SO ORDERED.

SIGNED this 20 day of April, 2006.

ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
TIMOTHY G. FOWLE,	)	**Case No. 03-13383**
MYONG H. FOWLE,	)	**Chapter 13**
	)	
Debtors.	)	
	)	

MEMORANDUM OPINION AND ORDER

Debtors filed their Motion to Strip Off Lien of Homecomings Financial on August 30, 2005.[1] (Dkt. 34). The motion was properly noticed and no objection was made to the motion. Debtors submitted a proposed order to the Court granting the motion. After reviewing this matter, the court, *sua sponte*, set this matter for a non-evidentiary hearing. (Dkt. 46).

On February 14, 2006, after hearing oral argument of debtors' counsel and the Trustee,

[1] Since debtors are seeking to only "strip off" part of Homecomings Financials' ("Homecomings") lien, the correct terminology is "strip down." Debtors acknowledge this in their brief in support.

the court took this matter under advisement on the record entered. Homecomings neither appeared at the hearing nor did it submit a response to debtors' motion. Thereafter, on April 10, 2006, with the Court's approval, debtors' submitted a brief in support of their motion to strip off (down) Homecomings' lien. (Dkt. 64).

I. Jurisdiction

The Court has jurisdiction over this core proceeding under 28 U.S.C. § 1334, 28 U.S.C. §157(b)(2)(B), and 28 U.S.C. §157(b)(2)(L).

II. Findings of Fact

The debtors filed their Chapter 13 bankruptcy petition and plan on June 23, 2003. Debtors' exempted their homestead located at 651 Waverly, Wichita, Kansas. There were two (2) mortgages on this property. Commercial Federal Mortgage Group was the first mortgage holder and held a mortgage of approximately $62,192.00 on the date of filing. Homecomings held a second mortgage of approximately $33,160.00. Homecomings is listed as holding a total claim of $33,160.00, with an unsecured claim of $27,352.00.

Debtors valued their homestead at $67,900.00. Hence, debtors' plan, in pertinent part, provides, "[The] Secured claim of [Homecomings] in the amount of $5,900.00 secured by a lien in the Debtors' 1995 Homestead will be paid through the Plan. This secured claim shall be paid in full with interest at the rate of 7% per annum. The amount of [Homecomings's] claim, which exceeds its secured claim, shall be treated as an unsecured claim." Homecomings did not object to the Chapter 13 plan and the plan was confirmed on October 9, 2003.

Homecomings has not actively participated in debtors' bankruptcy case despite being

listed on debtors' Schedule D and on the mailing matrix.[2] The address listed for Homecomings on the matrix was taken from the debtors' monthly mortgage statement. The Bankruptcy Noticing Center ("BNC") has not inserted or added a preferred address for Homecomings onto the debtors' mailing matrix, indicating that either Homecomings has not provided the BNC with a preferred address, or that the address on the matrix is Homecomings' preferred address.

On August 9, 2005, debtors filed a motion to modify plan (Dkt. 30) to decrease the amount of their plan payments. Debtors' attorney noticed up the amended plan to all of the creditors on the mailing matrix. Homecomings did not object to the amended plan. The trustee objected to the amended plan, but the trustee's objection was resolved and an Order Granting Motion to Modify Confirmed Chapter 13 Plan was issued on January 20, 2006.

Debtors have approximately four (4) months left to complete their Chapter 13 plan and receive their discharge. Debtors have paid Homecomings $5,900 for the secured portion of their second mortgage. In addition, as of March 2006, debtors have paid Homecomings $5,227.69 on the unsecured portion of the second mortgage.

III. Discussion

As a preliminary matter, the court notes that this motion can be granted as an uncontested motion since no response has been filed to the debtors' motion to strip down Homecomings' lien. D.Kan. Rule 7.4 provides if a respondent fails to file a response within the time required by D.Kan. Rule 6.1(d), the motion will be considered and decided as an uncontested motion, and ordinarily will be granted without further notice. In light of the relief requested, however, the

[2] Homecomings did not file a proof of claim by the claim deadline (10/28/03). Instead, Homecomings' proof of claim was filed by debtors' attorney.

Court believes that it should consider the merits of that relief.

By their motion, debtors ask that Homecomings' remaining claim be treated as wholly unsecured until their Chapter 13 Plan is completed. When debtors complete their plan, what remains of Homecomings claim will be discharged. Essentially, debtors seek an order enforcing the confirmed Chapter 13 plan. Initially, the court questioned whether it was appropriate to do so in light of the fact that the plan's treatment of Homecoming's lien is contrary to 11 U.S.C. § 1322(b)(2)[3] and *Nobelman v. American Savings Bank*.[4]

Debtors argue that the strong policy favoring finality of a confirmed Chapter 13 plan under § 1327 outweighs compliance with § 1322(b), citing *In re Bryant*,[5] *In re Szostek*,[6] and, generally, *In re Andersen*.[7] § 1327 provides that, absent fraud, confirmation of a debtor's plan binds both the debtor and the creditors.

The Tenth Circuit has addressed this issue in the context of plans that purport to discharge student loan debt and concluded that plans that might not otherwise be confirmable because they contain non-conforming provisions must still be given effect if an objection is not raised prior to entry of the confirmation order.[8] This result is appropriate when the creditor fails

---

[3] All further statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq., unless otherwise noted.

[4] 508 U.S. 324, 113 S.Ct. 2106 (1993)(Section 1322(b) prohibits Chapter 13 debtors from bifurcating undersecured homestead mortgagee's claim into secured and unsecured claim).

[5] 323 B.R. 635 (Bankr. E.D. Pa. 2005).

[6] 886 F.2d 1405 (3rd Cir. 1989).

[7] 179 F.3d 1253 (10th Cir. 1999).

[8] *Andersen*, 179 F.3d at 1258.

to take an active role in protecting its claim once given notice and an opportunity to be heard that its claim will be compromised and discharged after confirmation.[9]

In a case factually similar to the present matter, *In re Bryant*,[10] a debtor proposed a chapter 13 plan in which she offered to "pay in full" her home mortgage in the amount of $41,471.59. Only after the plan was confirmed did the lender filed a secured claim in the amount of $67,736.17, stating an *arrearage* of $41,471.59. The lender took no further action in the case. The debtor completed her plan and obtained a discharge. After her first case was closed, the lender began foreclosure proceedings in state court. To prevent this, the debtor filed a second chapter 13 case. When the lender filed a secured claim for an additional $44,424.69, comprised of missed payments, late fees, and interest, the debtor objected to this claim as being barred by the res judicata effect of her first confirmation order. Concluding that a creditor should be bound by a confirmed plan to which it has not objected, so long as the creditor has received due process, the *Bryant* court sustained the debtor's objection to the lender's claim in the second case, stating inter alia:

> . . . A creditor with a timely and unambiguous notice that its claim will be compromised and discharged may not ignore the confirmation process and fail to object notwithstanding that there either is no bar date for filing a claim or the time for filing a claim has yet to expire. "Confirmation of such a plan, after notice and an opportunity to be heard, bars the creditor's later-filed claim under the principles of res judicata."[11]

The *Bryant* holding is not only persuasive, but also accords with this Circuit's authority as stated in *Andersen*.

---

[9] *Id.* at 1257-1259. *See also In re Szostek*, 886 F. 2d 1405 (3rd Cir. 1989).

[10] 323 B.R. 635 (Bankr. E.D. Pa. 2005).

[11] 323 B.R. 635, 642 (citing *In re Fili*, 257 B.R. 370, 374 (1st Cir. B.A.P. 2001)).

In the present case, the debtors plan proposed to pay Homecomings only the amount of its secured claim, unambiguously depriving Homecomings of its right to have its claim not modified under § 1322(b)(2). There is no evidence to suggest that Homecomings did not receive notice of the plan, or that it lacked the opportunity to object to the plan. Homecomings has neither entered an appearance in the bankruptcy proceeding, filed an objection to the plan, appealed the confirmation order, nor has it responded to debtors' motion to strip down its lien. Clearly, Homecomings has failed to take an active role in protecting its claims. The Court can only conclude that Homecomings, having twice been notified of the debtors' intentions and having accepted their payments on the modified claim, all without objection, has consented to the treatment proposed in the plan and reaffirmed by the motion.[12]

IT IS THEREFORE ORDERED that Debtors' Motion to Strip Off (Down) Lien of Homecomings Financial is GRANTED.

IT IS FURTHER ORDERED that the claim of Homecomings shall be treated as partially unsecured during the pendency of the debtors' Chapter 13 plan and upon satisfactory completion of the debtors' plan, said lien will become void and the entry of a discharge order will automatically void Homecomings' Lien.

IT IS SO ORDERED.

# # #

[12] My colleague, the Honorable Janice Miller Karlin, has established a procedure by which debtors seeking to strip off a mortgage lien must file a separate motion, as debtors here have done, to assure that the lender receives appropriate notice. *See In re Woodling*, 2004 Bankr. LEXIS 1751 (Bankr. D. Kan. 2004). Debtors' counsel extra effort to insure Homecomings' receipt of appropriate notice is commendable and only supports today's conclusion that Homecomings has had the benefit of due process in receiving appropriate and unambiguous notice of debtors' intentions.