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JAN 15 2004

**UNITED STATES
BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA**

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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA**

In Re)	Chapter 7
GREGORY TRAVIS BOEHM,)	No. 00-10884-PHX-GBN
)	
Debtor.)	
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GREGORY TRAVIS BOEHM,)	Adversary No. 01-00062-GBN
)	
Plaintiff,)	
)	
vs.)	AMENDED
)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
SOUTHWEST STUDENT SERVICES)	AND ORDER
CORPORATION; PENNSYLVANIA)	
HIGHER EDUCATION ASSISTANCE)	
AGENCY (PHEAA); EDUCATIONAL)	
CREDIT MANAGEMENT CORPORATION,)	
)	
Defendants.)	
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The complaint of plaintiff Gregory Travis Boehm for a declaration that his student loan debt owed to creditors Educational Credit Management Corporation and the Pennsylvania Higher Educational Assistance Agency ("defendants") was discharged in his chapter 7 bankruptcy was heard as a bench trial on February 19, 2002. The proceeding was not submitted to the court for decision until November 18, 2003, to allow an extended opportunity to attempt to settle, to divert plaintiff's case to

1 an administrative resolution under the William D. Ford Loan
2 Consolidation Program, 34 C.F.R. § 685 et. seq. and for extensive
3 post trial briefing.

4 The Court has considered sworn witness testimony,
5 admitted exhibits, a declaration of defendants' witness Danielle
6 Smith and the facts and circumstances of this case. An interim
7 order was entered on December 4, 2003 announcing the Court's
8 decision. The following findings and conclusions are now
9 entered:

10 **FINDINGS OF FACT**

11 1. Plaintiff Boehm is a tetraplegic, unable to use
12 his arms or legs since suffering a spinal cord severance injury
13 in a May 7, 1981 automobile accident. He functions and interacts
14 verbally and through use of mouth sticks and employment of a
15 personal assistant. He has employed a personal assistant for the
16 last 20 years and is confined to a wheelchair. Following his
17 injury, plaintiff acquired a considerable amount of higher
18 education, receiving a Bachelor of Science degree in Hotel
19 Administration in 1990, a Juris Doctor degree from the Arizona
20 State University Law School in 1994 and a Master's degree in
21 Business Administration in 1995. Mr. Boehm is single and has no
22 dependents. Plaintiff has been unable to pass the examination
23 requirements for admission to Arizona bar membership after eight
24 attempts. Since August 16, 2001 plaintiff has been employed part
25 time at Arizona State University as a technical support
26 representative, responding to inquiries by telephone and email.
27 His salary is \$954 per month. He estimates his current gross

1 salary is \$15-16,000. Plaintiff additionally receives \$763
2 monthly in untaxed Social Security Disability Insurance payments.
3 He previously received \$486 monthly in Supplemental Security
4 Income ("SSI") payments. The SSI payments terminated when he
5 became employed at the University

6 At the time of trial, plaintiff was concerned because
7 his Social Security disability benefits were under periodic
8 agency review. If he were to lose his social security, the state
9 of Massachusetts would cut off his personal assistant benefits,
10 paid directly to the assistant. He maintains state residency by
11 leasing premises in Clinton, Massachusetts. Plaintiff testified
12 his personal expenses have escalated since he filed his Schedule
13 J current expenditures statement on October 5, 2000¹ and he is
14 unable to make payments on defendants' claims. Trial testimony
15 of Gregory Travis Boehm of February 19, 2002 ("test."); admitted
16 exhibit ("ex") B. The Court finds that debtor is a credible
17 witness.

18 2. Plaintiff filed a Chapter 7 bankruptcy case in
19 this judicial district on October 5, 2000. He scheduled his
20 monthly income as \$1,203.76, based entirely on government
21

22 ¹ The pro se litigant subsequently supported his trial
23 testimony by post-trial filings of bills, including a statement
24 reflecting his Massachusetts lease has increased from \$51
25 monthly, effective February 1, 2001 to \$902, effective October 1,
26 2003. Dkt. 52. He also attaches correspondence reflecting the
27 Social Security Administration is attempting to collect an
28 asserted overpayment of \$6,570.66. Dkt. 40 at attachment.
Defendants properly object to consideration of documents not
admitted at trial. In re *MacDonald*, 222 B.R. 69, 72-73 (Bankr.
E.D.Pa. 1998). The documents will not be considered. Plaintiff's
trial testimony will be considered, however.

1 assistance through Social Security Disability and the SSI
2 programs. His earnings from these same governmental assistance
3 programs provided income of \$13,064.00 in 1999 and \$13,215.00 in
4 1998. Debtor listed his expenses as \$1,454.89, including
5 payments of \$771.19 monthly on \$34,001.74 of scheduled student
6 loan debt owed to three creditors. Debtor's bankruptcy schedules
7 list his unsecured debt as \$95,656.51, including the above
8 student loans and \$61,246.33 in credit card debt owed to ten
9 creditors.² No secured or priority debt was listed. Plaintiff
10 valued his total assets at \$4,125, primarily consisting of a 1990
11 Ford van worth \$3,800. His bankruptcy trustee reported no assets
12 were available to pay creditors. Debtor has been granted a
13 bankruptcy discharge on January 29, 2001 and his case was closed
14 on August 8, 2002. Administrative file 00-10884-PHX-GBN and
15 supporting schedules.

16 3. On January 31, 2001 plaintiff filed the complaint
17 in this proceeding, seeking discharge of student loan debt held
18 by three defendants with a current balance of \$25,129.09. He
19 alleged in the complaint and testified at trial that he remained
20 current in his student loan payments until he filed the adversary
21 proceeding. Complaint at pgs. 1-4, adversary docket item
22 ("Dkt.") 1. Debtor credibly testified that he kept current with
23 his \$771 monthly student loan payments by charging expenses on
24 his credit cards

25

26 _____
27 2Credit card debts of \$650.73 and \$5,196.15 were apparently
28 listed twice. See Schedule F at pgs. 1-2.

28

1 A settlement was reached with defendant The Education
2 Resources Institute ("TERI") on January 7, 2002 by which the TERI
3 claim would be discharged on April 15, 2003, provided debtor
4 established through tax returns that his gross income did not
5 exceed \$25,000 in either calendar year 2001 or 2002. Stipulated
6 Judgment at 1-2, Dkt. 28. Plaintiff and the two remaining
7 defendants could not reach settlement: debtor rejected
8 defendants' request that he stipulate to a 25-year income
9 contingent repayment plan under the William D. Ford Foundation
10 Income Contingent Repayment Program. Defendants rejected
11 debtor's request that they stipulate to a settlement similar to
12 the TERI resolution. Test., ex. D.

13 4. To the extent any of the following conclusions of
14 law should be considered findings of fact, they are hereby
15 incorporated by reference.

16 **CONCLUSIONS OF LAW**

17 1. To the extent any of the above findings of fact
18 should be considered conclusions of law, they are hereby
19 incorporated by reference.

20 2. Pursuant to 28 U.S.C.§ 1334(a), jurisdiction of
21 debtor's bankruptcy case is vested in the United States District
22 Court for the District of Arizona. That court has referred all
23 cases under Title 11 of the United States Code and all adversary
24 proceedings arising under Title 11 or related to a bankruptcy
25 case to this court. 28 U.S.C.§ 157(a); Amended District Court
26 General Order 01-15. This proceeding having been appropriately
27 referred, this court has core bankruptcy jurisdiction to enter a

1 final judgment determining whether defendants' claims should be
2 discharged in the related bankruptcy case. 28 U.S.C. §
3 157(b)(2)(I).

4 3. This court's conclusions of law are reviewed de
5 novo. Its factual findings are reviewed for clear error. *Hanf*
6 *v. Summers* (In re *Summers*), 332 F. 3d 1240, 1242 (9th Cir. 2003).
7 The appellate court accepts the bankruptcy court's findings,
8 unless upon review, it is left with the definite and firm
9 conviction that a mistake has been committed. *Ganis Credit Corp.*
10 *v. Anderson* (In re *Jan Weilert RV, Inc.*), 315 F. 3d 1192, 1196
11 (9th Cir.) amended by 326 F. 3d 1028 (9th Cir. 2003). Whether a
12 claim is dischargeable presents mixed issues of law and fact that
13 are reviewed de novo. *Hamada v. Far East National Bank* (In re
14 *Hamada*), 291 F. 3d 645, 649 (9th Cir. 2002).

15 4. Under § 523(a)(8) of the Bankruptcy Code, the
16 issue is whether plaintiff has established that he is entitled to
17 discharge defendants' student loans as constituting an undue
18 hardship on him. 11 U.S.C. § 523(a)(8). The Ninth Circuit has
19 adopted the so-called Brunner test. Under this three-part test,
20 debtor must first establish that he cannot maintain, based on
21 current income and expenses, a minimal standard of living, if
22 forced to repay the loans. Second, debtor must show that
23 additional circumstances exist indicating this state of affairs
24 is likely to persist for a significant portion of the repayment
25 period. The third prong requires that debtor has made good faith
26 efforts to repay the loans. *Saxman v. Educational Credit*

1 *Management Corp. (In re Saxman)*, 325 F. 3d 1168, 1173 (9th Cir.
2 2003).

3 Plaintiff has the burden to satisfy all three elements
4 before a student loan can be discharged. If he fails to meet one
5 of the requirements, the court's inquiry must end there with a
6 finding of no dischargeability. *United Student Aid Funds, Inc.*
7 *v. Nascimento (In re Nascimento)*, 241 B.R. 440, 445 (9th Cir.
8 Bankr. 1999). The elements are to be proven by a preponderance
9 of the evidence. *Cota v. U.S. Department of Education (In re*
10 *Cota)*, 298 B.R. 408, 414 (Bankr. D. Az. 2003).

11 5. The first prong of the Brunner test requires
12 debtor to prove he cannot maintain, based on current income and
13 expenses, a minimal standard of living if forced to repay the
14 loans. This requires an examination of debtor's current income
15 and expenses to see if payment would cause his standard of living
16 to fall below that minimally necessary. Debtor must demonstrate
17 more than simply tight finances. Courts require more than
18 temporary financial adversity, but typically stop short of utter
19 hopelessness. The proper inquiry is whether it would be
20 unconscionable to require debtor to earn more income or reduce
21 expenses. *Birrane v. Pennsylvania Higher Education Assistance*
22 *Authority (In re Birrane)*, 287 B.R. 490, 495 (9th Cir Bankr.
23 2002).

24 Defendants presented no witnesses controverting
25 plaintiff's credible testimony that he could not maintain his
26 modest living standard and make payments on their claims. There
27 is no evidence of a lavish lifestyle or significant disposable
28

1 income. Defendants' post trial briefing attacks inclusion of
2 \$55 budgeted for monthly home maintenance, although plaintiff is
3 a renter (no trial time was spent on this issue on cross
4 examination) and urges that since plaintiff pre petition could
5 make \$771.19 monthly student loan payments, he should be able to
6 do so post petition as well. Defendants' supplemental reply,
7 dkt. 58 at pgs. 5-6. Defendants also argue for the existence of
8 \$793 in disposable income, based on his 2003 income and his 2000
9 Expense Schedule J, filed in his bankruptcy. Post trial brief at
10 2, dkt. 38. These arguments do not overcome plaintiff's credible
11 testimony that he was required by Social Security regulations to
12 keep his student loans current which he did by charging living
13 expenses on multiple credit cards. This testimony is supported
14 by the large number and amount of credit card debt scheduled in
15 the bankruptcy. See finding of fact 2, id. This fact finder
16 concludes debtor has met his burden to establish the first prong
17 of the Brunner test.

18 6. The second prong requires debtor to prove that
19 additional circumstances exist indicating that debtor's current
20 situation is likely to persist for a significant portion of the
21 student loan repayment period. 287 B.R. at 497. This test is to
22 effect clear congressional intent to make discharge of student
23 loans more difficult than that of other debt. There must be
24 evidence debtor's road to recovery is obstructed by the type of
25 barrier that would lead the court to believe he will lack the
26 ability to repay for several years. Examples of such barriers
27 may include psychiatric problems, lack of usable job skills and

1 limited education. Id., citing cases. Nothing has been
2 presented indicating plaintiff's present disabled condition will
3 improve over time. He meets defendants' suggestion of seeking
4 more gainful employment as an attorney, paralegal, or business
5 manager with the following:

6 The debtor has taken the bar exam 8 times,
7 and a good portion of the debtor's
8 discharged debt was incurred in the
9 pursuit of a successful bar exam. Exams
10 plus review courses all have fees that are
11 fairly substantial. Debtor could not
12 afford these fees at present. Debtor
13 cannot afford to incur more debt.

14 Also, defense counsel fails to consider
15 Debtor's total lack of physical ability
16 and his complete dependence on others to
17 assist in his day. The biggest variable
18 is the dependence on others. Employees
19 are (sic) don't show up, are late or
20 tired, hungover, angry, have personal
21 problems and a myriad of other things
22 going on in their lives besides their work
23 for Debtor. If employees don't show up
24 for work, the debtor cannot do their work
25 for them. As Defense counsel will point
26 out, these circumstances existed at the
27 time the loans were incurred.

28 However, the comfortable pace of law
school and the physical rigors of an
active attorney are entirely different.
These differences only became apparent
through actual externships as a law clerk
and as student counsel to juvenile
defendants. Attorneys typically are at
the office early and they stay late on
many occasions especially as a new
attorney. Flexibility in their ability to
schedule is imperative to success.
Attorneys read and reread papers, briefs,
depositions; (sic) shuffle papers,
retrieve files, do legal research, get
themselves to court, depositions, and
other activities all without assistance.
A paralegal's duties can be similar to an
attorney's but include secretarial-type
activities. The Debtor is dependent on

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others for this assistance. This assistance is not free and the monies the debtor receives from the state for his care is relegated to Activities of Daily Living (personal care, at-home medical care, and necessary household assistance). Use of the monies for other activities (such as help with employment related activities) is not allowed.

These circumstances are indeed, extraordinary and will persist for all if not more than the loan repayment period.

Plaintiff's answer to closing brief at 3-4, dkt. 40

This court concurs. Debtor has met the second prong of the test

7. The third prong of the Brunner test requires that debtor prove good faith efforts were made to repay the loans. *Birrane* at 499. Courts measure good faith by examining various factors. The fact debtor has made no or only some payments is not, in and of itself dispositive. Good faith is measured by debtor's efforts to obtain employment, maximize income and minimize expenses. *Id.* (citing cases). Debtor may not willfully or negligently cause his own default. His condition must result from factors beyond his reasonable control. 287 B.R. at 500. Finally, good faith is also measured by debtor's effort, or lack thereof, to negotiate a repayment plan. *Id.*

Plaintiff's trial testimony that he remained current with \$771.19 monthly student loan payments until February of 2001 is undisputed. His adversary complaint was filed in January of 2001. His filing of the adversary does not automatically excuse his obligation to continue to make good faith student loan

1 payments, if feasible. Birrane at 500. While he ceased payments
2 as his complaint was being adjudicated, his testimony that he
3 could only remain current by living on credit cards is both
4 credible and undisputed. There is no good faith requirement that
5 he create unpaid post petition credit card debt to ensure his
6 student loans are current

7 Debtor's good faith efforts to negotiate a repayment
8 plan include a successful settlement with defendant TERI,
9 allowing discharge of student loan debt provided debtor
10 documented his modest income. Finding of fact 3. He also
11 attempted to settle with the remaining defendants. Given his
12 disability and employment status, debtor was unwilling to commit
13 to a long-term 25-year, income-contingent repayment plan.
14 Defendants in turn, refused his request to settle based on a
15 proposal similar to the TERI arrangement. Id. at 3. In post
16 trial briefing, plaintiff asserts he also attempted to comply
17 with defendants' request for a physician certified total and
18 permanent disability finding. Closing brief at 4-5, dkt. 37.
19 See 34 C.F.R. 55685.212(b), 213(c)

20 As plaintiff argues:

21 The debtor has co-operated (sic) with the
22 defense by showing good faith prior to and
23 after filing for bankruptcy. The debtor
24 faithfully paid toward reducing the debt
25 owed on his student loans prior to
26 bankruptcy.

27 What is not noted by defense counsel is
28 that student loans were a first priority
of the debtor at the expense of other
debts as the need to request bankruptcy
drew near; there was not enough income to
satisfy all creditors.

1 There is not excess income, as stated by
2 the Defense. In fact, income is reduced
3 since the inception of this litigation.
4 Additionally, two of the Debtor's monthly
5 obligations, the state-owed PCA
6 fee/premium and his Section 8 rent, are
7 income-sensitive, increasing/decreasing
8 with his income.

9 Answering Brief at 4-5, dkt. 40

10 This court concludes debtor made good faith efforts to
11 negotiate a repayment plan, given his physical and employment
12 prospects. Debtor has met the third prong of the test.

13 8. After making findings and conclusions that all
14 three undue hardship prongs have been met, courts in the Ninth
15 Circuit must evaluate debtors' income and expenses to determine
16 if a partial or complete hardship discharge of student loans
17 should be entered. *Saxman* at 1173-75.

18 This fact finder evaluates debtor's income and
19 expenses as justifying a complete, rather than a partial
20 discharge. The method for calculating debtor's average monthly
21 expenses is properly left to the discretion of the bankruptcy
22 court. *United Student Aid Funds, Inc. v. Pena (In re Pena)*, 155
23 F. 3d 1108, 1112 (9th Cir. 1998).

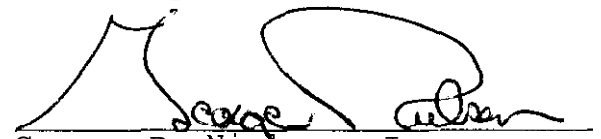
24 First, there was no trial evidence received
25 indicating a reasonable prospect of improvement of either
26 debtor's debilitating physical or modest financial circumstances
27 Second, this fact finder views debtor's testimony of his present
28 modest finances and lifestyle as credible and substantiated by
 filed bankruptcy schedules. Defendants' argument that the
 discharge of thousands of dollars of debt leaves available the

1 funds originally used to keep the student loans current, founders
2 on the uncontradicted testimony and evidence that debtor was able
3 to keep current only by going into debt on his credit cards.'
4 While the standard for discharge of a student loan is indeed
5 stringent, debtors are not required to set the stage for a second
6 bankruptcy filing.

7 **ORDER**

8 The Court finds for plaintiff and against defendants.
9 Plaintiff's complaint is sustained and defendants' claims are
10 discharged in this bankruptcy pursuant to 11 U.S.C. §523(a)(8).
11 A judgment was issued on December 12, 2003.

12 Dated this 15th day of January, 2004.

13 
14 _____
15 George B. Nielsen, Jr.
16 United States Bankruptcy Judge

17 Copy mailed the 15 day
18 of January, 2004, to:

18 Gregory T. Boehm
19 P O Box 1986
20 Tempe AZ 85280-1986
21 Plaintiff Pro Se

22 _____
23 3 Our Bankruptcy Appellate Panel's requirement of
24 maintaining student loan payments presents a conundrum for
25 debtors. If debtor fails to do so, good faith may be lacking. If
26 debtor does so, arguably there is post discharge income available
27 to pay student loans. Birrane at 500, citing, U.S. Department of
28 Education v. Wallace (In re Wallace), 259 B.R. 170, 185 (C.D.
Cal. 2000). *C.f.* Cota, 298 B.R. at 420. (Failure to make payments
does not prevent a finding of good faith when debtor lacks the
resources to make payments).

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By H Diane Lewis
Deputy Clerk