

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

Honorable Fredrick E. Clement
Fresno Federal Courthouse
2500 Tulare Street, 5th Floor
Courtroom 11, Department A
Fresno, California

PRE-HEARING DISPOSITIONS

DAY: WEDNESDAY
DATE: SEPTEMBER 23, 2015
CALENDAR: 10:00 A.M. CHAPTER 7 ADVERSARY PROCEEDINGS

GENERAL DESIGNATIONS

Each pre-hearing disposition is prefaced by the words "Final Ruling," "Tentative Ruling" or "No Tentative Ruling." Except as indicated below, matters designated "Final Ruling" will not be called and counsel need not appear at the hearing on such matters. Matters designated "Tentative Ruling" or "No Tentative Ruling" will be called.

COURT'S ERRORS IN FINAL RULINGS

If a party believes that a final ruling contains an error that would, if reflected in the order or judgment, warrant a motion under Federal Rule of Civil Procedure 60(a), as incorporated by Federal Rules of Bankruptcy Procedure 9024, then the party affected by such error shall, not later than 4:00 p.m. (PST) on the day before the hearing, inform the following persons by telephone that they wish the matter either to be called or dropped from calendar, as appropriate, notwithstanding the court's ruling: (1) all other parties directly affected by the motion; and (2) Kathy Torres, Judicial Assistant to the Honorable Fredrick E. Clement, at (559) 499-5860. Absent such a timely request, a matter designated "Final Ruling" will not be called.

1. [15-11535](#)-A-7 JOHN HALOPOFF STATUS CONFERENCE RE: COMPLAINT
[15-1098](#) 7-27-15 [[1](#)]
WESTERN SURETY COMPANY V.
HALOPOFF
RAY GARWACKI/Atty. for pl.

Final Ruling

This matter is continued to October 21, 2015, at 10:00 a.m.

2. [15-11535](#)-A-7 JOHN HALOPOFF STATUS CONFERENCE RE: COMPLAINT
[15-1099](#) 7-27-15 [[1](#)]
THE BOARD OF TRUSTEES ET AL V.
HALOPOFF
TRACY MAINGUY/Atty. for pl.
DISMISSED: 9/10/15

Final Ruling

The adversary proceeding dismissed, the status conference is concluded.

3. [14-15952](#)-A-7 AUSTREBERTO MAGANA CONTINUED STATUS CONFERENCE RE:
[15-1059](#) COMPLAINT
HAWKINS V. MAGANA 5-12-15 [[1](#)]
ROBERT HAWKINS/Atty. for pl.

No tentative ruling.

4. [14-14479](#)-A-7 FABIO GALVEZ MOTION TO DISMISS ADVERSARY
[14-1153](#) USA-1 PROCEEDING/NOTICE OF REMOVAL
GALVEZ ET AL V. THE UNITED 8-17-15 [[61](#)]
STATES OF AMERICA, THE
JEFFREY LODGE/Atty. for mv.

Tentative Ruling

Motion: Dismiss Complaint for Failure to State a Claim

Notice: LBR 9014-1(f)(1); written opposition required

Disposition: Denied

Order: Civil minute order

Defendant United States moves under Federal Rule of Civil Procedure 12(b)(6) to dismiss plaintiff Fabio Galvez's complaint for failure to state a claim. Galvez's complaint requests an order determining that his student loans are dischargeable under section 523(a)(8) of the Bankruptcy Code because excepting such loans would present an undue hardship on him. No opposition has been filed to the motion.

RULE 12(b)(6) STANDARDS

Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6), *incorporated by* Fed. R. Bankr. P. 7012(b). "A Rule 12(b)(6) dismissal may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121-22 (9th Cir. 2008); *accord Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

The Supreme Court has established the minimum requirements for pleading sufficient facts. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

In ruling on a Rule 12(b)(6) motion to dismiss, the court accepts all factual allegations as true and construes them, along with all reasonable inferences drawn from them, in the light most favorable to the non-moving party. *Spewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The court need not, however, accept legal conclusions as true. *Iqbal*, 556 U.S. at 678. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

In addition to looking at the facts alleged in the complaint, the court may also consider some limited materials without converting the motion to dismiss into a motion for summary judgment under Rule 56. Such materials include (1) documents attached to the complaint as exhibits, (2) documents incorporated by reference in the complaint, and (3) matters properly subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *accord Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007) (per curiam) (citing *Jacobson v. Schwarzenegger*, 357 F. Supp. 2d 1198, 1204 (C.D. Cal. 2004)). A document may be incorporated by reference, moreover, if the complaint makes extensive reference to the document or relies on the document as the basis of a claim. *Ritchie*, 342 F.3d at 908 (citation omitted).

CLAIM FOR DISCHARGEABILITY UNDER SECTION 523(a)(8)

Legal Standards

The Ninth Circuit has formally adopted the three-prong test from *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987), *aff'g* 46 B.R. 752 (S.D.N.Y. 1985), to determine whether a debtor can discharge a student loan for undue hardship. See *U.S. Aid Funds, Inc. v. Pena (In re Pena)*, 155 F.3d 1108, 1112 (9th Cir. 1998). The *Brunner* test requires that the debtor establish the following:

- (1) That the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans;
- (2) That additional circumstances exist indicating that the debtor's state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and
- (3) That the debtor has made a good faith effort to repay the loans.

Id. at 1111. The debtor's failure to prove any of these prongs will preclude discharge of the student loan. *Carnduff v. U.S. Dep't of Educ. (In re Carnduff)*, 367 B.R. 120, 127 (B.A.P. 9th Cir. 2007).

Burdens

"[T]he lender has the initial burden to establish the existence of the debt and that the debt is an educational loan within the statute's parameters." *Roth v. Educ. Credit Mgmt. Corp. (In re Roth)*, 490 B.R. 908, 916 (B.A.P. 9th Cir. 2013). Once the lender has met its burden, the burden then shifts to the debtor. *Roth*, 490 B.R. at 916-17. "[T]he burden of proving undue hardship is on the debtor, and the debtor must prove all three elements [of *Brunner*] before discharge can be granted." *Rifino v. United States (In re Rifino)*, 245 F.3d 1083, 1087-88 (9th Cir. 2001).

The court notes here that the United States incorrectly seeks to place the burden on Galvez of establishing the existence of the debt and that the debt is a loan within the statute's parameters. The United States argues that the terms of the loans should be described in the complaint. Def.'s Mot. Dismiss. at 4, ECF No. 61. The court disagrees especially given that the burden is on the United States to show the existence of the debt and that the debt is within § 523(a)(8)'s scope.

Minimal Standard of Living

For the first prong, the debtor must prove that she cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans. *Pena*, 155 F.3d at 1111. "To meet this requirement, the debtor must demonstrate more than simply tight finances. In defining undue hardship, courts require more than temporal financial adversity, but typically stop short of utter hopelessness." *Rifino*, 245 F.3d at 1088 (citation omitted) (internal quotation marks omitted). "Application of the first prong of the undue hardship test requires an examination of a debtor's current finances[, and] [t]he meaning of a 'minimal standard of living' must be determined in light of the particular facts of each case." *Educ. Credit. Mgmt. Corp. v. Howe (In re Howe)*, 319 B.R. 886, 890 (B.A.P. 9th Cir. 2005) (citations omitted) (internal quotation marks omitted).

In this case, Galvez has sufficiently pleaded facts showing that he cannot maintain a minimal standard of living based on current income and expenses if forced to replay his student loans. The complaint, drafted by Galvez in pro per, states "I cannot afford, even at a reduced monthly payment, to pay the debt." Compl. at p. 3. Additionally, Galvez alleges that he "use[s] all disposable funds for

everyday living expenses and necessities." Compl. at p. 4. He also alleges facts indicating that living costs are high and that he suffers from a medical condition that requires an expensive diet, constant monitoring, medicines and equipment. Compl. at p. 5. He claims that his funds are depleted before the end of the month. *Id.*

Furthermore, Galvez alleges he cannot have direct contact with family because of his income. His expenditures are not frivolous, he does not take vacations or even "go out" often, and he does not pay for cable or internet. These facts, if taken as true, give the United States sufficient notice of what claims have been brought and the factual grounds for such claims. Specific evidence of actual income and expense figures need not be provided at the pleading stage. The complaint presents plausible facts that Galvez cannot maintain a minimal standard of living for himself and his

Additional Circumstances

For the second prong, the debtor must prove additional circumstances exist indicating that the debtor's state of affairs is likely to persist for a significant portion of the repayment period of the student loans. *Pena*, 155 F.3d at 1111. In other words, "the determinative question is whether the debtor's inability to pay will, given all we know about the salient features of her existence, persist throughout a substantial portion of the loan's repayment period." *Educ. Credit Mgmt. Corp. v. Nys (In re Nys)*, 446 F.3d 938, 946 (9th Cir. 2006). The court must "presume that the debtor's income will increase to a point where she can make payments and maintain a minimal standard of living; however, the debtor may rebut that presumption with 'additional circumstances' indicating that her income cannot reasonably be expected to increase and that her inability to make payments will likely persist throughout a substantial portion of the loan's repayment period." *Nys*, 446 F.3d at 946.

There is no "requirement that additional circumstances be 'exceptional' in the sense that the debtor must prove a 'serious illness, psychiatric problems, disability of a dependent, or something which makes the debtor's circumstances more compelling than that of an ordinary person in debt. Undue hardship requires only a showing that the debtor will not be able to maintain a minimal standard of living now and in the future if forced to repay her student loans." *Nys*, 446 F.3d at 946. Therefore, these "circumstances need be 'exceptional' only in the sense that they demonstrate insurmountable barriers to the debtors' financial recovery and ability to pay." *Id.* (internal quotation marks omitted).

The Ninth Circuit has provided a non-exhaustive list of some of the additional circumstances that a debtor can prove. *Nys*, 446 F.3d at 947. "These 'additional circumstances' are meant to be objective factors that courts can consider when trying to predict the debtor's future income." *Id.* at 945.

Although the complaint could have been more specific regarding the details of Galvez's medical condition, the court will not require evidence of his condition at this stage of the proceedings. Galvez sufficiently alleges an additional circumstance that could plausibly be an insurmountable barrier to financial recovery. Compl. at p. 3, 5. He refers to his condition as a "chronic life[-]threatening illness" that requires "vital recurrent medical exams and tests" to ensure that this condition remains under control. *Id.* His condition

requires "expensive diet, constant and consistent monitoring." It also requires medicines and equipment. From these allegations, taken as true in the light most favorable to Galvez, the court infers that this condition could plausibly persist throughout a substantial portion of the loan's repayment period, whatever that period may be. See, e.g., *Educ. Credit Mgmt. Corp. v. Mason (In re Mason)*, 464 F.3d 878, 883-84 (9th Cir. 2006) (holding that bankruptcy court did not clearly err in finding that debtor's learning disability was an additional circumstance indicating debtor's inability to pay would persist for a significant period of time). A chronic medical condition that requires constant monitoring and medical check-ups could plausibly impair Galvez's ability to earn a sufficient income now or in the future. See *id.* at 883. Finally, Galvez also alleges that his education was subpar. Compl. at 2, 4.

Good Faith

For the third prong, the debtor must prove that she has made a good faith effort to repay the loans. *Pena*, 155 F.3d at 1111. The court should consider the debtor's efforts (or lack thereof) in the following: (1) obtaining employment, (2) maximizing income, and (3) minimizing expenses. *Mason*, 464 F.3d at 884.

The court should also consider the debtor's efforts (or lack thereof) to negotiate a repayment plan (such as by exploring the ICRP option). *Hedlund v. Educ. Res. Inst. Inc.*, 718 F.3d 848, 852, 855 (9th Cir. 2013); *Mason*, 464 F.3d at 884. Yet, "failure to negotiate or accept an alternative repayment plan is not dispositive," and [a]ny offered repayment plan's terms, duration, and consequences need to be examined." *Roth*, 490 B.R. at 917. Additionally, a debtor's refusal to apply for or enroll in a repayment plan (such as the IBRP) does not necessarily indicate lack of good faith where the plan would not have required any payment from her since the debtor should not be obligated to engage in futile acts. *Id.* at 919-20.

The court can also consider whether the debtor has made any voluntary payments on the student loan, "although a history of making or not making payments is, by itself, not dispositive." *Hedlund*, 718 F.3d at 852, 855. Additionally, "lack of even minimal voluntary payments is not lack of good faith if the debtor did not have the financial wherewithal to make them." *Roth*, 490 B.R. at 918.

Whether the debtor has sought or considered other loan options is another consideration. Such loan options include deferments, forbearances, and loan consolidation that could make the debt less onerous. *Roth*, 490 B.R. at 917; *Educ. Credit Mgmt. Corp. v. Frushour (In re Frushour)*, 433 F.3d 393, 402 (4th Cir. 2005) (citing *Alderete v. Educ. Credit Mgmt. Corp. (In re Alderete)*, 412 F.3d 1200, 1206 (10th Cir. 2005)); accord *Nys*, 446 F.3d at 947.

Lastly, the court may also take into account the length of time that the debtor has waited before filing bankruptcy and seeking discharge of the loan. *Hedlund*, 718 F.3d at 855-56. And it should consider "whether the debtor's financial condition resulted from factors beyond her reasonable control, as a debtor may not willfully or negligently cause her own default." *Roth*, 490 B.R. at 917.

Galvez's complaint meets the minimal standards for pleading whether he has made a good faith effort to repay the loans. Galvez states that he has tried to stay in school and has had training courses to help

him find employment that would permit him to maintain a minimal standard of living while also repaying his loans. His complaint alleges that he has taken on "multiple jobs when possible, and kept a very frugal way of life." Compl. at p. 2. He recently obtained employment moreover with California's Department of Corrections, three hours away from his family. He also plausibly recites facts that would, if true, show he has minimized his expenses. Compl. at p. 2. He has kept a very frugal way of life, Compl. at 2, and avoids unnecessary expenses such as vacations, pleasure outings, and cable and internet services. Compl. at p. 5-6. Thus, Galvez plausibly alleges that he has made good faith efforts to obtain employment, maximize income and minimize expenses.

But Galvez has not alleged that he negotiated an alternative repayment plan, explored the ICRP or other such options, sought loan consolidation, loan forbearance or other such options, or made any voluntary payments on the loans.

The complaint nevertheless does mention that he and his spouse "[would] be forced to live below a minimum standard" even "[u]nder any repayment option that [he] ha[d] been offered." Compl. at p. 6. Accepting the truth of this allegation, this implies that he has at least considered the effect of alternative repayment options. Furthermore, "a history of making or not making payments is, by itself, not dispositive." *Hedlund*, 718 F.3d at 852, 855. And whether or not the debtor has negotiated or accepted an alternative repayment plan is also not outcome determinative. *Roth*, 490 B.R. at 917.

In any event, the pleadings are not the stage where Galvez must satisfy his burden of proof on each element of undue hardship. Instead, Federal Rule of Civil Procedure requires only "a short and plain statement of the claim showing that the pleading is entitled to relief." Fed. R. Civ. P. 8, *incorporated by* Fed. R. Bankr. P. 7008. Given that every fact necessary to prove the ultimate case at trial need not be pleaded and that all reasonable inferences must be drawn in Galvez's favor on a motion to dismiss under Rule 12(b)(6), the court rules that Galvez has pleaded the necessary facts to support a plausible claim for dischargeability under § 523(a)(8).

CONCLUSION

The court shall issue a civil minute order that conforms substantially to the following form:

The Defendant United States' Rule 12(b)(6) motion to dismiss for failure to state a claim has been presented to the court. Having reviewed the papers filed in support, and having reviewed the complaint and heard the arguments of counsel, if any,

IT IS ORDERED that the motion is denied.

IT IS FURTHER ORDERED that the Defendant shall serve an answer no later than 21 days after service of the court's order on this motion. The time to answer the complaint shall not be enlarged beyond this deadline absent leave of court upon duly noticed motion filed before the time to respond has expired.

5. [13-16682](#)-A-7 RICHARD/BARBARA GRENINGER CONTINUED STATUS CONFERENCE RE:
[14-1111](#) AMENDED COMPLAINT
SALVEN V. STRAIN 3-20-15 [[39](#)]
ROBERT HAWKINS/Atty. for pl.

No tentative ruling.

6. [15-11593](#)-A-7 BRIAN LUONG STATUS CONFERENCE RE: COMPLAINT
[15-1095](#) 7-23-15 [[1](#)]
AMERICAN EXPRESS BANK, FSB V.
LUONG
KEN WHITTALL-SCHERFEE/Atty. for pl.

No tentative ruling.