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National Collegiate Student Loan Trust 2005-3, 2006-3, 2007-4

**UNITED STATES BANKRUPTCY COURT**
**CENTRAL DISTRICT OF CALIFORNIA**
**LOS ANGELES DIVISION**

| | |
|---|---|
| In re<br><br>Pedro Magdaleno and Rosie Magdaleno<br><br>Debtors, | Case No. 2:12-bk-38467-RK<br>Chapter 7<br>Honorable Robert N. Kwan |
| Pedro Magdaleno and Rosie Magdaleno<br><br>Plaintiffs,<br><br>vs.<br><br>National Collegiate Student Loan Trust 2005-3, A Delaware Statutory Trust(s), et., al,<br><br>Defendants. | Adversary No. 2:14-ap-01387-RK<br><br>**DEFENDANTS' TRIAL BRIEF**<br><br>Trial:<br><br>Date: 10/08/2015<br>Time: 9:00 a.m.<br>Location: 255 E. Temple St., Courtroom 1675<br>Los Angeles, CA 90012 |

Defendants National Collegiate Student Loan Trust 2005-3, 2006-3, 2007-4 hereby submit the following Trial Brief.

## I. STATEMENT OF FACTS

1. The following statement of facts is supported by Defendants' Trial Declaration submitted herewith signed by the custodian of records for Defendants.

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2. Plaintiffs signed a "Note Disclosure Statement" requesting a student loan from Bank of America N.A. in the amount of $31,250.00 to be disbursed on August 1, 2005. Plaintiffs also signed a "Loan Request/Credit Agreement" with Bank of America N.A. on July 21, 2005. A true and accurate copy of the Note Disclosure Statement is attached as **(Exhibit B)**. A true and accurate copy of the Loan Request / Credit Agreement is attached as **(Exhibit C)**. Bank of America N.A. transferred its interest in Plaintiffs' loans to The National Collegiate Student Loan Trust 2005-3. A true and accurate copy of the 2005-3 Pool Supplement evidencing the transfer is attached as **(Exhibit D)**. Plaintiff is currently due for the October 7, 2011 payment. A true and accurate copy of a Loan Payment History Report evidencing financial activity from November 30, 2011 to June 19, 2014 is attached as **(Exhibit E)**. The balance on the account as of June 19, 2014 is $42,866.85. Plaintiff has made no further payment from the June 19, 2014 statement date. See Declaration of Bradley Luke paragraph 2.

3. Plaintiff Pedro Magdaleno signed a "Note Disclosure Statement" requesting a student loan from Bank of America N.A. in the amount of $33,149.17.00 to be disbursed on August 2, 2006. Plaintiff also signed a "Loan Request/Credit Agreement" with Bank of America N.A on or about July 7, 2006. A true and accurate copy of the Note Disclosure Statement is attached as **(Exhibit F)**. A true and accurate copy of the Loan Request / Credit Agreement is attached as **(Exhibit G)**. Bank of America N.A. transferred its interest in Plaintiff's loans to The National Collegiate Student Loan Trust 2006-3. A true and accurate copy of the 2006-3 Pool Supplement evidencing the transfer is attached as **(Exhibit H)**. Plaintiff is currently due for the September 7, 2011 payment. A true and accurate copy of a Loan Payment History Report evidencing financial activity from

October 31, 2011 to June 19, 2014 is attached as (**Exhibit I**). The balance on the account as of June 19, 2014 is $45,295.43. Plaintiff has made no further payments from the June 19, 2014 statement date. See Declaration of Bradley Luke paragraph 3.

4. Plaintiff Pedro Magdaleno signed a "Note Disclosure Statement" requesting a student loan from Bank of America N.A. in the amount of $44,198.90 to be disbursed on June 26, 2007. Plaintiff also signed a "Loan Request/Credit Agreement" with Bank of America N.A on or about June 11, 2007. A true and accurate copy of the Note Disclosure Statement is attached as (**Exhibit J**). A true and accurate copy of the Loan Request / Credit Agreement is attached as (**Exhibit K**). Bank of America N.A. transferred its interest in Plaintiff's loans to a Purchaser Trust. A true and accurate copy of the transfer agreement to a Purchaser Trust is attached hereto as (**Exhibit L**). The Purchaser Trust was National Collegiate Student Loan Trust 2007-4. A true and accurate copy of the Deposit and Sale Agreement The National Collegiate Student Loan Trust 2007-4 evidencing the transfer is attached as (**Exhibit M**). Plaintiff is currently due for the October 7, 2011 payment. A true and accurate copy of a Loan Payment History Report evidencing financial activity from November 30, 2011 to June 19, 2014 is attached as (**Exhibit N**). The balance on the account as of June 19, 2014 is $56,584.42. Plaintiff has made no further payments from the June 19, 2014 statement date. See Declaration of Bradley Luke paragraph 4.

## II. ARGUMENT

Plaintiffs submit several theories in support of their claim that the student loans are not within the exception to discharge codified at 11 U.S.C. § 523(a)(8)(A) or (B). First, Plaintiffs argue that Defendants cannot produce assignments to show that Defendants are the proper party to defend this adversary proceeding. Second, Plaintiffs argue that the loans are not "qualified educational loans" under 11 U.S.C. § 523(a)(8)(B). Alternatively, Plaintiffs second theory is that said loans were not made under any program funded in whole or in part by a governmental

1 unit or non-profit institution pursuant to 11 U.S.C. § 523(a)(8)(A)(i). Third, Plaintiffs argue
2 that repaying the student loans would impose an undue hardship.

3 Section 523(a)(8) provides that a discharge under §§ 727, 1141, 1228(a), 1228(b) or
4 1328(b) of this title does not discharge an individual debtor from any debt ...

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6 > (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the
7 > debtor's dependents, for –
8 >
> (A)(i) an educational benefit overpayment or loan made,
9 > insured or guaranteed by a governmental unit or made under any program funded in whole or in part by a governmental unit or
10 > nonprofit institution; **or**
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> (ii) an obligation to repay funds received as an
12 > educational benefit, scholarship, or stipend; **or**
13 >
> (B) any other educational loan that is a qualified
14 > educational loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an
15 > individual...

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17 *See* 11 U.S.C. § 523(a)(8) (emphasis added). Courts have recognized that "[s]ection 523(a)(8)
18 protects four categories of educational loans from discharge: (1) loans made, insured or
19 guaranteed by a governmental unit; (2) loans made under any program partially or fully
20 funded by a government unit or nonprofit institution; (3) loans received as an education
21 benefit, scholarship, or stipend; and (4) any 'qualified educational loan' as that term is defined
22 in the Internal Revenue Code." *See Liberty Bay Credit Union,* 2012 WL 4620987 at *13-14
23 citing *Rumer v. Am. Educ. Servs. (In re Rumer),* 469 B.R. 553, 561 (Bankr. M.D. Pa. 2012). In
24 this case, the Court must determine whether Plaintiffs' student loans were made under a
25 program funded by a nonprofit institution for purposes of § 523(a)(8)(A)(i), or whether the
26 debtor incurred an obligation to repay funds received as an educational benefit for purposes of
27 § 523(a)(8)(A)(ii). If said loans do not fall into one of the aforesaid categories under §
28 523(a)(8)(A), then this Court must determine whether Plaintiffs' student loans are qualified
education loans for the purposes of § 523(a)(8)(B).

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## A. PLAINTIFFS' STUDENT LOANS ARE NONDISCHARGEABLE PURSUANT TO 11 U.S.C. § 523(a)(8)(A).

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### 1. Plaintiffs' loans were funded by TERI and therefore nondischargeable under 11 U.S.C. § 523(a)(8)(A)(i).

5 Federal courts have interpreted the plain language of § 523(a)(8) to mean that an
6 individual's loan need not be funded by a non-profit institution, but rather that the program
7 must be funded by a non-profit institution. *See In re Pilcher*, 149 B.R. 595, 598 (BAP. 9th Cir.
8 1993). Federal Courts have differed somewhat as to what involvement by a non-profit
9 constitutes funding of a program. *Id.* (interpreting section 523(a)(8) to except from discharge
10 "all loans made under a program in which a non-profit institution plays any meaningful part in
11 providing funds")(quotation omitted); *In re O'Brien*, 419 F.3d 104, 107 (2d Cir. 2005)(holding
12 that "section 523(a)(8) includes within its meaning loans made pursuant to loan programs that
13 are guaranteed by non-profit institutions"); *Decker v. EduCap, Inc.*, 476 Br. R. 463, 468
14 (W.D.Pa. 2012)(finding that the non-profit defendant "by acting as a disbursement agent,
15 servicer and guarantor for education loans funded the program under which Plaintiff's loan
16 was issued," even though a for profit bank provided all funding of the loan itself); *In re Sears*,
17 393 B.R. 678, 680- 81 (Bankr. W.D. Mo. 2008) (placing emphasis "on the non-profit
18 institution's degree of involvement in the administrative functions of the program under which
19 a loan is funded"); *In re Drumm*, 329 B.R. 23, 35 (Bankr. W.D.Pa. 2005)(stating that a non-
20 profit guarantee was enough and that "[a] meaningful financial contribution or a meaningful
21 financial risk is not required"). Federal Courts have arrived at this interpretation based on the
22 historical purpose of the student loan discharge exception. *See In re Segal*, 57 F.3d 342, 348
23 (3d Cir. 1995) ("[T]he legislative history of section 523(a)(8) teaches that the exclusion of
24 educational loans from discharge provisions was designed to remedy abuses of the educational
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loan system by restricting the ability of a student to discharge an educational loan by filing for bankruptcy shortly after graduation, and to safeguard the financial integrity of the educational loan programs").

Here, there is no dispute that the student loans that Plaintiffs signed were made under a program funded in whole or in part by The Education Resource Institute Inc. ("TERI"), a non-profit institution. "Specifically, I understand that you have purchased a guaranty of this loan, and that this loan is guaranteed by The Education Resource Institute, Inc. ("TERI"), a non-profit institution." *See* "JOINT PRETRIAL CONFERENCE ORDER" [Doc. 19] Stip. Facts 15. See also Stip. Facts 8, 9, 10, 11, 12, 13, 14 regarding Plaintiffs' stipulations regarding other provisions of the student loans. Plaintiffs attempt to argue that since TERI did not honor its guarantee that the student loans should lose its non-dischargeable status. Plaintiffs offer no support as to this assertion. 11 U.S.C. § 523(a)(8) in pertinent part provides: "[a] … loan made under any program funded in whole or in part by a … non-profit institution." The plain statutory language discusses when the loan is made, not whether the non-profit institution honors the guarantee years later. For these reasons, Plaintiffs' arguments are not valid.

**2. Plaintiffs' student loans were received as an educational benefit, thus, Plaintiffs are obligated to repay them pursuant to 11 U.S.C. § 523(a)(8)(A)(ii).**

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") separated § 523(a)(8) into two independent clauses, i.e., (A)(i) and (A)(ii) and added subsection (B). BAPCPA's separation between the phrase "obligation to repay funds received as an educational benefit" from the phrases "loan made, insured or guaranteed by a governmental unit" and "program funded in whole or in part by a nonprofit institution" in § 523(a)(8)(A)(i), must be read as encompassing a broader range of educational benefit obligations, such as

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those in the instant case. *See In re Belforte*, 2012 WL 4620987 at *19 *citing Sensient Techs. Corp. v. Baiocchi (In re Baiocchi)*, 389 B.R. 828, 831-32 (Bankr. E.D. Wis. 2008). The relevant inquiry into the applicability of §523(a)(8)(ii) is the purpose of the loan, not the beneficiary of the education. *In re Belforte*, 2012 WL 4620987 *24 *citing In re Pelkowski*, 900 F.2d 737, 747 (3d Cir. 1993)(*quoting The Educ. Resources Inst., Inc. v. Varma (In re Varma)*, 149 B.R. 817, 818 (Bankr. N.D.Tex. 1992)). An additional purpose does not remove a loan from the educational benefit category so long as there is an educational purpose. *Id. at *25 citing Baiocchi*, 389 B.R. at 831-32.

Sections 523(a)(8)(A)(i) and (ii) both apply to "educational benefit" loans, a term that is not defined in the Bankruptcy Code, so courts have turned to legislative history of § 523(a)(8) for guidance. "Educational loans are different from most loans. They are made without business considerations, without security...and relying for repayment solely on the debtor's future increased income resulting from the education." *See In re Belforte*, 2012 WL 4620987 at *17; *see also Tift County Hosp. Auth. V. Nies (In re Nies)*, 334 B.R. 495 (Bankr. D. Mass. 2005) *citing* H.R. Rep. No. 595, 95th Cong., 2d Sess. 133, reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 6094. Although the breadth of the term "educational benefit" has been the subject of some debate, a majority of courts determine whether a loan qualifies as an "educational benefit" by focusing on the stated purpose for the loan when it was obtained, rather than on how the loan proceeds were actually used. *See Busson-Sokolik v. Milwaukee School of Eng'g (In re Sokolik)*, 635 F.3d 261, 266 (7th Cir. 2011) ("[W]e hold that it is the purpose of a loan which determines whether it is 'educational.'"), *cert. denied*, 131 S. Ct. 3039, 180 L. Ed. 2d 848 (2011); *Murphy v. Penn. Higher Educ. Assistance Agency (In re Murphy)*, 282 F.3d 868, 870 (5th Cir. 2002) (citing cases and concluding that "it is the

purpose, not the use, of the loan that controls" the dischargeability determination under § 523(a)(8)); *Tift County Hospital Authority v. Nies (In re Nies)*, 334 B.R. 495, 501 (Bankr. D. Mass. 2005) (explaining that a "majority of courts has adopted a test that determines the educational nature of the loan by focusing on the substance of the transaction which resulted in the obligation" but holding that a loan made under a physician recruitment program was not for educational purposes) (citations omitted); *contra In re Ealy,* 78 B.R. 897, 898 (Bankr. C.D. Ill. 1987) (holding, under a prior version of § 523(a)(8), that the "test for determining whether a loan is a student loan is whether the proceeds of the loan were used for 'educational purposes'"). Focusing the analysis on the purpose of the loan, rather than the use of the proceeds, also avoids potential inequities that could result from application of a "use" test. *See In re Sokolik*, 635 F.3d at 266.

Various bankruptcy courts have found loans processed for something other than a qualified education loan are dischargeable if they provided the debtor with an educational benefit. For example, a loan for a plumbing apprenticeship is nondischargeable under §523(a)(8)(A)(ii) because it provided an educational benefit. *In re Rosen*, 179 B.R. 935, 939 (Bankr. D. Or. 1995). In *In re Rosen*, the Bankruptcy Court for the District of Oregon explained that §523(a)(8) "is not limited to obligations pertaining to education received at institutions of higher or post-secondary education." *Id.* at 938. The court reasoned that "the apprenticeship training program at issue in this case is an educational program." *Id.* It substantiated its position by explaining that the program "offered apprentices the opportunity to expand their knowledge of matters pertaining to the plumbing profession, enhance their professional capabilities, obtain the qualifications and experience necessary for a professional license, and obtain college credits." *Id.*

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Similarly, a loan for a sheet metal worker's apprenticeship is nondischargeable under §523(a)(8)(A)(ii) because it provided an educational benefit. *In re Dressel*, 212 B.R. 611, 615 (Bankr. E.D. Mo. 1997). In *In re Dressel*, the Bankruptcy Court for the Eastern District of Missouri agreed with the reasoning of the Bankruptcy Court for the District of Oregon in *In re Rosen* in that a loan for an apprenticeship is a nondischargeable education loan under §523(a)(8(A)(ii) because it provides an educational benefit. *Id.* The court explained that, "through his participation in the Apprenticeship Program, Dressel learned the skills necessary to a sheet metal worker." *Id.*

Likewise, a loan for private tutoring is nondischargeable under §523(a)(8)(A)(ii) because it provided an educational benefit. *In re Roy*, 2010 Bankr. LEXIS 1218 (Bankr. D.N.J. Apr. 8, 2010). In *In re Roy*, the Bankruptcy Court for the District of New Jersey stated that, for a loan to be considered a nondischargeable education loan under §523(a)(8)(A)(ii), "it is enough that the debt at issue be an obligation to repay funds received as an educational benefit." *Id.* at 2. It is irrelevant whether the educational institution is "government supported, a school, or a for-profit institution." *Id.* The court explained there is "no requirement under §523(a)(8)(A)(ii) that the student have been enrolled full time or be seeking a degree." *Id.* at 2-3.

Analogously, a loan for a private day school is nondischargeable under §523(a)(8)(A)(ii) because it provided an educational benefit. *In re Goldstein,* 2012 Bankr. LEXIS 6034 (Bankr. N.D. Ga. Nov. 26, 2012). In *In re Goldstein,* the Bankruptcy Court for the Northern District of Georgia agreed with the reasoning from the Bankruptcy Court for the District of New Jersey *In re Roy* in that "it is enough that the debt at issue be an obligation to repay funds received as an educational benefit." *Id.* at 10 (quoting *In re Roy*, 2010 Bankr. LEXIS 1218 (Bankr. D.N.J. Apr.

8, 2010)). The court explained that §523(a)(8)(A) "exempts from discharge all educational loans, not just loans for higher education." *Id.* at 8.

In the case at bar, it is undisputed that the purpose of the student loans that Plaintiffs signed and which are due and owing to the Defendants were for an educational benefit. *See* JOINT PRETRIAL CONFERENCE ORDER Stip. 7 (Pedro was accepted to Ryokan College for a two-year Master of Arts Program in Counseling Psychology starting July of 2005), Stip 9, 10, and 11 (Pedro applied and qualified for three separate loans). In fact, the loan documents clearly indicate that the funds to be disbursed are to be used for educational expenses and that the loan is subject to section 523(a)(8) of the United States Bankruptcy Code. *See* Stip. 15. None of the arguments raised by the Plaintiff are sufficient to overcome the plain language of the loan application documents, which specifically and repeatedly reference the educational nature of the loans.

**B. PLAINTIFFS' CANNOT PROVE UNDUE HARDSHIP. THUS, PLAINTIFFS' STUDENT LOANS ARE NONDISCHARGEABLE PURSUANT TO 11 U.S.C. § 523(a)(8).**

Plaintiffs claim they qualify for the undue hardship discharge of the Loan under the *Brunner Test*, which has been adopted by the 9th Circuit Court of Appeals. However, Plaintiffs do not qualify for the undue hardship discharge of the Loan because they failed to establish all prongs of the *Brunner* Test. It is irrelevant whether Plaintiff has established one prong without satisfying all three because failure of one of the prongs precludes Plaintiff from the undue hardship discharge of the Loan.

The Ninth Circuit adopted the three-part *Brunner* Test to determine whether an education loan is dischargeable under §523(a)(8) for causing a debtor an undue hardship. *In re Pena*, 155 F.3d 1108, 1112 (9th Cir. 1998). The first prong of the *Brunner* Test requires a

debtor to prove "that she cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans." Id. at 1111 (quoting *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. N.Y. 1987)). The second prong of the *Brunner* Test requires the debtor to show "that 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." Id. (quoting *Brunner* at 396). The third prong of the *Brunner* Test requires the debtor to prove that she "has made good faith efforts to repay the loans…" *Id.* A debtor must prove all three prongs of the *Brunner Test* to establish that her education loans cause an undue hardship. *Id.*

The first prong of the *Brunner* Test requires a debtor to prove "that she cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans." *Id.* "The debtor's bare necessities essential to life are to be compared to her actual expenses to determine if she has minimized her expenses as required for the *Brunner* test." *In re: Hart*, 438 B.R. 406, 410 (E.D.M.I. 2010). In *Hart*, the court upheld the bankruptcy court's finding that $115 for telephone service (including $65.00 on telephone and $50 on cell phone), $65.00 on cable/internet and $75.00 on recreation are not "essential expenses." *Id.* The Sixth Circuit has also rejected these same "non essential" expenses. Id. citing to *Miller v. Pa. Higher Educ. Assistance Agency*, 377 F. 3d 616, 623-24 (6th Cir. 2004). In the case at bar, Plaintiffs list substantial expenses in their budget that could be used to pay a portion of their student loans. For example, Plaintiffs state that they expend $350.00 per month for internet and $285.00 per month for telephone. See Plaintiffs declaration paragraph 44. In addition, Plaintiffs claim medical copays of $675.00 per month, medicine of $650.00 per month without further evidentiary support. Plaintiffs have not shown by a

1 preponderance of the evidence that they meet the minimal standard of living of the *Brunner*
2 Test.
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4 In regard to the second prong of the *Brunner* Test, Plaintiffs rely upon the age of both
5 Pedro, 62 years of age (Stip. 5), and Rosie, 65 years of age (Stip. 6) in determining that the
6 student loans should be non-dischargeable. The Fourth Circuit in *In re: Spence*, 541 F.3d 538
7 (2008) determined that age should not be a factor alone. The Fourth Circuit held: "We
8 conclude that Ms. Spence has not met this exacting standard. She is now in her late 60s and has
9 a low-paying job, but she is by all accounts a reliable, diligent worker with a master's degree
10 along with completed Ph.D. course work. Her grades were excellent, and her education is not so
11 outdated that higher-paying alternatives would be unreachable. Ms. Spence suffers from
12 diabetes and high blood pressure, but neither these ailments nor any other age-related health
13 problems affect her ability to work full-time." *Id.* at 544. Similarly, in the case *In re:*
14 *Dimoyannis*, 2010 Bankr. LEXIS 1480, (Bankr. N.D.Cal. 2010), the court held: "Although
15 Dimoyannis is certainly living modestly, he does appear to be capable of living, on a month by
16 month basis, on the income he earns through working and via social security benefits."
17 Plaintiffs do not allege that Rosie Magdaleno has any issues and clearly fails to provide
18 "additional circumstances exist indicating that this state of affairs is likely to persist for a
19 significant portion of the repayment period of the student loans" pursuant to the second prong of
20 the *Brunner* Test. Plaintiffs appear to solely rely upon Rosie's age in asking this court to
21 discharge the student loans as to her obligations.
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23 Plaintiffs allege that Pedro Magdaleno does have a disability that is likely to persist for a
24 significant portion of the repayment period. However, all doctor reports that have been
25 submitted to Defendants through discovery show that Pedro Magdaleno has Parkinson's disease
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that is "mild in severity". There is no indication from doctor reports produced by Plaintiff that Pedro Magdaleno is unable to work. This information will be provided to the court to rebut Plainitffs' testimony.

The third prong of the Brunner Test requires that the Plaintiffs show that they made a good faith effort to repay the student loans. "In evaluating good faith, the court considers a number of factors regarding the Plaintiff's efforts to repay student loans. *In re: Benjumen* 408 B.R. 9, 25 (Bankr. E.D.N.Y 2009). These include the Plaintiff's actions to maximize his income and minimize his expenses, *Pobiner v. Educ. Credit Mgmt. Corp. (In re Pobiner*), 309 B.R. 405, 420 (Bankr. E.D.N.Y. 2004) (citing *Elmore, 230 B.R. at 27*), his loan repayment history, *French v. NCO Fin. Sys. (In re French)*, 2006 Bankr. Lexis 2221, (Bankr. S.D.N.Y. 2006), and whether he has negotiated or enrolled in an alternative repayment plan. *Allen v. Am. Educ. Servs. (In re Allen)*, 324 B.R. 278, 281-282 (Bankr. W.D. Pa. 2005).

In the case at bar, Pedro's gross monthly income for the past five years (See Plaintiffs' Decls: 35) was:

2010- $5,016
2011- $5,066
2012- $5,117
2013- $5,168
2014- $5,220

Rosie's gross monthly income for the past five years (See Plaintiffs' Decls: 36) was:

2010- $3,327
2011- $3,452
2012- $3,428
2013- $3,585
2014- $4,192

Plaintiffs had substantial income. Plaintiffs' last payment on their student loans occurred on November 2, 2010 in the amount of $25.00 on each loan. See Luke Declaration

Exhibits E, I, and N. Plaintiffs failed to make any payments on the loans for almost five years even though their gross income was over $8,300 per month. This court should find that Plaintiffs failed to meet the third prong of the Brunner test by not making any payments for almost five years.

Although the purpose of the Bankruptcy Code is to guarantee honest debtors a "fresh start" through the bankruptcy discharge, *Liberty Bay Credit Union v. Belforte*, 2012 Bankr. LEXIS 4574, 2012 WL 4620987 *13 (Bankr. Mass. 2012) *citing Grogan v. Garner*, 498 U.S. 279, 286-87, 111 S. Ct. 112 L. Ed. 2d 755 (1991), Congress legislated under §523(a)(8) that certain educational loans are excepted from discharge unless the debtor can establish "undue hardship". *See Liberty Bay Credit Union. Supra*; 11 U.S.C. § 523(a)(8). A debtor's burden of proof is considerable in a dischargeability action under § 523(a)(8). *In re Arroyo*, 470 B.R. 27. The First Circuit has stated that by requiring a showing of "undue hardship," Congress decided that "the interest in ensuring the continued viability of the student loan program takes precedence" over the general purpose of the Bankruptcy Code to give debtors a fresh start. *Id. citing Nash v. Conn. Student Loan Foundation (In re Nash)*, 446 F.3d 188, 191 (1st Cir.2006). Undue hardship is generally found only in "truly exceptional circumstances, such as illness or the existence of an unusually large number of dependents." *Id. citing Nash* at 797; *Sanborn*, 431 B.R. at 6.

1 Here, Plaintiffs do not meet the substantial burden of the Brunner test and the Plaintiffs'
2 student loan debt should not be discharged.
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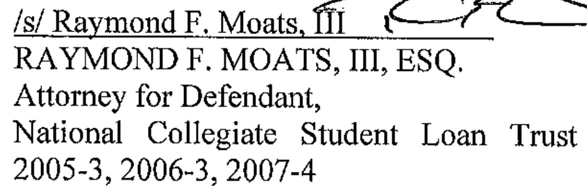
4 Weltman, Weinberg & Reis Co., L.P.A.



5 Dated: September 15, 2015 /s/ Raymond F. Moats, III

6 RAYMOND F. MOATS, III, ESQ.
Attorney for Defendant,
7 National Collegiate Student Loan Trust
2005-3, 2006-3, 2007-4

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# PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

2155 Butterfield Dr., Suite 200-S, Troy, MI 48084

A true and correct copy of the foregoing document entitled (*specify*): Trial Brief____________________________________

will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

**1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) 09/15/15, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Glenn Ward Calsada, Attorney for Plaintiffs, (glenn@calsadalaw.com)
Howard M Ehrenberg (TR), Trustee, (ehrenbergtrustee@sulmeyerlaw.com, ca25@ecfcbis.com;C123@ecfcbis.com; hehrenberg@ecf.inforuptcy.com
United States Trustee (LA), ustpregion16.la.ecf@usdoj.gov

☐ Service information continued on attached page

**2. SERVED BY UNITED STATES MAIL**:
On (*date*) 09/15/15, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

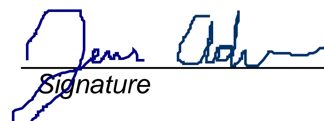
Pedro Magdaleno and Rosie Magdaleno, Plaintiffs, 5027 Meridian Street , Los Angeles, CA 90042

☐ Service information continued on attached page

**3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL** (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) _______________, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

| 09/15/2015 | Jennie Adragna |  |
|---|---|---|
| *Date* | *Printed Name* | *Signature* |