United States Bankruptcy Court
District of New Mexico

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
JOSE SERNA and
LINDA SERNA,
Debtors. No. 13-00-12595 SA

AMENDED
MEMORANDUM OPINION
ON CONFIRMATION

This matter came before the Court to consider confirmation of the debtors' chapter 13 plan. On July 10, 2001, the Court entered a Memorandum Opinion which applied to two cases[1] which was based on the assumption that all creditors would receive 100% payment. (The Court's assumption was based on its review of the files, including the Debtors' schedules and plans.) The Chapter 13 Trustee filed Motions for Reconsideration in both cases, setting forth her calculations that the plans would not, in fact, be 100% plans. The Sernas concur that the plan will not be a 100% plan. The Court has reviewed the Motions, and finds that it should reconsider the previously issued memorandum opinion and confirmation order in Serna. Therefore this Amended Memorandum Opinion replaces the one entered on July 10, 2001.

[1] The other case, Thomas Edward Smith and Betty Oneida Smith, No. 7-00-12422 SR, converted to Chapter 7 before the Court could issue this Amended Opinion on Confirmation. Confirmation in the Smith case is now moot.

The debtors are represented by Bill Gordon & Associates. The issue is whether the debtors' voluntary contributions to retirement plans are reasonably necessary expenses for the maintenance or support of the debtors or their dependents. This is a core proceeding. 28 U.S.C. § 157(b)(2)(L).

The Sernas filed their Chapter 13 petition on May 10, 2000. All assets are over encumbered or exempt and it appears that there would be no distribution to unsecured creditors in a hypothetical chapter 7 case. Mrs. Serna is in her fifties; the record does not indicate Mr. Serna's age. The debtors have one dependent, age 15. They have $26,417.00 in retirement savings.

The Schedule I listed gross income of $4,506.38, payroll deductions of $1,884.53 (including "Stock/401k" of $196.67 and "Cash Balance Loan" to employer of $179.26) for a monthly net take home pay of $2,621.85. The $196.67 payment appears to represent approximately 6.3% of Mr. Serna's gross wages, and approximately 4.2% of Mr. and Mrs. Serna's combined gross wages. Debtors listed $222.00 as income from daughter's payment for a 1997 Nissan (basically a pass through because debtors list $222 for this as an expense also; the vehicle is not written down in or paid through the plan and no arrearages are scheduled for payment under the plan). Debtors also listed $57.00 as a prorated amount of estimated income tax returns for total combined monthly income of $2,900.85. Monthly expenses were listed on Schedule J in the amount of $2,464.00, resulting in projected excess income of $436.85 per month. The monthly expenses are reasonable.

The Sernas’ Chapter 13 plan (doc. 6) calls for 60 payments of $435 ($26,100). After trustee fees ($2,610) and attorney fees ($1,587), the plan pays a secured claim of $12,850 with interest at 10% and another secured claim of $4,413 with 0% interest. The balance is paid on unsecured claims. At confirmation, the Sernas agreed to stop the loan repayment of $179.26 to Mrs. Serna’s employer. The plan, as amended, would not pay unsecured creditors 100% of their claims. The issue presented is whether $196.67 for Mr. Serna’s current stock/401k contribution is reasonably necessary for the support or maintenance of the debtors or their dependents.

Under the Bankruptcy Code, if the trustee or an unsecured creditor objects, the Court may not confirm a Chapter 13 plan unless (A) it provides for repayment of 100% of the debt owed to unsecured creditors, or (B) all of debtor’s disposable income will be paid into the plan for at least three years. 11 U.S.C. § 1325(b)(1). The debtors do not propose to pay

100% of their unsecured creditors, so 11 U.S.C. § 1325(b)(1)(A) does not apply. The Court therefore must determine if the debtors meet the requirements of 11 U.S.C. § 1325(b)(1)(B). That is, the Court must determine if all of the debtors' projected disposable income will be paid into the plan for at least three years. For the purposes of 11 U.S.C. § 1325(b)(1)(B), "disposable income" is income which the debtor receives but is not "reasonably necessary" for the maintenance of support of the debtor or a dependent of the debtor, 11 U.S.C. § 1325(b)(2)(A)[2] (and, if the debtor is engaged in business, also for expenditures necessary for the continuation, preservation, and operation of the business, 11 U.S.C. § 1325(b)(2)(B)).

Dozens of reported cases attempt to pinpoint the elusive concept of "disposable income." These cases break down into basically three categories. James Rodenberg, Reasonably Necessary Expenses or Life of Riley?: the Disposable Income Test and a Chapter 13 Debtor's Lifestyle, 56 Mo.L. Rev. 617, 631-35 (1991)(most footnotes omitted):

[2] 11 U.S.C. § 1325(b)(2)(A) also provides that up to 15% of gross income of a debtor may be contributed to a qualified religious or charitable entity or organization and not be considered disposable income. The debtors' budget does not propose religious or charitable contributions.

At one extreme, some courts take the position that only luxury items should be disallowed as unnecessary expenses. Under this approach, the court reviews the debtor’s schedule of expenses and is concerned only when there are luxury expenditures in the budget. Probably the best expression of this approach is the often quoted language from the leading commentary on the Code:

> Hence, a court determining the debtor’s disposable income is not expected to, and should not, mandate drastic changes in the debtor’s lifestyle to fit some preconceived norm for chapter 13 debtors. The debtor’s expenses should be scrutinized only for luxuries which are not enjoyed by an average American family. ... Indeed, where a debtor’s total household income is only a modest amount, the court should be reluctant to impose its own values with respect to any expenditures, even those which seem unnecessary; the debtor’s choice to make such expenditures rather than spending a greater amount on, for example, housing or clothing expenses which the court would find reasonable, is not one with which the court should interfere.
>
> In short, the court cannot and should not order debtors to alter their lifestyles where there is no obvious indulgence in luxuries, even where one or more unsecured creditors demand such a change. To engage in such close judgments and supervision would be to contravene the intent of Congress. It would also place impossible burdens on the court in determining the absolute necessity of every expense in each debtor’s budget. Since the views of judges on such value-laden issues differ significantly, such an interpretation of the amendments would contravene their purpose of restoring nationwide uniformity to chapter 13. [Collier on Bankruptcy, § 1305.08].

Thus, this approach maintains that a court should not impose its values on the debtor except in cases of obvious luxuries or extravagance. This is often referred to as the “narrow” interpretation of disposable income because it is based on the discretion of the debtor, with minimal restraint from the court.

A second approach, knows as the “broad” interpretation, takes the opposite extreme. Courts advocating this position state that they should use broad discretion and impose their values on the debtor’s budget to ensure the debtor is only proposing expenses for life’s basis necessities. The objective is for the court to examine every expense category to eliminate any expenditure that is not absolutely necessary for the support and maintenance of the debtor or his dependents. The premise is that the debtor should be reduced to a basic lifestyle to minimize expenses and thereby maximize the amount of disposable income available to pay general unsecured creditors. This is the approach adopted by a majority of the courts that have considered the reasonableness of a debtor’s expenditures in a Chapter 13 plan.

The leading case advocating the broad interpretation, <u>In re Jones</u> [55 B.R. 462 (Bankr. D. Mn. 1985)] was the first attempt by a court to address the disposable income test after the effective date of BAFJA. ... According to this standard, as enunciated in <u>Jones</u>, a court should eliminate any expense not necessary for basic living and reduce any expense that is in excess of the average lifestyle. This approach does not give any weight to the debtor’s former standard of living; rather, it seeks to maximize the dividend for general unsecured creditors.

A third approach takes the middle ground. Courts advocating this approach treat the disposable income test as a factual determination that varies debtor-by-debtor and case-by-case. This approach is most appropriately characterized as the “totality of the circumstances” approach. Courts using this totality-of-the-circumstances approach focus on the debtor’s behavior in proposing the plan, past spending habits and desire to repay creditors. This approach is a compromise between the other two extremes and it is relatively recent in its development. In effect, it is somewhat of an equitable approach to the "reasonably necessary" determination.

The objective is to examine each expense category on its own merits and allow the debtor some semblance of his regular lifestyle within the confines of the average lifestyle in the debtor's geographical area. ... One court proposed the following set of factors for consideration when using the totality of the circumstances approach:

While a court should not lightly substitute its judgment for that of the debtor, section 1325(b) mandates that it do so when any one of the following factors is present:

a. The debtor proposes to use income for luxury good or services;
b. The debtor proposes to commit a clearly excessive amount to non-luxury goods or services;
c. The debtor proposes to retain a clearly excessive amount of income for discretionary purposes;
d. The debtor proposes expenditures which would not be made but for a desire to avoid payments to unsecured creditors;
e. The debtor's proposed expenditures as a whole appear to be deliberately inflated and unreasonable.

[In re Navarro, 83 B.R. 348, 355-56 (Bankr. E.D. Pa. 1988)(citations omitted)(The court noted that "these factors are not meant to be exclusive, but rather a guide to relevant considerations in evaluating a case under section 1325(b)." Id. at 158.]

These three approaches are demonstrated by, for example: In re McDaniel, 126 B.R. 782, 784 (Bankr. D. Mn. 1991)("Expenses that are not absolutely essential to the maintenance and support of debtors can nonetheless be 'reasonably necessary' for such purposes. ... This Court must deny confirmation under

Section 1325(b)(1)(B) whenever debtors include in their budgets expenditures for luxury items or excessive expenditures for non-luxury items.")(narrow view[3]); Anes v. Dehart (In re Anes), 195 F.3d 177, 180-81 (3rd Cir. 1999)("Voluntary contributions to retirement plans, however, are not reasonably necessary for a debtor's maintenance or support and must be made from disposable income.")(broad view) and Harshbarger v. Pees (In re Harshbarger), 66 F.3d 775, 777 (6th Cir. 1995)("This expenditure [repayment of a pension loan] may represent prudent financial planning, but it is not necessary for the 'maintenance or support' of the debtors.")(broad view); New York City Employee's Retirement System v. Sapir (In re Taylor)[4], 243 F.3d 124, 129 and n.5 (2nd Cir. 2001)("It is within the discretion of the bankruptcy court judge to make a decision, based on the facts of each individual case, whether or not the pension contributions qualify as a reasonably necessary expense for that debtor.")(case by case approach) and Smith v. Spurgeon (In re Smith), 207 B.R. 888, 890 (9th Cir. B.A.P. 1996))(Holding that

[3] This approach has not been widely adopted. Rodenberg, 56 Mo.L. Rev. at 631 n.73.

[4] Trustee cites to the District Court opinion at 248 B.R. 37. The Second Circuit reversed the District Court on March 20, 2001 and adopted the "case by case" approach for the Second Circuit, after the briefs were filed in these cases.

life insurance may be a reasonably necessary expense depending on the facts of the case. “This is a matter for the exercise of sound discretion by the court; a per se rule is error.”)(case by case approach).

The Court of Appeals for the Tenth Circuit has not ruled on the approach it would prefer that the Bankruptcy Courts use in calculating disposable income. However, the Tenth Circuit’s general preference for case by case analysis and its reluctance to adopt per se rules in bankruptcy matters are both relevant and instructive. For example, in In re Stewart, 175 F.3d 796 (10^{th} Cir. 1999) the issue was whether a chapter 7 petition should be dismissed for substantial abuse under 11 U.S.C. § 707(b). Id. at 799. The Tenth Circuit noted that some courts regard ability to repay debt as dispositive in determining whether substantial abuse occurred. Id. at 808. Other courts, however, apply a “totality of the circumstances” standard under which other factors must be considered. Id. at 808-09. The Tenth Circuit rejected the “ability to pay” standard in favor of the “totality of circumstances” standard, and ruled that substantial abuse must be analyzed on a case by case basis. Id. at 809. The Court noted that, while ability to repay debt is a primary factor, other relevant factors such as unique hardships must be examined before dismissing a chapter 7 petition. Id. See also Mason v. Young (In re Young), 237 F.3d 1168, 1174 (10^{th} Cir. 2001)("As a general matter, a determination of good faith [for section 1325(a)(3)] must be made on a case by case basis, looking at the totality of the circumstances."); Gier v. Farmers State Bank of Lucas, Kansas (In re Gier), 986 F.2d 1326, 1328 (10^{th} Cir. 1993)(Serial filings under Chapter 7 and Chapter 13 are not per se evidence of bad faith; proper inquiry for bankruptcy court is "totality of the circumstances."); Flygare v. Boulden, 709 F.2d 1344, 1348 (10^{th} Cir. 1983)("We agree with the Eighth Circuit that '[a] per se minimum payment requirement to unsecured creditors as an element of good faith would infringe on the desired flexibility of Chapter 13 and is unwarranted.' In re Estus, 695 F.2d at 316 [United States v. Estus (In re Estus), 695 F.2d 311 (8^{th} Cir. 1982)]". Flygare sets forth 11 factors for the courts to consider in determining good faith.)

"Substantial abuse" cases under 707(b) and "disposable income" cases under 1325(b) are, in a sense, two sides of the same coin. In both 707(b) cases and a 1325(b)(1)(B) cases the Courts are called upon to make value judgments about the debtor's lifestyles. In a 707(b) case the Court must determine "substantial" abuse, relying on ability to pay as a major factor. <u>Stewart</u>, 175 F.3d at 809. Ability to pay, however, necessarily relates to the debtor's budget and a determination of what expenses are "reasonably necessary." This is the same determination mandated by § 1325(b)(2). A court must apply its own values to determine whether something is "substantial" or "reasonably necessary." It therefore seems that application of the "case by case" approach to determine reasonably necessary expenses would comport with the Tenth Circuit's adoption of the "totality of the circumstances" approach to substantial abuse.

This Court also believes that the case by case approach comports most with Congress' use of the term "reasonably necessary" in § 1325(b)(2). <u>See</u> <u>In re Davis</u>, 241 B.R. 704, 709 (Bankr. D. Mt. 1999):

> [T]he use of a phrase such as "reasonably necessary" appears to invite the Court to look at the circumstances of each case and each individual debtor, and his or her obligations under State law or contract to determine whether such obligations are in fact reasonably necessary for the support of debtors and their dependents. § 1325(b)(2)(A).

<u>See also</u> <u>Taylor</u>, 243 F.3d at 129 (quoting <u>Davis</u>); <u>Carmichael v. Osherow (In re Carmichael)</u>, 100 F.3d 375, 380 (5th Cir. 1996)(Section 522(d)(10)(E) exempts certain pension plans "to the extent reasonably necessary" for support. The quantum

needed for support is entrusted to the bankruptcy court's discretion.)

Without looking at the overall picture presented by a debtor's schedules and life situation, it is not possible to determine whether any particular expense is reasonable. For example, a debtor with a clerical job may not need a cell phone but an executive might. On the other hand, a debtor with a clerical job and a chronically ill child may need a cell phone but an executive working out of her home might not. A family with children may need a larger recreation budget than a single person would need. A debtor may have an unusual food budget for religious or health reasons. A debtor may have chosen to live in an inexpensive apartment[5] instead of a house with a large mortgage payment in order to contribute[6] the savings to a pension plan. The Court should examine all the facts and circumstances surrounding each of the debtor's lifestyle choices before deciding if challenged expenses are unreasonable or excessive. If a debtor scrimps in one

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[5] Courts seldom refuse to confirm a plan because of the amount a debtor is expending for housing. Rodenberg, 56 Mo.L. Rev. at 636.

[6] Several bankruptcy courts have based their decisions on the grounds that the retirement contributions at issue were mandatory. In re Awuku, 248 B.R. 21, 28 (Bankr. E.D. N.Y. 2000). This Court is not convinced that this distinction matters. See Id.

category to be able to spend a little more in another category while maintaining an overall reasonable budget, it is probably not the province of the court system to overrule that lifestyle choice. See Navarro, 83 B.R. at 355 ("11 U.S.C. § 1325(b) should not be considered a mandate for a court to superimpose its values and substitute its judgment for those of the debtor on basic choices about appropriate maintenance and support.")(footnote omitted.)

> The policy of allowing a fresh start does not license debtors to lightly rid themselves of the burden of their indebtedness without an honest attempt at repayment. Yet neither does that policy compel debtors, in Dickensian fashion, to labor for the rest of their lives under the crushing weight of gigantic debt; under our law, the world is not to be made a debtor's prison by a lifelong sentence of penury.

Young, 237 F.3d at 1178. In sum, this Court will adopt a case by case approach to any determination under section

1325(b)(1)(B) and reject any per se rule[7] about what expense is unreasonable.

Based on the above, the Court disagrees with the majority of cases that hold that pension plan contributions can never be a reasonably necessary expense. The purpose of a pension plan is to ensure that workers have sufficient funds with which to support themselves and their dependents during their retirement years. Solomon v. Cosby (In re Solomon), 67 F.3d 1128, 1133 (4th Cir. 1995). "[T]here can be no doubt that Congress has expressed a deep and continuing interest in the

[7] The Court has considered Trustee's argument, well supported by an apparent majority of cases, that pension contributions are per se unreasonable. See, e.g. In re Hansen, 244 B.R. 799, 802 (Bankr. N.D. Il. 2000)(There is "overwhelming consensus" that retirement contributions are not reasonably necessary for maintenance and support.) Trustee cites In re Marvin, No. 7-99-11159 ML (Bankr. D. N.M. Feb. 15, 2000)(Order Granting the United States Trustee's Motion to Dismiss under 11 U.S.C. § 707(b) with Leave to Convert) for the proposition that pension contributions are considered to be part of disposable income in the District of New Mexico. The Court does not read the Marvin Order that expansively. In Marvin, Judge McFeeley examined the totality of the circumstances, as required by Stewart. The Marvins had disposable income of $416.30 after a voluntary monthly pension contribution of $112.23. Mr. Marvin, who was 49, had a pension fund of over $46,000. Under Chapter 7, the unsecured creditors would receive nothing. Based on these facts, Judge McFeeley found that Chapter 7 would be a substantial abuse. He did note that "Allowing Debtors to contribute to their savings plan while creditors receive nothing effectively forces creditors to fund Debtors' savings." Under those facts, this Court agrees. Marvin does not state, however, that a pension contribution would never be allowable as a reasonable expense in Chapter 13.

preservation of pension plans, and in encouraging retirement savings, as reflected in the statutes which have given us ERISA, Keogh plans and IRAs." Velis v. Kardanis, 949 F.2d 78, 82 (3rd Cir. 1991). The Court recognizes that there is a tension between this Congressional policy of encouraging savings for retirement and the protection of the rights of unsecured creditors in a bankruptcy. The Court finds, however, that the rights of both debtors and creditors is best served by the Court examining the totality of the circumstances and evaluating whether any proposed pension contribution is reasonable under the circumstances. Taylor, 243 F.3d at 129 ("It is within the discretion of the bankruptcy court judge to make a decision, based on the facts of each individual case, whether or not the pension contributions qualify as a reasonably necessary expense for that debtor.")

Next, given this state of affairs, the Court should give some guidance on factors that it will consider in making the reasonableness determination. The Court finds that the following may, in any given case, be relevant considerations:

a. Does the debtor propose to use income for luxury good or services (Navarro, 83 B.R. at 355);

b. Does the debtor propose to commit a clearly excessive amount to non-luxury goods or services? (Navarro, 83 B.R. at 356);

c. Does the debtor propose to retain a clearly excessive amount of income for discretionary purposes? (Id.);

d. Does the debtor propose expenditures which would not be made but for a desire to avoid payments to unsecured creditors? (Id.);

e. Do the debtor's proposed expenditures as a whole appear to be deliberately inflated and unreasonable? (Id.)

Additionally, if the questioned expense is a pension:

f. What is the debtor's age and when is retirement expected? (Taylor, 243 F.3d at 129);

g. What is the amount of the monthly contribution and will the debtor have to "buy back"[8] the pension after bankruptcy? (Id.);

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[8] Some retirement plans, e.g. defined benefit plans, require an employee to buy back missed contributions in order to avoid deficits that could affect future pension benefits. See e.g., New York City Employee's Retirement System v. Sapir (In re Taylor), 248 B.R. 37 (S.D. N.Y. 2000), rev'd, 243 F.3d 124 (2nd Cir. 2001).

h. Will the buy back payments jeopardize the fresh start? (Id. at 129-30);

i. What is the number and nature of debtor’s dependents? (Id. at 130);

j. Will the debtor suffer adverse employment conditions if the contributions are ceased? (Id.);

k. What is the debtor’s yearly income? (Id.);

l. What is the debtor’s overall budget? (Id.);

In addition, the Court lists its own factors:

m. What are the general nature of the debts being discharged (e.g., is the plan an attempt to discharge credit card debts for luxury purchases, or is it an attempt to make some payment on a catastrophic medical expense?)

n. What are the proposed contributions in relation to the debtor’s proposed plan payments?

o. Are the overall budget and plan proposed in good faith?

p. Would denial of the pension deduction materially change the dollar amount or percentage that unsecured creditors would receive?

q. What would the creditors receive in a chapter 7?

r. Is debtor making his or her best effort?

s. What standard of living does the proposed budget represent[9]?

CONCLUSIONS

The Court has reviewed the facts and file, and concludes as follows:

The Court finds that $106 is a reasonable expenditure for a 401k contribution. The Court bases this number on the following. Mrs. Serna is in her fifties, and the debtors have $26,417 in retirement savings. The plan payment proposed is the $435 set out in the Plan plus the employer loan repayment of $179, or $614 for the first 3 years. The Court assumes that the plan payment would revert to $435 after the first 3 years. The overall budget and plan appear reasonable and proposed in good faith. Debtors proposed a 401k contribution of $197. This contribution of $197 represents 6.3% of Mr. Serna’s salary; this amount appears high both in actual dollar amount and percentage of gross wages for a chapter 13 debtor. The $197 proposed 401k contribution is 32% of the proposed plan payment, which percentage the Court also finds high. If the 401k contribution is reduced to $106, an additional $91 is

[9] This could probably be called the “smell test.” See Industrial Insurance Services, Inc. v. Zick (In re Zick), 931 F.2d 1124, 1127 (6th Cir. 1991)(Adopting “smell test” to determine lack of good faith for § 707(a) dismissal.)

added to disposable income, resulting in a plan payment of $711 for the first 3 years. The 401k contribution will then be approximately 15% of the annual plan payment for the first three years, which in this case the Court finds reasonable. The factors the Court finds most relevant to this reasonableness determination are the Debtors' age(s), the small amount of existing retirement savings, the lack of a contingency fund, and the relatively minor impact of allowing the $106, a small amount in absolute terms, as a percentage of total proposed payments[10]. If Debtors wish to make additional contributions to their 401(k) plan, they have available at least $40 from their recreation budget.

In summary, the Court will confirm this Chapter 13 plan if debtors increase the monthly payment by $91 for the first 36 months in addition to the $179 increase offered at confirmation. The Court will enter an Order reflecting the above ruling.

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[10] $106 x 36 = $3816 into the 401k in the first three years; the first three years of plan payments total $29,196 ($811 x 36). The plan payments over five years total $34,956 ($29,196 + $10,440 ($435 x 24).

Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on October 9, 2001, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

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