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3 UNITED STATES BANKRUPTCY COURT
4 EASTERN DISTRICT OF CALIFORNIA
5 MODESTO DIVISION
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8 In re) Case No. 07-90256-A-13G
9 SHERYL FLETCHER,) Docket Control No. RLB-1
10) Date: June 25, 2007
11 Debtor.) Time: 2:00 p.m.
12)

13 *On June 25, 2007 at 2:00 p.m., the court considered the*
14 *debtor's motion to confirm a chapter 13 plan as well as*
15 *objections to confirmation by the chapter 13 trustee and Bank of*
16 *America (Ecast). The court's ruling on the motion and the*
17 *objections is appended to the amended minutes of the hearing.*
18 *Because that ruling constitutes a "reasoned explanation" of the*
19 *court's decision, it is also posted on the court's Internet site,*
20 *www.caeb.uscourts.gov, in a text-searchable format as required by*
21 *the E-Government Act of 2002. The official record, however,*
22 *remains the ruling appended to the minutes of the hearing.*

18 **AMENDED FINAL RULING**

19 The motion will be denied and the objection will be
20 sustained in part.

21 The debtor has reported \$384.24 in monthly projected
22 disposable income on her Statement of Current Monthly Income.
23 Because the debtor's household income exceeds the applicable
24 median income, and assuming the debtor has projected disposable
25 income, the debtor's applicable commitment period is 5 years.
26 While the proposed plan's duration is 60 months, the plan
27 proposes to pay a 20.65% dividend to Class 7 unsecured creditors
28 even though the disposable income projected by the Statement of

1 Current Monthly Income permits the debtor to pay these creditors
2 a 24.50% dividend. Given the objection of the trustee, this plan
3 cannot be confirmed consistent with 11 U.S.C. § 1325(b) because
4 it does not provide all projected disposable income to unsecured
5 creditors.

6 To the extent the trustee is arguing that the debtor's
7 projected disposable income should be higher than \$384.24, the
8 objection will be overruled.

9 The trustee notes that according to the debtor's 2006 income
10 tax return, she had income of approximately \$83,000 in 2006. The
11 Statement of Current Monthly Income reports annualized current
12 monthly income of only \$75,295.92. Current monthly income is
13 comprised of income earned in the six months prior to the
14 petition. The petition was filed on March 14, 2007. What was
15 earned in the 12 months of 2006 is not necessarily indicative of
16 income earned in the last 3 ½ months of 2006 and the first 2 ½
17 months of 2007. And, the trustee has not established that what
18 was earned in 2006 is what the debtor earned in the relevant
19 period of late 2006 and early 2007.

20 The trustee also complains that the debtor has deducted the
21 allowance permitted under the IRS Local Standards for
22 transportation ownership expenses associated with one car even
23 though the debtor's car is not encumbered by a secured claim.

24 There is no requirement that the debtor's car be encumbered
25 in order to claim this expense on the Statement of Current
26 Monthly Income. Under section 1325(b), the amounts permitted by
27 the IRS Local Standard for transportation expenses are allowances
28 that are unaffected by the debtor's actual expenses other than to

1 cap those expenses for purposes of the Statement of Current
2 Monthly Income. The court comes to this conclusion for several
3 reasons.

4 The transportation allowances are part of the National and
5 Local Standards which in turn are part of the Collection
6 Financial Standards developed and used by the IRS to determine a
7 taxpayer's ability to pay delinquent taxes. See
8 www.irs.gov/individuals/article/0,,id=96543,00.html and
9 www.irs.gov/irm/part5/ch15s01.html. The transportation
10 allowances are part of the Local Standards. The transportation
11 allowance has two components, an ownership expense component
12 based on the number of vehicles (up to two vehicles) and an
13 operational expense component. The allowance for the former is a
14 uniform amount (\$471 for one vehicle), while the operational
15 expense allowance varies by region of the country.

16 The Internal Revenue Manual includes the Financial Analysis
17 Handbook ("the handbook"). This handbook assists IRS field
18 agents in applying the National and Local Standards when
19 determining a taxpayer's ability to pay. Under the handbook,
20 taxpayers are permitted to claim the National Standard for food,
21 clothing, housekeeping supplies, and personal care products and
22 services even if their actual expenses for these items and
23 services are lower. They may claim no more, however, than
24 permitted by the National Standard. See Internal Revenue Manual
25 at 5.15.1.8., ¶ 2, found at www.irs.gov/irm/part5/ch15s01.html.

26 For the Local Standards, including the transportation
27 allowance, the handbook specifies that a taxpayer is permitted
28 the allowance permitted by the Local standard or the amount

1 actually paid, whichever is less. See Internal Revenue Manual at
2 5.15.1.7., ¶ 4, found at www.irs.gov/irm/part5/ch15s01.html.

3 If the interpretation given to the Local Standards in the
4 Internal Revenue Manual and the handbook is applicable here, the
5 trustee's objection would be well-founded. However, the court
6 concludes that the Internal Revenue Manual and the handbook is
7 not applicable.

8 First, as noted by the bankruptcy courts in In re Fowler,
9 349 B.R. 414, 418 (Bankr. D. Del. 2006) and in In re Sawdy, 362
10 B.R. 898 (Bankr. E.D. Wis. 2007), 11 U.S.C. §
11 707(b) (2) (A) (ii) (I), which for over-median income chapter 13
12 debtors is used to determine reasonably necessary expenses under
13 11 U.S.C. § 1325(b) (3), does not incorporate the Internal Revenue
14 Manual or the handbook. Indeed, in section 707(b) (2) (A) (ii) (I),
15 the statute specifies that the debtor can deduct the "applicable"
16 National and Local Standards and, in addition, the debtor may
17 claim the "actual" expenses permitted under the IRS's Other
18 Necessary Expense Standard. As noted by the court in Fowler:

19 *The use of "actual" with respect to Other Necessary*
20 *Expenses and "applicable" with respect to the National*
21 *and Local Standards must mean that Congress intended*
22 *two different applications. See Duncan, 533 U.S. at*
23 *173, 121 S.Ct. 2120 (citation omitted) (noting that*
24 *"where Congress includes particular language in one*
25 *section of a statute but omits it in another section of*
26 *the same Act, it is generally presumed that Congress*
27 *acted intentionally and purposely in the disparate*
28 *inclusion or exclusion"); In re Demonica, 345 B.R. 895,*
902 (Bankr. N.D. Ill. 2006) (concluding that "[i]n
order to give effect to every word in [section
707(b) (2) (A) (ii) (I)], the term 'actual monthly
expenses' cannot be interpreted to mean the same as
'applicable monthly expenses'."); In re Donald, 343
B.R. 524, 537 (Bankr. E.D.N.C. 2006) (stating that "the
use of a particular phrase in one statute but not in
another 'merely highlights the fact that Congress knew
how to include such a limitation when it wanted to'"

1 (quoting In re Coleman, 426 F.3d 719, 725 (4th
2 Cir.2005))).

3 See also Sawdy, 362 B.R. at 911-12.

4 One commentator, agreeing with the foregoing, concluded:

5 [A] plain reading of the statute would allow a
6 deduction of the amounts listed in the Local Standards
7 even where the debtor's actual expenses are less.
8 Thus, as with the allowances of the National Standards,
9 even if the debtor's transportation and housing needs
10 were actually satisfied without cost to the debtor,
11 [section] 707(b)(2)(A)(ii)(I) would allow the debtor a
12 deduction in the amounts specified in the IRM's Local
13 Standards.... The ... IRM states that if the debtor
14 makes no car payments, the ownership expense amount may
15 not be claimed. Indeed this result follows necessarily
16 from the IRM's treatment of the Local Standards as caps
17 on actual expenditures: if a taxpayer has no car payments, the
18 taxpayer obviously cannot claim a Local Standard amount intended
19 to cap actual car payment expenses. However, since the means test
20 treats the Local Standards not as caps but as fixed allowances,
21 it is more reasonable to permit a debtor to claim the Local
22 Standards ownership expense based on the number of vehicles the
23 debtor owns or leases, rather than on the number for which the
24 debtor makes payments. This approach reflects the reality that a
25 car for which the debtor no longer makes payments may soon need
26 to be replaced (so that the debtor will actually have ownership
27 expenses), and it avoids arbitrary distinctions between debtors
28 who have only a few car payments left at the time of their
bankruptcy filing and those who finished making their car
payments just before the filing.

Wedoff, "Means Testing in the New World," 79 Am. Bankr. L.J. 231,
255-57 (Spring 2006) (footnotes omitted).

Second, the interpretation urged by the trustee would lead
to inequitable results. For instance, the trustee apparently
believes that if the debtor is making payments on a car loan, the
full ownership expense allowance permitted by the Local Standard
for transportation standard may be claimed. So, if a debtor had
a \$20 car payment (or even a \$471 monthly car payment that would
continue for one month after the filing of the petition), in
chapter 13 that debtor would be permitted to take the \$471

1 allowance when projecting disposable income over the entire
2 applicable commitment period. But, a debtor with no car payment
3 may take no part of the allowance, even if the debtor might be
4 expected to purchase a replacement vehicle on credit during the
5 applicable commitment period.

6 Third, the legislative history of BAPCPA suggests that
7 Congress chose not to incorporate the Internal Revenue Manual and
8 the handbook into the means test of section 707(b)(2)(A). As
9 explained by the court in Fowler:

10 *... A prior version of the BAPCPA which was never*
11 *passed defined "projected monthly net income" for the*
12 *means test to require a calculation of expenses as*
13 *follows: (A) the expense allowances under the*
14 *applicable National Standards, Local Standards, and*
15 *Other Necessary Expenses allowance (excluding payments*
16 *for debts) for the debtor ... in the area in which the*
17 *debtor resides as determined under the Internal Revenue*
18 *Service financial analysis for expenses in effect as of*
the date of the order for relief. H.R. 3150, 150th
Congress (1998) (emphasis added). The reference to the
Internal Revenue Service financial analysis was
replaced by the language currently in section
707(b)(2)(A) which simply states that a debtor gets the
"applicable monthly expense amounts specified under the
National and Local Standards." 11 U.S.C. §
707(b)(2)(A)(ii)(I).

19 Fowler, 349 B.R. at 419.

20 This legislative change suggests that Congress intended that
21 the financial analysis contained in the Internal Revenue Manual
22 and the handbook not bind the courts. The change in the
23 legislation supports a conclusion that the amounts allowed by the
24 Local Standards may be claimed by every debtor owning a car. Id;
25 In re Sawdy, 362 B.R. at 913. Those standards are "applicable"
26 when the debtor owns a car; it is unnecessary that the car be
27 encumbered.

28 The trustee also asserts that the debtor has improperly

1 claimed \$215 in additional monthly telecommunications expenses on
2 the Statement of Current Monthly Income. This expense also
3 appears on Schedule I and is comprised of a home telephone (\$50),
4 a cell phone service (\$125), and Internet service (\$80). Given
5 the debtor's occupation as a nurse, the debtor works different
6 and irregular shifts, and must be reachable by her employer at
7 virtually all times. Under these circumstances, the court cannot
8 say that these expenses are unreasonable.

9 Bank of America's (Ecast) objection raises some of the same
10 issues and the court will dispose of it similarly. To the extent
11 the Bank maintains that the court should project the debtor's
12 likely disposable income during the plan's duration by
13 disregarding the Statement of Current Monthly Income and
14 considering Schedules I and J or some other predictor of her
15 future net income, the objection will be overruled.

16 In the words of the bankruptcy court in In re Alexander:

17 *What is now considered "disposable" is based upon*
18 *historical data-current monthly income derived from the*
19 *six-month period preceding the bankruptcy filing. 11*
20 *U.S.C. § § 101(10A), 1325(b)(2). The court finds that,*
in order to arrive at "projected disposable income,"
one simply takes the calculation mandated by §
1325(b)(2) and does the math.

21 *...*
22 *To veterans of Chapter 13 practice, it runs afoul of*
23 *basic principles to suggest that a debtor with no*
24 *disposable income can nonetheless propose a confirmable*
25 *plan. Yet BAPCPA permits precisely that. [Footnote*
26 *omitted.] Because the pre-BAPCPA definition of*
27 *"disposable income" calculated a real number rather*
28 *than a statutory artifact, it largely mirrored §*
1322(a)(1)'s basic requirement that the debtor have
future earnings or income "as is necessary for the
execution of the plan." 11 U.S.C. § 1322(a)(1).
Because disposable income largely took into
consideration all income and all expenses, a debtor
with no positive number simply had no means to fund the
added costs of a Chapter 13 plan. The result is
different under BAPCPA. For any number of reasons,

1 because a debtor has income not counted in the
2 definition of current monthly income, has housing or
3 transportation expenses less than the permissible IRS
4 deductions, has huge secured debt for luxury items
5 that, bizarrely, may be deducted in full as a
6 reasonable and necessary expense, or wishes to continue
7 to contribute to or repay a loan to her 401(k) plan
rather than pay her unsecured creditors, a debtor under
the new "disposable income" test may show a zero or
negative number, yet may be able to make the required
showing that she actually has enough income to fund a
confirmable plan. The debtor is at least entitled to
try.

8 In re Alexander, 344 B.R. 742, 749-50 (Bankr. E.D.N.C. 2006).

9 See also In re Barr, 341 B.R. 181 (Bankr. M.D.N.C. 2006); In re

10 Rotunda, 349 B.R. 324 (Bankr. N.D.N.Y. 2006); In re Trammers, 355

11 B.R. 234 (Bankr. D. Mont. 2006); In re Kagenveama, 2006 Bankr.

12 Lexis 259 (Bankr. D. Az. July 10, 2006); In re Hanks, 2007 WL

13 60812 (Bankr. D. Utah Jan. 9, 2007); In re Miller, 2007 WL 128790

14 (Bankr. N.D. Ala. Jan. 18, 2007); In re Lawson, 2007 WL 184733

15 (Bankr. D. Utah Jan. 25, 2007); In re Brady, 2007 WL 549359

16 (Bankr. D.N.J. Feb. 13, 2007); In re Kolb, 2007 WL 219951 (Bankr.

17 S.D. Ohio March 30, 2007).

18 This court further notes that the debtor in this case
19 actually shows less monthly net income, \$363.20, on Schedules I
20 and J than she shows on her Statement of Current Monthly Income,
21 \$384.24.

22 The court sustains one objection raised by Bank of America.
23 On the Statement of Current Monthly Income, the debtor has
24 claimed, on Line 25A, \$868 for a rent expense. This represents
25 the maximum amount under the IRS Local Standard for housing for a
26 household of one in Stanislaus County. However, on Line 26 the
27 debtor has claimed an additional \$512 because her rent is
28 actually \$1,200 a month (\$868 + \$512 = \$1,200).

1 Line 26, like Line 21, the corresponding line on the chapter
2 7 variant of the Statement of Current Monthly Income, does not
3 invite debtors to increase their housing and/or utility expenses
4 simply because they have higher expenses than allowed by the
5 standard. [Although, Lines 37 and 42 invite debtors to claim
6 additional telecommunications and home energy expenses beyond
7 what the allowance for nonmortgage/nonrent expenses permits for
8 utilities.] Line 26 allows debtors to contest only how the U.S.
9 Trustee has divided the Local Standard for housing between the
10 mortgage/rent and nonmortgage/nonrent expense categories. That
11 is, the IRS permits a taxpayer with delinquent taxes to pay one
12 aggregate amount for both mortgage/rent and nonmortgage/nonrent
13 expenses. The IRS does not break down this aggregate amount into
14 the two categories. Indeed, if one were to look at the IRS's
15 Internet site which gives its Housing and Utility Allowable
16 Living Expenses,
17 www.irs.gov/businesses/small/article/0,,id=104696,00.html, one
18 would see the following cautionary note:

19 ***Disclaimer:*** *IRS Allowable Expenses are intended for use*
20 *in calculating repayment of delinquent taxes. Expense*
21 *information for use in bankruptcy calculations can be*
22 *found on the website for the U.S. Trustee Program.*

23 The U.S. Trustee has divided the aggregate amount set by the
24 IRS into the two categories, mortgage/rent and
25 nonmortgage/nonrent. Line 26 allows the debtor to argue that the
26 U.S. Trustee's allocation is not appropriate for any reason.
27 However, the aggregate amount claimed may not exceed the amount
28 specified in the Local Standard for housing.

 Here, the debtor has increased his mortgage/rent expense

1 beyond what is permitted by the Local Standard for housing as
2 interpreted by the U.S. Trustee. On January 31, 2007, the IRS
3 allowed a total housing expense of \$1,189 per month for a
4 household of one in Stanislaus County. The U.S. Trustee has
5 broken this number down and permits \$321 for nonmortgage/nonrent
6 expenses and \$868 for mortgage/rent expenses.

7 The debtor here is attempting to claim more than a total of
8 \$1,189. She is claiming \$321 for nonmortgage/nonrent expenses
9 (utilities, etc.), the \$868 allowed rent expense, and an
10 additional \$512 for rent, a total of \$1,701. A maximum of \$1,189
11 is allowed. The debtor is not claiming a total of \$1,189 and
12 reallocating that total amount between the mortgage/rent and
13 nonmortgage/nonrent categories. The debtor is limited to a total
14 of \$1,189, plus any additional telecommunication and home energy
15 expenses that can be claimed on Lines 37 and 42.

16 The debtor justifies taking more than permitted by the Local
17 Standard for housing because she is paying a monthly rent of
18 \$1,200. However, the debtor has cited no authority permitting
19 her to increase the standard housing expense in such a manner.
20 The debtor is limited to the amount permitted by the standard on
21 Line 25. Were the court to adopt the debtor's position, any
22 debtor paying more for rent would never be limited by the Local
23 Standard for housing.

24 The \$512 in additional rent also cannot be claimed under the
25 IRS Other Necessary Expense Standard. Logically, something
26 cannot be an "other" expense if it is provided for as an expense
27 in a different category.

28 Other necessary expenses under the means test may include

1 reasonably necessary health insurance, disability insurance, and
2 health savings account expenses for the debtor and the debtor's
3 spouse and dependents. See 11 U.S.C. § 707(b)(2)(A)(ii)(I).
4 Generally speaking, this category is not used to supplement what
5 is permitted under the IRS National and Local Standards. See
6 Internal Revenue Manual at 5.15.1.10., ¶ 3, found at
7 www.irs.gov/irm/part5/ch15s01.html. Other necessary expenses may
8 include state and federal income, self-employment, social
9 security, and Medicare taxes; dental, vision, long-term care, and
10 life insurance; childcare expenses; court ordered payments such
11 as spousal and child support payments; mandatory payroll
12 deductions for such things as uniforms, pension contributions,
13 and union dues; and business expenses. See Lines 30-37 of
14 Official Form 22C.

15 This portion of the Bank's objection will be sustained.
16 This will add an additional \$512 a month to the debtor's
17 projected disposable income that must be paid to unsecured
18 creditors. Because the plan makes no provision for the payment
19 of this projected disposable income to unsecured creditors, the
20 plan cannot be confirmed consistent with section 1325(b).
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