UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: Judith Allyn McCormack, Debtor.	C/A No. 99-10637-W Adv. Pro. No. 99-80401-W
Judith Allyn McCormack, Plaintiff, v. Educational Credit Management Corp., successor in interest to Sallie Mae Defendant.	**ORDER** Chapter 7

THIS MATTER comes before the Court upon a Complaint to Determine Dischargeability of Debts filed by Judith Allyn McCormack ("Plaintiff" or "Debtor") on December 7, 1999. Debtor seeks to discharge a debt in the amount of $15,513.89[1] owed to Educational Credit Management Corporation ("ECMC") pursuant to 11 U.S.C. §523(a)(8).[2] After reviewing the pleadings in this matter, considering the evidence presented, and hearing the arguments of counsel at the trial on the merits; the Court makes the following Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52, made applicable to bankruptcy proceedings by Fed. R. Bankr. P. 7052.[3]

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[1] The amount of $15,513.89 represents the principal of $14,743.21 and accrued interest in the amount of $770.68.

[2] Further references to the Bankruptcy Code shall be by section number only.

[3] The Court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such; and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

FINDINGS OF FACT

1. On December 7, 1999, Debtor filed a voluntary Chapter 7 petition. Schedule F lists Sallie Mae Servicing as an unsecured nonpriority creditor with a claim in the amount of $14,740.21. On December 7, 1999, Debtor also filed this adversary proceeding seeking to discharge the student loan debt as an undue hardship.

2. Plaintiff served the Summons and Complaint on the original defendant, Sallie Mae. On January 14, 2000, ECMC filed an Application for Substitution of Party and Request for Opportunity to Be Heard Regarding Late Filing of Answer. On February 7, 2000, the parties entered into a Consent Order--Substitution of Parties and Late Filing of Answer, substituting ECMC as the successor defendant and allowing ECMC to answer the Complaint.

3. Plaintiff is 51-years-old and has no dependants. Prior to moving to South Carolina, Plaintiff lived in Ohio with her ex-husband with whom she had been married for 27 years. Three children were born of that marriage; aged 32, 27, and 24.

4. During the marriage, Plaintiff only worked part-time jobs but never pursued a full-time career. Plaintiff also helped out in the family's photography studio.

5. As the marital situation was deteriorating, Plaintiff decided to pursue a college degree and; in May of 1997, she received a Bachelor degree in Science and Nursing from Kent University.

6. Pursuant to the divorce, her husband was required to pay Plaintiff alimony for a period of three years to help her financially while she was continuing her undergraduate education. The alimony has since ceased.

7. After the divorce, Plaintiff decided to move from Ohio due to the abusive nature of the marriage. At that time, she was working at a clinic in Cleveland and was contacted by Richland

Memorial Hospital of Columbia, South Carolina to see if she would be interested for a nursing position. She accepted the job offer from Richland Memorial Hospital in late December of 1998 and moved to South Carolina on February 11, 1999.

8. The pay that Richland Memorial Hospital offered Plaintiff was less than what she was making at Cleveland Clinic. However, she had been told by the nurse recruiter at Richland Memorial Hospital that, due to the fact that in South Carolina the nurse census was down by 35%, her student loans would be paid through one of the hospital's program or grant. Once she moved to South Carolina, she was informed that the expectations that her student loans would be paid through some program must have been the result of a misunderstanding, and her student loans were never paid off by the hospital.

9. While employed at Richland Memorial Hospital, Plaintiff worked an average of 84-85 hours per week. Plaintiff began suffering from strong migraine headaches due to the long work hours, and, in December of 1999, the hospital cut back on Plaintiff's time because her nursing was being jeopardized by the long hours.

10. Richland Memorial Hospital informed Plaintiff that, because her nursing judgment was being restricted by the overtime, they were planning to move her to a secretarial position. Plaintiff felt that a nursing position would offer more financial stability and thus, toward the end of December of 1999, gave Richland Memorial Hospital her two-weeks-notice and began looking for another nursing job.

11. She was hired by Providence Hospital in Columbia, South Carolina and began working there on April 24, 2000.

12. Presently, Plaintiff's bi-weekly net pay is in the amount of $1,039.28, not including

deductions for health insurance and contribution to a retirement plan.[4] When including deductions for health insurance and contributions to a retirement fund, her bi-weekly salary will be of approximately $780.98.

13. At the present time, Plaintiff works approximately 37 hours per week. Even though she was hired by Providence Hospital to work night shifts, which would have resulted in a higher per-hour wage, the hospital switched her to day shifts because, as a senior nurse, she would be of greater help to the junior nurses working those shifts. Despite her expressed willingness to work more than 40 hours per week and to work nights or weekends at wage differentials, Plaintiff's present position at Providence Hospital has not offered such an opportunity.

14. Debtor's monthly expenditures are as follows:

Mortgage (including taxes and insurance)	$685.00
Electricity	$204.00
Water and Sewer	$60.00
Telephone	$80.00
Home Maintenance	$100.00
Food	$200.00
Clothing	$30.00
Laundry/Dry Cleaning	$20.00
Medical and Dental	$30.00
Transportation	$100.00
Recreation (books and newspapers)	$30.00
Charitable	$300.00
Life Insurance	$33.00
Automobile Insurance	$73.00
Nursing Malpractice Insurance	$33.00
Taxes on auto	$50.00
Car Payment	$288.48
Nursing license/dues	$22.00
Eyeglasses	$28.00

[4] Plaintiff testified at trial that the figure did not deduct for health insurance payments because Providence Hospital requires for an employee to have worked for a period of three months prior to be entitled to insurance coverage. Furthermore, Plaintiff will not be entitled to invest in the hospital's retirement program until January or February of 2001.

Visitation with son	$80.00
TOTAL	**$2,446.48**

15. Plaintiff lives in a three bedroom, three bathroom home with a total of 1,600 squared feet. She bought the house when she moved to South Carolina in February of 1999, and she purchased it for $83,500. The tax assessment for the house presently reflects the value of the home to be $85,000. Plaintiff owns approximately $81,000 on the mortgage.

16. The Original Schedule J, filed with the Court on December 7, 1999, reflects monthly mortgage payments on the home in the amount of $658.88. However, at trial, Plaintiff introduced an Amended Schedule J which reflects an increase in the mortgage payments to $685.00 per month. The discrepancies in mortgage payments in the two schedules resulted from an increase in home insurance which has to be placed in a escrow account through the mortgage company.

17. As a Christian, Plaintiff believes in tithing. Plaintiff did not tithe during her marriage because her ex-husband did not allow her to; however, since the divorce, she has made charitable contributions of 10% or more of her income.

18. Plaintiff's 1997, 1998, and 1999 Income Tax Returns reflect gifts to charity in the amounts of $2,080, $2,000, and $2,967 respectively.

19. Plaintiff's monthly expenditures also include $80.00 in traveling expenses to visit her son who is currently incarcerated in Ohio. Plaintiff visits her son approximately every six weeks.

20. Plaintiff makes monthly payment in the amount of $288.48 toward her 1995 Honda Accord. She purchased the vehicle two years ago, and she still has three years worth of payments remaining on her loan.

21. The income tax returns show that in 1997, Plaintiff's gross income was in the amount of

$22,148. The figure for that year was not based on a full year of work; in fact, Plaintiff had just graduated from Kent University and thus had only been employed for part of the tax year. The income tax return for 1998 shows that Plaintiff had a gross income of $46,594; and in 1999, Plaintiff's tax return shows that her gross income for that year was of $55,043.

CONCLUSIONS OF LAW

The issue before this Court is whether Debtor's student loan owed to ECMC is dischargeable pursuant to §523(a)(8) which provides as follows:

> (a) A discharge under Section 747, 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.[5]

Section 523(a)(8) was enacted to prevent the abuse of the bankruptcy system by indebted students who would file for bankruptcy upon graduation even though they had or were soon to have a career which would ultimately enable them to repay the obligation. See, e.g., Tennessee

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[5] Originally, the Bankruptcy Code did not prohibit the discharge of student loan debts. The Bankruptcy Code was later amended and §523(a)(8) was enacted to allow the discharge of student loans which first became due more than five years prior to the date of the filing of the bankruptcy petition or to allow discharge of student loans when such obligations would result in undue hardship to the debtor. In 1990, the section was partially amended to provide for a discharge of student loans which had become due more than seven years before the date of the filing of the petition. In 1998, Congress once again amended §523(a)(8) "by removing the limitation period altogether, thus permitting discharge only when a person establishes undue hardship." Kapinos v. Graduate Loan Ctr. (In re Kapinos), 243 B.R. 271, 276 (W.D. Va. 2000).

Student Assistance Corp. v. Hornsby (In re Hornsby), 144 F.3d 433, 436-37 (6th Cir. 1998); Green v. Sallie Mae Serv. Corp. (In re Green), 238 B.R. 727, 731 (Bankr. N.D. Ohio 1999) ("The underlying policy basis for excepting student loans from a bankruptcy discharge was the perceived need to rescue the student loan program from insolvency, and to also prevent abuse of the bankruptcy system by students who finance their higher education through the use of government backed loans . . . ."). Notwithstanding the policy concerns underlined in §523(a)(8), Congress provided for an undue hardship exception which allows for a discharge to "some student debtors [who are] in true need of bankruptcy relief." In re Green, 238 B.R. at 733.

Even though §523(a)(8) permits student loan debts to be discharged if the debtor can prove that a repayment of such debt would create "undue hardship," Congress has failed to define those terms and has left such interpretation to the courts' discretion. See In re Hornsby, 144 F.3d at 437 ("Courts universally require more than temporary financial adversity and typically stop short of utter hopelessness."). In the case of Ammirati v. Nellie Mae, Inc. (In re Ammirati), this district, as the majority of other courts, adopted the Brunner standard in determining whether the repayment of student loans would constitute "undue hardship" on the debtor. Ammirati v. Nellie Mae, Inc. (In re Ammirati), 187 B.R. 902, 905-06 (D.S.C. 1995), aff'd 85 F.3d 615 (4th Cir. 1996); see also In re Hornsby, 144 F.3d at 437-38; Kapinos v. Graduate Loan Ctr. (In re Kapinos), 243 B.R. 271 (W.D. Va. 2000); Salinas v. United Student Aid Funds, Inc. (In re Salinas), 240 B.R. 305, 314-15 (Bankr. W.D. Wis. 1999); In re Green, 238 B.R. at 734; Hoyle v. Pennsylvania Higher Educ. Assistance Agency, 199 B.R. 518, 521 (Bankr. E.D. Pa. 1996); Caulder v. Educational Credit Management Corp. (In re Caulder), C/A No. 98-06808-W; Adv. Pro. No. 98-80273-W (Bankr. D.S.C. 04/06/1999).

The Brunner standard used to determine whether a debtor's repayment of student loans

would constitute an undue hardship under §523(a)(8) consists of the following three requirements that need to be proven in order for the debt to be discharged: (1) the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependant, if any, if forced to repay the loan; (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) the debtor has made good faith efforts to repay the loans. While the lender has the initial burden to prove the existence of the student loan and that the debt is owed to, insured, or guaranteed by a governmental agency on nonprofit institution; the debtor has the ultimate burden to prove that barring the debt from discharge would cause undue hardship. See Caulder v. Educational Credit Management Corp. (In re Caulder), C/A No. 98-06808-W; Adv. Pro. No. 98-80273-W (Bankr. D.S.C. 04/06/1999) (quoting In re Raymond, 169 B.R. 67, 69 (Bankr. W.D. Wash. 1994)). In this case, there is no no dispute as to the balance of the student loans that Plaintiff owes to ECMC, a nonprofit institution guarantying Plaintiff's student loans; therefore, the burden rests on Plaintiff to prove the three prongs of the Brunner test.

In determining whether the first requirement under the Brunner test is satisfied, some courts have equated poverty with "minimal" standard of living. See, e.g., In re Griffin, 197 B.R. 144, 147 (Bankr. E.D. Okla. 1996). However, this district, as well as many other jurisdictions, do not require the debtor to live in poverty in order to satisfy the first prong; rather, those courts take into consideration the debtor's current income and expenses in determining whether the debtor and his or her dependents, if any, will be able to sustain a "minimal" standard of living. See Ammirati v. Nellie Mae, Inc. (In re Ammirati), 187 B.R. 902, 907 (D.S.C. 1995), aff'd 85 F.3d 615; see also Salinas v. United Student Aid Funds, Inc. (In re Salinas), 240 B.R. 305, 314 (Bankr. W.D. Wis. 1999) ("The bankruptcy court must determine what amount is minimally

necessary to ensure that the debtor's needs for care, including food, shelter, clothing, and medical treatment are met. . . . Once that determination is made, the question is whether the debtor has any additional funds with which to make payments toward his or her student loan obligations."); Hoyle v. Pennsylvania Higher Educ. Assistance Agency, 199 B.R. 518, 523 (Bankr. E.D. Pa. 1996) ("We do not believe . . . that Congress intended a fresh start under the Bankruptcy Code to mean that families must live at poverty level in order to repay educational loans. Where a family earns a modest income and the family budget, which shows no unnecessary or frivolous expenditures, is still unbalanced, a hardship exists from which a debtor may be discharged of his student loan obligations.").

When considering Plaintiff's monthly income and expenses, the Court concludes that she cannot maintain a minimal standard of living if she were ordered to repay the full amount of her student loans. The evidence presented at trial demonstrated that her present monthly expenses are in the amount of $2,446.48; while her monthly income as of the date of trial was $2,078. However, Plaintiff testified that the monthly income did not include deductions for health insurance and retirement plan which had yet to become effective. In fact, as an employee at Providence Hospital, she is required to wait three months from the date she was hired before she becomes eligible for health insurance coverage. Furthermore, after a year of working as a nurse at Providence Hospital, Plaintiff will be entitled to contribute to a retirement plan; which, considering her age and her lack of any other assets, is a reasonable investment. Plaintiff testified that when both the health insurance and the contribution to the retirement plan will become effective, her monthly income will decrease to $1,560.00.

The Court finds that some of the items budgeted in her monthly expenses are in fact excessive. Plaintiff lives in a home with hardly any equity and her mortgage payments are

$685.00 per month. Her electric bill of $204.00 per month also appears excessive.[6] Furthermore, from the time she moved in, she has had to make several repairs in the home and those expenses averaged out to $100.00 per month. Thus, the $1,029 monthly combined costs for the current mortgage payments, electric bill, water and sewer bill, and home maintenance are excessive, especially when taking into consideration the fact that Plaintiff is single and has no dependants. The Court also finds that monthly contributions totaling $300.00 to charity are unreasonable, given her present financial condition.[7] Thus, while it is possible for Plaintiff to sell her house and live in an apartment for cheaper, her monthly expenses would still exceed her income. When reducing her mortgage, electricity bill, water and sewer bill, and home maintenance bill to $700.00 and excluding the tithing from Plaintiff's budget, her expenses would still be of $1,797.48. When comparing it to her monthly income of $1,560, once the health insurance and contributions to retirement are deducted from her pay, it becomes clear that Plaintiff would not be able to maintain a "minimal" standard of living if she were forced to fully repay her student loans.

The second Brunner factor requires a showing by the debtor that additional circumstances exist which would cause the financial affairs of the debtor to persist during the term of the

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[6] At trial, Plaintiff testified that she called the electric company to inquire about the high bills, but she was told that her bills were not excessive compared to the previous homeowners' bills which were three times as high.

[7] Even though the Court recognizes the Religious Freedom Restoration Act of 1993 and Religious Liberty and Charitable Donations Act of 1998, the Court notes that such acts have amended only certain sections of the Bankruptcy Code, and that no such amendment was reflected in §523(a)(8). Furthermore, in this case, even when subtracting Plaintiff's charitable contributions from her monthly expenses, her monthly budget still exceeds her income; therefore, the Court does not need to address at this time the impact of tithing on the Brunner's requirements.

repayment period, or a significant part of it. "It is this prong of the Brunner test which ensues that the financial hardship the debtor is experiencing is actually undue." Green v. Sallie Mae Servicing Corp. (In re Green), 238 B.R. 727, 734-35 (Bankr. N.D. Ohio 1999). If the circumstances that prevent the debtor from being able to repay the student loans are temporary and it is likely that his or her financial situation will improve; then, excepting the repayment of the loans from discharge would not result in undue hardship. See, e.g., Hoyle v. Pennsylvania Higher Educ. Assistance Agency, 199 B.R. 518, 524 (Bankr. E.D. Pa. 1996) (quoting Elebrashy v. Student Loan Corp., 189 B.R. 922, 927 (Bankr. N.D. Ohio 1995)) ("Requiring the debtor to prove that his inability to pay will endure reflects the judgment that bankruptcy should not provide a means by which 'frustrating and burdensome student loan payments' may be eliminated simply because steady employment is not forthcoming soon after a student completes his or her education.").

In this case, no circumstances have been demonstrated that will persist for the approximate nine years of the repayment term and that will prevent Plaintiff from repaying any portion of the debt. Plaintiff is presently in good health and is employed full time as a nurse. Her income history demonstrates a higher income than she is presently receiving. While employed at Richland Memorial Hospital, Plaintiff was working over eighty hours a weeks and was working night shifts at a pay differential. Even though the Court does not expect Plaintiff to work such extraneous hours to her health's detriment, it recognizes that Plaintiff has the potential of working at night and weekend shifts which would provide for a higher pay. At trial, Plaintiff expressed her willingness to work at such shifts but explained that at the present time she has not been able to find a position that would offer such possibilities. Thus, the Court believes that the evidence presented demonstrates that Debtor has a higher earning potential which should be

considered when determining what portion of student loans should be discharged.

The last prong of the Brunner test requires a determination of whether the debtor has made good faith efforts to repay the obligation due. Courts have considered the following factors when determining whether the debtor has acted in good faith:

> (1) whether the debtor attempts to repay the debt;
> (2) the length of time after the student loan becomes due that the debtor seeks to discharge the debt;
> (3) the percentage of the student loan debt in relation to the debtor's total indebtedness;
> (4) the debtor's attempts to find suitable employment.

Green v. Sallie Mae Serv. Corp (In re Green), 238 B.R. 727, 736 (Bankr. N.D. Ohio 1999) (quoting Cheesman v. Tennessee Student Assistance Corp. (In re Cheesman), 25 F.3d 356, 360 (6th Cir. 1994)). In this case, it is clear that Plaintiff has not willfully caused her own default. She has made good faith efforts to repay the debt; but, due to various circumstances in her life including the divorce from her husband of 27 years and her move to South Carolina, her financial situation has deteriorated beyond her control. The Court notes that Debtor made over twenty payments on her student loan prior to filing bankruptcy, and she has made various efforts to find a job that would provide more income, but has been unable to find one at the present time.

"Where a debtor's circumstances do not constitute undue hardship as to part of the debt but repayment of the entire debt would be an undue hardship, some bankruptcy courts have partially discharged student loans even while finding the student loans nondischargeable." Tennessee Student Assistance Corp v. Hornsby (In re Hornsby), 144 F.3d 433, 440 (6th Cir. 1998); see also Ammirati v. Nellie Mae, Inc. (In re Ammirati), 187 B.R. 902 (D.S.C. 1995), aff'd 85 F.3d 615 (4th Cir. 1996); Salinas v. United Student Aid Funds, Inc. (In re Salinas), 240 B.R. 305 (Bankr. W.D. Wis. 1999) ("[Partial discharge] is only appropriate where the court is unable

to determine whether the debtor's financial distress will continue indefinitely."); Educational Credit Management Corp. v. Jones, 1999 WL 1211797, *2 (E.D. Va. 1999) ("The Congressional scheme is better carried out by permitting partial discharge or some other modification of the student loan debt in certain circumstances. Although complete discharge or nondischarge should remain the rule under §523(a)(8)(B), come variance from the general rule should be permissible where the situation presents an inability to pay which may not continue indefinitely."). The Court finds that the factual circumstances of the case warrant discharge of a portion of the student loan owed to ECMC. When considering Plaintiff's income history and her willingness to work overtime and price differential shifts, the Court believes that Plaintiff's financial circumstance will most likely improve in the future. Furthermore, the Court is inclined to defer any payment on the non-dischargeable portion of the loan until January 2001 to give Plaintiff some time to work out her hardship and try to find a position that will allow her to work the hours and shifts that provide for higher wages, as she is willing to do. Based on these foregoing arguments, the Court concludes that one-half of the student loan should be discharged. It is therefore,

ORDERED that Plaintiff pay one-half of the remaining balance on the student loan plus interest at 6% on the non-dischargeable portion in 99 payments beginning January 1, 2001.

AND IT IS SO ORDERED.

John E. Waites
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
July 3, 2000.

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States Bankruptcy Court for the District of South Carolina hereby certifies that a copy of the document on which this stamp appears was mailed on the date listed below to:

JUL 6 2000

mailed to:
Anderson
UST
Mclarmack
Gorman
Heiser
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DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

KELLEY MORGAN
Deputy Clerk

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: Judith Allyn McCormack, Debtor.	C/A No. 99-10637-W Adv. Pro. No. 99-80401-W
Judith Allyn McCormack, Plaintiff, v. Educational Credit Management Corp., successor in interest to Sallie Mae Defendant.	**JUDGMENT** Chapter 7

Based on the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, Judith Allyn McCormack's student loans are partially discharged and she will have to pay one half of the student loan balance due with interest at 6% in 99 payments beginning January 1, 2001.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
July 3, 2000

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States Bankruptcy Court for the District of South Carolina hereby certifies that a copy of the document on which this stamp appears was mailed on the date listed below to:

JUL 6 2000

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

KELLEY MORGAN

Deputy Clerk

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