

**United States Bankruptcy Court
District of New Mexico**

Document Verification

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Case Number: 03-18816
Chapter : 13
Judge Code: SS
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Document Information			
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Description:	Memorandum Opinion and Order re: [56-1] Amended Plan. Debtor's atty shall convert case or file a second amended plan, consistent with this opinion, within 14 days of this order. If dtr does neither, the tr shall submit an Order dismissing the case.		
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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
EDWARD LARUSSO,
Debtor.

No. 7-03-18816 SS

MEMORANDUM OPINION ON CONFIRMATION and ORDER

This matter came before the Court for confirmation of the Debtor's Amended Chapter 13 Plan ("Plan") (doc 56) and the objection thereto by the Chapter 13 Trustee (doc 62). This is a core proceeding. 28 U.S.C. § 157(b)(2)(L).

FACTS

Debtor's Amended Schedule I¹ (doc 63) shows total monthly income of \$6,382 and net income of \$3,630 but includes a payroll deduction for "401K" of \$757. Debtor's Second Amended Schedule J shows total monthly expenses of \$2,676. The second amended Schedule J omits a car payment of \$350 which is proposed to be paid through the plan.² If the Court were to rule that no pension plan deduction were permissible, net income would be

¹ Debtor amended Schedule J but not Schedule I in February 2005. Doc 41. He filed an amended Schedule I and a second amended Schedule J in July 2005.

² The Plan states that the value of the Jeep is \$9,985.00 with a claim due of \$15,225 at 7.5%. The box indicating that the Plan constitutes a Motion to Value collateral is not checked, however, and the Certification of Service section does not indicate that any motions to value collateral were served on any creditors. Therefore, if this plan were confirmed, the undersecured creditor would receive payment in full. Allowing Debtor to pay \$15,225 for a \$9,985 vehicle would be a preference to the undersecured creditor at the expense of unsecured creditors. Debtor should promptly amend the plan to provide for a write-down of this vehicle and properly serve the creditor.

\$4,384. Excess income would be \$1,708. Thirty-six months of payments would result in a fund of \$61,488. Debtor's Amended Plan calls for monthly payments of \$213 for months 1 to 4, then \$954 for months 5 to 36. The Amended Plan therefore results in a fund of \$31,380, or \$30,108 less than the amount to which the creditors are entitled.³

Debtor's budget overall seems reasonable. Debtor is in his mid-fifties and has accumulated a retirement fund of approximately \$40,000, which is very little considering his age and salary. His employment does not have a pension plan other than the 401K. It would not be unreasonable for Debtor to continue to fund his retirement with a reasonable monthly contribution. In this case, the Court finds that a 6% contribution is reasonable, or \$383 per month versus the \$757 (12.8%). So, instead of a payment of \$954, the payment should increase by \$374 to \$1,328 for the balance of the plan.

However, the Court also finds that the plan proposed is less than the absolute minimum contemplated by § 1325(b)(1)(B) of the Code; i.e., 36 months of projected disposable income. (The Plan proposes to pay only \$213 for months 1 to 4.) Under these

³ The Plan also provides that the Debtor shall contribute his CY 2005 and 2006 tax refunds. The Court has not included these numbers in its calculations, nor does it need to, since the Debtor does not intend or need to spend the refunds and therefore they in effect constitute additional income that should go to the creditors.

circumstances, the Court believes it is would be reasonable and fair for Debtor to make up the shortfall by extending the \$1,328 payments for an additional 22⁴ months, resulting in a 58 month plan.

CONCLUSIONS OF LAW

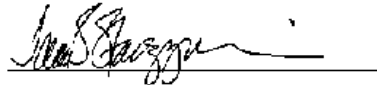
The Court concludes that based upon the case by case approach adopted by the Tenth Circuit in dealing with § 707(b) cases, it should use a case by case approach in determining whether a specific debtor should be allowed to make contributions to a pension plan. See In re King, 308 B.R. 522, 528 (Bankr. D. Kan. 2004)(citing In re Stewart, 175 F.3d 796, 809 (10th Cir. 1999)). This ruling is consistent with the ruling in In re Ferguson, No. 13-04-11927 SR (minutes - doc 23, at 2).⁵ In Ferguson, this Court issued a ruling which in effect held that where there is a way to meet the minimum payment requirement of the Code under § 1325(b)(1)(B) and also allow the debtor to continue saving for retirement, the payment periods should be extended. That is what is possible and reasonable in this case. Thus the Court need not consider what the result would be if those two goals were in conflict.

ORDER

⁴\$30108 shortfall/\$1328=22.67.

⁵ That decision is available on the Oral Rulings list on the Court's chambers homepage.

Debtor's attorney shall convert this case or file a second amended plan, consistent with this opinion, within 14 days of the entry of this Order. If Debtor does neither, the Trustee shall submit an Order dismissing the case.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on March 23, 2006, a true and correct copy of the foregoing was electronically transmitted, faxed, delivered, or mailed to the listed counsel and/or parties.

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