



Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
August 22, 2024

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

* * * * *

In re:

JONATHAN DAVID HEATT,

Debtor.

JONATHAN HEATT,

Plaintiff,

v.

U.S. DEPARTMENT OF EDUCATION,

Defendant.

Case No.: 23-10718-MKN
Chapter 7

Adv. Proc. No. 23-01016-mkn

Date: August 8, 2024
Time: 1:30 p.m.

MEMORANDUM DECISION ON MOTIONS FOR SUMMARY JUDGMENT¹

On August 8, 2024, the court heard a Motion for Summary Judgment as well as a Countermotion for Summary Judgment brought in the above-captioned adversary proceeding (together “SJ Motions”). The appearances of the parties and counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

¹ In this Memorandum Decision, all references to “ECF No.” are to the number assigned to the documents filed in the above-captioned bankruptcy case as they appear on the docket maintained by the clerk of court. All references of “AECF No.” are to the documents filed in the above-captioned adversary proceeding. All references to “Section” or “§§ 101-1532” are to the provisions of the Bankruptcy Code. All references to “Bankruptcy Rule” shall be to the Federal Rules of Bankruptcy Procedure. All references to “Civil Rule” shall be to the Federal Rules of Civil Procedure.

1 On February 28, 2023, Jonathan David Heatt (“Debtor”), in pro se, filed a voluntary
 2 Chapter 7 petition,² along with his schedules of assets and liabilities (“Schedules”) and statement
 3 of financial affairs (“SOFA”).³ (ECF No. 1). The case was assigned for administration to
 4 Chapter 7 bankruptcy trustee Shelley D. Krohn (“Trustee”).⁴

5 On March 20, 2023, Debtor commenced the above-captioned adversary proceeding
 6 (“Adversary Proceeding”) by filing a complaint (“Complaint”) against the U.S. Department of
 7 Education (“DOE”). (AECF No. 1).⁵ The Complaint alleges that “in the early 2000’s Mr. Heatt

8 ² The Chapter 7 petition is filed only by the Debtor showing an address of 2384
 9 Champagne Isle Street, Las Vegas, Nevada 89135.

10 ³ Debtor signed his Schedules and SOFA on February 28, 2023 under penalty of perjury.
 11 Schedule “D” lists no creditors who have security interests or liens against any property.
 12 Schedule “E/F” attests that the Debtor has an unsecured tax debt to the Internal Revenue Service
 13 (“IRS”) of \$4,748.54 for the 2018 tax year. The same Schedule attests that in 2010 the Debtor
 14 incurred unsecured student loan debt owed to the Department of Education, that is not subject to
 15 offset, in the amount of \$75,168 as of the bankruptcy filing date. It also attests that the Debtor
 16 has \$2,551.24 of nonpriority unsecured debt to three separate creditors. Schedule “H” attests
 17 that Regina Heatt is a co-debtor who resides at the same address as the Debtor. Schedule “I”
 18 provides that “If you are married and not filing jointly, and your spouse is living with you,
 19 include information about your spouse.” Schedule “I” lists zero income on the petition date for
 20 the Debtor and indicates that he is unemployed. That Schedule also discloses \$4,824.00 in gross
 21 income for Regina Heatt who is employed as a teacher with the Clark County School District
 22 (“CCSD”). Schedule “I” also reflects that the Debtor receives zero income from any business
 23 operations, unemployment compensation, Social Security, or government assistance. According
 24 to Schedule “J,” the Debtor and Regina Heatt have \$3,030 in monthly expenses, leaving net
 25 monthly income of \$1,115.71. Schedule “J” does not list any student loan payments among the
 26 monthly expenses for the household. Part 2 of the same Schedule identifies various monthly
 27 expenses from Items 4 through 20, while Item 21 allows for “Other” monthly expenses to be
 28 listed. Item 21 does not list any student loan payment and the amount is \$0.00. According to
 Part 1 of his SOFA, Debtor had zero gross income from employment in 2023 and in 2022, and
 had gross non-employment interest income of \$5.26 and \$27.47 in 2023 and 2022, respectively.
 According to Part 4 of his SOFA, Debtor was not subject to any lawsuits or other creditor actions
 within one year of filing for bankruptcy relief.

25 ⁴ A Notice of Chapter 7 Bankruptcy Case - - No Proof of Claim Deadline (“Bankruptcy
 26 Notice”) was issued, scheduling a meeting of creditors (“341 Meeting”) for March 29, 2023.
 27 (ECF No. 2). The Bankruptcy Notice also set a deadline of May 30, 2023, for creditors to object
 28 to discharge and to dischargeability of debts.

⁵ Attached to the Complaint is a copy of an Attestation of Jonathan Heatt in Support of
 Request for Stipulation Conceding Dischargeability of Student Loans dated March 11, 2023
 (“2023 Debtor Attestation”). The 2023 Debtor Attestation is signed under penalty of perjury.

1 borrowed \$75,170 in federal student loans pursuing a degree he never earned from Wright State
 2 University. These loans have been in default since August, 2010.” Complaint at ¶ 2. Debtor
 3 seeks to discharge \$75,170 in student loans on the basis of undue hardship pursuant to Section
 4 523(a)(8).

5 On March 20, 2023, a summons was issued on the Complaint and service was executed
 6 upon the DOE. (AECF Nos. 3 and 4).

7 On March 29, 2023, the Trustee filed her Chapter 7 Trustee’s Report of No Distribution.
 8 (ECF No. 10).

9 On May 23, 2023, the DOE filed its answer (“Answer”) to the Complaint. (AECF No.
 10 6). The Answer admits that “in 2010, Plaintiff consolidated federal student loan debt; the
 11 amount of the debt will be provided by a Department of Education official in a certificate of
 12 indebtedness.” Answer at ¶ 2.

13 On May 31, 2023, Debtor received his Chapter 7 discharge.⁶ (ECF No. 12).

14 On July 27, 2023, an initial scheduling conference (“Scheduling Conference”) was held
 15 in the Adversary Proceeding and further continued to October 26, 2023, at 10:00 a.m.

16 On October 17, 2023, a stipulated order was entered continuing the Scheduling
 17 Conference to January 11, 2024, at 10:00 a.m. (AECF No. 11). The Scheduling Conference was
 18 continued several times. (AECF Nos. 13-16).

22 ⁶ The Chapter 7 discharge was entered after the May 30, 2023 objection deadline elapsed.
 23 As a result, Debtor received a discharge of his personal liability for the three nonpriority
 24 unsecured claims totaling \$2,551.24 listed in his Schedule “E/F”, see note 3, supra, but perhaps
 25 not as to the tax claim of the IRS under Section 523(a)(1), nor the student loan debt owed to the
 26 DOE under Section 523(a)(8). Although monthly repayment on the Debtor’s student loan
 27 apparently was suspended during the COVID pandemic, the suspension expired on September 1,
 28 2023. See Answer at ¶ 2. Under Section 727(a)(8), Debtor will not be eligible for another
 Chapter 7 discharge for 8 years after he filed the current case, i.e., until after February 28, 2031.
 Because the Debtor was not subject to any lawsuits or collection activity during the year
 preceding the bankruptcy filing, he unfortunately may have sacrificed a significant legal
 opportunity for little financial benefit.

1 On June 18, 2024, Debtor filed in pro se his SJ Motion (“Debtor SJ Motion”) along with
2 two attachments. (AECF No. 17).⁷

3 On June 26, 2024, the DOE filed its opposition to the Debtor SJ Motion that includes a
4 countermotion for summary judgment (“DOE Counter SJ Motion”),⁸ along with a statement of
5 undisputed facts (“DOE SUF”).⁹ (AECF No. 21).¹⁰

6 On June 26, 2024, Debtor noticed the Debtor SJ Motion to be heard on August 8, 2024.
7 (AECF No. 22). On that same date, the court also continued the Scheduling Conference to
8 August 8, 2024.

9
10 ⁷ The attachments consist of (1) a copy of an Attestation of Jonathan Heatt in Support of
11 Request for Stipulation Conceding Dischargeability of Student Loans signed February 21, 2024
12 (“2024 Debtor Attestation”), and (2) a copy of a Department of Justice Memorandum for All
13 United States Attorneys All Civil Chiefs, dated November 17, 2022, Subject: Guidance for
14 Department attorneys regarding student loan discharge litigation (“2022 DOJ Guidance”). The
15 2024 Debtor Attestation is signed under penalty of perjury.

16 ⁸ The 2022 DOJ Guidance reflects a litigation policy shift of the current Presidential
17 Administration to address outstanding student loan debt exceeding \$1.6 trillion held by more
18 than 40 million borrowers nationwide. Although the guidance is directed to the response of the
19 DOJ to borrower requests for relief under Section 523(a)(8), the determination of undue hardship
20 is solely the province of the bankruptcy court. Nothing in the 2022 DOJ Guidance requires
21 counsel for the DOE to accept, agree, or concur in the factual circumstances or representations
22 made by the borrower in the Attestation supplied by the debtor. More important, even if the DOJ
23 stipulates that a debtor’s student loan should be discharged as an undue hardship, the bankruptcy
24 court is not bound by the stipulation and must independently determine whether such a
25 conclusion is supported by the evidence. Additionally, even if the DOJ offered to settle for a
26 partial discharge of the Debtor’s student loan debt, see Debtor Opposition at 4:3-4, such a
27 settlement would require approval of the bankruptcy court under Bankruptcy Rule 9017. Even a
28 partial discharge, however, still requires a consideration of whether undue hardship exists. See
discussion below at note 13, infra.

⁹ Attached as exhibits to the SUF are copies of: “A” – Declaration of Gin Say Chan in
Support of United States’ Motion for Summary Judgment (“Chan Declaration”); “B” –
Attestation dated February 21, 2024 (“2024 Debtor Attestation”); “C” – Plaintiff’s Responses to
Interrogatories dated February 21, 2024 (“Debtor Interrogatory Responses”); and “D” – Excerpts
from Deposition of Jonathan Heatt taken on March 14, 2024 (“Debtor Deposition”).

¹⁰ A DOE representative who is a loan analyst familiar with the records maintained in the
ordinary course of business attested as to the status of the Debtor’s loan as of June 20, 2024. See
Chan Declaration at ¶¶ 3 through 7.

On July 10, 2024, Debtor filed his response to the DOE Counter SJ Motion (“Debtor Opposition”).¹¹ (AECF No. 31).

On August 8, 2024, the matters were heard by the court and taken under submission.

SUMMARY JUDGMENT STANDARDS

A motion for summary judgment is governed by Civil Rule 56, which is applicable in this adversary proceeding under Bankruptcy Rule 7056. See Silva v. Smith’s Pac. Shrimp, Inc. (In re Silva), 190 B.R. 889, 891 (B.A.P. 9th Cir. 1995). Summary judgment may be granted only if “the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a). For summary judgment purposes, “[m]aterial facts are those that may affect the outcome of the case.” Farmer v. Las Vegas Metro. Police Dep’t, 423 F.Supp.3d 1008, 1013 (D. Nev. 2019), citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1985). Findings of fact may not be entered because summary judgment may only be granted where there are no disputed issues of fact. See Animal Legal Def. Fund v. U.S. Food & Drug Admin., 836 F.3d 987, 989-90 (9th Cir. 2016).

A genuine issue of material fact exists when “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Id. The moving party’s evidence is judged by the same standard of proof applicable at trial. See Celotex Corp. v. Catrett, 477 U.S. 316, 323 (1986); see also S. California Gas Co. v. City of Santa Ana, 336 F.3d 885, 888 (9th Cir. 2003). The burden of proof is on the party seeking the summary judgment, but the inferences are viewed in favor of the opposing party. See Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 456, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992); see also Miller v. Glenn Miller Prods., Inc., 454 F.3d 975, 987 (9th Cir. 2006). If all of the opposing party’s allegations are accepted as true, summary judgment in favor of the moving party is appropriate if the material facts are not in genuine dispute. See 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL, §2723 (4th ed. 2024) (“[A]dmissions in the brief of

¹¹ The signature block for the Debtor Opposition includes the following: “I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.” Although the Debtor Opposition is not presented as an affidavit or declaration, the court will treat the document as the pro se Debtor’s testimony under 28 U.S.C. § 1746.

the party opposing the motion may be used in determining that there is no genuine dispute as to any material fact, since they are functionally equivalent to ‘admissions,’ which are expressly mentioned in Rule 56(c)(1)(A)...”). Thus, while determinations of intent or credibility generally are ill-suited for disposition by summary judgment, see Fogel Legware, etc. v. Wills (In re Wills), 243 B.R. 58, 65 (B.A.P. 9th Cir. 1999), a responding party’s uncontested representations may be sufficient to establish the undisputed material facts.

Once the moving party demonstrates the absence of disputed material facts, the responding party must provide admissible evidence raising a genuine dispute. The responding party cannot rely solely on conclusory allegations unsupported by factual data. See Farmer v. Las Vegas Metro. Police Dep’t, 423 F.Supp.3d at 1014 (“the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data [. . .] Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial.”) (external citations omitted).

APPLICABLE LEGAL STANDARD

Section 727(b) provides for an individual’s Chapter 7 discharge of personal liability for pre-bankruptcy debts. Section 523 describes certain types of pre-bankruptcy debts that an individual debtor cannot discharge. Subsection (a)(8) provides that “unless excepting such debt from discharge...would impose an undue hardship on the debtor and the debtor’s dependents...” a debt excluded from a bankruptcy discharge includes a debt for “an educational...loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit...” 11 U.S.C. § 523(a)(8)(A)(i). (Emphasis added.)¹²

¹² Of the nineteen different types of debt described in Section 523(a), sixteen are “self-executing” because the creditor is not required take steps during the bankruptcy case to prevent the debt from being discharged. Three types of debt are not self-executing because Section 523(c) require the creditor to timely object to the discharge of such debt. See 11 U.S.C. § 523(c) [encompassing debts under 523(a)(2) {fraud}, 523(a)(4) {breach of fiduciary duty, larceny and embezzlement}, and 523(a)(6) {willful and malicious injury}]. Whether a particular pre-bankruptcy loan qualifies as the type of educational loan encompassed by Section 523(a)(8) will determine whether the bankruptcy discharge enjoins post-bankruptcy enforcement of the loan as

1 The Bankruptcy Code does not define “undue hardship.” See Educ. Credit Mgmt. Corp.
 2 v. Nys (In re Nys), 446 F.3d 938, 942 n.3 (9th Cir. 2006). To determine if excepting a student
 3 loan from discharge will impose an undue hardship on an individual debtor, the Ninth Circuit has
 4 adopted the three-part test established by the decision in In re Brunner, 46 B.R. 752 (S.D. N.Y.
 5 1985), aff’d, Brunner v. New York State Higher Educ. Serv. Corp., 831 F.2d 395 (2d Cir. 1987).
 6 See United Student Aid Funds, Inc. v. Pena (In re Pena), 155 F.3d 1108, 1112 (9th Cir. 1998).

7 Under the Brunner test, the debtor must establish that: (1) based on current income and
 8 expenses, the debtor cannot maintain a minimal standard of living for the debtor and debtor’s
 9 dependents if forced to repay the loan; (2) additional circumstances exist indicating that this state
 10 of affairs is likely to persist for a significant portion of the repayment period; and (3) the debtor
 11 has made a good faith effort to repay the student loan. See In re Pena, 155 F.3d at 1111. See
 12 also Hedlund v. Educ. Resources Inst. (In re Hedlund), 718 F.3d 848, 851 (9th Cir. 2013); In re
 13 Love, 649 B.R. 556, 562-63 (Bankr.E.D.Cal. 2023). “Good faith is measured by the debtor’s
 14 efforts to obtain employment, maximize income, and minimize expenses.” In re Hedlund, 718
 15 F.3d at 852.

16 The debtor has the burden of proving all three prongs of the Brunner test, and if the
 17 debtor fails to prove any one of the three prongs, the loan will not be discharged. See In re Pena,
 18 155 F.3d at 1111-12.¹³

19 MATERIAL FACTS NOT IN GENUINE DISPUTE

20 Debtor attested in his Schedules that he owed \$75,168 to the DOE when he filed his
 21 voluntary Chapter 7 petition on February 28, 2023. See Schedule “E/F”, Part 2, at 4.2. The
 22 DOE representative attests that the amount owed had increased to \$76,861.22 as of June 18,
 23
 24 a personal liability. See Irigoyen v. 1600 West Investments, LLC (In re Irigoyen), 659 B.R.1,
 25 13-14 (B.A.P. 9th Cir. 2024).

26 ¹³ In this circuit, a “partial discharge” of a student loan debt has been permitted under
 27 Section 523(a)(8) even though the language of the statute includes no such provision. See
 28 Saxman v. Educational Credit Management Corp. (In re Saxman), 325 F.3d 1168, 1174-75 (9th
 Cir. 2003) (relying on general equitable authority under Section 105(a) to permit a partial
 discharge as long as the Brunner elements have been met).

2024, and that the standard monthly payment amount is \$369.50.¹⁴ See Chan Declaration at ¶11. Additionally, the DOE representative attests that as a result of a student loan consolidation, the Debtor received two loan disbursements of \$25,621.87 and \$32,876.09 in 2010, see Chan Declaration at ¶ 8, and that the Debtor has made one payment in the total amount of \$708.¹⁵ Id. at ¶ 10. Debtor states in his 2023 and 2024 Attestations that the loans were obtained in 2010 to pursue a bachelor's degree in motion picture production. See 2023 Debtor Attestation at ¶ 7; 2024 Debtor Attestation at ¶ 7. He also attested that in Spring 2004 he left his course of study and did not receive a bachelor's degree.¹⁶ See 2023 Debtor Attestation at ¶ 8; 2024 Debtor

¹⁴ The \$369.50 amount is based on amortized payments over 25 years at 3.125 percent interest. During his deposition taken on March 14, 2024, Debtor testified that he doesn't remember what his regular monthly loan payment would be. See Debtor Deposition at 39:23 to 40:1. This is somewhat surprising because it is the Debtor's burden under the Brunner test to establish the amount of the monthly payment that would prevent him from maintaining a minimal standard of living. Debtor attests, however, that the \$369.50 figure is arbitrary because he cannot afford to pay it. See Debtor Opposition at 3:9-10. That an individual might not have the resources to pay a debt, of course, does not make the amount of the debt an arbitrary figure. Additionally, Debtor's adamance that his household income is insufficient to make the monthly payment is simply an argument rather than evidence of the asserted fact.

¹⁵ In his 2023 Attestation, Debtor states that the outstanding loan balance is \$75,170. See 2023 Debtor Attestation at ¶ 5. In his 2024 Attestation, Debtor states that the outstanding loan balance is \$76,094. See 2024 Debtor Attestation at ¶ 5. In his 2023 Attestation, Debtor stated that his currently monthly payment was "currently paused," see 2023 Debtor Attestation at ¶ 6, while in his 2024 Attestation he indicated that his currently monthly payment obligation is in default. See 2024 Debtor Attestation at ¶ 6. In both Attestations he stated that his student loan obligation went into default in August 2010. See also Debtor Deposition at 39:1-5.

¹⁶ In the Complaint and in the Answer, the parties agree that the Debtor originally obtained federal student loans in the "early 2000's" to attend Wright State University. There is no dispute that after the Debtor left his course of study in 2004, he consolidated his loans on or about April 4, 2010, in the form of a Federal Consolidation Promissory Note to cover the outstanding amounts the Debtor previously borrowed. See Counter SJ Motion at 1:27 to 2:4. Debtor also attests that Regina Heatt received her bachelor's degree in 2005 and her master's degree in 2006, both from Wright State University. See Debtor Interrogatory Response No. 8. Debtor and Regina Heatt married in 2008. See Debtor Deposition at 15:20-25. Because the Debtor turns 48 years old in 2024, he would have been 34 years old in 2010 when his loans to attend Wright State University were consolidated. He attended that institution to obtain a bachelor's degree specializing in motion picture production. Debtor did not complete his degree. There is nothing in the record indicating his employment history, if any, before he consolidated his loans or before started attending college.

1 Attestation at ¶ 8. Debtor attested that he enrolled in an income-contingent repayment plan in
 2 2013, but was unable to make any payments because he was not employed. See 2023 Debtor
 3 Attestation at ¶ 24; 2024 Debtor Attestation at ¶ 24. In addition to enrolling in an income
 4 contingent repayment plan, Debtor states that he applied for nine loan forbearances or
 5 deferments, see 2023 Debtor Attestation at ¶ 22 and 2024 Debtor Attestation at ¶ 22, as well as a
 6 consolidation loan. See Debtor Opposition at 3:13-15.¹⁷

7 Debtor also attested in his Schedules that when he filed his voluntary Chapter 7 petition
 8 on February 28, 2023, there was net monthly household income of \$1,115.71 remaining after
 9 payment of \$3,030 in living expenses. See note 3, supra. The list of living expenses does not
 10 include a monthly payment for any student loans. Id. Debtor states in his 2023 Attestation
 11 signed on March 11, 2023, that after deducting monthly household expenses, he has \$1,115 of
 12 remaining income. See 2023 Debtor Attestation at ¶ 16. He also explained that basic needs
 13 currently are not met because of other expenses paid and owed by his spouse: “There is no extra
 14 income after expenses.” Id. at ¶ 17. In his 2024 Attestation signed on February 21, 2024, Debtor
 15 stated that after deducting monthly household expenses, he had no remaining income and that
 16 basic needs are not currently met. See 2024 Debtor Attestation at ¶ 16. He attested that his
 17 spouse has a monthly payment plan for her separate student loans, owes back taxes to the IRS,
 18 and is making monthly credit card payments. Id. at ¶ 17.

19 Debtor attests in his SOFA that he had zero employment income in 2023 and 2022. See
 20 SOFA, Part 2, Item 4. Debtor stated in both his 2023 and 2024 Attestations that his current
 21 monthly household gross income from all sources is \$4,824. See 2023 Debtor Attestation at ¶ 11;
 22 2024 Debtor Attestation at ¶ 11.¹⁸ In his interrogatory responses, Debtor testified that the
 23 adjusted gross income for the household was \$71,738 in 2022, \$80,645 in 2021, and \$58,354 in

24
 25 ¹⁷ Debtor also attests that he has attempted to contact the DOE or its servicing agent at
 least 12 times. See 2023 Debtor Attestation at ¶ 23 and 2024 Debtor Attestation at ¶ 23.

26
 27 ¹⁸ In his Chapter 7 Statement of Your Current Monthly Income (“CMI Statement”) that
 accompanied his Schedules, Debtor attests that this \$4,824 figure is for the gross monthly
 28 income of his non-filing spouse. In Part 2 of the CMI Statement, Debtor calculates the gross
 annual income for the household at \$57,932.52.

2020.¹⁹ See Debtor Interrogatory Response No. 7. Debtor confirmed those amounts during his deposition testimony, see Debtor Deposition at 19:21 to 20:4, but was not asked to explain the significant swings in household gross income from year to year.²⁰

Debtor attests in his Schedules that he was unemployed on the February 28, 2023 bankruptcy petition date. See Schedule “I.” Debtor stated in his 2023 Attestation that he was unemployed as of March 11, 2023. See 2023 Debtor Attestation at ¶9. Debtor testified in his 2024 Attestation that he was unemployed as of February 21, 2024. See 2024 Debtor Attestation at ¶ 9. Debtor confirmed at his March 14, 2024 deposition that he is unemployed and periodically has obtained part time employment in the past but never full-time employment.

Debtor testified that he was hired full-time by the U.S. Census Bureau as a census worker in late 2019 or early 2020, but did not earn a paycheck because he did not want to work during the COVID pandemic. See Debtor Deposition at 7:20 to 8:18. Debtor also testified that he was employed by CCSD as a substitute teacher in 2015 or 2016, but only a few days per week depending on demand, earning maybe around \$5,000 per year. Id. at 8:19 to 9:18. Debtor testified that his teaching license has expired but he has not checked into the renewal requirements because he does not want to teach any more. Id. at 8:22 to 9:7. He recalled that he may have had full-time employment but not within the past ten years. Id. at 9:3-6. Debtor testified that within the six months prior to his deposition, he applied to be a delivery driver for a marijuana dispensary but did not hear back. Id. at 10:11-24. He recalled part-time work in 2017 or 2018 for delivery services such as Postmates and Door Dash that he could do again if his vehicle could sustain the wear and tear. Id. at 12:15 to 13:3.²¹ Debtor testified that he had

¹⁹ The household gross income apparently came from Regina Heatt’s employment as a middle school teacher with CCSD where she has been employed for the past 10 years. See Debtor Interrogatory Response No. 9.

²⁰ At his deposition, Debtor testified that his wife’s 2023 earnings from the school district were \$76,612.81 based on her last pay stub for that year. See Debtor Deposition at 29:10-20. He stated that he does not know the amount of any across-the-board pay raise that his wife may receive in 2024. Id. at 30:11-25.

²¹ Employers that provide vehicles to delivery drivers apparently would not cause additional wear to an employee’s personal vehicle.

1 applied to be a delivery driver for Amazon a couple of years ago but has never heard back. Id. at
 2 14:3-14. He acknowledged that he would be able to work in restaurants, bars or “those sorts of
 3 businesses” but he had never worked in such places. Id. at 13:17-21. Debtor also applied for
 4 remote jobs through an internet employment agency but has not been hired. Id. at 11:4-12 and
 5 14:15-18. He testified that he prefers remote work or telework because he views himself as an
 6 introvert and he prefers filmmaking jobs because of his schooling. Id. at 13:22 to 14:21. In his
 7 2024 Attestation signed on February 21, 2024, Debtor stated that despite great effort, he has been
 8 unable to find employment in the movie industry. See 2024 Debtor Attestation at ¶ 18. He
 9 testified that after discontinuing his efforts in 2004 to obtain a degree in motion picture
 10 production, see 2023 Debtor Attestation at ¶¶ 7 and 8; 2024 Debtor Attestation at ¶¶ 7 and 8, he
 11 continued to seek employment in the entertainment industry for the past 15 years. See Debtor
 12 Opposition at 3:17-18. He has written screenplays, ebooks and audiobooks, directed a short film,
 13 attended events in Los Angeles, and has entered multiple contests in hopes of obtaining
 14 filmmaking work, all without success. Id. at 3:17-24; see also 2024 Debtor Attestation at ¶ 18;
 15 Debtor Opposition at 3:13-25. He testified that the last job application he submitted before his
 16 deposition was the delivery driver position for the marijuana dispensary. See Debtor Deposition
 17 at 14:22 to 15:14.

18 In his 2024 Attestation, Debtor also stated that he is about to turn 48 years old. See 2024
 19 Debtor Attestation at ¶ 19. At his deposition taken on March 14, 2024, Debtor testified that he
 20 does not have any kind of disabilities that affect his ability to work. See Debtor Deposition at
 21 11:13-15. He also attested that he has never applied to the Social Security Administration for
 22 disability benefits. Id. at 11:16-18. Debtor stated that he has not applied for disability benefits
 23 with any private insurers. Id. at 11:19-21. He attested that he is not a veteran. Id. at 11:22-23.
 24 Debtor stated that there are no lawsuits within the last five years in which he claimed any kind of
 25 permanent injuries or disability. Id. at 11:24 to 12:1. He attested that there are no workers’
 26 compensation claims in the last five years where he has claimed any kind of physical injuries,
 27 permanent injuries, disability, or “anything like that.” Id. at 12:2-8. In his interrogatory
 28

1 responses, Debtor attests that he has not inherited or received any property within the past five
2 years nor is he a beneficiary (presumably of a will or trust). See Debtor Interrogatory No. 12.

3 DISCUSSION

4 As previously mentioned, to establish undue hardship within the meaning of Section
5 523(a)(8), the Debtor bears the burden of proving each of the elements of the Brunner test.

6 **1. Inability to maintain a minimal standard of living for the debtor and debtor's dependents.**

7 The annual income for the Debtor's household appears to be a minimum of \$57,932.52 if
8 an average monthly income of \$4,824 is applied. See note 18, supra. Other annual adjusted
9 gross income figures supplied by the Debtor, however, appear to reflect a higher average
10 monthly amount: \$71,738 in 2022 (\$5,978 average per month); \$80,645 in 2021 (\$6,720 average
11 per month); \$58,354 in 2020 (\$4,863 average per month). See Debtor Interrogatory Response
12 No. 7.²² While Debtor argues that the income of his non-debtor wife should not be considered in
13 whether a minimal standard of living can be maintained, see Debtor Opposition at 2:6-9, 6:20-29
14 and 3:5-9, his argument is contrary to persuasive legal authority²³ as well as common sense.²⁴
15

16 ²² The annual figure for 2023 is unknown because the last paystub received by the
17 Debtor's spouse for the 2023 school year was \$76,612.81 which may be different from the
18 amount of adjusted gross income for the 2023 tax year. If the \$76,612.81 figure is used,
19 however, the average monthly income would be \$6,384.

20 ²³ For Chapter 7 cases where an individual debtor seeks to discharge a student loan, but
21 not the student loan of a non-debtor spouse, see In re Dolan, 256 B.R. 230, 236 (Bankr.D.Mass.
22 2000); In re Greco, 251 B.R. 670, 676-77 (Bankr.E.D.Pa. 2000); In re White, 243 B.R. 498, 512-
23 14 (Bankr.N.D.Ala. 1999). For Chapter 7 cases where joint debtors file, but seek to discharge
24 the student loan obligation of only one spouse, see also In re Ananian, 2013 WL 1897842, at *2
(Bankr.N.D.Cal. 2013); In re England, 264 B.R. 38, 49-50 (Bankr.D.Idaho 2001); In re Elmore,
230 B.R. 22, 27 (Bankr.D.Conn. 1999). Compare In re McSparran, 410 B.R. 664, 668
(Bankr.D.Mont. 2009) (considering non-debtor spouses income in making median income
calculation for Chapter 13 means test).

25 ²⁴ Student loan borrowers generally are not required to provide collateral to a lender nor
26 to have the current income to repay the debt that is incurred. Nor are student loan borrowers
27 necessarily required to have a guarantor that the lender can look to for repayment in the event the
28 borrower fails or refuses to repay the debt. In a sense, student loans may be the riskiest of all
voluntary extensions of credit. The exception to discharge of student loans under Section
523(a)(8) may be the lender's only effective recourse due to the absence of collateral. The
central purpose of bankruptcy relief is to provide "the opportunity for a completely

1 Thus, using a monthly household income figure of at least \$4,824, the court initially considers
 2 the only specific monthly household expense figure of \$3,030 that appears in the Schedules filed
 3 on February 28, 2023.

4 Like his Schedules, the 2023 Attestation signed on March 11, 2023, required the Debtor
 5 to list his current income and expenses. He was required to list his monthly household expenses
 6 including the payroll deductions from his spouse's monthly paycheck, as well as housing costs,
 7 transportation costs, and other necessary expenses. Debtor attested in 2023 that "after deducting
 8 the foregoing monthly expenses from my household gross income, I have \$1115 remaining
 9 income." See 2023 Debtor Attestation at ¶ 16 (emphasis added). In his later Attestation signed
 10 on February 21, 2024, Debtor identified three monthly expense adjustments: mortgage or rent
 11 payments increased from \$1,635 to \$1,685, utilities increased from \$370 to \$440, and vehicle
 12 operating costs increased from \$160 to \$260. See 2024 Debtor Attestation at ¶ 15 (b) and (c).
 13 These three increased monthly expenses total \$220. The latter Attestation also states that "after
 14 deducting the foregoing monthly expenses from my household gross income, I have no
 15 remaining income." See 2024 Debtor Attestation at ¶ 16 (emphasis added). In other words,
 16 from remaining monthly income figure of \$1115 in the 2023 Attestation, and the \$220 in
 17 increased household expenses identified in the 2024 Attestation, Debtor attests that instead of
 18 \$895 of remaining household income, there is nothing left over to make a payment toward his
 19 student loan obligation. The \$895 figure far exceeds the monthly student loan payment of
 20 \$369.50 suggested by the uncontested record. See note 14, supra.

21 In his 2023 Attestation, Debtor offered that before the COVID pandemic hit in early
 22 2020, \$600 of his wife's wages were being garnished for payment of her separate student loans.
 23 See 2023 Debtor Attestation at ¶ 17. In the 2024 Attestation signed on February 21, 2024,
 24 however, Debtor states that his wife is now on a monthly payment plan for her student loan. See

25 _____
 26 unencumbered new beginning to the honest but unfortunate debtor..." Grogan v. Garner, 498
 27 U.S. 279, 286-87 (U.S. 1991). Under the Debtor's argument, however, a debtor would be able to
 28 assert the existence of a "hardship" even though the debtor has the good fortune of having all of
 his or her living expenses met through the efforts or largesse of others. Even if such an
 extraordinary situation for an individual debtor would constitute a hardship, it would fall far
 short of bring "undue."

2024 Debtor Attestation at ¶ 17. In his interrogatory response signed on February 21, 2024, Debtor attests that his wife's student loan payment amount currently is \$130. See Debtor Interrogatory Response No. 6. In his deposition taken on March 14, 2024, Debtor confirmed that Regina Heatt's student loan payment is \$130 per month. See Debtor Deposition at 40:9-20. Debtor also attests that IRS garnishments of his wife's wages have not resumed. See Debtor Interrogatory Response No. 5. According to the Debtor's testimony, his wife now is paying \$470 less per month for her student loans than she was before the COVID pandemic hit in 2020. There is no explanation of whether the payments now made by Regina Heatt on her other financial obligations reduces the household income in an amount that would preclude a \$369.50 payment on the Debtor's student loans. Moreover, because the information provided by the Debtor suggests that the average monthly household income may well exceed the \$4,824 minimum,²⁵ the record falls far short of establishing that a minimal standard of living is in jeopardy.²⁶

Based on his own testimony, Debtor has failed to meet his burden of proof on the first of the Brunner requirements.

2. Existence of additional circumstances indicating that this state of affairs is likely to persist for a significant portion of the repayment period.

While the Debtor asserts that he cannot make a \$369.50 monthly payment at all, he does not dispute that the monthly payment figure is based on amortized payments over 25 years at 3.125 percent interest. Because the Debtor has been in default since 2010, any commencement

²⁵ The DOE argues that the Debtor's average annual household income from 2020, 2021, 2022 and 2023, is \$71,837, or approximately \$5,986 per month. See DOE Counter SJ Motion at 4:18-22 & n.1. Although using an average of the annual income figures provided by a debtor is permissible, see, e.g., In re Love, 649 B.R. at 563, it is unnecessary to do so in this instance.

²⁶ The DOE observes that the Debtor would not be eligible for waiver of filing fees for the bankruptcy proceeding because his household income exceeds 150% of the official poverty rate for a two-person household announced by the U.S. Department of Health and Human Services. The figures for a two-person household in Nevada is \$30,660 annually or \$2,555 per month. See DOE Counter SJ Motion at 4:22-25, citing <https://www.nvb.uscourts.gov/sites/default/files/poverty-guidelines.pdf> (last visited 6/20/24). While the official poverty rate is informative, the minimal standard of living standard element of the Brunner test does not set a poverty rate threshold nor does it look to a "middle class" standard of living.

1 of monthly payments in the \$369.50 amount would require 25 years to satisfy the balance of the
 2 loan. The second of the Brunner elements therefore begs the question of whether the Debtor's
 3 current state of affairs is likely to persist for a significant portion of the 25 year repayment
 4 period? By a preponderance of the evidence, the Debtor is required to (1) demonstrate additional
 5 circumstances indicating that his asserted inability to make payments will persist, and (2)
 6 establish that the inability will persist for a substantial portion of the 25 year repayment period.

7 Debtor is approximately 48 years old. If he commenced the \$369.50 payments in the
 8 current year, the loan balance would be paid off when he is 73 years old. In the past, the Debtor
 9 had part-time work as a substitute teacher for CCSD and as a delivery driver for consumer
 10 goods. Debtor no longer wants to teach, however, and does not believe his personal automobile
 11 is reliable enough to provide delivery services. He acknowledged that he would be able to work
 12 in restaurants, bars or "those sorts of businesses" but he had never worked in those capacities.
 13 He has applied for remote jobs but has not been hired. Not surprisingly, Debtor wants to work in
 14 the motion picture or film industry but has never obtained meaningful employment in the field.

15 During his deposition taken on March 14, 2024, Debtor indicated that he is in good
 16 health. Debtor does not have any kind of disabilities that affect his ability to work.²⁷ He has
 17 never applied for Social Security disability benefits. Debtor has not applied for disability
 18 benefits with any private insurers. He is not a veteran and therefore is not eligible for veteran's
 19 disability benefits. Debtor has not commenced any legal action claiming that he suffers from any
 20 kind of permanent injuries or disability. He had pursued no workers' compensation claims in the
 21 last five years where he has claimed any kind of physical injuries, permanent injuries, disability,

22
 23 ²⁷ In contrast, decisions under Section 523(a)(8) are legion where individual borrowers
 24 have unsuccessfully asserted a variety of medical, physical and mental conditions as additional
 25 circumstances precluding them from the employment necessary to make future student loan
 26 payments. See, e.g., In re Lozada, 604 B.R. 427, 436 (S.D.N.Y. 2019) (various health
 27 conditions); Greene v. U.S. Dept. of Educ. (In re Greene), 2013 WL 5503086, at *6 (E.D.Va.
 28 Oct. 2, 2013) (mental illness, anxiety disorder and inability to work around men); Robinson v.
Educ. Mgmt. Corp. (In re Robinson), 416 B.R. 275, 280 (E.D.Va. 2009) (medical treatment for
 cancer). Even if the debtor succeeds in demonstrating a current inability to work, the individual
 debtor is required to establish that the inability will persist for a significant portion of the
 repayment period.

1 or similar malady. Debtor does not suggest that he has any past or current medical conditions or
 2 circumstances that prevented him from employment in the past or which would prevent him from
 3 employment in the future.²⁸

4 Based on this evidentiary record, the court concludes that the Debtor has failed to
 5 demonstrate additional circumstances indicating that any inability to pay is likely to persist.
 6 Even if the Debtor succeeded in establishing that the income of his household is insufficient to
 7 maintain a minimal standard of living, no additional circumstances have been demonstrated.
 8 Debtor is 48 years old and in good health. He has no physical disabilities nor medical conditions
 9 that prevent him from continuing to seek employment. Debtor was not asked in the
 10 interrogatories nor apparently at his deposition whether he is incapable or unable to perform jobs
 11 requiring manual labor. Debtor has not offered any evidence that he has any physical disabilities
 12 or limitations that prevent him from performing basic physical tasks.

13 Debtor testified that he prefers to work remotely, but is capable of performing other jobs
 14 such as delivery work, food service, and teaching. He acknowledges that he could renew his
 15 credential to teach in the CCSD, but he does not want to teach even though his wife was able to
 16 complete her college studies in the field of education and sustains the household solely through
 17 her teaching salary. See Debtor Interrogatory Nos. 8 and 9.²⁹ Like most people, Debtor wants to
 18 earn income in his areas of interest and schooling, but currently has not been successful in
 19 gaining employment in the film industry. The understandable desire to obtain a preferred job,
 20 however, is not a bar to seeking a paying job.³⁰ It is fully within the Debtor's control to seek

21
 22 ²⁸ Fortunately, Debtor does not suggest nor does the evidentiary record indicate that
 23 Regina Heatt has any past or current medical conditions or circumstances that would prevent her
 from continuing her employment with CCSD.

24 ²⁹ Regina Heatt earned her bachelor's degree and master's degree in childhood education
 25 in 2005 and 2006 from Wright State University. She has been employed by CCSD for past 10
 years. She currently teaches math at Grant Sawyer Middle School.

26 ³⁰ The DOE has not questioned whether the Debtor has the abilities required for
 27 employment in the field that he has pursued. Even if an individual has specialized training,
 28 actual experience, or even a college degree in any field of interest, however, those attributes
 provide no assurance of employment at any given time.

1 employment to contribute to the household income even if it might be work less desirable to him
 2 but acceptable to others. Merely abandoning the effort, however, is a self-created result and not
 3 an additional circumstance demonstrating persistence of his current state of unemployment.
 4 Additional circumstances simply have not been established.

5 Even if additional circumstances had been established, Debtor has not demonstrated that
 6 any current inability to maintain a minimal standard of living will persist for a significant portion
 7 of the 25 year repayment period. There is no dispute that despite the loan consolidation in 2010,
 8 Debtor has made only one payment in the amount of \$708. There is no evidence in the record or
 9 any suggestion by the Debtor that the \$708 payment, much less a \$369.50 payment, prevented
 10 the household from meeting its living expenses during any portion of the repayment period.
 11 Moreover, the household income figures provided by the Debtor indicate that Regina Heatt's
 12 teaching income increased between 2020 and 2023. See discussion at 12 & n.22. Debtor
 13 acknowledges that he does not know whether his wife's salary is likely to increase in 2024. See
 14 note 20, supra. Assuming that a 25 year repayment period applies, Debtor simply has not
 15 demonstrated that during any portion of the repayment period, much less a significant portion, a
 16 \$369.50 payment on his student loan obligation will preclude his household from maintaining a
 17 minimal standard of living.

18 Based on his own testimony, Debtor has failed to meet his burden of proof on the second
 19 of the Brunner requirements.

20 **3. Good faith effort to repay the student loan.**

21 Debtor left his studies in 2004 and consolidated his outstanding student loans in 2010.
 22 He has made one payment towards his student loans although it is not clear from the record
 23 whether that payment was made before or after the consolidation in 2010. Debtor applied for
 24 loan forbearances or loan deferments nine times, and attempted to contact the DOE at least
 25 twelve times.³¹

27
 28 ³¹ To his credit, Debtor apparently has not buried his head in the sand by simply ignoring
 or denying the existence of his student loan debt. But acknowledging a financial difficulty is not
 the same as attempting to effectively address it. Forbearances, deferments and consolidations

1 Debtor has continued to pursue employment in the entertainment industry for the past 15
2 years, even though he discontinued his efforts to obtain a bachelor's degree in motion picture
3 production in 2004. To promote his desire to be employed as a filmmaker, he has attended
4 events in Los Angeles, entered various contests, written screenplays and books, and even
5 produced a short film. Despite such efforts, he has not gained employment in his chosen field.³²

6 While Debtor's efforts to obtain employment in the entertainment industry are
7 impressive, his efforts to obtain other employment are not. He has no disabilities or limitations
8 that prevent him from doing other work on at least a part-time basis, such as consumer delivery
9 services. Apparently the Debtor successfully obtained a part-time position as a substitute teacher
10 with CCSD in 2015 or 2016. He acknowledges that he could teach again if he renews his
11 teaching credential, but he simply does not want to teach. Debtor acknowledges that he was
12 offered full-time employment as a census worker, but did not want to risk door-to-door exposure
13 to COVID during the pandemic. Debtor acknowledges that he could work in food businesses or
14 similar service positions, but says he is an introvert who would prefer to work remotely. He
15 apparently has applied for work that can be performed remotely but without success.

16 Obtaining even part-time employment certainly would be a step towards maximizing the
17 income of the Debtor's household. Debtor candidly acknowledges, however, that there are types
18 of employment that he is capable of performing but that he has chosen not to pursue. Those
19 choices have consequences. Under these circumstances, the court concludes that the Debtor's
20 efforts fall short of the good faith required to meet his burden of proof on the third Brunner
21 requirement.

22 / / /

23
24 may postpone collection activity, but may not be meaningful if the borrower does not use the
25 additional time to attempt actual repayment.

26 ³² In seeking to become a filmmaker, it is unclear whether the Debtor used household
27 funds to physically travel to in-person events in Los Angeles, to pay entry fees for contests or
28 competitions, or to shoot his own short film. Whatever those expenses were, if any, the amounts
may have been excessive in hindsight. The monthly expenditures appearing in Schedule "J" as
well as in Paragraphs 16 of the 2023 Attestation and 2024 Attestation, however, do not appear to
be excessive on their face.

CONCLUSION

The material facts are not in genuine dispute. Based on the material facts, Debtor has failed to meet his burden of proof on the first, second and third elements of the Brunner test. As a result, a judgment as a matter of law against the Debtor and in favor of the DOE is warranted under Section 523(a)(8).

A separate judgment under Civil Rule 58 is entered contemporaneously with this Memorandum Decision.

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