



ORDERED in the Southern District of Florida on April 21, 2009.

**Erik P. Kimball, Judge
United States Bankruptcy Court**

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION**

In re:

CASE NO.: 08-20710-EPK

**RICHARD M. ARCISZEWSKI and
ESTRELLA ARCISZEWSKI,**

CHAPTER 13

Debtors.
_____ /

ORDER OVERRULING OBJECTION TO CONFIRMATION

THIS MATTER came before the Court for hearing on April 16, 2009, upon the *Claimant FIA Card Services aka Bank of America by eCAST Settlement Corporation as its Agent's Second Amended Objection to Confirmation of Chapter 13 Plan* (the "Objection") [DE 38] filed by eCAST Settlement Corporation, assignee of FIA Card Services aka Bank of America (the "Movant"). The Court considered the Objection, the reply thereto filed by Richard M. Arciszewski and Estrella Arciszewski (the "Debtors"), and the presentations of counsel, and is fully advised in the premises.

I. Introduction

On July 30, 2008, the Debtors filed their voluntary petition for relief under chapter 13 of Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* (the “Bankruptcy Code”).¹

On March 6, 2009, the Movant filed its Objection, objecting to confirmation of the Debtors’ proposed chapter 13 plan (the “Proposed Plan”) on two bases.

The Movant argues that the Debtors’ current monthly income, used to calculate “projected disposable income” under Section 1325(b)(1)(B), should reflect actual increases in the Debtors’ income after the commencement of this case. At the hearing held on April 16, 2009, the parties stipulated to a monthly income figure for the Debtors for purposes of calculation of projected disposable income in connection with the Proposed Plan. In light of the agreement of the parties, the Court makes no determination with regard to the Debtors’ income for this purpose.

The Movant also argues that the Debtors include in their calculation of projected disposable income an automobile expense for a vehicle that the Debtors own outright, and that inclusion of such expense is not proper under Section 1325(b)(1)(B). On their Schedule B, the Debtors list two vehicles: a 2008 Lexus 350 and a 1999 Honda Accord. While the 2008 Lexus 350 is encumbered, the 1999 Honda Accord is neither financed nor leased and is, therefore, unencumbered. On their *Amended – Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income* [DE 31] (“Form 22C”), the Debtors’ monthly expenses include a deduction of \$478.00, representing the IRS Local Standard for transportation ownership/lease expense for a second vehicle, the 1999 Honda Accord. The Movant argues that the deduction in the amount of \$478.00 is not proper because the Debtors have no regular monthly expense in connection with the subject vehicle.

¹ References to “section” shall be to the Bankruptcy Code unless otherwise specified.

II. Jurisdiction

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(b) and 1334(b), and the standing order of reference in this District. This is a core proceeding under 28 U.S.C. § 157(b)(2)(L).

III. Analysis

Section 1325(a) provides that, except as provided in subsection (b), the court shall confirm a chapter 13 plan if certain enumerated requirements are met. Section 1325(b)(1) provides, in relevant part, that if “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 . . . the plan provides that all of the debtor’s projected disposable income . . . will be applied to make payments to unsecured creditors under the plan.” 11 U.S.C. § 1325(b)(1)(B).

“Disposable income” is defined in Section 1325(b)(2), in pertinent part, as “current monthly income received by the debtor . . . less amounts reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor.” 11 U.S.C. § 1325(b)(2)(A)(i). For debtors whose income exceeds the median income for their household size and state of residence, Section 1325(b)(3) provides that the expense component of projected disposable income “shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2).” In this case, as shown on Form 22C, the Debtors’ income exceeds the median income for a household of three in the state of Florida.

Section 707(b)(2)(A)(ii)(I) provides, in relevant part, that the “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, 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.”

When determining whether a debtor may take the ownership expense deduction for an unencumbered vehicle, courts follow one of two approaches. Courts that do not permit a debtor to take the ownership expense deduction if the debtor does not have car payments reason that “the word ‘applicable’ [in Section 707(b)(2)(A)(ii)(I)] means that the deduction may only be taken if the deduction is ‘relevant,’ that is, if the debtor has such an expense.” *In re Ross-Tousey*, 549 F.3d 1148, 1157 (7th Cir. 2008) (citations omitted). Courts that follow the so-called plain language approach and permit a debtor to take the ownership expense deduction even if the vehicle at issue is unencumbered reason that the word “‘applicable’ refers to the selection of an expense amount corresponding to the appropriate geographic region and number of vehicles owned by the debtor.” *Id.* (citations omitted).

This Court follows the latter approach, and holds that the Debtors may take the ownership expense deduction with regard to the 1999 Honda Accord in spite of the fact that they have no monthly expense for such vehicle. “[I]t is clear that Congress, on the deduction side, meant to take away all judicial discretion in the specific deduction areas set forth in section 707(b)(2)(A) and (B) and in those areas in which the [IRS] standards apply. The use of ‘shall’ in section 1325(b)(3) is mandatory and leaves no decisions with respect to expenses and deductions that are to be deducted in arriving at disposable income.” *In re Arsenault*, 370 B.R. 845, 852 (Bankr. M.D. Fla. 2007) (internal citation omitted). *See also In re Becquer*, No. 08-20483-BKC-RAM, 2009 Bankr. LEXIS 374 (Bankr. S.D. Fla. Jan. 14, 2009) (Mark, J.); *In re Morgan*, 374 B.R. 353 (Bankr. S.D. Fla. 2007) (Cristol, J.). This Court adopts the reasoning of the Seventh Circuit Court of Appeals set forth in *In re Ross-Tousey*, 549 F.3d 1148 (7th Cir. 2008). “[A]

debtor who owns his car free and clear may take the Local Standard transportation ownership deduction under the section 707(b)(2)(A)(ii)(I) means test.” *In re Ross-Tousey*, 549 F.3d at 1162.²

Accordingly, it is

ORDERED AND ADJUDGED that the Objection [DE 38] is **OVERRULED**.

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U.S. Trustee

James E. Copeland, Esq. is directed to serve a conformed copy of this Order on all interested parties not listed above and to file a Certificate of Service attesting to such service.

² *In re Ross-Tousey* addressed the vehicle expense question in the context of a motion to dismiss a chapter 7 case. Nevertheless, in reaching its decision the *Ross-Tousey* court referenced opinions addressing the vehicle expense issue in chapter 13 cases. *In re Ross-Tousey*, 549 F.3d at 1157 n.5. Section 1325(b)(3) incorporates Sections 707(b)(2)(A) and (B). The text of Section 707(b)(2)(A) and (B) is the same whether the case falls under chapter 7 or 13. Thus, while this order addresses a chapter 13 case, it is appropriate to look to cases construing Sections 707(b)(2)(A) and (B) in the chapter 7 context.