

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

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In Re:

Yvonn N. Lerro,

Case No. 03-36253

Chapter 13

Debtor.

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**NOTICE OF HEARING AND MOTION FOR MODIFICATION OF PLAN**

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TO: Yvonn N. Lerro, the Debtor named above, and her attorney, Ian Traquair Ball, 12 South Sixth Street, Suite 326, Minneapolis, MN 55402; Jasmine Z. Keller, Chapter 13 Trustee, 310 Plymouth Building, Minneapolis, MN 55402; the U.S. Trustee, 1015 U.S. Courthouse, 300 South 4<sup>th</sup> Street, Minneapolis, MN 55415, and other entities specified in Local Rule 3019-2 and 9013-3.

1. Todd Michael Harrington moves the court for the relief requested below and give notice of hearing.

2. The court will hold a hearing on this motion at 10:30 a.m. on October 28, 2004, in Courtroom 228B, St. Paul, Minnesota before Judge Gregory F. Kishel.

3. Any response to this motion must be filed and delivered not later than October 25, 2004, which is 3 days before the time set for the hearing, or filed and served by mail not later than October 21, 2004, which is seven days before the time set for the hearing. **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, Bankruptcy Rule 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The

petition commencing this chapter 13 case was filed on September 12, 2003. The case is now pending in this court.

5. This motion arises under 11 U.S.C. §§ 1326 and 1329. This motion is filed under Bankruptcy Rules 3015 and 9014 and Local Rule 9013. Movant proposes to order the trustee to make regular payments to him as an unsecured creditor out of proceeds paid by Debtor or in the alternative to modify the Chapter 13 plan to provide for the payment of all unsecured creditors who have filed a proof of claim.

6. If oral testimony is necessary as to the relevant facts, the Movant will testify at the hearing.

7. Debtor's Chapter 13 Petition was filed on September 12, 2003 as Case No. 03-36253 and Movant has instructed his attorneys to request that the trustee be required to make regular payments under the Plan to him as all other allowed unsecured creditors or in the alternative that the Chapter 13 Plan be modified or that he be permitted to enter judgment against the Debtor and avail himself or ordinary collection remedies in enforcing his claim.

8. Movant Todd Harrington did not receive a Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines (341 Notice) in this matter. The reason is not known, but Movant has had disruptions in his mail service.

9. Until shortly before the mailing of Movant's Proof of Claim in this matter on March 10, 2004 Todd Harrington was not aware that Debtor Yvonn N. Lerro had commenced her Chapter 13 case.

10. Todd Harrington only became aware of the filing of the Debtor's Chapter 13 case after he asked his attorney in early March, 2004 when the payments would commence.

11. The attorney for Movant has been advised by the attorney for Debtor that Todd

Harrington's claim should not be paid under the terms of Debtor's Plan because the claim was not timely filed and Debtor refused to permit Movant's claim from being paid under the Debtor's Plan and refused to modify the Plan to provide for payment.

12. The action of Movant against the Debtor arises out of Movant's action against Debtor in BKY 02-32775, ADV 02-3216, seeking to except his claim from discharge on account of fraud. Exhibit A, attached hereto, is a true and correct copy of the Proof of Claim filed by Movant's attorney along with the Settlement Stipulation and Order in this adversary proceeding.

13. The Settlement Agreement resolving the adversary proceeding referenced above was entered into on September 15, 2003 and the Order approving the Settlement was executed by Judge Dennis D. O'Brien on September 16, 2003.

WHEREFORE, Movant moves the court for an order granting Movant the following relief:

- A. Ordering that he be paid in full under the Plan as a timely unsecured creditor;
- B. In the alternative, modifying the Plan of Debtor as provided in the accompanying proposed Modified Plan;
- C. In the alternative, ordering that the automatic stay in this case be lifted to permit Movant to pursue collection remedies available to him a judgment creditor in accordance with the provisions of the Settlement Stipulation in the adversary proceeding in BKY 02-32775; ADV 02-3216.
- D. Grant Movant such other and further relief as may be just and equitable.

Dated: 6 August 2004

TWIN CITY ATTORNEYS, P.A.



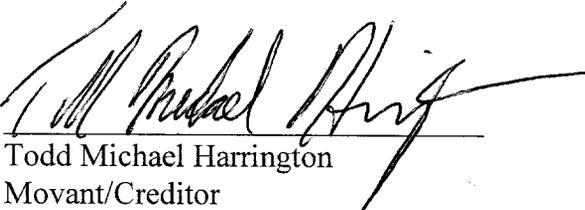
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Attorneys for Movant  
Todd Michael Harrington  
By James C. Whelpley  
Attorney I.D. 11649X  
2151 North Hamline Avenue #202  
Roseville, MN 55113  
Telephone: (651) 639-0313

**VERIFICATION**

I declare under penalty of perjury that the foregoing allegations are true and correct to the best of my knowledge, belief and understanding.

Dated: August 9, 2004.



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Todd Michael Harrington  
Movant/Creditor

<b>UNITED STATES BANKRUPTCY COURT DISTRICT OF MINNESOTA</b>		<b>PROOF OF CLAIM</b>
Name of Debtor: <u>Yvonne N. Lerro</u>		Case Number: <u>03-36253</u>
NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.		
Name of Creditor: (The person or entity to whom the debtor owes money or property) <u>Todd Harrington</u>		THIS SPACE IS FOR COURT USE ONLY
Name and address where notices should be sent: <u>Todd Harrington, c/o James C. Whelpley, 2151 N. Hamline Ave. Roseville, MN 55113 Telephone number: 651-639-0313</u>		
<input type="checkbox"/> Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars. <input type="checkbox"/> Check box if you have never received any notices from the bankruptcy court in this case. <input type="checkbox"/> Check box if the address differs from the address on the envelope sent to you by the court.		
Account or other number by which creditor identifies debtor:		Check here <input type="checkbox"/> if this claim: <input type="checkbox"/> replaces <input type="checkbox"/> amends a previously filed court claim, dated: _____
<b>1. Basis for Claim:</b> <input type="checkbox"/> Goods sold <input type="checkbox"/> Services performed <input type="checkbox"/> Money loaned <input type="checkbox"/> Personal injury/wrongful death <input type="checkbox"/> Taxes <input checked="" type="checkbox"/> Other <u>Settlement Stipulation Adv #02-3216</u> <input type="checkbox"/> Retiree benefits as defined in 11 U.S.C. § 1114(a) <input type="checkbox"/> Wages, salaries, and compensations (Fill out below) Your SS# _____ Unpaid compensations for services performed from _____ to _____ (date) (date)		
2. Date debt was incurred: <u>Sept 2003</u>		3. If court judgment, date obtained: _____
<b>4. Total Amount of Claim at Time Case Filed:</b> \$ <u>4,500.00</u> <input type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.		
<b>5. Secured Claim</b> <input type="checkbox"/> Check this box if your claim is secured by collateral (including a right of setoff). Brief Description of Collateral: <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other _____ Value of Collateral: \$ _____ Amount of arrearage and other charges at time case filed included in secured claim, if any: \$ _____		<b>6. Unsecured Priority Claim</b> <input type="checkbox"/> Check this box if you have an unsecured priority claim. Amount entitled to priority claim \$ _____ Specify the priority of the claim: <input type="checkbox"/> Wages, salaries, or commissions (up to \$4,650*), earned within 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier — 11 U.S.C. § 507(a)(3) <input type="checkbox"/> Contributions to an employee benefit plan — 11 U.S.C. § 507(a)(4) <input type="checkbox"/> Up to \$2,100* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use — 11 U.S.C. § 507(a)(6) <input type="checkbox"/> Alimony, maintenance, or support owed to a spouse, former spouse, or child — 11 U.S.C. § 507(a)(7) <input type="checkbox"/> Taxes or other penalties of governmental units — 11 U.S.C. § 507(a)(8) <input type="checkbox"/> Other — Specify applicable paragraph of 11 U.S.C. § 507(a) _____ <small>*Amounts are subject to adjustment on 4/1/04 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.</small>
<b>7. Credits:</b> The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. <b>8. Supporting Documents:</b> Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary. <b>9. Date-Stamped Copy:</b> To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.		SEND ORIGINAL TO: U.S. BANKRUPTCY COURT 200 U.S. COURTHOUSE 316 NORTH ROBERT STREET ST. PAUL, MN 55101  FOR PAYMENT SEND COPY TO: CHAPTER 13 TRUSTEE (SEE NOTICE OF COMMENCEMENT OF CASE FOR NAME AND ADDRESS OF CHAPTER 13 TRUSTEE)
Date <u>3/10/04</u>	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any): <u>[Signature]</u>	

*Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.*

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In re:

Yvonn Noemi Lerro, a.k.a.  
Yvonn Noemi Harrington,  
Debtor.

Bky. No. 02-32775  
Chapter 7

Todd Michael Harrington,  
Plaintiff,

Adv. No. 02-3216

vs.

Yvonn Noemi Lerro, a.k.a.  
Yvonn Noemi Harrington,  
Defendant.

**SETTLEMENT STIPULATION**

This Settlement Stipulation is entered into by and between Todd Harrington ("Harrington") and Yvonn Lerro ("Lerro") this 15<sup>th</sup> day of September, 2003.

**RECITALS**

**FIRST:** On August 5, 2002, Lerro filed a petition for relief under Chapter 7 of Title 11 of the United States Code.

**SECOND:** On October 24, 2002, Harrington commenced this adversary proceeding by filing the Complaint. In the Complaint, Harrington alleged that the Lerro was indebted to him in the amount of \$22,000 and that the alleged obligation of Lerro to Harrington should be excepted from discharge pursuant to Sections 523(a)(2), (a)(4) and (a)(6) of the Title 11 of the United States Code.

**THIRD:** Lerro denied any liability to Harrington and denies that any liability that might exist is excepted from the discharge.

**FOURTH:** The parties desire to settle the claims between them as provided herein.

### AGREEMENT

**NOW, THEREFORE,** the parties hereby agree to the following:

1. Payment to Harrington. Lerro shall file a petition under chapter 13 of Title 11 of the United States Code. Lerro agrees to pay to Harrington the sum of \$4,500 ("Principal Amount") pursuant to the terms of a Chapter 13 plan ("Plan"). The Plan will contain the following terms ("Principal Terms"): a) the Plan will provide a term of five years; and b) the plan will provide that Lerro shall make monthly payments as follows: (i) month 1 through month 12, \$100; (ii) month 13 through 24, \$125; (iii) month 25 through month 36, \$150; (iv) month 37 through month 48, \$175; (v) month 49 through month 60, \$200 ("Debtor Contribution Schedule"). Through the term of the Plan, the total distributions to Harrington shall be equal to the Principal Amount. Harrington shall vote to approve the Plan provided that it contains the Principal Terms. Further, provided that the Plan contains the Principal Terms, Harrington shall not: a) object to confirmation of the Plan; b) object to the Debtor's discharge; c) seek to have his claim excepted from the discharge; d) object to the Debtor's claimed exemption; or e) seek relief from the automatic stay.

2. Personal Property. Harrington acknowledges that he has received the following items of personal property ("Personal Property") all of which he acknowledges are in satisfactory condition.

- a. Barbeque Cooking Utensils Kit given to Harrington by his mother.
- b. Coffee Table

- c. Microwave Oven.
- d. Painting of Farm with Train.

3. Video Tapes. Lerro will either provide the originals or copies (in VHS format) of video tapes from the parties' trip to Hawaii, from the cruise, from the wedding, the tape purchased from the photographer on the cruise, and any tapes containing images of Harrington or his family members.

4. Event of Default. It shall be an Event of Default under this Stipulation if, prior to the Debtor receiving the full Principal Amount, the court enters an order dismissing the chapter 13 case.

5. Remedies Upon Default. Upon the occurrence of an Event of Default, Harrington shall be entitled to the following remedies:

- a. On the 11<sup>th</sup> day after the occurrence of an Event of Default, if Lerro has not paid the unpaid portion of the Principal Amount, Harrington shall be entitled to entry of Judgment in this matter by filing and serving upon Lerro an Affidavit of Default recounting the circumstances of the Event of Default. The Judgment shall be entered against Lerro on the 10<sup>th</sup> day following the service of the Affidavit of Default on Lerro unless on or before such 10<sup>th</sup> day Lerro has filed and served upon Harrington or his counsel an affidavit of non-default stating the reasons why there is no default in which event a hearing shall be scheduled to determine whether there has occurred an Event of Default. If the Court finds that an Event of Default has occurred that has not been cured by the 10<sup>th</sup> day following service of the Affidavit of Default on Lerro, the Court shall enter judgment in the amount

of the unpaid portion of the Principal Amount plus the One-Time Principal Amount Increase (as described below).

- b. On the 11<sup>th</sup> day following the occurrence of an Event of Default, if Lerro has not paid the unpaid portion of the Principal Amount, the unpaid portion of the Principal Amount shall be increased by the sum of \$500 (“One-Time Principal Amount Increase”); Harrington shall be entitled to only one One-Time Principal Amount Increase.

6. Release of Lerro. Harrington hereby releases, acquits and forever discharges Lerro from all claims and causes of action of any and all types now existing or arising prior hereto including but not limited to all obligations that were or could have been alleged in the Complaint, arising under or with respect to the parties’ marriage, ownership of personal property or the proceeds from the sale of any personal or real property provided however that Lerro shall not be released from her obligations hereunder until she is granted a discharge under Title 11.

7. Release of Harrington. Lerro hereby releases, acquits and forever discharges Harrington from all claims and causes of action of any and all types now existing or arising prior hereto including but not limited to all obligations that were or could have been alleged in response to the Complaint, arising under or with respect to the parties’ marriage, ownership of personal or real property or the proceeds from the sale of any personal or real property provided however that Harrington shall not be released from his obligations hereunder.

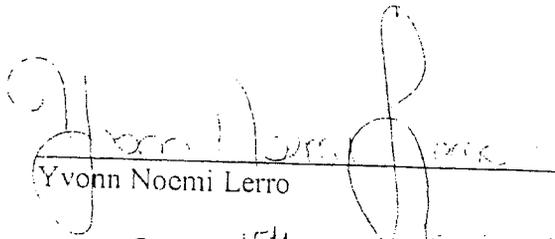
8. Entry of Order. The parties hereby jointly request that the Court enter an order in the form attached hereto as Exhibit A approving this Stipulation and dismissing this Adversary Proceeding with prejudice.

9. No Admissions. By executing this Stipulation, neither Lerro nor Harrington admit the assertions alleged by the other party. This settlement is entered into for the purposes of resolving a dispute in an amicable efficient manner and does not reflect either parties' acknowledgment of the truth of the allegations made by the other

10. Counterparts. This Agreement may be executed in multiple counterparts.

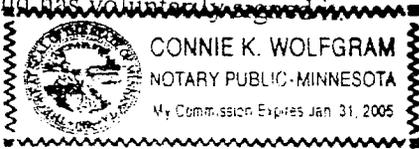
Dated: 9-15-03

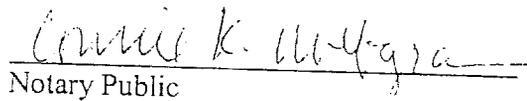
Dated: \_\_\_\_\_

  
Yvonn Noemi Lerro

\_\_\_\_\_  
Todd Michael Harrington

On the 15th day of September, 2003 Yvonn Noemi Lerro appeared before me and acknowledged that she has read and understands the foregoing Settlement Stipulation and has voluntarily signed it.

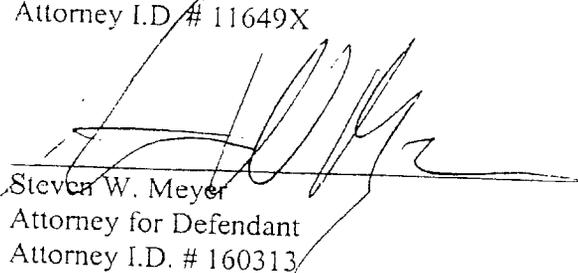


  
Notary Public

On the \_\_\_\_\_ day of \_\_\_\_\_, 2003 Todd Michael Harrington appeared before me and acknowledged that he has read and understands the foregoing Settlement Stipulation and has voluntarily signed it.

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
James C. Whelpley  
Attorney for Plaintiff  
Attorney I.D. # 11649X

  
Steven W. Meyer  
Attorney for Defendant  
Attorney I.D. # 160313

7. Release of Harrington. Lerro hereby releases, acquits and forever discharges Harrington from all claims and causes of action of any and all types now existing or arising prior hereto including but not limited to all obligations that were or could have been alleged in response to the Complaint, arising under or with respect to the parties' marriage, ownership of personal or real property or the proceeds from the sale of any personal or real property provided however that Harrington shall not be released from his obligations hereunder.

8. Entry of Order. The parties hereby jointly request that the Court enter an order in the form attached hereto as Exhibit A approving this Stipulation and dismissing this Adversary Proceeding with prejudice.

9. No Admissions. By executing this Stipulation, neither Lerro nor Harrington admit the assertions alleged by the other party. This settlement is entered into for the purposes of resolving a dispute in an amicable efficient manner and does not reflect either parties' acknowledgment of the truth of the allegations made by the other

10. Counterparts. This Agreement may be executed in multiple counterparts.

Dated: \_\_\_\_\_

Dated: 9-12-03

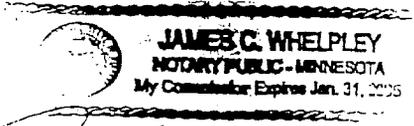
\_\_\_\_\_  
Yvonn Noemi Lerro

Todd Michael Harrington  
Todd Michael Harrington

On the \_\_\_\_\_ day of \_\_\_\_\_, 2003 Yvonn Noemi Lerro appeared before me and acknowledged that she has read and understands the foregoing Settlement Stipulation and has voluntarily signed it.

\_\_\_\_\_  
Notary Public

On the 12 day of Sept, 2003 Todd Michael Harrington appeared before me and acknowledged that he has read and understands the foregoing Settlement Stipulation and has voluntarily signed it.



[Signature]  
Notary Public

[Signature]  
James C. Whelpley  
Attorney for Plaintiff  
Attorney I.D. # 11649X

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In re:

Yvonn Noemi Lerro, a.k.a.  
Yvonn Noemi Harrington,

Debtor.

Bky. No. 02-32775

Chapter 7

Todd Michael Harrington,

Plaintiff,

Adv. No. 02-3216

vs.

Yvonn Noemi Lerro, a.k.a.  
Yvonn Noemi Harrington,

Defendant.

**ORDER APPROVING SETTLEMENT STIPULATION**

This matter comes before the Court on the Settlement Stipulation by and between Plaintiff, Todd Harrington and Defendant Yvonn Lerro dated as of \_\_\_\_\_ ("Settlement Stipulation"). Based upon the Settlement Stipulation and the files and records herein, it is hereby ordered that:

1. The Settlement Stipulation is hereby approved.
2. This Adversary Proceeding is hereby dismissed with prejudice provided, however, that the Plaintiff may file a motion for entry of judgment against Defendant in accordance with the provision of the Settlement Stipulation if there should occur an Event of Default as provided in the Settlement Stipulation.

Dated: \_\_\_\_\_

BY THE COURT:

\_\_\_\_\_  
Dennis D. O'Brien  
United States Bankruptcy Judge

EXHIBIT A

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

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In Re:

Yvonn N. Lerro,

Debtor.

Case No. 03-36253  
Chapter 13

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**ORDER CONFIRMING MODIFIED POSTCONFIRMATION PLAN**

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It appears that the Movant filed a modified plan, that the modified plan conforms to Local Rules 3015 and 3019-2, that the trustee has filed a certificate, that notice of the modified plan was mailed to creditors under Local Rule 1007-2 and 9006-1, that a hearing on confirmation of the modified plan was held, and that no objection to the confirmation of the modified plan has been made, or if made, has been since withdrawn or overruled by the court.

IT IS THEREFORE ORDERED, that the modified plan dated \_\_\_\_\_, and filed \_\_\_\_\_, is confirmed and that the modified plan has become the plan.

Dated: \_\_\_\_\_

\_\_\_\_\_  
U.S. Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

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In Re:

Yvonn N. Lerro,

Debtor.

Case No. 03-36253

Chapter 13

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**MEMORANDUM OF TODD HARRINGTON IN SUPPORT OF MOTION**

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**FACTS**

Movant's claim against the Debtor for false representation in connection with a marital dissolution was litigated in Debtor's Chapter 7 case (BKY 02-32775, ADV 02-3216). A Settlement Stipulation was entered into by the parties on 15 September 2003 and the Order Approving Settlement Stipulation was signed 16 September 2003. The Settlement Stipulation provided, among other things, that Movant would be paid \$4,500 through a Chapter 13 Plan with payments in varying amounts over a period of five years. The Stipulation provided that in the event of default Movant would be entitled to judgment, either upon a court finding that a default had occurred or if there were no response to a notice of default sent to the Debtor by Movant. In the event of default the principal sum owed, after the passage of 11 days, would be increased by \$500.

Debtor's Petition had been filed on 12 September 2003, before the Stipulation and the Order were executed. Court records show the 341 Notices were mailed on 1 October 2003. However, the 341 notice was not received by Movant and he did not become aware of the Debtor's Chapter 13 filing until March, 2003. The deadline stated on the 341 Notice for filing a

Proof of Claim by a non-governmental entity was 20 January 2004. After being contacted by Movant concerning when he might be receiving payments under the settlement in early March, 2004, Movant's attorney searched bankruptcy records and discovered Debtor's Chapter 13 filing. The attorney for Movant filed a Proof of Claim on 10 March 2004.

The instant dispute arises from two provisions of Debtor's Plan. Paragraph 2 of the Plan, which provides for payments by the Trustee states, "The trustee will make payments only to creditors for which proofs of claim have been timely filed, ...". Paragraph 9 of the Plan is entitled "TIMELY FILED UNSECURED CREDITORS" and states that

"The trustee shall pay holders of nonpriority unsecured claims for which proofs of claim were timely filed the balance of all payments received by the trustee and not paid under ¶2,3,5,6,7 and 8 their pro rata share \$7,650."

Total unsecured claims were listed as "\$8,224". The Trustee has declined to make payments to Movant out of the Plan proceeds and the Debtor has refused to permit Plan payments to be made to Movant.

### LAW

Movant requests three alternative types of relief:

- I. That he be paid in full under the Plan as a timely unsecured creditor;
- II. That the Plan be modified to provide for payment of Movant's claim; or
- III. That he be granted judgment in the amount of \$5,000 and the automatic stay lifted to permit him to use standard collection remedies to satisfy the judgment.

#### **I. Movant Should Be Paid Under the Plan as a Timely Unsecured Creditor.**

The circumstances of this case argue strongly that Movant should be treated, and be paid, as any allowed unsecured creditor.

a) **Movant did not receive notice in time to file a timely Proof of Claim.**

The evidence supports Movant's position that he did not receive notice or have actual knowledge of either the filing or deadline for filing a Proof of Claim until after the deadline for filing of claims. Movant's verified moving papers state that he did not know of the filing until early March approximately six weeks after the 20 January deadline. He states that other mail has been misdelivered or not been delivered to him.

The testimony is credible because Movant and Debtor went through a sharply contested adversary proceeding. It is simply not credible that Movant would expend considerable energy and resources to vigorously prosecute the adversary proceeding only to sit on his rights after he received notice of the Chapter 13.

Timely notice to protect a parties' rights is a cornerstone of due process. As noted by the Court in *In Re Ricks*, 253 B.R. 734, 739 (M.D. La. 2000), if a creditor were not listed and did not receive notice from the Court the creditor "will be unable to participate in the bankruptcy case and will therefore lose the prospect of taking on any of the aforementioned protective actions, most of which are time sensitive." In discussing a Chapter 7 distribution the importance of notice to a creditor was discussed in *In re Oberlander*, BKY 4-92-6279:

"[The creditors] must have been a creditor without 'notice or actual knowledge of the case in time for timely filing.' This section [§726(a)(2)(C)] assures due process to the creditor whose late filing was not the result of a failure to act by the creditor. See *Zidell, Inc. v. Forsch*, 920 F.2d 1428m 1431 (9<sup>th</sup> Cir. 1990); *In re Columbia Ribbon & Carbon Mfg., Inc.*, 54 B.R. 714, 717 (S.D. NY 1985).

Applicable rules permit an expansion of the deadlines for filing a proof of claim under circumstances beyond the control of a creditor. Rule 9006 of the *Bankruptcy Rules* authorizes the enlargement of this deadline:

"(b) Enlargement.  
    "(1) In general

“Except as provided in paragraphs (2) and (3) of this subdivision, when an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

“...(3) Enlargement not permitted

“The court may enlarge the time for taking action under Rules 1006(b)(2), 1017(e), 3002(c), 4004(b), 4004(a), 4007(c), 8002, and 9033, only to the extent and under the conditions stated in those rules.”

The application of this rule in a case with an allegation that notice was not received was discussed in *In Re Yoder Co.*, 758 F.2d 114, 1117 (6th Cir. 1985):

“The Bankruptcy Court made a factual finding that notice of the bar date had been sent to Ornstein. The Court did not discuss its reasons for this finding or explain how it weighed the evidence, although the evidence concerning mailing was far from undisputed. Testimony of non-receipt is evidence that the notice was not mailed. [citations] We do not need to decide whether the finding that notice was mailed was clearly erroneous, however, because we hold that the Bankruptcy Court abused its discretion in holding that Bratton’s attorney received the notice, which we hold to be clearly erroneous.

“Rule 906(b) of the Rules of Bankruptcy Procedure provides that a time period may be extended if failure to act in time ‘was the result of excusable neglect.’ The parties disagree over the definition of excusable neglect: Yoder urges as a definition “the failure to timely perform a duty due to circumstances beyond the reasonable control of the person whose duty it was to perform.”; Bratton suggests a less restrictive definition. Under even Yoder’s definition, however, nonreceipt of notice would clearly constitute excusable neglect.”

**b) Movant’s filing must be considered ‘timely’ under the facts of this case.**

Movant’s attorney acted promptly upon discovery of the Chapter 13 filing. The moving papers show that Movant did not know of the filing until approximately five to six weeks after the deadline. Movant’s proof of claim was then filed almost immediately.

Papers setting out the nature and extent of Movant’s claim were already on file well before

the deadline for filing proofs of claim. In fact, the claim had been litigated to conclusion in the parties' adversary proceeding. The claim was constructively filed on 16 September 2003, when Judge O'Brien approved the Settlement Stipulation.

The filing of Movant's Proof of Claim must be considered timely because Movant could not have been reasonably expected to have made the filing any earlier.

**c) Debtor would not be unduly prejudiced by payment of Movant's claim.**

Debtor had knowledge that Movant would assert his claim at the time of filing. This is demonstrated by the Settlement Stipulation entered into three days after filing of this case. It plainly anticipates the payment of Movant's claim through the Plan, and the Plan lists Movant's claim. The claim was in no way contingent or unliquidated. The amount and even terms of payment of the claim were set out in the Stipulation.

The payment of Movant's claim will not upset any expectation of Debtor at the time she entered into the Plan. In fact, given the size of Movant's claim and the other debts scheduled, it was a major or the major claim precipitating the filing of the Plan. The payment of Movant's claim at this time will in no way disrupt the orderly administration of the Plan. Moreover, Movant's Proof of Claim was filed before any or any substantial part of the Plan distributions had been made.

For many years there was a liberal rule permitting recognition of timely informal proofs of claim or the amendment of claims after the deadline for filing. The reason for such a policy was discussed in *In Re Anderson-Walker Industries, Inc.*, 798 F.2d 1285, 1287 (9<sup>th</sup> Cir. 1986),

“Bankruptcy courts are courts of equity, and must assure ‘that substance will not give way to form, [and] that technical considerations will not prevent substantial justice from being done.’ *Pepper v. Litton*, 308 U.S. 295, 305 (1939); *In re International Horizons, Inc.*, 751 F.2d 1213, 1216 (11<sup>th</sup> Cir. 1985). The liberal rule reflects our preference for resolution on the merits, as against strict adherence to formalities.

The equities of this case are clear, requiring payment to Movant only requires Debtor to pay the claim she agreed to in the manner she agreed to. The equities do not favor a technical rule apparently designed to take advantage of the odd creditor who sits on his rights or one is one of those who does not respond because his notice is misdelivered.

**d) Payment of Movant's claim is required under the Settlement Order in the parties' adversary proceeding.**

Payment to Movant under this Plan is governed by the terms of their Settlement Stipulation, approved by the Order Approving Settlement Stipulation of September 16, 2003. It should be noted that both the Stipulation and the Order were executed (by all parties) *after* the filing of the Petition.

The Stipulation plainly provides for "Payment to Harrington." and that "Through the term of the Plan, the total distributions to Harrington shall be equal to the Principal Amount." Settlement Stipulation, BKY 02-32775, ADV 02-3216, ¶1.

Thus the terms of the Order already directly require that payments to be made out of the Plan to Movant. Both parties litigated the adversary proceeding to its conclusion and are bound by this result. The terms of the Bankruptcy Court's Order incorporating the Stipulation can not be changed unilaterally by Debtor in her Plan. They can only be changed with the consent of both parties with the approval of the Court.

Equity also requires the enforcement of the Stipulation by ordering distributions to Movant. The Debtor should be estopped from arguing distributions should not be made to Movant when she has already agreed that she would provide a plan making distributions to Movant in a set amount.

**II. The Plan Should Be Modified to Provide for the Payment of Movant's Claim.**

In the event the trustee is not ordered to make distributions to Movant under the present

Plan, Movant's proposed Modification of Plan should be confirmed.

11 U.S.C. §1329 authorizes the modification of a plan upon the request of

“the debtor, the trustee, or the holder of an allowed unsecured claim,  
to

“(1) increase or reduce the amount of payment on claims of a  
particular class provided for by the plan;

“(2) extend or reduce the time for such payments; or

“(3) alter the amount of the distribution to a creditor whose claim is  
provided for by the plan to the extent necessary to take account or any  
payment of such claim other than under the plan.”

Movant has standing to request the modification of Debtor's Plan since he is the holder of an allowed claim. Under 11 U.S.C. §502(a) a claim “is deemed allowed, unless a party in interest” objects. Thus, since no objection has been made to Movant's Proof of Claim filed last March it is deemed allowed, whether filed before or after the ninety day deadline.

In other words, an *allowed* claim is different from a *timely* claim. As explained in *In re Hausladen*, 146 B.R. 552 (Minn. 1992),

“Section 502 then sets out eight specific grounds for disallowing claims. Tardy of late filing is not one of them. The statute says that the statute means: ‘the court ... shall allow ... claim(s) ... except ... . 11 U.S.C. 502(b) (emphasis added). The words are clear; ‘lateness is not a ground for disallowance under section 502 of the Code. [citations] In fact, in the face of an objection based on lateness, the statute explicitly requires us to allow the claim.’”

and its progeny an ‘untimely’ claim is different from an ‘allowed’ claim.

Movant acknowledges that it is unusual for a creditor to request such a modification in the absence of changed financial circumstances of a debtor. However, this is an unusual case for two reasons.

First, in most cases a creditor would be estopped by his receipt of notice of the filing of the Plan because he would have an opportunity to object to the plan prior to confirmation. In this case though, since Movant did not receive notice of the Plan, he had no opportunity to object to

confirmation and could not be bound by a plan or confirmation when he was unable to interpose an objection or otherwise object to the provisions of the Plan. Thus, Movant can not be bound by a confirmation order he had not opportunity to litigate and res judicata does not preclude his motion to modify the Plan.

Second, there is a strong justification for modification of the Plan because of substantially changed circumstances not anticipated at the time the Plan was submitted. An examination of Debtor's Schedules shows that the bulk of Debtor's payments were obviously directed at the payment of Movant's claim. If no distribution were required for Movant's claim Debtor would have a substantial amount of disposable income to devote to the payment of any 'untimely' claims. The size and extent of Movant's claim compared to the other scheduled debts make this a substantial changed circumstance. This changed circumstance was obviously not anticipated at the time the Plan was submitted, roughly contemporaneously with the filing of the adversary Settlement Stipulation. Based on Debtor's Schedules, Debtor has the financial capability to pay all or substantially all allowed claims, timely or untimely.

Modification as set out in Movant's proposed Plan is justified because:

1. It effects the agreement of the parties expressed in their settlement agreement. The objects of the agreement will be attained if distributions are made to Movant as provided in the Modified Plan;
2. It effectuates the Order in the adversary proceeding as well;
3. According to her schedules, Debtor has sufficient to make the payments;
4. Debtor's Plan unfairly discriminates against untimely filed creditors because, as argued above, she has not be unfairly prejudiced by any delay in filing; and
5. Debtor's Plan unfairly discriminates against untimely filed creditors because there is no policy justification or equitable justification for permitting a debtor to substantially write off the

bulk of her debt when she has the ability to pay the debt; and

6. It will promote judicial economy by making it unnecessary for Movant to further pursue his collection remedies under the Settlement Agreement and Order after the conclusion of this case.

**III. The Stay Should Be Lifted to Permit Movant to Pursue His Collection Remedies Against Debtor.**

If payment is not ordered under Debtor's Plan and the Plan is not modified, the Stay should be lifted to permit the Movant to serve a notice of default upon Debtor, and, if the default continues, to pursue the entry of judgment against Debtor as provided in ¶5 of the Settlement Agreement.

The Settlement Agreement provides that the Movant, on the eleventh day after "an event of default, if Lerro has not paid the unpaid portion of the Principal Amount, Harrington shall be entitled to entry of judgment in this matter" by either serving an affidavit of the default which is not responded to or if responded to by applying to the Court for an order. In this case, "the Court shall enter judgment in the amount of the unpaid portion of the Principal Amount plus the One-Time Principal Amount Increase (as described below)." Settlement Stipulation (BKY 02-32775, ADV 02-3216), ¶5. This amount would be \$5,000.

The Debtor has defaulted under the terms of the Settlement Stipulation. Paragraph 1 of the Settlement Agreement provides that "Through the term of the Plan, the total distributions to Harrington shall be equal to the Principal Amount." [\$4,500] If no payments can be made under the Plan, Debtor will obviously not be able to comply with the terms of the Stipulation. In addition, she proposes to pay less than the full amount she owes Movant.

Lifting the stay in this case is necessary to effectuate the Stipulation and accompanying Order. It is appropriate because the Stipulation is clear under its terms, it predates this case, and

the filing of this case is covered in the Stipulation. Moreover, little remains to be paid to the other creditors in this case.

Dated: August 5, 2004.

TWIN CITY ATTORNEYS, P.A.

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**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

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In Re:

Yvonn N. Lerro,

Case No. 03-36253

Chapter 13

Debtor.

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**UNSWORN DECLARATION OF PROOF OF SERVICE**

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Angela K. Morrow, employed by Twin City Attorneys, P.A., with an office address of 2151 N. Hamline Avenue #202, Roseville, MN 55113, declares that she served a copy of the attached Notice of Hearing and Motion for Modification of Plan, proposed Order Confirming Modified Postconfirmation Plan, Memorandum, and Modification by Movant of Chapter 13 Plan, upon each entities named below by mailing to each of them a copy thereof, by enclosing same in an envelope with first-class mail, postage prepaid and depositing same at the post office at Roseville, Minnesota addressed to each of them as follows:

Jasmine Z. Keller  
Chapter 13 Trustee  
310 Plymouth Building  
12 South 6<sup>th</sup> Street  
Minneapolis, MN 55402

Ramsey County Sheriff  
Law Enforcement Center  
425 Grove Street  
St. Paul, MN 55101

U.S. Trustee Office  
1015 U.S. Courthouse  
300 South 4<sup>th</sup> Street  
Minneapolis, MN 55415

State of Minnesota  
Department of Manpower Services  
390 North Robert Street  
St. Paul, MN 55101

Ian Traquair Ball  
12 South Sixth Street  
Suite 326  
Minneapolis, MN 55402

US Attorney  
600 US Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415

Yvonn Lerro  
1397 Marion  
St. Paul, MN 55117

US Bank  
PO Box 20005  
Owensboro KY 42304

MN Department of Revenue  
Bankruptcy Section  
PO Box 64447  
St. Paul, MN 55164

US Bank  
PO Box 5229  
Cincinnati OH 45201-5229

Wells Fargo Bank  
CO Attention LLC  
PO Box 210000  
Stockton CA 95269

I declare, under penalty of perjury, that the foregoing is true and correct.

Dated: 10 August 2004.

/e/ Angela K. Morrow  
Angela K. Morrow