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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE)	CASE NO. 98-53278
)	
LINDA DARNELL MURKINS,)	CHAPTER 13
)	
Debtor.)	JUDGE MARILYN SHEA-STONUM
)	ORDER DENYING MOTION OF
)	UNITED STUDENT AID FUNDS, INC.
)	TO MODIFY PLAN

This matter came before the Court on the Motion to modify the debtor's chapter 13 plan (the "Motion") filed on March 24, 1999 by United Student Aid Funds, Inc. ("United"). This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 157(a) and (b)(1) and by the Standing Order of Reference entered in this District on July 16, 1984.

I. FINDINGS OF FACT

A. The Filing of the Case and Debtor's Service on United

On October 15, 1998, Linda Darnell Murkins ("Debtor") filed a petition under chapter 13 of the Bankruptcy Code. On October 17, 1998, Debtor's counsel sent a letter to United notifying United of the filing of Debtor's bankruptcy case (the "Notification Letter"). [Exhibit A] The Notification Letter was sent to P.O. Box 6137, Indianapolis, IN 46206-6137. Debtor's counsel informed the Court that he obtained this address from a letter sent from United to Debtor's employer on February 27, 1998. On October 16, 1998, Debtor's counsel also sent a complete copy of Debtor's chapter 13 plan to United at

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this address.¹ [Certificate of Service regarding Debtor's chapter 13 plan, dated October 16, 1998, attached as Exhibit C to Debtor's Response to the Motion]

On November 12, 1998, United filed a proof of nonpriority unsecured claim in the amount of \$4,625.30. The address given by United in its proof of claim is P.O. Box 6180, Indianapolis, IN 46206-6180. [Exhibit C] On December 28, 1998, Debtor's counsel sent Debtor's modification of her chapter 13 plan (the "Modification") to United at the address set forth in United's proof of claim.² [Exhibit D]

United did not file an objection to confirmation of Debtor's chapter 13 plan, either as originally filed or as modified. On February 17, 1999, the Court confirmed Debtor's modified plan (the "Plan").

United acknowledges that it received a copy of the Notification Letter but contends that United did not receive a copy of Debtor's original chapter 13 plan. United further contends that it did not receive a copy of the Modification until February 17, 1999, the date the Court confirmed the Plan. United states that it would have objected to confirmation of the Plan had United received a copy of the Plan in time to do so.

Having failed to object to confirmation of the Plan in a timely manner, United seeks to modify the Plan "to remove the language in the Plan stating that there was no default on the Student Loan obligations and that USA Funds is . . . an agent of the U.S. Department of Education." Motion, at 3.

13 plan provides that "the U.S. Department of Education, its agents or assigns, shall waive any default and shall be paid \$50.00 per month directly by the debtor, outside the plan, on its claim for a student loan." [Exhibit B]

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The Modification provides that "USA Group Loans, an agent for the U.S. Dept. of Education, shall waive any default and shall be paid \$50.00 per month directly by the debtor outside the plan as a separate class of unsecured long term debts." [Exhibit D]

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B. Testimony at the Evidentiary Hearing

At the evidentiary hearing held regarding the Motion, Brent E. Smith, the Supervisor of the Bankruptcy Litigation Unit of USA Group, Inc., of which United is an affiliated company, testified that United and its affiliates occupy two large buildings in Indianapolis. Mr. Smith stated that both buildings have mailrooms, and documents are transferred by van from one building to another. Mr. Smith further stated that United and its affiliates receive tens of thousands of documents each day, that employees in the mailroom are responsible for routing mail to the correct department, and that there are two departments which handle bankruptcy matters. Mr. Smith testified that it was possible that his unit did not receive a copy of the original plan and received a copy of the Modification long after it was mailed because of mistakes made in the mailroom.

On the copy of the Modification produced by United at the hearing there appears a stamp at the top stating "Jan 4 1999" and a stamp at the top stating "Feb 17 1999." [Exhibit D]. Mr. Smith stated that it was possible that someone in United's mailroom had stamped the Modification "Jan 4 1999" and that it took more than one month for the Modification to get from the mailroom to the Bankruptcy Litigation Unit.

II CONCLUSIONS OF LAW

A. The Statutory Authority on Which United Relies

United has brought the Motion pursuant to § 105(a) of the Bankruptcy Code and Rule 60(b)(6) of the Federal Rules of Civil Procedure, applicable to this case by Rule 9024 of the Federal Rules of Bankruptcy Procedure. Section 105(a) provides in pertinent part that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Rule 60(b)(6) of the Federal Rules of Civil Procedure allows for relief from a judgment or order for "any other reason justifying relief from the operation of the judgment." "To justify relief under

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[Rule 60(b)(6)], a party must show ‘extraordinary circumstances’ suggesting that the party is faultless in the delay." Pioneer Inv. Services Co. v. Brunswick Assoc. Lim'd Partnership, 507 U.S. 380, 393, 113 S.Ct. 1489, 1497, 123 L.Ed.2d 74 (1993), quoting Ackerman v. U.S., 340 U.S. 193, 197-200, 71 S.Ct. 209, 211-13, 95 L.Ed. 207 (1950). United contends that relief from the order confirming the Plan (the "Confirmation Order") is justified because United allegedly never received a copy of the original chapter 13 plan and allegedly did not receive a copy of the Modification until the date the Court entered the Confirmation Order.³

B. Debtor's Service of the Original Chapter 13 Plan and the Modification Provided Due Process to United

Due process requires 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). "Where a creditor challenges the accuracy of a listed address [in the debtor's filed list of creditors], the burden should properly fall on the creditor to establish that the address provided by the debtor was so incorrect as to fall short of this threshold." In re Walker, 125 B.R. 177, 180 (Bankr. E.D. Mich. 1990), citing Hill v. Smith, 260 U.S. 592, 595, 43 S.Ct. 219, 220, 67 L.Ed. 419 (1923).

In Teitelbaum v. Equitable Handbag Co. (In re Outlet Dep't Stores), 49 B.R. 536,

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Fed. R. Bankr. P. 7001(5) provides that an adversary proceeding must be commenced to revoke an order of confirmation for a chapter 13 plan. See also Fed. R. Bankr. P. 9024 ("a *complaint* to revoke an order confirming a plan may be filed only within the time allowed by . . . § 1330")(emphasis added). United has not commenced an adversary proceeding as concerns this matter. However, at the evidentiary hearing, Debtor agreed to waive this requirement as concerns the Motion.

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540 (Bankr. S.D.N.Y. 1985), regarding service of a summons and complaint to recover a preferential transfer, the court held that notice sent to the address provided in the defendant's proof of claim constituted "notice reasonably calculated" to give the defendant actual notice of the proceedings. Similarly, in In re Kleather, 208 B.R. 406, 412 (Bankr. S.D. Ohio 1997), the court held that the debtor's use of the address identified by the creditor for the receipt of the debtor's loan payments constituted "notice reasonably calculated" to give the creditor actual notice of the bankruptcy proceedings. See also In re DaShiell, 124 B.R. 242, 249 (Bankr. N.D. Ohio 1990)(holding that mailing of summons and complaint to address which creditor used to accept payments from debtor satisfied due process requirement).

In the case at hand, Debtor initially used the address identified by United for the receipt of loan payments and sent the Notification Letter and the original plan to that address. After the filing of United's proof of claim, Debtor used the address identified in United's proof of claim for the mailing of the Modification. Sending the original plan and the Modification to the addresses identified by United for the provision of loan payments or in United's proof of claim constitutes "notice reasonably calculated" to provide due process to United.

C. United Has Not Demonstrated the Existence of Extraordinary Circumstances Justifying Relief From the Confirmation Order

When a creditor has been accorded timely service, a creditor is not entitled to relief from an order under Fed. R. Civ. P. 60(b)(6) when the creditor mishandles the notice and thus fails to react timely. "[W]hen a creditor mishandles a notice from the bankruptcy court, the case law is clear that the creditor is unentitled to plead lack of notice in defense of its claim." Kleather, 208 B.R. at 412 , citing Dependable Ins. Co. v. Horton (In re Horton), 149 B.R. 49, 58 (Bankr. S.D.N.Y. 1992) and In re Williams, 51 B.R. 627,

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628-29 (Bankr. S.D. Ohio 1985).

In Williams, subsequent to confirmation of a chapter 13 plan, a creditor requested, among other things, that the court vacate the confirmation order because a particular employee of the creditor did not receive notice of the confirmation hearing until after the date of the hearing. The court's file contained a certification from the clerk of the court that notice of the confirmation hearing was mailed to the creditor twenty-three days before the date of the hearing. The court ruled that the creditor's failure to deal expeditiously with a notice from the court did not excuse the creditor for failing to take action. Williams, 51 B.R. at 629. See also Green Tree Financial Servicing Corp. v. Karbel (In re Karbel), 220 B.R. 108, 113 (Bankr. 10th Cir. 1998)(affirming order of bankruptcy court denying creditor's motion to vacate chapter 13 confirmation order when creditor received adequate notice but did not object to confirmation until the date that the court entered the confirmation order).

United has acknowledged that the Bankruptcy Litigation Unit received the Notification Letter but contends that the Bankruptcy Litigation Unit did not receive a copy of Debtor's original chapter 13 plan. United also has acknowledged that it received a copy of the Modification, on which copy the stamp "Jan 4 1999" appears at the top, but that the Modification did not reach the Bankruptcy Litigation Unit until the date the Court confirmed the Plan. Mr. Smith testified that it was possible that the mailroom failed to forward these documents to his unit, which is one of two units dealing with bankruptcy matters, in a timely manner. If United mishandled these documents, as appears to have been the case, with the result that the Bankruptcy Litigation Unit failed to object timely to confirmation of the Plan, that mishandling does not constitute "extraordinary circumstances" which justify the relief sought by United.

Given that Debtor provided sufficient notice of the Plan and the confirmation

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hearing to United, and United failed to object to confirmation of the Plan prior to the confirmation hearing, United is not entitled to have the Plan modified in the manner it requests. Therefore, the Motion shall be, and hereby is, denied.

IT IS SO ORDERED.

MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 5/3/99