

1 **I. BACKGROUND**

2 **A. Procedural History**

3 Debtor filed her voluntary chapter 7 bankruptcy petition on November 10, 2014
4 (“Petition Date”). She filed her Schedule F reflecting an unsecured, undisputed
5 obligation to Defendant’s predecessor-in-interest in the amount of \$227,499.00
6 (Administrative Docket Number (“Adm. DE”) 22). On January 12, 2015, Plaintiff
7 commenced this adversary proceeding with the filing of her Complaint (DE 1)⁴ to
8 determine the dischargeability of Debtor’s student loans. An Answer was filed on
9 February 12, 2015 (DE 11). Defendant Nelnet Loan Servicing was replaced as a party
10 Defendant by the State of Colorado, Department of Higher Education, Colorado Student
11 Loan Program dba College Assist (“College Assist”) by order of the Court dated March
12 5, 2015 (DE 18). Defendant U.S. Department of Education was dismissed from this
13 Adversary Proceeding on April 14, 2015 (DE 28). Defendant College Assist was
14 replaced by ECMC as party defendant, pursuant to this Court’s order of January 16,
15 2016 (DE 53).

16 The parties filed their Joint Pretrial Statement (“JTPS”) (DE 42) on December 10,
17 2015. On January 19, 2016, the Court entered its order (DE 54) approving the parties’
18 agreed motion (DE 49) to amend the JTPS. On February 16, 2016, the Court held a trial
19 on this matter. At the conclusion of the trial, the Court took this matter under
20 advisement.

21 **B. The Evidence**

22 Two witnesses testified at trial: Jennifer Skerbinc and Debtor.

23 1. Jennifer Skerbinc. Ms. Skerbinc is a Litigation Specialist for ECMC. She
24 testified that the amount owed by Debtor to Defendant totaled \$245,327. She reviewed
25 Debtor’s adjusted gross income, as reflected in Debtor’s 2015 federal tax return
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⁴ DE shall hereafter refer to docket entries in the adversary file in this case.

1 (Exhibit 8)⁵. Ms Skerbinc then reviewed the “REPAYE” and Income Based Repayment
2 (“IBR”) student loan repayment programs. Both of these student loan repayment
3 programs call for an annual review of an obligor’s income and expenses. Absent such
4 proof, each program assumes a 5% annual increase in the obligor’s earnings. Both
5 “programs” call for a 25 year repayment program and both call for forgiveness of
6 indebtedness of an obligor’s student loans if she successfully completes 25 years of
7 payments. The primary differences between these two programs are that the IBR
8 program requires proof of the obligor’s hardship and calls for payment of 15% of the
9 obligor’s discretionary income. The REPAYE program requires no proof of hardship
10 and calls for payment of 10% of obligor’s discretionary income.

11 Based on Debtor’s presumed 2015 adjusted gross income of \$30,622,
12 Ms. Skerbinc testified that Debtor’s initial payments under the REPAYE program would
13 be \$56 per month but would be \$84 per month for the first 12 months under the IBR
14 program.

15 2. Rita Gail Edwards. Debtor is an intelligent, well-spoken, 56-year-old
16 single woman with two adult children. The eldest, Regina Sebert, is a 34-year-old single
17 woman who suffers from type 1 diabetes, a disease which has caused blindness, failing
18 kidneys, and a failing pancreas. She lives on her own and receives \$844 per month in
19 public assistance, which amount is insufficient to cover her living expenses and medical
20 needs. Debtor’s other child is Seth Sebert, a 32-year-old transwoman known as “Asia.”
21 Asia is a convicted felon, has bipolar disorder, post-traumatic stress and a host of other
22 maladies. Asia has lived with Debtor since November 2014, but has spent the bigger
23 end of the past 15 years in correctional institutions. Although Asia receives food
24 stamps, she has been denied disability benefits. However, Debtor is hopeful that Asia’s
25 disability appeal will reverse this denial. According to Debtor, Asia is intelligent but is

26 ⁵ It is the Court’s understanding that this tax return, while signed by the Debtor on January 11, 2016, had not been
filed as of the date of the trial.

1 so debilitated by her numerous psychological challenges that, for the foreseeable future,
2 she is not likely to produce any meaningful support for herself or her mother's
3 household. The father of Regina and Asia died in 1990.

4 Debtor has three degrees from Ottawa University, in Secondary Education (B.A.
5 1996), Education (Masters 2000) and Professional Counseling (Masters 2002). The
6 student loans at issue were obtained to pay for Debtor's education and living expenses
7 while pursuing these degrees at Ottawa.

8 Debtor's post-graduate employment includes jobs in education and various forms
9 of counselling for wages ranging from \$16 to \$28 per hour. Debtor and her then
10 husband both lost their jobs during the recession in 2009. In 2009, Debtor formed a sole
11 proprietorship named SET Counselling ("SET") which provides a host of counselling
12 services in Northern Arizona. Her tax returns from 2010 to 2014 reflect annual income
13 ranging from \$26,625 to \$638 for an average annual income of \$14,157.80. In 2015,
14 Debtor generated adjusted gross income of \$30,622. At the time of trial, Debtor's
15 monthly take home income was generally about \$2,200 per month and her expenses
16 were around \$2,500 per month.⁶ Defendant challenges the reasonableness of certain
17 expenses of the Debtor including recreation (\$50 per month), term insurance (\$27) and
18 two payments (\$403 per month) related to her 2015 purchase of a 2006 Toyota with
19 115,000 miles. One of the car loans calls for a monthly payment of \$153 to an arm's-
20 length creditor but another \$250 per month is due to Debtor's mother and step-father
21 who, post-petition, released their lien against a vehicle Debtor traded in so she could
22 acquire the Toyota. Debtor has approximately 1.5 years of payments left on each of
23 these loans.

24 . . .

25 _____
26 ⁶ While the JTPS reflects an agreed gross income of \$2,840 per month for the past six months and expenses of \$2,504 per month, the Debtor's testimony made it clear that these figures failed to include her income tax bills of about \$600 per month.

1 Debtor has applied for numerous jobs in the past four years, to no avail. Her SET
2 employment enables her to be relatively close to her children so she can attend to their
3 needs while also providing the flexibility to take them to medical appointments and
4 provide for their other daily demands. Regina, of course, cannot drive. Debtor receives
5 no governmental aid nor does she receive income from any source beyond her work with
6 SET.⁷

7 Debtor's student loans were consolidated in 2006 after which time she requested
8 and obtained several forbearances. See Exhibits 31 (dated December 16, 2010) , 32
9 (dated February 13, 2010) and 34 (dated February 22, 2011). Debtor made loan
10 payments on her student loans in 2011 (at least four, totaling \$143.47), 2012 (at least 9,
11 totaling \$201.39), 2013 (at least 13, totaling \$333.40) and 2014 (at least 7, totaling
12 \$179.62) for an aggregate of at least 33 payments totaling \$857.88. Although Debtor
13 made these loan payments, she failed to pay her income taxes between 2012 and 2015.
14 She now owes unpaid taxes in excess of \$16,000, a portion of which she is repaying at
15 the rate of \$150 per month.

16 Debtor lives with Asia in a tiny mobile home in Cornville, Arizona. She bought
17 this mobile home for \$37,500 in April 2011 and pays \$494 per month towards the
18 mortgage. Prior to acquiring the mobile home, she lived for two years in a 20-year-old
19 fifth wheel trailer with her then husband. At her current residence she sometimes turns
20 off the water heater for several months at a time in order to trim expenses. Debtor has
21 no health insurance but is being assessed for health insurance under the Affordable
22 Health Care Act. Although her 2015 tax return (Exhibit 8) has apparently not yet been
23 filed, she expects it will produce an additional federal tax bill in excess of \$6,000.⁸

24 . . .

25 ⁷ Debtor has been divorced twice but neither former spouse pays her support of any kind. Asia does receive food
26 stamps totaling \$190 per month.

⁸ This amount is part of the \$16,000 tax debt referred to above.

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II. JURISDICTION

This adversary proceeding is a core matter over which the Court has jurisdiction. 28 U.S.C. §§ 157(B)(2)(1) and 1334.

III. ISSUE

Has Debtor proven by a preponderance of the evidence that her student loans owed to Defendant are to be wholly or partially discharged under § 523(a)(8) of the Code?

IV. LAW

Section 523(a) of the Code states in relevant part, as follows:

- (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt— . . .
- (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor’s dependents, for—
 - (A)(i) 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
 - (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
 - (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual;

Although § 523(a)(8) references “undue hardship,” that term is not defined in the Code. The Southern District of New York announced its definition of undue hardship in *Brunner*, 46 B.R. 752 (S.D.N.Y. 1985) (Aff’d by 831 F.2d 395(2nd Cir. 1987)). The Ninth Circuit, in turn, adopted *Brunner’s* three-prong undue hardship test in the case of *In re Pena*, 155 F.3d 1108 (9th Cir. 1998).

The *Brunner* test is as follows:

1. The Debtor is not presently capable of maintaining a “‘minimal’ standard of living for herself and her dependents if forced to repay the [student] loans.” *Brunner*,

1 831 F.2d at 396;

2 2. “That additional circumstances exist indicating that this state of affairs is
3 likely to persist for a significant portion of the repayment period of the student loans.”
4 *Id.*; and

5 3. “That the debtor has made good faith efforts to repay the [student] loans .
6 . . .” *Id.*

7 Debtor “bears the burden of proving by a preponderance of the evidence, all of
8 the” three prongs of the *Brunner* test. *In re Birrane*, 287 B.R. 490, 494 (9th Cir. B.A.P.
9 2002). *See also In re Refino*, 245 F.3d 1083, 1087 (9th Cir. 2001).

10 Discharge litigation under § 523(a)(8) is not necessarily a winner-takes-all
11 proposition. “Bankruptcy courts may exercise their equitable authority under § 105(a) to
12 partially discharge student loans.” *In re Jorgensen*, 479 B.R. 79, 86 (9th Cir. B.A.P.
13 2012); *see also In re Saxman*, 325 F.3d 1168, 1173 (9th Cir. 2003). The Court’s
14 discretion extends to both the amount discharged and the repayment terms for the
15 undischarged portion. *Jorgensen*, 479 B.R. at 86. However, even if the student loan
16 discharge is partial, the Debtor still must satisfy all three prongs of the *Brunner* test. *Id.*
17 and *Saxman*, 325 F.3d at 1174.

18 **A. Brunner Prong No. 1 – Minimal Standard of Living**

19 To satisfy the first prong of the *Brunner* test, Debtor must demonstrate more than
20 that she is experiencing tight finances. *In re Nascimento*, 241 B.R. 440, 445 (9th Cir.
21 B.A.P. 1999). “In defining undue hardship, courts require more than temporary
22 financial adversity but typically stop short of utter hopelessness.” *Id.*

23 **B. Brunner Prong No. 2 – Additional Circumstances**

24 In describing the second prong of the *Brunner* test, the Ninth Circuit B.A.P. has
25 noted:

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1 Additional circumstances are any circumstances beyond the
2 more current inability to pay, that show the inability to repay
3 is likely to persist for a significant portion of the repayment
4 period. *In re Nys*, 308 B.R. at 444. “The circumstances need
5 be ‘exceptional’ only in the sense that they demonstrate
6 insurmountable barriers to the debtor’s financial recovery
and ability to pay.” *Id.* A court may consider a number of
factors not limited to the following: the debtor’s age,
training, physical and mental health, education, assets, ability
to obtain a higher paying job or reduce expenses. *Id.*

7 *Jorgensen*, 479 B.R. at 88. The “additional circumstances” test is, “by its nature, case-
8 by-case.” *Nys*, 308 B.R. 436, 444 (9th Cir. B.A.P. 2004) aff’d 446 F.3d 938 (9th Cir.
9 2006). The *Nys* court cites a non-exclusive list of twelve factors to review in
10 determining whether a debtor has satisfied the second prong of the *Brunner* test:

- 11 1. Serious mental or physical disability of the debtor or
12 the debtor’s dependents which prevents employment
or advancement; *Brunner*, 831 F.2d at 396;
- 13 2. The debtor’s obligations to care for dependents; *Id.*;
- 14 3. Lack of, or severely limited education; *Pena*, 155
15 F.3d at 1114;
- 16 4. Poor quality of education⁹;
- 17 5. Lack of usable or marketable job skills; *Birrane*, 287
18 B.R. at 497;
- 19 6. Underemployment;
- 20 7. Maximized income potential in the chosen
21 educational field, and no other more lucrative job
22 skills;
- 23 8. Limited number of years remaining in work life to
24 allow payment of the loan; *Brunner*, 831 F.2d at 396;
- 25 9. Age or other factors that prevent retraining or
relocation as a means for payment of the loan;
- 26 10. Lack of assets, whether or not exempt, which could be
used to pay the loan;
11. Potentially increasing expenses that outweigh any
potential appreciation in the value of the debtor’s
assets and/or likely increases in the debtor’s income;
12. Lack of better financial options elsewhere.

⁹ See *Pena*, 155 F.3d at 1114 (educational training for a job in an over-saturated market); *Cota*, 298 B.R. at 418 (school’s incompetency); *Speer v. Educ. Credit Mgmt. Corp (In re Speer)*, 272 B.R. 186, 187 (Bankr. W.D. Tex. 2001) (trade school had improperly trained debtor and few graduates obtained jobs).

1 Nys at 446-447.

2 **C. Brunner Prong No. 3 – Good Faith**

3 In reviewing the third prong of the *Brunner* test, the Ninth Circuit B.A.P. has
4 stated that:

5 To determine good faith, the court measures the debtor’s
6 efforts to obtain employment, maximize income, minimize
7 expenses, and negotiate a repayment plan. *In re Mason*, 464
8 F.3d 878, 884 (9th Cir. 2006). Whether a debtor made
9 payments prior to filing for discharge is also a persuasive
factor in determining whether she made a good faith effort to
repay her loans. *In re Pena*, 155 F.3d at 1114.

10 *In re Jorgensen*, 479 B.R. at 89.

11 In his concurring opinion in *In re Roth*, 490 B.R. 908, 920-923 (9th Cir. B.A.P.
12 2013) Judge Pappas acknowledges that courts in the Ninth Circuit are bound by *Brunner*
13 and *Pena* but makes impassioned and persuasive arguments as to why the Ninth Circuit
14 should revisit this outdated test. Loyola Law School Prof. Anne Wells takes up Judge
15 Pappas’ torch and provides further background into the history of student loan
16 dischargeability policies, statutes, case law and changed conditions in the market place.
17 Ann E. Wells, Replacing Undue Hardship With Good Faith: An Alternative Proposal
18 for Discharging Student Loans in Bankruptcy, 33 Cal. Bankr. J. 313-344 (2016).
19 Among other things, Prof. Wells notes that, as of March 13, 2015, student loan debt in
20 the United States totaled more than \$1.25 trillion. *Id.* This amount is more than the
21 combined national debts of Austria and Belgium. *Id.* At the end of 2012, Americans in
22 their 50’s owed \$112 billion and those in their 60’s owed \$43 billion. *Id.* at 319. In
23 short, student loan debt is a gigantic issue in the United States, and not just for students
24 in their 20’s.

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V. ANALYSIS

A. Minimum Standard of Living

At present, Debtor is not just living hand to mouth, she is barely eeking out an existence. She lives in a tiny mobile home in a small but affordable Northern Arizona town. Her vehicle, while apparently serviceable, is an old high mileage compact car. Debtor does not live an extravagant life. She periodically shuts off her water heater in an effort to reduce expenses.

Defendant criticizes several of Debtor's monthly expenditures (e.g., recreation, term insurance and car payments). This Court, however, finds each of these expenses to be reasonable under the Debtor's circumstances. Debtor's term insurance provides an appropriate safety net for her children should Debtor pass away. The insurance premiums are nominal (\$27 per month). Debtor's \$50 per month entertainment expenses are hardly lavish. Debtor's car payments reflect the fact that she could not afford to buy a car for cash, that she had an outstanding balance on her trade-in, and that two lien payments were necessary to acquire the Toyota Corolla. Despite her efforts to minimize expenses, Debtor has been unable to timely pay her income tax bills. Debtor cannot presently maintain a minimal standard of living if she were forced to repay her student loans.

Debtor's financial difficulties are not merely a temporary state of affairs. Debtor's tax returns since 2010 reveal the prolonged nature of her financial hardship. These returns do not reveal that her two children have long suffered from their current ailments and both are dependent upon financial assistance which their mother supplies. For quite some time in the past and for the foreseeable future could not and will not be able to maintain a minimal standard of living if she were forced to repay her student loans.

...

1 **B. “Additional Circumstances”**

2 This Court will address the second prong of the *Brunner* test by walking through
3 the twelve steps program announced by the Ninth Circuit B.A.P. in *Nys*.

4 1. Disabilities of Debtor or Her Dependents. The Debtor is not physically or
5 emotionally handicapped. In view of her monumental life challenges, this Court was
6 impressed by how diligent, stable and well-adjusted she appeared to the Court. That
7 said, Debtor is very restricted by the demands of motherhood and the realities of her
8 income earning potential. Although Regina receives some state assistance, it is not
9 enough to cover her cost of care. Debtor has for years been supplementing Regina’s
10 modest revenue and will need to continue doing so for the remainder of her life. As to
11 Asia, at present, she appears to be wholly dependent upon her mother’s income. Asia
12 may be physically capable of performing some level of work but this Court was
13 persuaded by Debtor’s credible testimony to the effect that Asia is so affected by
14 psychological issues that she is not likely to generate any meaningful income for a long
15 time, maybe for the rest of her life. Regina’s and Asia’s conditions do not prevent
16 Debtor from working but their needs have inhibited and will continue to inhibit Debtor’s
17 working hours and geographical location.

18 2. Caring for Dependents. See paragraph 1, above.

19 3. Educational Limitations. Debtor is well educated. For years she has been
20 actively employed in her field of education. However, under the very best of
21 circumstances, Debtor’s education would not likely qualify her for a lucrative salary.
22 The Court finds Debtor is making a reasonable level of income with the education and
23 training she has acquired.¹⁰

24 ...

25 _____
26 ¹⁰ The more puzzling question is how Debtor ever qualified for \$250,000 in student loans to pursue a course of study that was never likely to enable her to produce sufficient income to service her student loans. This, of course, is part of the student loan crisis addressed in Prof. Wells’ article and Judge Pappas’ concurrence referenced above.

1 4. Quality of Education. Debtor holds one undergraduate and two graduate
2 degrees from Ottawa University. Ottawa is not exactly a name brand university but this
3 Court was not supplied with evidence which would enable the Court to criticize the
4 merits of the education supplied by this non-profit university.

5 5. Job Skills. Debtor has usable and marketable job skills but there is a limit
6 to the earning capacity these skills can produce. Debtor could admittedly make more
7 money in a bigger market place (e.g. Phoenix), but her expenses would also increase
8 dramatically. Moreover, Debtor would not be in a position to care for her dependent¹¹
9 children as she is presently.

10 6. Underemployment. Debtor is somewhat underemployed at present. She
11 does, however, periodically apply for regional jobs as they become known to her. Her
12 underemployment is through no fault of her own. Nor, as Defendant suggests, has
13 Debtor chosen to do less than she is capable of doing in the workplace.

14 7. No More Lucrative Job Skills. Debtor is and has long been actively
15 employed in her chosen educational field. She is not likely to earn more anytime soon,
16 especially since she must care for her two children. Unfortunately, Debtor does not
17 possess other skills which would qualify her for more lucrative employment in another
18 discipline.

19 8. Work Years Remaining. Debtor is 56 years old, a year younger than the
20 author of this opinion. While some would say the 50's are the new 40's, we all know
21 otherwise. Debtor likely has another eight years of maximum earning potential and
22 maximum job performance. Our culture has long pegged age 65 as the logical
23 retirement age. This Court anticipates Debtor will likely retire at 65. The student loan
24 repayment programs discussed by defendant's witness, Ms. Skerbinc, call for a 25-year
25

26 ¹¹ Although Regina cannot be claimed as a dependent for tax purposes, this Court finds she is nevertheless materially (albeit partially) dependent on her mother's care and income.

1 payment regimen.¹²

2 9. Retraining Prospects. Debtor is already highly trained and skilled in her
3 chosen field. To suggest she change careers at age 56 is not reasonable. More
4 importantly, piling on additional student loan debt would be the Debtor's only means of
5 acquiring new skills. Accumulating more student loans is the last thing Debtor needs.
6 Devoting one to three more years in study would also be unwise if Debtor has only eight
7 working years left in her.

8 10. Lack of Assets. Debtor owns a very modest home, a well-worn vehicle
9 and an education that produces a minimal standard of living. She lacks the assets or
10 means to pay all or even most of her student loans.

11 11. Increasing Expenses. Debtor has done a remarkable, even heroic, job
12 trimming her expenses. There is no evidence that her mobile home will appreciate in
13 value but this Court is well aware that Cornville has long been a sleepy rural community
14 and that 600 sq. ft. mobile homes do not generally appreciate, nor do 10-year old Toyota
15 Corollas.

16 12. Lack of Better Options Elsewhere. As noted in section V(B)(5) above,
17 Debtor could and likely would earn more in a major metropolitan area, if a 56-year old
18 woman could find the right job. However, her living expenses would also increase and
19 she would likely need to find and pay for a replacement caregiver for Regina. Debtor is
20 also convinced that the distractions of a bigger city will cause Asia to once again find
21 herself in trouble with the law. Phoenix surely does hold a greater number of
22 distractions than does Cornville.

23 In hindsight, it is a shame that Debtor ever incurred these student loan debts.
24 While her Ottawa University education may have given her the tools and credentials to
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26 ¹² Even if Debtor were required to adhere to a 25-year repayment schedule (a prospect this Court finds unreasonable to expect of a 56-year old woman), the discharge she could receive under these programs would leave her with significant debt forgiveness income. *See Roth*, 490 B.R. at 923.

1 work in an emotionally satisfying role and may have provided a well needed skilled
2 counselor in her rural community, the predictable economic reward was never likely to
3 justify the massive economic burden she incurred. Debtor, of course, is not blameless in
4 this regard. She signed these loan obligations and promised to pay the balances.
5 However, she was married and may very well have reasonably anticipated a different
6 overall financial future for her and her family.

7 In summary, Debtor does not satisfy each and every one of the twelve *Nys*
8 factors, but she does satisfy most of them. This Court finds that additional
9 circumstances do exist in Debtor's life such that her grim financial circumstances are
10 likely to persist for the remainder of her life. Short of acquiring a winning Powerball
11 ticket, this Court finds the Debtor's dire financial straits will persist through and beyond
12 the date she turns 65.

13 **C. Debtor's Good Faith Repayment Efforts**

14 Since the student loans at issue were consolidated in 2006, Debtor made at least
15 33 payments on these loans. One could call these payments nominal but they were in
16 accordance with her agreement with Defendant's predecessor(s) and those payments
17 were in accordance with her financial means. Significantly, while Debtor was making
18 these student loan payments, she was unable to pay her income taxes. She now owes
19 \$16,000 in non-dischargeable tax debt. Debtor should not be forced to repay her student
20 loans if doing so causes her to amass unpaid income tax liability. Debtor has satisfied
21 the third prong of the *Brunner* test.

22 Defendant notes in the JTPS at page 22, that Debtor's home loan will be fully
23 matured in 2021,¹³ assuming she does not refinance or buy a replacement home before
24 then. Debtor will be 62 years old at that time. Her \$494 monthly payment may then be
25 concluded but it is not unreasonable to believe she will need to commit that monthly
26

¹³ This is not a stipulated fact under the JTPS nor does the Court recall this "fact" being introduced into evidence.

1 financial freedom to other obligations, including deferred maintenance to the mobile
2 home, a newer car, etc.

3 **VI. CONCLUSION**

4 Debtor has satisfied her burden of proof on each of the three *Brunner* tests.
5 Moreover, this Court concludes a partial discharge is not appropriate under the
6 circumstances as this Court finds that Debtor does not, and most likely will not, have the
7 capacity to repay any portion of her student loans. The Court, therefore, wholly
8 discharges the student loans at issue under 11 U.S.C. § 523(a)(8).

9 **So ordered.**

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11 Dated: March 31, 2016



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DANIEL P. COLLINS
15 UNITED STATES BANKRUPTCY JUDGE
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17 COPY of the foregoing mailed by the BNC to:

18 Interested Parties
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