

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

November 30, 2023 at 11:00 a.m.

1. 17-27077-E-13 23-2022 CAE-1	MICHAEL SCALLIN	CONTINUED STATUS CONFERENCE RE: COMPLAINT 2-16-23 [1]
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**SCALLIN V. U.S. DEPARTMENT OF
EDUCATION**

Plaintiff's Atty: Peter L. Cianchetta
Defendant's Atty: unknown

Adv. Filed: 2/16/23
Summons Reissued: 3/7/23
Answer: none

Nature of Action:
Dischargeability - student loan

Notes:
Continued from 11/2/23 by order filed 10/25/23 [Dckt 37]

The Status Conference is continued to 2:00 p.m. on February 21, 2024, to allow time for the entry of the Judgment and the conclusion of post-judgment motions.

NOVEMBER 30, 2023 STATUS CONFERENCE

The court granted Plaintiff-Debtor's Motion for Entry of Default Judgment determining that the student loan obligations owed to the United States Department of Educations (set forth in Amended Proofs of Claim 6-2 and 7-2) create an undue burden on Plaintiff-Debtor and his dependent, and that such student loan obligations are dischargeable in Plaintiff-Debtor's Chapter 13 Bankruptcy Case, 17-27077, in which the Chapter 13 Plan has now been completed and the discharge entered.

The Status Conference is continued to allow for the entry of the judgment and conclusions of any post-judgment motions.

The court shall issue an order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Status Conference having been conducted, the court having granted Plaintiff-Debtors Motion for Entry of Default Judgment determining that the two student loan obligations (Amd. Proofs of Claim 6-2 and 7-2) create an undue burden and are dischargeable obligations in Plaintiff-Debtor's Chapter 13 Case, and good cause appearing,

IT IS ORDERED that the Status Conference is continued to **2:00 p.m. on February 21, 2024**, to allow time for the entry of the Judgment and the conclusion of post-judgment motions.

**SCALLIN V. U.S. DEPARTMENT OF
EDUCATION**

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court’s resolution of the matter.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Defendant on July 5, 2023. By the court’s calculation, 50 days’ notice was provided. 28 days’ notice is required.

The Motion for Entry of Default Judgment has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered.

The Motion for Entry of Default Judgment is granted.

Debtor Michael Everett Scallin (“Plaintiff-Debtor”) filed the instant Motion for Default Judgment on July 6, 2023. Dckt. 17. Plaintiff-Debtor seeks an entry of default judgment against the United States Department of Education (“Defendant” / “United States”) in the instant Adversary Proceeding No. 23-02022.

The instant Adversary Proceeding was commenced on February 16, 2023. Dckt. 1. The summons was issued by the Clerk of the United States Bankruptcy Court on February 16, 2023. Dckt. 3. The Complaint and Summons were properly served on Defendant. Dckt. 7.

SUMMARY OF COMPLAINT

The Complaint, Dckt. 1, asserts claims to determine the dischargeability of a student loan debt. Claims have been filed by the United States Department of Education in Plaintiff-Debtor’s Bankruptcy Case which total \$85,803.08. It is further alleged that the total student loan debt is in excess of \$95,193.14. The

Complaint states detailed factual allegations (not mere conclusions), as well as reference to some legal authority, relating to the asserted undue hardship caused to Plaintiff-Debtor by these student loan obligations. The factual allegations and legal grounds include:

1. Plaintiff-Debtor lives paycheck to paycheck and has no disposable income to repay their student loans. Complaint, Dckt. 1 ¶ 7.
2. Plaintiff-Debtor lives on less than the Internal Revenue Service standard for a single parent with one child. *Id.*
3. Between 2017 and 2021, Plaintiff-Debtor held numerous jobs, and struggled to make Plan payments without the help of family contributions. *Id.* ¶ 8.
4. Plaintiff-Debtor is now employed with a current monthly salary of \$6,543.30, which is under the median family income for California and the size of the household. *Id.* ¶ 8.
5. Plaintiff-Debtor cannot decrease their monthly expenses any further to help make payments toward their student loans. *Id.* ¶ 9.
6. Plaintiff-Debtor is 47 years old and has 50% custody of their minor child. Plaintiff-Debtor does not anticipate any future income that would allow Plaintiff-Debtor to repay their loans. *Id.* ¶ 10.
7. Plaintiff-Debtor has attempted to maximize their income and minimize expenses. *Id.* ¶ 11.
8. Excepting Plaintiff-Debtor's debts from discharge would impose an undue hardship on Plaintiff-Debtor. And thus the court should determine the debt dischargeable pursuant to 11 U.S.C. § 523(a)(8). *Id.* ¶¶ 12, 13.

SERVICE OF SUMMONS AND COMPLAINT

A reissued summons was obtained by Plaintiff-Debtor on March 7, 2023 (Dckt. 6). No Certificate of Service has been filed by Plaintiff-Debtor. No answer or other responsive pleading has been filed by the United States Department of Education.

On April 5, 2023, A Certificate of Service for the Reissued Summons and Complaint was filed. Dckt. 7. Service was made on March 7, 2023 on:

US Department of Education
50 United Nations Plz Ste 1200
San Francisco, CA 94102
(Certified Mail)

This is the address provided on the Roster of Governmental Agencies maintained by the Clerk of the Court and posted on the Court's website.

DEFENDANT’S DEFAULT

Defendant failed to file a timely answer or response or request for an extension of time. Default was entered against Defendant pursuant to Federal Rule of Bankruptcy Procedure 7055 by the Clerk of the United States Bankruptcy Court on May 24, 2023. Dckt. 12.

August 24, 2023 Hearing

Counsel for Plaintiff-Debtor notified the Courtroom Deputy for Department E that he was ill and could not attend the August 24, 2023 hearing. He requested the court continue the hearing 60 days in light of his illness and some issues the court had identified in the Tentative Ruling posted for the August 24, 2023 hearing.

This being a hearing on a Motion for Entry of Default Judgment, the court continued the hearing to November 2, 2023. Such continuance is consistent with a continuance for purposes of allowing supplemental briefing, with some additional time added due to counsel’s illness.

November 2, 2023 Hearing

The court further continued the hearing to November 30, 2023.

PLAINTIFF-DEBTOR’S AMENDED MOTION FOR DEFAULT JUDGMENT

On November 16, 2023, Debtor filed an Amended Motion/Application for Entry of Default Judgment to address the court’s concerns. Dckt. 41. Debtor submits his own Declaration and the Declaration of his attorney, Peter Cianchetta, in support. Dec., Dckts. 42, 43. Plaintiff-Debtor’s Motion requests entry of default judgment on the following grounds:

1. **Procedural Grounds:**
 - a. All defendants have been served and the proof of service was filed. Motion, Dckt. 41 at 4:18-21.
 - b. Defendant did not respond to the filed complaint. *Id.*
 - c. On May 24, 2023, Default was entered. *Id.*
 - d. Plaintiff-Debtor has not heard from Defendant regarding this proceeding. *Id.* at 5:4-7.
2. **Factual and Legal Grounds:**
 - a. “Excepting Plaintiff’s debts to defendants from discharge would impose an undue hardship on Plaintiff under the three-prong Brunner test.” Motion, Dckt. 41 at 6:19-22.

The court notes, Plaintiff-Debtor provides a legal citation and explanation of what this test is, addressing this concern of the court.

- b. Plaintiff-Debtor cannot maintain a minimum standard of living if he were obligated to pay back the loans. He is a single parent and lives paycheck to paycheck. Motion, Dckt. 41 at 7:4-10.
- c. Plaintiff-Debtor will likely never be able to pay off the debt as their expenses continue to rise and skills decline. Plaintiff-Debtor has little marketable skills other than to sell insurance, and competes with the increases of technology which has caused Plaintiff-Debtor to be out of work. Plaintiff-Debtor has submitted hundreds of applications seeking work, and he is often told he is over qualified. Debtor's role as a single parent has hampered his ability to develop job skills and without support causes severe hardship. *Id.* at 7:10-28.
- d. Regarding the third prong, Plaintiff-Debtor has made good faith efforts to repay his student loans by constantly seeking work to afford the payment. *Id.* at 8:4-9.

Plaintiff-Debtor's Declaration, Dckt. 42, provides some factual testimony as to the facts stated above.

3. **Attorney's Fees Provisions:**

- a. The promissory notes for the loans contain an attorney's fees clause. Pursuant to California Civil Code § 1717, Plaintiff-Debtor, as prevailing party, is entitled to the attorney's fees. Motion, Dckt. 41 at 8.

In reviewing Plaintiff-Debtor's Declaration he also testifies (identified by paragraph number in the Declaration):

- 1. Plaintiff-Debtor believes his student loan obligation should be discharged.
- 1. Plaintiff-Debtor provides testifies that the student loans cause an undue hardship.
- 1. Plaintiff-Debtor's current monthly earnings are \$6,543.30, which he believes is below the mean for Sacramento.
- 1. Plaintiff-Debtor has a teenage daughter and he concludes that they can barely pay the bills.
- 2. Plaintiff-Debtor relied upon contributions from his mother to make the Chapter 13 Plan payments due to Debtor's unemployment.

2. Plaintiff-Debtor states his conclusion that he will never be able to pay off any of his student loan debt.
2. Plaintiff-Debtor has little marketable skills, other than selling insurance.
3. Plaintiff-Debtor states that he tried to repay his student loans by attempting to maximize income and minimize expenses while negotiating repayment options.
4. Being a single parent limits Plaintiff-Debtor's ability to develop more job skills.
5. Plaintiff-Debtor cannot afford to go to college to increase his marketable skills.
8. Plaintiff-Debtor concludes that he cannot afford the student loans and "no one told me how hard it would be to repay them at the time they gave them to me."

Declaration; Dckt. 42.

Plaintiff-Debtor has partly addressed the court's previous concerns regarding unsupported legal and factual conclusions. He has filed this Amended Motion and stated grounds for relief with particularity.

Peter Cianchetta, Debtor's Attorney, testifies in his Declaration that he has still not received any response from anyone at the U.S. Department of Education, despite effectuating proper service. Dec., Dckt. 44. He also testifies that his hourly rate is reasonable given his experience in bankruptcy proceedings. *Id.*

However, other than stating a dollar amount of monthly earnings, Plaintiff-Debtor still did not provide any evidence of his current employment, his current gross income, his current expenses, and projected expenses going forward. Plaintiff-Debtor provided no evidence of the college education and degree(s) obtained by him, but he did testify he received a Bachelor Degree in Business Administration.

In Plaintiff-Debtor's related Chapter 13 Case, the financial information provided under penalty of perjury upon which the Plan and then the Modified Plan were confirmed include the Supplemental Schedules I and J that were filed on December 3, 2020. 17-27077; Dckt. 148. While a bit dated, this is financial information relied upon by the court, Chapter 13 Trustee, and Creditors in confirming the plans.

Supplemental Schedule I lists that Plaintiff-Debtor is self-employed in the business of Insurance Sales. He lists having net business income of only \$996 a month. *Id.*; p. 2. It was only through family financial contributions that Plaintiff-Debtor could perform his Chapter 13 Plan.

On Supplemental Schedule J Plaintiff-Debtor lists expenses for his family unit of two persons of only (\$3,447) a month. Of this, (\$1,595) is for his mortgage, (\$80) for property taxes, and (\$25) for home maintenance and repairs. That leaves only survival level net income of \$849 (after including \$3,300 in family support) for Plaintiff-Debtor and his teenage child.

November 30, 2023 Hearing

Though Plaintiff-Debtor could have provided the court with realtime income and expense data, no counter evidence has been provided by Defendant. No opposition has been provided by Defendant.

Defendant has not filed anything in this Adversary Proceeding, even a statement of non-opposition showing that it was consciously making the decision that Plaintiff-Debtor is correct and judgment is warranted.

Clearly Defendant has had an opportunity to counter the allegations in the Complaint and the evidence presented by Plaintiff-Debtor. Defendant has not offered any opposition.

Based on the evidence presented, the court determines that Plaintiff-Debtor has, and continues to suffer from grievous financial challenges. He has been able to survive, both in his related Chapter 13 Case and in life through the substantial support of his family members.

In *Craig v. Education Credit Management Corp.*, 759 F.3d 1040 (9th Cir. 2009), the Ninth Circuit Court of Appeals provides a good overview of the law relating to the dischargeability of student loan obligations after the 1998 revisions to 11 U.S.C. § 523(a)(8). The revision deletes the discharge of the student loans after a specified period of time and provides only for discharge if the loans create an “undue hardship” for the debtor and debtor’s dependents.

Under 11 U.S.C. § 523(a)(8), a student loan debt is non-dischargeable in bankruptcy "unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents" 11 U.S.C. § 523(a)(8). Under this provision, a bankruptcy court may discharge a student loan debt in full or in part. *Saxman v. Educ. Credit Mgmt. Corp. (In re Saxman)*, 325 F.3d 1168, 1173-74 (9th Cir. 2003). To obtain a discharge, a debtor must demonstrate that she meets the "undue hardship" requirement of § 523(a)(8) as to that portion of the debt to be discharged. *Id.* at 1174.

We apply a three-part test, known as the Brunner test, to determine whether excepting all or part of a student loan debt from discharge will impose an "undue hardship" under § 523(a)(8). *See United Student Aid Funds, Inc. v. Pena (In re Pena)*, 155 F.3d 1108, 1112 (9th Cir. 1998) (citing *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987)). Under the *Brunner* test, a debtor must demonstrate:

(1) 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; (2) 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 (3) that the debtor has made good faith efforts to repay the loans.

Saxman, 325 F.3d at 1173 (citing *Pena*, 155 F.3d at 1111; *Brunner*, 831 F.2d at 396).

Craig v. Educ. Credit Mgmt. Corp. (In re Craig), 579 F.3d at 1044.

These three prongs are discussed further in 4 Collier on Bankruptcy ¶ 523.14[3], which includes the following [emphasis added]:

In the first prong of the Brunner test, the court will consider the debtor's income, living expenses and standard of living. A debtor is not expected to live in "abject poverty" in order to repay a student loan. Accordingly, the federal poverty level is too strict a standard for measuring whether the debtor's standard of living is at a minimal level and should not be employed for that purpose. Nor is it appropriate for the court to go through a debtor's budget dollar-for-dollar in order to find every possible way to create or increase a surplus if the overall expense level and living standard remains minimal. Rather, **the court should examine the debtor's income and expenses in a manner that is sensitive to the particular circumstances of the case**, taking into account the debtor's needs for care, including food, shelter, clothing, transportation medical treatment and a small source of recreation.

The **second prong of the test, sometimes referred to as "the additional circumstances test,"** requires that the court make a **predictive judgment as to the likelihood that the debtor's financial hardship will continue** for a significant portion of the repayment period. There are two elements to the second prong. The first is whether the debtor's financial difficulties are "likely" to continue. Under this standard, a debtor must establish by a **preponderance of the evidence that the debtor's financial situation is not likely to improve.** The debtor is not required to prove with certainty that the financial situation will not improve and the court's determination must be based on a realistic, factual assessment of the debtor's financial prospects, not on unfounded optimism.

A number of courts have assessed the second prong by employing the talismanic phrase, "a certainty of hopelessness." However, the better view is that neither the statute nor the Brunner test require the debtor to make such an onerous showing. **The debtor need only prove that his or her financial distress will continue** due to a serious illness, psychological problem, disability of the debtor or a dependent or some other exceptional circumstances that are likely to persist for a significant portion of the repayment period. The court's judgment on this question necessarily must be based on a consideration of the debtor's education, work history, health and other relevant circumstances.

In cases in which the debtor's claimed undue hardship is based on illness or psychological problems, the question arises whether the debtor must submit expert medical evidence to support the contention that health problems are the cause of the asserted financial hardship that will persist for a lengthy time period. The better view is that **there is no *per se* requirement that the debtor must produce expert medical evidence to support the claim.** Of course, without such evidence the bankruptcy court may not be persuaded by the debtor's testimony and supporting nonexpert evidence.

The second element of the second prong is temporal. The debtor must prove that the **duration of his or her likely financial hardship will be a significant portion of the repayment period.** There is little judicial discussion of the meaning of the term "significant portion of the repayment period," perhaps because courts are able to make judgments whether the factors causing a debtor's financial hardship are

likely to persist indefinitely without the need for more precision. One court concluded that, for a 10-year loan, five years constituted a significant portion of the repayment period and evaluated the debtor's financial prospects within that time frame. Another court rejected the argument that the second prong repayment period should be measured by the 20- or 25-year term of a potential income contingent repayment plan; because the debtor, in good faith, declined to enter an income contingent repayment plan; the court determined the repayment period to be the seven-year period remaining under the terms of the loan documents. Similarly, another court reasoned that [t]he second prong directs courts to look at the current repayment period, not a hypothetical one."

The third prong—the good faith inquiry—is guided by the understanding that “undue hardship” encompasses a notion that the debtor’s bad financial condition and default should not have been caused by the debtor’s own willfulness or negligence, but rather by factors beyond the debtor’s control. Therefore, if the debtor has not made payments on the loans because, through no fault of the debtor, he or she has never had the ability to pay, the good faith effort test is met. In this part of the inquiry, courts focus on the debtor’s efforts to obtain employment, maximize income and minimize expenses, including efforts to minimize student loan repayment through, for example, loan consolidation.

Based on the evidence presented, and there being nothing to the contrary by Defendant, the court concludes that all three prongs of the dischargeability test have been met and that the student loan debt of (\$11,014.38) [See Amended Proof of Claim 6-2] and (\$74,788.70) [See Amended Proof of Claim 7-2] present the Plaintiff-Debtor and his dependent with an undue hardship.

First, Plaintiff-Debtor is unable, and has been unable for the five years of the Chapter 13 Plan, to provide sufficient income for his and his dependent’s basic living requirements. Only through the substantial support of family members have Debtor and his dependent been able to financially (and likely physically) survive. Debtor is able to generate monthly net income of less than \$1,000 a month. During the five years of the Chapter 13 Plans there was not significant increase as shown not only by the Plaintiff-Debtor not providing additional information, but the Chapter 13 Trustee not coming forward based upon his due diligence and review seeking to modify the Chapter 13 Plans based on Plaintiff-Debtor generating greater monthly income. Looking at Original and Supplemental Schedule J filed in the Bankruptcy Case, Debtor and his dependent are only able to maintain a subsistence income, and that only because of substantial family financial support.

Second, Debtor has been unable to improve his financial condition and earnings during the five years of the Chapter 13 Plan and thereafter. With the protections of Chapter 13, if the Plaintiff-Debtor was able to increase his income, that would have gone straight into providing Plaintiff-Debtor and his dependant with something more than a subsistence existence. Given the extended period in which Plaintiff-Debtor has been unable to generate any substantial income, the court is presented with credible evidence that this lack of income will continue well into the future.

Plaintiff-Debtor now testifies that he currently is earning \$6,543 a month, from which he has to provide for himself and his dependent. Dec., ¶ 1; Dckt. 42. While not an insignificant amount, whether gross or net pay, \$6,543 does not stretch very far for this family unit of two persons in 2023 and the foreseeable future.

For the third prong, Plaintiff-Debtor leaves the court hanging a bit. He provides some conclusions in his Declaration as to what he has done, but provides little specifics.

1. I believe the court should discharge my student loans because without the discharge, it will cause an undue hardship on me to try to pay my student loans off. I currently earn \$6,543.30 which is less than the median income for Sacramento, according to what I have been told. I struggle to pay my monthly basic rent, food, electricity, auto insurance, gas and other normal expenses. I have a daughter, who recently turned 18, whom I am still fully supporting.

2. During my Chapter 13 bankruptcy, I have had to rely on my mother to pay my Chapter 13 plan payments because I was under employed and sometimes unemployed. It is likely I will never be able to pay off the student loan debts as my expenses continue to rise and my skills decline. I have little marketable skills other than selling insurance and with the increases in technology, I find myself out of work. It seems the older I get, it is harder to land a good job.

3. I have tried to repay my student loans by attempting to maximize my income and minimize my expenses while negotiating income-based repayment plans so I can afford the minimum payments, but they were overwhelming.

4. Being a single parent has hindered my ability to develop my job skills while I am parenting.

5. I received a bachelor's degree in business administration, but that degree seems irrelevant to further my career or increase my income. I cannot afford to go to more college and incur more debt to increase my marketable skills. That seems like it would end in failure.

6. If there was a way to repay my debts I would but I cannot afford a car payment to replace my car, let alone repaying my student loans.

Dec.; Dckt. 42.

This testimony is unopposed and not contradicted. It provides the court with a basis for finding that the third prong of the Brunner test has been satisfied – this financial condition has not been caused by the Plaintiff-Debtor's own willingness or neglect. Rather, this reads like the tale of more than a few students, who took on debt not appreciating what it takes to repay the debt, and then the degree obtained and being able to provide a basis for the former student to generate substantial income.

Additionally, the court takes judicial notice of the highly publicized withdrawals of major insurance companies from the California market for what are stated to be perceived unreasonable regulatory issues.

Thus, the court concludes, and judgment shall be entered for Plaintiff-Debtor that the obligations owed to the United States Department of Education, for which Amended Proof of Claim 6-2 in the amount of (\$11,014.38) and Amended Proof of Claim 7-2 in the amount of (\$74,788.70) have been filed, create an undue burden on the Plaintiff-Debtor and his dependent, and that each of those debts are dischargeable in

Plaintiff-Debtor's Chapter 13 Bankruptcy Case, 17-27077, in which Plaintiff-Debtor was granted a discharge, with the Order of Discharge having been entered on October 16, 2023. 17-27077; Order of Discharge, Dckt. 180.

Plaintiff-Debtor's counsel shall lodge with the court a proposed judgment consistent with this Ruling. Attorney's fees and costs may be requested as provided in Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Entry of Default Judgment filed by Debtor Michael Everett Scallin ("Plaintiff-Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Entry of Default Judgment is granted and Judgement shall be entered for Michael Scallin, the Plaintiff-Debtor, and against the United States Department of Education, the Defendant, determining that the student loan obligations upon which Amended Proof of Claim 6-2 and Amended Proof of Claim 7-2 filed by the United States Department of Education create an undue burden on Plaintiff-Debtor.

Plaintiff-Debtor's counsel shall lodge with the court a proposed judgment consistent with this Ruling.

Attorney's fees and costs may be requested as provided in Federal Rule of Civil Procedure 54 and Federal Rule of Bankruptcy Procedure 7054.