

So Ordered.

Dated: October 23rd, 2015



Frederick P. Corbit

Frederick P. Corbit
Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In re:

Case No. 14-04545-FPC7

JUSTIN McCAFFERTY and
AUTUMN McCAFFERTY,

NOT FOR PUBLICATION

Debtors.

AUTUMN I. McCAFFERTY,

Plaintiff,

Adversary No. 15-80015-FPC

vs.

MEMORANDUM DECISION

UNITED STATES DEPARTMENT OF
EDUCATION, et al.,

Defendants.

INTRODUCTION

Autumn and Justin McCafferty filed a chapter 7 bankruptcy petition in December 2014 seeking to discharge their consumer debt. The discharge was granted on April 15, 2015. On March 24, 2015, Autumn McCafferty commenced

1 this adversary proceeding seeking an undue hardship discharge of her student loan
2 obligations pursuant to 11 U.S.C. § 523(a)(8). Defendants, the United States
3 Department of Education (“DOE”) and Educational Credit Management Corporation
4 (“ECMC”), filed answers denying that Mrs. McCafferty satisfies the test for undue
5 hardship. A one-day trial was held on September 23, 2015. Mrs. McCafferty, pro se,
6 appeared and testified. Defendant ECMC was represented by Daniel J. Bugbee and
7 Defendant DOE was represented by Vanessa R. Waldref. Defendants called to
8 testify Justin McCafferty, (Plaintiff’s husband) and Philippe Guillon, loan analyst.
9 Plaintiff’s exhibits B-E and K and Defendants’ exhibits 2, 8-12 and 14 were
10 admitted into evidence without objection. This matter is ready for decision.

11 This court has jurisdiction of this adversary proceeding under 28 U.S.C.
12 § 1334(b). This is a core proceeding to determine dischargeability of a particular
13 debt under 28 U.S.C. § 157(b)(2)(I). This memorandum decision includes the court’s
14 findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052 (applying
15 Fed. R. Civ. P. 52 in adversary proceedings). For the reasons set forth below, an
16 order shall be entered denying Autumn McCafferty an undue hardship discharge
17 pursuant to 11 U.S.C. § 523(a)(8) of her student loan debt.

18 **FACTUAL BACKGROUND**

19 Mrs. McCafferty is a healthy thirty-three-year-old female who lives in an
20 apartment in Pullman, Washington, with her husband and thirteen-year-old daughter.

1 Mrs. McCafferty began her postsecondary education in 2000 at Spokane Community
2 College. From 2000-2014, she attended various institutions and obtained a
3 cosmetology license, a cosmetology instructor license, and an A.S. degree in office
4 administration. Mrs. McCafferty is currently working toward obtaining a B.A. in
5 accounting.¹

6 During the same time frame, Mrs. McCafferty's employment history varied
7 from unemployed to working full-time.² Currently, Mrs. McCafferty is employed by
8 DABCO Property Management, earning \$15 per hour and \$22.50 per hour for
9 overtime. Her position is full-time during the month of December and the months
10 May through August. During the rest of the year, her position is part-time at twenty
11 hours per week. Because of staffing changes, Mrs. McCafferty worked over-time
12 hours in June, July, and August of 2015. She did not anticipate that the over-time
13 would continue. However, Mrs. McCafferty is hopeful that her position will become
14 full-time year-round and that she will receive a pay increase within the next couple
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16
17 ¹ The parties stipulated to the following summary of Mrs. McCafferty's postsecondary education:
18 2000-2001, Spokane Community College (cosmetology program, no degree obtained); 2001-2002,
19 Mr. Leon's School of Hair Design (no degree obtained); 2004-2006, Spokane Falls Community
20 College (A.S. in office administration); 2008-2009, Mr. Leon's School of Hair Design
(cosmetology and instructor cosmetology license); and 2011-2014, Western Governor's
University, (pursuing a B.A. in accounting).

² The following summarizes Mrs. McCafferty's work history as stipulated by the parties: 2002-
2004 (unemployed); April 2005-October 2008, administrative assistant (full-time at \$12.77/hour);
August 2009-April 2011, cosmetologist (full-time at \$90/day); and April 2011-June 2014
(unemployed).

1 of months (after her one-year review). During times of unemployment,
2 Mrs. McCafferty regularly sent out resumes and diligently sought employment.

3 Mr. McCafferty worked as a car salesman at Chipman & Taylor Chevrolet
4 from 2003-2015. Mr. McCafferty voluntarily left that position in March, 2015 to
5 start his own lawn-care company, Level 5 Lawn Care Services. The decision to leave
6 the car dealership was based on Mr. McCafferty's family's best interest. Despite
7 long hours and diligence at Chipman & Taylor Chevrolet, a down-turn in the
8 economy had severely affected car sales and he had four months of zero-sum
9 paychecks. Therefore, Mr. McCafferty justifiably decided to put his hard work and
10 energy into a different business.

11 During discover, Mrs. McCafferty submitted gross income information for the
12 last seven years. From the evidence presented, the McCaffertys' income was highest
13 in 2008 (approximately \$82,000) and steadily declined until 2011, where it has
14 remained fairly steady averaging approximately \$55,000.³ Both Mr. and Mrs.
15 McCafferty testified that it was their goal to maximize their income and hoped that
16 with the new business and the possibility that Mrs. McCafferty's position would
17 become full-time year-round, that their yearly income would at least stay at its
18 current level and hopefully increase. Given the variability in the hours

19 _____
20 ³ Both parties stipulated to the adjusted gross income as indicated on the McCaffertys' previous federal income tax returns: 2008 (AGI \$82,096); 2009 (AGI \$74,350); 2010 (AGI \$66,493); 2011 (AGI \$53,594); 2012 (AGI \$55,923); 2013 (AGI \$49,230); and 2014 (AGI \$55,075).

1 Mrs. McCafferty currently works, and the fact that Mr. McCafferty recently started
2 the new business, it is difficult to establish an accurate and fixed net monthly income
3 amount. However, evidence presented demonstrates that the McCaffertys' net
4 monthly income is currently \$3,726.00 per month.

5 At issue in this case are Mrs. McCafferty's multiple student loans. It is not
6 disputed that Mrs. McCafferty primarily financed her postsecondary education with
7 loans and currently has outstanding loans with both the DOE and ECMC.

8 Mrs. McCafferty received her first educational loan disbursement in 2001 and her
9 last in 2013. The interest rates on the loans vary from 2.3% to 6.6%. The combined
10 amount owing on both the DOE and ECMC loans is approximately \$73,000.00,
11 which includes the principal, accrued interest, and fees. Mrs. McCafferty has never
12 made a payment on her DOE loans and has paid about \$1,000 toward her ECMC
13 loans.

14 As to her student loans, Mrs. McCafferty testified that (1) in the past she was
15 unable to pay any amount toward her student loans, (2) she currently remains unable
16 to pay, and (3) she does not foresee any change in the future as to her ability to make
17 payments on her student loans. According to Mrs. McCafferty, paying any amount
18 toward her student loans would be an undue hardship. Defendants disagree.

19 Defendants argue that Mrs. McCafferty incurred significant student loan debt, and
20

1 now, having paid almost nothing on that debt, seeks to discharge it all despite being
2 young, healthy, and employable.

3 All parties agree that flexible repayment options remain available to
4 Mrs. McCafferty under the William D. Ford Program (“Direct Loan Program”).⁴ At
5 trial, the defendants attested that an Income Based Repayment (“IBR”) plan with a
6 payment of approximately \$315.00 per month is currently available to
7 Mrs. McCafferty. This IBR plan includes all principal, interest and fees of both
8 Mrs. McCafferty’s DOE and ECMC loans. In order to enroll in the IBR plan,
9 Mrs. McCafferty merely needs to indicate her approval to the defendants.

10 **LEGAL ANALYSIS**

11 The purpose of bankruptcy is to give good-faith debtors a fresh start. *Little v.*
12 *Reaves (In re Reaves)*, 285 F.3d 1152, 1157 (9th Cir. 2002). In tension with this
13 overall purpose, educational loans are presumptively non-dischargeable in
14 bankruptcy “unless excepting such debt from discharge . . . would impose an undue
15 hardship on the debtor and the debtor’s dependents.” 11 U.S.C. § 523(a)(8). Thus, to
16 obtain a discharge, a debtor must demonstrate that she meets the “undue hardship”
17 requirement of § 523(a)(8).

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⁴ The William D. Ford Program is found at 34 C.F.R. § 685.100, et seq.

1 **I. Brunner Test**

2 To determine what constitutes undue hardship under 11 U.S.C.
3 § 523(a)(8)(B), the Ninth Circuit, along with many other circuits, has adopted a
4 three-part test first enunciated in *In re Brunner*.⁵ See *United Student Aid Funds v.*
5 *Pena (In re Pena)*, 155 F.3d 1108, 1114 (9th Cir. 1998) (“We adopt the *Brunner* test
6 as the test to be applied to determine the ‘undue hardship’ required to discharge
7 student loans in bankruptcy pursuant to 11 U.S.C. § 523(a)(8)(B).”). Under the
8 *Brunner* test, to discharge a student loan debt, the debtor must prove that: (1) she
9 cannot maintain, based on current income and expenses, a “minimal” standard of
10 living for herself and her dependents if required to repay the loans; (2) additional
11 circumstances exist indicating that this state of affairs is likely to persist for a
12 significant portion of the repayment period; and (3) the debtor has made good faith
13 efforts to repay the loans. *Educ. Credit Mgmt. Corp. v. Mason (In re Mason)*, 464
14 F.3d 878, 882 (9th Cir. 2006); *Brunner*, 831 F.2d at 396.⁶ The debtor bears the
15 burden of proving all three elements by a preponderance of the evidence in order to
16 obtain a discharge of an educational debt. *Rifino v. United States (In re Rifino)*, 245

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⁵ *In re Brunner*, 46 B.R. 752 (S.D.N.Y. 1985), *aff’d sub nom., Brunner v. N.Y. State Higher Educ.*
Servs. Corp., 831 F.2d 395 (2d Cir. 1987) (three-prong undue hardship test first enunciated).

19 ⁶ The *Brunner* test has come under increasing criticism. Others have noted that the *Brunner* test
20 “is too narrow, no longer reflects reality, and should be revised.” *In re Roth*, 490 B.R. 908, 920
(B.A.P. 9th Cir. 2013) (Pappas, J., concurring). However, until revised, it is binding law and the
test this court must follow.

1 F.3d 1083, 1087-88 (9th Cir. 2001). “If the debtor fails to satisfy any one of these
2 requirements, ‘the bankruptcy court’s inquiry must end there, with a finding of no
3 dischargeability.’” *Id.* at 1088 (quoting *In re Faish*, 72 F.3d 298, 306 (3d Cir.1995)).

4 In this case, Mrs. McCafferty satisfies the first two prongs of the *Brunner* test.
5 However, she fails to satisfy prong three because she has not shown that she made a
6 good faith effort to repay her student loans.

7 **a. Whether Mrs. McCafferty can maintain a “minimal” standard of**
8 **living if forced to repay the loan**

9 The initial prong of the undue hardship analysis under *Brunner* requires the
10 debtor to show a present inability to maintain a minimal standard of living if forced
11 to repay her student loan. *Rifino*, 245 F.3d at 1088. Although the standard to obtain a
12 discharge of student loans is high, it is not unattainable. *See Pa. Higher Educ.*
13 *Assistance Agency v. Birrane (In re Birrane)*, 287 B.R. 490, 495 (B.A.P. 9th Cir.
14 2002). “[C]ourts require more than temporary financial adversity, but typically stop
15 short of utter hopelessness.” *Id.* (quoting *In re Nascimento*, 241 B.R. 440, 445
16 (B.A.P. 9th Cir. 1999)). Thus, this element of the undue hardship analysis compares
17 the individual’s standard of living against her current income and expenses. *See cf.*,
18 *Rifino*, 245 F.3d at 1088 (finding this element satisfied if the debtor proves she could
19 not maintain a minimal standard of living based on her current income and
20 expenses); *Pena*, 155 F.3d at 1112-13 (subtracted debtor’s average monthly

1 expenses from net monthly income to determine whether first prong of *Brunner* test
2 was met).

3 The McCaffertys' monthly net income is \$3,726.00 per month.

4 Mrs. McCafferty testified that her family's monthly expenses totaled approximately
5 \$3,700 per month. The defendants do not contest the fact that the McCaffertys incur
6 the specified expenses. Rather, the defendants argue that many of the expenses are
7 not reasonably necessary to achieve a minimal standard of living.⁷ As evidenced by

8 _____
9 ⁷ The following table indicates each party's estimation of the McCaffertys' monthly expenses
10 necessary to maintain a "minimal" standard of living as noted in their respective trial briefs.

Monthly Expenses	Plaintiff	Defendants
Rent	\$685	\$685
Telephone	\$250	\$90
Electricity	\$150	\$125
Internet Service	\$52	\$52
Automobile Payments	\$530	\$531
Automobile Maintenance	\$75	\$50
Automobile Fuel	\$300	\$150
Automobile Insurance	\$94	\$94
Life Insurance	\$44	\$0
Dependent Allowance & Savings	\$40	\$0
Groceries	\$675	\$600
Clothing	\$50	\$50
Orthodontist	\$235	\$235
Geidel Clinic Fees (Plaintiff & daughter)	\$80	\$80
Prescriptions	\$20	\$20
Anytime Fitness Gym Membership	\$70	\$0
Netflix Subscription	\$17	\$0
Hulu Subscription	\$8	\$0
Ipsy Subscription	\$10	\$0
Focus on the Family Subscription	\$15	\$0
Church Offering	\$150	\$0

1 the expense table, the parties dispute the necessity of monthly expenses totaling
2 approximately \$900 per month. Of that disputed amount, approximately \$300 relates
3 to expenses that the McCaffertys designate as tithes to their church or other church-
4 sponsored donations. The McCaffertys' tithes/charitable church contributions include
5 a \$150.00 per month church offering, a \$100.00 per month missionary sponsorship,
6 and a \$50.00 per month sponsorship of a child through World Vision.

7 Resolving the dispute over the McCaffertys' budget, "is a matter properly left
8 to the discretion of the bankruptcy court." *Pena*, 155 F.3d at 1112. This court
9 employs common sense, knowledge gained from ordinary observations in daily life,
10 and general experience when determining whether someone's expenses are
11 unnecessary or unreasonable, whether someone is paying for something that is not
12 needed, or whether someone is paying too much for something that is needed. This
13 court agrees that "[p]eople must have the ability to pay for some small diversion or
14 source of recreation, even if it is just watching television or keeping a pet." *Ivory v.*
15 *United States Dep't of Educ. (In re Ivory)*, 269 B.R. 890, 899 (Bankr. N.D. Ala.
16 2001). Additionally, in a previous case, this court rejected Defendant ECMC's

Missionary Sponsorship Donation	\$100	\$0
World Vision: Sponsored Child	\$50	\$0
Total	\$3,700	\$2,762

1 assertion that a debtor eligible to participate in an IBR plan could never show undue
2 hardship under prong one. ECMC’s argument impermissibly substituted an
3 administrative formula for a bankruptcy judge’s discretion.⁸ This court found that
4 following such an argument would “render an absurd result” that would be
5 “inconsistent with the *Brunner* analysis.” *Morrison v. Sallie Mae, Inc. (In re*
6 *Morrison)*, No. 13-00933-FPC7, 2014 WL 739838 at *4 (Bankr. E.D. Wash.
7 Feb. 26, 2014). Similarly, this court concludes that the Defendants’ argument that
8 tithing can never be an allowable expense under the § 523(a)(8) analysis is an
9 attempt to usurp a bankruptcy judge’s discretion.

10 **i. Tithing and § 523(a)(8)**

11 Defendants argue that the McCaffertys’ tithing and charitable giving expenses
12 are not allowable expenses under a § 523(a)(8) undue hardship analysis and contend
13 that the monthly donated amounts should be considered available to pay on the
14 student loans. The court is not convinced.⁹ The question is whether the passage of
15 the Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No.
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18 ⁸ As other courts have commented, “some officials of the Ford Program are compassionless
19 number-crunchers and that determinations as to how much a debtor can afford to pay are much
20 better left to the courts.” *Nys v. Cal. Student Aid Comm’n (In re Nys)*, No. 02-11455, 2003 WL
22888941 at *1 (Bankr. N.D. Cal. Aug. 11, 2003).

⁹ The parties did not cite, nor has the court been able to locate, any binding authority concerning
whether charitable contributions should be considered in undue hardship determinations.

1 105-183, 112 Stat. 517 (1998) (“RLCDPA”) impacts this court’s § 523(a)(8) undue
2 hardship analysis.

3 The RLCDPA amended several sections of the Bankruptcy Code to exclude
4 charitable contributions of up to fifteen percent of the debtor’s adjusted gross
5 income (“AGI”) from consideration by the bankruptcy courts.

6 For example, Congress amended Section 707(b) to make clear that
7 the bankruptcy court should not consider a debtor’s modest
8 charitable contributions in determining whether to dismiss a Chapter
9 7 case for “substantial abuse.” 11 U.S.C. § 707(b). Congress also
10 amended Sections 544(b) and 548(a) to insulate such charitable gifts
11 from avoidance by a trustee as fraudulent conveyances. 11 U.S.C.
§§ 544(b)(2), 548(a)(2), 548(d)(2)(4). Congress also declared that
charitable contributions should not be considered “disposable
income” by the bankruptcy court in determining the amount of
required payments by a debtor to creditors under a Chapter 13 plan.
11 U.S.C. § 1325(b)(2)(A).

12 *Ritchie v. Northwest Educ. Loan Assn. (In re Ritchie)*, 254 B.R. 913, 920 (Bankr. D.
13 Idaho 2000). Notably however, the RLCDPA made no amendments to § 523(a)(8).
14 Courts have interpreted this omission as Congressional intent to alternatively create
15 (1) a per se prohibition of charitable giving as an allowable expense under the
16 § 523(a)(8); (2) a per se allowable expense of charitable giving (not to exceed 15%
17 of a debtor’s gross annual income); or (3) no impact on the § 523(a)(8) analysis.

18 **(1) Per Se Prohibition**

19 Courts construing the omission of a change to § 523(a)(8) under the RLCDPA
20 as acting as a per se exclusion of charitable giving as an allowable expense rely on

1 the rule of statutory interpretation stating that “[w]here Congress includes particular
2 language in one section of a statute but omits it in another section of the same Act, it
3 is generally presumed that Congress acts intentionally and purposefully in the
4 disparate inclusion or exclusion.” *Ritchie*, 254 B.R. at 919 (quoting *Bates v. United*
5 *States*, 522 U.S. 23, 29-30 (1997)). Following this statutory interpretation, some
6 courts concluded that because Congress chose not to amend § 523(a)(8), the
7 negative implication must be that Congress *intended to prevent* debtors from
8 including tithing as a permissible expense when calculating income available for
9 student loan repayment. *See, e.g., Ritchie*, 254 B.R. at 919-21. However, this
10 analysis fails to take into account that RLCDPA was passed primarily to protect
11 churches from being sued by bankruptcy trustees attempting to recover tithes
12 previously made by debtors. *See* H.R. Rep. No. 105-556, at 2-3 (1998). Given this
13 purpose, “Congress would have little reason to make changes to § 523(a)(8) when it
14 deals only with whether or not a student loan should be discharged and never allows
15 a retroactive reach back into a church’s coffers. Therefore, the omission of a tithing
16 protection in § 523(a)(8) should not be construed as Congressional intent to always
17 exclude tithes as an expense under the undue hardship analysis but rather that
18 Congress simply paid no mind to § 523(a)(8) when it passed the RLCDPA.”

1 *McLaney v. Ky. Higher Educ. Assistance Authority (In re McLaney, 375 B.R. 666,*
2 *681 (M.D. Ala. 2007).*¹⁰

3 **(2) Per Se Allowable**

4 Courts that have concluded that tithes are a permissible expense when
5 conducting a § 523(a)(8) undue hardship analysis rely on the rule of statutory
6 construction instructing that provisions in one act which are omitted in another on
7 the same subject matter should be applied when the purposes of the two acts are
8 consistent. *See cf. Durrani v. Educ. Credit Mgmt. Corp. (In re Durrani), 311 B.R.*
9 *496, 503-04 (Bankr. N.D. Ill. 2004)* (“conclud[ing] that a bankruptcy judge should
10 not override a debtor’s commitment to tithing”); *In re Cavanagh, 242 B.R. 707*
11 *(Bankr. D. Mont. 2000), aff’d, 250 B.R. 107 (B.A.P. 9th Cir. 2000)* (finding
12 charitable contributions to the extent not exceeding 15% are reasonable). Such
13 courts concluded that because (1) a determination of disposable income is a
14 component of all the bankruptcy sections and (2) the RLCDPA creates a
15 presumption that bona fide charitable giving (up to 15% of debtor’s AGI) will be
16 protected, that (3) the § 523(a)(8) analysis should also permit similar contributions.

17
18 ¹⁰ It seems even courts that indicate tithing is not a permissible expense, may allow de minimis
19 tithing. *See cf., Ritchie, 254 B.R. at 919* (“question presented is whether Congress intended that
20 debtors seeking to discharge student loans be able to make *significant* charitable donations”) (emphasis added); *Fulbright v. United States Dep’t of Educ. (In re Fulbright), 319 B.R. 650, 659*
(Bankr. D. Mont. 2005) (noting debtor’s monthly tithe was “*not de minimis, or modest and*
reasonable under the circumstances, and . . . is a significant charitable donation . . . and is per se
unreasonable when not required for membership”) (emphasis added).

1 *See, e.g., Lebovits v. Chase Manhattan Bank (In re Lebovits)*, 223 B.R. 265 (Bankr.
2 E.D.N.Y. 1998) (tithing was permissible expense under § 523(a)(8)); *Meling v.*
3 *United States (In re Meling)*, 263 B.R. 275 (Bankr. N.D. Iowa 2001) (monthly tithes
4 of \$100 were reasonable for purposes of § 523(a)(8)). However, it is not so clear that
5 the purpose of the Code sections changed by the RLCDDPA and § 523(a)(8) are
6 similar enough to presume charitable donation protection.

7 **(3) No change**

8 Indeed, this court is hesitant to automatically sweep the § 523(a)(8) hardship
9 analysis under the RLCDDPA protections. Rather, this court agrees with the *Fulbright*
10 court in that it does “*not view* the subject matter of § 523(a)(8) . . . as the same
11 subject matter or purpose as the subject matter and purposes of § 548(a)(2) (recovery
12 of fraudulent transfers), § 707(b) (dismissal for substantial abuse if Chapter 7), and
13 § 1325(b) (confirmation of a Chapter 13 plan).” *Fulbright v. United States Dep’t of*
14 *Educ. (In re Fulbright)*, 319 B.R. 650, 660 (Bankr. D. Mont. 2005) (emphasis
15 added). This court finds the First Circuit accurately explained why the purpose of the
16 bankruptcy sections amended by the RLCDDPA are simply too different from
17 § 523(a)(8) to be considered “consistent” with each other. *Educ. Credit Mgmt. Corp.*
18 *v. Savage (In re Savage)*, 311 B.R. 835 (B.A.P. 1st Cir. 2004). When explaining, the
19 *Savage* court stated:

20 In undue hardship analysis, most courts employ the same model
as is used to determine “disposable income” for Chapter 13 plan

1 confirmation purposes. Although the problems are similar
2 (ascertaining whether there are sufficient resources to fund
3 payments), the objects (disposable income for plan confirmations
4 vs. payment without undue hardship) differ. Under § 1325, a
5 debtor is generally not required to alter reasonable lifestyle
6 choices. The same can be said of § 707(b) analysis, which
7 generally focuses on the availability of sufficient disposable
8 income to fund a Chapter 13 plan.

9 Under § 523(a)(8), the debtor's lifestyle (particularly expenses) is
10 subjected to more rigid scrutiny. Courts differ on the degree of
11 scrutiny applied, or, more precisely, on how much hardship a
12 debtor can be expected to bear before it becomes "undue." But
13 deference to a debtor's lifestyle choices is, to put it kindly,
14 muted. Eliminating some expenses that would be considered
15 legitimate under § 1325 might well be done without creating
16 "undue" hardship.

17 *Savage*, 311 B.R. at 840 n.7 (citations omitted). Because of the differences in the
18 Code sections, it would be inappropriate to automatically transfer the RLCDDPA's
19 charitable safe harbor to the § 523(a)(8) hardship analysis.

20 This court echoes the other courts that have noted that the RLCDDPA made no
changes to § 523(a)(8). Therefore, any interpretation that expressly allows or
disallows tithing should be rejected as both interpretations seem to effectively
amend § 523(a)(8) when Congress did not. *See Pa. Dep't Pub. Welfare v.*
Davenport, 495 U.S. 552, 562 (1990) ("We will not read the Bankruptcy Code to
erode past bankruptcy practice absent a clear indication that Congress intended such
a departure."). Rather, having thoroughly reviewed relevant authority, this court
finds the last interpretation most convincing: RLCDDPA's passage does not impact

1 the analysis of whether tithing should be considered a reasonable and necessary
2 expense under § 523(a)(8). *See, e.g., Educ. Credit Mgmt. Corp. v. Rhodes*, 464 B.R.
3 918 (W.D. Wash. 2012) (finding religious or charitable contributions not per se
4 reasonable or unreasonable). Therefore, this court will continue to consider
5 charitable giving expenses on a case-by-case basis, considering factors such as the
6 amount and the debtor’s history in order to determine whether, for that particular
7 debtor, tithing constitutes a reasonably necessary expenditure. “[I]f bankrupt
8 families are allowed to indulge a family pet or watch . . . cable television [then]
9 surely a bona fide tithe to their church may at least be considered as a proper
10 expense.” *McLaney*, 375 B.R. at 682. In this case, the McCaffertys are deeply
11 religious with a long history of monthly tithing. Therefore, tithing expenses up to
12 \$150 per month would be reasonable.¹¹

13 **ii. Other expenses**

14 Additionally, defendants challenge the following expenses: the McCaffertys’
15 cell phone expense (\$250), monthly vehicle fuel (\$300), daughter’s allowance (\$40),
16 groceries (\$675), clothing (\$50), orthodontist (\$235), Geidel Clinic Fees (\$80),
17 prescriptions (\$20), fitness gym membership (\$70), Netflix (\$17), Hulu (\$8), and
18

19 ¹¹ The court would have concluded that Mrs. McCafferty’s tithing budget, to the extent that it
20 exceeded \$150.00, could be used to pay on her student debt. However, at this rate, the principal
would never be repaid. Therefore, if Mrs. McCafferty had satisfied all three *Brunner* prongs, the
court would have, as allowed in the Ninth Circuit, entered an order discharging some, but not all,
of her student loan debt. *See In re Saxman*, 325 F.3d 1168 (9th Cir. 2003).

1 Ipsy subscription (\$10). Defendants argue that many of these expenses are
2 discretionary and can be eliminated altogether, while other expenses are merely
3 excessive.¹² The calculation of cost reductions are factual in nature and, as such, “is
4 a matter properly left to the discretion of the bankruptcy court.” *Pena*, 155 F.3d at
5 1112; *Educ. Credit Mgmt. Corp. v. Jorgensen (In re Jorgensen)*, 479 B.R. 79, 68
6 (B.A.P. 9th Cir. 2012). Evidence presented demonstrates that the McCaffertys do not
7 live an extravagant life style. They do not own a home. Both of their vehicles are
8 approximately ten years old. They do not take expensive vacations. *See In re Cline*,
9 248 B.R. 347 (B.A.P. 8th Cir. 2000) (explaining not necessary to review debtors’
10 budgets line-by-line to wring out all possible surplus where the expenses are
11 minimal). Therefore, the court concludes that the listed expenses do not include any
12 significant items that are not reasonably necessary to maintain a minimal standard of
13 living. Indeed, their listed expenses fail to include many items that are arguably
14 “necessary” for even a minimal lifestyle—including health insurance for
15 Mr. McCafferty. Except to the extent that Mrs. McCafferty’s tithing budget exceeds
16 \$150.00 per month, the remaining expenses are reasonable and necessary to
17 maintain a minimal standard of living.¹³

18 ¹² *See supra* expense table note 7.

19 ¹³ *See Hedlund v. Educ. Res. Inst. Inc.*, 718 F.3d 848, 855 (9th Cir. 2013) (finding the bankruptcy
20 court’s determination of allowable expenses not clearly erroneous); *Rifino*, 245 F.3d at 1087
(affirming the bankruptcy court’s determination that debtor’s standard of living would fall below a
minimal level if she were required to repay her student loans even though debtor’s budget included

1 **b. Whether additional circumstances exist indicating that**
2 **Mrs. McCafferty’s state of affairs is likely to persist**

3 Under *Brunner*’s second prong, Mrs. McCafferty must prove “that her present
4 inability to pay will likely persist throughout a substantial portion of the loan’s
5 repayment period.” *Educ. Credit Mgmt. Corp. v. Nys (In re Nys)*, 446 F.3d 938, 945
6 (9th Cir. 2006) (citing *Pena*, 155 F.3d at 1114). The Ninth Circuit explained that
7 bankruptcy courts should endeavor to identify whether “additional circumstances”
8 exist to support this finding, but clarified that “the determinative question is whether
9 the debtor’s inability to pay will, given all we know about the salient features of her
10 existence, persist throughout a substantial portion of the loan's repayment.” *Id.* at
11 946. Importantly, the second prong does not require the debtor “show exceptional
12 circumstances beyond the inability to pay in the present and a likely inability to pay
13 in the future. *Nys*, 446 F.3d at 947.¹⁴

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17 tanning, cable television, and new car payments); *Birrane*, 287 B.R. at 496 (rejecting creditor’s
18 argument that bankruptcy court’s finding regarding minimal standard of living was erroneous even
19 though debtor’s budget included: “extraneous expenses related to debtor's dance company,
20 charitable contributions, dining out expenses, and book club purchases and gifts,” noting that
“whether to decline a discharge due to expenses which may be beyond the minimal standard of
living is discretionary with the court.”).

¹⁴ See also *Educ. Credit Mgmt. Corp. v. Mandighomi (In re Mandighomi)*, 242 F. App’x 401, 404
(9th Cir. 2007) (internal quotation omitted) (“affirm[ing] the bankruptcy court’s conclusion that
[debtor’s] dim earnings forecast, children’s needs, age, and size of debt make it such that his
inability to make payments will likely persist throughout a substantial portion of the loan's
repayment period.”).

1 In *Nys*, the Ninth Circuit indicated that courts may refer to the following non-
2 exhaustive list of possible “additional circumstances” which may prevent a debtor
3 from having the ability to pay in the future. *Nys*, 446 F.3d at 946-47.

4 Serious mental or physical disability of the debtor or the debtor’s
5 dependents which prevents employment or advancement; (2) The
6 debtor’s obligations to care for dependents; (3) Lack of, or severely
7 limited education; (4) Poor quality of education; (5) Lack of usable or
8 marketable job skills; (6) Underemployment; (7) Maximized income
9 potential in the chosen educational field, and no other more lucrative
10 job skills; (8) Limited number of years remaining in the debtor’s work
11 life to allow payment of the loan; (9) Age or other factors that prevent
12 retraining or relocation as a means for payment of the loan; (10) Lack
13 of assets, whether or not exempt, which could be used to pay the loan;
14 (11) Potentially increasing expenses that outweigh any potential
15 appreciation in the value of the debtor's assets and/or likely increases
16 in the debtor's income; (12) Lack of better financial options
17 elsewhere.

18 *Nys*, 446 F.3d at 947.

19 In this case, Mrs. McCafferty is thirty-three-years-old with no physical or
20 mental limitations. However, the McCaffertys have very limited savings and
minimal assets. Mrs. McCafferty’s marketable skills are limited. Thus, it is unlikely
that Mrs. McCafferty could obtain significantly better employment prospects or
chances for more lucrative earnings. Additionally, Mr. McCafferty’s business is
physically demanding and weather dependent. Therefore, the new business (while
not an unwise decision), will not likely lead to substantial changes in the

1 McCaffertys' current income. The court finds Mrs. McCafferty sustained her burden
2 as to prong two.

3 **c. Whether Mrs. McCafferty has made good faith efforts to repay the**
4 **debt**

5 The third and final prong of the Brunner test requires the debtor to prove that
6 she made good faith efforts to repay the loans or show that the forces preventing
7 repayment are truly beyond her control. *Brunner*, 46 B.R. at 755. The final prong of
8 the *Brunner* test requires that the debtor exhibit good faith in her efforts to repay the
9 student loans. *Mason*, 464 F.3d at 884; *Pena*, 155 F.3d at 1114; *Rifino*, 245 F.3d at
10 1087.¹⁵ Although, "a history of making or not making payments is, by itself, not
11 dispositive," *Mason*, 464 F.3d at 884, it is a persuasive factor in determining
12 whether a debtor has made a good faith effort to repay her loans. *Pena*, 155 F.3d at
13 1114.

14 Significant to this court's analysis of prong three is that despite maximizing
15 her income and minimizing her expenses, Mrs. McCafferty has made minimal
16 payments on her student loans in the last fourteen years. Mrs. McCafferty testified

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18 ¹⁵ "Good faith is measured by the debtor's efforts to obtain employment, maximize income, and
19 minimize expenses." *Hedlund v. Educ. Res. Inst. Inc.*, 718 F.3d 848, 852 (9th Cir. 2013) (quoting
20 *In re Birrane*, 287 B.R. at 499). In this case, the McCaffertys have likely maximized their income
and minimized their expenses. There is no evidence that either Mr. or Mrs. McCafferty have
purposely sought lower-paying jobs. Mrs. McCafferty, in addition to being currently employed, is
actively involved in her daughter's education and assists with her husband's new business.
Although Mr. McCafferty voluntarily chose to leave his position as a car salesman, the court found
his testimony as to the reasons why he left to be credible and not unreasonable.

1 that she has made no voluntary payments on her DOE debt at any time and she has
2 only paid approximately one thousand dollars toward her ECMC loans. Further,
3 Mrs. McCafferty testified that when she had the financial ability to pay down debt,
4 she has always chose to make payments on debts other than her educational loans.
5 Unfortunately, a lack of any meaningful payment by debtors weighs heavily against
6 finding of good faith. *See contra England v. United States (In re England)*, 264 B.R.
7 38, 48 (Bankr. D. Idaho 2001) (finding no lack of good faith even though debtor had
8 failed to make payments because debtor did not have the financial wherewithal to
9 make payments). Mrs. McCafferty’s decision to focus on other debt first “makes
10 perfect sense if one ultimately pays off all one’s debts. However, in a bankruptcy
11 context, the court simply cannot conclude that paying non-student loan debt while
12 not paying student loan debt constitutes a good faith effort to repay student loan
13 debt.” *Fuller v. United States Dep’t of Educ. (In re Fuller)*, 296 B.R. 813, 819
14 (Bankr. N.D. Cal. 2003).

15 Also relevant to the good faith analysis and the facts at hand, is a “debtor’s
16 effort-or lack thereof-to negotiate a repayment plan.” *Mason*, 464 F.3d at 884
17 (internal quotation marks and citations omitted). Some courts have found the
18 debtor’s unwillingness to do so to be a significant factor in the good faith analysis.
19 *Birrane*, 287 B.R. at 500 (“Good faith is also measured by a debtor’s effort-or lack
20 thereof-to negotiate a repayment plan.”); *United States Dep’t of Educ. v. Wallace (In*

1 *re Wallace*), 259 B.R. 170, 184 (C.D. Cal. 2000) (“A debtor’s good faith can be
2 measured by evaluating how he responded to repayment opportunities that were
3 presented to him.”).

4 Mrs. McCafferty testified that prior to the filing of this adversary proceeding,
5 she had not attempted to negotiate a repayment plan with either lender. Defendants
6 indicated that had Mrs. McCafferty investigated, at least four different income
7 contingent repayment plans were available. Although this court makes no finding as
8 to the prudence of the repayment plans available to Mrs. McCafferty, the court finds
9 it relevant that Mrs. McCafferty failed to even investigate. *See, e.g., Mason*, 464
10 F.3d at (finding debtor’s failure to diligently pursue “renegotiation of his debt under
11 the ICRP” demonstrated lack of good faith); *Educ. Credit Mgmt. Corp. v. DeGroot*,
12 339 B.R. 201, 339 B.R. 201 (D. Or. 2006) (finding failure on part of Chapter 7
13 debtor to even apply for income-contingent repayment program was failure to make
14 “good faith” effort to repay her student loan debt); *Fulbright*, 319 B.R. at 663
15 (finding no discharge for debtor who declined repeated offers by student loan
16 creditor to allow him to participate in income-contingent repayment program).¹⁶

17 Given Mrs. McCafferty’s lack of payments and lack of diligence in pursuing
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20 ¹⁶ Debtor in *Fulbright* argued that he refused the repayment plans because he disputed the amount the creditor indicated was due and owing. *Fulbright*, 319 B.R. at 663. However, the debtor failed to come forward with any evidence contradicting creditor’s calculation of amount owed. *Id.*

1 repayment options, the court finds Mrs. McCafferty failed to satisfy her burden
2 under prong three.

3 **CONCLUSION**

4 Mrs. McCafferty failed to satisfy the third prong of the *Brunner* test, therefore
5 her student loan debt is not dischargeable under 11 U.S.C. § 523(a)(8).
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