

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE: \*  
\*  
JAMES JOSEPH HUMMEL and \*  
PAMELA JUNE HUMMEL, \* CASE NUMBER 05-42571  
\*  
Debtors. \*  
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JAMES JOSEPH HUMMEL, \*  
\* ADVERSARY NUMBER 05-4106  
Plaintiff, \*  
\*  
vs. \*  
\*  
EDUCATIONAL CREDIT MANAGEMENT \*  
CORPORATION, \*  
\* HONORABLE KAY WOODS  
Defendant. \*  
\*

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M E M O R A N D U M O P I N I O N  
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Debtor/Plaintiff James Joseph Hummel ("Debtor") initiated this action against Associated Bank and Great Lakes Educational Loan Services, Inc. ("GLELSI") to determine the dischargability of debt incurred by Debtor for an educational benefit guaranteed by a governmental unit. Educational Credit Management Corporation ("ECMC") moved to substitute itself as party defendant on the basis that it acts as a special guarantee agency under the Federal Family Educational Loan Program ("FFELP").<sup>1</sup> ECMC, in this capacity,

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<sup>1</sup>Associated Bank is the original lender of the debt in question. Under the Federal Family Educational Loan Program, lenders may not hold an interest in student loans that are subject to a bankruptcy proceeding or that have defaulted. Debtor defaulted on his loans on June 25, 1997 and GLELSI, as original guarantor of the student loans, paid Associated Bank the guaranty. Educational Credit Management Corporation is GLELSI's special guarantor in the event a student loan becomes part of a bankruptcy proceeding.

accepted the assignment of Debtor's student loan accounts from FFELP and the United States Department of Education as a result of Debtor's student loans being listed as debt in this bankruptcy proceeding. The Court granted ECMC's motion to substitute, which created a two-party dispute between Debtor and ECMC.

A trial was held on this matter on May 1, 2006. Debtor was represented by Robert S. Wynn, Esq. ECMC was represented by Michael J. McGee, Esq.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391, 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C § 157(b)(2)(I). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

#### **I. FACTS**

Debtor is a thirty-nine year old male. He is in good health and does not have any looming health concerns. Debtor is currently married to, but separated from, Pamela June Hummel. Debtor and his estranged wife do not have any children together; however, Mrs. Hummel has three children.

Debtor graduated from high school in 1985. After high school, Debtor joined the military and received an honorable discharge. After service in the military, Debtor attended Kent State University in Kent, Ohio. During that time, he borrowed from Associated Bank and incurred the following four student loans (collectively "Student Loans"):

1. On or about March 15, 1991, Debtor borrowed \$1,312.00 at a variable rate as a student loan in the Guaranteed Student Loan Program ("GSLP"). (Joint Stipulation ¶ 3.) At the time the Joint Stipulation was filed, the interest rate was 6.25%. (*Id.* at ¶ 8.);
2. On or about December 21, 1991, Debtor borrowed \$2,625.00 at a variable rate as a student loan in the GSLP. (*Id.* at ¶ 5.) At the time the Joint Stipulation was filed, the interest rate was 6.25%. (*Id.* at ¶ 8.);
3. On or about December 22, 1991, Debtor borrowed \$2,361.00 at a variable rate as a student loan in the GSLP. (*Id.* at ¶ 4.) At the time the Joint Stipulation was filed, the interest rate was 6.25%. (*Id.* at ¶ 8.); and
4. On or about December 20, 1994, Debtor borrowed \$3,044.00 at a variable rate as a student loan in the GSLP. (*Id.* at ¶ 6.) At the time the Joint Stipulation was filed, the interest rate was 6.10%. (*Id.* at ¶ 8.).

Debtor quit Kent State University to support his family after two semesters of college. Debtor testified that, without specialized training, he held numerous jobs that entailed "physical and mental work" with "not the greatest pay in the world." Debtor currently works at a CITCO factory as an ewag operator.<sup>2</sup> Debtor is employed full time at an hourly wage of \$12.00, which equates to bi-weekly net pay of \$734.00, monthly net pay of \$1,590.00 and yearly net pay of \$19,080.00. Debtor testified that he does not anticipate a change in his financial condition because his employer has not raised wages in six years. Debtor has been unable to find a higher paying job.

On May 5, 2005 (the "Filing Date"), Debtor filed a joint voluntary Chapter 7 bankruptcy petition with his estranged

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<sup>2</sup>An ewag machine makes diamond tooling.

wife.<sup>3</sup> Debtor's Schedule A indicates that he and his estranged wife own real property valued at \$111,500.00 subject to a secured claim of \$121,415.11. Schedule B indicates that they own personal property valued at \$5,196.84. Schedule F lists unsecured nonpriority claims in the amount of \$44,759.23, consisting of \$26,175.76 in credit card debt, \$4,490.81 for utility bills, \$647.66 for medical expenses, a \$6,500.00 loan and \$6,945.00 for student loans.<sup>4</sup> Schedule G lists an executory contract with Martha and Ramon Dietrich for rental of an apartment, entered into on December 1, 2004, at a rate of \$350.00 per month plus electricity and gas.<sup>5</sup>

Schedule I indicates that Debtor, at the time of the petition, was employed as a laborer at Kraft Maid Cabinetry Inc. and received monthly net pay of \$1,428.07<sup>6</sup> (annualized to be \$17,136.84).

Schedule J lists Debtor's monthly expenses as \$1,441.00, which consist of: \$400.00 for rent, \$200.00 for heat and electricity, \$50.00 for water and sewer, \$50.00 for phone service, \$40.00 for cable/internet, \$300.00 for food, \$50.00 for clothing, \$20.00 for laundry, \$200.00 for transportation, \$25.00 for recreation, \$25.00

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<sup>3</sup>Debtor testified that he has not lived with his estranged wife since November 2004.

<sup>4</sup>Debtor admits that his estranged wife has no obligation to pay the student loan debt.

<sup>5</sup>It appears that this executory contract is a lease for the residence of the estranged wife, since Schedule J indicates she is paying \$350.00 a month in rent and the docket reflects that the Debtor and his estranged wife have forfeited their house.

<sup>6</sup>This amount includes a monthly deduction of \$105.27 for Debtor's contribution to a 401(k) retirement account.

for charitable contributions, \$56.00 for insurance, and \$25.00 for personal sundries.<sup>7</sup>

At trial, Debtor updated his financial condition. Debtor stated that he pays the following monthly expenses: \$400.00 for rent, \$70.00 for electricity, \$500.00 for heating fuel,<sup>8</sup> \$55.00 for telephone, \$20.00 for internet, \$200.00 for food, \$30.00 for laundry, \$190.00 for transportation and \$41.00 for insurance.<sup>9</sup> Debtor states that any extra money goes to fix up his 1991 Chevrolet 1500 pickup truck, which has 301,000 miles.<sup>10</sup> Debtor explained that he no longer had money for entertainment or charitable contributions. Debtor informed the Court of his financial woes by stating that: (i) his savings consisted of the \$7.00 in his pocket, (ii) his shirt and pants each cost \$7.00 and (iii) he has not purchased anything that he wanted in several years. He further stated that he did not receive a federal income tax refund last year because he owes the IRS \$1,378.00 in penalty fees for early withdrawal of his 401(k) retirement account.

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<sup>7</sup>Debtor checked the box that his spouse maintains a separate household, thus Debtor and his estranged wife set forth separate expenses.

<sup>8</sup>When Debtor was cross-examined on his monthly heating expense, Debtor admitted that his heating bill was not \$500.00 a month year round. Debtor stated that he paid \$500.00 a month in the coldest months, but he paid nothing from May through August and he paid a minimal heating fuel bill from September through November. Debtor explained that he did not provide an average monthly expense for heating fuel because in the warmer months he used the money that was not required for heat to pay for air-conditioning, extra food for the winter and to repair his truck.

<sup>9</sup>Debtor, in his Answer to Interrogatories, included \$50.00 for recreation, but at trial Debtor testified that he no longer spends money for recreation.

<sup>10</sup>Debtor testified that the truck is currently disabled and needs repair. Debtor said that he is borrowing his stepson's truck for transportation and further states that, without his truck, he would not be able to work and would be in a worse position.

Due to these conditions, Debtor stopped making payments on his Student Loans after the Filing Date.<sup>11</sup> Debtor initiated this adversary proceeding to seek discharge of his Student Loans. ECMC provided Debtor with payment options under the William D. Ford Federal Direct Loan Program operated by the United States Department of Education pursuant to which Debtor could choose to: (i) enter into an income contingent repayment program consisting of 209 monthly payments of \$66.04, or (ii) enter into a graduated repayment program of 144 monthly payments beginning at \$49.48 (the "Program Payments"). Debtor has elected not to take advantage of either Program Payment. As of March 22, 2006, Debtor owes \$7,356.70, consisting of a principal of \$7,029.08 and \$327.62 of interest, on the Student Loans. (Joint Stipulation ¶ 8.)

## II. LAW & ANALYSIS

The Bankruptcy Code provides that student loans generally are nondischargeable in bankruptcy.

A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt --

. . .

(8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents[.]

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<sup>11</sup>Debtor defaulted on the Student Loans in 1997 (see n.1 on p. 1); it is not clear if he made any payments on the Student Loans between June 1997 and May 2005.

11 U.S.C. § 523(a). As a consequence, Debtor's Student Loans will not be discharged unless he can establish that he will suffer undue hardship if such loans are not excepted from discharge.

The Bankruptcy Code does not define "undue hardship," leaving this task to the courts. "Courts universally require more than temporary financial adversity and typically stop short of utter hopelessness." *Tenn. Student Assistance Corp. v. Hornsby (In re Hornsby)*, 144 F.3d 433, 437 (6th Cir. 1998). The Sixth Circuit Court of Appeals has adopted the test set forth by the Second Circuit Court of Appeals in *Brunner v. New York State Higher Educ. Service Corp.*, 831 F.2d 395 (2nd Cir. 1987) (*per curiam*), which is the most widely accepted test to determine undue hardship. *Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler)*, 397 F.3d 382, 385 (6th Cir. 2005). Under the *Brunner* test, the Debtor must prove each of the following three elements:

- (1) the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for [himself] and [his] dependents if forced to repay the loans;
- (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period; and
- (3) the debtor has made good faith efforts to repay the loans.

*Flores v. U.S. Dep't of Educ. (In re Flores)*, 282 B.R. 847, 853 (Bankr. N.D. Ohio 2002), (*quoting Brunner*, 831 F.2d 395). With respect to this test, it is the Debtor's burden to establish, by a preponderance of the evidence, that each of the elements have

been met. See, *Grine v. Tex. Guaranteed Student Loan Corp. (In re Grine)*, 254 B.R. 191, 197 (Bankr. N.D. Ohio 2000).

As set forth below, Debtor has failed to establish, by a preponderance of the evidence, the elements in the *Brunner* test.

First, Debtor has failed to prove that he cannot maintain a minimal standard of living if he were forced to pay the Student Loans. In his Answer to Interrogatories, Debtor lists current monthly expenses of \$1,556.00 and current monthly net income of \$1,590.00, which leaves \$34.00 of disposable income. This amount of disposable income does not appear to be enough to make either of the monthly Program Payments of \$66.04 or \$49.48.<sup>12</sup> Utilizing Debtor's amended monthly expenses, it appears that he would need \$32.04 or \$15.48 more income each month to make one of the Program Payments. However, upon close examination, Debtor's amended monthly expenses do not stand up to scrutiny; specifically the \$500.00 heating expense is not credible.

On cross-examination, Debtor testified that his monthly heating bill was not \$500.00 a month year round. In fact, Debtor admitted he did not pay any amount for heating fuel from May through August and he paid only minimal heating expenses from September through November. Debtor testified - without specifics - that he paid \$500.00 for heat during only the coldest winter months. Crediting Debtor's testimony, he pays \$500.00 per month for heat during each

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<sup>12</sup>The Answer to Interrogatories includes \$50.00 for recreation expense, however Debtor testified that he no longer spends money on recreation. As a consequence, Debtor's budget includes enough disposable income (*i.e.* \$84.00) to make one of the Program Payments. Based on Debtor's own testimony, the Student Loans would not be dischargeable.

of the months December through April, a "minimal" amount (estimated by the Court to be \$100.00 per month) for September through November, and nothing for May through August. Using these figures, Debtor's annual expense for heating fuel is \$2,800.00, which averages approximately \$233.00 per month. Debtor's testimony at trial about his monthly expenses was not at all consistent with his Schedule J, which lists \$200.00 for both heating and electricity.<sup>13</sup> When questioned about this discrepancy, Debtor testified that the difference was based on his utilities at the marital residence (Schedule J) and his current heating expense (Answers to Interrogatories). This explanation, however, is not credible. Debtor, on Schedule J, checked the box that he and his estranged spouse were living separately. Debtor testified - and the docket reflects - that Debtor surrendered the house during the bankruptcy proceeding. Furthermore, Schedule J indicates that Debtor paid \$400.00 a month for rent, which is the same amount he pays to rent his current residence. Moreover, his estranged wife's Schedule J indicates that she pays \$350.00 a month for rent, which is the same amount in the real property lease listed on Schedule G. Finally, Debtor's mortgage payment was \$945.64, which is not listed on Schedule J for either Debtor or his estranged wife. It thus appears that the heating expense listed in Schedule J is for Debtor's current residence. Based on Debtor's own testimony, the Court concludes that the amended expense of \$500.00 a month for heat is

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<sup>13</sup>Debtor testified that his electric bill is approximately \$70.00, therefore Debtor's monthly heating bill would be approximately \$130.00.

not legitimate and that the original expense of \$130.00 for heat is more likely accurate. See *supra* n.13.

Debtor tried to salvage his testimony by stating that any money he was not required to spend for heat was used (i) to air-condition his apartment, (ii) for clothing, (iii) to stock-pile food or (iv) to fix his truck. Based upon the inconsistencies between Schedule J and Debtor's Answers to Interrogatories and crediting the higher amounts in each case as the accurate amounts, the Court can determine that Debtor spends \$300.00 for food and \$50.00 for clothing per month which would increase his expenses by an additional \$150.00 per month.<sup>14</sup> Debtor provided no testimony or evidence regarding Debtor's monthly expenses for air-conditioning or vehicle repairs, consequently the Court cannot take these expenses into account.

Based upon Debtor's evidence (including Schedule J, Answer to Interrogatories and his trial testimony), the Court finds that Debtor's monthly expenses are: \$400.00 for rent,<sup>15</sup> \$70.00 for electricity, \$55.00 for telephone, \$20.00 for internet, \$300.00 for food, \$30.00 for laundry, \$200.00 for transportation, \$41.00

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<sup>14</sup>The extra \$100.00 comes from the difference listed for food in Debtor's Schedule J (\$300.00) and in his Answer to Interrogatories (\$200.00). The extra \$50.00 comes from the difference listed for clothing in Debtor's Schedule J (\$50.00) and in his Answer to Interrogatories (\$0.00).

<sup>15</sup>ECMC's attorney argues that since Debtor did not have a formal rental agreement with his parents, he could forego making rental payments and make one of the Program Payments. The Court finds this argument to be unreasonable. Debtor should not have to choose between creditors, regardless of Debtor's relationship to one of the creditors. Furthermore, the *Brunner* test requires the Debtor to be able to meet a minimal standard of living, which certainly includes shelter. If Debtor cannot afford the necessities of life (*i.e.*, shelter), he would easily satisfy prong one of the *Brunner* test. See *Saffle v. U.S. Dep't of Educ. (In re Saffle)*, Adv. No. 05-3081, at page 6 (Bankruptcy Judge Whipple, available at [www.ohnb.uscourts.gov](http://www.ohnb.uscourts.gov), issued on June 12, 2006).

for insurance, \$50.00 for clothing, \$50.00 for water and sewer, \$25.00 for personal sundries and \$233.00 for heat. (See page 9, *supra.*) As a consequence, Debtor's total monthly expenses are \$1,474.00.<sup>16</sup> Debtor's monthly net income is \$1,590.00. Thus, Debtor's monthly disposable income is approximately \$116.00, which is more than enough to satisfy one of the Program Payments. Since Debtor's Student Loan payments under the William D. Ford Federal Direct Loan Program are either \$66.04 or \$49.48, Debtor has enough disposable income to meet a minimal standard of living without discharge of his Student Loans.

Since Debtor has enough disposable income to elect to make one of the Program Payments, he fails the first prong of the *Brunner* test. As a result of failing the first prong of the *Brunner* test, Debtor cannot prove (i) the second prong of the *Brunner* test because it is dependant upon a finding that the first prong of this test is met, or (ii) that he has a good faith reason for not repaying the Student Loan, as required by the third prong. Consequently, Debtor has failed to meet his burden of proof.

### III. CONCLUSION

Debtor failed to meet his burden to prove that the Student Loans create an undue hardship, as required by section 523(a) of the Bankruptcy Code. Although Debtor's evidence - including his trial

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<sup>16</sup>Debtor testified that he no longer has recreational expenses. Debtor also testified that he did not make charitable contributions, but the charitable contribution listed on Schedule J was the monthly donation given by his estranged wife to her church. Debtor's Answer to Interrogatories show that Debtor's insurance amount changed (*i.e.*, it appears he no longer pays for renter's insurance) and that he no longer pays for cable. Consequently, the monthly expenses listed by the Court reflect these reductions.

testimony, Schedule J, and Answer to Interrogatories - was inconsistent and contradictory, Debtor established that he has sufficient disposable income to make one of the Program Payments. Consequently, Debtor failed to prove he could not maintain a minimal standard of living if his Student Loans were not discharged. Since Debtor failed to prove he met the first prong of the *Brunner* test, he also fails to meet prongs two and three. Debtor failed to prove the required elements set forth in *the Brunner* test as adopted by the Sixth Circuit in *Oyler*. Therefore, the Student Loans are non-dischargeable.

An appropriate order shall follow.

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HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

JAMES JOSEPH HUMMEL and  
PAMELA JUNE HUMMEL,  
  
Debtors.

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JAMES JOSEPH HUMMEL,  
  
Plaintiff,

ADVERSARY NUMBER 05-4106

vs.

EDUCATIONAL CREDIT MANAGEMENT  
CORPORATION,  
  
Defendant.

HONORABLE KAY WOODS

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O R D E R

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For the reasons set forth in this Court's Memorandum Opinion entered this date, the Student Loans of Debtor/Plaintiff James Joseph Hummel are nondischargeable.

IT IS SO ORDERED.

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HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY COURT