp. (In re East)*, 270 B.R. 485, 495  
22 (Bankr. E.D. Cal. 2001), and the timing of the debtor's attempt  
23 to have the loan discharged, *Educ. Credit Mgmt. Corp. v. DeGroot*  
24 *(In re DeGroot)*, 339 B.R. 201, 214 (D. Or. 2006).

25 Examining these factors in light of the undisputed facts,  
26 good faith efforts to repay are lacking. Plaintiff made no  
27 payments on her student loan between March of 2007 (when her  
28 private loans were consolidated with a loan from the defendant)

1 through March of 2013 (when she was approved for the IBR payment  
2 plan). After plaintiff was approved for the IBR plan in March  
3 of 2013, she made only four payments and stopped paying.

4 Plaintiff maxed out deferments and defaulted multiple times.  
5 That means plaintiff made zero payments on her student loan  
6 before she filed bankruptcy in March of 2011 and, significantly,  
7 zero payments before she received her discharge in June of 2011.

8 During the time plaintiff made no payments, *i.e.*, between  
9 March of 2007 and March of 2013, plaintiff also made no effort  
10 to reduce her monthly expenses. In fact, plaintiff actually  
11 *increased* expenses during the non-repayment period. According  
12 to Schedule D filed in plaintiff's chapter 7 bankruptcy case,  
13 plaintiff incurred \$68,000 in secured debt in October of 2009.  
14 She also incurred additional unsecured debt as reflected by  
15 current payments on credit cards now reported and which, if  
16 discharged, would not require payment. Plaintiff's phone bill  
17 also went from \$25 as reported in her bankruptcy Schedule I to  
18 the \$240 she now reports for cell phones, plus an additional \$89  
19 for "internet/phone." And, as noted above, plaintiff elected to  
20 allocate \$496 per month to expenses not reasonably necessary to  
21 allow her and her family to maintain a minimal standard of  
22 living, *i.e.*, childrens' savings, entertainment, meals out, and  
23 vacation, rather than use those funds for loan repayment.

24 In the eight years since she obtained her student loan from  
25 the defendant, plaintiff has deferred, defaulted, and made a  
26 total of four payments. Although plaintiff negotiated repayment  
27 plans, she failed to perform under the plans negotiated. In  
28 that respect, plaintiff's effort to repay is tantamount to no

1 effort at all despite plaintiff's significant discretionary  
2 income that, when redirected, permits her to make at least a  
3 \$321 monthly payment towards repayment of her student loan.  
4 Taking all these facts together, there are no material disputed  
5 facts that the plaintiff has not made a good faith effort to  
6 repay the student loan. Put another way, the undisputed facts  
7 establish that plaintiff made no good faith effort to repay her  
8 student loan.

9

10 CONCLUSION

11 Based on all the foregoing, the defendant's motion for  
12 summary judgment will be granted.

13 A separate order and judgment will enter.

14 Dated: May 6, 2015.

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UNITED STATES BANKRUPTCY JUDGE

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**INSTRUCTIONS TO CLERK OF COURT  
SERVICE LIST**

The Clerk of Court is instructed to send the attached document, via the BNC, to the following parties:

Tangerie M. Shells  
5922 Villa Rosa Way  
Elk Grove CA 95758

Jeffrey J. Lodge  
2500 Tulare St #4401  
Fresno CA 93721