IT IS ORDERED as set forth below:

Date: October 02, 2007

Paul W. Bonapfel
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

IN THE MATTER OF:	:	CASE NUMBER: R06-42597-PWB
	:	
JAMES R. SEARS	:	
and MARSHA H. SEARS,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 13 OF THE
Debtors.	:	BANKRUPTCY CODE

ORDER

The Chapter 13 Trustee objects to confirmation of the above-median Debtors' plan on the ground that it does not provide for payment of all their projected disposable income to unsecured creditors. Specifically, the Trustee contends that the Debtors are not entitled to deduct $471 as a vehicle "ownership expense" pursuant to the IRS Local Standards because their vehicle is unencumbered. Disallowance of the deduction requires a larger pool of funds for unsecured creditors and, as a result, a higher dividend on unsecured claims. The Debtors contend that whether they owe payments on the vehicle has no bearing on their entitlement to the ownership expense deduction.

For the reasons set forth herein, the Court concludes that, for purposes of calculating projected disposable income, the above-median Debtors may deduct a vehicle ownership expense pursuant to § 707(b)(2)(A)(ii)(I), regardless of whether an actual payment is owed on the vehicle. However, because there appear to be errors in the calculation of projected disposable income, a further hearing on confirmation of the Debtors' plan is required.[1]

Section 1325(b)(1)(B) provides:

> If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan –
>
> . . . .
>
> (B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

As amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), new § 1325(b)(2) defines "disposable income" as "current monthly income" (a new term defined in § 101(10A)), less certain exclusions not material here, less "amounts reasonably necessary to be expended" for, among other things, maintenance and support of the debtor. For above-median income debtors, new § 1325(b)(3) requires determination of "amounts reasonably necessary to be expended" in accordance with § 707(b)(2)(A) and (B), which BAPCPA also added. Because the Debtors' annual income of $64,716 is above-median, § 707(b)(2) governs

[1]This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(L), over which this Court has jurisdiction pursuant to 28 U.S.C. § 1334.

determination of "reasonably necessary expenses."

Section 707(b)(2) sets forth the mechanisms for calculating a debtor's expenditures for purposes of determining whether she has the ability to pay a statutorily specified amount of debt. The provisions are commonly referred to as the "means test." Subparagraph A of § 707(b)(2) contains the standards for determining permissible expenditures that are taken into account in determining how much a debtor could pay and, consequently, whether a presumption of abuse arises. Subparagraph (B) then permits a debtor to rebut the presumption of abuse by demonstrating "special circumstances."

Section 707(b)(2)(A) cotains a number of categories of permissible deductions. Of relevance here is § 707(b)(2)(A)(ii)(I):

> The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides, as in effect on the date of the order for relief, for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent.

The National Standards and Local Standards are standardized allowable expenses utilized by the IRS in analyzing budgets for taxpayers attempting to create repayment agreements with the IRS. Included in the Local Standards are transportation expenses that are broken down into two categories: (1) operating expenses and (2) ownership expenses.

Official Form 22C is the form on which a debtor calculates current monthly income (CMI) and inputs other information necessary for the means test calculations. To that end, the form breaks down § 707(b)(2)(A)(ii)'s categories of expenses. Line 27 directs a debtor to enter the appropriate Local Standard for a "vehicle operation/public transportation expense." Line 28

directs a debtor (1) to enter the appropriate "transportation ownership/lease expense;" (2) to subtract the "average monthly payment" for any debt secured by the vehicle; and, consequently, (3) to arrive at a "net ownership/lease expense."

The Debtors own two vehicles: (1) a 2004 Kawasaki Vulcan motorcycle with a value of $4,500, which is encumbered by a lien held by Citizens First Bank in the amount of approximately $4994; and (2) a 1997 Jeep Cherokee Laredo unencumbered by liens and with a value of $500.

The Debtors have claimed ownership expense deductions for both vehicles: $471 for the unencumbered Jeep Laredo and $332 for the motorcycle, less its average monthly payment, for a net ownership expense of $106 for the motorcycle. By the Debtors' calculations as reflected on Form B22, they have $229 monthly disposable income. Over 60 months, this results in $13,740 to be paid to unsecured creditors. The Debtors' second amended plan [Doc. No. 16], in fact, after payments to secured creditors, provides that unsecured creditors will receive a pro rata share of $16,621 or a dividend of 54%, whichever is greater. Unsecured claims totaling $32,531.64 have been filed.

The Trustee, however, contends that the Debtors are not entitled to deduct a $471 vehicle ownership expense for the unencumbered Jeep. The Trustee relies on the Internal Revenue Manual that would disallow such a deduction for an unencumbered vehicle. Instead, the Trustee contends that the Debtors are limited to a $200 operating expense for a vehicle that is over six years old and/or has mileage in excess of 75,000 miles as permitted by § 5.8.5.5.2 of the Internal Revenue Manual. If the $471 is disallowed, but an additional $200 operating expense is permitted, the Trustee contends that there is a net increase of $271 per month and a monthly disposable income of $500. If paid over 60 months, this would result in $30,000 or a dividend of roughly

92% to unsecured creditors, and a monthly payment of no less than $735 to complete the Debtors' plan in 60 months.[2]

Courts have divided on the issue of whether a debtor may deduct an ownership expense for an unencumbered vehicle. *See In re Wilson*, –B.R.–, 2007 WL 2199021, *2-3 (Bankr.W.D. Ark. July 30, 2007) (collecting cases); *In re Sawdy*, 362 B.R. 898, 903-912 (Bankr. E.D. Wis. 2007) (collecting cases and discussing rationales offered by both views). The analysis has focused on the meaning of "applicable monthly expense amounts;" the role of IRS guidance on the standards in the context of the means test; and the purpose of the means test in general.

Some courts have found that a debtor may not deduct an ownership expense for a vehicle owned free and clear. Because the statute provides that a debtor's monthly expense shall be the debtor's "applicable monthly expense amounts" under the Local Standards, these courts have concluded that, if a debtor does not own or lease a vehicle or incur expense for the purchase or lease of a vehicle, then the ownership expense is not "*applicable*" to the debtor. *E.g., Fokkena v. Hartwick (In re Hartwick)*, –B.R.–, 2007 WL 2350560, *4 (D. Minn. Aug. 20, 2007); *In re Slusher,* 359 B.R. 290, 308-309 (Bankr. D.Nev. 2007); *In re McGuire*, 342 B.R. 608, 613 (Bankr. W.D. Mo. 2006); *In re Wiggs*, 2006 WL 2246432, *2 (Bankr. N.D. Ill. Aug. 4, 2006).

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[2]Both the Debtors' and the Trustee's calculations appear to be incorrect. The Debtors' figures are incorrect because it does not appear the Debtors have deducted the correct average monthly payment for the motorcycle expense; the Debtors have deducted $226 at line 29(b) while line 47 reflects an average monthly expense of $83. If $83 is deducted instead of $226, this actually results in a greater net expense to the debtors and a further reduction in projected disposable income to $86 per month. The Trustee's numbers are incorrect because, if the $471 deduction for the unencumbered vehicle is disallowed, the Debtors will instead take the $471 deduction (rather than $332) for the motorcycle and subtract its average monthly payment of $83 disclosed on line 47. If the Debtors are permitted a $200 additional operating expense for the Jeep under the Trustee's scenario, the Debtor's monthly projected disposable income would be $218, $11 less than what is currently (though incorrectly) calculated as the Debtors' projected disposable income on Form 22C [Doc. No. 20].

Courts denying the deduction have also looked to the IRS' guidelines for IRS usage of the standards for guidance on their application in bankruptcy cases. The IRS' Manual and Financial Analysis Handbook (used by the IRS in its tax repayment analysis) explicitly state that the ownership expense is a "cap" and that the debtor is allowed either the Local Standard or the actual payment, whichever is less.[3] Further, § 5.8.5.5.2 of the Manual states that an ownership expense is permitted only for the purchase and/or lease of a vehicle. Thus, relying on the IRS' interpretation of its own standards, courts have not allowed debtors to deduct the ownership expense when the vehicle is owned free and clear. *See In re Talmadge*, 371 B.R. 96, 101 (Bankr. M.D. Pa. 2007) ("Terms of art, National and Local Standards, have no meaning without reference to the Financial Analysis Handbook, which spawned the terms"); *In re Slusher*, 359 B.R. 290, 309 (Bankr. D.Nev. 2007); *In re Barraza*, 346 B.R. 724, 729 (Bankr. N.D. Tex. 2006).

Finally, courts denying the deduction have suggested that permitting an ownership expense for an unencumbered vehicle undermines the purpose of the means test and produces inequitable results. *See In re Howell*, 366 B.R. 153, 157 (Bankr. D. Kan. 2007) ("Allowing debtors to deduct from their disposable income a fictional ownership allowance would give debtors with unencumbered vehicles a windfall at the expense of their unsecured creditors.").

The Court respectfully disagrees with these cases and their rationales. For the reasons set forth below, the Court concludes that the Debtors are entitled to deduct an ownership expense

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[3]Section 5.8.5.5.2 of the Internal Revenue Manual provides, with respect to ownership expenses, that "Taxpayers will be allowed the local standard or the amount actually paid, *whichever is less*." Section 5.15.1.7 of the Financial Analysis Handbook, which is used by the IRS in conjunction with the Manual, provides with respect to the Local Standards Transportation costs that "If a taxpayer has a car payment, the allowable ownership cost added to the allowable operating cost equals the allowable transportation expense. If a taxpayer has no car payment only the operating cost portion of the transportation standard is used to figure the allowable transportation expense."

pursuant to the Local Standards.

Analysis begins with the language of the statute. Section 707(b)(2)(A)(ii)(I) provides that "[t]he debtor's monthly expenses shall be the debtor's *applicable* monthly expense amounts specified under the National Standards and Local Standards, and the debtor's *actual* monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides." (Emphasis added).

This language thus draws a clear delineation between applicable amounts (such as standardized ownership expenses) and actual amounts (such as taxes or child care). As one court has observed, this suggests that, while an "Other Necessary Expense" must be the actual amount incurred by the debtor, "[e]xpenses under the 'Local Standards,' in contrast, need only be those 'applicable' to the debtor – – because of where he lives or how large his household is. It makes no difference whether he 'actually' has them." *In re Farrar-Johnson*, 353 B.R. 224, 230-231 (Bankr. N.D. Ill. 2006) (analyzing standard housing expense). *See In re Swan*, 368 B.R. 12, 18 (Bankr. N.D. Cal. 2007); *In re Billie*, 367 B.R. 586, 591 (Bankr. N.D. Ohio 2007), *In re Wilson*, 356 B.R. 114, 119 (Bankr. D. Del. 2006).

The Court concurs. The statute's use of the term "shall" mandates use of the amounts specified in the Local Standards. The term "applicable" merely references the applicable region, household size, and, with respect to an ownership cost, whether a debtor has one or more vehicles. Nothing in the language of § 707(b)(2)(A)(ii)(I) requires a debtor to have a debt payment on a vehicle in order to claim the ownership expense. *See In re Wilson*, –B.R.–, 2007 WL 2199021, *5 (Bankr. W.D. Ark. Jul. 30, 2007) ("Requiring an existing vehicle payment as a prerequisite to entitlement to the Local Standard deduction amounts to a rewriting of the statute in order for the outcome to make more sense."); *In re Haley*, 354 B.R. 340, 343 (Bankr. D.N.H. 2006).

This analysis is consistent with the language of Form 22C and the advisory committee notes to it. Although the language of the Form and the notes are not law and, therefore, are not binding, they are persuasive because they are the result of informed analysis and study of what the statute requires. The advisory committee notes to Form 22 state:

> The amount of the vehicle operation/public transportation allowance depends on the number of vehicles the debtor operates, with debtors who do not operate vehicles being given a public transportation allowance. The instruction for this line item makes it clear that every debtor is thus entitled to some transportation expense allowance. No debt payment is involved in this allowance. The ownership/lease component, on the other hand, *may involve debt payment*. Accordingly, the forms require debtors to reduce the allowance for ownership/lease expense by the average monthly loan payment amount (principal and interest), up to the full amount the IRS ownership/lease expense amount. This average payment is as reported on the separate line of the forms for deductions of secured debt under § 707(b)(2)(A)(iii). (emphasis added).

Thus, the advisory notes' use of the term "may involve debt payment" suggests a recognition that a debt payment *may not* exist with respect to all vehicles which trigger the Local Standard ownership expense. *See In re Crews*, 2007 WL 626041, *3-4 (Bankr. N.D. Ohio Feb. 23, 2007).

The Court also rejects the use of the IRS Manual and Handbook to determine statutory rules in the context of the means test or calculation of projected disposable income. The statute itself makes clear that it is the amounts specified in the Local Standards that shall be used; nothing in the statute incorporates usage of IRS internal guidance for use in application of §707(b)(2)(A)(ii)(I). *See In re Chamberlain*, 369 B.R. 519, 525 (Bankr. D.Ariz. 2007) ("Nothing in the statute, Bankruptcy Rules or official forms refers a debtor to any IRS publications for

additional rules or interpretation.); *In re Prince*, 2006 WL 3501281, *3 (Bankr. M.D.N.C. Nov. 30, 2006) ("To read § 707(b)(2)(A)(ii)(I) as permitting the courts to comb through the Internal Revenue Manual in order to pick and choose provisions to apply in a given case injects great uncertainty into the process of determining a debtor's expenses for purposes of the means test").

Finally, the Court concludes that the policy arguments advanced by courts that disallow the deduction are flawed because they mischaracterize the policy itself. Although it is counterintuitive that a debtor should be entitled to claim an ownership expense for a vehicle that is completely paid in full, it does not follow that it is logical to disallow such an expense in its entirety. In *In re Wilson*, 2007 WL 2199021, *6 (Bankr. W.D. Ark. July 30, 2007), the Court observed:

> Some would argue, as many cases do, that it makes no sense to allow a vehicle ownership expense according to Local Standards if the debtors have no vehicle payment at all. This has obvious logical appeal. But does it make any more sense if the debtors have a $100.00 vehicle payment, but are still allowed to deduct $471.00 as if that were their vehicle payment? Does it make any sense to allow anything but a debtor's actual expense? Does it make any sense that the gift of non-existent expenses are conferred only on above-median income debtors?

These questions beget other questions. For example, does it make any sense to effectively reward the debtor who has an expensive vehicle by giving her a monthly ownership expense which will reduce her projected disposable income, while punishing the frugal debtor who drives an older, fully paid for vehicle and denying her an ownership allowance and the resultant reduction in projected disposable income? If one of the purposes of the means test approach is to standardize expenses and remove judicial discretion, then engaging in a results-oriented analysis that ignores the plain language of the statute undermines those very policy goals. To attempt to

make sense of the means test to produce a more palatable outcome may very well undermine the purpose of the means test itself.

For all these reasons, the Court concludes that the Debtors are entitled to deduct an ownership expense for a vehicle that has no monthly debt payment. The Trustee has not argued that the Debtors' plan is not proposed in good faith and the Court makes no determination in this Order as to whether a deduction for an unencumbered vehicle could nevertheless run afoul of the good faith standard of § 1325(a)(3). *See In re McGillis*, 370 B.R. 720, 747 (Bankr. W.D. Mich. 2007) ("Ability to pay must be part of Section 1325(a)(3) good faith if that section is to properly complement Section 1325(b)."). Based on the facts of this case, however, the Court cannot see that any "good faith" problem exists. As the Court noted *supra*, note 2, there appear to be errors in the Debtors' calculation of projected disposable income on Form 22C. Because the Debtors may need to file an amended Form, the Court will reschedule the hearing on confirmation of the Debtors' plan to give them an opportunity to do so. Accordingly, it is

ORDERED that the Trustee's objection to confirmation is overruled. The Debtors are entitled to deduct a Local Standard ownership expense pursuant to § 707(b)(2)(A)(ii)(I) for their unencumbered vehicle. It is

FURTHER ORDERED that the hearing on confirmation of the Debtors' plan is rescheduled for October 31, 2007, at 9:30 a.m., in Courtroom 326, U.S. Courthouse, 600 East First Street, Rome, Georgia.

End of Document

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