

Student Loans – Hardship Discharge
Partial Discharge
11 U.S.C. § 523(a)(8)

Nitcher v. ECMC, National Collegiate Student Loan Trust et al
In re Nitcher

Main Case

18-03090-pcm
18-31729-pcm

08/23/2019

Unpublished

Debtor is a 38-year-old, single attorney with no dependents or serious medical issue. She is well educated, has marketable job skills, is fully employed and is 10 years into her legal career. She graduated from law school and was admitted to the Oregon State Bar in 2008. After graduation, she was unable to find full-time employment and did sporadic contract work for different attorneys. In 2014, she accepted a position in a small criminal defense firm and moved to Bend where she has been steadily employed since. Debtor's gross income has increased incrementally since 2008; her gross earnings for 2018 was \$69,398.00. She has no nonexempt assets, real estate or retirement plans or benefits.

Before filing bankruptcy, Debtor defaulted on her student loans. She attempted, but was unable, to negotiate an affordable repayment agreement with National Collegiate Student Loan Trust ("NC") on three private student loans. One loan had fully matured; the other two were due to mature in 2028. Upon default, NC accelerated the balances of the unmatured loans and filed suit in state court to collect. Debtor filed her chapter 7 proceeding before the state court entered judgments to prevent garnishment of her wages.

Debtor filed this adversary proceeding seeking a full or partial hardship discharge of her student loans under § 523(a)(8). At the time of filing, Debtor owed approximately \$198,691 on multiple federal student loans held by ECMC and \$51,821 on private student loans held by NC.


Debtor settled with ECMC prior to trial. Pursuant to their agreement, the parties stipulated to Debtor's participation in ECMC's Revised Pay as You Earn (REPAYE) Income Driven Repayment program and the proceeding was dismissed as to ECMC. Under the REPAYE program, Debtor's initial monthly payment will be approximately \$479, is subject to increase as her income increases and will last 20 to 25 years.

Debtor did not dispute her liability to NC. NC conceded that Debtor paid \$18,215.82 prepetition on the student loans.

The Court found that Debtor satisfied the requirements of the Brunner test even though she did not fit the standard profile of one who is unable to maintain a minimal standard of living while repaying her student loans. In reaching that conclusion, the Court considered, inter alia, Debtor's Amended Schedule J with ECMC's REPAYE student loan payment resulting in negative monthly net income of (\$474); NC's loans are private student loans; NC did not offer an income-driven repayment program or affordable repayment option; the loans had matured or been accelerated leaving Debtor subject to garnishment; Debtor had made efforts to maximize her income; and, Debtor had made payments on her student loans for approximately eleven years before filing bankruptcy.

The Court further concluded that, although Debtor satisfied all three prongs of the Brunner test and cannot afford to repay the student loans in full, she can afford to repay a portion of the loans (\$16,500) in smaller periodic payments.

Below is an opinion of the court.


PETER C. MCKITTRICK
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:

LESLIE TAIKO NITCHER,
Debtor.

LESLIE TAIKO NITCHER,
Plaintiff,

v.

EDUCATIONAL CREDIT MANAGEMENT
CORPORATION, NATIONAL COLLEGIATE
STUDENT LOAN TRUST 2006-3,
NATIONAL CRLEGIATE STUDENT LOAN
TRUST 2007-4, AND PNC BANK, N.A.,

Defendants.

Bankruptcy Case
No. 18-31729-pcm7

Adv. Proc. No. 18-03090-pcm

MEMORANDUM DECISION

This adversary proceeding tells a far too common story of the plight of a professional swallowed by massive student loan debt, much of which she has no hope of repaying during her lifetime. In 2005, when Leslie Nitcher ("Nitcher") enrolled in law school, it was with the hope and expectation her advanced degree would lead to a legal career at a level of compensation commensurate with the standard of living that

1 lawyers historically have enjoyed. Instead, she faced a bleak job market
2 when she graduated from law school in 2008. After trying to balance her
3 living expenses and massive student debt for 11 years, Nitcher finally
4 succumbed to her growing consumer debt. She filed chapter 7 bankruptcy
5 and received her discharge. The question posed for the court in this
6 case is to what extent her student loan debt will remain a noose around
7 her economic neck for the remainder of her economically productive
8 years.

9 After considering the evidence presented, I hold that payment of
10 the entire debt would impose an undue hardship on Nitcher and that the
11 debt is discharged to the extent it exceeds \$16,500.00. My findings of
12 facts and conclusions of law follow.¹

13 I. Procedural Background

14 Nitcher filed this adversary proceeding seeking a partial or total
15 discharge of her student loans. Nitcher's original Complaint, Doc. 2,
16 named fourteen loan servicers as defendants. After she was able to
17 identify the current holders and servicers of her loans, Nitcher
18 dismissed most of the defendants. See Doc. 40. Nitcher filed a First
19 Amended Complaint, Doc. 41, against the remaining defendants: PNC Bank,
20 N.A., Educational Credit Management Corporation ("ECMC"), National
21 Collegiate Student Loan Trust 2006-3 and National Collegiate Student
22 Loan Trust 2007-4 (together, "NC").

25 ¹This disposition is specific to this case and is not intended for publication or
26 to have a controlling effect on other cases. It may, however, be cited for whatever
persuasive value it may have.

1 PNC Bank, N.A., did not file an Answer. Nitcher and ECMC settled
2 and ECMC was dismissed from this action. Docs. 49, 50. NC was the sole
3 remaining active defendant at the time of trial.

4 The bulk of Nitcher's loans are held by ECMC and are federal
5 student loans. Pursuant to the parties' settlement agreement, Nitcher
6 stipulated to the non-dischargeability of the student loans held by ECMC
7 and will apply for a Revised Pay as You Earn (REPAYE) Income Driven
8 Repayment program once her loans with ECMC have been consolidated. The
9 balance owed ECMC as of February 26, 2019, is \$198,691.00. Doc. 49.
10 Nitcher testified her initial payment under the REPAYE program will be
11 approximately \$479.00 a month and is subject to increases as her income
12 increases.

13 II. Facts

14 At issue in this adversary proceeding are three private loans held
15 by NC. The loans are identified as Loan ID #001, #002, and #003
16 (together, the "Student Loans"). Loan #001 was disbursed in August 2005
17 in the original amount of \$20,032.26. Loan #002 was disbursed in
18 October 2005 in the original amount of \$1,505.38. Loan #003 was
19 disbursed in August 2006 in the original amount of \$24,064.52. As of
20 August 28, 2018, the charge-off balance of the loans is \$23,744.33,
21 \$823.13, and \$27,254.16, respectively, for a total of \$51,821.62.
22 Statement of Joint Stipulated Facts for Trial in Adversary Proceeding
23 ("Stipulated Facts"), Doc. 64. All three loans had variable interest
24 rates.

25 Loan #002 has fully matured. Plaintiff's Exhibit 1, p. 11. Loan
26 #001 was to mature in November, 2028, and Loan #003 was to mature in

1 October, 2028. Id. at pp. 1, 21. However, after Nitcher defaulted, the
2 entire balance of each loan was accelerated, and NC filed suit in state
3 court to collect the balances owed on Loans #001 and #003. Plaintiff's
4 Exhibit 2, pp. 7, 13. In response, Nitcher filed this chapter 7
5 proceeding before the state court entered judgments on the loans.

6 Nitcher does not dispute her liability for, or the amount of, the
7 Student Loans or that she obtained those loans for educational purposes.
8 NC does not dispute Nitcher has paid a total of \$18,215.82 toward her
9 student loan obligations to NC. Stipulated Facts.

10 Nitcher is a 38-year-old, single attorney with no dependents. She
11 is a graduate of Oregon State University and Willamette University
12 School of Law. She was admitted to the Oregon State Bar in 2008. After
13 graduation, Nitcher was unable to find full-time employment. She lived
14 in Salem, Oregon and did sporadic contract work for different attorneys.
15 She was self-employed from October 2010 through August 2014. In 2014,
16 Nitcher accepted a position with the small criminal defense firm of
17 Kollie Law Group (formerly DeKalb & Associates) in Bend, Oregon. She
18 has been steadily employed there since 2014. Her taxed Social Security
19 income since 2010 is as follows:

20

2010	2011	2012	2013	2014	2015	2016	2017
\$17,131	\$40,981	\$34,168	\$45,378	\$62,672	\$60,112	\$68,813	\$74,403

21
22
23

24 Nitcher's W-2 earnings for 2018 were \$69,398.00. Stipulated Facts.
25 Debtor testified that given her age, education, background, experience,
26

1 location and practice, she is probably near the top of her earning
2 potential.

3 The record shows Nitcher has no nonexempt assets. She owns no real
4 estate, drives a 2012 car worth less than \$11,000.00, and has no
5 retirement accounts or retirement benefits through her employer.
6 Plaintiff's Exhibit 7.

7 **III. Standard for Student Loan Discharge**

8 A student loan is dischargeable in bankruptcy if "excepting such
9 debt from discharge . . . would impose an undue hardship on the debtor
10 and the debtor's dependents[.]" 11 U.S.C. §523(a)(8). Undue hardship
11 is determined by applying the three-part test enunciated in Brunner v.
12 New York State Higher Educ. Servs. Corp., 831 F.2d 395 (2d Cir. 1987).
13 In re Pena, 155 F.3d 1108, 1111 (9th Cir. 1998). The burden of proving
14 undue hardship is on the debtor and the debtor must prove all three
15 elements of the Brunner test before discharge can be granted. In re
16 Rifino, 245 F.3d 1083, 1087-1088 (9th Cir. 2001). If the debtor fails to
17 satisfy any one of those elements, "the bankruptcy court's inquiry must
18 end there, with a finding of no dischargeability.'" Id. at 1088
19 (quoting In re Faish, 72 F.3d 298, 306 (3^d Cir. 1995)).

20 If a debtor proves the undue hardship test is met as to only a
21 portion of the debt, the court can partially discharge the debt. In re
22 Myrvang, 232 F.3d 1116, 1123-24 (9th Cir. 2000); In re Howe, 319 B.R.
23 886, 889 (9th Cir. BAP 2005)(citing In re Saxman, 325 F.3d 1168, 1173
24 (9th Cir. 2003)); In re Sequeira, 278 B.R. 861, 865 (Bankr. D. Or. 2001).
25 "The bankruptcy court has discretion in determining the amount and terms
26

1 of payment of a partial discharge." In re Jorgensen, 479 B.R. 79, 86
2 (9th Cir. BAP 2012). See also Sequeira, 278 B.R. at 866 (same).

3 The first prong of the Brunner test requires a showing that the
4 debtor cannot, based on current income and expenses, maintain a
5 "minimal" standard of living for herself if forced to repay the loans.
6 Brunner, 831 F.2d at 396. "[A] 'minimal standard of living' must be
7 determined 'in light of the particular facts of each case.'" Howe, 319
8 B.R. at 890 (quoting In re Cota, 298 B.R. 408, 415 (Bankr. D. Ariz.
9 2003)). The debtor must make "more than a showing of tight finances"
10 but is not required to prove "utter hopelessness." In re Nascimento,
11 241 B.R. 440, 445 (9th Cir. BAP 1999). The application of this prong of
12 the test requires an examination of the debtor's current finances.
13 Howe, 319 B.R. at 890.

14 The second part of the test requires the debtor to show "that
15 additional circumstances exist indicating that this state of affairs is
16 likely to persist for a significant portion of the repayment period of
17 the student loans." Brunner, 831 F.2d at 396.

18 Additional circumstances are any circumstances, beyond the mere
19 current inability to pay, that show the inability to repay is
20 likely to persist for a significant portion of the repayment
21 period. The circumstances need be "exceptional" only in the sense
22 that they demonstrate insurmountable barriers to the debtor's
financial recovery and ability to pay.

23 In re Nys, 308 B.R. 436, 444 (9th Cir. BAP 2004), *aff'd*, 446 F.3d 938 (9th
24 Cir. 2006). A court may consider a number of factors, not limited to
25 the following: the debtor's age, training, physical and mental health,
26

1 education, assets, and ability to obtain a higher paying job or reduce
2 expenses. Id.

3 The final prong of the Brunner test requires the debtor to prove
4 that she made a good faith effort to repay the loans or show that the
5 forces preventing repayment are truly beyond her control. Jorgensen,
6 479 B.R. at 89 (citing Brunner). Good faith is determined by the
7 debtor's efforts to obtain employment, maximize income, minimize
8 expenses and negotiate a repayment plan. In re Mason, 464 F.3d 878, 884
9 (9th Cir. 2006). "Whether a debtor made payments prior to filing for
10 discharge is also a persuasive factor in determining whether she made a
11 good faith effort to repay her loans." Jorgensen, 479 B.R. at 89.
12 However, a history of making or not making payments is, by itself, not
13 dispositive. Mason, 464 F.3d at 884.

14 IV. DISCUSSION

15 A. First Prong: Ability to Maintain Minimal Standard of Living

16 At first glance, Nitcher does not fit the standard profile of a
17 debtor who is unable to maintain a minimal standard of living while
18 repaying her student loans. However, the trial exhibits and testimony
19 tell a different story. At trial, Nitcher introduced her Amended
20 Schedules I and J, Plaintiff's Exhibit 8, listing her monthly income and
21 expenses. Schedule I shows: gross monthly income of \$5,304.00, tax
22 withholdings of \$1,565.00, and monthly net income of \$3,739.00. Schedule
23 J lists the following expenses:

Rent	\$1,500.00	Transportation	350.00
Renter's Insurance	14.00	Recreation	50.00
Heat & Electricity	200.00	Life Insurance	120.00
Cell Phone, Internet	288.00	Auto Insurance	119.00
Food & Housekeeping	500.00	Flex Spending Acct	83.00
Clothing & Dry Cleaning	145.00	Pet Care	50.00
Personal Care Products	100.00	ECMC Loan	479.00
Medical & Dental	215.00	Total Expenses	\$4,213.00

Those expenses, which include the anticipated payment to ECMC in the amount of \$479.00, result in a negative monthly net income of (\$474.00).

Nitcher admits some of her monthly expenses exceed the IRS Standards. "While a bankruptcy court may consider the IRS Standards as one piece of evidence in relation to its first prong analysis, it should not use the IRS Standards as the sole measure of what is necessary to maintain a minimal standard of living." Howe, 319 B.R. at 892-893. The IRS Standards represent average expenditures only for certain categories of basic living expenses. In addition, the IRS Standards do not provide for certain expenses that courts have recognized as necessary to the maintenance of a minimal standard of living in § 523(a)(8) cases. Id. See also Jorgensen, 479 B.R. at 87 (approving additional allowance for food, clothing, and vehicle purchase). In addition to the IRS Standards, the court may look to the disposable income test of chapter 13 (11 U.S.C. §1325(b)) for guidance in determining what is necessary to maintain a minimal standard of living. In re Carnduff, 367 B.R. 120, 132-33 (9th Cir. BAP 2007).

1 Nitcher testified that the move to Bend did increase her income,
2 but it also increased her monthly expenses. She testified, credibly,
3 that Bend is a tourist town where rents, food costs, utilities and gas
4 prices are higher than in Salem. NC argues that certain of Nitcher's
5 budget items are excessive or unnecessary. I agree in two respects.

6 At trial, Nitcher testified she maintains a life insurance policy
7 naming her non-dependent mother as a beneficiary because of her mother's
8 recent divorce. Although admirable, that \$120.00 monthly expense is not
9 necessary for Nitcher to maintain a minimal standard of living.

10 Nitcher's transportation expense at \$350.00 a month is likely excessive.
11 However, even if the life insurance expense is eliminated and the
12 transportation expense is reduced, Nitcher will not be able to pay her
13 necessary living expenses and maintain a minimal standard of living.

14 Importantly, the Student Loans have all matured or been
15 accelerated. If those loans are not discharged, Nitcher's required
16 payments on the Student Loans will consume 25% of her net income and her
17 wages will be subject to garnishment by NC until the Student Loans are
18 fully paid. Based upon Nitcher's current net income of \$3,739.00, NC
19 would be entitled to garnish approximately \$935.00 per month of
20 Nitcher's wages. Although NC's counsel argued Nitcher may be able to
21 reach an accommodation with NC, any repayment concession or other
22 restructuring is subject to the unilateral discretion of NC because
23 these are private student loans. Even with further trimming, Nitcher's
24 budget cannot support a garnishment by NC, ECMC's payment and a minimal
25 standard of living.

26 Nitcher points out that the term "undue hardship" was not defined

1 at the time of the Brunner decision and has not been well-defined by any
2 court since. In the context of reaffirmation agreements, Nitcher
3 argues, "undue hardship" is defined as expenses exceeding income. She
4 then concludes that, based on her Schedules I and J, she meets that
5 threshold. I disagree that the Brunner undue hardship standard is as
6 formulaic as Nitcher argues and that it is the same as that applicable
7 in the reaffirmation context. Having a negative net income on Schedule
8 J certainly is a factor to consider, but it is only one factor. For the
9 reasons stated, I find that Nitcher has satisfied the first prong of the
10 Brunner test as properly applied in the context of a §523(a)(8)
11 proceeding.

12 **B. Second Prong: State of affairs likely to persist for a significant**
13 **portion of the repayment period**

14 The second prong of the Brunner test is the most challenging for
15 Nitcher. This prong requires a showing "that additional circumstances
16 exist indicating that this state of affairs is likely to persist for a
17 significant portion of the repayment period of the student loans."
18 Brunner, 831 F.2d at 396. "[N]either Brunner nor Pena imposes a
19 requirement that additional circumstances be 'exceptional' in the sense
20 that the debtor must prove a 'serious illness, psychiatric problems,
21 disability of a dependent, or *something* which makes the debtor's
22 circumstances more compelling than that of an ordinary person in debt.'" In re Nys,
23 446 F.3d 938, 946 (9th Cir. 2006)(quoting BAP decision in Nys,
24 308 B.R. at 444). The debtor is required to show only that she will be
25 unable to maintain a minimal standard of living now and in the future if
26 forced to repay her student loans. Id.

1 The court in Nys stated that it would "not presume that an
2 individual's present inability to make loan payments will continue
3 indefinitely." 446 F.3d at 946. Instead, the court held that "[w]e
4 will presume that the debtor's income will increase to a point where she
5 can make payments and maintain a minimal standard of living; however,
6 the debtor may rebut that presumption with 'additional circumstances'
7 indicating that her income cannot reasonably be expected to increase and
8 that her inability to make payments will likely persist throughout a
9 substantial portion of the loan's repayment period." Id. "Additional
10 circumstances" include, but are not limited to:

11 [(1)] Serious mental or physical disability of the debtor or the
12 debtor's dependents which prevents employment or advancement; [(2)]
13 The debtor's obligation to care for dependents; [(3)] Lack of, or
14 severely limited education; [(4)] Poor quality of education; [(5)]
15 Lack of usable or marketable job skills; [(6)] Underemployment;
16 [(7)] Maximized income potential in the chosen educational field,
17 and no other more lucrative job skills; [(8)] Limited number of
18 years remaining in [the debtor's] work life to allow payment of
19 the loan; [(9)] Age or other factors that prevent retraining or
20 relocation as a means for payment of the loan; [(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.

21 Id. at 947 (quoting BAP decision in Nys, 308 B.R. at 446-47).

22 NC addressed the bulk of the "additional circumstances" set forth
23 in Nys during cross examination of Nitcher and makes a superficially
24 compelling argument that she failed to meet her burden. Nitcher
25 testified that she has no serious medical issues or dependents; is well
26 educated; has marketable job skills; is fully employed; has many

1 fruitful years of gainful employment ahead; and has a vehicle that could
2 be sold with the proceeds applied to the Student Loans. NC contends
3 Nitcher is unable to demonstrate her current tight financial
4 circumstances are likely to persist for a significant portion of the
5 repayment period because she is only 10 years into her legal career and,
6 according to NC, has prospects to increase her income if she so chooses.
7 NC argues that Nitcher has nothing in writing showing she applied for
8 other positions in a more lucrative area of the law or in a geographic
9 area with more opportunity.

10 Despite the surface appeal of NC's argument, Nitcher testified that
11 her prospects for future increased income are modest at best. Due to
12 market conditions, she found work and developed expertise in indigent
13 criminal defense. Her pay and job are subject to her firm retaining its
14 criminal defense contracts at their current levels. Although Nitcher
15 can earn additional money if she works on "private pay" clients, those
16 amounts have been steadily minimal over the past three years. She
17 testified she already works approximately 50 hours a week and does not
18 have the time to work another job. She further testified that she has no
19 civil experience and is not qualified to be hired to do civil work, at
20 least not without starting at lower pay if she could find a job.
21 Nitcher also testified that she has been looking for other jobs in the
22 area, but nothing has come available. She indicated she would be hard-
23 pressed to find a position at higher pay. I found Nitcher's testimony
24 on these points to be convincing and credible.

25 Nitcher's young age and advanced education make this analysis
26 difficult. Attorneys can certainly make significant amounts of money,

1 well more than the \$64,000 annual income currently being generated by
2 Nitcher.² Further, her income has incrementally increased since 2008
3 when she graduated from law school. However, focusing on the evidence
4 before me, and considering the credible testimony of Nitcher, I believe
5 she has shown that the current state of affairs is likely to persist for
6 a significant period.

7 If NC is left to its own devices and garnishes Nitcher's wages for
8 the next several years, she will be left unable to make her monthly
9 payment to ECMC, let alone afford the necessities of life. In addition,
10 Nitcher's required payment to ECMC will increase if her gross wages
11 increase. The applicable formula translates to an additional \$300.00 per
12 month in payments to ECMC for every \$2,000 of increased gross income.
13 The effect of an increase in income would also increase the amount of
14 Nitcher's wages subject to garnishment by NC, thereby substantially
15 diluting any benefit from an increase in income.

16 The second prong of Brunner also "requires the court determine if
17 the debtor will remain at the margins of a minimal standard of living
18 'for a significant portion of the repayment period.'" In re Price, 573
19 B.R. 579, 597 (Bankr. E.D. Pa. 2017)(quoting Brunner), *rev'd on other*
20 *grounds*, Devos v. Price, 583 B.R. 850 (E.D. Pa. 2018). In addressing
21 the temporal nature of the second prong of the Brunner test, the Price
22 court characterized the relevant inquiry to involve two questions: "(1)
23 How long is the applicable repayment period? (2) What is a 'significant
24 portion' of that repayment period (sufficient to warrant discharge of
25 the debtor's student loan)?" 573 B.R. at 597.

26 ² Nitcher's current annual income as reflected on her Amended Schedule I is
\$63,648.00.

1 The longer the repayment period, the more difficult the Debtor's
2 evidentiary burden. It also is possible that a debtor might
3 establish that his or her financial difficulties will not abate for
4 a finite period that constitutes a "significant portion" of the
5 existing contractual repayment period, but that longer term
6 prospects, within a "significant portion" of an available extended
repayment period are more favorable. Thus, the choice of repayment
period is potentially outcome-determinative in this and other
cases.

7 Id. at 597-98. After an in depth analysis, the bankruptcy court
8 concluded that the "repayment period" was the original, seven-year
9 contract term and that five years constituted a "significant portion" of
10 that repayment period. Id. at 602-08.

11
12 Nitcher and NC disagree on the applicable repayment period.
13 Consistent with Price, Nitcher argues that the applicable repayment
14 period is the remaining term of the loans: Zero for Loan #002 and 9
15 years for the other two loans. NC argues that the remaining term should
16 start as of 2015, the date Nitcher entered into a default status on her
17 loans. NC's position would result in a repayment period of
18 approximately 13 years. I conclude that the repayment period is the
19 remaining repayment term for each loan: for Loan #2, Zero; and for Loans
20 1 and 3, 110 months, assuming a start date of September 1, 2019. NC
21 does not cite any authority for the proposition that the repayment
22 period should be extended due to default and offers no convincing
23 argument why I should stray from the well-reasoned analysis of the court
24 in Price.
25
26

1 Nitcher's inability to pay her basic living expenses, the ECMC debt
2 and the NC garnishment will continue for a substantial duration of the
3 repayment period. She will drown from the weight of her necessary
4 monthly living expenses, her payment to ECMC, and a garnishment of 25%
5 of her net wages, even with a material increase in her compensation.

6 Therefore, I conclude Nitcher has met her burden of proof as to the
7 second prong of the Brunner test.
8

9 **C. Third Prong: Good Faith Efforts to Repay the Debt**

10 "To determine a debtor's good faith efforts to repay the loan, the
11 court measures the debtor's efforts to obtain employment, maximize
12 income, minimize expenses, and negotiate a repayment plan." Jorgensen,
13 479 B.R. at 89. Whether a debtor made payments prior to filing for
14 discharge is also a persuasive factor in determining a good faith effort
15 to repay student loans. Id.
16

17 NC claims Nitcher has not made a good faith effort to repay the
18 Student Loans. In support of that contention, NC points out that Nitcher
19 stopped making payments on her loans in late 2015, just when her income
20 was increasing significantly. Nitcher argues she has made significant
21 payments, including voluntary payments on the federal loans, and
22 payments of more than \$18,000 to NC. She also paid off her state student
23 loan by cashing out a small 401k account.
24

25 A review of Nitcher's bankruptcy schedules demonstrates that the
26 timing of her default is not a product of a failure to make good faith
efforts to repay the debt, but rather because she fell prey to her

1 consumer debt, which piled up as she valiantly tried to continue paying
2 her student loans. Nitcher's schedules show that she had amassed
3 significant credit card debt. Nitcher testified she incurred that debt
4 in trying to pay for normal living expenses and stay current on her
5 student loans. She also suffered the interception of her federal tax
6 refunds by her federal student loan lender during the times she was in
7 default. Many of the cases that address this prong of the Brunner test,
8 struggle with cases where income-contingent repayment plans are
9 available, but have not been applied for, or situations where the debtor
10 has made minimal or no payments on their student loans. See, e.g.,
11 Mason, 464 F.3d 878; In re Birrane, 287 B.R. 490 (9th Cir. BAP 2002).

12 Nitcher presents a different profile. She made substantial payments
13 to NC and her other lenders, even when she was a recent graduate with
14 almost no income. She credibly testified, without contradiction, that
15 she was offered settlement options with NC, but none that reduced the
16 payments or the amount due to a level she could afford. She has
17 voluntarily entered a repayment program with ECMC which will last for
18 20-25 years, at which time she likely will still have a significant
19 balance due on her federal loans that will be discharged. There is no
20 mandated income-driven repayment option available to Nitcher with regard
21 to the Student Loans without NC voluntarily agreeing to such a payment
22 plan. Nitcher has made every effort to maximize income, even by moving
23 cities to accept a full-time position at her law firm. She incurred
24 consumer debt to supplement her resources and lives in a one-bedroom
25 condominium, drives a 7-year-old car, and has limited assets. She has
26 no retirement or other savings.

1 I therefore find Nitcher has met this prong of the Brunner test
2 with ease.

3 V. PARTIAL DISCHARGE

4 The reason that I have concluded that the Student Loans should be
5 discharged is largely because Nitcher cannot survive if NC garnishes her
6 wages. The fact that NC is a private lender complicates the equation
7 because there is no income driven repayment option available. However,
8 the fact that Nitcher cannot afford to repay the Student Loans in full,
9 does not mean that she cannot afford to pay some portion of those loans
10 in smaller periodic payments. As stated, in the Ninth Circuit, a
11 bankruptcy court may partially discharge student loans when payment of
12 the full amount would constitute an undue hardship. See, e.g., Saxman,
13 325 F.3d at 1173.

14 As I discuss above, some of Nitcher's expenses are not necessary to
15 maintain a minimal standard of living. The life insurance expense is
16 unnecessary and Nitcher's transportation budget is excessive. It is also
17 reasonable to presume her income will increase modestly as she continues
18 to practice indigent criminal defense. Therefore, I conclude that
19 Nitcher can afford to pay the sum of \$150.00 per month and under the
20 circumstances, I find it appropriate she make payments for the remainder
21 of the repayment period, 110 months. That sum equals \$16,500.00. Rather
22 than discount this amount to a present value and add interest, I have
23 reached this number based on the debtor's ability to pay, and such
24 amount will not accrue interest.

25 VI. CONCLUSION

26

1 For the reasons stated, I find that the Student Loans are
2 discharged to the extent they exceed \$16,500. Loans 001 and 003 shall
3 be decelerated. No interest shall accrue on the loans. All other terms
4 of the notes shall remain as in the original. Unless the parties agree
5 otherwise, the Debtor shall commence making payments of \$150.00 per
6 month on September 1, 2019, and shall make 110 consecutive monthly
7 payments.
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9 Mr. Parker should submit an order consistent with this decision.
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11 ###
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13 cc: Mr. Parker
14 Mr. Kullen
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