FILED
United States Court of Appeal
Tenth Circuit

April 23, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: GORDON NITKA,

Debtor.

GORDON BEECHER NITKA,

Plaintiff - Appellant,

v.

DEPARTMENT OF EDUCATION,

Defendant - Appellee.

No. 20-1270
(BAP No. CO 20-002)

ORDER AND JUDGMENT*

Before **MORITZ**, **BALDOCK**, and **EID**, Circuit Judges.

Gordon Nitka initiated an adversarial proceeding in bankruptcy court against the Department of Education ("DOE"), seeking discharge of approximately $200,000 in law school student loans based on "undue hardship" under 11 U.S.C. § 523(a)(8).

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

The bankruptcy court granted summary judgment to DOE, and the Bankruptcy Appellate Panel ("BAP") affirmed. Nitka appeals pro se from the BAP's decision.[1] Exercising jurisdiction under 28 U.S.C. § 158(d)(1), we affirm.

BACKGROUND

Nitka graduated from Colorado College in 2005 with degrees in English and Biology. During college, he worked as a host for the school's administration, a physiology and anatomy tutor, a surgical paraprofessional, and a bartender and server at a resort. After graduating, he continued working at the resort before taking a position as the co-director of a hospitality center at the 2006 Winter Olympics in Italy. Upon returning to Colorado, he resumed his jobs at the resort and also began working in nightclubs, first as security and later as a manager.

In 2010, Nitka enrolled at Phoenix School of Law, later renamed the Arizona Summit Law School. He financed his education with student loans, executing two master promissory notes. While in school, he held several paid positions, including in the legal field and as a fitness coach. After graduating, he worked as a contract employee at a law firm, earning $25 per hour as a law clerk and rising to the rank of

[1] "[W]e generally construe pro se pleadings liberally" but have not "extend[ed] the same courtesy to . . . licensed attorney[s]." *Comm. on the Conduct of Att'ys v. Oliver*, 510 F.3d 1219, 1223 (10th Cir. 2007) (internal quotation marks omitted). The parties dispute whether, and to what extent, we should liberally construe Nitka's filings, considering he is a law school graduate but not a licensed attorney. Because it does not affect the outcome of the case, we liberally construe Nitka's filings. But he still must "follow the same rules of procedure that govern other litigants," and we "cannot take on the responsibility of serving as [his] attorney in constructing arguments and searching the record." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (internal quotation marks omitted).

firm director. He took the Arizona bar exam twice but did not pass. To supplement his income, Nitka (1) continued fitness coaching until November 2015, earning up to $90 per hour; (2) served as an advisor to a start-up fitness company, earning equity compensation; and (3) worked twenty to thirty hours per week selling commission-based insurance for MassMutual from August 2014 to January 2018.

In May 2018, the law firm terminated Nitka's employment. He has since been unemployed, with the exception of earning approximately $3,000 over the course of a couple months as a roofing salesman. He unsuccessfully applied for several jobs and testified in May 2019 that he had ceased submitting applications, instead focusing his time on (1) building a mobile phone application for the restaurant industry, and (2) converting a bus into a vacation rental that he will park near ski resorts. He lives rent-free with his mother and has about $32,000 in retirement accounts. When he has income, he spends about $200 per month on food and $60 on a cell phone plan.

As of November 2019, Nitka's student loan debt was $209,716.48. He made no payments on the loans in 2013 and obtained a deferral for most of 2014. In June 2015, he began participating in an income-driven repayment program that reduced his monthly obligation. Still, he did not make any payments in 2015, despite earning $61,901, with an adjusted gross income of $39,156 and taxable income of $28,856. In 2016, he made six payments of $21.82, totaling $130.92, although his gross income was $83,000, with taxed Social Security earnings of $54,643. He earned $31,180 in 2017 and made five payments of $21.82, totaling $109.10. He made no payments in 2018, when he earned $8,381, with an adjusted gross income of $8,010.

Nitka has paid a total of only $240.02, but DOE has asserted he remains eligible for an income-based program, under which his balance would be forgiven after 25 years.

In July 2018, Nitka, then 36 years old, filed a petition under Chapter 7 of the Bankruptcy Code and an adversary proceeding to have his loans discharged. After several discovery disputes, DOE moved for summary judgment. Nitka opposed the motion and moved for sanctions, claiming DOE made factual misrepresentations. The bankruptcy court denied Nitka's motion for sanctions and granted DOE's motion for summary judgment. The BAP affirmed, and Nitka appealed to this court.

DISCUSSION

"In our review of BAP decisions, we independently review the bankruptcy court decision," *In re Albrecht*, 233 F.3d 1258, 1260 (10th Cir. 2000), assessing legal conclusions de novo and factual findings for clear error, *see Borgman v. Dunckley (In re Borgman)*, 698 F.3d 1255, 1259 & n.5 (10th Cir. 2012). Nitka raises several challenges to the bankruptcy court's judgment. None are persuasive.

I. Procedural Rulings Prior to DOE Moving for Summary Judgment

First, Nitka contends the bankruptcy court erred in granting DOE's motion under Fed. R. Civ. P. 37 to prohibit him from using exhibits or witnesses, other than himself, at trial due to his failure to fully and timely comply with the scheduling order's requirements for serving trial exhibits. As the BAP observed, the bankruptcy court considered Nitka's exhibits in ruling on DOE's motion for summary judgment. Because we conclude that the court properly granted summary judgment to DOE, the issue of what evidence would be admitted at trial is moot.

Nitka also contends the bankruptcy court erred in forcing him to choose between foregoing reliance on his medical conditions in support of his hardship claim or submitting to reopened discovery. Specifically, as a result of Nitka's shifting positions throughout the proceedings regarding his medical conditions and their relation to his hardship claim, DOE moved to prohibit him under Fed. R. Civ. P. 37 from offering evidence of medical conditions or, alternatively, to reopen discovery to seek information related to such conditions. The bankruptcy court found that Nitka had abused the discovery process and gave him the option of foregoing reliance on medical conditions or submitting to further discovery. Based on Nitka's commitment not to "rais[e] any medical issues in support of [his] case," R., vol. 2 at 823, the court denied the motion to reopen discovery and granted the motion to prohibit evidence of medical conditions. Although Nitka now contends the court abused its discretion, he made his choice and cannot complain of any invited error.[2] *See John Zink Co. v. Zink*, 241 F.3d 1256, 1259 (10th Cir. 2001) ("The invited error doctrine prevents a party from inducing action by a court and later seeking reversal on the ground that the requested action was error." (internal quotation marks omitted)).

II. Contents of DOE's Motion for Summary Judgment

Next, Nitka contends that DOE made false statements of fact and that the bankruptcy court erred in not granting his motion for sanctions. Because he moved

[2] Nitka states, without argument or authority, that he was subjected to a "forced waiver." Aplt. Opening Br. at 62. We will not consider such a perfunctory contention. *See United States v. Wooten*, 377 F.3d 1134, 1145 (10th Cir. 2004).

for sanctions under Fed. R. Civ. P. 11, the court applied "Fed. R. Bankr. R. 9011, which is derived from Fed. R. Civ. P. 11." *Masunaga v. Stoltenberg (In re Rex Montis Silver Co.)*, 87 F.3d 435, 438 (10th Cir. 1996). The bankruptcy court denied the motion because Nitka failed to follow the "safe harbor" provision, which requires that the non-movant be given notice and an opportunity to cure the allegedly offending conduct. Fed. R. Bank. P. 9011(c)(1)(A); *cf.* Fed. R. Civ. P. 11(c)(2). Nitka does not claim he complied with the "safe harbor" provision but, instead, argues it does not apply because he filed his motion under Fed. R. Civ. P. 56(c)(2). However, he based his motion only on Fed. R. Civ. P. 11(c)(2), with no mention of Fed. R. Civ. P. 56(c)(2). *See* R., vol. 2 at 861. In any event, Fed. R. Civ. P. 56(c)(2), which allows a party to object to a summary judgment motion, does not address sanctions. Accordingly, we find no abuse of discretion by the bankruptcy court.[3]

Nitka also contends the bankruptcy court abused its discretion by not striking the declaration of DOE loan analyst Christopher Bolander. He argues that DOE offered Bolander as an expert under Fed. R. Evid. 702 and that because DOE previously disclosed an expert, Bolander's declaration violated the scheduling order, which limited each side to one expert. Nitka also argues the court should have struck the declaration because DOE did not disclose Bolander as an expert under Fed. R. Civ. P. 26(a)(2)(A). However, "Bolander based his declaration on his

[3] We decline to consider Nitka's conclusory assertion, unsupported by argument or authority, that the court erred in not imposing sanctions sua sponte. *See Wooten*, 377 F.3d at 1145.

position at [DOE] and his review of [Nitka's] loan information and payment history," and he "described facts as they pertain to [Nitka's] student loan[s], including the promissory loans, the outstanding balance, the payment history and switch to alternative repayment plans, and details regarding [DOE's] options for repayment." R., vol. 1 at 28. Our precedent suggests this testimony—if opinion testimony at all[4]—was lay testimony under Fed. R. Evid. 701, not expert testimony under Fed. R. Evid. 702, *see Ryan Dev. Co., L.C. v. Ind. Lumbermens Mut. Ins. Co.*, 711 F.3d 1165, 1170-71 (10th Cir. 2013) (noting "[a] lay witness accountant may testify [under Fed. R. Evid. 701] on the basis of facts or data perceived in his role as an accountant based on his personal knowledge of the company" (internal quotation marks omitted)). Therefore, the bankruptcy court did not abuse its discretion in refusing to strike the declaration.

Finally, Nitka objected to DOE's motion for summary judgment on the grounds that it relied on portions of his deposition transcript and that he lacked the funds to obtain his own complete copy. In particular, he moved the court to deny or delay ruling on the summary judgment motion because he could not "present facts essential to justify its opposition" without a copy of the transcript. Fed. R. Civ. P. 56(d)(1). He insists he needed a copy because "DOE used select, out-of-context excerpts." Aplt. Opening Br. at 64. The court denied his request as (1) procedurally

[4] *See United States v. Kearn*, 863 F.3d 1299, 1307 n.3 (10th Cir. 2017) (stating testimony providing "facts, not opinions," is not subject to Fed. R. Evid. 701 or 702).

defective, because it was not supported by an "affidavit or declaration," Fed. R. Civ. P. 56(d); and (2) without merit, because Nitka knew or should know what was said at his own deposition. He contests the procedural ruling but not the merits ruling, and thus, his challenge to the denial of his Fed. R. Civ. P. 56(d)(1) motion fails. *See Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 877 (10th Cir. 2004) (affirming summary judgment where appellant failed to appeal alternative basis for ruling).

Nitka also contends DOE was required to produce the entire transcript based on Fed. R. Evid. 106, which provides "[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time." But this rule "does not necessarily require admission of an entire statement, writing or recording" but "only those portions which are relevant to an issue in the case and necessary to clarify or explain the portion already received." *United States v. Lopez-Medina*, 596 F.3d 716, 735 (10th Cir. 2010) (brackets and internal quotation marks omitted). Nitka has not identified which additional portions of his deposition transcript needed to be admitted, nor has he argued how he was prejudiced, and it is not our role to make the arguments for him. *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005).

Last, Nitka contends the "transcript was not admissible as evidence because DOE failed to follow Fed. R. Civ. P. 5(d)(1) which requires a deposition transcript to

be filed with the court if it is used in the proceeding." Aplt. Opening Br. at 66-67 (internal quotation marks omitted). He therefore argues the bankruptcy court erred in overruling his objection "that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). But plainly, the material cited by DOE could be presented in a form that would be admissible in evidence—Nitka's own testimony. In any event Fed. R. Civ. P. 5(d)(1) is a rule of procedure, not evidence, and provides that deposition transcripts "must *not* be filed until they are used in the proceeding or the court orders filing," Fed. R. Civ. P. 5(d)(1)(A) (emphasis added). The rule does not *require* an entire transcript be filed if a portion is used, and the local rules specify that only "relevant excerpt[s]" should be attached to a summary judgment motion, D. Colo. L. Bankr. R. 7056-1(c). Nitka thus has not shown the court erred in its rulings regarding the transcript.[5]

III. Order Granting Summary Judgment

In his final argument, Nitka contends the bankruptcy court erred in granting summary judgment to DOE. We review this issue de novo and must "affirm if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Lee v. McCardle (In re Peeples)*, 880 F.3d 1207, 1212 (10th Cir. 2018) (citation and internal quotation marks omitted). "A dispute is genuine" if the

[5] Nitka also states, without argument or authority, that he was entitled to copies of the transcript under Fed. R. Civ. P. 30(f) and 26(a) and that the transcript should have been struck under Fed. R. Civ. P. 12(f). We decline to consider such conclusory assertions. *See Wooten*, 377 F.3d at 1145.

evidence could reasonably result in a ruling for non-movant, and a fact is material if "it might affect the outcome." *Bird v. W. Valley City*, 832 F.3d 1188, 1199 (10th Cir. 2016) (internal quotation marks omitted). The non-movant, however, may not rely on "[u]nsubstantiated allegations." *Bones*, 366 F.3d at 875.[6]

To establish undue hardship for discharging student loans under 11 U.S.C. § 523(a)(8), a debtor must satisfy three factors:

> (1) that the debtor cannot maintain, based on current income and expenses, a minimal standard of living for herself and her dependents if forced to repay the loans;
>
> (2) 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; and
>
> (3) that the debtor has made good faith efforts to repay the loans.

Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1307, 1309 (10th Cir. 2004) (internal quotation marks omitted). The test must be applied to allow discharge for "debtors who truly cannot afford to repay their loans." *Id.* at 1309.

The bankruptcy court concluded Nitka made a sufficient showing on the first and third factors to withstand summary judgment but not on the second factor. When considering this factor, a court must take "a realistic look . . . into [the] debtor's circumstances and . . . ability to provide for adequate shelter, nutrition, health care, and the like." *Id.* at 1310. A "court[] should base [its] estimation of a debtor's prospects on specific articulable facts, not unfounded optimism, and the inquiry into

[6] Nitka devotes much of his briefs to disputing statements in DOE's summary judgment motion. Our focus, however, remains on the court's order and the record.

future circumstances should be limited to the foreseeable future, at most over the term of the loan." *Id.* (internal quotation marks omitted). A debtor need not show "a certainty of hopelessness," but the second factor "recognizes that a student loan is viewed as a mortgage on the debtor's future." *Id.* (internal quotation marks omitted).

It is undisputed that Nitka is relatively young, has no dependents, and is highly educated. He twice failed the Arizona bar exam, but "[m]any attorneys fail the bar examination a time or two and go on to very successful careers in the law." R., vol. 4 at 2623. He alleges he cannot afford to take the Colorado bar exam, which he believes he can pass, but there is no evidence that he has inquired into a fee waiver. Nitka also has significant "experience in numerous industries," *id.*, and has proven capable of holding steady employment when he chooses. But he has taken no steps to re-enter the insurance industry, and he "just [does not] want to work in a restaurant," R., vol. 1 at 171. He averaged only one job application per month between May 2018 and May 2019, at which point he "gave up on job searching." *Id.* at 180. He instead spends 100 hours per week on "new business ventures," which "is his choice." R., vol. 4 at 2623. One project is building a mobile phone application, which, coupled with his knowledge of HTML, *see* R., vol. 1 at 147, indicates technological proficiency he could use in obtaining employment. The other project is converting a bus into a vacation rental, which he planned to complete by the end of 2020 and rent for $100 to $400 per night. Although he uses his "own two hands" to convert the bus, *id.* at 184, and plans to convert one bus per year, he

suggests his medical conditions hinder his job prospects. But as upheld above, he waived any reliance on his medical conditions to show undue hardship.

Ultimately, Nitka "has a strong potential for future employment should he choose to go back to work" and has not shown "his financial situation [is] unlikely to improve." R., vol. 4 at 2624. He also has not shown "his financial difficulties are likely to persist for a significant portion of the repayment period," which "is at least 21 years." *Id.*[7] He alleged he does "not plan on remaining in [his] current desperate situation" and "fully anticipate[s] pulling [him]self out of these circumstances." *Id.* (internal quotation marks omitted). And he testified he needs the discharge because of his "*current* economic situation, *now and in the near future*." R., vol. 1 at 155 (emphasis added). That hardly bespeaks a "state of affairs . . . likely to persist for a significant portion of the repayment period of the student loans." *Polleys*, 356 F.3d at 1307. Accordingly, the court properly granted summary judgment for DOE.

[7] Nitka insists his "repayment period was over" as of September 2018, when, according to the rules on DOE's website, he defaulted on his loans. Aplt. Opening Br. at 34. *But see* Aplt. Opening Br. at 33 (stating he was "in default as of February 26, 2019 (270 days from the June 1, 2018 payment date)"). He thus contends that because the repayment period ended and he is unable to pay the balance in full, he has shown his "state of affairs is likely to persist for a significant portion of the repayment period," *Polleys*, 356 F.3d at 1307. But while Nitka made this argument in the BAP, he did not raise it in bankruptcy court, and he has not argued plain error. We therefore decline to consider this argument. *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1131 (10th Cir. 2011).

CONCLUSION

The bankruptcy court's judgment is affirmed.

Entered for the Court

Bobby R. Baldock
Circuit Judge

FILED
United States Court of Appeals
Tenth Circuit

May 10, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: GORDON NITKA,

Debtor.

GORDON NITKA,

Plaintiff - Appellant,

v.

DEPARTMENT OF EDUCATION,

Defendant - Appellee.

No. 20-1270
(BAP No. 20-002-CO)
(Bankruptcy Appellate Panel)

ORDER

Before **MORITZ**, **BALDOCK**, and **EID**, Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge Thomas B. McNamara

In re: GORDON BEECHER NITKA, Debtor.	Bankruptcy Case No. 18-16296 TBM Chapter 7
GORDON BEECHER NITKA, Plaintiff, v. U.S. DEPARTMENT OF EDUCATION, Defendant.	Adv. Pro. No. 18-1230 TBM

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. Introduction.

The Plaintiff, Gordon Beecher Nitka (the "Plaintiff"), borrowed heavily from the Defendant, United States Department of Education (the "DOE"), to fund his law school education. He graduated in May 2013 severely in debt for his student loans but was unable to pass the Arizona bar examination. So, for several years, he labored in various positions that did not require a law degree. Mainly, he sold life insurance for MassMutual and worked as a contract law clerk and director in a law firm. But, he also took a few other assorted positions over the years. He coached as a fitness instructor, served as an advisor for a fitness technology company, sold roofing, and helped a hospitality group. Some years, he did fairly well financially. He earned gross income of $61,901 in 2015 and $83,000 in 2016. (Those amounts are above Colorado median-income levels for a debtor like the Plaintiff.) But, he struggled. He stopped working for MassMutual in January 2018 and lost his position at the law firm in May 2018. Since then, for the most part, he stopped seeking employment. Currently, the Plaintiff is unemployed. For 2018, the Plaintiff earned gross income of only $8,381. The Plaintiff filed for protection under Chapter 7 of the Bankruptcy Code[1] in July 2018.

[1] 11 U.S.C. § 101 *et seq.* Unless otherwise indicated, all references to "Section" are to Sections of the United States Bankruptcy Code.

The Plaintiff is indebted to the DOE to the tune of about $210,000. Meanwhile, he has not done much to repay his student loans. He paid nothing during 2013. The Plaintiff applied for and received an unemployment deferment in 2014. So he paid nothing in 2014 — and nothing in 2015 either. During 2016 (when his gross income was about $83,000), he managed to pay just $130.92 to the DOE. The next year he paid the DOE only $109.10. And, then he filed for bankruptcy protection without paying anything more. The Plaintiff is highly-educated and fairly young — just 37 years of age. He has no dependents and the record reveals no disabilities. However, he wishes to cancel his student loan obligations to the DOE. Acting on a *pro* se basis,[2] he filed this Adversary Proceeding seeking discharge of his student loans under Section 523(a)(8) for "undue hardship."

The DOE submitted a "Motion for Summary Judgment" under Fed. R. Civ. P. 56, as incorporated by Fed. R. Civ. P. 7056. (Docket No. 76, the "Motion for Summary Judgment.")[3] The alleged undisputed facts set forth in the Motion for Summary Judgment are fully supported by record evidence (including the Plaintiff's deposition, discovery responses, an affidavit, and related materials). The Defendant, through its Motion for Summary Judgment, challenges the Plaintiff's ability to prove his case at trial. The Plaintiff opposed the Motion for Summary Judgment. (Docket No. 87, the "Response.") However, he failed to properly contravene any of the alleged undisputed facts advanced by the DOE. And, he provided no counter-facts or additional evidence at all.

So, somewhat regrettably, the Court is left to decide the Motion for Summary Judgment only on the basis of the undisputed facts presented by the DOE. The Court sympathizes with the Plaintiff and the financial challenges that he has faced. However, on the record presented, the Court is obligated to determine that the Plaintiff failed to meet his summary judgment burden to show evidence of "undue hardship" under

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[2] Although the Plaintiff is proceeding without the advice and assistance of legal counsel, he is a law school graduate and has shown some facility with the law and procedures governing litigation. Regardless, he is proceeding on his own behalf. "The court, therefore, 'review[s] h[is] pleadings and other papers liberally and hold[s] them to a less stringent standard than those drafted by attorneys.'" *Heath v. Root9b*, 2019 WL 1045668, at *2 (D. Colo. Mar. 4, 2019) (quoting *Trackwell v. U.S.*, 472 F.3d 1242, 1243 (10th Cir. 2007)). *See also, Thompson v. Coulter*, 680 Fed. Appx. 707, 710 (10th Cir. 2017) (unpublished); *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005)); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the Court "'cannot take on the responsibility of serving as the litigant's attorney in constructing arguments' or the 'role of advocate' for a pro se plaintiff." *Root9b*, 2019 WL 1045668 at *3 (quoting *Garrett*, 425 F.3d at 840). Finally, even though he has elected to proceed on a *pro* se basis, the Plaintiff is required to follow the same rules of procedure that other litigants must abide by. *Garrett*, 425 F.3d at 840 (quoting *Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994)).

[3] The Court will use the convention "Docket No. ___" to refer to a document filed in the CM/ECF file for this Adversary Proceeding. When referring to a document filed in the CM/ECF file for the Debtor's main bankruptcy case, *In re Gordon Beecher Nitka*, Case No. 18-16296 TBM (Bankr. D. Colo.) (the "Main Case"), the Court will use the convention: "Docket No. ___ in Main Case").

Section 523(a)(8). Thus, the Court will enter judgment in favor of the DOE and against the Plaintiff. The Plaintiff's student loan obligations to the DOE are determined to be nondischargeable.

II. Procedural Background.

A. The Bankruptcy Case.

The Plaintiff filed for relief under Chapter 7 of the Bankruptcy Code on July 19, 2018 in the case captioned *In re Gordon Beecher Nitka*, Case No. 18-16296 (Bankr. D. Colo.). (Docket No. 1 in Main Case.) With respect to assets and liabilities, on his Schedules A/B and C (as amended) the Plaintiff asserted that he had no non-exempt assets. (Docket Nos. 1, 17, 20, 22, 29, and 31 in Main Case.) He listed a disputed debt of $191,081 to the DOE. (Docket No. 29 in Main Case.) Such amount constituted about 83% of all claims listed by the Plaintiff. (*Id.*) Regarding income and expenses, on his Schedule I, the Plaintiff identified himself as unemployed and earning no income. (Docket No. 31 in Main Case.) On his Schedule J, he listed $2,284 in monthly expenses and stated: "I do not plan on remaining in my current desperate situation. I don't have specifics, but I fully anticipate pulling myself out of these circumstances." (*Id.*)

The Chapter 7 Trustee filed a "Report of No Distribution" indicating that creditors will be paid nothing through the bankruptcy process. (Docket Entry 9/17/18 in Main Case.) On January 29, 2019, the Court issued its "Order of Discharge," generally discharging the Plaintiff from pre-petition debts. (Docket No. 35 in Main Case.) However, the Order of Discharge excepted from its reach "debts that the bankruptcy court has decided or will decide are not discharged in this bankruptcy case." (*Id.*)

B. The Adversary Proceeding.

The same day that the Plaintiff filed for bankruptcy (and well before the entry of the Order of Discharge), the Plaintiff initiated this Adversary Proceeding by filing his "Complaint to Determine Dischargeability of Student Loan." (Docket No. 1, the "Complaint.") Through his Complaint, the Plaintiff requested that any debt owed to the DOE be discharged under Section 523(a)(8) as an "undue hardship." (*Id.*) The Plaintiff initially asserted claims against both the DOE and Nelnet, Inc. Subsequently, the Court dismissed Nelnet, Inc. as a defendant. (Docket No. 20.) Thus, the DOE is the only remaining Defendant. The DOE filed an "Answer to Plaintiff's Complaint" contesting discharge of the Plaintiff's student loan debt. (Docket No. 16.)

On March 7, 2019, after receiving the input of the Plaintiff and the DOE, the Court entered a "Scheduling Order Under Fed. R. Civ. P. 16(b) and Fed. R. Bankr. P. 7016" setting the dispute framed by the Complaint and Answer for trial. (Docket No. 26, the "Scheduling Order.") The Court also set a series of pre-trial deadlines. (*Id.*) Since the issuance of the Scheduling Order, the record reflects that the Adversary Proceeding has been rather hotly contested with numerous discovery disputes, an interlocutory

appeal to the United States Bankruptcy Appellate Panel for the Tenth Circuit (along with multiple ancillary motions), and various other pretrial motions. (Docket Nos. 31, 33, 34, 47, 49, 51, 53, 57, 61, 62, 64, 67-75, 79, 81, 84, 86, 88-92, 95, 97-98, 101, 102-107, 113, 115, 116, 118-119.) Suffice it to say, over the course of the pretrial proceedings, the Court has become very familiar with the dispute between the parties.

C. The Recurring Discovery Dispute and the Rule 37 Sanctions Hearing.

One of the recurring pretrial issues was whether the Plaintiff would assert any medical condition in support of his Complaint. He had alluded in his Complaint to a medical condition which contributed to his current financial circumstances. (Docket No. 1 at 2.) However, when the DOE sought discovery related to his alleged medical condition, the Plaintiff resisted answering both during his deposition and in response to written discovery requests. The Court was called upon to convene hearings to resolve those discovery disputes. (Docket Nos. 31 and 47.)

Then, after the close of discovery, the Plaintiff filed a Supplemental Discovery Response (Docket No. 48) in which he intimated that he would be relying on a medical condition to meet his burden at trial. That prompted the DOE to file its "Motion for Further Orders Regarding Incomplete Disclosures, and for Order Limiting Plaintiff's Ability to Introduce Evidence of Alleged Medical Condition Under Rule 37, or, In the Alternative, Leave to Reopen Limited Discovery." (Docket No. 53, the "Motion Regarding Incomplete Disclosures.") The Court convened a hearing on the Motion Regarding Incomplete Disclosures on November 7, 2019 (the "Sanctions Hearing"). At the Sanctions Hearing, the dispute over the Plaintiff's reliance on any medical condition came to a head. Even at the Sanctions Hearing, the Plaintiff continued to equivocate as to whether he would rely at trial on his alleged medical conditions in support of his Complaint. *See* Transcript of Hearing Held on November 7, 2019 at 22:4-24:23 (Docket No. 74, the "Transcript" [hereinafter, cited as "Tr."]).

After hearing the arguments of the parties and reviewing the relevant documents and record in the case, the Court ultimately concluded that the Plaintiff had been evasive, incomplete, and unresponsive in answering the discovery requests made of him (Tr. at 29:22-25); that he had abused the discovery process (Tr. at 30:4-5); and that sanctions under Fed. R. Civ. P. 37 were warranted (Tr. at 30:7-10). So, the question before the Court was what sanction to impose on the Plaintiff for such conduct.

On the record, the Court described the alternative sanctions available under Rule 37 that were urged by the Defendant:

> And there are at least two different alternatives available to the Court which have been properly described by the government. The first alternative is that the Court could prohibit the debtor from introducing any testimony concerning medical issues to support his claims for dischargeability under -- in the case and under Section 523

> of the Bankruptcy Code. I could do that. I could prohibit you from getting into this.
>
> And it sounded like to me, at the, sort of toward the beginning of the case, you didn't want to get into it, anyway. That's one of the reasons, Mr. Nitka, why I was asking you whether you wanted to get into your medical issues and make arguments about it or you didn't. So, I could prohibit you from doing that.
>
> Or, alternatively, I could reopen the discovery process and allow the government a full and complete opportunity to conduct discovery about all your medical conditions and why you believe that your medical conditions impact your ability to pay. And toward that end, I also could extend the period of time for expert reports, and I may need to vacate the trial, which I hardly ever do. I'm very committed to try to get cases to the end.
>
> In this case I'm very tempted to, and probably ordinarily would, just prohibit you from using any testimony or evidence concerning medical issues. However, I'm going to, in this unusual case, note also that you are proceeding on a *pro se* basis, even though you've gone to law school, and you've at least asserted or alleged that there are issues concerning your capacity and so forth.

Tr. at 30:11-31:14. The Court offered the Plaintiff a final opportunity to decide whether he wished to rely on his alleged medical conditions at trial or not.

> And so what I'm going to do is I'm really going to turn to you, Mr. Nitka, and I'm going to give you an option. I'm going to ask you again whether or not you wish to pursue medical testimony in support of your case. And if you do, then I'm going to order a full round of discovery and so forth. And . . . if you don't want to produce any further medical information, then we'll just prohibit you from doing so. Okay?
>
> So, it's in your hands; I want your answer.

Tr. at 31:15-24.

Finally, the Plaintiff committed on the record that he would not argue any medical conditions at trial. This is what the Plaintiff said:

MR. NITKA: I will decline to address the medical issues in the trial.

THE COURT: Now you are declining. You commit that you will not be raising any medical issues in support of your case. Is that right, sir?

MR. NITKA: That's correct.

. . . .

THE COURT: . . . . But right now you're telling the Court, and you're also committing to the other side, that you're not going to raise any medical issues in support of your claims at trial. Is that correct, or is that not correct?

MR. NITKA: That is correct.

Tr. at 34:1-6.

On that basis, the Court granted the Defendant's Motion Regarding Incomplete Disclosures to the extent of precluding the Plaintiff from introducing evidence at trial related to any alleged medical conditions. (Docket No. 61.) Thus, the Court noted that discovery would not be reopened and that the trial on the Complaint could proceed as set. *Id.* at 37:1-9.

D. <u>The Motion for Summary Judgment</u>.

Apparently prompted by the Plaintiff's commitment that he would "decline to address the medical issues in the trial," the DOE filed the Motion for Summary Judgment at the last possible moment. In its Motion for Summary Judgment, the DOE listed 49 alleged undisputed facts and supported each of the alleged undisputed facts (sentence by sentence) with citations to "particular parts of materials in the record, including depositions, documents . . . affidavits or declarations, . . . interrogatory answers, or other materials . . . ." Fed. R. Civ. P. 56(c)(1); MSJ at 3-10.

As the Court discusses below, the DOE bears an initial burden at trial before the burden shifts to the Plaintiff. Specifically, in a case under Section 523(a)(8), the student loan creditor has the initial burden to establish the existence and amount of its debt and the character of its debt as an educational loan within the meaning of Section 523(a)(8). Once the creditor meets its burden, the burden shifts to the debtor to show that repaying the student loan debt will cause an "undue hardship." In the Motion for Summary Judgment, the DOE presented alleged undisputed facts regarding the debt and its character as well as negating "undue burden."

The Court has carefully reviewed all of the 49 proffered undisputed facts asserted by the DOE and compared such facts to the record citations. Every alleged undisputed fact is accurate and fully supported. In fact, the DOE's presentation of proffered undisputed facts in the MSJ is a model of proper summary judgment practice under Fed. R. Civ. P. 56. Based upon the alleged undisputed facts, the DOE requested judgment in its favor and against the Plaintiff determining the Plaintiff's student loan obligations are nondischargeable under Section 523(a)(8).

E. The Response.

The Plaintiff filed the Response generally contesting the Motion for Summary Judgment. However, he did not properly contravene any of the specific undisputed facts alleged by the DOE by citations to "particular parts of materials in the record, including depositions, documents . . . affidavits or declarations, . . . interrogatory answers, or other materials . . . ." Fed. R. Civ. P. 56(c)(1). In other words, the Plaintiff did not assert, with competent evidence, that any of the alleged undisputed facts advanced by the DOE were actually wrong — at least not in any material way. Furthermore, he did not present by citation to the record any additional purported facts. He did not even submit his own affidavit.

Instead, the Plaintiff responded (in a procedurally defective manner) to just five of the DOE's alleged undisputed facts mostly with picayune discrepancies and unsupported argument. For example, the DOE alleged that the Plaintiff is 36 years old based upon the Plaintiff's May 30, 2019 deposition. However, the Plaintiff asserted that such allegation was a "blatant disregard for fact" because the Plaintiff actually is 37 years old now. The difference is immaterial and easily explained since the Plaintiff turned 37 years old after his deposition. The DOE also asserted that the Plaintiff is "not seeking employment." The Plaintiff claimed that such alleged undisputed fact was "comical in light of the amount of discovery" on such topic. However, he provided the Court with no evidence contradicting the DOE's statement. As set forth below, the Plaintiff did not refute or put at issue with evidence any of the five alleged facts he purported to attack.

In any event, aside from addressing just a handful of the alleged undisputed facts, the main focus of the Plaintiff's Response was to assert a series of motions. As best the Court could ascertain, the Plaintiff advanced the following:

1. **Motion to Strike the Declaration of Christopher Bolander**. Response at 5-8. Christopher Bolander is a loan analyst for the DOE. The DOE submitted his Declaration in support of the Motion for Summary Judgment as Exhibit 7 (the "Bolander Declaration"). The Plaintiff argued that the Bolander Declaration should be stricken from the record primarily because the Plaintiff asserted that Mr. Bolander was an expert witness under Fed. R. Evid. 702 and also because Mr. Bolander allegedly did not have "first-hand knowledge." The Plaintiff cited to Fed. R. Civ. P. 12(f), 26(f), 56(c)(2), as incorporated by Fed. R. Bankr. P. 7012, 7026, and 7056, in support of the Motion to Strike.

2. **Motion to Defer Ruling or Deny Motion for Summary Judgment**. Response at 9-10. The Plaintiff argued that the Plaintiff could not present facts essential to justify his opposition to the Motion for Summary Judgment because, among other things, he could not obtain a copy of his deposition transcript for review. The Plaintiff cited to Fed. R. Civ. P. 56(d), as incorporated by Fed. R. Bankr. P. 7056, in support of the Motion to Defer Ruling or Deny Motion for Summary Judgment.

3. **Motion for Copy of Plaintiff's Deposition Transcript**. Response at 11-16. The Plaintiff argued that the DOE was obligated to provide him with a copy of his deposition transcript free of charge. The Plaintiff cited to Fed. R. Civ. P. 5(d), 26(a) and 30(f), as incorporated by Fed. R. Bankr. P. 7005, 7026, and 7030, in support of the Motion for Copy of Plaintiff's Deposition Transcript.

4. **Motion to Strike and Rule 56(c)(2) Objection**. Response at 8-11. The Plaintiff argued that the Motion for Summary Judgment should be stricken because it relied on the Plaintiff's own deposition transcript (which the Plaintiff does not have). The Plaintiff cited to Fed. R. Civ. P. 5(d), 12(f), and 56(c)(2), as incorporated by Fed. R. Bankr. P. 7005, 7012, and 7056, in support of the Motion to Strike and Rule 56(c)(2) Objection.

The Court conducted a hearing on December 19, 2019 on the Plaintiff's various motions embedded in the Response. After considering arguments presented by both the Plaintiff and the DOE, the Court denied each of the various motions embedded in the Response for the reasons set forth in the Court's extensive oral rulings. (Docket No. 118.) Since the Court already ruled on such issues, the Court need not further address the various motions embedded in the Response again and instead refers to the Court's oral rulings.

III. Jurisdiction and Venue.

The Court has subject matter jurisdiction over this Adversary Proceeding concerning dischargeability of debt pursuant to 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(I), because it seeks a determination as to the dischargeability of a particular debt. Venue is proper in this Court under 28 U.S.C. §§ 1408 and 1409.

In their "Joint Report," both the Plaintiff and the DOE agreed that the Court "has authority to enter final judgment with respect to the claims asserted in this Adversary Proceeding." (Docket No. 24.) Subsequently, neither the Plaintiff nor the DOE has contested this Court's jurisdiction or the propriety of venue in this Court.

IV. Burden of Proof Under Section 523(a)(8).

The burden of proof in cases for discharge of student loan debt under Section 523(a)(8) is somewhat different than most Section 523(a) nondischargeability actions and shifts. The DOE bears the initial burden of establishing a debt for an "educational

benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or part by a governmental unit . . . ." 11 U.S.C. § 523(a)(8)(A)(i). In other words, the DOE "must prove, by a preponderance of the evidence, that a debt exists and the debt is the type excepted from discharge under § 523(a)(8)." *Hoffman v. Educ. Credit Mgmt. Corp. (In re Hoffman)*, 557 B.R. 177, 184 (Bankr. D. Colo. 2016). *See also Grogan v. Garner*, 498 U.S. 279, 286-87 (1991) (establishing the "preponderance of the evidence" standard for Section 523(a) actions generally).

If the DOE meets that burden, then the student loan debt "is only discharged if the debtor establishes that repayment of the debt would constitute undue hardship." *Hoffman*, 557 B.R. at 184. Binding appellate precedent has repeatedly affirmed that "[t]he burden of demonstrating 'undue hardship' falls on the debtor." *Educ. Credit Mgmt. Corp. v. Mersmann (In re Mersmann)*, 505 F.3d 1033, 1043 (10th Cir. 2007). *See also Alderete v. Educ. Credit Mgmt. Corp.*, 412 F.3d 1200 (10th Cir. 2005) (same); *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1308 (10th Cir. 2004) (same); *Woodcock v. Chemical Bank NYSHESC (In re Woodcock)*, 45 F.3d 363, 367 (10th Cir. 1995) (same). The debtor's burden to show 'undue hardship' often is difficult to meet.

V. The Legal Standards Governing Motions for Summary Judgment.

Notwithstanding the general burdens of proof, this dispute is presented based upon a pretrial motion for summary judgment. Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure, as incorporated herein by Rule 7056 of the Federal Rules of Bankruptcy Procedure. One of the principal purposes of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Consistent with that purpose, the DOE seeks summary judgment asserting that the undisputed facts demonstrate the existence and character of the debt; but also arguing that the evidence establishes that the Plaintiff is unable to prove the required elements of his "undue burden" case.

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions, or affidavits show that there is "no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex*, 477 U.S. at 322 (quoting Fed. R. Civ. P. 56(c)). Put another way by the United States Supreme Court:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of

> the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of [his] case with respect to which [he] has the burden of proof.

Celotex, 477 U.S. at 322-23.

The moving party bears the initial burden of identifying the basis for its motion and designating those portions of the record which it believes entitles it to judgment. Fed R. Civ. P. 56(c); *Celotex*, 477 U.S. at 323. In response, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts . . . ." *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Instead:

> [T]he nonmovant that would bear the burden of persuasion at trial may not simply rest upon its pleadings; the burden shifts to the nonmovant to go beyond the pleadings and "set forth specific facts" that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant. To accomplish this, the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein.

Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 671 (10th Cir. 1998) (citations omitted). *See also Savant Homes, Inc. v. Collins*, 809 F.3d 1133, 1137 (10th Cir. 2016) (same); *Llewellyn v. Allstate Home Loans Inc.*, 711 F.3d 1173 (10th Cir. 2013) (nonmoving party has the affirmative duty of coming forward with evidence supporting his claim at summary judgment); *Bausman v. Interstate Brands Corp.*, 252 F.3d 1111, 1115 (10th Cir. 2001) (same).

In reviewing a motion for summary judgment, the Court must "view the facts and evidence in the light most favorable to the nonmoving party." *Morris v. City of Colo. Springs*, 666 F.3d 654, 660 (10th Cir. 2012). But, unsupported, conclusory allegations will not create an issue of fact, and the non-moving party must do more than provide its subjective interpretation of the evidence. *Tran v. Sonic Indus. Servs.*, Inc., 490 Fed. Appx. 115, 117-118 (10th Cir. 2012) ("A summary judgment is appropriate if the non-moving party cannot adduce probative evidence on an element of its claim upon which it bears the burden of proof.") (citing *Rohrbaugh v. Celotex Corp.*, 53 F3.d 1181, 1183 (10th Cir. 1995)). "A party cannot rely entirely on pleadings, but must present significant probative evidence to support its position." *Hansen v. PT Bank Negara Indonesia (Persero)*, 706 F.3d 1244, 1247 (10th Cir. 2013) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). And, "[i]f the nonmoving party fails to make a sufficient showing on an essential element with respect to which [it] has the burden of proof, judgment as a matter of law is appropriate." *Id.* However, "when the evidence could lead a rational fact-finder to resolve a dispute in favor of either party, summary judgment

is improper." *C.L. Frates & Co. v. Westchester Fire Ins. Co.*, 728 F.3d 1189 (10th Cir. 2013).

VI. Undisputed Facts.

The critical first step in adjudicating a motion for summary judgment is to identify the undisputed facts. Only then can the Court apply the law to the facts and reach a legal conclusion. Fed. R. Civ. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.")

A. The Procedural Rules.

Procedural rules dictate how the alleged undisputed facts are to be presented and challenged. Fed. R. Civ. P. 56(c) governs the facts alleged by the movant or challenged by the non-movant:

> (c) Procedures.
>
> (1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Then, Fed. R. Civ. P. 56(e) provides the consequences for "failing to properly support or address a fact":

> (e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials--including the facts considered undisputed--show that the movant is entitled to it; or

(4) issue any other appropriate order.

The Bankruptcy Court for the District of Colorado supplemented the Federal Rules of Civil Procedure by enacting its Local Bankruptcy Rules. L.B.R. 7056-1 governs summary judgment motions in Colorado and provides:

(a) Motion and Memorandum in Support. Any motion for summary judgment pursuant to Fed. R. Bankr. P. 7056 must include:

(1) a statement of the burden of proof;

(2) the elements of the claim(s) that must be proved to prevail on the claim(s);

(3) a short and concise statement, in numbered paragraphs containing only one fact each, of the material facts as to which the moving party contends there is no genuine issue to be tried;

(4) a statement or calculation of damages, if any; and

(5) any and all citations of law or legal argument in support of judgment as a matter of law.

The counterpoint is L.B.R. 7056-1(b) which governs oppositions to motions for summary judgment:

(b) Response and Memorandum in Opposition. Responses in opposition must include:

(1) any competing statements concerning the burden of proof, including burden shifting,

together with legal authority supporting such statements;

(2) any defenses to the elements of the claim(s) that must be proved to defeat such claim(s);

(3) a short and concise statement of agreement or opposition, in numbered paragraphs corresponding to those of the moving party, of the material facts as to which it is contended there is a genuine issue to be tried;

(4) a short and concise statement, in numbered paragraphs containing only one fact, of any additional facts as to which the opposing party contends are material and disputed;

(5) a statement or calculation of damages, if any; and

(6) any and all citations of law or legal argument in opposition to judgment as a matter of law.

Each alleged fact (whether by the movant or the non-movant) must be properly supported. L.B.R. 7056-1(c) tells how:

(c) Supporting Evidence. Each statement by the movant or opponent pursuant to subdivisions (a) or (b) of this Rule, including each statement controverting any statement of material fact by a movant or opponent, must be followed by citation to admissible evidence either by reference to a specific paragraph number of an affidavit under penalty of perjury or fact contained in the record. Affidavits must be made on personal knowledge and by a person competent to testify to the facts stated, which are admissible in evidence. Where facts referred to in an affidavit are contained in another document, such as a deposition, interrogatory answer, or admission, a copy of the relevant excerpt from the document must be attached with the relevant passages marked or highlighted.

Finally, L.B.R. 7056-1(d) states what happens if a non-movant does not properly contravene alleged undisputed facts:

> (d) Admission of Facts. Each numbered paragraph in the statement of material facts served by the moving party is deemed admitted for purposes of the motion unless specifically controverted by a correspondingly numbered paragraph in the statement served by the opposing party.

B. The DOE Complied With the Procedural Rules.

The DOE complied with Fed. R. Civ. P. 56 and L.B.R. 7056-1 exactly. The DOE identified 49 alleged undisputed facts and supported each of the alleged undisputed facts (sentence by sentence) with citations to "particular parts of materials in the record, including depositions, documents . . . affidavits or declarations, . . . interrogatory answers, or other materials . . . ." Fed. R. Civ. P. 56(c)(1); MSJ at 3-10. More particularly, the DOE cited to: the Plaintiff's deposition transcript; the Plaintiff's resume; the Plaintiff's U.S. Individual Income Tax Returns for 2015, 2016 and 2018; the Plaintiff's responses to discovery; and the declaration of Christopher Bolander, a loan analyst for the DOE. MSJ at 3-10. In his declaration, Mr. Bolander further properly authenticated and attached additional admissible evidence including: the Plaintiff's promissory notes to the DOE; a DOE Certificate of Indebtedness; the DOE's loan history for the Plaintiff's indebtedness; the Nelnet servicer account summary for the Plaintiff's indebtedness; and the Plaintiff's Unemployment Deferment Request. MSJ at Ex. 7-7F. The Court has carefully reviewed all of the 49 proffered undisputed facts asserted by the DOE and compared such facts to the record citations. Every alleged undisputed fact is accurate and fully supported in accordance with Fed. R. Civ. P. 56 and L.B.R. 7056-1.

C. The Plaintiff Failed to Comply With the Procedural Rules.

The Court's adjudication of the Motion for Summary Judgment has been hampered because the Plaintiff failed to comply with Fed. R. Civ. P. 56 and L.B.R. 7056-1. The first problem is that the Plaintiff did not present "a short and concise statement of agreement or opposition, in numbered paragraphs corresponding to those of the moving party, of the material facts as to which it is contended there is a genuine issue to be tried." L.B.R. 7056-1(b)(3). And, then, the Plaintiff did not allege "any additional facts as to which the opposing party contends are material and disputed." L.B.R. 7056-1(b)(4). Further, the Plaintiff failed to present and cite admissible supporting evidence contravening any of the alleged undisputed facts presented by the DOE. Fed. R. Civ. P. 56(c)(1)(A); L.B.R. 7056-1(c). The Plaintiff did not provide an affidavit or declaration, refer to excerpts from a deposition, or otherwise properly cite admissible record evidence.[4] The Plaintiff has essentially left it to the Court to ferret through the Response to determine if the Plaintiff contests any alleged undisputed facts.

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[4] The Plaintiff did attach a handful of unauthenticated materials relating to his 2015 and 2016 earnings. Response at Ex. A-E. As set forth below, these materials do not negate the Undisputed Facts but do bear on other income numbers such as "adjusted gross income" and "taxed social security

The consequences of the Plaintiff's failure to comply with the procedural requirements are clear. Under Fed. R. Civ. P. 56(c), if a party fails "fails to properly address another party's assertion of fact as required by Fed. R. Civ. P. 56(c)" the Court may "consider the fact undisputed for purposes of the motion" and "grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it." L.B.R. 7056-1(d) establishes a presumption that alleged undisputed facts not properly contested are "deemed admitted."

Based on the foregoing, all of the DOE's alleged undisputed facts asserted in the Motion for Summary Judgment have been deemed admitted by the Plaintiff. However, because the Plaintiff is proceeding *pro se* (albeit a law school graduate), the Court is reluctant to end its analysis there. Instead, the Court evaluates the portion of the Response wherein the Plaintiff addressed five discrete alleged undisputed facts. Response at 3-5.[5]

1. **The Response to Undisputed Fact No. 3.**

The DOE's alleged Undisputed Fact No. 3 states that "Plaintiff is 36 years old, has no children, no dependents, and has no relevant health conditions." The Plaintiff argues that "this is incorrect." Response at 3. First, he states that he is now "37 years old" because his birthday is July 2, 1982. The DOE cited to the Plaintiff's own deposition testimony that he was 36 years old. But, the deposition was taken a few months before the Plaintiff turned 37 years old. So be it. This is a non-material discrepancy easily explained by the timing of the deposition. In any event, the Court accepts that the Plaintiff is 37 years old. Second, the Plaintiff apparently wishes to dispute that he "has no relevant health conditions." Response at 4. But, the Plaintiff previously committed in Court that he would not assert any health conditions in support of his Complaint. *See* Tr. at 34. Thus, the Court previously ruled that:

> Based upon the Plaintiff's commitment that he does not intend to rely on any medical and/or mental health condition(s) in support of his Complaint, the Defendant's motion to prohibit the Plaintiff from introducing any evidence at trial regarding any medical and/or mental health condition(s) in support of his Complaint is GRANTED.

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income." In the end, the Court considered such documents and figures (and added them to the DOE's Undisputed Facts) even though not properly authenticated. But, they are not particularly material and do not change the Court's analysis.

[5] The Plaintiff also indirectly attacked Undisputed Fact Nos. 32-46 and 49. One of the motions the Plaintiff embedded in his Response was his request that the Court strike the Bolander Declaration which is the evidentiary support for such facts. However, as noted previously, the Court declined to strike the Bolander Declaration. So, because the Court rejected the Plaintiff's opposition to the Bolander Declaration, Undisputed Fact Nos. 32-46 and 49 are undisputed.

(Docket No. 61.) So, the Plaintiff can not bring up medical conditions now. In any event, even if the Plaintiff does have some "relevant health conditions," he failed to provide any proper evidence in the Response. He did not submit an affidavit or declaration about his medical conditions. And, he did not provide authenticated medical records on the topic. The Plaintiff also did not contest that he has no children and no dependents. So, the Plaintiff failed to properly contravene Undisputed Fact No. 3.

2. Response to Undisputed Fact No. 18.

The DOE's alleged Undisputed Fact No. 18 states that "[s]ince May 2018 . . . [the Plaintiff] also stopped seeking employment and is not presently looking for a job." The Plaintiff argues that this is wrong. However, Undisputed Fact No. 18 is based on the Plaintiff's own deposition testimony. During his deposition he testified under oath as follows regarding his job search:

> I'll give you some unsolicited information. I don't anymore. I gave up on job searching . . . . So not looking for a job but working for future income.

MSJ Ex. 1 98:11-22. The other deposition excerpts provided by the DOE demonstrate that the Plaintiff stopped his job search in May 2018 so he could focus on developing "my own source of income." *Id.* 105:1-13. That is, the Plaintiff is trying to pursue his own business ventures rather than engage in any job searches. *Id.* 98:22-104:25.

Despite his own deposition testimony, the Plaintiff now states in the Response that "he has made considerable efforts to secure employment" and "has applied to nearly one hundred jobs." Response at 4. The problem is that such statement is merely an unsupported assertion in a pleading. It is not evidence. The Plaintiff failed to submit an affidavit or declaration. And, he has not provided the Court with any documentary evidence of even a single job application in the Response. So, the Plaintiff's allegation is completely unsupported.

The Plaintiff's other quarrel with Undisputed Fact No. 18 is that he allegedly worked for a roofing company for a brief period after May 2018. The Plaintiff did not himself provide any evidence of that job by way of an affidavit, declaration, or documentary support. However, in its Reply, the DOE attached excepts from the Plaintiff's own deposition testimony wherein the Plaintiff stated that he worked for a roofing company. (Docket No. 99.) He made less than $3,000. *Id.* So, the roofing job was not particularly material. However, the Court accepts that while the Plaintiff gave up his job searching and is presently not looking for employment, he did earn less than $3,000 while working at a roofing company after May 2018. But, the Plaintiff failed to properly and materially contravene Undisputed Fact No. 18.

3. **Response to Undisputed Fact No. 22.**

The DOE's Undisputed Fact No. 22 states that "[i]n 2015, Plaintiff's gross income was $61,901." For support, the DOE correctly cited to the Plaintiff's 2015 Federal Income Tax Return which verifies that the Plaintiff himself reported 2015 "Gross Income" of $61,901. In the Response, the Plaintiff stated that he "objects to Defendant's use of 'gross income' as prejudicially misleading. Gross income is not reflective of a tax-payer's income." Response at 4. Instead, the Plaintiff prefers to use "Adjusted Gross Income" which the Plaintiff contends was somewhat less: $39,156.[6] But, the Plaintiff's contention is only argument. He does not contest that he reported $61,901 in "Gross Income" in 2015. That is undisputed. But, for purposes of adjudicating the Motion for Summary Judgment, the Court also will accept that the Plaintiff also reported a lower "Adjusted Gross Income" of $39,156 in 2015.

4. **Response to Undisputed Fact No. 23.**

The DOE's Undisputed Fact No. 23 states that "[i]n 2016, Plaintiff's total wages were approximately $83,000." For support, the DOE correctly cited to the Plaintiff's 2016 Federal Income Tax Return which verifies that the Plaintiff himself reported 2016 "gross income" of $83,000. In the Response, the Plaintiff suggested that the Court should instead rely on a Social Security Administration Earnings Record which shows that the Plaintiff's "Taxed Social Security Earnings" were $54,643 in 2016. Response at 5 and Ex. A and C. But, again, the Plaintiff's contention is only undeveloped argument. The Plaintiff has not even explained what the term "Taxed Social Security Earnings" means. He does not contest that he reported $83,000 in "gross income" on his Federal Income Tax Return in 2016. That is undisputed. Nevertheless, the Court also will accept that the Plaintiff's "Taxed Social Security Earnings" were $54,643 in 2016. Furthermore, in the Plaintiff's Statement of Financial Affairs, he reported 2016 "wages, commissions and bonuses" of $77,350.65. (Docket No. 1 in Main Case.)

5. **Response to Undisputed Fact No. 26.**

The DOE's Undisputed Fact No. 26 states that "Plaintiff is currently unemployed and not seeking employment and therefore has current income of $0." For support, the DOE correctly cited the Plaintiff's responses to discovery. In his Response, the Plaintiff contends that "Defendant's claim is comical . . . ." Response at 5. The Court sees nothing comical about it. The Plaintiff himself has contended that he is unemployed. In his Schedule I, the Plaintiff listed current income of $0. Those facts are not in dispute. So, the Plaintiff's retort that the DOE's claim is "comical" seems directed to the statement that he is "not seeking employment." However, as set forth above (in relation to Undisputed Fact No. 18), the Plaintiff himself confirmed in his deposition testimony that he is not seeking employment. In any event, the Plaintiff failed to properly contest Undisputed Fact No. 26 by providing and citing any contrary evidence at all.

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[6] In the text of the Response, the Plaintiff asserts that his 2015 "Adjusted Gross Income" was $29,156. Response at 4. However, in support the Plaintiff cites to an IRS Account Transcript attached as Exhibit E to the Response. That document shows $39,156, not $29,156.

D. Findings of Undisputed Facts.

As explained above, since the Plaintiff failed to comply with the governing procedural rules, he has admitted all of the undisputed facts identified in the Motion for Summary Judgment. Further, even considering the five undisputed facts that the Plaintiff discussed in the Response, he has not raised any competent and material disputes. Thus, the Court finds the following are the "Undisputed Facts" for purposes of the Motion for Summary Judgment:

1. On July 19, 2018, Plaintiff filed his Voluntary Petition for Chapter 7 relief pursuant to 11 U.S.C. § 101 et seq. On January 29, 2019, this Court entered an Order of Discharge, thereby discharging Plaintiff's debts (not including the student loans at issue in this action).

2. On July 19, 2018, the same day Plaintiff filed for bankruptcy, he filed the above-captioned Adversary Proceeding seeking to discharge his student loans. He asserts that repayment of his student loans would impose an undue hardship on him and that, therefore, he is entitled to a discharge of those loans pursuant to 11 U.S.C. § 523(a)(8).

3. Plaintiff is 37 years old, has no children, no dependents, and has no relevant health conditions.

4. Mr. Nitka started at Colorado College in the winter of 2002 and graduated from Colorado College in May 2005 with a B.A. in English and Biology.

5. During college, Mr. Nitka worked as a VIP host for the school's administration, a tutor in anatomy and physiology, and as a paraprofessional for surgical anatomy.

6. Following his graduation from Colorado College, Mr. Nitka obtained an internship with the United States Olympic Committee and worked as the co-director of U.S.A. House in Torino, Italy during the 2006 Winter Olympic Games. The U.S.A. House was a high-profile VIP hospitality center for celebrities, athletes, politicians, and dignitaries.

7. Mr. Nitka has experience in the hospitality industry. He worked for the Broadmoor Resort as a bartender and server at various times between 2004 and 2009 and worked in the nightclub industry after graduation from college,

working his way up from a doorman to a supervisor, to a manager of four high-volume nightclubs.

8. Mr. Nitka worked in the hospitality industry until he began law school at the Phoenix School of Law in 2010.

9. During law school Mr. Nitka worked in various legal positions, both paid and unpaid, as a law clerk or legal aide.

10. Towards the end of law school Mr. Nitka also worked as a fitness coach for a team of competitive athletes. He continued that work on a part-time basis after graduating from law school, through November of 2015, earnings up to $90 per hour.

11. Plaintiff started law school at Phoenix School of Law in 2010 and graduated in May 2013.

12. After graduating from law school, Plaintiff worked as a co-chair for the Board of Advisors for a San Francisco-based fitness technology company called Revive. Plaintiff was not paid a salary, and instead received equity compensation and owned a portion of the equity in the business, but the company ultimately dissolved.

13. After law school, Plaintiff also worked for a law firm called Negretti & Associates as a contract law clerk and worked his way up to the position of firm director. As a contract law clerk, he conducted legal research and writing for the firm. *Id.* While with Negretti & Associates, he earned approximately $25 per hour.

14. Plaintiff is not currently licensed to practice law. He has taken the bar exam in Arizona, but has never taken the bar exam in Colorado. Plaintiff believes he can pass the bar exam.

15. Plaintiff was removed from his position with Negretti & Associates in May or April of 2018 after his ex-wife's mother posted approximately 40 negative reviews of the firm.

16. Beginning in August 2014, Plaintiff also worked for MassMutual selling life insurance. He worked with MassMutual until January 2018 and was paid a commission based on the sales he made.

17. Plaintiff has held both state and national financial licenses for the sale of life insurance and annuities, including a Series 6 license. However, his licenses have been suspended by FINRA due to his failure to respond to a letter regarding his use of a Virtual Private Network ("VPN") during his tenure with MassMutual. Although use of a VPN is common, Mr. Nitka has chosen not to respond to the letter. He has not taken any steps to get back into good standing.

18. Since May 2018, shortly after Mr. Nitka stopped working for Negretti & Associates and two months before he filed this adversary proceeding, he also stopped seeking employment and is not presently looking for a job. However, sometime after May 2018, he worked for a roofing company and earned less than $3,000.

19. In early 2018, Mr. Nitka worked with the owner of a hospitality group to open a new location. The compensation for that work was intended to be a percentage of income from the new location. Mr. Nitka was ultimately let go from the position because other employees with more tenure with the company were chosen to start the new location.

20. Mr. Nitka explained that he is not currently employed with hospitality groups or specific restaurants or bars "[m]ostly because I just don't want to work in a restaurant."

21. While Mr. Nitka occasionally applies for positions, since May 2018 he has been primarily focused on his own business ventures, spending over 100 hours per week on those ventures. In particular, Mr. Nitka is working to develop a software application that would be used in bars and restaurants and on converting a bus into a tiny house that he hopes to rent out on Airbnb. Mr. Nitka hopes to park the bus in ski resort areas and charge between $100 and $400 per night.

22. In 2015, Plaintiff's gross income was $61,901. His adjusted gross income was lower: $39,156. This income was from his work with MassMutual and Negretti & Associates.

23. In 2016, Plaintiff's total wages were approximately $83,000. His adjusted gross income was lower. And, his "Taxed Social Security Earnings" were $54,653. This was

based on his work with MassMutual and Negretti & Associates.

24. For 2017, Plaintiff did not file taxes and still has not filed taxes for that year. Therefore, he has not reported to the IRS how much money he made during that year.

25. For 2018, Plaintiff's total reported income was $8,381 and his reported adjusted gross income was $8,010.

26. Plaintiff is currently unemployed and not seeking employment and therefore has a current income of $0.

27. Plaintiff currently has approximately $32,579.79 in retirement accounts.

28. Mr. Nitka lives with his mother and pays no rent.

29. Mr. Nitka pays, when he has income, approximately $200 a month on food.

30. Mr. Nitka pays, when he has income, $60 a month for his cell phone service and lease under his mother's plan.

31. Mr. Nitka pays, when he has income, approximately "a couple of grand" for a year or two of out of pocket medication.

32. In 2011 Plaintiff executed two master promissory notes for student loans related to his attendance at Phoenix School of Law. Fourteen loans were disbursed to Plaintiff under the 2011 Promissory Notes.

33. As of November 5, 2019, Plaintiff's student loan debt held by DOE related to the 2011 Master Promissory Notes is $209,716.48.

34. Nelnet is the servicer for each of Plaintiff's student loans held by DOE.

35. Mr. Nitka's first student loan payments were due between late November 2013 and early January 2014.

36. Plaintiff did not make any student loan payments or apply for a deferment or forbearance until May 14, 2014. On

May 14, 2014 Plaintiff submitted an unemployment deferment request.

37. Nelnet granted and then applied Plaintiff's May 2014 unemployment deferment request retroactively so that his account with Nelnet and DOE was no longer delinquent.

38. Since Plaintiff's loans entered repayment, he has made eleven payments of $21.82 each, totaling approximately $240.02. These payments were made in 2016 and 2017.

39. Plaintiff is eligible for income-driven loan repayment programs.

40. Plaintiff is eligible for three different loan repayment programs: IBR (Income Based Repayment), REPAYE (Revised Pay as Your Earn), and ICR (Income Contingent Repayment).

41. Under IBR and REPAYE, a borrower's student loan payments are $0 per month whenever a borrower makes less than 150% of the Health and Human Services ("HHS") Poverty Guidelines for their family size. For a single borrower living in Colorado, the 2019 HHS Poverty Guideline is $12,490 and 150% of that amount equals $18,735. As long as a single borrower earns under the threshold of $18,735 and certifies the same to the Department of Education, no monthly payment is required on a DOE loan under these programs.

42. A borrower's "discretionary income" is the amount the borrower earns over 150% of the HHS Poverty Guideline. Under IBR, a borrower's monthly payment is 15% of discretionary earnings, divided by 12. Under REPAYE, a borrower's monthly payment is 10% of discretionary earnings, divided by 12.

43. Under ICR, a borrower's student loan payments will be $0 per month whenever a borrower makes less than 100% of the HHS Poverty Guidelines. For borrowers above this threshold, monthly payments are equal to 20% of discretionary income, divided by 12.

44. Based on Plaintiff's current stated income of $0, Plaintiff's current repayment amount would be $0 per month under any of these programs.

45. IBR, REPAYE, and ICR all have a 25-year repayment period for Mr. Nitka. At the end of that 25-year repayment period, Mr. Nitka's outstanding loan debt would be forgiven.

46. Mr. Nitka first entered the IBR program in June 2015. Therefore, he has at least 21 years left in the repayment period under any of the above income-driven repayment programs.

47. Plaintiff believes his monthly student loan payments are $1,878.30.

48. Plaintiff believes that making student loan payments of $21 per month would not be a hardship for him.

49. Under the IBR program, the program that Plaintiff is currently enrolled in, Plaintiff's adjusted gross income would need to be $20,415 to be required to make payments of $21 per month. Under the REPAYE program, Plaintiff's adjusted gross income would need to be $21,255 to be required to make payments of $21 per month. Under the ICR program, Plaintiff's adjusted gross income would need to be $13,750 to be required to make payments of $21 per month.

The Plaintiff failed to properly identify any additional alleged facts for the Court's consideration. Thus, the Undisputed Facts constitute the only evidence for purposes of the Motion for Summary Judgment.

VII. Legal Conclusions.

Having completed the somewhat laborious task of identifying the Undisputed Facts, the Court now applies the law to the facts and reaches its legal conclusions.

A. The DOE Met Its Burden to Prove the Qualifying Debt.

The DOE bears the initial burden to "prove, by a preponderance of the evidence, that a debt exists and the debt is the type excepted from discharge under § 523(a)(8)." *Hoffman*, 557 B.R. at 184. A type of debt excepted from discharge under Section 523(a)(8) is a debt for an "educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or part by a governmental unit . . . ." 11 U.S.C. § 523(a)(8)(A)(i).

The Undisputed Facts establish that in 2011 the Plaintiff executed two master promissory notes for student loans related to his attendance at law school. Undisputed Fact No. 32. The DOE provided authenticated copies of the two promissory notes made by the Plaintiff in favor of the DOE. Thereafter, the DOE disbursed 14 loans to the Plaintiff. Undisputed Fact No. 32. The DOE provided authenticated copies of the DOE Certificate of Indebtedness and Account Summaries for the indebtedness. As of November 5, 2019, the Plaintiff's student loan debt was $209,716.48. Undisputed Fact No. 33. And, the DOE is the holder of such indebtedness. Undisputed Fact Nos. 33 and 34. The Plaintiff did not dispute any of the foregoing facts. Thus, the DOE established the existence and the amount of the debt.

The DOE also met its burden to prove that the debt is a type of debt excepted from discharge under Section 523(a)(8). Section 523(a)(8) applies to debt for an "educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or part by a governmental unit . . . ." 11 U.S.C. § 523(a)(8)(A)(i). The term "governmental unit" means "United States . . . [and] department, agency, or instrumentality of the United States." 11 U.S.C. § 101(27). The DOE is a department of the United States. The DOE made the loans to the Plaintiff. Undisputed Facts Nos. 32-34. And, the DOE is the holder of such indebtedness. *Id.* Through the Undisputed Facts, the DOE established that the $209,716.48 debt owed by the Plaintiff is the type of debt typically excepted from discharge under Section 523(a)(8).

B. The Plaintiff Failed to Meet His Evidentiary Burden to Show "Undue Hardship."

1. The Shifting Burden of Proof.

Since the DOE met its initial burden under Section 523(a)(8), the burden of proof then shifted to the Plaintiff to establish that the repayment of the student loan debt would constitute an "undue hardship" on the Plaintiff. 11 U.S.C. § 523(a)(8); *Mersmann*, 505 F.3d at 1043; *Alderete*, 412 F.3d 1200; *Polleys*, 356 F.3d at 1308; *Woodcock,* 45 F.3d at 367. To meet his burden, the Plaintiff may not merely stand by his pleadings. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249-50 (1986); *Celotex Corp.*, 477 U.S. at 323-24. Unsubstantiated arguments in briefs will not do. *Versarge v. Township of Clinton N.J.*, 984 F.2d 1359, 1370 (3rd Cir. 1993) ("we have repeatedly held that unsubstantiated arguments made in briefs or at oral argument are not evidence to be considered by this Court."). Instead, the Plaintiff must come forward with evidence to establish "undue hardship."

As explained above and below, in its Motion for Summary Judgment, the DOE provided Undisputed Facts in support of the elements it must prove at trial: the existence of the debt and the character of the debt. In addition, the DOE presented Undisputed Facts negating "undue burden." So, the burden shifted to the Plaintiff. However, the Plaintiff failed to do what was required to defeat the Motion for Summary Judgment. He presented nothing to contest the Undisputed Facts concerning the

existence and nature of the debt owed to the DOE. Also, he failed to make a sufficient evidentiary showing respecting his alleged "undue burden. Bankruptcy courts routinely grant summary judgment under Section 523(a)(8) in cases where debtors fail their summary judgment evidentiary burdens on "undue hardship" issues. *See e.g. Augustin v. U.S. Dep't of Educ. (In re Augustin)*, 588 B.R. 141 (Bankr. D. Md. 2018); *Quackenbush v. U.S. Dep't of Educ. (In re Quackenbush)*, 2018 WL 4056993 (Bankr. S.D. Miss. Aug. 24, 2018); *Fabrizio v. U.S. Dep't of Educ. (In re Fabrizio)*, 369 B.R. 238 (Bankr. W.D. Penn. 2007).

2. The *Brunner* Test.

In the not so distant past, Congress permitted qualified student loans to be discharged through bankruptcy in the same fashion as general unsecured debt. However, "the requirements for student loan discharge have become progressively more restrictive." *Mersmann*, 505 F.3d at 1042. First, the legislative branch put in place a time restriction. Under the 1978 version of the Bankruptcy Code, Congress made student loans nondischargeable in Chapter 7 cases for the first five years of repayment unless it would constitute an "undue hardship." *Id.;* Pub. L. No. 96-598. In 1990, the time restriction was extended to seven years. Pub. L. No. 101-647. Then, in 1998, Congress amended Section 523(a)(8) to eliminate the time restriction altogether and instead establish a presumption of nondischargeability unless the debtor establishes an "undue hardship." Pub. L. No. 105-244. Accordingly, "now student loans may not be discharged in Chapter 7 or 13 cases, except in *one* narrow circumstance when 'excepting such debt from discharge . . . would impose an *undue hardship* on the debtor and the debtor's dependents.'" *Mersmann,* 505 F.3d at 1042-43 (emphasis in original).

The Bankruptcy Code does not specifically define the narrow term "undue hardship." However, the Court is guided by binding appellate precedent. The test used by most courts to determine whether a debtor is entitled to a hardship discharge comes from *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987). *Accord Polleys*, 356 F.3d at 1307 ("Most circuits have adopted a version of the Second Circuit's three-factored test in *Brunner* . . . .").

The *Brunner* facts bear some similarities (but also some differences) to the current Adversary Proceeding. In *Brunner*, the debtor "was not disabled or elderly and had no dependents. She was also skilled and well educated. She did not recount to the court any specific jobs that she had sought and been refused, and did not attempt to find a job outside of her chosen field of work . . . . she filed for discharge within a month of the date the first payment of the loans became due, made virtually no attempt to repay, and did not request a deferment of payment." *Polleys*, 356 F.3d at 1307 (reciting *Brunner* facts). Considering the foregoing, the Second Circuit developed a three-part test referred to as the "*Brunner* Test" and decided that the debtor was not entitled to discharge her student loans. Under the *Brunner* Test, a plaintiff is required to prove:

> (1) that the debtor cannot maintain, based on current income and expenses, a 'minimal' standard of living for herself and her dependents if forced to repay the loans; (2) 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; and (3) that the debtor has made good faith efforts to repay the loans.

Brunner, 831 F.2d at 396. The United States Court of Appeals for the Tenth Circuit adopted the *Brunner* Test. *Alderete*, 412 F.3d at 1204 ("This Court has since considered this question and adopted the *Brunner* test as well."); *Polleys*, 356 F.3d 1309 ("We . . . join the majority of the other circuits in adopting the *Brunner* framework.") All three prongs of the *Brunner* test must be satisfied before an "undue hardship" discharge can be granted under Section 523(a)(8). *Alderete*, 412 F.3d at 1205 ("Under the *Brunner* analysis, if the court finds against the debtor on any of the three parts, the inquiry ends and the student loan is not dischargeable."); *see also Brown v. Sallie Mae, Inc. (In re Brown)*, 442 B.R. 776, 781 (Bankr. D. Colo. 2010).

Although requiring application of the *Brunner* Test, the Tenth Circuit also issued a clarification:

> . . . to better advance the Bankruptcy Code's "fresh start" policy, and to provide judges with the discretion to weigh all the relevant considerations, the terms of the [*Brunner*] test must be applied such that debtors who truly cannot afford to repay their loans may have their loans discharged.

Polleys, 356 F.3d at 1309. But, even with this clarification, the *Brunner* Test is tough to meet. *See e.g. Hemar Ins. Corp. of Amer. v. Cox (In re Cox)*, 338 F.3d 1238, 1243 (11th Cir. 2003) ("Considering the evolution of § 523(a)(8), it is clear that Congress intended to make it difficult for debtors to obtain a discharge of their student loan indebtedness.")

a. <u>The First *Brunner* Element</u>.

The first *Brunner* element requires the Plaintiff to prove that he "cannot maintain, based on current income and expenses, a 'minimal' standard of living for [himself] . . . if forced to repay the loans." The Undisputed Facts establish that the Plaintiff is currently in dire financial circumstances. He is "currently unemployed and not seeking employment and therefore has current income of $0." Undisputed Fact No. 26. That is as low as income goes. According to his Schedule I, his monthly expenses are about $2,284. Docket No. 31 in Main Case; *see also* Undisputed Fact Nos. 28-31 (identifying certain of Plaintiff's expenses that he pays "when he has income"). So, on this record, the Plaintiff is deeply in the hole every month thereby suggesting that he cannot maintain a "'minimal' standard of living" now.

The DOE argues that the Court should not focus "solely on a debtor's current income, because a debtor seeking discharge must demonstrate 'that he has maximized his ability to produce adequate income to pay his expenses and his student loans.'" MSJ at 12 (citing *Gesualdi v. Educ. Credit Mgmt. Corp. (In re Gesualdi)*, 505 B.R. 330, 339 (Bankr. S.D. Fla. 2013)). The *Gesualdi* decision certainly supports the DOE's argument. It has some persuasive value, but it is not precedential.

The Court chooses to look closer to home for authority on this issue. In *Polleys*, the Tenth Circuit explained the import of the first *Brunner* factor:

> This first part should serve as the starting point for the undue hardship inquiry because information regarding a debtor's current financial situation generally will be concrete and readily obtainable.

Polleys, 356 F.3d at 1310. So, the appellate court focused on the "current financial situation" — not the debtor's ability to increase or maximize income. Furthermore, the Tenth Circuit appeared to acknowledge that the first *Brunner* factor was satisfied in *Polleys* because the debtor established that she "ha[d] no discretionary income, live[d] on the largess of her parents, and [was] unemployed." *Id.*; *see also Roe v. College Access Network (In re Roe)*, 295 Fed. Appx. 927, 929 (10th Cir. 2008) (unpublished) (debtor was unemployed; implicitly suggesting that dire current circumstances satisfy first *Brunner* prong); *Brown*, 442 B.R. at 782 (evaluating only current income and expenses under first *Brunner* element and holding that "based on current income and expenses, [the debtor] is not able to maintain a minimal standard of living for herself and her three children (with or without having to repay the loan).").

The Court concurs with the foregoing authority and concludes that the first *Brunner* factor is a "starting place" looking primarily toward "current income and expenses." Considerations of income maximization are more appropriately considered under the second and/or third *Brunner* elements rather than the more static first *Brunner* factor. The Court has evaluated the Plaintiff's "current income and expenses" and the evidence is that he is unemployed and earns nothing. Under the current circumstances (*i.e.*, with no job) the Plaintiff cannot currently maintain a "'minimal' standard of living. Thus, the record evidence is sufficient for a rational trier of fact to decide in the Plaintiff's favor on the first *Brunner* factor.

b. The Second *Brunner* Element.

The second element of the *Brunner* Test requires a plaintiff to show that "additional circumstances exist indicating that this state of affairs [*i.e.*, the current financial condition] is likely to persist for a significant portion of the repayment period of the student loans." *Brunner*, 831 F.2d at 396. As further explained by the Tenth Circuit, when applying the second *Brunner* factor, the trial court:

> . . . need not require a "certainty of hopelessness." Instead, a realistic look must be made into a debtor's circumstances and the debtor's ability to provide for adequate shelter, nutrition, health care, and the like. Importantly, "courts should base their estimation of a debtor's prospects on specific articulable facts, not unfounded optimism," and the inquiry into future circumstances should be limited to the forseeable future, at most over the term of the loan.

Polleys, 356 F.3d at 1310 (citations omitted). The reason for the forward-looking second *Brunner* element is simple. "A recent graduate's salary might be so low that it is difficult to pay the loans now, but it is clear that his salary will increase in the future and therefore his loans should not be discharged." *Alderete*, 412 F.3d at 1205.

The second *Brunner* factor can be further broken down into two sub-elements. First, the Plaintiff must prove by a preponderance of the evidence "that his financial situation is not likely to improve. Implicit in this requirement is that the debtor demonstrate that he has made, or is currently making, diligent efforts to secure stable employment or demonstrate that he is unemployable." *Lozada v. Educ. Credit Mgmt. Corp. (In re Lozada)*, 594 B.R. 212, 226 (Bankr. S.D.N.Y. 2018). Second, the Plaintiff must establish by a preponderance of the evidence that his "financial difficulties are likely to persist for a significant portion of the repayment period." *Id.* Disabilities, including emotional or medical conditions, can be a basis for satisfying the second *Brunner* factor. *See, e.g.*, *Polleys*, 356 F.3d at 1311. However, a permanent and disabling medical condition is not a prerequisite for dischargeability of student loans. *Id.*

So, what are the Undisputed Facts relevant to the second *Brunner* prong in this Adversary Proceeding? The Plaintiff is relatively young — just 37 years old. Undisputed Fact No. 3. He has his whole life ahead of him. He has no children and no dependents. *Id.* At least for now, he only needs to find a way to make ends meet for himself. The Plaintiff is highly educated. He graduated from a prestigious liberal arts school, Colorado College, in May 2005 with a double Bachelor of Arts degree in English and Biology. Undisputed Fact No. 4. He continued his education by attending the Phoenix School of Law. He graduated with a Juris Doctorate degree in May 2013. Undisputed Fact No. 11.

In terms of work, the Plaintiff has an interesting and varied employment history. While in college, the Plaintiff served as a tutor in anatomy and physiology, as well as, a paraprofessional for surgical anatomy. Undisputed Fact No. 5. He has strong experience in the hospitality sector. He worked as the co-director of U.S.A. House in Torino, Italy during the 2006 Winter Olympic Games. Undisputed Fact No. 6. The U.S.A. House was a high-profile hospitality center for celebrities, athletes, politicians, and dignitaries. *Id.* At various times, the Plaintiff worked in hospitality for one of the premiere Colorado resorts: the Broadmoor Resort. Undisputed Fact No. 7. Later, he was employed as a manager and supervisor for four high-volume nightclubs in Colorado. *Id.* He also has been engaged in the fitness industry as a fitness coach and

co-chair for the Board of Advisors for a fitness technology company. Undisputed Fact Nos. 10 and 12.

After law school, the Plaintiff focused mainly on other employment. Unfortunately, he did not pass the Arizona bar examination. Undisputed Fact No. 14. Many attorneys fail the bar examination a time or two and go on to very successful careers in the law. However, although the Plaintiff believes he can pass the bar examination, he has not tried again and taken the bar examination in Colorado. Undisputed Fact No. 14. In any event, the Plaintiff entered the legal field as a contract law clerk for a law firm: Negretti & Associates. Undisputed Fact No. 13. He did legal research and writing for the law firm for about 4-5 years from 2013 until May 2018. Undisputed Fact No. 13 and 15. He earned approximately $25 per hour at Negretti & Associates. Undisputed Fact No. 13. After many years, the law firm terminated the Plaintiff because of the vindictive actions of the Plaintiff's ex-wife's mother. Undisputed Fact No. 15. There is no evidence that the Plaintiff's work product at the law firm was substandard. Indeed, his long tenure with the law firm suggests otherwise. Meanwhile, from August 2014 to January 2018, the Plaintiff supplemented his law firm income by selling life insurance for MassMutual, a big name in the insurance industry. Undisputed Fact No. 16. He earned state and national financial licenses to sell life insurance and annuities; however, the licenses were suspended because the Plaintiff failed to respond to a letter about his use of the VPN network. Undisputed Fact No. 17. Although use of a VPN network is common, the Plaintiff has not taken any steps to get back into good standing for his licenses. *Id.*

For reasons not clear from the Undisputed Facts, the Plaintiff seems to have given up any serious efforts at employment starting in 2018 even though he has a strong educational background and great depth of experience in numerous industries. He testified that he is not currently seeking employment. Undisputed Fact No. 26. He seems to have no interest in the hospitality sector "mostly because [he] just doesn't want to work in a restaurant." Undisputed Fact No. 20. Although he occasionally applies for positions, the Plaintiff's main focus has been developing new business ventures including a software application and converting a bus into a tiny house. Undisputed Fact No. 21. These so-far-unpaid efforts take up almost 100 hours a week — so the Plaintiff seems not to have time for a paid position. That is his choice.

Financially, the Plaintiff has experienced ups and downs. He earned above median-income gross wages in 2015 and 2016. Undisputed Fact Nos. 22 and 23.[7] The Court has received no information in the summary judgment process concerning the Plaintiff's 2017 income. His 2018 gross income was only $8,381. Undisputed Fact No. 25. From a health perspective, the Plaintiff voluntarily committed that he would not raise any medical issues in support of his claims in the Complaint. Tr. at 34.

So, in summary, the Undisputed Facts demonstrate that the Plaintiff is a young, highly-educated man with no dependents. He has job experience in numerous areas.

[7] The Court recognizes the different income measures presented including "gross income," "adjusted gross income," and "taxed social security earnings." The differences are not material for the Court decision on the Motion for Summary Judgment.

His best prospects would seem to be focusing on passing the bar examination and practicing law and/or reinstating his state and national licenses to sell insurance and annuities. He has done neither. And, he declines to return to the hospitality industry. So, he is unemployed for the moment. However, from all indications he has a strong potential for future employment should he choose to go back to work. There is no record evidence of any medical disabilities.

Against this background of Undisputed Facts, the Plaintiff failed in his burden to provide evidence that his financial situation is not likely to improve. He did not show, with competent evidence, that he has made, or is currently making, diligent efforts to secure stable employment or that he is trying to maximize his personal and professional resources. The Court received nothing on that score except argument in the Response. The Plaintiff has hinted repeatedly at a medical disability. However, he committed not to raise that issue in this Adversary Proceeding. And, in any event, he provided no competent evidence that any "additional circumstances exist indicating that [his] current state of affairs are likely to persist for a significant portion of the repayment period of the student loans." *Polleys*, 356 F.3d at 1310 (referring to the second element of the *Brunner* test). Even if the Plaintiff had provided evidence that his financial situation was unlikely to improve (which he has not), the Plaintiff also is required to provide evidence that his financial difficulties are likely to persist for a significant portion of the repayment period for his student loans. His remaining repayment period is at least 21 years. Undisputed Fact No. 46. The Plaintiff has not demonstrated that he will be chronically unemployed for a significant portion of that 21-year period. Indeed, on his Schedule J, the Plaintiff stated: "I do not plan on remaining in my current desperate situation. I don't have specifics, but I fully anticipate pulling myself out of these circumstances." Just so.

The Court has sympathy for the Plaintiff. Hopefully, his future will be bright with economic success. Perhaps not. But what is clear for now is that the Plaintiff simply failed to meet his evidentiary burden in contesting the second prong of the *Brunner* Test. On the current record, no rational trier of fact could determine that additional circumstances exist indicating that the Plaintiff's current dire financial condition is likely to persist for a significant portion of the repayment period of his student loans. So, the Court is obligated to deny discharge of the Plaintiff's student loan debt owed to the DOE.

c. The Third *Brunner* Element.

The Debtor's failure to provide evidence sufficient for the Court to be able to decide the second *Brunner* element in his favor is fatal to his case. *Roe*, 295 Fed. Appx. at 929 ("If a debtor fails to show all three elements, there is no undue hardship and the loans cannot be discharged.") However, for good measure, the Court also considers the third *Brunner* element pursuant to which the Plaintiff must prove that he "has made good faith efforts to repay the loans." The Tenth Circuit has instructed that "an inquiry into a debtor's good faith should focus on questions surrounding the legitimacy of the basis for seeking a discharge." *Polleys*, 356 F.3d at 1310. The failure

to make loan payments is clearly relevant; however "the failure to make a payment, standing alone, does not establish a lack of good faith." *Id.* at 1311; *see also Roe*, 295 Fed. Appx. at 930-31 (same).

The Undisputed Facts demonstrate that on student loan debt of about $210,000, the Plaintiff has made only very nominal payments. He repaid $130.92 in 2016 and $109.10 in 2017. That totals to just $240.02 over the life of the obligation so far. Undisputed Fact No. 38. Mathematically, the Plaintiff has paid only about 0.1% of the debt for his law school education. It is really a pittance. Even though the Plaintiff had above median-income gross income in 2015 and 2016, he demonstrated no real resolve to materially apply his income to the student loan debt.

However, the Plaintiff did something to address his delinquent student loan obligations. About five or six months after he failed to make the initial payments to the DOE, the Plaintiff applied for a deferment. Undisputed Fact Nos. 35-37. Then, the next year he entered into an Income Based Repayment Program (the "IBR"). Undisputed Fact Nos. 39-46 ("Mr. Nitka first entered the IBR program in June 2015.") Under the IBR, and based upon the Plaintiff's current stated income of $0, the Plaintiff's current repayment amount is $0 per month. Undisputed Fact Nos. 41-42 and 44. If the Plaintiff's adjusted gross income increases to $20,415 (which is just above 150% of the Health and Human Services Poverty Guideline), then the Plaintiff would be required under the IBR to pay only $21 per month. Undisputed Fact No. 48. The Plaintiff has candidly conceded that a payment of $21 per month would not be a hardship. Undisputed Fact No. 48. If the Plaintiff remains in the IBR and makes any required monthly payments but does not satisfy the debt in full in the next 21 years, then the outstanding student loan debt would be completely forgiven by the DOE. Undisputed Fact Nos. 45-46.

One might wonder why the Plaintiff is so intent on discharging his student loan debt when he is enrolled in a plan — the IBR — allowing him to pay just $0 per month for now while he is unemployed and then only nominal payments ($21 per month) after he hits 150% of the Health and Human Services Poverty Guideline. Of course, payments would increase if the Plaintiff's income increases in the future. And, if the Plaintiff is not able to complete full repayment after 21 years, then the debt would be completely forgiven. That type of repayment plan seems almost tailor-made for the circumstances presented in this case.

However, the Court's focus on the third *Brunner* element is not really on common sense solutions. Instead, the Court is called upon to address the Plaintiff's good faith and the legitimacy of the basis for seeking a discharge. The Tenth Circuit has instructed the following to be considered under the third *Brunner* element:

> [T]he failure to make a payment, standing alone, does not establish a lack of good faith. Courts should consider additional factors such as whether the debtor immediately sought to discharge her student loans or opted to

> consolidate or defer her loans. Courts also ought to consider whether the debtor is "actively minimizing current household living expenses and maximizing personal and professional resources." Additionally, courts should assess whether the debtor is "attempting to abuse the student loan system" by seeking to discharge her debt. A debtor who "willfully contrives a hardship in order to discharge student loans should be deemed to be acting in bad faith."

Roe, 295 Fed. Appx. at 930-31 (citing *Polleys*, 356 F.3d at 1311-12 and *Alderete*, 412 F.3d at 1206). Weight also should be given to the steps the Plaintiff took prior to filing for bankruptcy such as the entering into an income repayment program. *Alderete*, 412 F.3d at 1206.

Based upon the Undisputed Facts (and applying summary judgment standards), the Court finds that a reasonable trier of fact could determine that the Plaintiff acted in good faith. It is a very weak case for the Plaintiff. However, the evidence establishes that the Plaintiff did not seek to discharge his student loan debt immediately after he graduated from law school. Instead, he filed for bankruptcy and sought a discharge about five years after the debt became due. *Compare with Brunner*, 831 F.2d at 397 ("Brunner filed for the discharge within a month of the date the first payment on her loans became due.") And, then, he did not ignore his student loan obligations completely. The Plaintiff sought and obtained an initial deferment.

Thereafter, the Plaintiff entered into an income-based repayment plan — the IBR. "[P]articipation in a repayment program is not required to satisfy the good-faith prong of the *Brunner* test." *Alderete*, 412 F.3d at 1206. But, enrolling in an income repayment plan is an "important indicator of good faith." *Id.* at 1206 (citing *Alderete v. Colo. Student Loan Program (In re Alderete)*, 289 B.R. 410, 419 (Bankr. D.N.M. 2002)). In *Alderete*, the debtor failed to even consider applying for such an option. *Id.* at 1206. Thus, the trial court and the appellate court both held that the debtor failed to satisfy the third *Brunner* element. Similarly, in *Roe,* the debtor lacked good faith because, among other things, she refused to consolidate her loan and enter into an income-based repayment plan. *Roe*, 295 Fed. Appx. at 931. *See also Polleys*, 356 F.3d at 1312 (finding good faith since debtor consolidated her loans and "entered into deferral programs."). So, again, the Plaintiff took some action to address his student loan debt by entering into the IBR. And, then, the Plaintiff did make some payments. It was not much: only eleven payments totaling $240.02. But that is a small shred of evidence supporting good faith, an inquiry which focuses on the legitimacy of the debtor's basis for seeking a discharge. *Polleys*, 356 F.3d at 1310. *Compare with Roe*, 295 Fed. Appx. at 930 (debtor showed lack of good faith when she "had never made a payment on her student loans" and had not applied for a job in over eleven years).

The Court also considers whether the Plaintiff has been "actively minimizing current household living expenses." He has. The evidence shows that the Plaintiff lives

rent-free with his mother. Undisputed Fact No. 28. When he can afford it, he spends only about $200 per month on food. Undisputed Fact No. 29.

There is no record evidence that the Plaintiff willfully contrived a hardship in order to discharge student loans. Perhaps he made some bad decisions and is not trying hard enough. Indeed, the evidence is that he is not "maximizing personal and professional resources." As set forth previously, the Plaintiff has acknowledged that he is not actively seeking outside employment. Undisputed Fact No. 26. Instead he is spending almost all his time on his own projects (developing a software application and building a tiny house) hoping that such efforts eventually will pay a dividend.

In the end, there is some evidence both for and against the Plaintiff's good faith. On the current record, the Plaintiff's likelihood of prevailing on the third *Brunner* element seems weak. However, in a summary judgment posture, the Court views the evidence in the light most favorable to the nonmovant (the Plaintiff). The record evidence could lead a rational fact-finder to resolve the third *Brunner* factor in favor of the Plaintiff.[8]

VIII. Final Conclusion.

This is a difficult case. The Plaintiff is currently unemployed and presently unable to contribute much to the repayment of his significant student loan debt incurred for law school. Faced with the Motion for Summary Judgment, it was incumbent on the Plaintiff to come forward with competent evidence bearing on "undue hardship" under Section 523(a)(8) and the *Brunner* Test. The Court is somewhat reticent to decide the case on summary judgment rather than after trial. However, the Plaintiff did not provide evidence pursuant to which a rational trier of fact could determine (under the second *Brunner* factor) that additional circumstances exist indicating that the Plaintiff's current dire financial condition is likely to persist for a significant portion of the repayment period of his student loans. Thus, summary judgment in favor of the DOE is mandated.

Dated this 6th day of January, 2020.

BY THE COURT:

Thomas B. McNamara
United States Bankruptcy Judge

[8] The Court makes this determination based upon the summary judgment context pursuant to which it must view the evidence in the light most favorable to the Plaintiff. However, if the same evidence were presented at trial without such presumption, the Court very well might reach a different conclusion.

FILED
U.S. Bankruptcy Appellate Panel of the Tenth Circuit
July 23, 2020
Blaine F. Bates
Clerk

NOT FOR PUBLICATION*

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE TENTH CIRCUIT

IN RE GORDON BEECHER NITKA, Debtor.	BAP No. CO-20-002
GORDON BEECHER NITKA, Appellant, v. DEPARTMENT OF EDUCATION, Appellee.	Bankr. No. 18-16296 Adv. No. 18-01230-TBM Chapter 7 OPINION

Appeal from the United States Bankruptcy Court
for the District of Colorado

Submitted on the briefs.**

Before **CORNISH**, **HALL**, and **LOYD**, Bankruptcy Judges.

CORNISH, Bankruptcy Judge.

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* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8026-6.

** After examining the briefs and appellate record, the Court has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. Bankr. P. 8019(b). The case is therefore submitted without oral argument.

The standard for declaring student loan debt dischargeable is exacting and only available to a debtor with no real prospects of earning income that supports a minimum standard of living while repaying the debt. The debtor in this appeal asks the Court to reverse the bankruptcy court's dismissal of a complaint seeking to discharge student loan debt pursuant to 11 U.S.C. § 523(a)(8).[1] The debtor contends he is unable to obtain gainful employment despite a strong employment history and his prioritization of multiple entrepreneurial pursuits. Based on these facts, we AFFIRM the Bankruptcy Court's dismissal of the debtor's complaint which sought to discharge his student loans.

I. Factual & Procedural Background

Gordon Beecher Nitka (the "Debtor") filed a pro se petition under chapter 7 of the Bankruptcy Code in the Bankruptcy Court for the District of Colorado (the "Bankruptcy Court") on July 19, 2018. The Debtor scheduled no secured claims in his petition. Aside from minimal claims for unpaid state and federal income taxes, the Debtor's largest unsecured debt is a student loan in the amount of $191,081 owed to the Department of Education (the "Department"). Simultaneously, the Debtor also filed an adversary proceeding requesting a discharge of the student loan debt as an undue hardship pursuant to § 523(a)(8) (the "Complaint").

The Complaint named the Department and its loan servicer, NelNet, Inc., as defendants. The Complaint alleged the Debtor incurred student loan debt to attend law

[1] All future references to "Bankruptcy Code," "Code," or "§," refer to Title 11 of the United States Code.

school between 2010 and 2013 at Phoenix School of Law. Since graduating from law school, the Complaint alleged the Debtor experienced "a series of unfortunate legal and medical events that caused dire current financial circumstances."[2] Conflicts arose in the discovery stage of the adversary proceeding as the Department probed the Debtor's alleged medical conditions. The Department conducted a deposition of the Debtor, during which he objected to questions pertaining to the unfortunate medical events that impacted his financial situation, including explaining a $200 monthly medical expense listed in discovery responses and the medications he took for his condition. To resolve the Debtor's objection, the Bankruptcy Court conducted a telephonic hearing at which it sustained the Debtor's objection to disclosing his current medications but overruled his objection to disclosure of medical events and the $200 monthly medical expenses. As additional discovery disputes arose related to the Department's requests for production and interrogatories, the Bankruptcy Court ordered the Debtor to supplement prior discovery responses.

The Debtor's supplemental discovery responses prompted the Department to file a motion to compel him to disclose additional information "regarding his alleged medical and mental health conditions as a basis for finding undue hardship or affecting his ability to obtain or retain employment" or to allow reopening of discovery (the "Discovery Motion").[3] The Department alleged the Debtor's supplemental discovery responses

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2 *Debtor's Complaint to Determine Dischargeability of Student Loan* at 2, *in* Appellant's App. at 2.

3 *Defendant's Motion for Further Orders Regarding Incomplete Disclosures, and For Order Limiting Plaintiff's Ability to Introduce Evidence of Alleged Medical*

appeared to rely principally on alleged medical conditions as a basis for his hardship. The Department indicated this was the first time the Debtor appeared to rely on his medical condition to support a finding of hardship and requested additional discovery to obtain medical records and conduct another deposition. The Bankruptcy Court held a hearing on the Discovery Motion and the Debtor's response, at which it gave the Debtor two options: (1) if the Debtor intended to rely on the medical or mental health conditions at trial, the court would require him to produce additional information and discovery would be reopened; or (2) if the Debtor did not intend to rely on the medical or mental conditions at trial, the court would grant the motion to exclude the introduction of such evidence at trial. After wavering, the Debtor "voluntarily admitted on the record that he did not intend to rely on any medical and/or mental health condition(s) in support of his case at trial."[4] Accordingly, the Bankruptcy Court granted the Department's request to prohibit the Debtor from introducing evidence regarding his medical conditions at trial (the "Discovery Order").[5]

The Debtor appealed the Discovery Order to this Court,[6] sought leave to appeal an interlocutory order,[7] sought certification of a direct appeal to the United States Court of Appeals for the Tenth Circuit Court (the "Tenth Circuit"),[8] and requested a stay pending

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Conditions Under Rule 37, or, in the Alternative, Leave to Reopen Limited Discovery at 1, *in* Appellant's App. at 73.

4 *Minutes of Proceeding/Minute Order* at 2, *in* Appellant's App. at 103.

5 *Id.* at 1, *in* Appellant's App. at 102.

6 Appellant's App. at 108.

7 Appellant's App. at 110.

8 Appellant's App. at 185.

appeal. The Bankruptcy Court denied the Debtor's request for certification to the Tenth Circuit and stay pending appeal.[9] Shortly thereafter, this Court dismissed the appeal of the Discovery Order as interlocutory.

Motion for Summary Judgment

After entry of the Discovery Order, the Department filed a motion for summary judgment, arguing there were no genuine issues of material fact (the "Motion for Summary Judgment") pursuant to Federal Rule of Civil Procedure 56, made applicable to this case by Federal Rule of Bankruptcy Procedure 7056.[10] The Motion for Summary Judgment alleged the Debtor incurred debts totaling $209,716.48 as of November 5, 2019, to attend law school in Arizona. The Debtor graduated from law school but never passed the Arizona bar exam. The Debtor worked as a contract employee at an Arizona law firm earning $25 per hour until the spring of 2018. The Debtor also sold insurance for MassMutual between 2014 and 2018.

The Debtor participated in an income-driven repayment program that reduced his monthly student loan payment based on his income beginning in June 2015. The Debtor made eleven payments on the student loan, totaling $240.02. Based on the Debtor's current income of $0, his current monthly payment is $0. Finally, the Motion for

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9 *Procedural Order on Plaintiff's Motion for Leave to Appeal, Request for Certification of Direct Appeal, and Motion for Stay Pending Appeal* at 4, *in* Appellant's App. at 338.

10 *Defendant's Motion for Summary Judgment*, *in* Appellant's App. at 388. All future references to "Bankruptcy Rule(s)" are to the Federal Rules of Bankruptcy Procedure. All future references to "Civil Rule(s)" are to the Federal Rules of Civil Procedure.

Summary Judgment asserted that if the Debtor continues the income-driven repayment plan for 25 years, the remaining student loan balance will be forgiven.

The Debtor responded to the Motion for Summary Judgment and filed a motion for sanctions, alleging the Department made false statements of fact in the Motion for Summary Judgment. The Debtor argued the following statements were false: (1) that he first raised reliance on medical issues as support for finding undue hardship in his supplemental discovery responses; (2) that he was 36 years old (the Debtor was 37 at the time); (3) that he had not looked for employment since the spring of 2018; and (4) that his taxable income in 2015 was $28,856 instead of $61,901, and in 2016 was $54,643 instead of $83,000.[11]

The Bankruptcy Court compared the undisputed facts asserted by the Department with the record before it, finding "[e]very alleged undisputed fact is accurate and fully supported."[12] Accordingly, the Bankruptcy Court denied the Debtor's motion for sanctions[13] and a subsequent motion to reconsider.[14] After considering the undisputed facts, the Bankruptcy Court concluded the Debtor's complaint did not allege sufficient facts to support discharging the student loan debt pursuant to § 523(a)(8). The Bankruptcy Court, in a detailed and articulate order, granted the Motion for Summary

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11 *Plaintiff's Motion for Sanctions*, *in* Appellant's App. at 417.

12 *Order Granting Defendant's Motion for Summary Judgment* at 7, *in* Appellant's App. at 557.

13 *Order Denying Plaintiff's Motion for Sanctions*, *in* Appellant's App. at 535.

14 *Order Denying Plaintiff's Motion to Reconsider Order Denying Plaintiff's Motion for Sanctions*, *in* Appellant's App. at 545.

Judgment on January 6, 2020,[15] and vacated the trial in the adversary proceeding (the "Summary Judgment Order").[16] The Debtor filed a timely notice of appeal of the Summary Judgment Order.[17]

The Debtor's Educational & Employment History

The Debtor enrolled in Colorado College in Colorado Springs, Colorado, in 2002. During his college years, the Debtor worked as a tutor in anatomy and physiology and a surgical anatomy paraprofessional. He graduated from Colorado College in May 2005, completing his courses early by attending summer sessions. Also, during college and thereafter, the Debtor worked as a bartender at the Broadmoor Resort in Colorado Springs. In 2006, the Debtor served as a "co-director of operations of the U.S.A. House in Torino, Italy," a hospitality program at the 2006 Winter Olympics.[18] The Debtor also worked as security at a nightclub in Colorado Springs and became involved in nightclub management until he decided to attend law school in 2010.[19]

The Debtor attended Phoenix School of Law in Phoenix, Arizona, graduating in May 2013. While in law school, the Debtor held several legal-related jobs in the Phoenix area. The Debtor also provided services as a fitness coach for bodybuilding clients and served as an advisor to an unsuccessful San Francisco based start-up fitness company.

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15 *Order Granting Defendant's Motion for Summary Judgment*, *in* Appellant's App. at 551.

16 *Notice of Ruling and Order Vacating Trial*, *in* Appellant's App. at 550.

17 *Notice of Appeal*, *in* Appellant's App. at 588.

18 Summary Judgment Order at 18, *in* Appellant's App. at 568.

19 *Id.* at 18-19, *in* Appellant's App. at 568-69.

After graduating from law school, the Debtor sat for but failed the Arizona bar exam twice. Beginning in the summer of 2013, the Debtor took a position as a law clerk at the Arizona law firm, Negretti & Associates. His responsibilities included performing legal research and writing for personal injury cases. The Debtor worked as a contract employee earning $25 per hour between the summer of 2013 and either April or May of 2018, rising to the rank of firm director.

In addition to working for the law firm, the Debtor sold commission-based insurance products for MassMutual between August 2014 and January 2018. The Debtor worked twenty to thirty hours per week selling insurance. The position required him to hold a license to sell insurance and annuities as well as other specialized financial services licenses such as the Series 6. MassMutual terminated him based on issues related to computer access and monitoring. At times, the Debtor earned income from the law firm and MassMutual that allowed him to support himself. The Debtor earned gross income of $51,901 in 2015, and $83,000 in 2016. The Debtor did not file an income tax return in 2017, and in 2018 he reported $8,381 in income.

The Debtor indicated that although he applied for numerous positions, he has been unable to find employment. Therefore, he is concentrating his efforts on two fronts: building a mobile application that allows restaurant servers to take customer payments on a mobile phone and converting an old bus into a vacation rental that he plans to park near Colorado ski resorts. The Debtor lives with his mother and pays no rent.

Medical Circumstances

Although the Debtor's complaint alleged that medical events impacted his financial situation, it did not elaborate on his medical conditions nor how they prevented him from working. At his deposition, the Debtor testified he suffered an injury to his right bicep, which caused "physical labor [to be] painful to do, not impossible but painful."[20] The Debtor also stated that other undisclosed medical conditions impacted his ability to work in the past but refused to provide further details.

II. Jurisdiction

"With the consent of the parties, this Court has jurisdiction to hear timely-filed appeals from 'final judgments, orders, and decrees' of bankruptcy courts within the Tenth Circuit."[21] Neither party elected to have this appeal heard by the United States District Court for the District of Colorado; thus, the parties have consented to our review.

"A decision is considered final if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'"[22] The disposition of an adversary proceeding is a final order or judgment for purposes of appellate review.[23] Additionally,

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20 *Deposition* at 119, *in* Appellant's App. at 97.

21 *Straight v. Wyo. Dep't of Trans. (In re Straight)*, 248 B.R. 403, 409 (10th Cir. BAP 2000) (first quoting 28 U.S.C. § 158(a)(1), and then citing 28 U.S.C. § 158(b)(1), (c)(1) and Fed. R. Bankr. P. 8002).

22 *In re Duncan*, 294 B.R. 339, 341 (10th Cir. BAP 2003) (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996)).

23 *Hook v. Manzanares (In re Hook)*, 391 B.R. 211, 2008 WL 2663370, at *2 (10th Cir. BAP July 8, 2008) (first citing 28 U.S.C. § 158(a)(1) & (c)(1); Fed. R. Bankr. P. 8001–8002; 10th Cir. BAP L.R. 8001–1; and then citing *Quackenbush,* 517 U.S. at 712 (order is final if it "'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'")).

any prior interlocutory orders or decrees merge into a final judgment.[24] Accordingly, we have jurisdiction to hear the appeal of the order granting the Motion to Dismiss and any interlocutory orders from which the Debtor seeks appeal.

24 *McBride v. CITGO Petroleum Corp.*, 281 F.3d 1099, 1104 (10th Cir. 2002) (citing *Cooper v. Am. Auto. Ins. Co.*, 978 F.2d 602, 607-09 (10th Cir. 1992) ("[A] notice of appeal which names the final judgment is sufficient to support review of all earlier orders that merge in the final judgment.")

III. Standard of Review

We review a bankruptcy court's dismissal of an adversary proceeding on summary judgment *de novo*, applying the same standard as the bankruptcy court.[25] "Whether a debtor's student loans would impose an 'undue hardship' under § 523(a)(8) is a question of law. It requires a conclusion regarding the legal effect of the bankruptcy court's findings as to the debtor's circumstances, and is therefore reviewed de novo."[26]

"*De novo* review requires an independent determination of the issues, giving no special weight to the bankruptcy court's decision."[27] "Summary judgment is appropriate only if 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' when viewed in the light most favorable to the non-moving party, 'show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'"[28]

The Debtor also appeals several of the Bankruptcy Court's rulings on discovery issues and a motion for sanctions. Discovery rulings and decisions on sanctions are reviewed for abuse of discretion.[29] A trial court "abuses its discretion when it (1) fails to

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25 *LTF Real Estate Co. v. Expert S. Tulsa, LLC (In re Expert S. Tulsa, LLC)*, 522 B.R. 634, 643 (10th Cir. BAP 2014) (quoting *Rushton v. Bank of Utah (In re C.W. Mining Co.)*, 477 B.R. 176, 180 (10th Cir. 2012), *aff'd*, 749 F.3d 895 (10th Cir. 2014)).

26 *In re Alderete*, 412 F.3d 1200, 1204 (10th Cir. 2005) (quoting *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1305 (10th Cir. 2004)).

27 *In re Expert S. Tulsa*, 522 B.R. at 643(citing *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991)).

28 *Expert S. Tulsa, LLC v. Cornerstone Creek P'ship (In re Expert S. Tulsa, LLC)*, 534 B.R. 400, 408 (10th Cir. BAP 2015) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986)).

29 *Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 938 (10th Cir. 2005) (citing *Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1550 (10th Cir. 1995)) (explaining discovery orders are

exercise meaningful discretion . . . , (2) commits an error of law, such as applying an incorrect legal standard or misapplying the correct legal standard, or (3) relies on clearly erroneous factual findings."[30]

IV. Discussion

a. Discovery Orders

The Debtor assigns error to several of the Bankruptcy Court's orders related to discovery issues. First, the Debtor argues the Bankruptcy Court erred in requiring him to provide evidence of his medical conditions in discovery in order to introduce that evidence at trial. Next, the Debtor argues the Bankruptcy Court erroneously denied his motion to strike the affidavit of Christopher Bolander as an exhibit to the Motion for Summary Judgment. Finally, the Debtor argues the Bankruptcy Court erred in denying his request for a full transcript of the deposition the Department took of him.

i. Discovery Related to the Debtor's Medical Condition

The Debtor argues the Bankruptcy Court erred when it determined the Department did not receive sufficient notice to take discovery of issues related to his medical condition. As such, the Debtor asserts the Bankruptcy Court abused its discretion in disposing of the Department's Discovery Motion by giving the Debtor the option of either reopening discovery regarding his medical issues or excluding all evidence of the Debtor's medical condition at trial.

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review for abused of discretion); *Gust v. Jones*, 162 F.35 587, 598 (10th Cir. 1998) (reviewing a motion for sanctions for abuse of discretion).

30 *Farmer v. Banco Popular of N. Am.*, 791 F.3d 1246, 1256 (10th Cir. 2015).

We find support for the Bankruptcy Court's decision in Tenth Circuit case law. The "[o]ne clear purpose of the federal discovery rules is to facilitate fact finding and prevent unfair surprise."[31] To prevent such surprise, a trial court may order the reopening of discovery at its discretion.[32] The Tenth Circuit recognizes

> several relevant factors in reviewing decisions concerning whether discovery should be reopened. These include: 1) whether trial is imminent, 2) whether the request is opposed, 3) whether the non-moving party would be prejudiced, 4) whether the moving party was diligent in obtaining discovery within the guidelines established by the court, 5) the foreseeability of the need for additional discovery in light of the time allowed for discovery by the district court, and 6) the likelihood that the discovery will lead to relevant evidence.[33]

Furthermore, "[a] party that without substantial justification fails to disclose information required by [Civil] Rule 26(a) . . . is not, unless such failure is harmless, permitted to use as evidence at a trial . . . any . . . information not so disclosed."[34] "The determination of whether a [Civil] Rule 26(a) violation is justified or harmless is entrusted to the broad discretion of the [trial] court. A [trial] court need not make explicit findings concerning the existence of a substantial justification or the harmlessness of a failure to disclose."[35]

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31 *Dunlap v. City of Okla. City*, 12 F. App'x 831, 834 (10th Cir. June 7, 2001) (unpublished) (citing Fed. R. Civ. P. 26)).

32 *Smith v. United States*, 834 F.2d 166, 169 (10th Cir. 1987) (citing *United States v. Reliance Ins. Co.*, 799 F.2d 1382, 1387 (9th Cir. 1986)).

33 *SIL-FLO, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1514 (10th Cir. 1990) (quoting *Smith*, 834 F.2d at 169).

34 *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 952 (10th Cir. 2002) (quoting Fed. R. Civ. P. 37(c)(1)).

35 *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 993 (10th Cir. 1999) (internal citations omitted).

First, the Bankruptcy Court disposed of the adversary proceeding on summary judgment, not at trial. Therefore, it relied on information either already discovered or provided through affidavits. The Debtor refused to disclose information regarding his medical condition when objecting to the Discovery Motion and declined to introduce evidence of his medical condition at trial.[36] If the Debtor now contends there are genuine issues of material fact related to his medical condition, he has waived that issue by not agreeing to the discovery before trial.[37]

The Debtor's arguments are not compelling. The Debtor relies on precedent from outside the Tenth Circuit to argue he cannot be compelled to provide corroborating evidence by expert testimony or documentation when it imposes an unnecessary and undue burden and may be established by the debtor's testimony.[38] However, contrary to the Debtor's argument, the Bankruptcy Court's order on the Discovery Motion did not require the Debtor to provide expensive expert evidence to corroborate his medical condition. The Bankruptcy Court required the Debtor to either disclose any conditions he intended to rely upon at trial to show undue hardship and allow further discovery related

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36 *Transcript* at 34, *in* Appellant's App. at 379 ("I will decline to address the medical issue in the trial.").

37 *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127-28 (10th Cir. 2011) ("If the theory is intentionally relinquished or abandoned in the [trial] court, we usually deem it waived and refuse to consider it.").

38 Appellant's Br. 48 (first citing *Barrett v. Educ. Credit Mgmt. Corp. (In re Barrett)*, 487 F.3d 353 (6th Cir. 2007) (holding debtor did not have to present expert medical evidence to corroborate medical condition) and then citing *Educ. Credit Mgmt. Corp. v. Mosley (In re Mosley)*, 494 F.3d 1320 (11th Cir. 2007) (holding expert medical evidence independent of a debtor's testimony is not necessary to establish undue hardship under § 523(a)(8))).

to those conditions or waive the introduction of evidence at trial. The Bankruptcy Court made this decision in light of the impending trial and the Department's efforts to obtain evidence of his medical condition during the discovery period. The Debtor cannot have it both ways. He alleged medical issues that precluded him from repayment of his student loans, but refused to provide the information that might excuse him from repayments. Accordingly, the Bankruptcy Court did not abuse its discretion in disposing of the Discovery Motion.

ii. Debtor's Trial Exhibits

The Debtor argues the Bankruptcy Court abused its discretion by precluding him from introducing exhibits at trial after finding he did not serve the exhibits on the Department by the deadline set out in the pretrial scheduling order. Because the Bankruptcy Court decided the issue on summary judgment and considered the exhibits included in the Debtor's response to the Motion for Summary Judgment, we need not consider this argument.

iii. The Motion to Strike

The Debtor argues the Bankruptcy Court abused its discretion by denying his motion to strike the affidavit of Christopher Bolander, one of the Department's employees, as an exhibit to the Motion for Summary Judgment. The Debtor bases his argument on a pretrial order that limited the parties to two witnesses each, only one of which could qualify as an expert witness. The Debtor argues the Bankruptcy Court erred by failing to consider Bolander as an expert witness pursuant to Federal Rule of Evidence

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702.

Civil Rule 56 requires that affidavits supporting a motion for summary judgment "be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."[39] "'At [the] summary judgment stage, evidence need not be submitted in a form that would be admissible at trial,' but 'the content or substance of the evidence must be admissible.'"[40]

The Debtor's argument fails for several reasons. First, the Bankruptcy Court disposed of the adversary proceeding at summary judgment, meaning it took no witness testimony, and Federal Rule of Evidence 702 does not apply. Next, even if Federal Rule of Evidence 702 did apply, Mr. Bolander's affidavit states facts instead of opinions. Mr. Bolander described facts as they pertain to the Debtor's student loan, including the promissory notes, the outstanding balance, the payment history and switch to alternative repayment plans, and details regarding the Department's options for repayment.[41] Mr. Bolander based his declaration on his position at the Department and his review of the Debtor's loan information and payment history. Therefore, even if the adversary had gone to trial, Mr. Bolander could appear and testify regarding the facts within his knowledge.

To the extent the Debtor argues Mr. Bolander's affidavit violated the parties' joint discovery report,[42] the argument is baseless. The limitation of experts applies to an expert

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39 Fed. R. Civ. P. 56(c)(4).

40 *Pack v. Hickey*, 776 F. App'x 549, 554 (10th Cir. June 11, 2019) (unpublished) (quoting *Argo v. Blue Cross & Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1199 (10th Cir. 2006)).

41 *Declaration of Christopher Bolander, in* Appellant's App. at 410.

42 *Joint Report* at 2, *in* Appellant's App. at 14.

a party intends to "use at *trial* to present evidence" in the form of an opinion.[43] The procedural rules on summary judgment do not limit the number of affidavits allowed, and even if affidavits were limited, the Department only included one. Accordingly, the Bankruptcy Court did not abuse its discretion in denying the Debtor's motion to strike Mr. Bolander's declaration.

iv. The Debtor's Deposition Transcript

Finally, the Debtor argues the Bankruptcy Court erred in failing to compel the Department to provide him with a full copy of the transcript of his deposition. In the Debtor's request for a full transcript, he acknowledged the Tenth Circuit held "[t]here is no statutory requirement that the government provide a litigant proceeding in forma pauperis with a copy of his deposition transcript."[44] Regardless, the Debtor still sought a copy pursuant to Civil Rule 30, which provides

> [u]nless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. *When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.*[45]

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43 Fed. R. Civ. P. 26(a)(2)(A) (emphasis added).

44 *Response to Defendant's Motion for Summary Judgment* at 13, *in* Appellant's App. at 442 (citing *Burns v. Gray*, 106 F.3d 413, 1997 WL 26534, at *1 (10th Cir. Jan. 24, 1997) (unpublished)).

45 Fed. R. Civ. P. 30(f)(3) (emphasis added).

Accordingly, the general rule "is that a party must obtain copies of deposition transcripts from the court reporter upon the payment of a reasonable charge, and not from opposing counsel or the court."[46]

The Debtor argues Civil Rule 56(d) required the Bankruptcy Court to order the Department to provide a copy of the deposition transcript. Civil Rule 56(d) states that if a nonmovant shows facts essential to justify opposition are unavailable to the nonmovant, the court may issue any appropriate order. The Debtor argues that without the full transcript, he could not adequately oppose the Motion for Summary Judgment.

First, this argument is disingenuous as the Debtor seeks a transcript of his own deposition, and we must presume he has knowledge of his own testimony. Furthermore, as the Bankruptcy Court concluded, the Debtor did not comply with the procedural requirements of Civil Rule 56(d). That rule requires the party opposing summary judgment to "present an affidavit that identifies 'the probable facts not available and what steps have been taken to obtain these facts.'"[47] Such "motions [should] be robust, and . . . '[an] affidavit's lack of specificity' counsels against a finding [of] abuse [of] discretion."[48] The Debtor did not submit an affidavit in support of his Civil Rule 56(d) request to the Bankruptcy Court, and we find no evidence in the record that he adequately

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46 *Schroer v. United States*, 250 F.R.D. 531, 537 (D. Colo. 2008) (denying plaintiff's request for deposition transcript in lawsuit against the Internal Revenue Service). Also cited by Nitka. *Response to Defendant's Motion for Summary Judgment* at 13, *in* Appellant's App. at 442.

47 *Ellis v. J.R.'s Country Stores, Inc.*, 779 F.3d 1184, 1206 (10th Cir. 2015) (quoting *F.D.I.C. v. Arciero*, 741 F.3d 1111, 1116 (10th Cir. 2013)).

48 *Id.* (quoting *Trask v. Franco*, 446 F.3d 1036, 1042 (10th Cir. 2006)).

preserved his Civil Rule 56(d) argument first before the Bankruptcy Court. Instead, the Debtor simply "declared" that he was unable to adequately review an essential record. Therefore, the Court will not consider this argument.

The Debtor also relies on Federal Rule of Evidence 106, which allows an adverse party to require the entirety of a writing to be admitted into evidence to allege error. As the United States District Court for the District of New Mexico explained, applying Federal Rule of Evidence 106 at the summary judgment stage is improper as its application "typically arises during trial in the context of determining whether part of an exhibit may be introduced or whether all of it must be introduced."[49] We agree with the New Mexico District Court that there does not appear to be "any published case law that applies Rule 106 to the [Civil] Rule 56 summary judgment stage."[50] Accordingly, we find no error.

Finally, the Debtor argues the Bankruptcy Court should have struck the deposition transcript from the Motion for Summary Judgment because the deposition would not be admissible as the Department failed to follow the service procedures set forth in Civil Rule 5(d)(1). Civil Rule 5(d)(1) provides "[d]epositions . . . are not automatically filed with the court" as they "must not be filed until they are used in the proceeding or the court orders filing."[51] However, Colorado Local Bankruptcy Rule 7056 states when a

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49 *Castillo v. City of Albuquerque*, No. CIV 01-626, 2002 WL 35649869, at *2 n.1 (D.N.M. July 1, 2002) (unpublished).

50 *Id.*

51 *Rohrbough v. Harris*, 549 F.3d 1313, 1318 (10th Cir. 2008) (quoting Fed. R. Civ. P. 5(d)(1)).

motion references a deposition, "a copy of the relevant *excerpt* from the document must be attached."[52] The Motion for Summary Judgment included excerpts from the deposition transcript as an exhibit pursuant to the Bankruptcy Court's local rules. Accordingly, the Bankruptcy Court did not err in failing to strike the relevant excerpts from the Debtor's deposition transcript.

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52 Bankr. D. Colo. L.R. 7056(c) (emphasis added).

b. Denial of the Debtor's Motion for Direct Certification

The Debtor argues the Bankruptcy Court erred in denying his request to certify his appeal of the Discovery Order directly to the Tenth Circuit because the appeal involved a question of law on which there is no controlling decision by the Tenth Circuit or the Supreme Court. This Court dismissed the Debtor's appeal of the Discovery Order as interlocutory, mooting the Debtor's argument. However, even if the Bankruptcy Court erred in denying direct certification of that appeal, we agree with the Ninth Circuit Bankruptcy Appellate Panel that upon disposition of this appeal, the Debtor "now [has] a direct path of appeal to the [Tenth] Circuit without need for a Rule 8006 certification. Reversing the [B]ankruptcy [C]ourt on this point would be impractical and a waste of judicial resources."[53]

c. The Bankruptcy Court did not err in granting the Motion for Summary Judgment

i. Standards for Discharging a Debt Pursuant to § 523(a)(8)

Student loan debts are difficult to discharge in bankruptcy. The text of the Bankruptcy Code excepts obligations to repay a qualified educational loan from discharge "unless excepting such debt from discharge . . . would impose an undue hardship on the debtor and the debtor's dependents."[54] The Bankruptcy Code does not define the phrase "undue hardship." Accordingly, courts developed a judicial test to determine whether repaying an educational loan would result in undue hardship based on

53 *In re Tomkow*, 563 B.R. 716, 731 (9th Cir. BAP 2017).

54 11 U.S.C. § 523(a)(8).

the debtor's circumstances. This test, known as the *Brunner* test,[55] requires a debtor to show:

> (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) 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; and (3) that the debtor has made good faith efforts to repay the loans.[56]

Courts applying the *Brunner* test often "constrain[ ] the three *Brunner* requirements to deny discharge under even the most dire circumstances."[57]

Like many other courts, the Tenth Circuit adopted the *Brunner* test to determine whether government-backed student loans impose an undue hardship on a debtor.[58] The Tenth Circuit's analysis of undue hardship provides a discharge of student debt "should be based upon an inability to earn and not simply a reduced standard of living."[59] When applying the *Brunner* test, the first prong "should serve as the starting point for the undue hardship inquiry because information regarding a debtor's current financial situation generally will be concrete and readily obtainable."[60] The second prong requires "a realistic look . . . into debtor's circumstances and the debtor's ability to provide for

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55 Derived from *Brunner v. New York State Higher Educ. Serv. Corp.*, 831 F.2d 395 (2d Cir. 1987).

56 *Roe v. Coll. Access Network (In re Roe)*, 295 F. App'x 927, 929-30 (10th Cir. Oct. 9, 2008) (unpublished) (quoting *Educ. Credit Mgmt. Corp v. Polleys (In re Polleys)*, 356 F.3d 1302, 1307 (10th Cir. 2004)).

57 *Polleys*, 356 F.3d at 1308 (citing cases summarizing examples of dire circumstances)

58 *Roe*, 295 F. App'x at 929.

59 *Polleys*, 356 F.3d at 1306 (quoting *Cuenca v. Dep't of Educ.*, 64 F.3d 669, 1995 WL 499511, at *2 (10th Cir. Aug. 23, 1995) (unpublished)).

60 *Polleys*, 356 F.3d at 1310.

adequate shelter, nutrition, health care, and the like;" however, the debtor need not show "a 'certainty of hopelessness.'"[61] The final prong requires "focus[ing] on questions surrounding the legitimacy of the basis for seeking a discharge" and whether the debtor "willfully contrive[d] a hardship."[62] "Good faith, however, should not be used as a means for courts to impose their own values on a debtor's life choices."[63]

The Tenth Circuit's application of the *Brunner* test provides bankruptcy courts "with the discretion to weigh all the relevant considerations" and apply the test "such that debtors who truly cannot afford to repay their loans may have their loans discharged."[64] A student loan creditor bears the burden of proving an obligation is an educational loan falling within § 523(a)(8)'s discharge exception; however, "the debtor has the burden of proving that repayment would constitute an undue hardship" pursuant to § 523(a)(8).[65]

ii. The Bankruptcy Court's Decision

The Bankruptcy Court in a well-reasoned opinion applied the *Brunner* test to the facts, concluding: (1) the Debtor met the requirement of showing he could not maintain a minimal standard of living in addition to repaying his student loans; (2) the Debtor failed to show his current financial condition is likely to exist for a significant portion of the repayment period; and (3) although there was conflicting evidence as to the Debtor's

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61 *Id.*

62 *Id.*

63 *Id.* (citing Robert F. Salvin, *Student Loans, Bankruptcy and the Fresh Start Policy: Must Debtors be Impoverished to Discharge Educational Loans?*, 71 Tul. L.Rev. 139, 197 (1996)).

64 *Id.* at 1309.

65 *Francis, C. Amendola, et al*, 8B C.J.S. Bankr. § 1105 Burden of Proof (2020).

good faith, when viewed in the light most favorable to the Debtor, the final element favored finding he acted in good faith. Reviewing the decision on summary judgment *de novo*, we consider the facts asserted and the application of the legal standard without deference to the Bankruptcy Court.

1. Genuine Issues of Material Fact

Summary judgment is proper upon a showing that there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.[66] The Debtor takes issue with the Bankruptcy Court's reliance on the undisputed facts. The Bankruptcy Court analyzed the undisputed facts proffered by the Department, finding the Debtor failed to follow the procedural rules to object to the Department's facts and failed to allege any additional material facts in dispute.[67] Although the Civil Rules allow a court to consider facts undisputed unless property rebutted, the Bankruptcy Court "reviewed all of the 49 proffered undisputed facts . . . and compared such facts to the record citations," concluding "[e]very alleged undisputed fact [was] accurate and fully supported in accordance with Fed. R. Civ. P. 56 and L.B.R. 7056-1."[68] Our independent review of the record confirms there is support for each undisputed fact alleged.

Although the Debtor takes issue with all of the undisputed facts, he assigns error to two specific facts in his appellate briefing. First, the Debtor argues the Bankruptcy Court incorrectly considered his total wages in 2016 as approximately $83,000 when tax

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66 *LTF Real Estate Co. v. Expert S. Tulsa, LLC (In re Expert S. Tulsa, LLC)*, 522 B.R. 634, 643 (10th Cir. BAP 2014).

67 *Opinion*, at 14, *in* Appellant's App. at 605 (citing Colo. L.B.R. 7056-1(b)(3)-(4)).

68 *Id.*, *in* Appellant's App. at 605.

records show he only earned $54,643. The Bankruptcy Court "accept[ed] that the [Debtor's] 'Taxable Social Security Earnings' were $54,643 in 2016."[69] Our review suggests that even if the Debtor's 2016 earnings were only $54,643, this was sufficient income to allow him to repay his student loan under an income-driven repayment plan.

Next, the Debtor argues the Bankruptcy Court improperly accepted the amount of his student loan payment as $0, when one statement received in June 2018 reflects a payment amount of $1,878.30.[70] Our review of the record indicates that correspondence from the loan servicer instructs the Debtor to recertify his income-driven plan to have his loan placed in forbearance and brought current.[71] Furthermore, the record indicates the loans returned to forbearance status as of October 2019.[72] Accordingly, the Debtor's argument fails to account for all the evidence of the payment amount contained in the record. As such, we find no error in the Bankruptcy Court's acceptance of the payment amount.

2. Application of the *Brunner* Test

The Bankruptcy Court found the Department met its burden of establishing a qualified education obligation and placed the burden of satisfying the *Brunner* test on the Debtor. The Bankruptcy Court then concluded elements one and three of the test weighed in the Debtor's favor. Therefore, we focus our analysis on the second element of the *Brunner* test requiring "that additional circumstances exist indicating that this state of

69 *Opinion* at 17, *in* Appellant's App. at 608.
70 *June 2018 Statement*, *in* Appellant's App. at 1113.
71 *Correspondence*, *in* Appellant's App. at 1115.
72 *Exhibit B*, *in* Appellant's App. at 686.

affairs is likely to persist for a significant portion of the repayment period of the student loans."[73] The Bankruptcy Court concluded the Debtor failed to carry his burden of showing his financial situation is not likely to improve. The Bankruptcy Court based this conclusion on facts indicating the Debtor is highly educated and possesses a variety of job experiences but has not made diligent efforts to obtain stable employment.[74]

The Debtor's employment and income history indicates he earned enough to make at least a minimal student loan payment under an income-driven repayment plan when he was employed. Although the Debtor is no longer employed and his financial condition has changed, he failed to show that this financial condition is likely to persist for the life of the loan. Evidence in the record indicates he is pursuing entrepreneurial goals of developing a mobile payment application and converting a bus into a vacation rental. These endeavors suggest the Debtor still possesses skills and abilities that translate to a variety of jobs ranging from professional careers to general labor. This also suggests that the Debtor's current situation need not persist for the duration of the repayment period. Accordingly, the Bankruptcy Court did not err in concluding the Debtor failed to carry

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73 *Roe v. Coll. Access Network (In re Roe)*, 295 F. App'x 927, 929 (10th Cir. Oct. 9, 2008) (unpublished) (quoting *Educ. Credit Mgmt. Corp v. Polleys (In re Polleys)*, 356 F.3d 1302, 1307 (10th Cir. 2004)).

74 The Debtor's appellate briefing does not assign error to the Bankruptcy Court's conclusions under the *Brunner* test, instead distinguishing the facts in his case from cases cited by the Department in its Motion for Summary Judgment. Appellant's Br. 56-59. The Debtor's sole reference to the requirement of showing his financial state is likely to persist for the duration of the repayment period objects to facts deemed undisputed. Appellant's Br. 58. As already discussed, the Bankruptcy Court's finding of the undisputed fact is not clearly erroneous.

his burden of showing his circumstances will continue for a significant portion of the repayment period.[75]

The Debtor argues the Bankruptcy Court erred in recognizing the law as it applied to the facts in his case. First, he argues the Tenth Circuit does not require a plaintiff to show maximization of earning potential to demonstrate undue hardship. Reviewing the Bankruptcy Court's opinion, the court ultimately concluded case law addressing income maximization is only persuasive and not precedential; therefore, the Bankruptcy Court did not address the Debtor's effort to maximize his income.[76] The Debtor also argues cases cited by the Department are not precedential and are distinguishable from his case. As the specific cases the Debtor references were either not cited by the Bankruptcy Court or were cited to articulate the legal standard of review and not for factual comparison, we find no merit in the Debtor's arguments.[77]

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[75] The Debtor appears to argue the entire $209,716.48 balance of his student loan is past due and the repayment period has ended without pointing to any evidence to support this contention. However, the loan servicing records indicate the loan is in forbearance based on the filing of the bankruptcy petition. *Exhibit B*, *in* Appellant's App. at 686; *Exhibit C* at 106-07, *in* Appellant's App. at 797-98.

[76] Opinion at 27, *in* Appellant's App. at 577 ("[*Gesualdi v. Educ. Credit Mgmt. Corp. (In re Gseualdi)*, 505 B.R. 330, 339 (Bankr. S.D. Fla. 2013)] certainly supports the [Department]'s argument. It has some persuasive value, but it is not precedential.")

[77] The Debtor argues *Cuenca v. Dep't of Educ.*, 64 F.3d 669, 1995 WL 499511, at *2 (10th Cir. Aug. 23, 1995) (unpublished)) is factually distinguishable. The Bankruptcy Court did not cite *Cuenca* or analogize to its facts. The Debtor argues the facts of *Brown v. Sallie Mae, Inc. (In re Brown)*, 442 B.R. 776 (Bankr. D. Colo. 2010) also differ from his case. The Bankruptcy Court cited *Brown* to establish that all three elements of the *Brunner* test must be met to prove undue burden and to suggest income maximization should be considered as part of the second element, if at all. *Opinion* at 26, 27, *in* Appellant's App. at 576, 577 (citing among other cases *Brown*, 442 B.R. at 781-82). The Debtor argues the Department improperly cited cases from the bankruptcy courts for the Middle District of Pennsylvania and the Southern District of Florida. The Bankruptcy

d. Denial of the Debtor's Motion for Sanctions

Finally, the Debtor argues the Bankruptcy Court erred in denying his motion to sanction the Department for making false statements of fact in the Motion for Summary Judgment. The Debtor argued the following assertions were incorrect: (1) that he first raised reliance on medical issues as support for finding undue hardship in his supplemental discovery responses; (2) that he was 37 years old instead of 36; (3) that he was not looking for employment since the spring of 2018; and (4) that his taxable income in 2015 was $28,856 instead of $61,901, and in 2016 was $54,643 instead of $83,000.[78] The Debtor also alleged the Department improperly listed two expert witnesses in violation of the parties' joint report.[79] The Bankruptcy Court denied the Debtor's motion for sanctions[80] and a motion to reconsider the denial.[81]

We review a ruling on a motion for sanctions for abuse of discretion.[82] The Supreme Court has held Bankruptcy Rule 9011 "authorizes the court to impose sanctions for bad-faith litigation conduct . . . . The court may also possess further sanctioning authority under either § 105(a) or its inherent powers."[83] The failure to follow the "safe

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Court did not cite to a case from Pennsylvania and stated the case from the Southern District of Florida had "some persuasive value, but [was] not precedential." *Id.* at 27, *in* Appellant's App. at 577.

78 *Plaintiff's Motion for Sanctions*, *in* Appellant's App. at 417.

79 *Id.* at 8, *in* Appellant's App. at 424.

80 *Order Denying Plaintiff's Motion for Sanctions*, *in* Appellant's App. at 535.

81 *Order Denying Plaintiff's Motion to Reconsider Order Denying Plaintiff's Motion for Sanctions*, *in* Appellant's App. at 545.

82 *Gust v. Jones*, 162 F.3d 587, 598 (10th Cir. 1998).

83 *Law v. Siegel*, 571 U.S. 415, 427 (2014) (internal citations omitted).

harbor" procedures "[should] result in the rejection of the motion for sanctions."[84] Concluding otherwise constitutes an abuse of discretion.[85]

The Bankruptcy Court based its order denying the Debtor's motion for sanctions on Bankruptcy Rule 9011(c)(1)(A)'s "safe harbor provision," which requires a movant to serve a motion for sanctions on a party and allow the party twenty-one days to correct errors in a pleading as the basis for denying the motion. In his motion to reconsider the order denying the Motion for Sanctions, the Debtor requested the Bankruptcy Court take notice of the Department's many false assertions and award sanctions on its own motion pursuant to Bankruptcy Rule 9011(c)(1)B).[86] Bankruptcy Rule 9011(c)(1)(B) allows a court to issue sanctions on its own initiative upon finding a violation of 9011(b). The Bankruptcy Court reviewed the facts alleged by the Department in the Motion for Summary Judgment and concluded "[e]very alleged undisputed fact [was] accurate and fully supported in accordance with Fed. R. Civ. P. 56 and L.B.R. 7056-1."[87] On appeal, the Debtor points to no evidence in the record indicating he complied with Bankruptcy Rule 9011's "safe harbor" provision and does not identify any specific facts the Department misrepresented in the Motion of Summary Judgment.[88] Accordingly, the

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84 *Roth v. Green*, 466 F.3d 1179, 1192 (10th Cir. 2006) (quoting 5A Charles Alan Wright & Arthur R. Miller, *Federal Prac. & Procedure* § 1337.2, at 723 (3d ed. 2004)).

85 *Id.* at 1193.

86 *Motion to Reconsider Order Denying Motion for Sanctions* at 1, n.2, *in* Appellant's App. at 539.

87 *Opinion* at 14, *in* Appellant's App. at 605.

88 *See* Appellant's Br. 37-38.

Bankruptcy Court did not abuse its discretion in denying the Debtor's motion for sanctions.[89]

V. Conclusion

While the Bankruptcy Code presumptively excepts student loan obligations from discharge, the Tenth Circuit instructs bankruptcy courts to apply the *Brunner* test "such that debtors who truly cannot afford to repay their loans may have their loans discharged."[90] In this case, the undisputed facts establish that the Debtor previously held gainful employment. Although the Debtor is currently experiencing financial difficulty, he presented no evidence to the Bankruptcy Court tending to show his financial condition is likely to persist for the duration of his repayment period as required by the second element of the *Brunner* test. Instead, the record before this Court suggests the Debtor has not really tried to find work or leave the confines of his mother's home, and would prefer to be self-employed rather than obtain gainful employment. The record before this Court supports the conclusion the Debtor "seems to have given up any serious efforts at employment."[91] Accordingly, judgment of the Bankruptcy Court is AFFIRMED.

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89 The Debtor argues the Bankruptcy Court erred in failing to consider his motion for sanctions pursuant to Fed. R. Civ. P. 56(c)(2) and Model R. Prof. Conduct 3.3(a)(1). Civil Rule 56(c)(2) provides no authority to sanction a party. Model R. Prof. Conduct 3.3(a)(1) provides "[a] lawyer shall not knowingly make a false statement of fact or law to a tribunal." As the Bankruptcy Court found "[e]very alleged undisputed fact [was] accurate and fully supported in accordance with Fed. R. Civ. P. 56 and L.B.R. 7056-1," we find no basis for the Debtor's argument under Model R. Prof. Conduct 3.3(a)(1). *Opinion* at 14, *in* Appellant's App. at 605.

90 *Educ. Credit Mgmt. Corp. v. Polleys*, 356 F.3d 1302, 1309 (10th Cir. 2004).

91 *Opinion* at 29, *in* Appellant's App. at 579.