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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:) Case No. 08-36209-D-13L
)
KHAMMANY NADONE and) Docket Control No. SS-2
NALY PHONHLAMOUNGDY,)
) Date: April 21, 2009
Debtors.) Time: 1:00 p.m.
) Dept: D

10 This memorandum decision is not approved for publication and may
11 not be cited except when relevant under the doctrine of law of
the case or the rules of claim preclusion or issue preclusion.

12 MEMORANDUM DECISION

13 On February 26, 2009, the debtors herein, Khammany Nadone
14 and Naly Phonhlamoungdy ("the debtors"), filed a Motion to
15 Confirm Amended Plan, bearing Docket Control No. SS-2 ("the
16 Motion"), by which the debtors seek confirmation of their First
17 Amended Chapter 13 Plan ("the plan"), filed the same day.
18 Secured and unsecured creditor The Golden 1 Credit Union ("the
19 Credit Union") opposes the Motion. For the reasons set forth
20 below, the court will deny the Motion.

21 I. INTRODUCTION

22 In the plan, the debtors propose to pay \$3,334.06 per month
23 for 36 months, which will yield nothing for general unsecured
24 creditors. Because the plan does not propose a 100% dividend to
25 unsecured creditors, and because the Credit Union, as the holder
26 of an unsecured claim, has objected, the plan must provide that
27 all the debtors' projected disposable income to be received
28 during the applicable commitment period will be applied to make

1 payments to unsecured creditors under the plan. 11 U.S.C.
2 § 1325(b)(1).¹

3 The issue is whether the debtors have projected disposable
4 income, as defined in § 1325(b)(2), such that they may obtain
5 confirmation only if their plan proposes an applicable commitment
6 period of five years, under § 1325(b)(4). If the debtors do not
7 have projected disposable income, the "applicable commitment
8 period" will not apply to them, and a three-year plan may be
9 confirmed, despite the fact that the debtors, by their own
10 admission, are above-median income debtors. Maney v. Kagenveama
11 (In re Kagenveama), 541 F.3d 868, 875 (9th Cir. 2008).

12 II. ANALYSIS

13 The answer derives from an analysis of the debtors' Amended
14 Chapter 13 Statement of Current Monthly Income and Calculation of
15 Commitment Period and Disposable Income, Form B22C, filed
16 February 26, 2009 ("Amended Form B22C" or "B22C"). The Credit
17 Union contends that the debtors have used inappropriate figures
18 in the B22C, and that when the figures are corrected, the debtors
19 have disposable income, and thus, must propose a five-year plan.

20 A. The Deduction for Taxes

21 The Credit Union contends the debtors' deduction for taxes,
22 on line 30 of the B22C, \$1,280, should instead be \$133.67, which
23 would result in a positive monthly disposable income.

24 The Credit Union's figures are based on the debtors' actual
25 "total tax," as shown on their 2007 federal and state income tax

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27 1. Unless otherwise indicated, all Code, chapter, section
28 1532, and to the Federal Rules of Bankruptcy Procedure, Rules
1001-9037.

1 returns. However, those returns do not reflect deductions from
2 the debtors' income for social security taxes, Medicare taxes,
3 and state disability insurance ("SDI"). These latter deductions
4 are appropriate for inclusion on line 30, along with income tax
5 deductions.

6 The debtors have submitted their 2008 federal and state
7 income tax returns (without attachments) and a group of employer
8 pay advices. The debtors' income tax liability, state and
9 federal, using the figures in the tax returns, totals \$6,429, or
10 an average of \$536 per month.

11 The debtors' pay advices for their primary jobs reflect
12 their year-to-date deductions for social security taxes, Medicare
13 taxes, and SDI through roughly the end of October; their pay
14 advices for their second jobs run through October 11 and October
15 19, respectively. Using a divisor of 10 for the primary jobs,
16 and divisors of 9-1/3 and 9-2/3, respectively, for the second
17 jobs, the averages for the debtors' social security tax, Medicare
18 tax, and SDI deductions total \$714 per month. Thus, the grand
19 total of deductions for all taxes -- state and federal income
20 taxes, social security taxes, Medicare taxes, and SDI -- is an
21 average of \$1,250 per month, just \$30 less than the figure the
22 debtors used.²

23 B. The Increased Household Size

24 The Credit Union's second argument carries more weight. In
25 the Amended Form B22C, the debtors list their household size as

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27 2. Using the pay advices rather than the tax returns for
28 the state and federal income tax deductions results in an average
of \$1,245 per month for all these deductions.

1 eight, whereas in an earlier version, filed with the petition on
2 November 5, 2008, they had reported a household size of six.
3 According to the debtors' I-schedule, the household is comprised
4 of the debtors and their four children. The household of eight,
5 as listed on the Amended Form B22C, includes the parents of
6 debtor Naly Phonhlamoungdy, who reside with the debtors and their
7 children.

8 As a result of this change, the Amended Form B22C lists
9 expense deductions on lines 24A and 24B based on the national
10 standards for a household of eight rather than six. These
11 deductions are higher by a total of \$638 than the deductions on
12 the debtors' original Form B22C. The Amended Form B22C does not
13 report the parents' income.

14 This change raises two concerns -- first, that the debtors
15 changed the reported size of the household after the Credit Union
16 objected to their original chapter 13 plan,³ and second, that the
17 debtors are using the increased household size as a means of
18 increasing their expenses without at the same time including the
19 parents' income as household income.

20 As a result of the Credit Union's objection to their
21 original plan, the debtors reduced some of the expenses on their
22 Form B22C -- those on lines 31, 44, 47, 50.⁴ These reductions
23 would have resulted in a positive monthly disposable income,
24 which would have required a five-year plan. Thus, it appears the
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26 3. The Credit Union's objection was overruled as moot, the
27 chapter 13 trustee's separate objection having been sustained.

28 4. For three of the four lines, the changes made by the
debtors correspond exactly to the changes sought by the Credit
Union; for the fourth, line 47, they correspond substantially.

1 debtors sought a way to increase other expenses; what they hit
2 upon was increasing their reported household size so they could
3 increase the deductions on lines 24A and 24B.

4 The court finds this strategy -- modification of original
5 sworn testimony to meet a creditor objection -- to be too
6 expedient. At their meeting of creditors, the debtors testified
7 that the parents resided in the debtors' residence, but had their
8 separate income and separate expenses.⁵ This is consistent with
9 the household size of six reported in the debtors' original Form
10 B22C - the parents' income was not reported, but neither were
11 they counted as household members for purposes of the expense
12 deductions.⁶ In both instances -- the original Form B22A and the
13 meeting of creditors -- the debtors' testimony was given under
14 penalty of perjury.

15 In their Amended Form B22C, in response to the Credit
16 Union's objections, the debtors now report the increased
17 household size for purposes of expenses only, but do not include
18 the parents' income as a contribution to the household income.
19 The difficulty with this tactic is that each time a party changes
20 his or her story, absent a very good reason, the court attributes
21 less credibility to the end product.

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23 5. Declaration of Roxanne T. Daneri, filed March 24, 2009.

24 6. The debtors' original I-schedule, filed with their
25 petition on November 5, 2008, is also consistent, in that they
26 did not list the parents as their dependents, whereas in an
27 amended I-schedule, filed at the same time as the Amended B22C,
the parents are listed as dependents.

28 The debtors' tax returns are consistent with their original
position -- they do not list the parents as dependents. See 2008
federal and state income tax returns, filed April 14, 2009.

1 The debtors defend their strategy on the basis that the
2 parents' only income is social security income, which is not to
3 be included in the Form B22C. Under § 101(10A), "current monthly
4 income" (which is the starting point for determining disposable
5 income under § 1325(b)(2)) includes amounts paid by persons or
6 entities other than the debtors, on a regular basis, for the
7 household expenses of the debtor and his or her dependents, and
8 excludes benefits received under the Social Security Act.

9 The former -- amounts contributed by third parties -- are to
10 be listed on line 7 of the Form B22C. There is no indication in
11 the Code or the official form of an exclusion of any particular
12 type of income received by the third party and then contributed
13 to the household. Thus, in this case, to the extent the parents
14 were to be considered as members of the household, for purposes
15 of computing the debtors' expense deductions, their contributions
16 to the household income should also have been included, on line
17 7. In other words, as to the third party, the income may be
18 Social Security benefits, but as to the debtors, it is not; it is
19 nothing more nor less than contributions from a third party.

20 The only evidence offered by the debtors in response to the
21 Credit Union's present objection is this: "[Naly's parents] did
22 not make regular contributions to household expenses during the
23 six-month period prior to [the filing]."7 However, the Credit
24 Union's records show that \$762 "from the US Treasury 310 (Supp
25 Sec)" was deposited each month into an account on which debtor
26 Naly Phonhlamoungdy was the primary account holder and her mother

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28 7. Debtors' declaration, filed April 14, 2009.

1 was the joint account holder. The funds were then withdrawn and
2 some were placed in other accounts of the debtors from which
3 household expenses were paid.⁸

4 The debtors have offered no response to this evidence, other
5 than the conclusion that the parents did not make regular
6 contributions to the household expenses. They have not explained
7 where the \$762 went each month after it was deposited or shown
8 that the majority of the funds did not go to household expenses.

9 Virtually all the debtors' testimony and documents filed
10 prior to the present objection are consistent with the conclusion
11 that the parents' income and expenses were treated as separate
12 from the debtors'. Thus, an Amended Form B22C, filed only in
13 response to that objection, that includes the parents as
14 household members for purposes of the expense deductions, but
15 excludes their income from household income, is given little, if
16 any, weight.

17 Returning the household size to its original six, the
18 expenses on lines 24A and 24B drop from \$2,418 and \$456 back to
19 their amounts on the original Form B22C, \$1,894 and \$342, for a
20 total reduction in expenses of \$638. Adding this amount to the
21 monthly disposable income shown on the Amended Form B22C,
22 <\$553.24>, results in a positive number for disposable income.
23 As the debtors have disposable income, their proposed three-year
24 plan cannot be confirmed.

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28 8. Declaration of Roxanne T. Daneri, filed March 24, 2009.

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III. CONCLUSION

For the foregoing reasons, the debtors' motion to confirm their first amended plan will be denied. It is unnecessary at this time for the court to decide any other issues raised by the Credit Union, such as the amounts deducted for the debtors' car payments.

The court will issue an appropriate order.

Dated: April 30, 2009

Robert Bardwil
ROBERT S. BARDWIL
United States Bankruptcy Judge

CERTIFICATE OF MAILING

I, Andrea Lovgren, in the performance of my duties as Deputy Clerk to the Honorable Robert S. Bardwil, mailed by ordinary mail a true copy of the attached document to each of the parties listed below:

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Deputy Clerk