

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)
)
JON EARL SLOUGH and) CASE NO. 04-34028 HCD
JOCELYNE DIANA SLOUGH,) CHAPTER 13
)
DEBTORS.)

ORDER

At South Bend, Indiana, on April 7, 2005.

The court has determined that a clerical mistake was made in the record of this case. Pursuant to Federal Rule of Civil Procedure 60(a), made applicable in bankruptcy cases pursuant to Federal Rule of Bankruptcy Procedure 9024, the court now corrects its own mistake sua sponte. *See American Trucking Ass'ns. v. Frisco Transp. Co.*, 358 U.S. 133, 145, 79 S. Ct. 170, 177, 3 L.Ed.2d 172 (1958) (“It is axiomatic that courts have the power and the duty to correct judgments which contain clerical errors or judgments which have issued due to inadvertence or mistake.”).

The court is now aware that, through an oversight, the clerk’s office failed to add to the mailing matrix the creditors listed in the debtors’ Amendment to List of Creditors & Verification, filed August 19, 2004. The court has rectified this mistake by adding the creditors to the matrix and by notifying them. *See* R. 43, 45.

The result of that mistake remains before the court, however. Because of the omission of those entities from the matrix, 28 creditors did not receive notice of the debtors’ Chapter 13 Plan and did not have opportunity to object to it at the hearing on confirmation. *See* 11 U.S.C. § 1324; Fed. R. Bankr. P. 2002(b). The debtors included those creditors in their Plan and intended that the creditors review it and file their objections, if any, to it before the court confirmed the Plan. However, on December 2, 2004, the court confirmed the debtors’ Plan without the unnoticed creditors’ consideration of it. As a result, the court finds, the record does not reflect the intention of the parties or the court.

Rule 60(a) “authorizes the court to undo the effect of the clerical mistake.” *American Precision Vibrator Co. v. National Air Vibrator Co. (In re American Precision Vibrator Co.)*, 863 F.2d 428, 428 (5th Cir. 1989); *cf. Wesco Prods. Co. v. Alloy Automotive Co.*, 880 F.2d 981, 984 n.4 (7th Cir. 1989) (finding no conflict with 5th Circuit’s holding in *American Precision Vibrator Co.*). The direct consequence of the clerical mistake was the court’s confirmation of the debtors’ chapter 13 Plan before the creditors additionally listed by the debtors had been given notice of the Plan. The Bankruptcy Code provides that a confirmed plan binds the debtors and each creditor, but only after all parties in interest had received notice of the plan and had been given the opportunity to object to confirmation. *See* 11 U.S.C. §§ 1324, 1327(a). Because the court’s confirmation order necessarily resulted from the clerical error of the clerk’s office, the court considers whether relief from the court’s order of confirmation is appropriate to undo the effect of that error. *See Miller v. Farmers Home Admin. (In re Miller)*, 16 F.3d 240, (8th Cir. 1994) (affirming bankruptcy court’s equitable determination to set aside plan confirmation order based on lack of notice).

The court finds that the lack of notice raised due process issues. “An 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 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). Although parties with adequate notice of the bankruptcy proceeding cannot ordinarily attack a confirmed plan, *see In re Harvey*, 213 F.3d 318, 321 (7th Cir. 2000), parties not given notice of the plan and opportunity to object have not been accorded due process “and the dictates of due process trump policy arguments about finality [of confirmation orders].” *In re Hanson*, 397 F.3d 482, 486 (7th Cir. 2005).

In the case before this court, the added creditors were not given notice of the chapter 13 Plan, as required under Rule 2002, and the Plan was confirmed. In *In re Hanson*, the creditor was given notice of the plan but was not served a dischargeability complaint under Rule 7004, and its debt was discharged. In both cases,

the creditors were unable to object before the court ruled. This court found *Hanson* to be instructive. In it, the Seventh Circuit Court of Appeals found that the debtor, who had failed to serve the creditor with a summons and adversary proceeding complaint under Bankruptcy Rule 4007, “effectively denied [the creditor] the opportunity of presenting an objection prior to the adjudication of its rights.” *Id.* The appellate court held that, “where the Bankruptcy Code and Bankruptcy Rules require a heightened degree of notice [under Rule 7004], due process entitles a party to receive such notice before an order binding the party will be afforded preclusive effect.” *Id.* at 487 (quoting *Banks v. Sallie Mae Servicing Corp. (In re Banks)*, 299 F.3d 296, 303 n.4 (4th Cir. 2002)). Courts have held that, when notice is insufficient, due process is violated and the court must not accord finality to its order. *See Banks*, 299 B.R. at 302-03; *see also Piedmont Trust Bank v. Linkous (In re Linkous)*, 990 F.2d 160, 162-63 (4th Cir. 1993) (holding that the violation of the creditor’s due process rights, due to inadequate notice, was a sufficient ground for vacating the confirmation order with respect to that creditor); *Ruehle v. Educational Credit Mgmt. Corp. (In re Ruehle)*, 307 B.R. 28, 37 (6th Cir. B.A.P. 2004) (affirming bankruptcy court’s decision to vacate its order confirming debtor’s plan because creditor was denied due process by lack of proper notice); *In re Rideout*, 86 B.R. 523, 529-30 (Bankr. N.D. Ohio 1988) (finding that the absence of notice to creditors rendered the order confirming chapter 13 plan void as violative of the Fifth Amendment, providing ground for vacation of the order under § 105(a)).

In this case, the court finds, notice was completely lacking to 28 creditors who, through a clerical error in the clerk’s office, were not added to the mailing matrix. As a result, it determines that the Order Confirming Chapter 13 Plan was entered in violation of those creditors’ due process rights. Those creditors cannot be bound by the terms of that chapter 13 Plan. Following *Hanson*, this court thus finds that the confirmation order is not entitled to preclusive effect. *See Hanson*, 397 F.3d at 486 (recognizing “the strong policy favoring finality of confirmation orders” but holding that “the dictates of due process trump policy arguments about finality”). Accordingly, using its inherent power to correct its own mistakes under 11 U.S.C. § 105(a) and Federal Rule of

Civil Procedure 60(a), which is made applicable in bankruptcy proceedings under Federal Rule of Bankruptcy Procedure 9024, the court now vacates its December 2, 2004 Order Confirming Chapter 13 Plan.

Having set aside the Order Confirming Chapter 13 Plan, the court orders and gives notice that:

1. The § 341 meeting of creditors is reset for May 18, 2005, at 1:00 p.m., E.S.T., at One Michiana Square, 5th Floor, 100 East Wayne Street, South Bend, Indiana 46601.
2. The last day for filing claims for creditors other than governmental units is August 16, 2005.
3. The clerk's office is directed forthwith to serve a copy of this order on all creditors and parties in interest.
4. The clerk's office is directed to reschedule hearing on confirmation of debtors' chapter 13 plan by separate order and notice.

The court further notifies the creditors that, as a result of the filing of the petition, certain acts and proceedings against the debtors and their property are stayed as provided in 11 U.S.C. § 362(a).

The trustee of the estate is Debra L. Miller, Esq.

SO ORDERED.



HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT