UNITED STATES BANKRUPTCY COURT

IN AND FOR THE DISTRICT OF ARIZONA

In Re **MARY E. STOCKMAN,** **Debtor.**	**Chapter 13 Proceedings** **Case No. 05-BK-11523-CGC** **Adv. No. 05-799**
MARY E. STOCKAMAN, **Plaintiff,** **v.** **EDUCATIONAL CREDIT MANAGEMENT CORPORATION** **Defendant.**	**UNDER ADVISEMENT DECISION RE UNDUE HARDSHIP**

I. Introduction

This matter is before the Court on remand from the District Court on three issues: 1) an error of fact regarding the Debtor's expenses; 2) an error of law regarding the amount of Debtor's allowed tithing; and 3) an error of law in concluding that the Debtor's repayments to lenders were made in good faith. The Debtor filed motions to present additional evidence on remand; Educational Credit Management Corporation ("ECMC") objected. On July 23, 2008 the Court granted the Debtor's motions. The parties conducted additional discovery, a trial was held on July 27, 2009 and post trial briefing was completed on August 6, 2009. The matter was taken under advisement at that time.

II. Background

A. Pre-Trial History

The Court set forth the history and background of the case in the Court's July 23, 2008 Under Advisement Decision. A restatement of the background is appropriate.

The Debtor is a 63 year old woman who decided to change careers in the 1990s. Debtor had been a real estate agent for 26 years when she decided to complete her undergraduate degree and then continue onto law school. She decided to change careers because her real estate office had closed and real estate opportunities in Maryland, where she lived at the time, had diminished. She attended law school in Florida and during the course of her legal education amassed approximately $200,000 in student loans. She received her law degree in 1998 when she was 52 years old.

Upon graduation, she was told that there was no market for new attorneys in Florida. After research, the Debtor decided that Arizona provided the best possibility for her to gain employment as an attorney. She moved to Arizona and was admitted to the bar. She applied and interviewed with several law firms but did not receive any offers. In July 1999, a year after graduating law school, she did not have a job and the forbearance period on her student loans was expiring.

Under these circumstances, she decided to start her own firm. Based, in part, on her experience as a summer intern with the United States Trustee's Office, she specialized in consumer bankruptcy. She worked hard to build her practice - working 45 to 60 hours a week - but did not succeed. Her statement of financial affairs indicates that she made $35,000 in 2003, $60,000 in 2004 and $31,200 in 2005.

In June 2005, the Debtor filed a Chapter 13 bankruptcy case. Like many other bankruptcy attorneys, when BAPCPA became effective in October 2005 the Debtor determined that the change in the law would make survival difficult and decided to close her office. After doing so, she became a mortgage broker earning approximately $37,000 per year.

In April 2007, she sold her house, received $50,000 in proceeds and moved to Florida, using the funds to pay off her Chapter 13 plan. As of May 2007, she was working as a mortgage broker purely on a commission basis.

Since 2007 she has had a spotty employment history. Most recently she worked for Jackson

Crowder and Associates, however she was terminated in December 2008. The Debtor is currently unemployed and has been receiving unemployment since April 1, 2009.

In June 2007, the Court held a trial to determine if undue hardship existed in repaying the Debtor's student loans to The Educational Resource Institute ("TERI") and ECMC. The Court concluded that undue hardship did exist. Based on these conclusions, the Court determined that the Debtor would be able to pay back $27,500 of her loans with the remaining amount being discharged. The Court ordered the Debtor to pay $170 per month to ECMC and $80 per month to TERI. ECMC appealed the Court's order; TERI did not. The District Court vacated this Court's order as to ECMC and remanded the matter for further proceedings.

In this Court's decision, made on the record, the Court enumerated the Debtor's monthly expenses and announced total expenses of $2,954. However, the itemized monthly expenses set forth on the record totaled only $2,619. Using *United Student Aid Funds, Inc. v. Pena (In re Pena)*, 155 F.3d 1108 (9th Cir. 1998) as a guide, the District Court held that this Court's findings concerning the Debtor's expenses were clearly erroneous. The District Court also held that the $200 amount allotted for tithing was unreasonable as a matter of law citing to *Waguespack v. Rodriguez*, 220 B.R. 31, 34 (W.D.La. 1998). Based on these two errors, the District Court found insufficient support for a finding that the Debtor satisfied prong one of the *Pena* test. Because of these uncertainties, the District Court determined that it could not analyze prong two - whether an inability to pay will persist.

The District Court also found error in the Court's analysis of prong three of *Pena*. According to the District Court, this Court determined that it was not bad faith for Debtor to repay only one of her two loans. The District Court did not take issue with the Court's finding, but it did determine that the wrong legal standard was applied. According to the District Court, the burden was on the Debtor to show good faith in repayment of her loans, not an absence of bad faith. According to the District Court, the Debtor "must supply the bankruptcy court with an affirmative, plausible explanation as to how one lender received significant repayment at the nearly complete expense of the other." The matter was remanded and the District Court took no position on whether the Debtor's loans are dischargeable in whole or in part.

B. July 27, 2009 Trial

1. Income and Expenses

As of the date of trial, the Debtor was still unemployed. As of July 2009, she earned $2,439.67 per month; $1,191.67 from unemployment and $1,248 from Social Security. Her tax returns show the following income:

2006 = $43,121.00
2007 = $4,583.00
2008 = $31,343.16

Her most recent employment, with Jackson, Crowder & Associates, a law firm based in Glendale, CA, ended in December 2008. The Debtor actively searched for employment, as shown by her 80+ exhibits regarding her job search, but has unable to find work. The Debtor is an older professional; most of her experience is in real estate; and the country (and Florida in particular) is suffering through a severe decline in the real estate market. With these factors working against her, the Debtors employment prospects remain bleak.

The Debtor claims that her expenses outpace her income. The Debtor lists the following monthly expenses on Exhibit #79:

Rent	$850	
Cell Phones	$64	
Utilities	$150	
Food	$285	
Household	$28	
Apparel (professional)	$100	
Personal Care	$31	
Misc	$87	
Transportation	$275	
Medical	$110	
Eye Exams	$37	
Gym	$30	
Doctor Visits	$50	
Dental Visits	$100	
Labs	$75	
Office supplies	$30	
TERI	$80	
Life Insurance		$87
Dental Insurance	$12	
Bar Dues	$40	
Moving Expenses	$40	
If employed health insurance	$705	

Based on these exhibits the Debtor claims expenses of $2,303 per month without health insurance and $2,703 per month with health insurance.[1]

2. Bills from AES

The Debtor notes that all of her student loans, whether guaranteed by TERI or ECMC, were issued by Key Bank or an affiliate of Key Bank and serviced by American Education Services ("AES"). The Debtor testified that she had no control over which loan account her payments were applied to by AES. In support of her contention, the Debtor supplies an August 5, 1999 letter from AES which includes an August 19, 1999 invoice from AES ("Invoice"). The Invoice shows a total of eight loans; seven of which are owned by "Key Bank U"; and one loan owned by "Keycrop Tr". Three of the seven Key Bank U loans show the loan program as "LAL" and four of the seven Key Bank U loans show the loan program as "UNSTFD". The Keycorp Tr loan shows the loan program as "BEL". Each loan shows an individual amount due, but the Invoice shows a total amount due of $1,667.34. The Invoice contains no field on which to direct payments. When asked why the ECMC loans were not on the invoice, the Debtor testified that they were in deferment status at the time.

The Debtor also submitted an August 18, 2005 letter from AES. The letter contains a summary of all payments made by the Debtor to AES and an accounting of how much has been applied to each loan, including those guaranteed by ECMC. The letter clearly states that the loans are serviced by AES. The Debtor testified that she simply paid her bills to AES and they determined how to distribute her payments.

3. Post-Petition Payments

The Debtor presented no evidence that she made any post-petition payments to ECMC. Little if any of the $50,000 she received for selling her home was used to repay ECMC. Further, when asked during the trial if she made the $170 payment as ordered by the Court, the Debtor testified that at first she did, but as soon as she realized that ECMC would pursue its appeal she stopped payments to ECMC. The Debtor did make the $80 per month payments to TERI.

[1] The Court notes that when totaled, the itemized list show expenses of $2,561 per month without health insurance and $3,266 per month with insurance.

4. IBR Payments

ECMC claims that the Debtor's refusal to enter into the Income Contingent Repayment Plan ("ICRP") or Income Based Repayment ("IBR") program shows a lack of good faith by the Debtor. Both repayment plans are premised on a borrower's income - the lower the borrower's income, the lower the payment; as their income rises so too does their monthly payments. If the loan are not fully paid at the end of 25 years, the unpaid portion is discharged.

Under the ICRP the Debtor would be required to repay her loan at the following rates:

Annual AGI	Monthly AGI	Monthly Payment
$14,976.00	$1,248	$69.10
$31,343.16	$2,611.93	$341.89
$60,000.00	$5,000	$819.50

See U.S. Department of Education, *Income contingent repayment calculator* <http://www.ed.gov/offices/OSFAP/DirectLoan/RepayCalc/dlentry2.html> (last visited December 3, 2009). Under the IBR the Debtor would be required to repay her loan at the following rates:

Annual AGI	Monthly AGI	Monthly Payment
$14,976.00	$1,248.00	$ 0.00
$31,343.26	$2,611.93	$190.00
$60,000.00	$5,000.00	$545.00

See U.S. Department of Education, *Income-Based Repayment Calculator*, <http://studentaid.ed.gov/PORTALSWebApp/students/english/IBRCalc.jsp> (last visited January 11, 2010). The Debtor has refused to enter either program because she will be tied to the program for the next 25 years and she fears the tax liability that she would face at the conclusion of the program.

III. Analysis

The Ninth Circuit has adopted the *Brunner* test to determine "if excepting student loan debt from discharge will impose an undue hardship." *In re Saxman*, 325 F.3d 1168, 1173 (9th Cir. 2003) (citing to *Brunner v. New York State Higher Education Services Corp. (In re Brunner)*, 831 F.2d 395, 396 (2d Cir.1987)). Under the *Brunner* test the Debtor, bearing the burden of proof, must show:

> (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 at 1173. "Under this test, the burden of proving undue hardship is on the debtor, and the debtor must prove all three elements before discharge can be granted." *In re Rifino*, 245 F.3d 1083, 1087-88 (9th Cir. 2001).

A. Standard of Living

As of the trial date, the Debtor's income was approximately $2,450: roughly $1250 in monthly Social Security and $1200 from unemployment. Her unemployment was due to terminate in September 2009. The Debtor did testify that she would be forced to seek employment at chains such as Walmart or Lowes, but had no immediate prospects for additional income. Based on the foregoing, the Court concludes that the Debtors income is $1250 per month.

According to Exhibit #79, the Debtor calculates $2,303-$2703 in monthly expenses depending on whether or not she obtains health insurance. However, totaling her expenses listed on Exhibit #79 shows expenses of between $2,561 and $3,266 per month. Of the expenses listed the Court concludes that $2,286 per month is reasonable.[2] Regardless of which calculation the Court

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[2]The Court calculates the Debtor's expenses as follows:

	Debtor's Calculation	Court's Calculation
Rent	$850	$850
Cell Phones	$64	$64
Utilities	$150	$150
Food	$285	$285
Household	$28	$28
Apparel (professional)	$100	$0
Personal Care	$31	$0
Misc	$87	$100
Transportation	$275	$275
Medical	$110	$110
Eye Exams	$37	$37
Gym	$30	$0
Doctor Visits	$50	$50
Dental Visits	$100	$100
Labs	$75	$75
Office supplies	$30	$30
TERI	$80	$80
Life Insurance	$87	$0
Dental Insurance	$12	$12
Bar Dues	$40	$40
Moving Expenses	$40	$0
Subtotal	$2,561	$2,286
If employed health insurance	$705	$0
Total	$3,266	$2,286

relies on, it is clear that the Debtor's current income does not allow her to pay for all of her monthly expenses. Based on her current income and expenses, the Debtor cannot maintain a minimal standard of living if required to repay the loans.

B. Likely to Persist

The Debtor has demonstrated that she has little possibility of obtaining a high-paying professional job despite her extensive experience and education. The reality is that she is an unemployed 63 year-old who is seeking employment in one of the worst job markets in decades. Her areas of expertise are in real estate and the law - both of which have suffered tremendous job losses. Further, she has conducted an extensive job search which has rarely led to interviews, much less a job offer. When she does get an interview, the Debtor testified credibly that employers are expecting a younger applicant. This, coupled with the Debtor's deteriorating health, leads the Court to conclude that at best, the Debtor will be under-employed in a service industry related field. At worst, the Debtor will remain unemployed. Thus, the Court finds that the Debtor's circumstances are likely to persist.

C. Good Faith

The District Court remanded the matter, in part, because this Court used the wrong legal standard when it found that the Debtor lacked bad faith. Instead, the District Court directed this Court to determine if the Debtor showed good faith. The District Court specifically remanded the matter for this Court to consider whether the Debtor showed good faith in repaying the "TERI" loans disproportionally more than the ECMC loans.

The Court concludes that the Debtor showed good faith in repaying her loans pre-petition. AES was the servicer of the Debtor's loans. The Invoice indicates that all loans were on one invoice. There is no ability on the Invoice to direct payments to one loan as opposed to another. Moreover, the August 2005 Letter from AES shows that all the Debtor's student loans were serviced by AES. Additionally, the Debtor testified that she simply paid her bills to AES which determined

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The Court notes that the Debtor no longer claims tithing expenses. Accordingly, an issue raised by the District Court is moot.

how to distribute her payments. While the District Court is correct that Ms. Stockman is no ordinary consumer, it is reasonable for Ms. Stockman to expect that one payment to one servicer, AES, servicing several loans for one bank, KeyCorp, would distribute the payments as directed by the bank. It is unreasonable to expect a borrower, no matter his or her expertise, to direct the application of their payment to specific loans. Therefore, the Court concludes that pre-petition the Debtor has shown good faith.

However, the good faith requirement in repayment of student loans continues post-petition. "A debtor's obligation to make 'good faith' efforts to repay [her] education loans is not extinguished with the filing of an adversary proceeding in bankruptcy." *In re Birrane*, 287 B.R. 490, 500 (9th Cir.BAP 2002) (quoting *In re Wallace*, 259 B.R. 170, 185 (C.D.Cal. 2000)). *See also In re Nys*, 446 F.3d 938, 947 (9th Cir. 2006) (stating "[t]his determination will require the bankruptcy court to consider the evidence regarding the Ford program, and whether [the debtor], in good faith, considered consolidation options.") *See Alderete v. Educ. Credit Mgmt. Corp. (In re Alderete)*, 412 F.3d 1200, 1206 (10th Cir.2005) (agreeing that "[although] participation in a repayment program is not required to satisfy the good-faith prong" it is considered "an important indicator of good faith" (internal quotation marks omitted)). Further, "good faith is also measured by a debtor's effort - or lack thereof - to negotiate a repayment plan." *In re Birrane* at 501.

In 2005, this Court concluded that, "there is authority that says squarely that failure to apply -- comply with the Ford program is not itself a sign of bad faith. That argument's been made a number of times by student loan lenders and I think it's not accepted law at this point." However, the District Court remanded because this Court:

> concluded that failure to "comply with the Ford program is not itself a sign of bad faith." ...We agree that failure to participate in loan restructuring is not determinative, but the burden is not on the lender to show bad faith, but on the debtor to show good faith effort to repay the loans.

This Court must revisit the Debtor unwillingness to repay her student loans under the Ford program to determine is she's done so in good faith.

"[A] willingness to participate in a repayment program, while an important indicator of good faith, is not required to satisfy the good-faith prong of the *Brunner* test." *In re Greenwood*, 349 B.R.

795, 804 (Bankr.D.Ariz. 2006). Some Courts have found that a failure to enter into the Ford Program is a factor in the lack of good faith,[3] while other courts have found good faith despite a failure to enter into the Ford Program.[4] In this case, the scale tips against good faith. "Where the Ford Program offers no effective relief, failure to participate in it cannot be considered to be an indication of lack of good faith." *Greenwood* at 804. But the opposite is equally true. Here, as presented by ECMC, the Ford Program gives effective relief. Under the Court's previous ruling, it partially discharged the Debtor's ECMC student loans ordering the Debtor to pay $170 per month to ECMC and $80 per month to TERI. Comparatively, under the IBR Program the Debtor will pay $0 per month to ECMC based on her current income. The Court fails to understand how this is not effective relief.[5]

Yes, the Debtor's payments will increase as her income increases. But, the increases are proportionate. For instance, under the IBR if the Debtors income increased to $31,343.26, her 2008 income, her payment would be $190 per month; just $20 more than the amount previously ordered

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[3]*See In re Mason*, 464 F.3d 878 (9th Cir. 2006); *In re Fulbright*, 319 B.R. 650 (Bankr.D.Mont. 2005); *In re Hutchison*, 296 B.R. 810 (Bankr.D.Mont 2003); *In re Chappelle*, 328 B.R. 565 (Bankr.C.D.Cal. 2005); *In re Birrane*; *Educational Credit Management Corp. v. DeGroot*, 339 B.R. 201 (D.Or. 2006) *Educational Credit Management Corp. v. Pope*, 308 B.R. 55, 61 n. 3 (N.D.Cal. 2004) (dicta); *In re Wallace*, 259 B.R. 170 (C.D.Cal. 2000); *In re Burgess*, 2006 WL 4811262 (Bankr.W.D.Wash. 2006) (not reported); *In re Berchtold*, 328 B.R. 808 (Bankr.Idaho 2005) (analyzing a failure to enter the Ford Program under the first prong of *Brunner*); *In re Chapelle*, 328 B.R. 565 (Bankr.C.D.Cal. 2005); *In re Cheary*, 2003 WL 21466918 (Bankr.E.D.Cal. 2003); *In re England*, 264 B.R. 38 (Bankr.D.Idaho 2001); *In re Naranjo*, 2000 WL 33155269 (Bankr.C.D.Cal. 2000); *In re Ritechie*, 254 B.R. 913 (Bankr.D.Idaho. 2000).

[4] *See In re Greenwood*; *In re Adler*, 300 B.R. 740 (Bankr.N.D.Cal. 2003); *In re Cota*, 298 B.R. 408 (Bankr.D.Ariz. 2003); *In re Marks*, 2003 WL 22004844 (N.D.Cal. 2003) (not reported); *In re Booth*, 410 B.R. 672 (Bankr.E.D.Wash. 2009) (analyzing the Ford Program under the first prong of *Brunner* only); *In re Hamilton*, 361 B.R. 532 (Bankr.D.Mont. 2007) (finding that not pursuing the ICRP was good faith by the Debtor who was initially told by the lender that he was ineligible for the Ford Program); *Gray v. Educational Credit Managment Corp.*, 2006 WL 4528536 (Bankr.D.Or. 2006) (not reported) (finding good faith where ECMC could not guarantee debtor's eligibility for the Ford Program); *In re Williams*, 301 B.R. 62 (Bankr.N.D.Cal. 2003); *In re East*, 270 B.R. 485 (Bankr.E.D.Cal. 2001).

[5]The Court notes that in its 2007 Decision it did not find bad faith on behalf of the Debtor for failing to enter into the Ford Program. However, at that time the evidence before the Court indicated that the Debtors Ford Program payments would be $800 per month, not $0.

by the Court. Moreover, the Court has concluded that the Debtor has approximately $2,300 per month in expenses. Her monthly gross income at $31,343.26 would be roughly $2,600; thus leaving her with approximately $300 per month to make a $190 payment.[6] In the end, the Debtor's refusal to enter into the Ford program reflects a lack of good faith.

The Court is not swayed by the Debtor's argument that she will face a tax burden in 25 years if the remaining liability under the loan is forgiven. The existence of a tax liability in 25 years is speculative at best. As stated in *Educ. Credit Mgmt. Corp. v. Stanley:*

> But it seems a stretch to assert that payment of student loans for 25 years under a federally approved program would create such a tax liability, even under today's tax laws. Forecasting such a tax liability under whatever tax laws will be in effect in 25 years would be sheer speculation. Forecasting the effect any such liability would have on [debtor's] actual standard of living at that time would be even more speculative.

Id. At 300 B.R. 813, 818 n. 8 (N.D.Fla 2003).

The Debtor has also shown a lack of good faith in her post-petition dealings with ECMC. The Debtor received $50,000 from the sale of her home in 2007. She states that she used this money to pay her ongoing living expenses. However, those expenses did not include ECMC. Further, during the trial the Debtor admitted that after this Court ruled in her favor regarding a partial discharge, she stopped paying the $170 per month to ECMC once she realized that ECMC was pursuing an appeal. She has steadfastly refused to consider participation in a repayment program that, based upon the facts shown, would not impose a substantial hardship upon her.

IV. Conclusion

When taken together, the Debtor's refusal to enter into the IBR, failure to remit a portion of her house proceeds to ECMC and her refusal to pay ECMC as ordered by the Court show a lack of good faith. Accordingly, the Debtor's request for a discharge under §523(a)(8) is denied.

This ruling is premised in substantial part on ECMC's representation that the Debtor will qualify for the IBR. If the Debtor takes the proper steps to apply for the IBR but her application

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[6]The Court understands that it is relying on gross income figures, not net income figures. However, the examples shows that the increase in payments under the IBR are a close match to the Court's 2007 Decision.

is denied, the Court will reconsider whether the remaining factors are sufficient to find that the debtor lacked good faith.

Counsel for ECMC is to upload a form of judgment.

So ordered.

DATED: March 24, 2010

Charles G. Case II
UNITED STATES BANKRUPTCY JUDGE

COPY of the foregoing mailed by the BNC and/or
sent by auto-generated mail to:

MARY E. STOCKMAN
30 Turner St., #407
Clearwater, FL 33756

EDUCATIONAL CREDIT MANAGEMENT CORPORATION
P.O BOX 1463
HARRISBURG, PA 17105

MADELEINE C. WANSLEE
JEREMY M. GOODMAN
GUST ROSENFELD
201 E. WASHINGTON ST., #800
PHOENIX, AZ 85004,
Attorneys for ECMC