UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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April 3, 2006

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Dale A. Wein,
Chapter 13 Trustee
Post Office Box 759
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Subject: *In re Monty R. and Susan M. Montgomery*,
Chapter 13, Bankr. No. 03-50416

Dear Mr. Mairose and Trustee Wein:

The matter before the Court is the Motion for Reconsideration filed by Debtor and the joinder filed by Trustee Dale A. Wein. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014(c). As discussed below, the Motion will be denied.

Summary. Debtors Monty R. and Susan M. Montgomery moved to modify their confirmed plan to address housing issues that arose following their move from South Dakota to Texas. One creditor, KSK Antiques, objected on the grounds that it wanted its pre-petition claim paid under the modification. KSK Antiques, however, had not timely filed a proof of claim. In a letter decision entered March 6, 2006, the Court overruled KSK Antiques' objection since the motion had not been proposed to deal with KSK Antiques' claim, and granted Debtors' motion to modify their confirmed plan to address the housing issues. The Court, however, noted under 11 U.S.C. §§ 1328(a) and 1329(a)(3), Debtors' plan probably could not be modified to accommodate KSK Antiques' claim because the creditor had not timely filed a proof of claim. The Court also noted KSK Antiques' claim would not be discharged after completion of Debtors' plan payments because their plan did not provide for this claim.

On March 14, 2006, Debtors moved for a reconsideration of the Court's March 6, 2006, decision. They wanted the Court to find

since KSK Antiques could have timely filed a proof of claim but did not, it should still be bound by the terms of the confirmed plan, and its claim should be discharged after their plan payments are completed. Trustee Wein joined in that motion on March 17, 2006.

Discussion. For a creditor to be bound by a Chapter 13 plan, its claim must have been "provided for by the plan," 11 U.S.C. § 1328(a), *and* the creditor must have had notice of the case in time to participate in the confirmation process. *See Impac Funding Corp. v. Simpson (In re Simpson)*, 240 B.R. 559, 562 (B.A.P. 8th Cir. 1999); *In re Moore*, 290 B.R. 141, 144 (Bankr. W.D. Mo. 2003). While KSK Antiques had time to file a proof of claim after it was added to the case, it did not receive notice in time to participate in the confirmation process. The Notice of Commencement of Case, which included the date for filing an objection to Debtors' proposed plan and the date of the confirmation hearing, was not placed in the mail to KSK Antiques until two days after the plan objection deadline. A copy of Debtors' plan was never served on KSK Antiques. Further, KSK Antiques was not served with any of the confirmation continuance orders since it had not appeared at the first confirmation hearing. No modified plans were ever filed and noticed. Finally, neither the Plan as Confirmed nor a notice of confirmation order were served on KSK Antiques.[1] Consequently, KSK Antiques never had an opportunity to participate in the confirmation process. KSK Antiques' due process rights would be violated were the Court to conclude its claim will nonetheless be discharged because it could have filed a timely proof of claim.[2]

> The Supreme Court has repeatedly held that, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action

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[1] For whatever reason, Fed.R.Bankr.P. 2002(f)(7) requires the clerk (or someone else who has been so designated) to give notice of an order confirming a Chapter 9, 11, or 12 plan. Chapter 13 is not included.

[2] Complete, correct schedules and a case mailing list from the inception of the case are extremely important under Chapter 13. Neither the "no harm, no foul" provisions of 11 U.S.C. § 523(a)(3) nor the ability for late-filed claims to be recognized under 11 U.S.C. § 726(a)(2)(C) are available in Chapter 13 cases.

> and afford them an opportunity to present their objections." *Reliable Elec. Co., Inc. v. Olson Constr. Co.*, 726 F.2d 620, 622 (10th Cir. 1984), *quoting Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950).

In re Smith, 142 B.R. 862, 865 (Bankr. E.D. Ark. 1992).

The cases discussed by Debtors in their Motion do not reach a contrary conclusion. In *In re Wright*, 300 B.R. 453 (Bankr. N.D. Ill. 2003), which was cited by Debtors, the court stated:

> [E]ven an unscheduled prepetition creditor can be deemed "provided for" if it somehow obtains *actual knowledge of the pendency of the bankruptcy case* in time to file a proof of claim **and object to plan confirmation**; [footnote omitted] such a creditor cannot bypass the chapter 13 process and then choose to collect the debt when the case is closed. *In re Leber*, 134 B.R. 911, 915-16 (Bankr. N.D. Ill. 1991); *Crites v. Oregon ex rel. Roberts (In re Crites)*, 201 B.R. 277, 279 (Bankr. D. Or. 1996); *In re Ryan*, 78 B.R. 175, 176, 182-84 (Bankr. E.D. Tenn. 1987), *affirmed*,1990 U.S. Dist. LEXIS 6440 (E.D. Tenn. May 15, 1990). Similarly, a creditor who belongs to a class receiving a zero-percent dividend under the plan but who **received notice of the case in time to challenge the plan payments under § 1325 of the Code** is also "provided for." *Matter of Gregory*, 705 F.2d 1118, 1122 (9th Cir. 1983); *In re Glow*, 111 B.R. 209, 219-20 (Bankr. N.D. Ind. 1990); *In re Tipton*, 118 B.R. 12, 14 (Bankr. D. Conn. 1990). On the other hand, an unscheduled creditor who does not have actual knowledge of the case and who thus cannot file a timely proof of claim under Rule 3002 **or object to confirmation on grounds listed in § 1322 or § 1325 of the Code cannot be deemed "provided for."** *In re Leber*, 134 B.R. 911, 916 (Bankr. N.D. Ill. 1991); *Crites v. Oregon ex rel. Roberts (In re Crites)*, 201 B.R. 277, 278-81 (Bankr. D. Or. 1996); *In re Ryan*, 78 B.R. 175, 183 (Bankr. E.D. Tenn. 1987), *affirmed*, 1990 U.S. Dist. LEXIS 6440 (E.D. Tenn. May 15, 1990); *Matter of Pack*, 105 B.R. 703, 705-06 (Bankr. M.D. Fla. 1989); *In re Scott*, 119 B.R. 818, 818-19 (Bankr. M.D. Ala. 1990); *In re Cash*, 51 B.R. 927, 928-29 (Bankr. N.D. Ala. 1985); *Matter of Dunn*, 83 B.R. 694, [696] (Bankr. D. Neb. 1988); *In re Tipton*,

> 118 B.R. 12, 13-14 (Bankr. D. Conn. 1990); cf. *In re Stewart*, 190 B.R. 846, 850 (Bankr. C.D. Ill. 1996); *In re Brogden*, 274 B.R. 287, 294 (Bankr. M.D. Tenn. 2001).

Wright, 300 B.R. at 467-68 (emphasis added).

Debtors also cited *United States v. Hairopoulos (In re Hairopoulos)*, 118 F.3d 1240 (8th Cir. 1997). In that case, the IRS received notice the debtor had filed Chapter 7, but there was no record the IRS received a combined notice of the conversion of the case to Chapter 13, the confirmation hearing, and the proof of claim filing deadline. The debtor's plan did not specifically address his tax liabilities. The IRS did not receive a copy of the confirmation order.

The IRS contended it did not obtain the combined notice until more than two years after it was originally entered. In the interim, the debtor made plan payments and eventually received his discharge. The IRS received a copy of the discharge order. Since it had not filed a proof of claim, it did not receive any plan payments. Ultimately, the IRS began a collection action for its unpaid taxes, interest, and penalties. The debtor then moved to reopen his case and seek enforcement of his discharge order. The Bankruptcy Court agreed with the debtor and held the IRS's claim was discharged because the plan had provided for the claim and, because the IRS had notice of the Chapter 7. It held the IRS was on inquiry notice regarding further activity in the case. The District Court reversed and said the debtor's plan had not provided for the claim and notice to the IRS of the conversion was insufficient. The Court of Appeals affirmed the District Court and held a " claim cannot be considered to have been provided for by the plan if a creditor does not receive proper notice of the proceedings." *Hairopoulos*, 118 F.3d at 1244.

> Both statutory and constitutional implications arise when a creditor fails to receive adequate notice of the bankruptcy proceedings. 11 U.S.C. § 342(a) provides that "[t]here shall be given such notice as is appropriate … of an order for relief in a case under this title." Rule 2002 of the Federal Rules of Bankruptcy Procedure further specifies that the clerk of the bankruptcy court shall give notice to all creditors of, *inter alia*, a conversion to another chapter, the creditors' meeting, the claims bar date, the time for modification of a plan and for

objections to confirmation, and the confirmation order. The burden of establishing that a creditor has received appropriate notice rests with the debtor. *See, e.g., In re Savage Indus.*, 43 F.3d 714, 721 (1st Cir. 1994); *In re Horton*, 149 B.R. 49, 57 (Bankr. S.D.N.Y. 1992). A letter properly addressed and mailed is presumed to have been delivered to the addressee. *Id.* However, in the present case this presumption was not invoked where the bankruptcy court found that the record on the issue of service was "inconclusive."

The constitutional component [footnote omitted] of notice is based upon a recognition that creditors have a right to adequate notice and the opportunity to participate in a meaningful way in the course of bankruptcy proceedings. *See City of New York v. New York, New Haven & Hartford R.R. Co.*, 344 U.S. 293, 297, 73 S.Ct. 299, 301, 97 L.Ed. 333 (1953)("The statutory command for notice embodies a basic principle of justice-that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights."); *Reliable Elec. Co. v. Olson Constr. Co.*, 726 F.2d 620, 623 (10th Cir. 1984)("the discharge of a claim without reasonable notice ... is violative of the fifth amendment"); *In re Avery*, 134 B.R. 447, 448 (Bankr. N.D. Ga. 1991)("fundamental due process mandates that a creditor be given notice and opportunity to participate"). "Reasonable notice" is defined by the Supreme Court as "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950).

The opportunity to participate in the bankruptcy proceedings is of obvious importance to creditors. In *Greenburgh*, 151 B.R. at 713, the court observed that "the addition of a creditor, at a late stage in a case, is inherently problematic" and emphasized the "recognition that creditors have a right to adequate notice and the opportunity to participate in hearings/meetings in the course of a bankruptcy case, e.g., the meeting of creditors, the confirmation hearing, and/or other

> processes, such as the proof of claim process, before disallowance or discharge of their claims." *Id.* at 715. *See also In re Martinez*, 51 B.R. 944, 947 (Bankr. D. Colo. 1985)("Inasmuch as ... Chapter 13 proceedings are subject to the Due Process Clause ... creditors must be notified of all vital steps ... in order to afford them an opportunity to protect their interests.").

Hairopoulos, 113 F.3d. at 1244-45. Accordingly, both cases relied upon by Debtors in fact support this Court conclusion. KSK Antiques did not receive the proposed plan and the appropriate notices in time to participate in the confirmation process. Accordingly, KSK Antiques is not bound by Debtors' confirmed plan, and its claim cannot be discharged when Debtors complete their plan payments.

An appropriate order will be entered.

Sincerely,

Irvin N. Hoyt
Bankruptcy Judge

INH:sh

CC: case file (docket original; serve parties in interest)

On the above date, a copy of this document was mailed or faxed to the parties shown on the Notice of Electronic Filing as not having received electronic notice and Debtor(s), if Debtor(s) did not receive electronic notice.

Charles L. Nail, Jr.
Clerk, U.S. Bankruptcy Court
District of South Dakota

NOTICE OF ENTRY
Under Fed.R.Bankr.P. 9022(a)

This order/judgment was entered on the date shown above.

Charles L. Nail, Jr.
Clerk, U.S. Bankruptcy Court
District of South Dakota