



1 district's rule regarding meet-and-confer before discovery  
2 disputes were addressed. Defendant ECMC had raised that issue in  
3 its opposition, and there was nothing in plaintiff's pleadings in  
4 the court file to contradict that assertion.

5 Plaintiff has filed a renewed motion to compel, and has  
6 shown that in fact he had complied with the meet-and-confer rule.  
7 What apparently happened is that plaintiff submitted his  
8 pleadings on paper. All such documents are routinely scanned  
9 into the court's electronic files. In this instance, several  
10 pages, including debtor's declaration, were somehow not scanned  
11 in and were thus not part of the record before or available to  
12 the Court when it considered the original motion.

13 Accordingly, the Court will consider plaintiff's renewed  
14 motion as an original motion, not as a request for  
15 reconsideration.

16 As noted, plaintiff seeks a determination that his student  
17 loan obligations are dischargeable under 11 U.S.C. § 523(a)(8)  
18 because requiring payment of them would impose "an undue  
19 hardship" on him, as the statute expressly recites. Case law has  
20 held that "undue hardship" is something more than "garden-variety  
21 hardship." In re Pena, 155 F.3d. 1108, 1111 (9<sup>th</sup> Cir. 1998).  
22 The Ninth Circuit has adopted the three-prong test of Brunner v.  
23 N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395 (2nd Cir.  
24 1987):

25 First, the debtor must establish "that she  
26 cannot maintain, based on current income and  
expenses, a 'minimal' standard of living for

1 herself and her dependents if forced to repay  
2 the loans." Brunner, 831 F.2d at 396. . . .

3 Second, the debtor must show "that  
4 additional circumstances exist indicating  
5 that this state of affairs is likely to  
6 persist for a significant portion of that  
7 repayment period of the student loans."  
8 Brunner, 831 F.2d at 396. This second prong  
9 is intended to effect "the clear  
10 congressional intent exhibited in section  
11 523(a)(8) to make the discharge of student  
12 loans more difficult than that of other  
13 nonexcepted debt." Id.

14 The third prong requires "that the  
15 debtor has made good faith efforts to repay  
16 the loans. . . ." Brunner, 831 F.2d at 396.  
17 The "good faith" requirement fulfills the  
18 purpose behind the adoption of section  
19 523(a)(8). . . . Section 523(a)(8) was a  
20 response to "a 'rising incidence of consumer  
21 bankruptcies of former students motivated  
22 primarily to avoid payment of education loan  
23 debts.'" Id. . . . This section was intended  
24 to "forestall students . . . from abusing  
25 the bankruptcy system." Id.

26 Pena, 155 F.3d at 1111 (some citations omitted).

The debtor, not the creditor, has the burden to prove all  
three prongs of the Brunner test. If the debtor fails to prove  
any one of the three prongs then the loan will not be discharged.  
In re Nys, 308 B.R. 436, 441-42 (9<sup>th</sup> Cir. BAP 2004), aff'd, 446  
F.3d 938 (9<sup>th</sup> Cir. 2006).

On March 30, 2007, the Bankruptcy Appellate Panel filed its  
decision in In re Carnduff, \_\_\_\_\_ B.R. \_\_\_\_\_, BAP No. WW-06-1200-  
MoSPa, and ordered it published. It provides a current view of  
the law applicable in this Circuit and, to avoid paraphrasing,  
this Court will borrow liberally in reviewing that law.

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1            "A.    The first prong of Brunner

2            Debtors have the burden to prove that they 'cannot maintain,  
3 based on current income and expenses, a 'minimal' standard of  
4 living for [themselves] and [their] dependents if forced to repay  
5 the loans.' Brunner, 831 F.2d at 396 (emphasis added).  
6 Id. at 12.] . . .

7            B.    The second prong of Brunner

8            This prong, which examines future finances, has generated  
9 some confusion. Its purpose, according to the Second Circuit in  
10 Brunner, is to test whether the hardship presented is truly  
11 "undue." Brunner, 831 F.2d at 396. Therefore, in addition to a  
12 current inability to repay the debt, the debtor must show  
13 "exceptional" circumstances "strongly suggestive of continuing  
14 inability to repay over an extended period of time." Id. The  
15 word "exceptional" led at least one court to believe that there  
16 must be evidence of a serious illness, psychiatric problems,  
17 disability of a dependent, or similar circumstances, and not just  
18 an inability to repay. See Nys, 308 B.R. at 440 (quoting  
19 bankruptcy court's holding). We and the Ninth Circuit have  
20 clarified that the circumstances need be exceptional only in the  
21 sense that they demonstrate insurmountable barriers to the  
22 debtor's financial recovery and ability to repay the student loan  
23 now and for a substantial portion of the loan's repayment period.  
24 Id. at 444, aff'd, 446 F.3d at 941.

25            Another confusing aspect of the second prong is the standard  
26 of proof required. The district court in Brunner required a

1 "certainty of hopelessness, not simply a present inability to  
2 fulfill financial commitment." In re Brunner, 46 B.R. 752, 755  
3 (S.D.N.Y. 1985) (emphasis added, citation omitted), aff'd, 831  
4 F.2d 395. We have used the same language. Nys, 308 B.R. at 443.  
5 Even though this language could be interpreted to require  
6 absolute certainty that a debtor's financial situation will not  
7 improve, this is not so. Rather, only a preponderance of the  
8 evidence standard applies. What must be certain is the  
9 hopelessness -- the expectation that the debtor will be unable to  
10 repay the student loans -- but predicting future finances is  
11 "problematic" and the projected dollar amounts could never be  
12 certain. Brunner, 831 F.2d at 396. Thus, in Nys we equated the  
13 "certainty of hopelessness" language with the test that the  
14 Second Circuit actually adopted in Brunner and which we have  
15 quoted above: "exceptional circumstances, strongly suggestive of  
16 continuing inability to repay over an extended period of time."  
17 Nys, 308 B.R. at 443 (quoting Brunner, 831 F.2d at 396) (emphasis  
18 added). In Nys we also quoted with approval a leading commentator  
19 describing the standard as "preponderance of the evidence" and  
20 noting that the debtor is not required to prove his or her case  
21 "with certainty." Nys, 308 B.R. at 442-43 (quoting 4 Collier on  
22 Bankruptcy ¶ 523.14[2], at 523-100 (Alan R. Resnick and Henry J.  
23 Sommer eds., 15<sup>th</sup> ed. rev. 2003)).

24 Applying the above standards, Brunner's second prong sets  
25 a high but not impossible bar. To discharge any of their  
26 student loan debt to the Government, debtors must prove by a

1 preponderance of the evidence that, for a substantial portion  
2 of the loan repayment period, they would not be able to maintain  
3 even a "minimal" standard of living if forced to pay that debt."  
4 Id., at 13, 14.

5 C. The third prong of Brunner

6 Simply stated, as already set out, the third prong is  
7 whether the debtor has made good faith efforts to repay the loan.

8 The Carnduff panel reiterated:

9 "Undue hardship is tested by the three prongs of Brunner,  
10 regardless whether at the end of trial the bankruptcy court is  
11 considering a full or a partial discharge. On the first prong  
12 the debtor presents evidence of 'current income and expenses' and  
13 the bankruptcy court determines whether, consistent with a  
14 "minimal" standard of living, the debtor currently can pay some,  
15 all, or none of the student loan debt. Pena, 155 F.3d at 1111  
16 (quoting Brunner, 831 F.2d at 396). On the second prong the  
17 debtor presents evidence of additional circumstances indicating  
18 that 'this state of affairs is likely to persist for a  
19 significant portion of the repayment period of the student  
20 loans.' Id. Finally, the debtor presents evidence of 'good  
21 faith efforts to repay the loans.' Id. If the debtor does not  
22 make a *prima facie* showing of these things, or if the lender  
23 rebuts that showing, then the debtor is not entitled to even a  
24 partial discharge." Id., at 19.

25 With the applicable law and allocated burdens in mind, it  
26 is appropriate to turn to the instant motion. Eleven

1 interrogatories are at issue. Interrogatory 8 asks for an  
2 itemized accounting for a charge for "Collection Costs".  
3 Interrogatory 9 asked for an itemized accounting for "Unpaid  
4 Accrued Interest". ECMC objected to both those interrogatories  
5 in part on the ground they are not relevant or likely to lead to  
6 admissible evidence on the issue of undue hardship. The Court  
7 concludes that is a valid objection, and the motion as to those  
8 two interrogatories is denied.

9 Interrogatory 10 asks whether ECMC or any other entity took  
10 any steps to mitigate or "diminish the effects of plaintiff's  
11 default", including offering a forbearance, deferment, reduction  
12 of principal, interest, or interest rate. While ECMC objected on  
13 multiple grounds, including lack of relevance to undue hardship,  
14 ECMC also explained that the loans were transferred to it after  
15 the adversary was filed. It also indicated that plaintiff's  
16 "loans are eligible for the William D. Ford Direct Loan Program",  
17 and provided the website to review possible plans. Plaintiff has  
18 offered no authority for the notion that a student loan creditor  
19 has an obligation to offer any of those items, or otherwise is  
20 obliged to take some form of reduction in its contractual  
21 entitlements to principal, interest, or interest rate, nor how  
22 any such notion relates to debtor's burden to prove undue  
23 hardship. Accordingly, no further response by ECMC is required.

24 Interrogatory 11 asked whether plaintiff's Loan Discharge  
25 Application met "the discharge application guidelines established  
26 by relevant federal regulations". The instant proceeding does

1 not involve a challenge to an allegedly wrongful denial of a  
2 discharge of the underlying loans. This is a nondischargeability  
3 proceeding which will be decided on the statutory issue of  
4 § 523(a)(8). That is how plaintiff elected to proceed.  
5 Accordingly, no response to interrogatory 11 is required.

6 Having written the foregoing, the Court turned to the  
7 earlier interrogatories, and in doing so, pulled up the  
8 electronic case file to again review the complaint filed by  
9 plaintiff. In doing so, the Court discovered that plaintiff had  
10 filed a document purporting to give notice that the Court had not  
11 addressed the renewed motion to compel. What that document is  
12 intended to accomplish is difficult to divine since it is just  
13 filed in a file, not tied to any event that would cause the court  
14 to see it. With over 1,000 cases per judge, no judge has  
15 occasion to review every file every day, or week, or even month  
16 without some triggering event. In any event, at the last  
17 hearing, plaintiff was advised the Court intended to address the  
18 renewed motion prior to any hearing on his summary judgment  
19 motion because part of the relief he seeks is exclusion of  
20 evidence ECMC might attempt to offer in opposition. The Court  
21 is in the process of addressing the renewed motion, well before  
22 the summary judgment is scheduled to be heard.

23 Returning to Interrogatory 1, it references that ECMC denied  
24 many of the allegations in plaintiff's complaint on the ground  
25 that it lacked sufficient information on which to form a belief  
26 as to the truth of the allegations. Plaintiff then asks whether

1 ECMC knows of "any fact or observation, document, or item of  
2 evidence that, either directly or indirectly, supports YOUR  
3 denial, or otherwise contradicts the allegations in plaintiff's  
4 complaint". Plaintiff's complaint has 121 separately numbered  
5 paragraphs, most of which are of facts which have nothing to do  
6 with ECMC, even as successor to prior lenders. Others involve  
7 alleged conclusions of law.

8 After stating multiple objections, ECMC also set out: "ECMC  
9 cannot respond to this interrogatory until it has completed its  
10 discovery and investigation in this matter. To date, ECMC has  
11 been unable to complete its discovery and investigation in this  
12 matter, as Plaintiff has failed to provide full ad [sic] complete  
13 responses to discovery." The Court notes that ECMC has since  
14 brought its own motion to compel discovery, which has been  
15 granted. If ECMC has received information from whatever source  
16 that enables it to now respond, it should consider whether a  
17 supplemental response is required under Rule 7026(e)(2).

18 Certain allegations contained in the complaint are ones the  
19 Court would assume ECMC would at some point be able to answer.  
20 They are: Paragraphs 9, 10, 11, 12, 13, 14, 76, 82-89, 92, 93.  
21 Certain others involve facts which plaintiff has not shown ECMC  
22 would have any reason to know. They include: 15, 17-57, 59,  
23 61-75, 77, 90, 98, 99, 104, 105-107, 113, 114, 115 and 117.  
24 Still other paragraphs, as noted, involve contentions of law.  
25 The Court will not require responses to those when they are not  
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1 tied to specific facts. Those include, 16, 21, 25, 47, 78, 79,  
2 80, 81, 94, 95, 118, 120, 121.

3 In reality Interrogatory 1 is not one interrogatory, but  
4 really at least 121, and a number of the paragraphs in the  
5 complaint contain multiple allegations. Requiring ECMC to  
6 respond to each of them would be oppressive and burdensome, and  
7 not calculated to provide any information useful to plaintiff.  
8 It seems as if plaintiff ultimately is asking ECMC to admit or  
9 deny certain allegations in the complaint. That is a separate  
10 process under Rule 7036, not involving interrogatories.

11 Accordingly, except to the extent ECMC may be obliged to  
12 supplement certain responses to paragraphs 9-14, 76, 82-89, 92  
13 and 93, no further response to interrogatory 1 is required.

14 In its answer to plaintiff's complaint, ECMC asserted one  
15 affirmative defense alleging a failure to state a claim.  
16 Interrogatory 2 asked for all facts and evidence to support it.  
17 The interrogatory is really irrelevant since to the extent it  
18 applies to § 523(a)(8) undue hardship it just means the  
19 allegations are insufficient. Plaintiff still has the burden.  
20 ECMC responded that to the extent plaintiff might think he had  
21 alleged some other cause of action, which is not specified in the  
22 complaint, then it, too, fails. No further response to  
23 interrogatory 2 is required.

24 Interrogatory 3 is bizarre. It reads: "State in detail, and  
25 with specificity, YOUR version and description of the events that  
26 give rise to the subject of plaintiff's complaint/adversary

1 proceeding complaint." While ECMC objected on multiple grounds,  
2 it might simply have said something like "plaintiff seeks to  
3 discharge his liability on student loans on the ground that  
4 requiring him to pay them would impose an undue hardship." No  
5 further response to Interrogatory 3 is required.

6 Interrogatory 4 gets closer to having some merit, but  
7 involves an incorrect legal premise, as already discussed.  
8 Specifically, plaintiff asked: "Do YOU contend plaintiff acted  
9 in bad faith in relation to any fact that affects discharge of  
10 his student loan in this action?" ECMC objected on multiple  
11 grounds, including that the phrase "bad faith" was vague and  
12 ambiguous. ECMC added: "ECMC does not know if Plaintiff is  
13 referring to 'bad faith' in terms of this third prong of the  
14 Brunner test or some other definition. As such, ECMC cannot  
15 respond to this interrogatory without speculating regarding the  
16 meaning of the term 'bad faith'." Under Brunner debtor has the  
17 burden of demonstrating "good faith". Bad faith, however  
18 defined, is not an element of a § 523(a)(8) cause of action.  
19 Moreover, as the Bankruptcy Appellate Panel recently reiterated  
20 in In re Guastella, 341 B.R. 908 (9<sup>th</sup> Cir. 2006), the absence of  
21 good faith is not synonymous with bad faith. No further response  
22 to Interrogatory 4 is required.

23 Interrogatories 5, 6 and 7 ask, serially, whether ECMC  
24 contends debtor 1) has ever had the ability to make payments;  
25 2) presently has the ability to make payments; and 3) will have  
26 the ability to pay back the loans in the next 20 years. The

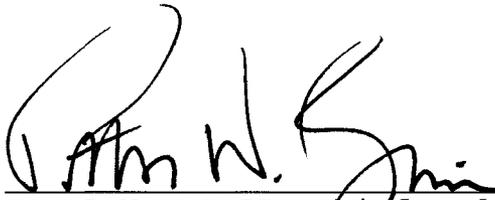
1 questions are appropriate, but so are ECMC's responses, which are  
2 identical. ECMC, after stating objections, responded: "Unknown.  
3 ECMC has attempted to obtain tax records, evidence of  
4 liabilities, evidence of income and similar, but Plaintiff has  
5 failed to provide the requested documents." No further responses  
6 to Interrogatories 5, 6 and 7 are required unless plaintiff  
7 provides the requested information or ECMC obtains it from other  
8 sources, and then supplemental responses may be appropriate under  
9 Rule 26(e)(2).

10 For the foregoing reasons, plaintiff's renewed motion to  
11 compel is denied.

12 Plaintiff has also asked that ECMC be precluded from  
13 offering evidence that is inconsistent with or contradicts  
14 plaintiff's allegations since ECMC has not identified or provided  
15 it to plaintiff in response to the interrogatories. Since no  
16 further response to the interrogatories is required, such an  
17 order would be unsupportable at this time. However, the Court  
18 reserves the authority to review any proffer by ECMC at such time  
19 as it is made to determine whether ECMC has complied with its  
20 responsibilities under Rule 26.

21 IT IS SO ORDERED.

22 DATED: APR - 9 2007  
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24   
25 PETER W. BOWIE, Chief Judge  
26 United States Bankruptcy Court