UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Tony Ray Pope and Brenda Jean Pope,

Debtor.

C/A No. 93-71473-D

Adv. Pro. No. 97-80205-W

Tony Ray Pope and Brenda Jean Pope,

Plaintiff,

v.

United Company Lending Corporation,

Defendant.

JUDGMENT

Chapter 13

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, UC Lending's Motion for Summary Judgment in the above-captioned adversary proceeding pursuant to Federal Rule of Civil Procedure 56 is denied. The Debtors' Motion for Summary Judgment in the above-captioned adversary proceeding pursuant to Federal Rule of Civil Procedure 56 is granted and it is the finding of the Court that UC Lending's claim has been paid in full through the Chapter 13 Plan and UC Lending shall mark its mortgage satisfied and remove any liens securing its claim within fifteen (15) days of the entry of the attached Order.

John E. Waites
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
December 15, 1997.

CERTIFICATE OF MAILING

The undersigned clerk (or deputy clerk) of the United States Bankruptcy Court for this district hereby certifies that a copy of the document on which this stamp appears was mailed on 12-15-97, to:

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ORDER

Chapter 13

THIS MATTER comes before the Court upon the cross-motions of the plaintiffs Tony Ray Pope and Brenda J. Pope (collectively "Debtors"), and UC Lending Corporation, formerly known as United Companies Lending Corporation ("UC Lending"), seeking Summary Judgment in their favor.

After reviewing the briefs filed in this matter and considering arguments of counsel and upon stipulation of the parties that there is no question as to any material fact and that the determination of this matter involves merely a question of law, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Federal Rules of Civil Procedure, made applicable by Rule 7052 of the Federal Rules of Bankruptcy Procedure.

FINDINGS OF FACT

On or about December 9, 1990, Debtors executed and delivered to UC Lending a Promissory Note in the original principal amount of Twenty-Six Thousand, One Hundred and

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00/100 ($26,100.00) Dollars ("Note"). To secure the repayment of the Note and the debt evidenced thereby, Debtors executed and delivered to UC Lending a Mortgage dated December 6, 1990 and recorded on December 12, 1990 in the York County Register of Mesne Conveyances Office, pursuant to which Debtors granted UC Lending a first mortgage lien on a parcel of real property located in York County ("Real Property"). The Note was to be paid by January 1, 2003. The Real Property was and is used by the Debtors as their principal residence. The parties stipulated that no other collateral secures UC Lending's claim.

On March 16, 1993, Debtors filed a voluntary petition under Chapter 13 of the Bankruptcy Code. On April 12, 1993, UC Lending filed a Proof of Claim asserting a secured claim in the amount of $25,757.32; however the Proof of Claim did not show the amount of interest due under the contract and there was no copy of the Note or Mortgage attached to the Proof of Claim. The Debtors did not object to UC Lending's Claim.

On April 26, 1993, the Debtors Original Chapter 13 Plan was confirmed. UC Lending did not object to confirmation of the Original Plan and did not appeal the Order Confirming Plan. On May 24, 1996, the Debtors obtained confirmation of an Amended Chapter 13 Plan. However, the Amended Chapter 13 Plan did not alter or affect UC Lending's treatment.

Paragraph 2.(B)I. of the Debtors' Original Plan provides the following treatment for the claim of UC Lending:

> Long term or mortgage debt -- . to be paid to United Companies Lending Corp. at $626.00 per month along with 9% interest. (45 months)

Paragraph 4 of the Original Plan provides, in part, that, "[u]nless the plan provides otherwise, secured creditors shall retain their liens upon their collateral until the allowed amounts

of their secured claims are paid."

Debtors made payments pursuant to the Chapter 13 Plan. The Chapter 13 Trustee's records indicate that he has disbursed the total amount of $30,204.94 on account of UC Lending's secured claim, representing the payment of the Proof of Claim in the amount of $25,757.32 paid at 9% interest. Consequently, Debtors allege that UC Lending's claim has been paid in full and that UC Lending is required to release its Mortgage Lien on the Debtors' residence. However, UC Lending disagreed with the Debtors' assertion, contending that the Chapter 13 Plan impermissibly attempted to modify UC Lending's claim by not paying the contractual rate of interest, and that there was still a balance due and owing on Debtors' account.

On July 3, 1997, a Complaint instituting the instant adversary proceeding was filed.

CONCLUSIONS OF LAW

Initially, UC Lending relies upon the decision of the Fourth Circuit Court of Appeals in Cen-Pen Corp. v. Hanson, 58 F.3d 89 (4th Cir. 1995) and argues that its lien survives as its claim was not paid in full through the Chapter 13 plan. This Court disagrees. In Cen-Pen, the Fourth Circuit held that a creditor's lien survived confirmation of a Chapter 13 plan because the debtor failed to take appropriate affirmative action to avoid the creditor's lien. However, in Cen-Pen, the Fourth Circuit recognized that in order for a plan to vest property in the debtor free and clear of liens pursuant to 11 U.S.C. § 1327(c)[1], the plan must "provide for" the lien and held that "[a]s a general matter, a plan 'provides for' a claim or interest when it acknowledges the claim or interest and makes explicit provision for its treatment." Cen-Pen Corp. v. Hanson, 58 F.3d at 94.

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[1] Further references to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*, shall be by section number only.

In this case, the language of the Plan is very clear how UC Lending's claim would be treated and the interest rate that would be applied.[2] UC Lending filed a proof of claim and the Debtors accepted it and specifically provided for the claim in their Plan by proposing to pay the full amount, $25,757.32, with 9% interest.

In conjunction with its Cen-Pen argument, UC Lending also takes the position that it did not receive adequate notice from the Debtors that its entire claim rather than the arrearage only, would be subject to the 9% interest rate rather than the contractual rate of 15% and therefore to the extent the Plan was confirmed in violation of its due process rights, the provisions of the Plan that affects it are not binding according to the Fourth Circuit's decision in In re Linkous, 990 F.2d 160 (4th Cir. 1993) (which held that a secured creditor was denied its due process rights when the notice of a confirmation hearing that was provided to a creditor did not adequately put the creditor on notice that the court would also consider security valuation at the hearing).

> Ordinarily, once a Chapter 13 plan has been confirmed, a creditor may not raise an issue that could have been raised by an objection to confirmation. The confirmed plan is binding on the creditor even if the plan did not meet one of the requirements for confirmation. 11 U.S.C. § 1327(a); In re Szostek, 886 F.2d 1405, 19 Bankr.Ct.Dec. 1520, 21 Collier Bankr.Cas.2d 889 (3rd Cir.1989); Los Angeles Title & Trust Deed Co. v. Risser (In re Risser), 22 B.R. 868 (Bankr.S.D.Cal.1982); 2 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY § 6-9 (2nd ed. 1994). An exception to this general rule exists in the event the creditor would be denied due process for lack of notice.

In re Rodgers, 180 B.R. 504 (Bkrtcy.E.D.Tenn. 1995). In Rodgers, the Court found that notice was in fact sufficient and no violation of the creditors' due process rights.

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[2] Pursuant to the Plan, the payments to UC Lending were actually increased and UC Lending received payment of its claim sooner than if there had been no Chapter 13.

> In most situations the notice will be sufficient if it allows the creditor to determine how the plan proposes to maltreat its claim; that should alert the creditor to object to confirmation. In re Basham, 167 B.R. 903 (Bankr.W.D.Mo.1994); Lee Servicing Co. v. Wolf (In re Wolf), 162 B.R. 98, 30 Collier Bankr.Cas.2d 730 (Bankr.D.N.J.1993); In re Haynes, 107 B.R. 83 (Bankr.E.D.Va.1989); Lawrence Tractor Co. v. Gregory (In re Gregory), 705 F.2d 1118, 10 Bankr.Ct.Dec. 1073, 8 Collier Bankr.Cas.2d 605 (9th Cir.1983); In re Hogue, 78 B.R. 867 (Bankr.S.D.Ohio 1987) (insufficient notice).

In re Rodgers, 180 B.R. at 507.

The Debtors' Plan is very clear that secured creditors would retain their liens until their allowed claims were paid. The language of Paragraph 2. B) I. of the Original Plan unambiguously states the amount of the payment UC Lending was to receive (that being the mortgage debt as represented by its allowed claim) the interest rate that was to be paid, and whether the debt was to be treated as secured debt. Furthermore, it is clear that the Plan did not propose to cure an arrearage but make full payment with the total payments provided exceeding the full amount listed as being owed to UC Lending on Schedule D. Also, the language of Paragraph 4 of the Plan squarely addresses the issue of when the Debtors expected any liens to be canceled by a creditor. It is clear that the Debtors proposed and UC Lending did not object to the provision that its lien was to be released when the allowed amount of Defendant's secured claim was paid.

Additionally, while UC Lending did file a proof of claim, it did not show its contractual interest rate on the claim nor attach a copy of the note and mortgage which would evidence its further assertion of its contractual right to 15% interest. UC Lending was duly served with the Original Plan and could have filed an objection to confirmation and argue that it was entitled to

15% interest, but it did not. One court faced with a similar situation to the one presently before the Court recognized the policy in favor of protecting the rights of mortgage lenders, however, it also recognized the "wisdom of promoting the finality of the Court's confirmation order."

> Here there can be no doubt that the plan clearly and conspicuously advised the Bank of the intention to modify the terms of the note and mortgage, and through the confirmation process, gave the creditor an immediate opportunity to protest the proposed treatment, which for reasons not known to the Court it failed to do.

Matter of Walker, 128 B.R. 465 (Bkrtcy.D.Idaho 1991). That Court denied the Debtor's post-confirmation request for relief from the automatic stay because the creditor was bound by the confirmation of the Chapter 13 plan which reduced the number and amount of monthly payments and made no provision for interest on the claim.

For whatever reason, UC Lending did not file an objection to the Debtors' Plan. "When a creditor receives notice of the initiation of a Chapter 13 case by its debtor, it is under constructive or inquiry notice that its claim may be affected, and it ignores the proceeding to which the notice refers at its peril." In re Gregory, 705 F. 2d 1118, 1123 (9th Cir. 1983).

This line of cases is further supported by the Fourth Circuit Court of Appeals in a recent ruling which found that a creditor in a Chapter 11 reorganization case was too broadly interpreting the Cen-Pen decision.

> Due process requires that in order for a proceeding to be accorded finality, notice must be given that is "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); see also Piedmont Trust Bank v. Linkous (In re Linkous), 990 F.2d 160, 162-63 (4th Cir.1993).

Spartan Mills v. Bank of America Illinois, 112 F.3d 1251 (4th cir. 1997). In this case, the Court finds that UC Lending had sufficient notice of the Debtors' treatment of its lien and claim. UC Lending accepted the benefits of steady payment through the Chapter 13 Plan, did not object to the proposed original and modified plans, both of which included language modifying its interest rate and proposing to pay its claim at a set amount over a fixed, shorter period of time and accepted the payment of the entire claim amount without expressing any concern over the change in interest rate.

UC Lending also takes the position that despite notice of confirmation, that by paying UC Lending's claim on their principal residence at 9% interest rather than the contractual rate of 15% interest, the Debtors' Plan violated §1322(b)(2) and therefore it is not bound by such a provision in the Plan. Section 1322(b)(2) provides that:

> (b) Subject to subsections (a) and (c) of this section, the plan may --- . . .
>
> > (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence . . . .

11 U.S.C. §1322(b)(2). However, as stated above, UC Lending knew or should have known that the Debtors' Plan modified its rights, including the applicable rate of interest, and by not asserting an objection, has waived any argument that the Plan has impermissibly modified its rights.

> The Bank argues that its allowed secured claim may not be modified in the bankruptcy plan by lowering the annual interest rate from 11.82% to 10%, even though the Debtors are increasing their monthly payments from $520.84 to $531.57. The Bank emphasizes that the Debtors never objected to the filing of the claim for $44,593.81 at 11.82% annual interest and never sought a valuation hearing to determine allowance of the claim under 11

> U.S.C. § 506. Under such circumstances, the Bank contends, a secured, allowed claim may not be altered.
>
> The Bank never specifically raised the issue of modification of the interest rate before the bankruptcy judge. Because the Bank failed to object to the lowering of the interest rate before the bankruptcy court, it has waived its right to raise the issue on appeal. Kroner, 953 F.2d at 319; see also In re Arnold, 869 F.2d 240, 244.

Matter of Endicott, 157 B.R. 255 (W.D. Va. 1993). Also see In re Rodgers, 180 B.R. at 506 (Having concluded that the notice to [Creditor] was sufficient to apprise it of the treatment it could expect under debtor's proposed plan, the court must conclude that the plan, as confirmed, is binding upon the debtor and [Creditor]. 11 U.S.C. § 1327. [Creditor] is deemed to have waived its objections to the plan.) and Matter of Battle, 164 B.R. 394 (Bkrtcy.M.D.Ga. 1994) ([Creditor] contends that Trustee should have objected to its proof of claim prior to confirmation of the Chapter 13 plan. [Creditor] cites no authority for this assertion. The facts clearly show that it was [Creditor], not Trustee, which slept on its rights. "Equity aids the vigilant, not those who slumber on their rights"). It is therefore the finding of the Court that UC Lending has waived any right to object at this point to the Plan's treatment of its claim by not providing the contractual rate of interest and is bound to the terms of the Plan pursuant to § 1327(a).

UC Lending also takes the related position that the Debtors' attempt to modify its secured claim on their principal residence is an action that is expressly prohibited according to the United States Supreme Court in 1993 in the Nobelman v. American Savings Bank, 508 U.S. 324 (1993) opinion. Nobelman interpreted §1322(b)(2) to protect all of the pre-bankruptcy state law rights of a mortgagee holding, as its only collateral, a lien on the debtor's principal residence. Id. at 330-31. The Court stated that the rights of a mortgagee, "are contained in a unitary note that applies

at once to the bank's overall claim. . . ." Id. at 331. As the bank's rights "were bargained for the mortgage and mortgagee," §1322 protected them from modification. Id. at 329; Dewsnup v. Timm, 502 U.S. 410, 417 (1992).

However, of significant importance to UC Lending's reliance on the Nobelman decision in this case is the time line involving the confirmation of the Original Plan and the issuance of that decision. The Original Plan in this case was confirmed by order entered April 26, 1993. Nobelman was decided on June 1, 1993. Therefore, its clear prohibition against modifying the rights of creditors holding a claim secured by real property that is a debtor's residence is inapplicable and not binding on the Debtors.

> The Supreme Court did not hold that the Nobelman decision was to be applied retroactively. The Supreme Court has held that "when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, ----, 111 S.Ct. 2439, 2447, 115 L.Ed.2d 481 (1991) (emphasis added). The Supreme Court explained that retroactivity is limited by finality and that "once suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed." Id., 501 U.S. at ----, 111 S.Ct. at 2446.

In re Wolf, 162 B.R. 98 (Bkrtcy.D.N.J. 1993). Also see In re Moretti, 172 B.R. 984 (Bkrtcy.W.D.Okla. 1994) aff'd at Lumberman's Investment Corporation v. John Moretti, 100 F. 3d 967 (10th Cir. 1996).

The general rule is that when the Supreme Court makes a ruling, that rule is controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate announcement of the rule. Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 113 S.Ct. 2510

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(1993). However, the term "open on direct review" does not include a Chapter 13 case in which a plan has been confirmed.

> As a preliminary matter, because the Supreme Court applied its holding in Nobelman to the litigants in that case, this court must apply Nobelman to this case in which a confirmation order has not entered, notwithstanding the fact that this case and the instant motion were filed before Nobelman was decided. Harper v. Virginia Dep't of Taxation, 509 U.S. 86, ----, 113 S.Ct. 2510, 2517, 125 L.Ed.2d 74 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."); James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, ----, 111 S.Ct. 2439, 2448, 115 L.Ed.2d 481 (1991) ("[W]hen the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata."); Independence One Mortgage Corp. v. Wicks (In re Wicks), 5 F.3d 1372 (10th Cir., 1993) (Nobelman applied to case pending on appeal).

In re Hornes, 160 B.R. 709 (Bkrtcy.D.Conn. 1993). Also see In re Klus, 173 B.R. 51 (Bkrtcy.D.Conn. 1994)(Accordingly, the Nobelman decision applies only to cases still open on direct review. Because the Confirmation Order is final, this case is not open on direct review.) and In re Cole, 202 B.R. 375 (Bkrtcy.E.D.Pa. 1996)(Whenever an attempt has been made to thus apply Dewsnup or Nobelman "super-retroactively," it has been rejected because the prior decision, though based on legal principles subsequently discredited by Dewsnup or Nobelman, is res judicata between the parties.).

Therefore, there are no issues left unresolved or other matters that remain open on direct review. Not only has the Plan in this case been confirmed and not appealed, the payments pursuant to the Plan have been made over a period of years and are near completion. For these

reasons, this Court declines to apply Nobelman retroactively to this case.

Finally, upon the facts of this case alone, it would serve an injustice and be highly inequitable to allow a creditor in this situation to sit on its rights for as long as UC Lending did and silently wait until after its claim had been paid in full in reliance upon an uncontested confirmed Chapter 13 plan and then raise objections and refuse to satisfy its lien. The doctrine of equitable estoppel would apply to this case to prohibit the relief requested by UC Lending.

CONCLUSION

When deciding a summary judgment motion, the Court must determine whether there exists a genuine issue of material fact. Fed. R. C. P. 56; Fed. R. Bankr. P. 7056. In as much as the key facts are stipulated to by the parties, the Court need only determine the relevant law to apply, and having done so finds that the Defendant's Motion for Summary Judgment must be denied and the Debtors Motion for Summary Judgment must be granted. Therefore, it is the finding of the Court that UC Lending's claim has been paid in full through the Chapter 13 Plan and UC Lending shall mark its mortgage satisfied and remove any liens securing its claim within fifteen (15) days of the entry of this Order.

AND IT IS SO ORDERED.

John E. Waites
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
December 15, 1997.