

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NOT FOR PUBLICATION

ENTERED APR 11 2008 FILED APR 10 2008 CLERK, U.S. BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA BY _____ DEPUTY
--

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re

RANDY DAVID BENDER and
JANICE LEE BENDER,

Debtors.

Bankruptcy No. 07-05696-JM7

MEMORANDUM DECISION DENYING
UNITED STATES TRUSTEE'S
MOTION TO DISMISS CASE

The U.S. Trustee's Motion to Dismiss Case ("Motion") was heard on February 8, 2008. Based on the pleadings submitted, the arguments presented at the hearing and a review of the totality of the circumstances of the Debtors' financial situation, the Court finds that granting a discharge in this case would not constitute an abuse under 11 U.S.C. § 707(b)(3)(B).

This decision would have been simplified if the Debtors' Opposition to the Motion had included updated versions of Schedules I and J, and Form 22A, to reflect their actual projected income and expenses rather than a brief declaration referencing various categories and a vague statement that "some of our expenses have

1 changed." Despite the lack of an exhibit reflecting all the changes
2 to the Debtors' projected income and expenses since the petition was
3 filed, a review of the Debtors' overall circumstances leads to the
4 conclusion that this is not the type of situation the Congress was
5 envisioning as an abuse in enacting §707(b)(3)(B). The U.S. Trustee's
6 position is based solely on the Debtors' potential ability to fund a
7 Chapter 13 plan. There is no allegation of bad faith. Based on the
8 analysis provided in the Declaration of Randall Horton, the U.S.
9 Trustee concludes that the Debtors have monthly "disposable income"
10 of \$652.25, which would result in the ability to pay 41.82% of their
11 total unsecured claims.

12 The Debtors' Schedule I puts Mr. Benders' monthly gross income
13 at \$6962.80. Mrs. Bender is no longer working due to a stress related
14 disability. The Debtors have four children, ranging in age from 4 to
15 22. The oldest attends college. The youngest was adopted through the
16 County, and has developmental problems caused by exposure to drugs
17 prior to birth. The Debtors receive \$631 per month in government
18 assistance to help support the adopted child. While that payment may
19 not be excepted from the income categories used to prepare Form 22A,
20 it does appear to be in the nature of the parenthetical exceptions to
21 the definition of "disposable income" found in §1325(b)(2). The
22 adoption payment of \$631 per month is almost the full amount the U.S.
23 Trustee uses as the basis to fund a plan in a Chapter 13, and yet
24 would likely not be included as part of the "disposable income" under
25 §1325(b)(2).

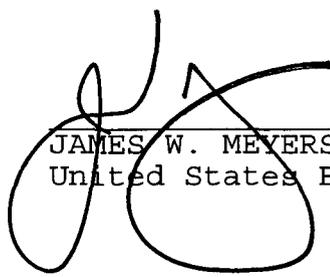
26 The U.S. Trustee's Reply points to areas in which the Debtors
27 were given the benefit of the doubt in the calculations provided by
28 Mr. Horton. However, due to inconsistencies between the Debtors' Form

1 22A, Schedules I and J, and their Declaration, there are several
2 expense categories that appear understated in Mr. Horton's analysis.
3 For example, there is no provision for health care or
4 telecommunication expenses in the Forms 22A prepared by Mr. Horton or
5 the Debtors, but Schedule J contains amounts of \$125 and \$250 for
6 those line items. The Forms 22A have no entry on lines 29 or 38,
7 although the Debtors' declaration refers to the extra cost for
8 expenses relating to their developmentally challenged child, and for
9 their teenagers.

10 There are other facts which support a finding that this case is
11 not an abuse of the provisions of Chapter 7. There is no indication
12 of manipulation, extravagance or bad faith on the part of these
13 Debtors. Doctors found a tumor on Mr. Bender's heart about a year
14 before this case was filed, and he had extensive surgery. They lost
15 their home to foreclosure. The schedules show they own a 1995 Saturn
16 and a 1996 Chevrolet Suburban, each with over 130,000 miles. Since
17 there are no liens on the vehicles, there is no provision for car
18 payments in Mr. Horton's analysis. There is no evidence that they
19 have any assets of a value above their allowed exemptions.

20 After reviewing all the circumstances of the Debtors' financial
21 situation, the Court finds that granting relief to the Debtors would
22 NOT be an abuse of the provisions of Chapter 7. The Court will enter
23 a separate order this same date.

24 DATED: **APR 10 2008**



JAMES W. MEYERS, JUDGE
United States Bankruptcy Court