Nos. 16-12884-BB

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ALEXANDRA ELIZABETH ACOSTA CONNIFF, Plaintiff-Appellant, v. ECMC, Defendant-Appellee.	Appeal from the United States District Court for the Middle District of Alabama Case No. 2:15-cv-12884-BB Hon. Keith Watkins District Court Judge

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BRIEF OF APPELLANT ALEXANDRA ELIZABETH ACOSTA CONNIFF

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Dated: August 15, 2016

CERTIFICATE OF INTERESTED PERSONS

Pursuant to F.R.A.P. 26.1 and 11th Cir. R. 26.1-1, Appellant, Alexandra Elizabeth Acosta Conniff, by and through her undersigned counsel, hereby certifies that the following persons and entities fall within the category of persons set forth in Eleventh Circuit Rule 26.1-1:

1. Ballen, Nicholas (Appellate Counsel for Defendant/Appellant)
2. Conniff, Alexandra Elizabeth Acosta (Debtor, Defendant and Appellant)
3. ECMC Foundation (Affiliate of Plaintiff/Appellee)
4. ECMC Group, Inc. (Parent of Plaintiff/Appellee)
5. ECMC Servicing Corporation (Affiliate of Plaintiff/Appellee)
6. Educational Credit Management Corporation (Plaintiff/Appellee)
7. Educational Credit Services Corporation (Affiliate of Plaintiff/Appellee)
8. Halcomb, William McCollum (Trial Counsel for Plaintiff/Appellee)

9. Manuel, Margaret Hammond (Trial and Appellate Counsel for Plaintiff/Appellee)
10. Morgan, Robert Allen (Trial and Appellate Counsel for Plaintiff/Appellee)
11. Premiere Credit of North America (Affiliate of Plaintiff/Appellee)
12. Rains, David Edwin (Appellate Counsel for Plaintiff/Appellee)
13. Sawyer, William R. (Bankruptcy Court Judge)
14. Schwartz, David Chip (Appellate Counsel for Plaintiff/Appellee)
15. Sodergren, Kristofer David (Appellate Counsel for Plaintiff/Appellee)
16. Steege, Catherine (Appellate Counsel for Defendant/Appellant)
17. Watkins, W. Keith (District Court Judge)
18. Webber, Rachel Lavender (Appellate Counsel for Plaintiff/Appellee)
19. Wedoff, Carl N. (Appellate Counsel for Defendant/Appellant)

20. Wedoff, Eugene R. (Appellate Counsel for Defendant/Appellant)
21. Zenith Education Group (Affiliate of Plaintiff/Appellee)
22. No publicly traded company or corporation has an interest in the outcome of the case or appeal.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a) and Eleventh Circuit Rules 28-1(c) and 34-3(c), Appellant Alexandra Elizabeth Acosta Conniff requests oral argument. The primary issue on appeal is whether the District Court erred as a matter of law when it engrafted a new element onto the test that this Circuit employs for deciding whether repayment of student loans will impose an undue hardship upon a debtor within the meaning of 11 U.S.C. § 523(a)(8). In addition, contrary to the case law governing the standard of review on appeal, the District Court largely rejected the Bankruptcy Court's factual findings and made independent factual findings of its own. Given the large number of debtors who file for bankruptcy with student loan debt, establishing both the appropriate standards under 11 U.S.C. § 523(a)(8) for the discharge of such debt in this Circuit and the standard of review for appeals of such decisions is important to the bankruptcy system. Ms. Conniff respectfully submits that oral argument addressing these issues will aid this Court's decisional process.

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STATEMENT OF JURISDICTION

On March 21, 2013, Alexandra Elizabeth Acosta Conniff filed an adversary proceeding pursuant to 11 U.S.C. § 523(a)(8) seeking a declaration that her student loans were discharged. (Adv. Dkt. 1.) The Bankruptcy Court had jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334(b) because it arose in Ms. Conniff's chapter 7 case, *In re Conniff*, 12-31448-WRS, and arose under the Bankruptcy Code. On March 25, 2015, the Bankruptcy Court entered judgment in favor of Ms. Conniff finding that her student loans owed to ECMC were discharged. (Adv. Dkt. 63.) On April 7, 2015, ECMC filed its Notice of Appeal. (Adv. Dkt. 66.) The District Court had jurisdiction over this appeal pursuant to 28 U.S.C. § 158(a). On May 2, 2016, the District Court reversed the Bankruptcy Court's judgment and remanded the case for entry of judgment in favor of ECMC. (Dist. Dkt. 22.) On May 25, 2016, Ms. Conniff appealed. (Dist. Dkt. 24.) This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 158(d)(1).

STATEMENT OF THE ISSUES

1. Whether the District Court erred as a matter of law by using a debtor's decision to incur a student loan as a basis for finding that payment of the loan is not an undue hardship.

2. Whether the District Court erred as a matter of law when it reviewed the Bankruptcy Court's factual findings *de novo* and failed to give those factual findings appropriate clear error deference.

STATEMENT OF THE CASE

A. Course of Proceedings Below

On March 21, 2013, Alexandra Elizabeth Acosta Conniff filed an adversary proceeding pursuant to 11 U.S.C. § 523(a)(8) seeking a discharge of her student loans. (Adv. Dkt. 1.) On January 26, 2015, after hearing the testimony of four witnesses and considering 28 admitted trial exhibits, the Bankruptcy Court found that Ms. Conniff's student loans should be discharged. (Adv. Dkt. 62; Adv. Dkt. 78 at 2, 75-80.) On March 25, 2015, the Bankruptcy Court issued a Memorandum Decision and Judgment reflecting its post-trial oral ruling. (Adv. Dkt. 62; Adv. Dkt. 63.)

On April 7, 2015, ECMC appealed. (Adv. Dkt. 66.) On May 2, 2016, the District Court reversed and remanded with instructions to enter judgment for ECMC. (Dist. Dkt. 21, 22.) On May 25, 2016, Ms. Conniff appealed to this Court. (Dist. Dkt. 24.)

B. Statement Of Facts

1. Ms. Conniff And Her Student Loans

Ms. Conniff is a 45-year-old single mother with two sons. (Adv. Dkt. 62 at 2.) She has been a teacher since 1997; the first six years in Jefferson County, Alabama, and since 2003, in Eufaula, Alabama. (*Id.*; *see* Adv. Dkt. 78 at 12, 41.) In 2008, she was named a Wal-Mart Teacher of the Year, and in 2012, she was named teacher of the year for her high school. (Adv. Dkt. 78 at 19.)

Ms. Conniff holds four degrees, all from Auburn University: a bachelors of science in chemistry, master's degrees in learning disabilities and educational leadership, and a Ph.D. in special education. (Adv. Dkt. 62 at 2; Adv. Dkt. 78 at 12, 40-41.) For most of her career, Ms. Conniff has taught high school students with severe disabilities in a self-contained classroom. (Adv. Dkt. 78 at 12, 19.) Because of health issues, she is currently teaching high school science. (*Id.* at 29.)

To finance her education, Ms. Conniff took out three different student loans. (Adv. Dkt. 78 at 74; Adv. Dkt. 19-2; Adv. Dkt. 19-3.) In 2006 and again in 2008, she consolidated these loans. (Adv. Dkt. 19-2; Adv. Dkt. 19-3.)

Before she filed her bankruptcy case, Ms. Conniff had repaid $9,275.42 on her student loans. (Adv. Dkt. 62 at 3; Adv. Dkt. 78 at 54.) For most of the six years leading up to her bankruptcy case, Ms. Conniff's student loans were in deferment or in forbearance, meaning that because of her income and family situation, she was not required to make payments, but interest continued to accrue and was capitalized pursuant to 34 C.F.R. § 682.202(b). (Adv. Dkt. 19-1 at ¶ 8; Adv. Dkt. 62 at 4; Adv. Dkt. 78 at 54-55.) The average interest rate on her loans is 5.5% (Adv. Dkt. 62 at 2 n.2; Adv. Dkt. 78 at 74.)

When she first consolidated her loans, she owed $76,887. (Adv. Dkt. 19-2.) At the time of her second consolidation, in 2008, she owed an additional $18,800. (Adv. Dkt. 19-3.) At the time of trial, with additional interest, she owed $112,281.06. (Adv. Dkt. 78 at 54; Adv. Dkt. 62 at 2.)

Having elected to teach in rural school districts in Alabama, Ms. Conniff understood that she would be covered by a student loan program that forgives $17,500 of debt for every five years of teaching. (Adv. Dkt. 62 at 3-4; Adv. Dkt. 78 at 5.) Ms. Conniff testified that when she applied for the program, she was told that she was ineligible because she had consolidated a qualifying loan with a non-qualifying loan. (Adv. Dkt. 62 at 4; Adv. Dkt. 78 at 10, 20.) At the time she consolidated her loans, however, she was not told she would become ineligible for this program. (Adv. Dkt. 78 at 42.)

2. Ms. Conniff's Chapter 7 Case

On June 13, 2012, Ms. Conniff filed a chapter 7 bankruptcy case *pro se*. (Bankr. Dkt. 1; Adv. Dkt. 62 at 1.) She listed assets totaling $104,019 in her bankruptcy schedules, primarily consisting of her home, which she valued at $92,000, and a 2008 Ford Taurus, which she valued at $10,000. (Bankr. Dkt. 1 at Schedules A, B.) Ms. Conniff listed debts of $213,283, consisting of an $89,045 mortgage on her home, a $10,000 loan secured by her car, $104,019 in student loans and $37,831 in other debts. (Bankr. Dkt. 1 at Schedules D, F.)

In her Schedules of Income and Expenses, Ms. Conniff stated that her net monthly take home pay was $2,954 (after payment of taxes and other payroll deductions) and that she received $500 per month in child support, yielding an average net monthly income of $3,454. (*Id.* at Schedule I.) She further estimated that her average monthly expenses were $3,487, leaving her with a deficit of expenses over income of $33 each month. (*Id.* at Schedule J.) Ms. Conniff did not include her student loan payments in her list of monthly expenses because at the time of her bankruptcy filing her loans were in deferment. (*Id.*; Adv. Dkt. 19-6; Adv. Dkt. 78 at 54-55.)

On January 13, 2013, the Bankruptcy Court issued a general discharge of Ms. Conniff's debts. (Adv. Dkt. 62 at 1-2.) Ms. Conniff's chapter 7 trustee determined that, after considering the liens against her assets and the exemptions she was allowed under 11 U.S.C. § 522(b)(2) and Alabama law, there were no assets available for distribution to her creditors. (Bankr. Dkt. 43.)

3. Ms. Conniff's Adversary Proceeding

On March 21, 2013, Ms. Conniff filed suit, again *pro se*, to obtain a discharge of her student loans. (Adv. Dkt. 1.) Before trial,

ECMC moved for summary judgment, arguing that Ms. Conniff could not prove she would suffer an undue hardship if she were required to repay her student loans for three reasons: (a) Ms. Conniff's income was above the poverty level for a family three; (b) Ms. Conniff was healthy and well-educated and thus could not demonstrate a total incapacity to repay her debts; and (c) Ms. Conniff had not made a good faith effort to repay her debts because: (i) she had not applied to participate in either the William D. Ford Program or the Public Service Loan Forgiveness Program, and (ii) she made payments into the Teachers' Retirement System of Alabama retirement plan. (Adv. Dkt. 19.) The Bankruptcy Court denied ECMC's motion and set the case for trial. (Adv. Dkt. 39.)

4. The Bankruptcy Court Trial

On January 26, 2015, the Bankruptcy Court heard the testimony of Ms. Conniff, and her father and mother, in person. One of ECMC's litigation specialists testified via telephone. (Adv. Dkt. 78 at 2.) The parties did not file pre- or post-trial briefs; instead, during closing argument, ECMC orally advanced the same arguments it had made in its summary judgment motion. (*Id.* at 72-75.)

a. Ms. Conniff's Case

i. Ms. Conniff's Background And Health Problems

Ms. Conniff testified about her educational background and work history. (*Id.* at 12-13.) She also testified about her health problems, explaining that she is obese, suffers from adult onset Type II diabetes, and takes daily medicine for her diabetes, kidney problems, and high blood pressure. (*Id.* at 13.) She further testified that as a result of her medical condition, she had to stop teaching children with severe learning disabilities because the physical demands of dealing with children who physically act out had become too difficult. (*Id.* at 29.) She is under the regular care of a physician. (*Id.* at 13.)

ii. Ms. Conniff's Inability To Repay Her Student Loans

The Court admitted Ms. Conniff's banking and expense records and her tax returns into evidence. (*Id.* at 4, 15, 58; Adv. Dkt. 31-3, 31-4, 31-6.) Those documents demonstrate that after paying for housing, transportation, food, health and disability insurance, and other ordinary living expenses, Ms. Conniff has no

disposable income. (Adv. Dkt. 31-3, 31-4, 31-6; *see also* Bankr. Dkt. 1 at Schedules I, J.)

Ms. Conniff testified that if she is forced to repay her student loans, she will likely lose her home or be unable to feed her family. (Adv. Dkt. 78 at 17.) She testified that her budget is so tight that it does not allow for any emergency expenditures and that she relies upon donations to provide clothing for herself and her two children. (*Id.* at 15.)

Ms. Conniff further testified about her difficulties meeting unexpected expenditures and provided, as an example, a problem she was then facing. (*Id.* at 16.) Ms. Conniff testified that the company that insures her home recently required her to obtain a $1,000 termite bond. (*Id.*) Ms. Conniff explained that she had only been able to pay $250 of the bond amount and risked losing her home if her homeowners' insurance were cancelled and the mortgage lender elected to declare a default and foreclose on her home. (*Id.*) In addition to the termite problem, Ms. Conniff also testified that she could not afford to make necessary repairs to her home. (*Id.* at 17.) She produced photographs showing the home's state of disrepair. (*Id.*; Adv. Dkt. 31-7.)

Ms. Conniff also called both of her parents to testify about her financial condition. (Adv. Dkt. 78 at 46-52.) Ms. Conniff's parents both testified that they helped their daughter cover unexpected medical expenses and home repairs that she could not defer. (*Id.*) They also testified that, from time to time, they helped Ms. Conniff with basic living expenses. (*Id.*) Her father testified that he did not believe that without his help, his daughter and her sons could meet all of their daily living expenses. (*Id.* at 49.)

In response to ECMC's argument that Ms. Conniff was not entitled to relief under 11 U.S.C. § 523(a)(8) because she made contributions to a retirement plan, Ms. Conniff produced the Alabama Teachers' Retirement plan document, which established that she was required, as a condition of her employment, to contribute $340 per month into the retirement plan and that this payment is not voluntary. (*Id.* at 20; Adv. Dkt. 31-5.) She further testified that even if she eliminated her additional voluntary contribution of $220 per month, after accounting for taxes, she would net only $150 more in take-home pay per month. (Adv. Dkt. 78 at 20.)

iii. Ms. Conniff's Efforts To Increase Her Income

Ms. Conniff also presented evidence about her efforts to increase her income. (*Id.* at 15-16, 18-19, 28.) She testified that she does translation work for the Eufaula Board of Education and has taught college courses in Montgomery, but that the cost of traveling to Montgomery (approximately 190 miles round trip) outweighs the $250 net per month that she is paid for teaching these courses. (*Id.* at 15-16, 28.) She further testified that teaching college courses as an adjunct professor is sporadic and that while she had taught in the spring semester of the previous year, there had been no work in the fall semester. (*Id.* at 28.) Ms. Conniff also works in the summer, providing homebound services to special education students and teaching science classes. (*Id.* at 36.)

In addition to taking on extra work, Ms. Conniff testified that she has sought to improve her financial circumstances by applying to be an assistant principal, a principal, a special education coordinator, a federal programs coordinator and superintendant—all positions that pay more than her current teaching position. (*Id.* at 18-19.) Ms. Conniff has been turned down for all of these jobs.

(*Id.* at 18.) While her advanced degrees have entitled her to be paid at the top of the scale for a teacher, Ms. Conniff testified that given her inability to date to obtain a higher paying job, she does not believe that her income will ever significantly increase. (*Id.* at 19.)

On cross-examination, ECMC suggested that Ms. Conniff should apply for administrative jobs outside of her current school district, but Ms. Conniff explained that if she took such a job she would have no tenure. (*Id.* at 26-27.) She also testified that she would lose the support of her family and social network in Eufaula. (*Id.* at 18-19.)

iv. Ms. Conniff's Efforts To Obtain Relief From Her Student Loans Outside Of Bankruptcy

In response to ECMC's argument that Ms. Conniff had not taken advantage of programs that would reduce her student loan payments, Ms. Conniff testified that she had applied to participate in such programs on three different occasions and been turned down each time. (*Id.* at 10, 20.) She further testified that she had tried to obtain relief under these programs even after she filed for bankruptcy and was again rejected. (*Id.* at 20.)

b. ECMC's Case

ECMC called one witness, its litigation specialist Jennifer Skerbinc, who testified by telephone. (*Id.* at 54-58.) Ms. Skerbinc testified that Ms. Conniff had received five forbearances and one deferment. (*Id.* at 54-55.) ECMC's records demonstrated that Ms. Conniff's hardship forbearance dated back to 2010. (Adv. Dkt. 19-6.)

Ms. Skerbinc also opined that if Ms. Conniff applied to participate in an income-based repayment program, Ms. Conniff would be required to repay $346 per month. (*Id.* at 55; Adv. Dkt. 19-10 at 3-4.) She further testified that it was "possible" that if Ms. Conniff repaid that amount for ten years and was in good standing at the end of ten years, Ms. Conniff might qualify to have the balance of her loan forgiven. (Adv. Dkt. 78 at 56.) Ms. Skerbinc admitted that while there were repayment plans available to Ms. Conniff other than the income-based repayment program, these other programs would require her to repay more than $346 per month. (*Id.*) Further, interest would continue to accrue on her student loans while the income-based repayment program remained in place. (Adv. Dkt. 62 at 4.) At an average annual interest rate of

5.5%, monthly interest on a loan balance of over $112,000 would exceed $500, and so the loan balance would continually increase even if Ms. Conniff could afford monthly payments of $346.

ECMC did not present evidence demonstrating that Ms. Conniff had an extra $346 per month in her budget, or any explanation for where this money would come from if Ms. Conniff were accepted into the income-based repayment program. (*See generally* Adv. Dkt. 78.) ECMC also did not present any evidence to rebut Ms. Conniff's evidence about her financial circumstances. (*Id.*) Finally, ECMC did not present any evidence to contradict any of Ms. Conniff's testimony about her efforts to find a higher paying job or to participate in student loan forgiveness programs. (*Id.*)

5. The Bankruptcy Court's Decision

At the conclusion of the trial, the Bankruptcy Court ruled orally that Ms. Conniff had proved by a preponderance of the evidence that repaying her student loans would be an undue hardship and therefore the loans should be discharged pursuant to 11 U.S.C. § 523(a)(8). (*Id.* at 75-80.) On March 25, 2015, the Bankruptcy Court issued a Memorandum Decision and Judgment Order explaining its ruling. (Adv. Dkt. 62; Adv. Dkt. 63.)

The Bankruptcy Court stated on the record and in its written ruling that it found Ms. Conniff's testimony to be "forthright and credible." (Adv. Dkt. 62 at 4; Adv. Dkt. 78 at 77.) It found that:

- Ms. Conniff's net take home pay and child support totaled $3,450 per month. (Adv. Dkt. 62 at 2.)
- Ms. Conniff's student loan payments were $915 per month and it would take 15 years to repay the loan at that rate. (*Id.* at 2 & n.2, 12.)
- Based on her Bankruptcy Schedules I and J, "it is readily apparent that Conniff could not make that payment [of $915 per month] and support herself and her children with a minimal standard of living if forced to repay the loan." (*Id.* at 2-3.)
- Ms. Conniff's expenses exceed her income by approximately $33 per month and she covers this deficit with assistance from her parents. (*Id.* at 11 n.5.)
- Ms. Conniff is required as a condition of her job to contribute $344 per month into the Alabama Teachers retirement plan, and thus could only create excess additional pre-tax income of $220 per month by voluntarily reducing her contributions. (*Id.* at 3.)
- Based on Ms. Conniff's testimony about her unsuccessful efforts to find a higher paying job and the Bankruptcy Court's knowledge of teacher's pay in Alabama,

"[Ms.] Conniff's pay is not likely to significantly increase in the near future." (*Id.*)

- Ms. Conniff does not spend money on child care and instead provided cell phones to her two sons so that she could "keep[] track of [them]." (*Id.* at 10.)
- Ms. Conniff "does not spend much on entertainment except that she does have cable television." (*Id.*)
- Ms. Conniff has health problems. (*Id.* at 2 n.2, 10.)
- Ms. Conniff had "made a good faith effort to repay the loan" because she had made payments exceeding $9,000 and had unsuccessfully tried on three occasions to participate in a program that would have reduced her loan balance based on her public service in a rural area. (*Id.* at 3-4.)
- Ms. Conniff in "good faith believed" that if she taught in a rural school district she would qualify to have $17,500 of her student loans discharged for every five years she taught. (*Id.* at 13.)
- Ms. Conniff's loan has been in deferment "for several years." (*Id.* at 4.)
- The fact that ECMC had itself agreed to defer payment of Ms. Conniff's loan for "several years" based "upon her income and family situation" was "further support for [Ms. Conniff's] claim that she cannot pay the debt and maintain a minimal standard of living without suffering

an undue hardship and in addition, is evidence of good faith." (*Id.*)

- Continued deferment of Ms. Conniff's loans would only cause the loans to continue to increase as additional interest accrued on the increasing loan balance. (*Id.*)
- The Bankruptcy Court found that the capitalization of interest on Ms. Conniff's student debt created a "pincher sort of movement," where the interest on her student loans equaled or surpassed any increases in her salary, making future repayment unlikely. (Adv. Dkt. 78 at 78.)
- Finally, it found that Ms. Conniff had been trying in good faith to repay the debt but had "not been able to make much of a dent in the student loans" and that "this is likely to continue." (*Id.* at 79-80.)

The Bankruptcy Court then applied to these facts the three-part test for determining whether a debtor would suffer "undue hardship" if forced to repay a student loan set forth in *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987), and adopted by this Court in *Helman Insurance Corp. v. Cox (In re Cox)*, 338 F.3d 1238 (11th Cir. 2003) and *Educational Credit Management Corporation v. Mosley (In re Mosley)*, 494 F.3d 1320 (11th Cir. 2007). (Adv. Dkt. 62 at 8-9.) The Bankruptcy Court stressed that *Brunner's* test for undue hardship must be "read in its

proper light." (*Id.* at 8.) When the debtor in *Brunner* sought an undue hardship discharge for her student loans, her first loan had just come due, she had no dependents, no health problems, had no period of unemployment, and had student loans that could be discharged "after they were 5 years old." (*Id.* at 7, 10.) As the Bankruptcy Court explained, "[a] denial of discharge of a student loan then was not a life sentence of nondischargeability, as it is now." (*Id.* at 7.) "What one may consider to be an undue hardship where a debtor is required to pay a debt of a few thousand dollars, which may ultimately be discharged in five or seven years, may be quite different than what one may consider to be an undue hardship of a debt in the amount of $100,000 or more, which will not be discharged for the life of the debtor." (*Id.* at 8.)

With respect to the first element of the *Brunner* test—whether, "'based on current income and expenses," the debtor can maintain "a 'minimal' standard of living for herself and her dependent[s] if forced to repay the loans" (*Id.* at 9 (quoting *Brunner*, 831 F.2d at 396))—the Bankruptcy Court concluded that Ms. Conniff could not (Adv. Dkt. 62 at 11-12). The Bankruptcy Court rejected ECMC's argument that a minimal standard of living meant "abject poverty"

or that having a cell phone or cable television disqualified a debtor from relief under 11 U.S.C. § 523(a)(8). (Adv. Dkt. 62 at 9-10.)

Instead, the Bankruptcy Court focused on the fact that even if Ms. Conniff eliminated her voluntary $220 per month pension contribution, she still would not have room in her budget to repay $915 per month for 15 years and maintain a minimal standard of living. (*Id.* at 11.) The Bankruptcy Court concluded that "[w]hile one may quibble about expenses such as cable television, the fact of the matter is Conniff could not reasonably be expected to support herself and her children at a minimal standard of living if required to repay the student loan." (*Id.* at 12.)

With respect to *Brunner's* second element—whether "'additional circumstances exist indicating this state of affairs is likely to persist for a significant portion of the repayment period of the student loans'" (*id.* at 9 (quoting *Brunner*, 831 F.2d at 396))—the Bankruptcy Court held that additional circumstances were present because the evidence proved that Ms. Conniff's circumstances were unlikely to change in the future. (Adv. Dkt. at 12-13.) The Bankruptcy Court rejected ECMC's argument that her financial circumstance would change because her two sons would

someday be adults, noting that "her youngest son was 11 at the time she filed her petition" and that when they were adults, Ms. Conniff's income would go down by the $500 per month she receives in child support. (*Id.* at 13.)

Finally, with respect to *Brunner's* third element—whether "'the debtor had made good faith efforts to repay the loans'" (*id.* at 9 (quoting *Brunner*, 831 F.2d at 396))—the Bankruptcy Court held that Ms. Conniff had made such efforts. (Adv. Dkt. 62 at 13.) The Bankruptcy Court found that "Ms. Conniff had struggled for years to pay her student loans, only to see the balance continue to grow." (*Id.* at 10.) It further found that Ms. Conniff had in "good faith believed" that she would be entitled to a $17,500 credit against her student loans for every five years she taught in a rural school district and thus, her efforts at repayment plus her decision to teach in a rural school district "are evidence of good faith." (*Id.* at 13.)

Based on all of these findings, the Bankruptcy Court concluded that Ms. Conniff had proved her entitlement to an undue hardship discharge of her student loans and entered judgment in

her favor. (*Id.* at 13-14; Adv. Dkt. 63.) ECMC appealed. (Adv. Dkt. 66.)

6. The District Court Appeal And Decision

Represented by different counsel in its appeal, ECMC both greatly expanded upon the arguments it had made below and made new arguments. (Dist. Dkt. 11, 18.) It argued for the first time that to prove the second prong of the *Brunner* test, Ms. Conniff was required to show that the "additional circumstances" that impacted her future earning potential did not exist at the time she took out her student loans and were beyond her control. (Dist. Dkt. 11 at 19-21.) ECMC further expanded on this argument in its Reply Brief, arguing "[n]o one put a gun to Ms. Conniff's head to pursue additional degrees" and that she should therefore be required to face the "consequences" of her decision to teach special education students in rural Alabama. (Dist. Dkt. 18 at 6; *see also id.* at 10.) Ms. Conniff again appeared *pro se* in the District Court.

The District Court reversed, concluding that Ms. Conniff had failed to prove *Brunner's* second element: "that 'additional circumstances exist indicating that [her] state of affairs is likely to persist for a significant portion of the repayment period of the

student loans . . . .'" (Dist. Dkt. 21 at 1-2.) The District Court did not address the Bankruptcy Court's findings on the first and third elements of the *Brunner* test. (*Id.* at 13 n.7.)

With respect to the second element, the District Court stated that in the Eleventh Circuit there is no "'clear guidance on applying [*Brunner's*] prong two other than to embrace the 'certainty of hopelessness' standard.'" (*Id.* at 15 (quoting *Williams v. Am. Educ. Serv. (In re Williams)*, 492 B.R. 79, 87 (Bankr. M.D. Ga. 2013)).) It then turned to decisions of the Third and Ninth Circuits for guidance, noting that the Third Circuit has held that to prove additional circumstances a debtor "'must prove 'a total incapacity . . . in the future to pay [her] debts for reasons not within [her] control'" and that while the Ninth Circuit has not completely foreclosed the possibility that circumstances within the debtor's control might qualify as additional circumstances, it had held that "'a debtor cannot purposely choose to live a lifestyle that prevents her from repaying her student loans.'" (*Id.* at 16 (quoting *Brightful v. Penn. Higher Educ. Assistance Agency (In re Brightful)*, 267 F.3d 324, 328 (3d Cir. 2001) and *Educ. Credit Mgmt. Corp. v. Nys (In re Nys)*, 446 F.3d 938, 946 (9th Cir. 2006)).) The District Court also

noted in a footnote that "courts give little weight to present hardships in assessing a debtor's future prospects and ability to pay." (*Id.* at 23 n.11.)

With that "backdrop of legal principles" (*id.* at 17), the District Court rejected the entirety of the Bankruptcy Court's analysis of the second *Brunner* element. *First*, the District Court held that even if it accepted the Bankruptcy Court's underlying factual determination that Ms. Conniff "lacks significant potential for pay increases," that fact did not demonstrate "additional circumstances" because Ms. Conniff chose to be a school teacher and therefore found "herself in circumstances largely of her own informed decision-making . . . ." (*Id.* at 18.) And although the District Court stated that it was not deciding, as ECMC argued, whether the additional circumstances must post-date the student loans to qualify under *Brunner* (*id.* at 16 n.8), the District Court highlighted that Ms. Conniff obtained a Ph.D. knowing what she would earn as a teacher (*id.* at 18). It also noted that while Ms. Conniff's concerns "about losing tenure and family support if she leaves" the Eufaula area for a better job were "understandable," the decision to stay and not seek a higher paying

job elsewhere also "is one she made of her own volition after measured deliberations." (*Id.* at 19.)

Second, the District Court rejected as clearly erroneous the Bankruptcy Court's finding that Ms. Conniff's inability to repay the debt would continue even after her sons became self-supporting adults because a reduction in her expenses would be offset by the loss of child support payments. (*Id.* at 20-21.) The District Court rejected the Bankruptcy Court's contrary factual finding because it found the financial information in the record to be insufficient to "permit an informed weighing of Conniff's future childcare savings against the $500 monthly child support payments she receives" and further suggested that Ms. Conniff's testimony on this issue was insufficient. (*Id.*)

Third, it rejected the Bankruptcy Court's finding that Ms. Conniff would not have the ability to earn more income in the future. It noted that as her sons grew older, it would be "easier to pursue" additional sources of income and that "there is no evidence that [Ms. Conniff] is precluded from applying again for future openings" in the Eufaula school district. (*Id.* at 21-22.)

Finally, the District Court concluded that because Ms. Conniff "holds multiple marketable degrees," "has a roof over her head, an automobile, and food for her table" and she was not homeless, incapable of working due to mental illness, and surviving on food stamps, like the debtor in this Court's decision in *Mosley*, "her circumstances do not qualify as 'additional' within the meaning of *Brunner's* second element." (*Id.* at 22-23.)

The District Court reversed the Bankruptcy Court's judgment and remanded "for entry of judgment in favor of Appellant ECMC." (*Id.* at 25; Dist. Dkt. 22.) Ms. Conniff appealed. (Dist. Dkt. 24.)

C. Standard Of Review

This Court reviews the Bankruptcy Court's legal conclusions *de novo* and the Bankruptcy Court's factual findings for clear error. *Mosley*, 494 F.3d at 1324. Whether a district court has applied the correct standard of review to a bankruptcy court's decision is a legal question that this Court reviews *de novo*. *See, e.g.*, *Rush v. JLJ Inc. (In re JLJ Inc.)*, 988 F.2d 1112, 1116-17 (11th Cir. 1993) (vacating district court order for exceeding proper scope of review by supplementing the bankruptcy court's factual finding with its own); *accord Hedlund v. Educ. Res. Inst. Inc.*, 718 F.3d 848, 854 (9th Cir.

2013) (reversing district court for reviewing *Brunner*'s third element *de novo* when clear error was the proper standard of review). Similarly, a district court's determination that a bankruptcy court's factual findings are clearly erroneous presents a question of law that this Court reviews *de novo*. *See, e.g.*, *Eq. Life Assurance Soc'y v. Sublett (In re Sublett)*, 895 F.2d 1381, 1384 & n.5 (11th Cir. 1990).

SUMMARY OF THE ARGUMENT

The District Court erred as a matter of law in holding that a debtor's unwise action in incurring student loan debt should be considered as a ground for denying discharge of that debt. This Court, like all of those that have considered whether it would be an undue hardship for a debtor to repay a student loan, has looked to the situation of the debtor at the time of repaying the loan. The Court's *Brunner* test considers first, the debtor's present financial difficulty; second, the debtor's likely future financial situation; and finally, the debtor's past repayment efforts. But the District Court added a new consideration—whether a debtor's initial decision to incur student loans was financially prudent—separate from the debtor's financial situation at the time of repayment. If a debtor

unwisely incurred a student loan, the District Court held, denying discharge of the loan could be proper regardless of the financial hardship that repayment imposes, since the debtor should have known that financial difficulty could be the result of incurring the debt.

This addition to the *Brunner* test is unprecedented and contrary to the overriding policy of dischargeability. Debtors often incur debt that, particularly in hindsight, may have been unwise, but—as several decisions hold—these debts are nonetheless discharged unless the debtor acted with fraudulent intent or engaged in other misconduct in incurring the debt. *See, e.g., Kawaauhau v. Geiger*, 523 U.S. 57, 64 (1998) (dischargeability under 11 U.S.C. § 523(a)(6)); *Rembert v. AT&T Universal Card Servs., Inc. (In re Rembert),* 141 F.3d 277, 280-81 (6th Cir. 1998) (dischargeability under 11 U.S.C. § 523(a)(2)); *Anastas v. Am. Savings Bank* (*In re Anastas*), 94 F.3d 1280, 1287 (9th Cir. 1996) (same); *ABC Sun Control, Inc. v. McMahon-Jones (In re McMahon-Jones)*, 461 B.R. 835, 847-48 (Bankr. W.D. Wash. 2011) (same under § 523(a)(6)). Honestly incurred debts are dischargeable without regard to the debtor's wisdom in incurring them.

The District Court also erred as a matter of law when it failed to give proper deference to the Bankruptcy Court's factual finding that "additional circumstances" were present indicating that Ms. Conniff would not be able to repay her student loans and maintain a minimal standard of living for a significant portion of the repayment period of her student loans. When a bankruptcy court finds that "additional circumstances" are present, it makes a factual determination. *See, e.g.*, *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 884-85 (7th Cir. 2013). On appeal, that means that the clear error standard of review applies and the trial court's factual finding must be affirmed "so long as [the factual finding] is plausible in light of the record viewed in its entirety." *Merrill Stevens Dry Dock Co. v. M/V YEOCOMICO II,* 329 F.3d 809, 816 (11th Cir. 2003) (internal quotation marks omitted).

In this case, the District Court did not apply that highly deferential standard. Instead, the District Court substituted its own judgment for that of the Bankruptcy Court, even improperly making its own factual findings. Because the District Court failed to employ the applicable, highly deferential standard of review, its decision

must be reversed. *See, e.g.*, *In re Saylors*, 869 F.2d 1434, 1438 (11th Cir. 1989).

ARGUMENT

I. The District Court Erred As A Matter Of Law By Treating As A Basis For Denying Discharge Of Student Loans A Debtor's Ability To Predict At The Time The Loans Were Incurred That Repayment Would Be Difficult.

All of the issues in this appeal involve the provision of § 523 of the Bankruptcy Code—subsection (a)(8)—that allows debt for a student loan to be discharged if leaving the debt in place would result in an "undue hardship" for the debtor and the debtor's dependents. 11 U.S.C. § 523(a)(8). Many judicial decisions have construed "undue hardship" in this context, but always as involving the debtor's situation during the period when the loan is payable. The most common test for undue hardship—announced in *Brunner* and adopted by this court in *Cox* and *Mosley*—clearly applies to the period of loan payment. It requires for a finding of undue hardship that three elements be satisfied:

> (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. These *Brunner* elements look at three different stages of the debtor's loan payment period: (1) the debtor's present ability to pay the loan; (2) the debtor's future ability to pay the loan; and (3) the debtor's past effort to pay the loan.

But the District Court added a different factor to the *Brunner* test, whether—at the time of incurring a student loan—the debtor could have predicted eventual economic difficulty. Specifically, the District Court stated that Ms. Conniff knew "how the cost of the [degree she was seeking] compared with the increase in pay it would provide," so that she "finds herself in circumstances largely of her own informed decision-making," which the District Court held precluded the Bankruptcy Court's finding of undue hardship. (Dist. Dkt. 21 at 18.)

Under the District Court's holding, the focus is not on a debtor's situation at the time of repaying the loan, as the *Brunner* test requires, but rather on the debtor's reasonableness in taking

out the loan in the first place. In effect, the District Court's holding tells student loan debtors that if they were foolish in incurring their loans, because they could have foreseen that additional income from their education would not likely be sufficient to pay their student loans, the resulting hardship is their own fault and so is not "undue."

There is no precedent for this holding. The only authority that the District Court cites to support this conclusion is *Brightful*, which, to be sure, states that debtors assume the risk that they will experience difficulty in paying student loans. 267 F.3d at 331. But the *risk* is that student loans are only dischargeable for undue hardship. *Brightful* never suggests that undue hardship itself may be determined by the reasonableness of the debtor's decision to incur the loans in the first place. To the contrary, the reasoning in *Brightful* is limited to the three elements of the *Brunner* test. It deals only with the period of loan repayment and it warns against adding other considerations: "[T]his test must be strictly construed: equitable concerns or other extraneous factors not contemplated by the test may not be imported into the analysis of 'un[due] hardship.'" *Id.* at 328 (citation omitted).

Basing a finding of undue hardship on whether a debtor acted wisely in incurring student debt not only contradicts the *Brunner* test, it also contradicts the discharge policy of the Bankruptcy Code. Under that policy, the debtor's conduct in incurring debt causes the debt to be nondischargeable only if the conduct was deliberately harmful. So, for example, an injury caused by willful and malicious conduct is nondischargeable under § 523(a)(6), but debts arising from negligent or even reckless conduct are discharged. *See, e.g.*, *Kawaauhau,* 523 U.S. at 64; *McMahon-Jones*, 461 B.R. at 848 (finding business debt dischargeable despite debtor's lack of "wise business judgment, the ability to manage organizations or the ability to keep coherent business records"). Even more to the point, debts incurred to support excessive spending are nondischargeable under § 523(a)(2)(A) only if the debtor never intended to pay them.

> A person on the verge of bankruptcy may have been brought to that point by a series of unwise financial choices, such as spending beyond his means, and if ability to repay were the focus of the fraud inquiry, too often would there be an unfounded judgment of non-dischargeability . . . . Rather, the express focus must be solely on whether the debtor maliciously and in bad faith incurred [the] debt with the intention of petitioning for bankruptcy and avoiding the debt.

Rembert, 141 F.3d at 281 (quoting *Anastas*, 94 F.3d at 1285-86)).

Just as "unwise" debts are dischargeable under the other subsections of § 523(a), so too should such "unwise" debts be dischargeable under subsection (a)(8). The perverse impact of holding otherwise is demonstrated most clearly in the context of low value educational loans taken out to support degrees from for-profit institutions. Under the District Court's holding, the more likely it is that the education for which a loan is incurred will not lead to higher income, the less likely it is that the loan will be considered an undue hardship subject to discharge. Recent studies show that increases in student loan defaults largely involve for-profit institutions, whose students have "borrowed substantial amounts to attend institutions with low completion rates and, after enrollment, experienced poor labor market outcomes that made their debt burdens difficult to sustain." Adam Looney & Constantine Yannelis, *A crisis in student loans? How changes in the characteristics of borrowers and in the institutions they attended contributed to rising loan defaults*, PAPERS ON ECON. ACTIVITIES

(Brookings Inst., Wash., D.C.), Fall 2015 at 63.[1] Given these studies, students who attend for-profit and other low-value educational institutions should know that they may not be able to repay their debt. Thus, such students would face an almost *per se* bar preventing the discharge of their debt no matter the student's current or future circumstances simply because statistically the decision to attend such institutions would be unwise. Nothing in § 523(a)(8)'s text or in *Brunner* and its progeny supports this result.

In actuality, as discussed in Section II *infra*, Ms. Conniff did not act unreasonably in incurring her student loans. She had reason to believe, at the time of the loans, that the degrees she was seeking would be subject to loan forgiveness and that they would enable her to obtain higher-paying administrative positions. (Adv.

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[1] *See also* COUNCIL OF ECON. ADVISORS, EXEC. OFFICE OF THE PRESIDENT, INVESTING IN HIGHER EDUCATION: BENEFITS, CHALLENGES, AND THE STATE OF STUDENT DEBT 60 (2016), https://www.whitehouse.gov/sites/default/files/page/files/20160718_cea_student_debt.pdf ("Under the Gainful Employment regulation . . . [career college] programs are deemed to have failed the requirements if their graduates have annual loan payments greater than 12 percent of total earnings and greater than 30 percent of discretionary earnings. . . . Based on available data, the Department of Education estimates that about 1,400 programs serving 840,000 students—of which 99 percent are at for-profit institutions—would not pass the accountability standards.").

Dkt. 62 at 3-4, 13; Adv. Dkt 78 at 18-19.) But even if her decision to borrow money to finance her master's degrees and her Ph.D. had been unwise, a failure on her part to forecast the likely result of her borrowing cannot bear on whether her student debts *today* create an undue hardship for her and her two sons. The District Court committed an error of law in assessing the soundness of Ms. Conniff's decision to borrow for her education as a relevant consideration under *Brunner* and its decision should therefore be reversed.[2]

[2] The District Court's holding was not only legal error; it also was rendered in a manner that was procedurally unfair to Ms. Conniff, who appeared *pro se* below. The District Court's ruling tracks an argument that ECMC made for the first time in its reply brief that "[n]o one put a gun to Ms. Conniff's head to pursue additional degrees" and that she must face the "consequences" of her decision to do so. (*See* Dist. Dkt. 18 at 6.) In light of the Eleventh Circuit's rule that "[a]rguments not properly presented in a party's initial brief or raised for the first time in the reply brief are deemed waived," the District Court never should have considered this argument in the first place. *Bank of Am., N.A. v. Mukamai (In re Egidi)*, 571 F.3d 1156, 1163 (11th Cir. 2009). Doing so in an appeal involving a *pro se* litigant who likely would not have understood this waiver rule, or the rule that an argument must be preserved in the first instance in the trial court, was particularly inappropriate.

II. The District Court Erred As A Matter Of Law When It Failed To Apply The Appropriate Standard Of Review To The Bankruptcy Court's Factual Findings.

A. Whether "additional circumstances" are present is a question of fact.

Three Circuits—the Fourth, Seventh and Ninth—have held that the question of whether "additional circumstances" are present is a question of fact, subject to clear error review. *See Krieger*, 713 F.3d at 884-85; *In re Mendoza*, 182 F. App'x 661, 664 (9th Cir. 2006); *Floyd v. Educ. Credit Mgmt. Corp*, 54 F. App'x 124, 126 (4th Cir. 2002); *In re Kasey*, 187 F.3d 630, 1999 WL 507274, at *3 (4th Cir. 1999) (unpublished table decision). As the Seventh Circuit explained, because "undue hardship" is a "case-specific, fact-dominated standard," appellate review is "deferential." *Krieger*, 713 F.3d at 884.

Krieger is directly on point. There, as in this case, the bankruptcy court found that the debtor proved *Brunner's* "additional circumstances" requirement because she had tried with "utter futility" to find a job that would allow her to repay her student loans and the result of any repayment plan would simply be ever accumulating interest with little to no chance of any

payments actually being made. *Id.* at 884-85. The district court disagreed, concluding that the debtor "could have searched harder for work . . . ." *Id.* at 883. The Seventh Circuit reversed the District Court, concluding that "a [bankruptcy] judge asked to apply a multi-factor standard interpreting an open-ended statute necessarily has latitude; the more vague the standard, the harder it is to find error in its application." *Id.* at 885. Because the bankruptcy court's "ultimate finding of 'undue hardship' [was] neither clearly erroneous nor an abuse of discretion," the Seventh Circuit remanded with instructions to reinstate the Bankruptcy Court's judgment. *Id.*

Although this Court has not explicitly addressed the standard of review a district court should apply to a bankruptcy court's finding of "additional circumstances," it suggested in *Mosley*, as the Seventh Circuit held in *Krieger*, that a bankruptcy court makes a "finding" when it determines whether it is "unlikely [a debtor] will be able to repay his loans." 494 F.3d at 1326-27. This Court also made that same suggestion in *Cox*, explaining that *Brunner*'s three-part inquiry is a tool for identifying "those debtors whose earning potential and circumstances make it unlikely that they will produce

the means necessary to repay the student loans while maintaining a minimal standard of living" and describing the bankruptcy court's conclusion of the debtor's inability to repay the loan as something that "the Bankruptcy Court found, as a matter of fact . . . ." 338 F.3d at 1242.

This Court's use of the word "finding" to describe an "additional circumstances" determination is consistent with the Circuit-level authority holding that *Brunner's* second element is a fact question. It also is consistent with Circuit-level authority holding that *Brunner's* third element—the debtor's good faith—is a fact question. *See Krieger*, 713 F.3d at 884 (good faith inquiry is "a predominantly factual understanding, on which the bankruptcy judge's findings must prevail" absent clear error); *Kasey*, 1999 WL 507274, at *3 (reversing district court because the bankruptcy court did not clearly err in finding that the debtor acted in good faith); *Hedlund*, 718 F.3d at 849 (reversing district court decision because the district court reviewed the bankruptcy court's finding that the debtor acted in good faith *de novo*). Indeed, when this Court has had the occasion to address the standard of review to apply to similar determinations under the Code, such as a debtor's

good faith in proposing a plan, it has held that such determinations are factual and reviewed for clear error. *See, e.g.*, *Saylors*, 869 F.2d at 1438.[3]

Accordingly, given the fact-bound analysis of *Brunner's* second element, the District Court should have reviewed the Bankruptcy Court's finding that additional circumstances were present for clear error. As explained in Section II.B, *infra*, its failure to do so constituted reversible legal error.

B. The District Court failed to apply the correct deferential standard of review to the Bankruptcy Court's finding of "additional circumstances."

Because it was a question of fact whether "additional circumstances" made it unlikely Ms. Conniff could repay her student loans and maintain a minimal standard of living, the Bankruptcy Court's determination that these additional circumstances were present in Ms. Conniff's situation was a fact finding that the District Court was required to affirm "so long as it [was] plausible in light of the record viewed in its entirety." *Merrill*

[3] Consistent with *Cox*, district courts in this Circuit also have given clear error deference to a bankruptcy court's *Brunner* findings. *See, e.g.*, *In re McLaney*, 375 B.R. 666, 676 (M.D. Ala. 2007).

Stevens Dry Dock, 329 F.3d at 816 (internal quotation marks omitted).[4] The Bankruptcy Court's factual finding that "additional circumstances" were present here was more than plausible based on the trial record. The Bankruptcy Court made that finding based on a well-developed record. It heard the testimony of four witnesses and considered 28 trial exhibits, including Ms. Conniff's financial records and her Bankruptcy Schedules filed under penalty of perjury. (*See generally* Adv. Dkt. 78.)

The Bankruptcy Court also made a credibility determination, finding Ms. Conniff's testimony to be "forthright and credible." (Adv. Dkt. 62 at 4; Adv. Dkt. 78 at 77.) "Assessing witness credibility is uniquely the function of the trier of fact" and thus, this Court has cautioned that courts sitting in review "may not and should not endeavor to replicate [those determinations] based on the cold paper record before it." *United States v. Peters*, 403 F.3d 1263, 1270 (11th Cir. 2005); *accord In re Kane*, 755 F.3d 1285, 1288 (11th Cir.

[4] As one Court colorfully put it: "'[t]o be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.'" *Cox Enters., Inc. v. News-Journal Corp.*, 794 F.3d 1259, 1272 n.92 (11th Cir. 2015) (quoting *Parts & Elec. Motors, Inc. v. Sterling Elec. Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)).

2014) ("when we examine the facts adduced at trial, generally we will not disturb a bankruptcy court's credibility determinations").

Based on the ample and well-developed trial record, the Bankruptcy Court engaged in a uniquely fact-bound analysis of Ms. Conniff's circumstances to determine whether Ms. Conniff's "earning potential and circumstances [made] it unlikely that [she] will produce the means necessary to repay the student loans while maintaining a minimal standard of living . . . ." *Cox*, 338 F.3d at 1242. The Bankruptcy Court heard testimony it found credible about: (a) Ms. Conniff's efforts to find higher paying jobs with no success; (b) the fact that any future pay increases under the pay scale for teachers in Alabama would be minimal; (c) that Ms. Conniff had tried to supplement her income through part-time work and applying for higher paying jobs but those efforts had not significantly improved her circumstances; and (d) that even ECMC agreed that Ms. Conniff deserved a loan deferment due to her financial and family circumstances. (Adv. Dkt. 62 at 1-4.)

As the Bankruptcy Court further found, Ms. Conniff's loan balance continued to grow as unpaid interest was added to her loan. (*Id.* at 4; Adv. Dkt. 78 at 78.) The Bankruptcy Court found

that Ms. Conniff was trapped in a "pincher sort of movement," where the continuing accrual of interest was surpassing any increases in her income, making it impossible for her to make "a dent" in her loans. (Adv. Dkt. 78 at 78-80.) The Bankruptcy Court concluded that Ms. Conniff was not likely to catch up ever, making the repayment of her loan an undue hardship. (*Id.* at 80; Adv. Dkt. 62 at 12, 14.)

The Bankruptcy Court record also included the testimony of the Debtor's parents, who testified that they were required to provide Ms. Conniff with financial assistance even when her loans were in deferment. (Adv. Dkt. 78 at 47-53.) Ms. Conniff also testified that her health had recently prevented her from working in special education and from taking on extra work—including jobs she had taken in the past—and testified that her medical situation might force her to retire early. (Adv. Dkt. 78 at 21, 61.)

Based upon this record, a finding that Ms. Conniff's earning potential and circumstances make it unlikely that she will produce the means necessary to repay her student loans while maintaining a minimal standard of living was not clear error. The District Court should have affirmed the Bankruptcy Court's decision. *See, e.g.*,

Krieger, 713 F.3d at 884-85. Instead of doing that, the District Court second-guessed the Bankruptcy Court's findings and replaced its own view of Ms. Conniff's future prospects with that of the trier of fact, imposing a burden of proof on Ms. Conniff that far exceeded the "preponderance of the evidence" standard the Supreme Court established for § 523(a) cases in *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991). This is evident from the following aspects of the District Court's decision.

1. The District Court erred when it substituted its own view of the facts for that of the Bankruptcy Court.

First, the District Court's decision is replete with instances where it simply disagrees with the Bankruptcy Court's fact findings. For example, the District Court concluded that Ms. Conniff's "future ability to earn extra income to repay her educational loans is not bleak." (Dist. Dkt. 21 at 21.) The Bankruptcy Court found the exact opposite. It found that Ms. Conniff's inability to repay her student loans was "likely to continue" (Adv. Dkt. 78 at 79-80), that she cannot repay $915 per month today (Adv. Dkt. 62 at 11), and that "nothing in her circumstances is likely to change in the future" (*id.* at 13). Similarly, the District Court found that Ms. Conniff might

still obtain a higher paying job as an administrator in the educational field (Dist. Dkt. 21 at 22), ignoring the Bankruptcy Court's exact opposite finding that Ms. Conniff's failure to obtain such jobs in the past despite repeated efforts to do so was not likely to change. (Adv. Dkt. 62 at 3, 12-13.)

In short, the District Court incorrectly substituted its view of the facts for those of the Bankruptcy Court. In *Krieger*, the Seventh Circuit held that it was legal error for a district court to substitute its own view of the debtor's future prospects for those of the bankruptcy court, which tried the case, and reversed the district court. 713 F.3d at 884-85. The Seventh Circuit stressed that it was especially important for appellate courts to respect a bankruptcy court's factual findings in student loan discharge cases because a court applying a "multi-factor standard interpreting an open-ended statute necessarily has latitude; the more vague the standard, the harder it is to find error in its application." *Id.* at 885. The District Court's failure to defer to the Bankruptcy Court's factual findings constitutes reversible error.

2. The District Court erred when it rejected the Bankruptcy Court's credibility findings.

Second, the District Court compounded its error by rejecting the Bankruptcy Court's credibility determinations. The District Court made it clear, notwithstanding the Bankruptcy Court's finding that Ms. Conniff's testimony was credible (Adv. Dkt. 62 at 4; Adv. Dkt. 78 at 77), that it questioned the sufficiency of her allegedly uncorroborated testimony, thereby implicitly finding her testimony was not credible (*see* Dist. Dkt. 21 at 8 n.5, 20).

For example, the District Court stated that Ms. Conniff's testimony alone "does not permit an informed weighing of Conniff's future childcare savings against the $500 monthly child support payment she receives" even as it acknowledged that Ms. Conniff provided testimony about the amounts she spent on her children. (*Id.* at 20.) Finding Ms. Conniff's testimony about what she spends on her children to be insufficient unless it was corroborated was tantamount to a finding that Ms. Conniff was not to be believed without support, the exact opposite of the Bankruptcy Court's credibility finding. Further, the District Court's attack on Ms.

Conniff's credibility ignored the fact that she had submitted corroborating financial records. (*See* Adv. Dkt. 31-3, 31-4, 31-6.)

Similarly, the District Court questioned the veracity of Ms. Conniff's testimony about her efforts to participate in student loan forgiveness programs, stating she "did not provide any evidence of these applications or denials." (Dist Dkt. 21 at 8 n.5.) But Ms. Conniff's testimony *was* evidence—evidence the Bankruptcy Court found credible. (Adv. Dkt. 62 at 4.) By stating Ms. Conniff's testimony was not evidence, the District Court was improperly substituting its own view of the credibility of Ms. Conniff's testimony for that of the Bankruptcy Court, which actually heard that testimony.

Therefore, the District Court erred as a matter of law when it rejected the Bankruptcy Court's credibility determinations based on its reading of "the cold paper record before it." *Peters*, 403 F.3d at 1270; *accord Kane*, 755 F.3d at 1288.

3. The District Court erred as a matter of law in making its one finding of clear error.

Third, the District Court's one clear error determination was itself made in error. This Court reviews *de novo* a district court's clear error determinations. *Sublett*, 895 F.2d at 1384 & n.5.

The District Court rejected as clear error the Bankruptcy Court's finding that Ms. Conniff's inability to repay her student loans would continue even after her sons became self-supporting adults because "much of the [future] savings from the emancipation of [Conniff's] children" would be offset by the cessation of the $500 per month child support payments. (Dist. Dkt. 21 at 20 (citing Adv. Dkt. 62 at 13).) The District Court found clear error because it concluded that Ms. Conniff's testimony about what she spent on her children did not provide an "adequate evidentiary record" and that the Bankruptcy Court was allegedly required to "speculate" about the amount of child-related costs she incurred. (Dist. Dkt. 21 at 21.) But Ms. Conniff testified about those child-related costs and as explained above, the District Court erred when it overrode the Bankruptcy Court's finding that Ms. Conniff's testimony was credible.

The District Court also erred because Ms. Conniff *did* provide financial records showing what she spent on her children (*see* Adv. Dkt. 31-3, 31-4, 31-6), which the District Court ignored (Dist. Dkt. 21 at 20). Most importantly, the testimony the District Court cites actually supports the Bankruptcy Court's finding. Had the District Court simply taken the expenses Ms. Conniff detailed—"$300 a month for lunches for her children and herself, $222 for family health insurance, a Verizon payment ranging from $134 to $278 that covers cell phone service and a data plan for three iPhones, and around $100 quarterly for life insurance policies on her sons" (Dist. Dkt. 21 at 20)—and prorated them, it would have arrived at a total of $558.33 per month in expense savings—savings that are almost exactly equal to the loss of $500 per month in child support.[5]

Thus, the Bankruptcy Court was not simply speculating when it concluded based on record evidence that emancipation of Ms. Conniff's children would not result in a net benefit as any decrease

[5] To calculate the expected savings of $558.33, one would divide the amount Ms. Conniff spends on lunches, health insurance, and phones (using the high-end of her estimate) by two-thirds and add the full amount she spends on her son's life insurance policies.

in expenses would be met with an almost exact drop in child support payments. Whether the District Court would have made a different finding based on this evidence is of no moment—the Bankruptcy Court's finding was "plausible in light of the record viewed in its entirety," was not clear error, and so was entitled to deference. *Merrill Stevens Dry Dock,* 329 F.3d at 816.

At a minimum, if the District Court was confused about the basis for the Bankruptcy Court's finding, it should have remanded with instructions to clarify this point. *See, e.g.*, *Sublett*, 895 F.2d at 1384. What the District Court was not entitled to do was to substitute its view of the record for the Bankruptcy Court's and disregard the Bankruptcy Court's findings simply because it would have decided the case differently. This Court should reverse with instructions to reinstate the Bankruptcy Court's judgment.

CONCLUSION

Ms. Conniff respectfully requests that this Court reverse the District Court's judgment, remand with instructions to reinstate the Bankruptcy Court's judgment, and grant such other relief as may be just.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 9,892 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii). This brief complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Bookman Old Style font.

/s/ Eugene R. Wedoff
EUGENE R. WEDOFF

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2016, I electronically filed the foregoing Principal Brief with the Clerk of the Court by using the CM/ECF system. I also further certify that the foregoing document was sent by United States Mail to Robert A. Morgan, Rosen Harwood PA, 2200 Jack Warner Parkway, PO Box 2727, Tuscaloosa, AL 35403 (rmorgan@rosenharwood.com) (Attorney for Plaintiff/Appellee).

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