



IT IS ORDERED as set forth below:

Date: January 30, 2009

A handwritten signature in black ink, appearing to read "W. H. Drake", is written over a horizontal line.

**W. H. Drake
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION**

IN THE MATTER OF:	:	CASE NUMBERS
	:	
CHRISTINE ANN ISRAEL,	:	BANKRUPTCY CASE
	:	NO. 04-17006-WHD
Debtor.	:	
_____	:	
	:	
CHRISTINE ANN ISRAEL,	:	
	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 08-1701
v.	:	
	:	
UNITED STATES DEPARTMENT	:	
OF EDUCATION,	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Defendant.	:	BANKRUPTCY CODE

ORDER

Before the Court are the Motion to Compel Discovery, filed by the United States Department of Education (hereinafter the "Defendant"), the Motion for Discovery, filed by Christine Ann Israel

(hereinafter the “Plaintiff”), and the Motion to Rule on Discovery Dates, filed by the Plaintiff. This discovery dispute arises in connection with a suit to determine the dischargeability of a student loan debt, pursuant to section 523(a)(8) of the Bankruptcy Code. Accordingly, these matters constitute a core proceeding over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(I); § 1334.

FACTS AND PROCEDURAL HISTORY

The Plaintiff filed a complaint to determine the dischargeability of her student loan debt on April 29, 2008. The Defendant filed its answer on July 22, 2008. The discovery period is currently set to end on February 23, 2009. On July 22, 2008, the Defendant served the Plaintiff with the Defendant’s First Set of Interrogatories, Requests for Production of Documents, and Requests for Admissions. After the Plaintiff failed to respond, the Defendant contacted the Plaintiff in September 2008 to determine why no response had been made, at which time, the Defendant learned that the Plaintiff had not received the discovery requests, and the Defendant transmitted copies of those requests to the Plaintiff via electronic mail.

Through various pleadings, the Plaintiff agreed to produce discovery relevant to the time period preceding her bankruptcy discharge, which was entered on May 13, 2004, but objected to any discovery regarding the time period following her discharge upon her contention that such information is not relevant to her complaint. In this regard, she filed the instant Motion to Rule on Discovery Dates, in which she essentially requests a protective order that would permit her to ignore any discovery request that seeks information pertinent to the postdischarge period. In the instant Motion to Compel, the Defendant asks the Court to compel the Plaintiff to fully respond to

its discovery requests.

In response to the Motion to Compel, the Plaintiff has reiterated her belief that discovery of information relevant to the postdischarge period is irrelevant and cannot be obtained by the Defendant. The Plaintiff has also filed a motion seeking information and documentation from the Defendant regarding the student loan. There is no indication from the motion that the Plaintiff had previously requested this information from the Defendant or that the Defendant has failed to respond to the Plaintiff's discovery request. Accordingly, the Court will consider the Motion for Discovery as a discovery request made to the Defendant, rather than a motion to compel discovery, and will presume that the Defendant has provided or will provide an appropriate response to the Plaintiff. Accordingly, the discovery request requires no order or other action by the Court at this time.

CONCLUSIONS OF LAW

Discovery in bankruptcy adversary proceedings is governed by the Federal Rules of Civil Procedure. *See* FED. R. BANKR. P. 7026-7037. Specifically applicable here is Federal Rule of Civil Procedure 26(b)(1), which provides:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

FED. R. CIV. P. 26(b)(1).

Accordingly, the general rule is that litigants are entitled to discover information that “appears reasonably calculated to lead to the discovery of admissible evidence” unless such information is privileged or the Court finds reason to limit discovery due to its burdensome nature. *See* FED. R. CIV. P. 26(c) (court may protect a party from “annoyance, embarrassment, oppression, or undue burden” by forbidding disclosure or discovery).

Having considered the Defendant’s discovery requests, the Court finds that the interrogatory answers, documents, and requests for admissions made by the Defendant are all relevant to the matter in dispute. Section 523(a)(8) excepts student loans from discharge unless doing so would “impose an undue hardship on the debtor and the debtor’s dependents.” 11 U.S.C. § 523(a)(8); *see also In re Mosley*, (11th Cir. 2008). The Bankruptcy Code does not define the term “undue hardship.” When determining whether the discharge of a student loan would impose an undue hardship on the debtor, the Court employs the so-called *Brunner* test, which was first enunciated by the Second Circuit Court of Appeals in *Brunner v. New York State Higher Education Services Corporation*.¹ Under the *Brunner* test, the debtor must prove that: 1) based on current income and expenses, she cannot maintain a “minimal” standard of living for herself and her dependents if required to repay the loans; 2) this state of affairs is likely to persist for a significant portion of the repayment period; and 3) she has made good faith efforts to repay the loans. *See In re Mosley*, 494 F.3d 1320 (11th Cir. 2007).

Under the first prong of the test, the debtor must demonstrate that her standard of living would fall below the minimum level if the debtor is required to repay the debt. *See id.* The second prong requires the debtor to demonstrate additional circumstances that would support a finding that

¹ 831 F.2d 395 (2d Cir. 1987).

the debtor's situation is unlikely to improve. *See id.* This prong requires the Court to inquire into not only the circumstances that existed at the time the debtor incurred the loan, but whether the debtor has any future prospects for a positive change in whatever condition is leading to her inability to pay the student loan debt. These two factors undoubtedly render information about the debtor's current financial and personal circumstances relevant and discoverable.

Further, under the third prong, the court must find that the debtor has made a good faith effort to repay the student loan. To do so, the court will consider the "debtor's efforts to obtain employment, maximize income, and minimize expenses." *In re Frushour*, 433 F.3d 393 (4th Cir. 2005); *see also In re Hornsby*, 144 F.3d 433 (6th Cir. 1998) (bankruptcy court failed to question debtor's exorbitant phone bill and expenses for cigarettes in making a finding that the debtor had minimized expenses). The court will also consider whether the debtor's hardship is contrived or within the debtor's control. *See In re Alderete*, 412 F.3d 1200 (10th Cir. 2005). Additionally, the debtor's payment history and level of cooperation with the lender are also factors relevant to the analysis. *See In re Polleys*, 356 F.3d 1302 (10th Cir. 2004) (the fact that debtor made no payments on the loan was excused by the fact that the debtor did not immediately seek discharge after student loan came due, but sought a deferral and tried to negotiate with the lender on the monthly payments); *In re Azwar*, 326 B.R. 165 (Bankr. 10th Cir. 2005) (debtor failed to show good faith where he sought discharge just three years after obtaining his masters degree and refused to look for work outside of a particular company). As noted above, information regarding the debtor's financial situation and payment history from the date of the entry of the discharge would certainly be relevant to the analysis of the third prong of the test.

CONCLUSION

For the reasons stated above, the Court finds that the Motion to Rule of Discovery Dates, filed by the Plaintiff should be, and hereby is, **DENIED**. The Motion to Compel Discovery filed by the Defendant is **GRANTED**.

The Plaintiff, Christine Israel, is hereby Ordered to provide full and complete answers to all interrogatories, to produce all documents responsive to the Defendant's request, and to respond to all requests for admission posed by the Defendant **on or before March 2, 2009**.

The Court hereby extends the discovery period until March 31, 2009.

END OF DOCUMENT