IT IS SO ORDERED.

Dated: 05:37 PM July 30 2007

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 05-5142
	)	
JON PRESCOTT THOMAS	)	CHAPTER 7
REBECCA LYNN THOMAS,	)	
DEBTOR(S)	)	JUDGE MARILYN SHEA-STONUM
	)	
JOHN PRESCOTT THOMAS, ET AL.	)	**ADV. NO. 05-5142**
PLAINTIFF(S)	)	
	)	
	)	
vs.	)	
	)	**MEMORANDUM OPINION RE: DISCHARGEABILITY OF STUDENT LOANS PURSUANT TO 11 U.S.C. § 523(a)(8)**
UNITED STATES DEPARTMENT OF EDUCATION, ET AL.	)	
DEFENDANT(S)	)	

This matter comes before the Court on plaintiff-debtors' complaint to determine the dischargeability of student loan debts pursuant to 11 U.S.C. § 523(a)(8). Appearing at the trial of this matter were Daniel Gigiano, counsel for plaintiff-debtors and Frederick Coombs, counsel for defendant, Educational Credit Management Corporation ("ECMC"). During the trial, the Court received evidence in the form of exhibits (including, the Letter, as defined below) and in the form

of testimony from plaintiff-debtors and Annette A. Ciotti, D.O.. At the conclusion of the trial, the Court took the matter under advisement.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (I) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon testimony and evidence presented at the trial, the arguments of counsel, the pleadings in this adversary proceeding and plaintiff-debtors' main chapter 7 case and pursuant to FED. R. BANKR. P. 7052, the Court makes the following findings of fact and conclusions of law.

A. FINDINGS OF FACT

The following facts are not disputed by plaintiff-debtors and defendant and are the subject of stipulations filed by counsel [*see* docket #24].

1. Defendant, ECMC, is a non-profit guarantor of eductional loans entitled to the protections of 11 U.S.C. § 523(a)(8).

2. Prior to April 30, 2004, Great Lakes Higher Education Guaranty Corporation ("Great Lakes") was the holder of five student loans incurred by plaintiff, Jon Thomas, between November 5, 1991 and September 30, 1996. The aggregate amount of the funds disbursed was $14,000.00.

3. On April 30, 2004, plaintiff, Jon Thomas, executed a Federal Consolidation Loan Application and Promissory Note through Great Lakes consolidating the previous student loans incurred by him during the period 1991 through 1996 (the "Jon Thomas Consolidation Note").

4. The original amount of the Jon Thomas Consolidation Note was $14,785.68. As of March 14, 2006 the amount due an owing (including unpaid interest) on the Jon Thomas Consolidation Note was $15,729.28.

5. Prior to July 14, 2004, Great Lakes was the holder of ten student loans incurred by plaintiff, Rebecca Thomas, between October 17, 1988 and January 5, 1999. The aggregate amount of the funds disbursed was $37,481.00.

6. On July 14, 2004, plaintiff, Rebecca Thomas, entered into a Federal Consolidation Loan Promissory Note with Great Lakes consolidating the previous student loans incurred by her during the period 1988 through 1999 (the "Rebecca Thomas Consolidation Note").

7. The original amount of the Rebecca Thomas Consolidation Note was $59,895.32. As of March 14, 2006 the amount due and owing (including unpaid interest) on the Rebecca Thomas Consolidation Note was $63,493.62.

8. The indebtedness represented by the Jon Thomas Consolidation Note and the Rebecca Thomas Consolidation Note were transferred to ECMC from Great Lakes on November 24, 2005.

9. Plaintiff, Jon Thomas, applied for Social Security Disability in October 2004 but was determined not to be disabled for purposes of the Social Security Act in a decision dated May 31, 2005. His request for reconsideration of that decision was denied on August 26, 2005. Mr. Thomas timely filed a request for hearing on this determination by an Administrative Law Judge; no hearing before the Administrative Law Judge has yet been held.

10. Plaintiffs reside together as husband and wife and have the following adjusted gross income, as reported on their federal tax returns: $12,341.00 for 2005; $26,742.00 for 2003; and $30,746.00 for 2002.[1]

11. As of the date of trial, plaintiff, Rebecca Thomas, was employed as a sales clerk with WalMart and had previously been employed by the American Automobile Association ("AAA") from

[1] Although the parties' stipulation referred to plaintiff-debtors' 2004 Form 1040 and a copy of that Form 1040 was attached to the stipulations, reported income for 2004 was not specifically set forth.

February 2000 to October 2004 as a travel consultant and was compensated at $7.00 per hour gradually increasing to $8.90 per hour full time.

12. Plaintiff, Rebecca Thomas, holds an Associate Degree of Applied Science in Legal Secretarial work from the University of Akron and an Associates in Fine Arts from the University of Akron.

13. Plaintiff, Jon Thomas, was a full time employee of the North American Indian Cultural Center ("NAICC") from 1999 to 2004. His original rate of pay was $7.00, gradually increasing to $8.50 per hour.

14. Plaintiff, Jon Thomas, has been made aware that he may be eligible for a total and permanent disability loan discharge through the Department of Education of his student loan indebtedness provided that a medial professional certifies that he has a disability which prevents him from being able to work and earn money in any capacity.

15. Plaintiff, Rebecca Thomas, has been advised that she may be eligible to seek consolidation of her loans under the Income Contingent Repayment Program of the William D. Ford Program of the United States Department of Education which, based upon her income at the time the stipulations were filed, would result in a monthly payment of $0.00.

16. Plaintiff, Rebecca Thomas, paid the following amounts on her student loans: $2,952.50 in 2005; $3,269.87 in 2004; and $430.00 in 2003. Of these amounts, the total amount paid in 2005 was the result of an Administrative Wage Garnishment (AWG) of her tax refund for that year and $1,334.87 of the amount paid in 2004 was the result of an AWG of her tax refund for that year.

17. Plaintiff, Jon Thomas, paid the following amounts on his student loans: $647.0 in 2005; $992.28 in 2004; $1,870.01 in 2003; and $2,461.12 in 2002. All but $188.00 of the 2003 payments and $392.00 of the 2004 payments were by way of an AWG against his income tax refunds.

19. Plaintiff, Rebecca Thomas, entered into forebearance agreements with Great Lakes in 1994, 1997 and 1998.

20. Plaintiff, Jon Thomas, entered into forebearance agreements with Great Lakes in 1998.

21. Plaintiff, Jon Thomas, owes at least $12,588.00 in child support arrearages, incurred between 1994 and the filing of his chapter 7 bankruptcy petition.

In addition to the foregoing stipulations, the Court makes the following findings of fact.

22. Plaintiff-debtors filed their chapter 7 case on July 6, 2005 and received a discharge on November 1, 2005.

23. On Schedule F - Creditors Holding Unsecured NonPriority Claims plaintiff-debtors list $59,330.07 in addition to the student loan debt.

24. No creditor filed an action challenging the dischargeability of plaintiff-debtors' debts.

25. Plaintiff-debtors' Schedule A - Real Property indicates that they do not own any real property.

26. Plaintiff-debtors' Schedule B - Personal Property indicates that they have a joint interest in a 401K plan but the amount of that interest is listed as "unknown." There was no evidence elicited at trial regarding this asset.

27. Plaintiff-debtors own two cars each with over 100,000 miles on them.

28. Plaintiff-debtors have been married since 1989 and are the parents of five children (not all an issue of plaintiff-debtors' marriage) who are all past the legal age of majority having been born in 1980, 1982, 1984, 1986 and 1988. Athough two of the children still live with plaintiff-debtors and

neither contributes to household expenses, there was no evidence presented at trial to indicate that any of the children is financially dependent upon either plaintiff-debtor due to a disability or other medical condition.

29. At the time of trial, plaintiff, Rebecca Thomas, was 49 years old.

B. DEFENDANT'S MOTION IN LIMINE

On December 5, 2006 ECMC filed a "Motion in Limine" [docket #33] which requested an order prohibiting plaintiff-debtor, Rebecca Thomas, from introducing into evidence (1) a certain letter dated June 2, 2006, authored by Annette A. Ciotti, D.O. (The "Letter") or (2) any oral testimony of Dr. Ciotti (the "Testimony") addressing a medical diagnosis or prognosis with respect to Rebecca Thomas. During a telephonic status conference conducted shortly after the Motion in Limine was filed but prior to the initially scheduled trial,[2] the Court orally advised counsel of its decision to deny the motion and to permit Dr. Ciotti to testify telephonically. At the beginning of the trial in this matter the Court reiterated its oral decision to deny the Motion in Limine and indicated that a written decision regarding the matter would be incorporated into the Memorandum Opinion.

The motion in limine is a comparatively recent legal development. 20 Am. Jur. Trials 441, § 3 (2006). Typically, a motion in limine is a motion made before or during a jury trial outside of the hearing of the jury, the purpose of which is to prevent the jury from hearing certain evidence, questions or statements that are allegedly prejudicial to the movant without first asking the court's permission. *See Provident Life & Accident Ins. Co. v. Adie*, 176 F.R.D. 246, 250 (E.D. Mich. 1997); *see also* 20 Am. Jur. Trials 441 § 4, § 5. The motion in limine affords the court an opportunity to rule

[2] The trial in this matter was originally scheduled for December 8, 2006 but ultimately adjourned to February 23, 2007 pursuant to a "Motion to Continue Trial," filed by defendant-debtors December 7, 2006 [docket #35].

on the admissibility of evidence in advance of trial, and is generally used to ensure evenhanded and expeditious management of trials by eliminating evidence that is clearly inadmissible for any purpose. *Indiana Ins. Co. v. General Electric Co.*, 326 F. Supp 2d 844, 846 (N.D. Ohio 2004), *citing Jonasson v. Lutheran Child and Family Serv*., 115 F. 3d 436, 440 (7th Cir. 1997). A motion in limine is not a final ruling upon the ultimate admissibility of evidence, but is instead interlocutory in nature and subject to change during the course of a trial. 75 Am. Jur. 2d Trials § 94, § 112.

A review of ECMC's Motion in Limine reveals that it neglected to cite any authority or present argument regarding the appropriateness of a motion in limine in the trial of this matter. Plaintiff-debtors' complaint does not include a jury demand. Thus, the trial will not take place before a jury, but will instead be tried to the bench. Moreover, ECMC has not explained why the Letter and the Testimony would cause prejudice to its case. Therefore, the issue of the introduction of prejudicial, irrelevant or otherwise inadmissible evidence is not one that merited a precautionary ruling or, for that matter, presented any foreseeable detriment to ECMC's right to a fair trial in this case.

ECMC framed the issues as being controlled by the business records exception to the hearsay rule pursuant to FED. R. EVID. 803(6).[3] ECMC submits that the Letter does not qualify as a "record of regularly conducted activity" under Evidence Rule 803(6). Specifically, ECMC contends that:

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[3] Fed R. Evid. 803(6) sets forth the following:

> *Records of Regularly Conducted Activity*. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph I includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(1) the Letter does not constitute a report made at or near the time of the information transmitted; (2) the Letter was not made or compiled as a regular business practice; and (3) the method or circumstances of preparation of the Letter indicate that it lacks trustworthiness.

1. Opportunity for Discovery

ECMC contends that the Letter should be excluded because it was produced after the close of discovery and thus did not afford ECMC an opportunity to follow up on the representations set forth therein. ECMC refers to this Court's "Order and Memorandum Re: Status Conference Held on March 20, 2006" [docket #21] in which the Court directed that all discovery was to have been completed by not later than May 31, 2006. ECMC argues that it could not stipulate to the Letter because the Letter post-dated the discovery deadline of May 31 2006, thus foreclosing ECMC's counsel from conducting any follow-up discovery or taking the deposition of Dr.Ciotti with respect to the Letter.

ECMC acknowledges this Court's "Order and Memorandum of Pretrial Conference Held on August 15, 2006" [docket #27] whereby the discovery deadline was further extended to October 13, 2006. However, ECMC argues that"[t]he limited reopening of discovery did not relate to the subject of the June 2, 2006, Ciotti letter and, therefore, opportunity to follow up on that letter was not afforded during the limited reopening of discovery." *See* Motion in Limine at pg. 6 [docket #33] .

To the contrary, this Court's review of its August 15, 2006 pretrial order reveals that it sets no limits whatsoever on the nature, purpose or scope of any additional discovery, but instead, simply states "[t]hat by no later than October 13, 2006, all discovery in this matter shall be completed." Accordingly, counsel for ECMC was free to take Dr. Ciotti's deposition or conduct any additional discovery, as necessary, to substantiate the contents of the Letter. ECMC cannot wait until the eve of trial to request a precautionary exclusionary ruling pertaining to purportedly objectionable

evidence when it did not avail itself of a discovery process which may have allayed its reservations and unwillingness to stipulate to the Letter. Any prejudice that ECMC incurred as a result of the introduction of the Letter was waived when it declined to accept the Court's granting of additional time in order to examine Dr. Ciotti.

2. Expert Testimony and Disclosure Requirements

ECMC further contended that Dr.Ciotti should not be permitted to testify at trial concerning Ms. Thomas' medical condition because she was never disclosed as an expert in the case, nor was there a written report and disclosure of qualifications made pursuant to FED. R. CIV. P. 26(a)(2)(B) (incorporated through FED. R. BANKR. P. 7026(a)(2)(B)). "Courts consistently have found that treating physicians are not expert witnesses merely by virtue of their expertise in the respective fields. Only if their testimony is based on outside knowledge, not on personal knowledge of the patient and his or her treatment, may they be deemed experts." *Mohney v. USA Hockey, Inc*. 300 F. Supp. 2d 556, 560 (N.D. Ohio 2004), *citing Fisher v. Ford Motor Co.*, 178 F.R.D. 195, 197(N.D. Ohio 1998). "As such, a physician 'whose proposed opinion testimony will come from his knowledge acquired as a treating physician is not someone from which a Rule 26(a)(2)(B) report is required.'" *Mohney v. USA Hockey, Inc.* 300 F.Supp . 2d at 560, *citing Martin v. CSX Transp., Inc.* 215 F.R.D. 554, 557 (S.D. Ind. 2003) (written expert disclosure report not required with respect to treating physicians' testimony where such physicians were not specially employed to provide testimony; their opinions were formulated during examination and care of the patient rather than in anticipation of litigation; and the defendant had opportunity to prepare for effective cross-examination).

In the instant case, ECMC did not argue that Dr. Ciotti would testify to information learned outside the scope of her diagnosis and treatment of Ms. Thomas. With no reason to conclude otherwise, the Court presumed (correctly, as it turns out) that her testimony as a treating physician

would be based on knowledge of Ms. Thomas' medical condition as acquired through the course of treatment. As such, Dr. Ciotti cannot be deemed an expert witness subject to the reporting and disclosure requirements of FED. R. CIV. P. 26(a)(2)(B) for purposes of this proceeding.

Furthermore, the purpose of disclosure under FED. R. CIV. P. 26(a)(2) is to provide opposing parties a reasonable opportunity to prepare for an effective cross-examination. *Mohney v. USA Hockey, Inc.* 300 F. Supp. 2d at 557. Such purpose was preserved in this case. ECMC's counsel received the Letter on June 5, 2006 (*see* Motion in Limine at pg. 2 [docket #33]), and the Letter provided disclosure of Dr. Ciotti's identity and role. As previously stated, discovery was extended by this Court to October 31, 2006, allowing ECMC sufficient opportunity to prepare for Dr. Ciotti's testimony.

3. Contemporaneity Requirement

ECMC further contends that the Letter is not admissible because it is not contemporaneous to the event, condition or opinion that it reports upon as required by Evidence Rule 803(6). ECMC refers specifically to the December 2003 diagnoses of cervical and lumbar disc disease, as well as the diabetes and fibromyalgia conditions referenced in the Letter.[4] Although not specifically stated in the Motion in Limine, the Court infered that ECMC's concern was presumably one surrounding Dr. Ciotti's memory and any impairment of her recollection of the events recorded in the Letter. In support of its position that the Letter is not timely, ECMC relies on *United States v. Lemire*, 720 F. 2d. 1327, 1350 (D.C. Cir. 1983) (a memorandum prepared one year and ten months after some of the events described was disqualified as an exception to the hearsay rule).

[4] Although the Letter discusses the diabetes and fibromyalgia conditions, it does not state the dates of diagnoses. ECMC contends that those dates are referenced in a joint exhibit as dating back to 2003, 2004 and the summer or early fall of 2005.

The requirement that the record be "made at or near the time" has been given a practical and flexible interpretation. How soon a record must be made after the happening of the act or event recorded, therefore, becomes a matter of degree and calls for the exercise of reasonable judgment on the part of the trial judge. *See United States v. Grossman*, 614 F. 2d 295 (1st Cir. 1980) (a case involving knowing receipt of stolen cigarette lighters, catalog issued in 1977 and so dated on the back cover was applicable to the lighters that formed the basis of the prosecution); *United States v. Bowers*, 593 F. 2d 376 (10th Cir. 1979) (a Postal Inspection Service report prepared shortly after the Service conducted an audit which discussed security procedures at a postal substation where theft occurred and recommended changes to avoid subsequent thefts properly admitted); *but cf. Gilmour v. Strescon Industries, Inc*., 66 F.R.D. 146 (E.D. Pa.1975) (report made after a lawsuit was initiated and months after alleged accident which the report covered held to be inadmissible); *Seattle-First Nat. Bank v. Randall*, 532 F. 2d 1291 (9th Cir. 1976) (document not made as a memorandum of any event, but designed as a general guideline for future transactions not admissible).

The joint trial exhibits submitted to the Court in advance of trial indicate that Ms. Thomas was a patient of the Wadsworth-Rittman Area Family Practice, Inc. dating from June 2002 to September 2005, and that she was examined frequently during that time by the various medical professionals associated with the Practice, including Dr. Ciotti. This Court was hesitant to conclude that Dr. Ciotti's recording was unreliable when it is based on regular examination and treatment of Ms. Thomas during a continuous four year period that ended no more than nine months prior to the Letter. Under such circumstances, the purported time gap between the dates of diagnoses and the date of the Letter does not likely have negative impact on the trustworthiness of Dr.Ciotti's recollection and the reliability of the information recorded in the Letter.

Further, counsel for ECMC had stipulated to the "contemporaneous medical records" of the Practice as contained in a joint exhibit. *See* Motion in Limine at pg. 4, note 1 [docket #33]. Thus, consistent with the Court's previous admonition, ECMC's counsel possessed unobjectionable information on which he was able to cross-examine Dr. Ciotti to assess her memory and the contents of the Letter to determine if they were contradictory to the stipulated medical records. The Court has dwelt on this motion to discourage such inapposite motions from ECMC's counsel in the future.

C. DISCUSSION

Pursuant to § 523(a)(8) of the Bankruptcy Code, educational loans are not dischargeable in bankruptcy "unless excepting such debt from discharge . . . will impose an undue hardship on the debtor and the debtor's dependents." Congress did not define what constitutes an "undue hardship" but courts, including the Sixth Circuit Court of Appeals, have adopted what has come to be known as the *Brunner* test. *Tirch v. Pa. Higher Educ. Assistance Agency (In re Tirch)*, 409 F.3d 677, 680 (6th Cir. 2005); *Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler)*, 397 F.3d 382, 385 (6th Cir. 2005); *Miller v. Pa. Higher Educ. Assistance Agency (In re Miller)*, 377 F.3d 616, 623 (6th Cir. 2004); *Cheesman v. Tenn. Student Assistance Corp. (In re Cheesman)*, 25 F.3d 356 (6th Cir. 1994). Under the *Brunner* test a debtor must prove the following three factors by a preponderance of the evidence in order to be entitled to an "undue hardship" discharge of educational loans:

> [1] that debtor 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 to indicate that this state of affairs is likely to persist for a significant portion of the loan repayment period; and
>
> [3] that debtor has made good faith efforts to repay the loans.

Brunner v. New York State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2nd Cir. 1987). In determining whether a plaintiff has proved the necessary elements of his/her case, the bankruptcy court, as trier of fact, must weigh conflicting facts, determine the credibility of witnesses and draw inferences from the evidence presented. *Investors Credit Corp. v. Batie (In re Batie),* 995 F.2d 85, 88 (6th Cir. 1993); FED. R. BANKR. P. 8013.

1. Factor One: Minimal Standard of Living

On their Schedule I - Current Income of Individual Debtor(s), plaintiff-debtors indicate that their combined monthly income is $578.05 and on their Schedule J - Current Expenditures of Individual Debtor(s), plaintiff-debtors indicate that their combined monthly expenses total $2,309.00. During trial, plaintiff-debtor s introduced into evidence an exhibit [Pl. Ex. D] that purported to show a breakdown of their then current monthly expenses. That document indicates that plaintiff-debtors' monthly expenses total $2,106.78 and also indicates their "total monthly net income from all sources whatsoever" is $1,412.75. Plaintiff-debtors provided no explanation as to the $834.70 per month increase in monthly income. In reponse to her counsel's question as to how plaintiff-debtors cover their net monthly deficiency Rebecca Thomas explained that they, in fact, only pay $200.00 per month for rent (instead of the $440.00 listed) and that the listed insurance expense of $172.00 per month has been reduced by at least one-half because they are no longer paying for their youngest child to be covered.

Notwithstanding the fact that plaintiff-debtors failed to present evidence which accurately reflects their current monthly income and expenses, there is nothing in the record to suggest that plaintiff-debtors' monthly expenses include extravagant expenditures nor does there appear to be any room in their budget to minimize those expenditures in a way that would allow them to reach a monthly net surplus. Accordingly, the Court finds that plaintiff-debtors cannot maintain a minimal

standard of living if they were required to repay their student loans. The first factor of the *Brunner* test has, therefore, been met.

2. Factor Two: Additional Circumstances

To satisfy the second factor of the *Brunner* test each plaintiff-debtor must "precisely identify [his/her] problems and explain how [his/her] condition would impair [his/her] ability to work in the future." *Tirch v. Pa. Higher Educ. Assistance Agency (In re Tirch)*, 409 F.3d 677, 681 (6th Cir. 2005). "The dischargeability of loans should be based upon 'a certainty of hopelessness, not merely a present inability to fulfill financial commitment.'" *Id.* (citations omitted).

(a) Plaintiff-Debtor, Rebecca Thomas

At the time of trial, Rebecca Thomas was 49 years old and employed at WalMart where she earned $8.40 per hour. Ms. Thomas testifed that she was currently working 27 hours per week but hoping that would increase to 40 hours per week. Ms. Thomas also testified that her employment opportunities at WalMart are limited because of her inability to perform physical labor such as stocking shelves and unloading trucks. According to Ms. Thomas, she is required to perform such duties to be considered for a management position.

Immediately prior to her employment at WalMart, Ms. Thomas was employed by the AAA and prior to that Ms. Thomas worked in a managment capacity for Sav-a-Lot, Pizza Hut and Holland Oil. In 1998, while working at Sav-a-Lot, Ms. Thomas suffered a back injury.

Ms. Thomas worked at the AAA from late 1999 to the middle of 2004. Ms. Thomas' income for the full years she worked at AAA was at least $13,448 for 2000; $16,036 for 2001; $21,675 for 2002 and $15,774 for 2003. [Joint Ex. 7].[5] Ms. Thomas' income from the AAA for the partial year

[5] These figures are from a February 23, 2005 Social Security Statement for Rebecca Thomas. Counsel did not elicit any direct testimony from Ms. Thomas regarding her income at the AAA but did indicate that the information on the Social Security Statement was correct.

she worked in 2004 was at least $12,954.00 and the adjusted gross income for 2004 for both plaintiff-debtors was $30,746.00 [Joint Ex. 5]. In addition to a salary, the AAA compensated Ms. Thomas through payment of retirement benefits and a portion of her medical insurance premium.

Ms. Thomas began her work at the AAA at an entry level position and worked her way up to travel agent. Ms. Thomas claims that her back injury and some other medical problems required her to miss a significant amount of work and such absence ultimately slowed her progression to travel agent. However, aside from an inability to unload heavy objects from a delivery truck (which happened infrequently), Ms. Thomas' back injury and other medical conditions did not significantly interfere with her job duties at the AAA. In fact, according to Ms. Thomas, the management at the AAA was aware of her physical limitations and accomodated her need to stretch during business hours which helped to alleviate stiffness in her back and legs. Ms. Thomas claims she was terminated from her employment with the AAA not because of her absences and medical conditions but because she discussed religion with a fellow worker.

Dr. Annette Ciotti was Rebecca Thomas' treating physician from June through November, 2006. During trial, Dr. Ciotti testified that Ms. Thomas suffers from several medical conditions including fibromyalgia, cervical and lumbar disc disease, non-insulin dependent diabetes and hyperlipidemia. Dr. Ciotti further testified that the fibromyalgia and cervical and lumbar disc disease cause Ms. Thomas pain and stiffness that restrict her movement and that, due to some of the medications she is taking, Ms. Thomas somtimes suffers from insomnia. Dr. Ciotti noted that, in particular, Ms. Thomas is not able to repetively lift anything weighing over five pounds or to lift anything over her head. Dr. Ciotti could not opine as to whether Ms. Thomas' medical conditions would prevent her from working a "desk job." Ms. Thomas testified that, in her opinion, her physical symptoms were getting worse. However, she also testified that she did experience some relief when

she received physical therapy but that she no longer receives any such therapy. There was no evidence presented to indicate that continued physical therapy would not be available to or beneficial for Ms. Thomas.

While working at the AAA, Ms. Thomas was able to earn a significantly higher salary than she now earns as a part-time hourly worker at WalMart. Although Ms. Thomas testified that she was looking for alternative employment that would not require her to do physical labor she could not point to anything more concrete in her search than looking through the want ads and registering with two Internet employment sites.

During her testimony, Ms. Thomas appeared attentive, bright and articulate and at the end of the day-long trial (at which she sat throughout), she did not appear to be overly tired or physically impaired. Given Ms. Thomas' skills and experience as a travel agent and the fact that working as a travel agent (or at another "desk job") does not involve the physical labor that Ms. Thomas cannot perform, the Court does not find there to be a "certainty of hopelessness" regarding her current financial condition. While the Court realizes that Ms. Thomas' medical problems may, as a practical matter, limit her future work prospects, such potential impediment is mitigated by her ability to particpate in the ICRP and defer any repayments on her student loans until she finds higher paying employement (*see* Section (C)(3)(a), *infra*). Based upon the foregoing, the Court finds that Ms. Thomas has not met her buden of proving the second factor of the *Brunner* test. *Cf. Kelsey v. Great Lakes Higher Educ. Corp. (In re Kelsey),* 287 B.R. 132 (Bankr. D. Vt. 2001) (undue hardship found where debtor presented evidence from her psychiatrist that a severe, debilitating and longstanding bipolar mood disorder prevented her from performing legal work for which she was educated); *Anelli v. Sallie Mae Servicing Corp. (In re Anelli),* 262 B.R. 1 (Bankr. D. Mass. 2000) (undue hardship found where debtor presented evidence from treating physician that, due to Chronic Fatigue

Syndrome, arthritis, fibromyalgia and depression, debtor was totally and permanently disabled); *Kline v. United States*, 155 B.R. 762 (Bankr. W.D. Mo. 1993) (undue hardship found where debtor presented evidence from treating physicians that chronic depression, anxiety and panic disorders would prevent debtor from obtaining jobs related to her degree).

(b) Plaintiff-Debtor, Jon Thomas

At the time of trial Jon Thomas was not employed. In 1999 Mr. Thomas was employed full time doing construction related work with the NAICC where his starting compensation was $7.00 per hour. In 1991 Mr. Thomas began a construction related job at the University of Akron and also a "factory job" at an entity her referred to as "JRB." In February 1994 Mr. Thomas suffered an industrial accident at JRB and injured his back. Mr. Thomas apparently suffered a herniated disc and has undergone several surgeries including one where a steel rod was inserted into his back. After his injury Mr. Thomas worked at at least two other jobs including as a manager at BP Oil where he was paid $6.00 per hour and also as a counselor at the NAICC where he helped children avoid use of drugs and alchohol. When Mr. Thomas left the employ of the NAICC in 2004 he was making $8.50 per hour. Mr. Thomas testified that as the pain from his back injury became more severe he became less able to work. Mr. Thomas has not been employed since 2004.

In November 2006 (approximately one week before the original date scheduled for the trial in this matter) Mr. Thomas fell and broke vertebrae in his back. On the day of trial, Mr. Thomas was wearing a brace that began below his neck and ended above his hips and he appeared to have limited range of movement due to the brace. Mr. Thomas testified that he wears the brace to help keep weight off of his spine and that he only removes the brace to sleep.

Mr. Thomas did not present any testimony from a treating physician regarding his medical issues. Counsel did, however, jointly enter into evidence a 24 page exhibit of doctors' statements and

medical records. [Joint Ex. 10]. In a March 16, 2006 letter, one physician indicates that Mr. Thomas suffers from "disabling low back pain," that he "is not able to lift, has difficulty standing/walking/sitting, and with movements involving the low back" and that he "is disabled due to his low back problems." [Joint Ex. 10 at pg. 1]. Notwithstanding Mr. Thomas' apparent physical impairment and the doctors' statements and medical records introduced into evidence, he has not been deemed disabled by the Social Security Administration. [Joint Ex. 4]. Neither party, however, presented evidence or argument regarding the standard by which the Social Security Administration makes a disability determination nor did Mr. Thomas' counsel present evidence regarding the status of his client's request for reconsideration of denial of Social Security Disability.

During his testimony, Mr. Thomas required the use of the Court's hearing assistance apparatus due to obvious hearing loss. Mr. Thomas appeared to be in significant physical pain and was unable, in many instances, to completely and coherently answer the questions put before him. At several times during his testimony Mr. Thomas became emotionally distraught. Unlike Ms. Thomas' situation, there is a certainty of hopelessness surrounding the circumstances of Mr. Thomas' life. The record evidence suggests that Mr. Thomas' health will continue to deteriorate over time and that his physical and emotional problems prevent him from obtaining any type of meaningful employment. His inability to work combined with his lack of retirement savings and his wife's current limited income and non-dischargeable financial obligations leads this Court to conclude that Mr. Thomas' current financial adversity is more than just a temporary state of affairs. The second fact of of the *Brunner* test has, therefore, been met.

3. Factor Three: Good Faith Efforts to Repay

Neither plaintiff-debtor made significant repayments towards their student loans. Although each made some minimal repayment voluntarily, the majority of the repayments that were made were accomplished through an AWG of plaintiff-debtors' tax refunds.

(a) Plaintiff-Debtor, Rebecca Thomas

Prior to trial the parties stipulated that Rebecca Thomas had been advised that she might be eligible to seek consolidation of her loans under the Income Contingent Repayment Program of the William D. Ford Program of the United States Department of Education (the "ICRP")[6] and that, based upon her income at the time the stipulations were filed, her monthly payments under the ICRP would be $0.00. There was no testimony presented at trial to explain why Ms. Thomas did not choose to take advantage of the ICRP.

In *Tirch v. Pa. Higher Educ. Assistance Agency (In re Tirch)*, the Sixth Circuit addressed a plaintiff-debtor's failure to avail herself of the ICRP and held that "[w]hile not a *per se* indication of lack of good faith, [a plaintiff-debtor's] decision not to take advantange of the IC[R]P is probative of her intent to repay her loans." *Tirch v. Pa. Higher Educ. Assistance Agency (In re Tirch)*, 409 F.3d 677, 682 (6th Cir. 2005). While the bankruptcy court and bankruptcy appellate panel determined that

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[6] As explained by the Sixth Circuit in *Tirsch*:

> The Income Contingent Repayment Program permits a student loan debtor to pay twenty percent of the difference between his adjusted gross income and the poverty level for his family size, or the amount the debtor would pay if the debt were repaid in twelve years, whichever is less. Under the program, the borrower's monthly repayment amount is adjusted each year to reflect any changes in these factors. The borrower's repayments may also be adjusted during the year based on special circumstances. *See* 34 C.F.R. § 685.209(c)(3). At the end of the twenty five year payment period, any remaining loan balance would be cancelled by the Secretary of Education. However, the amount discharged would be considered taxable income.

Tirch v. Pa. Higher Educ. Assistance Agency (In re Tirch), 409 F.3d 677, 682 (6th Cir. 2005).

debtor's failure to avail herself of the ICRP was not probative of her good faith because she could not afford monthly plan payments of $597.34, the Sixth Circuit found that the lower courts miscalculated debtor's payment requirements and that debtor was instead obligated to pay $183.66 per month, an amount that debtor was capable of paying.

The parties have stipulated that Ms. Thomas' payment obligation under the ICRP would be $0.00 per month based upon her current income. Because Ms. Thomas currently has no excess income with which to repay her student loan, this $0.00 per month payment obligation imposes no undue burden upon her or her dependents. Should Ms. Thomas obtain more fruitful employment that provides her with enough excess income to repay a portion of her student loan, she can then begin making payments under the ICRP. Because Ms. Thomas would have no current payment obligations if she enrolled in the ICRP, the Court finds that her limited volutary repayments combined with an unexplained failure to enroll in the ICRP demonstrates a lack of a good faith effort to repay her loans. Accordingly, Ms. Thomas has failed to satifsy the third prong of the *Brunner* test.

(b) Plaintiff-Debtor, Jon Thomas

The parties also stipulated that Jon Thomas had been made aware that he might be eligible for a total and permanent disability loan discharge throuth the Department of Education of his student loan indebtedness provided that a medical professional certifies that he is disabled. There was no testimony presented at trial to explain why Mr. Thomas did not apply for such a discharge. This failure by Mr. Thomas to explain why he has not taken advantage of alternative means to discharge his student loan debt is troubling to the Court given that it is *his* burden to prove all factors of the *Brunner* test. However, the lack of participation in the ICRP or other administrative alternative is not *per se* evidence of a lack of good faith. *Tirch v. Pa. Higher Educ. Assistance Agency (In re Tirch),* 409 F.3d 677, 682 (6th Cir. 2005).

As discussed more fully above, Mr. Thomas has no reasonable hope of every paying off his student loans as he is unable to work and earn an income. Although the Court may look to the income of his spouse *see, e.g., Educational Credit Mgmt. Corp. v. Waterhouse*, 333 B.R. 103, 109 (W.D.N.C. 2005) her limited resources combined with nondischargeability of her student loan debt preclude her from being able to also pay on Mr. Thomas' loans. The Court, therefore, finds that Mr. Thomas has satisfied the third prong of the *Brunner* test.

D. CONCLUSION

Based upon the foregoing the Court finds that plaintiff-debtor, Rebecca Thomas, is not entitled to an "undue hardship" discharge of her student loan obligations as she has failed to satisfy all three factors of the *Brunner* test. The Court further finds that plaintiff-debtor, Jon Thomas, has satisfied all three factors of the *Brunner* test and is, therefore, entitled to a "hardship discharge" of his student loan obligation. An entry of judgment consistend with this Memorandum Opinion will be entered separately in this proceeding.

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