**IT IS ORDERED as set forth below:**

**Date: April 2, 2012**

Mary Grace Diehl

**Mary Grace Diehl**
**U.S. Bankruptcy Court Judge**

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

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| In re: | : | Case Number: |
| **Christina Fawn Kidd**, | : | 09-74412-CRM |
| Debtor. | : | Chapter 7 |
| **Christina Fawn Kidd,** | : | |
| Plaintiff, | : | |
| v. | : | Lead Adversary Proceeding No. 09-6507-MGD Consolidated Proceedings |
| **Student Loan Xpress, Inc. and Xpress Loan Servicing,** | : | |
| Defendants. | : | |

**ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

This consolidated action is before the Court on Defendants' Motion for Summary Judgment. (Docket No. 71). Defendants seek a judgment that the student debt owing to them is non-dischargeable pursuant to 11 U.S.C. § 523(a)(8) because Plaintiffs cannot demonstrate that excepting

this debt from discharge would impose an undue hardship. Defendants' Motion seeks a non-dischargeability determination against six Plaintiffs: Jennifer Elaine Bui, Anthony Greg Farmer, John Christopher Furletti, Joshua Mark Murdock, Randy Scott Thomas, and Richard Lee Thomas.[1] Plaintiffs oppose the Motion and requested oral argument on the Motion. (Docket No. 80 & 81). Oral argument on the Motion was held March 27, 2012. Paul Vranicar appeared as counsel for Defendants, and Peter Lown appeared on behalf of the Plaintiffs. At the close of the hearing, Defendants' Motion was granted. This order memorializes the ruling and represents findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

Plaintiffs originally initiated separate adversary proceedings to determine the dischargeability of these debts. Nine adversary proceedings were eventually consolidated based on common legal issues and facts. (Docket Nos. 35 & 50). The debts at issue for all Plaintiffs were incurred to finance Plaintiffs' training at Silver State Helicopters, LLC ("Silver State"),a helicopter flight training school.[2] Plaintiffs financed the cost of Silver State's flight training program through the Career Xpress Loan Program ("Loan Program"). The Loan Program comprises various governmental, non-profit, and private entity participants. A non-profit entity contributed to funding the Loan Program through its guaranty. Defendants hold or service the loans in the Loan Program.

Previously, Defendants were awarded partial summary judgment as to two legal issues. (Docket No. 61). In the prior summary judgment order, theses debts were determined to be student

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[1] Jennifer Elaine Bui, 09-6503, Anthony Greg Farmer, 09-6505, John Christopher Furletti, 09-6506, Joshua Mark Murdock, 09-6508, Randy Scott Thomas, 09-6762, & Richard Lee Thomas, 09-6509. Donald Emory Barr, 10-6141, was originally included in Defendants' Motion, but that action has been dismissed by the parties. (Docket No. 86).

[2] Randy Scott Thomas, 09-6762, was not a student at Silver State. He was a guarantor on his son's, Richard Thomas, student loan.

loan debts under § 523(a)(8)(A)(i) and, therefore, Plaintiffs' undue hardship defense was limited to facts relevant under the *Brunner* test. In this Motion, Defendants assert that, based on the undisputed facts in the record, Plaintiffs cannot satisfy the undue hardship standard, which is governed by the *Brunner* test in this circuit.

Jurisdiction over this action is set forth in 28 U.S.C. §§ 157(b) and 1334(b). The matter is a core proceeding under 28 U.S.C. § 157(b)(2)(I) and venue is proper.

## I. Undisputed Material Facts

The parties have stipulated to the facts relevant to an undue hardship analysis. Defendants presented a signed stipulation for each Plaintiff that includes the statements set forth below. (Docket No. 73, Exhibits B through G).

(1) Plaintiff can adduce no evidence to establish any of the elements of "undue hardship," as articulated in *Brunner v. N.Y. State Higher Educ. Svc. Corp.*, 831 F.2d 395 (2nd Cir. 1987).

(2) Plaintiff cannot demonstrate that if he/she is forced to repay her student loans, he/she will be unable to maintain a minimal standard of living over the repayment period of the loans.

(3) Plaintiff cannot demonstrate that he/she will not be able to repay her student loans in the future.

(4) Plaintiff is not elderly and suffers from no disability which would prevent him/her from obtaining employment.

(5) Plaintiff has never made a payment on his/her student loans.

## II. Legal Standard

In accordance with Rule 56 of the Federal Rules of Civil Procedure, applicable to this Court pursuant to Rule 7056 of the Federal Rules of Bankruptcy Procedure, summary judgment is

appropriate only if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Material facts are those which might affect the outcome of a proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505 (1986). Further, a dispute of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The moving party has the burden of establishing the right to summary judgment. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991); *Clark v. Union Mut. Life Ins. Co.*, 692 F.2d 1370, 1372 (11th Cir. 1982). Once this burden is met, the nonmoving party cannot merely rely on allegations or denials in its own pleadings. Fed. R. Civ. P. 56(e). Rather, the nonmoving party must present specific facts that demonstrate there is a genuine dispute over material facts. *Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 918 (11th Cir. 1993). The "[o]ne who resists summary judgment must meet the movant's affidavits with opposing affidavits setting forth specific facts to show why there is an issue for trial." *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1217 (11th Cir. 2000); FED R. CIV. P. 56(e). Where the nonmoving party bears the burden of proof at trial, the burden can be satisfied if the moving party demonstrates the absence of evidence supporting the nonmoving party's case. *Hickson Corp. v. N. Crossarm Co., Inc.*, 357 F.3d 1256, 1259 (11th Cir. 2004). In determining whether a genuine issue of material fact exists, the Court must view the evidence in the light most favorable to the nonmoving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598 (1970); *Rosen v. Biscayne Yacht & Country Club, Inc.*, 766 F.2d 482, 484 (11th Cir. 1985). It remains the burden of the moving party to establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548 (1986).

Under § 523(a)(8), the debtor must prove "by a preponderance of the evidence each of the elements needed to establish that repayment of the [student] loans would cause [him/her] undue hardship." *Dewey v. Sallie Mae, Inc.* (*In re Dewey*), Nos. 05-00576 and 05-00684, 2008 WL 366004, at *1 (Bankr. W.D. Tenn. 2008). To evaluate undue hardship under § 523(a)(8), the Eleventh Circuit Court of Appeals in *Hemar Ins. Corp. of Am. v. Cox (In re Cox)*, 338 F.3d 1238 (11th Cir. 2003), adopted the three-prong test articulated by the Second Circuit Court of Appeals in *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987). To demonstrate undue hardship under *Brunner*'s three-pronged test, a debtor must show:

(1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans;

(2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and

(3) that the debtor has made good faith efforts to repay the loan.

*In re Cox*, 338 F.3d 1238, 1241 (11th Cir. 2003).

Since the debtor carries the burden of proving each element of the *Brunner* undue hardship test, if the debtor fails to prove just one element, the inquiry ends and the student loan will not be discharged. However, the matter before the Court involves a motion for summary judgment. As noted above, the moving party carries the initial burden of proof. The Defendants must show that the undisputed facts preclude Plaintiffs from prevailing as to just one prong of the *Brunner* test supporting Plaintiffs' undue hardship claim. *See White v. U.S. Dep't. of Educ.* (*In re White*), 243 B.R. 498, 506 (Bankr. N.D. Ala. 1999).

## III. Conclusions of Law

Defendants are entitled to summary judgment based on the stipulated facts. The stipulated facts establish that Plaintiffs cannot satisfy all three elements under *Brunner*'s undue hardship standard.

Plaintiffs oppose Defendants' Motion on two basis. First, Plaintiffs assert that application of the *Brunner* test for undue hardship is unjust in this context. Specifically, Plaintiffs argue that the closure of Silver State before Plaintiffs obtained an educational benefit from the training should disqualify these debts as student loan debts, and, as such, § 523(a)(8) should not apply. Based on the prior summary judgment ruling in this case, these debts qualify as student loan debts because Defendants established that the Loan Program met the statutory requirements provided in § 523(a)(8)(A)(i). Therefore, there is no legal basis to stray from the under hardship exception provided in the statute. Additionally, the Eleventh Circuit does not provide any exception from application of the three-pronged *Brunner* test in determining undue hardship.

Second, Plaintiffs assert that a material dispute of fact exists as to the amount of the debt owing. The amount of the debt is not a material fact. Plaintiffs have failed to demonstrate why the amount of the debt would alter application of the stipulated facts to *Brunner*'s undue hardship standard. Additionally, Defendants are not seeking a monetary judgment against Plaintiffs. The requested relief is limited to a non-dischargeability determination. Plaintiffs ability to contest the amount of the debt in the proper forum is not foreclosed by this ruling.

Defendants have established that they are entitled to judgment as a matter of law. The undisputed, material facts – presented by the parties' stipulations and considered in the light most favorable to the non-moving party– demonstrate that Plaintiffs cannot satisfy the undue hardship

standard. Therefore, Plaintiffs debts are non-dischargeable pursuant to § 523(a)(8). Accordingly, it is

**ORDERED** that Defendants' Motion for Summary Judgment is hereby **GRANTED.**

A separate judgment will be entered in favor of Defendants contemporaneously with the entry of this Order.

The Clerk is directed to serve a copy of this Order to the parties on the attached distribution list. The Clerk should also enter a copy of this Order in each of the follow adversary proceeding numbers: 09-6503, 09-6505, 09-6506, 09-6508, 09-6762, and 09-6509.

**END OF DOCUMENT**

**Distribution List**

Peter C. Lown
Harrington & Lown
Suite 100
112 Chip Place
Stockbridge, GA 30281-5055

Paul E. Vranicar
Holland & Knight, LLP
1201 W. Peachtreet Street, Suite 200
Atlanta, GA 30309

Milton D. Jones
Milton D. Jones & Associates
P.O. Box 503 Morrow, GA 30260

Jennifer Elaine Bui
6383 Hawthorne Terrace
Norcross, GA 30092

Anthony Greg Farmer
2300 Oak Hill Road
Covington, GA 30016-4475

John Christopher Furletti
2487 Zachary Woods Drive
Marietta, GA 30064

Joshua Mark Murdock
1000 Longview Trail
Griffin, GA 30223

Richard Lee Thomas
237 Mandy Court
McDonough, GA 30252

Randy Scott Thomas
2509 Bonita Court
Morrow, GA 30260

Dorothy Pearl Thomas
2509 Bonita Court
Morrow, GA 30260