



NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA**

RIVERSIDE DIVISION

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In re:)
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LUIS GUSTAVO NUNEZ and)
SANDRA LYNN NUNEZ,)
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Debtors.)

Case No. 6:08-bk-21645-PC
Chapter 13

MEMORANDUM DECISION

Date: February 4, 2009
Time: 1:30 p.m.
Place: United States Bankruptcy Court
Courtroom # 304
3420 Twelfth Street
Riverside, CA 92501

12 Before the court is the motion of Luis Gustavo Nunez and Sandra Lynn Nunez
13 (“Debtors”) for modification of their confirmed chapter 13 plan (“Motion”). Rod Danielson,
14 chapter 13 trustee (“Danielson”), opposes the Motion. At the hearing, Pam Lacey appeared for
15 the Debtors and Elizabeth Schneider appeared for Danielson. The court, having considered the
16 pleadings, evidentiary record, and arguments of counsel, makes the following findings of fact
17 and conclusions of law¹ pursuant to F.R.Civ.P. 52, as incorporated into FRBP 7052 and applied
18 to contested matters by FRBP 9014(c).²

I. STATEMENT OF FACTS

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20 On September 2, 2008, Debtors filed their voluntary chapter 13 petition. In the schedules
21 filed with the petition, Debtors disclosed real and personal property valued at \$404,200,

22 _____
23 ¹ To the extent that any finding of fact is construed to be a conclusion of law, it is hereby
24 adopted as such. To the extent that any conclusion of law is construed to be a finding of fact, it
is hereby adopted as such.

25 ² Unless otherwise indicated, all “Code,” “chapter” and “section” references are to the
26 Bankruptcy Code, 11 U.S.C. §§ 101-1330 after its amendment by the Bankruptcy Abuse and
27 Consumer Prevention Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005). “Rule” references are to
the Federal Rules of Bankruptcy Procedure (“F.R.Civ.P.”), which make applicable certain
Federal Rules of Civil Procedure (“FRBP”).

1 including a residence, two vehicles, and an interest in an ERISA-qualified 401K retirement
2 account. Debtors' statement of financial affairs reveals that Debtors had gross income of
3 \$120,840 and \$106,092 in 2007 and 2006, respectively. Debtors' residence valued at \$368,000
4 is encumbered by a deed of trust securing a debt of \$368,483 and a tax lien for \$2,500. Debtors
5 also owe \$14,232 on a 2005 Scion valued at \$8,400. Debtors list 20 creditors in Schedule F
6 holding unsecured nonpriority claims totaling \$54,836 consisting primarily of credit card debt.
7 There are no unsecured priority claims according to Schedule E.

8 Debtors' income is "above median" according to their Form B22C, Chapter 13 Statement
9 of Current Monthly Income and Calculation of Commitment Period and Disposable Income
10 ("Form B22C") filed under penalty of perjury with the petition. As a result, Debtors were
11 required by § 1325(b)(3) to calculate their expenses pursuant to § 707(b)(2), which resulted in
12 monthly disposable income under § 1325(b)(2) as a negative number: -\$2,442.86. Debtors'
13 Schedules I and J painted a different picture. Schedules I and J reflected monthly income and
14 expenses of \$6,290 and \$5,528, respectively, with monthly net income of \$762. In their original
15 plan, Debtors proposed to pay to Danielson the sum of \$760 per month for a period of 36
16 months, which was estimated to pay 0 % of allowed unsecured nonpriority claims. On
17 September 22, 2008, Debtors filed a First Amended Chapter 13 Plan which increased the
18 proposed plan payment to \$961 per month for 36 months, but still provided no dividend to
19 general unsecured creditors.

20 Prior to confirmation, Danielson attacked the veracity of the Debtors' calculations in
21 their sworn Form B22C based upon proof of income and documentation provided (or not
22 provided) in conjunction with meetings of creditors. According to Danielson's objection to the
23 Debtors' Motion:

24 "At the time of plan confirmation, it was the position of the Chapter 13 Trustee that
25 debtors' disposable income was a positive number based on adjustments to the debtors'
26 means test in the areas of income (an adjustment of \$2,905/month based on the proof of
27 income submitted); taxes (an adjustment of \$526/month, again, based on proof of income
submitted); and telecommunications (an adjustment of \$75/month as the debtors provided
no documentation in support of the amount taken in addition to their basic home

1 telephone and cell phone service already included in the Local Standards for Housing and
2 Utilities). Based on the adjusted “bottom line” number, per the debtors’ means test, in
3 the total amount of \$1,063, the percent to unsecured creditors needed to be raised
4 accordingly. In order to make the plan payment an amount that was more affordable, the
5 plan payment was calculated over a 60 month period. . . . In addition, the net income
6 based on proof was more than reflected in Schedule I in the amount of \$241/month
7 giving the debtors a total of \$1,701/month to make the agreed upon plan payment of
8 \$1,334/month.”

9 Danielson further states:

10 “[T]he original position of the Chapter 13 Trustee was the plan should be a 96-100 %
11 plan, but, based on negotiations at the 341a Meeting of Creditors, the 75%, 60 month
12 plan was the agreed upon resolution to the Chapter 13 Trustee’s objection to plan
13 confirmation.”

14 Debtors do not dispute these allegations.

15 On November 5, 2008, the court held a hearing on confirmation of the Debtors’ First
16 Amended Chapter 13 Plan at which time the Debtors’ plan was confirmed on Danielson’s
17 recommendation based upon the following terms: \$1,334 per month for a period of 60 months,
18 with a base amount of \$80,040 and estimated payment of 75% of allowed unsecured nonpriority
19 claims. Debtors did not raise any objection to the plan terms at the confirmation hearing. An
20 order confirming the Debtors’ first amended plan was entered on November 7, 2008.

21 On January 5, 2009, Danielson filed a motion to dismiss the case under § 1307(c)(6)
22 alleging a material default by the Debtors under their confirmed plan due to payment
23 delinquencies since confirmation of \$2,453. On January 10, 2009, Debtors responded by filing a
24 motion to modify their confirmed plan pursuant to § 1329. On January 20, 2009, Debtors also
25 filed opposition to Danielson’s dismissal motion.

26 Debtors’ proposed modification seeks to (1) reduce the term of the plan by 21 months,
27 *i.e.*, from 60 months to 39 months; (2) reduce the monthly plan payment from \$1,334 to \$961; (3)
reduce the base amount of the plan from \$80,040 to \$37,479; and (4) reduce the percentage paid
to Class 5 unsecured nonpriority claims from 75% to 0%. According to the Debtors, “[t]he plan
was confirmed at an amount that was greater than the Debtors can afford.” Debtors further argue
that “there is no basis for requiring a 60 month plan as the Debtor’s Current Monthly Income

1 Calculation shows a negative figure.” Debtors have filed amended Schedules I and J in
2 conjunction with their proposed modification. Debtors admit, however, that the only material
3 change in their financial situation since confirmation is that their mortgage payment increased
4 approximately \$118, *i.e.*, “from \$2,704.22 to \$2,821.89, beginning December 1, 2008.”

5 II. DISCUSSION

6 This court has jurisdiction over this contested matter pursuant to 28 U.S.C. §§ 157(b) and
7 1334(b). This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A), (B), (L) and (O).
8 Venue is appropriate in this court. 28 U.S.C. § 1409(a).

9 Section 1329(a), which authorizes modification of a confirmed plan, provides, in
10 pertinent part:

11 At any time after confirmation of the plan, but before the completion of plan
12 payments under such plan, the plan may be modified, upon request of the debtor,
the trustee, or the holder of an allowed unsecured claim, to –

- 13 (1) increase or reduce the amount of payments on claims of a particular class
14 provided for by the plan; [or]
15 (2) extend or reduce the time for such payments;

16 11 U.S.C. § 1329(a)(1) & (2). Debtors have an absolute right to request modification between
17 confirmation and completion of the plan, subject to the limitations of § 1329. Powers v. Savage
18 (In re Powers), 202 B.R. 619, 622 (9th Cir. BAP 1996). The court has discretion to grant a
19 motion to modify a chapter 13 plan, so long as the plan, as modified, meets the applicable
20 confirmation requirements of chapter 13. Id. Debtors are not required to demonstrate a
21 substantial, unanticipated change in circumstances to justify a modification proposing a reduction
22 in plan payments. Id. However, a change in financial circumstances is a factor to be considered
23 by the court in determining, in its discretion, whether a modification should be approved. Id.

24 Because modification of a confirmed plan essentially involves confirmation of a new
25 plan, the modified plan must comply with the statutory requirements for confirmation. Max
26 Recovery, Inc. v. Than (In re Than), 215 B.R. 430, 434 (9th Cir. BAP 1997). By virtue of §
27 1329(b)(1), the confirmation requirements of § 1325(a) apply to any plan modification under §

1 1329(a). 11 U.S.C. § 1329(b)(1). By its terms, however, § 1329(b)(1) “does not mandate
2 satisfaction of the disposable income test of § 1325(b)(1)(B) with respect to modified plans.”
3 Sunahara v. Burchards (In re Sunahara), 326 B.R. 768, 781 (9th Cir. BAP 2005). Instead, a
4 debtor’s circumstances, and the debtor’s proposal to deal with them in the modified plan, are
5 considered in the context of the good faith analysis under § 1325(a)(3). Id. “Such a
6 determination necessarily requires an assessment of a debtor’s overall financial condition
7 including, without limitation, the debtor’s current disposable income, the likelihood that the
8 debtor’s disposable income will significantly increase due to increased income or decreased
9 expenses over the remaining term of the original plan, the proximity of time between
10 confirmation of the original plan and the filing of the modification motion, and the risk of default
11 over the remaining term of the plan versus the certainty of immediate payment to creditors.” Id.
12 at 781-82. But see In re Keller, 329 B.R. 697, 701 (Bankr. E.D. Cal. 2005) (questioning whether
13 Sunhara requires the court, in the context of determining good faith, “to weigh each debtor’s
14 economic circumstances to determine whether the dividend payable to unsecured creditors under
15 a modified plan is the debtor’s best efforts or is otherwise sufficiently substantial, meaningful,
16 fair or equitable?”). Other factors to be considered in divining good faith include the
17 substantiality of proposed payment plans; whether the debtor has misrepresented facts in the
18 plan; whether the debtor has unfairly manipulated the Bankruptcy Code; and whether the plan is
19 proposed in an equitable manner. Goeb v. Heid (In re Goeb), 675 F.2d 1386, 1390 (9th Cir.
20 1982); see Villanueva v. Dowell (In re Villanueva), 274 B.R. 836, 841 (9th Cir. BAP 2002) (“As
21 good faith under § 1325(a)(3) is neither defined by the statute nor explained in legislative history,
22 courts in this circuit have adopted a multi-factor, case-by-case approach to the good faith
23 inquiry.”). The burden of establishing that a plan is submitted in good faith is on the debtor.
24 Fidelity & Cas. Co. of N.Y. v. Warren (In re Warren), 89 B.R. 87, 93 (9th Cir. BAP 1988).

25 In this case, Debtors claim that their confirmed plan is not affordable and must be
26 modified. Debtors have the burden of producing evidence to establish each element of § 1329(a),
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1 including evidence that the modification is proposed in good faith. In reviewing Debtors' overall
2 financial condition, the court notes that only 66 days have lapsed between the date of the
3 confirmation hearing and the filing of the Motion. There is little credible evidence that Debtors'
4 disposable income has changed significantly since confirmation of the plan.³ Indeed, Debtors'
5 admit that the only material change in their financial situation since confirmation is that their
6 mortgage payment increased approximately \$118. Nor is there a likelihood that the Debtors'
7 disposable income will significantly increase or decrease due to changes in income or expenses
8 over the remaining term of the original plan. Indeed, Debtors' amended Schedules I and J state
9 specifically that the Debtors do not anticipate either an increase in income or a decrease in
10 expenses within the next 12 months. Debtors have yet to make regular payments under their
11 confirmed plan, but seek by modification to eliminate any dividend to general unsecured
12 creditors. Under the circumstances, it is difficult to assess the risk of default over the remaining
13 term of the plan versus the certainty of immediate payment to creditors. Because there is little
14 credible evidence that Debtors' economic circumstances since confirmation have changed so
15 significantly as to warrant the severe modification requested, the court cannot find that the
16 Debtors' modification is proposed in good faith as required by § 1325(a)(3) as incorporated into
17 § 1329(a).

18 Debtors further argue that "there is no basis for requiring a 60 month term as the Debtors'
19 current Monthly Income Calculation shows a negative number." For confirmation of a plan, an
20 above median debtor's "disposable income" is calculated using the means test of § 707(b)(2),
21 without reference to Schedules I and J. 11 U.S.C. § 1325(b)(3). In the Ninth Circuit, an above
22 median debtor's "projected disposable income" is determined using the debtor's "disposable
23 income" figure, as calculated using Form B22C, and multiplying that figure by the applicable

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25 ³ Amended Schedule I reflects a \$94 decrease in income from Debtors' original Schedule I.
26 Amended Schedule J discloses the increased mortgage payment, but also shows that total
27 monthly expenses have been reduced by \$294 from Debtors' original Schedule I resulting in an
increase in monthly net disposable income.

1 commitment period. Maney v. Kagenveama (In re Kagenveama), 541 F.3d 859, 874-75 (9th Cir. 2008).
2 If the disposable income, defined in § 1325(b)(2) and calculated on Form B22C, is a negative
3 number, the debtor has no projected disposable income and the applicable commitment period is
4 irrelevant. Id. at 877. This assumes, however, that the information disclosed in Form B22C is
5 accurate.⁴ In this case, the information which was disclosed in the Debtors' Form B22C and
6 formed the basis for the negative number was inaccurate. Debtors' disposable income was, in
7 fact, a *positive* number under the means test after adjustments were made to the Debtors' Form
8 B22C based upon proof of the Debtors' actual income and expenses. The court will not
9 reconsider the findings made the basis for confirmation of the Debtors' plan under § 1325.
10 Debtors did not question the terms of the plan at the confirmation hearing, appeal the
11 confirmation order, nor seek relief from the order under FRBP 9024.

12 Having rejected the notion that the calculation of “disposable income” under § 1325(b)(2)
13 is merely a starting point for deriving “projected disposable income” and that “[c]ourts may
14 consider both the future and historical finances of the debtor to make the calculation,”⁵
15 Kagenveama would not permit above median debtors to circumvent by modification immediately
16 after confirmation the ill effects of a chapter 13 plan confirmed pursuant to the means test.
17 Recognizing that its interpretation of “the new law may produce less favorable results for
18 *unsecured creditors* when applied to above median income Chapter 13 debtors,”⁶ the Ninth
19 Circuit in Kagenveama pointed out that changes in the debtor's expenses or income *after*
20 *confirmation* could be addressed by modification under § 1329. 541 F.3d at 877 (“If [a debtor's]
21 income changes *in the future* before completion of the plan, the Trustee or the holder of an
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23 ⁴ The accuracy of the information provided by the debtor in Form B22C goes directly to the
24 issue of good faith under § 1325(a)(3).

25 ⁵ Kagenveama, 541 F.3d at 874 (abrogating Pak v. eCase Settlement Corp. (In re Pak), 378 B.R.
26 257 (9th Cir. BAP 2007).

27 ⁶ Id. at 875.

1 allowed unsecured claim may seek modification of the plan under § 1329.”) (emphasis added).
2 Whether sought by the debtor, trustee, or an unsecured creditor, a § 1329 plan modification must
3 be based upon changes in the debtor’s expenses or income after confirmation. The court then
4 reviews the debtor’s circumstances at the time of modification to assess the debtor’s ability to
5 pay going forward, as opposed to applying a set amount based on the six month period prior to
6 bankruptcy.

7 III. CONCLUSION

8 Debtors have not established that the modification is proposed in good faith. There is
9 little credible evidence that Debtors’ economic circumstances since confirmation have changed
10 so significantly as to warrant the severe modification requested. Therefore, the Debtors’ Motion
11 is denied without prejudice.

12 A separate order will be entered consistent with this opinion.

13 Dated: February 9, 2009

14 _____
15 /s/
16 PETER H. CARROLL
17 United States Bankruptcy Judge
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In re:
NUNEZ,

Debtor(s).

CHAPTER 13

CASE NUMBER RS 08-21645 PC

NOTE: When using this form to indicate service of a proposed order, **DO NOT** list any person or entity in Category I. Proposed orders do not generate an NEF because only orders that have been entered are placed on the CM/ECF docket.

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:
3420 12TH STREET, RIVERSIDE, CA 92501

The foregoing document described MEMORANDUM DECISION will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner indicated below:

I. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF")** – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On 2/9/09 I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email address(es) indicated below:

Rod (PC) Danielson notice-efile@rodan13.com
Andrew David Goldberg agoldberg@rosicki.com
Kian Mottahedeh notice@pricelawgroup.com
United States Trustee (RS) ustpreion16.rs.ecf@usdoj.gov

Service information continued on attached page

II. **SERVED BY U.S. MAIL OR OVERNIGHT MAIL**(indicate method for each person or entity served):

On 2/9/09 I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follows. *Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.*

Luis Gustavo Nunez
Sandra Lynn Nunez
9540 Hermitage Lane
Riverside, CA 92503

Service information continued on attached page

III. **SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL** (indicate method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on _____ I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. *Listing the judge here constitutes a declaration that personal delivery on the judge will be completed no later than 24 hours after the document is filed.*

Service information continued on attached page

| | | |
|------------------|------------|--|
| In re: NUNEZ, | Debtor(s). | CHAPTER 13 CASE NUMBER RS 08-21645 PC |
|------------------|------------|--|

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

2.9.09
Date

Connie Ray
Type Name

Connie Ray
Signature

| | |
|--|--|
| In re: NUNEZ, <div style="text-align: right;">Debtor(s).</div> | CHAPTER: 13 CASE NUMBER: RS08-21645 |
|--|--|

NOTE TO USERS OF THIS FORM:

- 1) Attach this form to the last page of a proposed Order or Judgment. Do not file as a separate document.
- 2) The title of the judgment or order and all service information must be filled in by the party lodging the order.
- 3) **Category I.** below: The United States trustee and case trustee (if any) will always be in this category.
- 4) **Category II.** below: List **ONLY** addresses for debtor (and attorney), movant (or attorney) and person/entity (or attorney) who filed an opposition to the requested relief. DO NOT list an address if person/entity is listed in category I.

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*) MEMORANDUM DECISION was entered on the date indicated as "Entered" on the first page of this judgment or order and will be served in the manner indicated below:

I. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") – Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s), the foregoing document was served on the following person(s) by the court via NEF and hyperlink to the judgment or order. As of 2/9/09, the following person(s) are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email address(es) indicated below.

Rod (PC) Danielson notice-efile@rodan13.com
 Andrew David Goldberg agoldberg@rosicki.com
 Kian Mottahedeh notice@pricelawgroup.com
 United States Trustee (RS) ustpreion16.rs.ecf@usdoj.gov

Service information continued on attached page

II. SERVED BY THE COURT VIA U.S. MAIL: A copy of this notice and a true copy of this judgment or order was sent by United States Mail, first class, postage prepaid, to the following person(s) and/or entity(ies) at the address(es) indicated below:

Luis Gustavo Nunez
 Sandra Lynn Nunez
 9540 Hermitage Lane
 Riverside, CA 92503

Service information continued on attached page

III. TO BE SERVED BY THE LODGING PARTY: Within 72 hours after receipt of a copy of this judgment or order which bears an "Entered" stamp, the party lodging the judgment or order will serve a complete copy bearing an "Entered" stamp by U.S. Mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following person(s) and/or entity(ies) at the address(es), facsimile transmission number(s), and/or email address(es) indicated below:

Service information continued on attached page