

UNITED STATES BANKRUPTCY COURT  
For the Southern District of Iowa

In the Matter of :  
CENTRAL STEEL TUBE COMPANY, : Case No. 83-856-D H  
Debtor. : Chapter 11

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KENNETH E. WEAVER, TREASURER OF :  
CLINTON COUNTY, IOWA; JAMES :  
VINING, SHELDON RITTMER, and : Adv. No. 87-0213  
KENNETH RUGGEBERG, CLINTON :  
COUNTY BOARD OF SUPERVISORS, :  
Plaintiffs and, :  
Counterclaim :  
Defendants, :

v. :

CENTRAL STEEL TUBE COMPANY, :  
Defendant, :

and :

KAL & CO., a Michigan :  
Co-Partnership, :  
Defendant and :  
Counterclaim, :  
Plaintiff. :

:

ORDER--MOTIONS FOR SUMMARY JUDGMENT

On September 7, 1988, a telephonic hearing was held on various matters including Defendant Kal & Co.'s motion for summary judgment and Plaintiffs' counter motion for summary judgment. The following attorneys appeared on behalf of their respective clients: Mark D. Walz for Defendat Kal & Co.

(hereinafter "KAL") and Carlton G. Salmons for Plaintiffs. At the conclusion of said hearing, the Court took the matter under advisement upon a briefing deadline. Proposed rulings and orders were timely filed and the Court considers the the matter fully submitted.

This is a core proceeding pursuant to 28 U.S.C. §157(b)(2). The Court, upon review of the pleadings, arguments of counsel and proposed rulings and orders submitted, now enters its findings and conclusions pursuant to F.R. Bankr. P. 7052.

#### **FINDINGS OF FACTS**

1. On June 14, 1983, Central Steel Tube Company (hereinafter "Central Steel") filed a Chapter 11 petition.

2. Clinton County was a scheduled creditor in Central Steel's Chapter 11 proceeding and received notice of proceedings including the bar date for filing proofs of claims and the confirmation hearing.

3. On January 25, 1985, Kenneth E. Weaver, Treasurer of Clinton County, Iowa, filed a proof of claim for \$453,874.21 in delinquent property taxes due by Central Steel. On April 26, 1985, Weaver filed a second proof of claim for \$462,396.73.

4. On May 13, 1985, Central Steel filed an objection to Clinton County's claims.

5. On November 14, 1985, Central Steel filed a second

amended disclosure statement and second amended plan of reorganization (hereinafter "Plan").

6. On November 5, 1985, the Court held a confirmation hearing on the Plan. Donald Neiman appeared on behalf of Clinton County and the Clinton County Treasurer.

7. Central Steel's objection to Clinton County's claims was settled by the parties, through their respective counsel, by the stipulation on the record at the confirmation hearing of the treatment said claims would receive under the Plan.

8. The parties agreed to the allowance of Clinton County's pre-petition tax claim in the amount of \$418,570.00 payable as follows:

One-sixth of that amount will be payable on the effective date and the balance will be payable in annual installments together with interest thereon at the rate of 11 per cent and will be paid annually commencing the first anniversary of the effective date.

9. The parties agreed to the allowance of Clinton County's post-petition, pre-confirmation tax claim in the amount of \$131,000.00 payable as follows:

\$18,895.00 payable on the effective date. The balance will be payable in 12 equal installments without interest, the first installment to commence then January 1, 1986.

10. The settlement made at the confirmation hearing was approved by the Plaintiffs or their predecessors on the Clinton County Board of Supervisors.

11. Clinton County did not file any objection to Central

Steel's Plan.

12. On November 27, 1985, the Court entered an Order confirming Central Steel's Plan which incorporated the stipulated settlements of Clinton County's claims.

13. The Order of Confirmation provided in part that:  
The Debtors be and hereby are, discharged  
and released from any and all debts which  
arose before the date of confirmation of  
the Plans...

and

[T]hat all property assets, and effects of  
the Debtors, as debtors-in-possession, be  
and hereby are revested in the Debtor, free  
and clear of all liens, claims, and  
interests of creditors and of equity  
security holders, except to the extent  
liens exist in favor of J. L. International  
as contemplated by the Central Plan....

14. In Central Steel's amended disclosure statement,  
second amended disclosure statement and Plan, as confirmed on  
November 27, 1985, Clinton County's claims are treated as tax  
priority claims, not as secured claims. No provision is made  
for the retention of a lien to secure the payment of Clinton  
County's claims in either the Plan or the confirmation order.

15. The alleged tax liens which are the subject of this  
action accrued pre-confirmation.

16. Clinton County did not appeal the Order confirming  
Central Steel's Plan.

17. Central Steel's second amended disclosure statement  
and Plan provided for Central Steel's reorganization and  
emergence from Chapter 11 as a viable business entity rather  
than a liquidating corporation.

18. Pursuant to the terms of its confirmed plan, Central Steel made the following post-confirmation payments to Clinton County:

	<u>Date</u>	<u>Amount</u>
a.	1/7/86	\$88,656.66 (\$18,895 & \$69,761.66 which is 1/6 of \$418,570)
b.	1/28/86	\$ 9,390.91 (1/12 of \$131,000 less \$18,895)
c.	2/24/86	\$ 9,390.91 (1/12 of \$131,000 less \$18,895)

19. After making the above three payments, Central Steel went into default and remains in default on its obligations under its confirmed Plan.

20. Manufacturers National Bank of Detroit, the Royal Bank of Canada, and Bank Hapoalim made a post-confirmation loan to Central Steel secured by all of its assets, including its real property. KAL is a Michigan co-partnership formed to act as a nominee for Manufacturers National Bank of Detroit.

21. KAL, acting as nominee for Manufacturers Bank of Detroit and as agent for the three banks and the second mortgagee, J. L. International, was the recipient of a conveyance in lieu of foreclosure of certain real property in Clinton County, Iowa, from Central Steel on or about March 13, 1987, by warranty deed.

22. On October 15, 1987, Plaintiffs commenced this adversary proceeding and requested the Court to declare and

order that: 1) Central Steel is in violation of its Plan; 2) Central Steel's Plan be amended or revised to exclude the claims of these Plaintiffs; 3) Central Steel's property was released from the jurisdiction of this Court and thereby subject to the laws of the State of Iowa, including any and all liens, penalties and interests for delinquent property taxes; and 4) Central Steel's Plan is null and void.

23. On January 28, 1988, KAL filed an answer, affirmative defenses and counterclaim stating that: 1) Clinton County's alleged claims and liens are barred by the November 27, 1985, confirmation order under the doctrine of res judicata and pursuant to Bankruptcy Code §1141; 2) Clinton County lacks standing to request a modification of the confirmed plan under §1127; 3) Clinton County is barred from seeking revocation of the confirmation order by the period of limitations set forth in §1144; and 4) requesting this Court to dismiss Clinton County's complaint and enter a declaratory judgment that Clinton County's claims against Central Steel are not a lien on the property conveyed by Clinton County to KAL.

#### DISCUSSION

The issues in this case concern the effect of the November 27, 1985, confirmation order on the continued validity of Clinton County's statutory tax lien upon property which was part of the estate of Central Steel. KAL argues that under §1141(c) and the doctrine of res judicata, the confirmation order divested Clinton

County of its tax lien, and that Clinton County cannot modify or revoke confirmation of Central Steel's Plan. Clinton County, on the other hand, argues the confirmed plan cannot by itself divest it of its lien on Central Steel's property and, alternatively, that such divestment violates the Fifth Amendment takings clause and rights to due process. Before addressing these issues, the Court must first determine whether summary judgment is appropriate in this case.

A. Summary Judgment

Bankruptcy Rule 7056 provides that Federal Rule of Civil Procedure 56, which governs motions for summary judgment, applies in bankruptcy adversary proceedings. The Eighth Circuit Court of Appeals has set forth the following standard:

Summary judgment is appropriate only when the moving party satisfies its burden of showing the absence of a genuine issue as to any material fact and that it is entitled a judgment as a matter of law. In reviewing a motion for summary judgment, the court must view the facts in the light most favorable to the opposing party and must give that party the benefit of all reasonable inferences to be drawn from the facts. This court often has noted that summary judgment is "an extreme and treacherous remedy" and should not be entered "unless the movant has established its right to a judgment with clarity as to leave no room for controversy and unless the other party is not entitled to recover under any discernable circumstances."

Foster v. Johns-Manville Sales Corp., 787 F.2d 390, 391-92 (8th Cir. 1986) (citations omitted).

The purpose of summary judgment is to enable a party to obtain judgment without the unnecessary delay and expense of trial where there is no genuine issue of material fact present. Anderson v.



Viking Pump, 545 F.2d 1127, 1129 (8th Cir. 1979); Lyons v. Bd. of Educ. of Charleston, 523 F.2d 346, 347 (8th Cir. 1975); Fed. R. Civ. P. 56. Once a motion for summary judgment has been made and properly supported, the party opposing summary judgment may not rest upon the mere allegations or denials of his pleadings but its response, by affidavits or otherwise, must set forth specific facts showing there is a genuine issue for trial. Burst v. Adolph Coors Co., 650 F.2d 930, 932 (8th Cir. 1981); Sec. Nat'l Bank v. Belleville Livestock Comm'n Co., 619 F.2d 840, 848 (10th Cir. 1980). Where a moving party establishes the absence of any genuine issue of material fact and the opposing party submits no evidence in rebuttal, summary judgment is justified. Stovall v. City of St. Louis, 614 F.2d 619, 621 (8th Cir. 1980); Willman Poultry Co. v. Morton-Norwich Products, Inc., 520 F.2d 289, 293 (8th Cir. 1975).

In the case at bar, both parties contend there is no genuine issue of material fact present and that each is entitled to a judgment as a matter of law. Upon review of the facts, the Court agrees the dispute is purely legal. As a result, the Court concludes that following a discussion of the issues, one of the parties will be entitled to summary judgment.

B. Effect of Confirmation Order on Continued Validity of Liens-§1141(c) and Res Judicata

Bankruptcy Code §1141 addresses the effect of confirmation and provides in relevant part that:

- (a) [T]he provisions of a confirmed plan bind the debtor [and all creditors]....
- (b) Except as otherwise provided in the plan or in the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.
- (c) Except as otherwise provided in the plan or in the order confirming the plan, after confirmation of the plan, the property dealt with by the plan is free and clear of all claims and interests of creditors....

11 U.S.C. §1141 (emphasis added). Under §1141(c), the term "interests" subsumes the term "lien" and therefore upon confirmation, unless otherwise provided, property vests in the reorganized debtor free and clear of the creditor's lien. In re Arctic Enterprises, 68 B.R. 71, 79 (D.Minn. 1986) (citations omitted); see In re American Properties, Inc., 30 B.R. 239, 246 (Bankr. D. Kan. 1983).

Following confirmation of a Chapter 11 plan, a creditor's lien rights are only those granted in the confirmed plan. Matter of Gross, Case No. 84-794-W H, slip op at 6 (Bankr. S.D. Iowa filed May 27, 1988) (citing Arctic Enterprises, 68 B.R. at 79). As a result, a creditor no longer can enforce its pre-Chapter 11 confirmation lien rights but instead can only enforce its lien rights granted in the plan. American Properties, 30 B.R. at 246 (citations omitted).

In the case at bar, Plaintiffs filed proofs of claim and Central Steel objected to the allowance of those claims. At the confirmation hearing, the objection to claims was settled by Central Steel and Plaintiffs, through their respective counsel, by the stipulation on the record regarding the treatment such claims would receive under

Central Steel's plan. Pre-petition taxes were allowed in the amount of \$418,570.00 and payable in equal installments, together with interest at the rate of 11%, over six years. Post-petition, pre-confirmation taxes were allowed in the amount of \$131,000.00 payable \$18,895.00 on the Plan's effective date and the balance payable in twelve equal monthly installments without interest. The stipulation between Central Steel and Plaintiffs was incorporated into Central Steel's Plan, and said plan was confirmed by the Court's Order of November 27, 1985. Neither the Plan nor the confirmation order provided that Plaintiffs would retain a lien on Central Steel's property for payment of either of the two allowed claims. Plaintiffs did not file an objection to Central Steel's Plan nor did they appeal the confirmation order. Applying the above authority to these facts, the Court concludes that pursuant to §1141(c), the November 27, 1985, confirmation order divested Clinton County of its tax lien on Central Steel's property.

Related to the §1141(c) binding effect of a confirmed plan is the doctrine of *res judicata*. A confirmation order is a final judgment and therefore appealable. Absent an appeal, all issues which were or could have been raised at a confirmation hearing are barred by the doctrine of *res judicata*. Republic Supply Co. v. Shoaf, 815 F.2d 1046, 1053 (5th Cir. 1987); see Lovell v. Mixon, 719 F.2d 1373, 1376 (8th Cir. 1983) (citing Federated Dep't Stores v. Moitie, 452 U.S. 394 (1981)). The elements necessary for the application of *res judicata* are as follows:

The parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final judgment of a court of competent jurisdiction, there must have been a final judgment on the merits and the same cause of action must be involved in both cases.

Republic Supply, 815 F.2d at 1051.

Two courts have specifically addressed the *res judicata* effect of a confirmation order on a creditor's pre-confirmation lien rights.

In American Properties, supra, the Saline County Treasurer, a creditor, failed to file a claim or file an objection to the proposed reorganization plan before confirmation of the plan. The court noted the provisions of §1141 and stated:

After confirmation of a Chapter 11 plan, a creditor's lien rights are only those granted in the confirmed plan. A creditor no longer can enforce its pre-confirmation lien rights; a creditor must seek to enforce its lien rights granted in the plan, rather than its pre-chapter 11 lien rights.

Id. at 246. The court continued:

A confirmed plan is binding on all parties "and must be enforced as written." "[A]ll questions which could have been raised pertaining to such plan are *res judicata*."

Id. (emphasis added) (citations omitted).

The court found that the Board of the County Treasurer had failed to object to confirmation and held that since the plan had been confirmed the Board was bound by the terms of the confirmed plan. Id. at 246-47. The court ruled that the Board:

[I]s barred under the confirmed plan from enforcing its pre-confirmation tax lien. The only remaining rights of the Board are those rights granted under the terms of the confirmed plan....

Id. at 247.

The court in In re Penn-Dixie Industries, Inc., 32 B.R. 173 (Bankr. S.D.N.Y. 1983) similarly held that a lien creditor is precluded from enforcing, post-confirmation, its pre-confirmation lien rights. At the time of filing under Chapter 11 by the Debtor, Penn-Dixie, Polk County, Iowa, and Madison County, Iowa, had real property tax liens upon certain parcels of real property belonging to Debtor. Id. at 174. Nine months later, on January 21, 1981, Penn Dixie entered into an asset purchase agreement with Martin Marietta to sell said real property free and clear of all liens and encumbrances. Id. On February 27, 1981, the court ordered that Penn-Dixie was authorized to sell these assets free and clear of liens and encumbrances and provided that the liens would attach to the proceeds of the sale. Id.

On February 19, 1982, Penn-Dixie filed an application and proposed order to satisfy certain tax claims including the Counties' tax claims over a six-year period. Id. In accordance with §1129(a)(9)(C) notice was provided to the Counties but no objection to nor appeal of the entry of the March 1, 1982, order on the application was made. Id. On March 4, 1982, Penn-Dixie's amended plan of reorganization was confirmed. Id. Paragraph G of the

confirmed plan provided that Penn-Dixie make deferred cash payments on account of tax claims over a six-year period. Id.

The Counties, sometime after confirmation, noticed the tax sale of the real property. Id. The then owner, Martin Marrieta, commenced a proceeding to enjoin the tax sale and to declare that the Counties' tax liens had attached solely to the proceeds of the sale of the property. Id. On June 21, 1983, a permanent injunction against the sale of the property by the Counties was entered. Id. at 175.

The Counties thereafter filed a complaint seeking reformation of the confirmation order. Id. In connection with its application for the order of confirmation, Penn-Dixie had filed a schedule of secured claims which claims were to be paid from the sale escrow account. Id. The Counties were not named in the schedule. The court noted that the Counties had not objected to, nor appealed from, the order allowing the deferred tax payments scheme or the order confirming the Penn-Dixie plan although the Counties received copies of the confirmation order with the schedule.

The Counties sought revision of the provision in the confirmation order which relegated payment of Penn-Dixie's tax obligation to them over a six-year period instead of in a lump sum, arguing that, as lien creditors, they did not qualify for deferred payment under §1129(a)(9)(C). Id. The court admitted that the payment scheme formulated impacted upon the Counties' rights a lien creditors to receive full payment on confirmation or earlier.

Id. The court concluded, however, that such a revision of the confirmed plan was barred by the doctrines of *res judicata* and estoppel. Id.

The court stated:

It is clear that the counties herein had ample opportunity to assert the issues presently before this Court....The issues raised herein could have been raised by motion at any time during the reorganization case. Moreover, no appeal was taken from any of the final orders of this Court nor was an objection to confirmation ever made. To allow the Counties to go forward with their motion now, more than one year after confirmation, would defeat the time-honored doctrine of *res judicata*. Parties must not be subject to endless relitigation of issues already decided in the forum that provided the opportunity for a full and complete airing of the issues.

Id. at 177 (emphasis added). The court further stated:

Moreover, Penn-Dixie relied upon and took action based upon the informed but inactive posture of the counties. It would now inure to Continental's detriment should the tax order be modified as requested by the counties. This is also true of all the other interested parties within this reorganization proceeding. Commitments were made, money changed hands and property was transferred. These actions cannot be reversed. To do so would clearly prejudice Continental and the other interested parties as to the reorganization.

Id. at 179.

The Court finds the reasoning in American Properties and Penn-Dixie Industries persuasive. Further, the elements necessary for the application of *res judicata* are clearly present here. Plaintiffs and Central Steel were each parties to the November 27, 1985,

confirmation hearing in the United States Bankruptcy Court for the Southern District of Iowa, a court of competent jurisdiction. The Order confirming Central Steel's Plan is a final judgment on the merits. Republic Supply, 815 F.2d at 1053. Plaintiffs' treatment under the Plan, although not actually litigated by reason of the stipulated settlement, is a final judgment on the merits. Id. Finally, the same cause of action--treatment of Plaintiffs' lien--is involved in both cases. As a result, the Court concludes Central Steel's confirmation order is *res judicata* on the issues Plaintiffs raise in this complaint.

Plaintiffs' arguments to the contrary of the above conclusions under §1141(c) and *res judicata* are unpersuasive but merit discussion. Plaintiffs first argue their pre-petition and post-petition, pre-confirmation tax claims were not properly classified by Central Steel and thus were not provided for under the Plan. Plaintiffs contend their claim for post-petition, pre-confirmation taxes was entitled to administrative expense priority under §503(b)(1)(B)(i), whereas their claim for pre-petition taxes was allegedly a secured claim. Plaintiffs contend further that such claim for post-petition, pre-confirmation taxes was entitled to first priority and payment pursuant to §507(a)(1), and is defined as an administrative claim in Central Steel's Plan pursuant to Article I, ¶1.1. Plaintiffs then assert that the post-petition, pre-confirmation taxes also became perfected tax liens against Central Steel's property by operation of Iowa Code §§445.28 and 445.29.



The Court need not engage in an analysis of whether or not Plaintiffs' claims were properly treated under the Bankruptcy Code in Central Steel's Plan. The record clearly establishes that the contest over allowance of Plaintiffs' claims was settled by stipulation between the parties at the confirmation hearing. The terms of the stipulation were incorporated into Central Steel's Plan as confirmed on November 27, 1985. The confirmation order now binds Plaintiffs to the agreed-upon terms and is *res judicata* for all questions related to the amount and terms of payment for Plaintiffs' claims. Arctic Enterprises, 68 B.R. at 79; Penn-Dixie Industries, 32 B.R. at 177; American Properties, 30 B.R. at 246. While Central Steel's Plan may have improperly classified Plaintiffs' claims, and perhaps should not have been confirmed over a timely objection on that ground, Plaintiffs are nonetheless bound by the Plan's terms, even if the Plan provides them with less than they are otherwise legally entitled. In re St. Louis Freight Lines, Inc., 45 B.R. 546, 552 (Bankr. E.D. Mich. 1984); see also Virgin Islands Bureau of Internal Revenue v. St. Croix Hotel Corp., 60 B.R. 412 (Bankr. D.V.I. 1982). The Court is constrained to merely interpret and enforce the terms of Central Steel's confirmed Plan, and the terms clearly indicate Plaintiffs stipulated to the very treatment they now argue against.

Plaintiffs also argue their tax liens remain valid post-confirmation because Central Steel did not initiate any lien avoidance proceeding under 11 U.S.C. §506(d). To support this

contention, Plaintiffs primarily rely upon In re Simmons, 765 F.2d 547 (5th Cir. 1985). The Court is not persuaded that the Simmons rule applies in Chapter 11 cases and particularly in the case at bar.

In Simmons, the debtor's Chapter 13 plan listed the creditor's claim as unsecured. Id. at 549. The creditor filed a proof of claim in which it asserted it was secured and claimed a lien upon the homestead of the debtor. Id. The creditor did not file an objection to the plan and the plan was confirmed. Id. Approximately a year after entry of the confirmation order, the debtor attempted to sell the real property and it became apparent that the creditor still claimed a lien upon the property. Id. at 550. The debtor then filed an adversary action seeking an order cancelling the lien. Id. The Bankruptcy Court refused to cancel the creditor's lien and further held that the lien, which was perfected pre-petition, was not affected by confirmation of the Chapter 13 plan. Id.

The Simmons Court engaged in a detailed analysis of the Code provisions concerning the allowance of claims and the effect of a Chapter 13 confirmation order on the validity of the creditor's lien. Id. at 551-52. The Court noted that pursuant to §502(b), in the absence of an objection by a party in interest, a proof of claim is deemed allowed. Id. at 553. The court also noted that the Debtor's plan did not constitute an objection to the creditor's proof of claim. Id. Therefore, the Court found that the creditor's claim should have been deemed an allowed secured claim for purposes of confirmation. Id. at 554. In addressing the effect of the

confirmation of the debtor's plan on the creditor's lien, the Simmons Court found that it would be inappropriate to allow a Chapter 13 debtor to join the issue of the allowability of a secured claim by treating the claim unfavorably in a Chapter 13 plan. Id. at 556. Therefore, in a Chapter 13 case, the Court held that the debtor must bring a separate objection to the proof of a secured claim under Bankruptcy Code §§502 and 506 in order to alter the treatment of a claim as filed. Id. at 559.

The Simmons case is readily distinguishable from the case at bar. First and foremost, Simmons was a Chapter 13 case, whereas Central Steel is a Chapter 11 case. Unlike Simmons, Central Steel objected to the allowance of Plaintiffs' claims, and the objection was resolved by stipulation between the parties to the treatment the claims would receive. Also, unlike the creditor in Simmons, Plaintiffs herein filed a proof of claim as an unsecured claim.

The Simmons rule has been adopted by various courts, but always in the context of a Chapter 13 case. See In re Mikrut, 79 B.R. 404 (Bankr. W.D. Wis. 1987); In re Stein, 63 B.R. 140 (Bankr. D. Neb. 1985). In a Chapter 11 case, however, a secured creditor may not ignore the bankruptcy proceeding and retain its lien. See Arctic Enterprises, supra; In re Pennsylvania Iron & Coal Co., Inc., 56 B.R. 492 (Bankr. S.D. Ohio 1985); Penn-Dixie Industries, supra; American Properties, supra. The different treatment of the Simmons question in Chapter 11 cases as opposed to Chapter 13 cases reflects the difference in the applicable statutes and the nature of those

reorganization schemes.

In contrast to a case under Chapter 13, Chapter 11 expressly allows the discharge of a pre-confirmation secured claim, notwithstanding the allowance of a claim under §502. Section 1141(d)(1)(A)(ii) so provides as follows:

Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan discharges the debtor from any debt that arose before the date of such confirmation...whether or not...such claim is allowed under section 502....

11 U.S.C. §1141(d)(1)(a)(ii). Confirmation of the Chapter 11 plan wholly substitutes the obligation set forth in the plan for the pre-confirmation debt which has been discharged. Lander & Warfield, A Review and Analysis of Selected Post-Confirmation Activities in Chapter 11 Reorganizations, 62 Am. Bankr. L. J. 203, 204 (1988). The cancellation of the pre-confirmation debt effects an automatic cancellation of the lien which secured such debt. Id. at 205.

The provisions of a Chapter 11 plan are a substitute for the pre-confirmation obligations of the debtor. In re Ernst, 45 B.R. 700, 702 (Bankr. D. Minn. 1985). The binding contractual nature of the plan is well established. Id.; St. Louis Freight Lines, 45 B.R. at 551. Every party in interest is bound by the plan's terms, even if the plan provides that party with less than it is otherwise legally entitled. St. Louis Freight Lines, 45 B.R. at 552. The plan is in the nature of a novation. It is a composition, and satisfaction of the substituted promise under the plan is not

necessary to bind the creditor to the accord. Matter of Stratton Group, Ltd., 12 B.R. 471, 474 (Bankr.S.D. N.Y. 1981).

The confirmed Chapter 11 plan is in sharp contrast to the Chapter 13 plan which is in essence an accord and satisfaction agreement. In re Vanasen, 81 B.R. 59, 61 (D. Ore. 1987). Upon default, post-confirmation, the creditors of the Chapter 13 debtor can enforce the pre-confirmation obligations. Id. Until the plan payments are completed, the debtor is not discharged of such pre-confirmation indebtedness, nor are such pre-confirmation liens satisfied. Id.; 11 U.S.C. §1328.

The court in In re Chattanooga Wholesale Antiques, Inc., 78 B.R. 162, 164 (Bankr. E.D. Tenn. 1987), recognized and discussed the differences between Chapter 11 and Chapter 13 cases and the relevances of those differences to the issue of whether the plan can change the status of an allowed secured claim or whether a separate objection is required. The trustee in that case, relying on Simmons, asserted that a Chapter 11 plan could not change the status of the creditor's allowed claim. Id. The court rejected his argument, stating, "the trustee is right as to the general rule in Chapter 13 cases, but they are distinguishable from Chapter 11 cases." Id. The court reasoned that whereas in a Chapter 13 the creditor controls the initial status of an allowed claim by filing the proof, it is the debtor in a Chapter 11 who initially determines the status of a claim by scheduling the claim. Id.

Practical considerations also play a part in not requiring the

Chapter 11 debtor-in-possession to file a lien avoidance action under §§502 and 506 to avoid a secured claim. The Arctic Enterprises court, in considering the impact of the application of the "Simmons rule" in Chapter 11 cases, stated, "Chapter 11 reorganization would be greatly complicated, for debtors would be required to challenge the claims of each and every lienholder prior to submitting a plan of reorganization, in order that the extent of its liabilities be known." Arctic Enterprises, 68 B.R. at 80 (emphasis in original).

The difference in whether a separate objection to a secured claim is required in Chapter 11 case is also based, in part, upon the difference in the function of the business reorganization available under Chapter 11. It is only by reorganization under Chapter 11 that the Bankruptcy Code grants a corporation a discharge. 11 U.S.C. §1141(d). The corporation's ability to attract new equity depends in large part upon the certainty provided by the provisions of Chapter 11 which make the plan a binding contract of the corporation's continuing obligations and liens. In re A. H. Robins Co., Inc., 59 B.R. 99, 103-04 (Bankr. E.D. Va. 1986). If the confirmation order of the reorganized corporate debtor was not given *res judicata* effect, this certainty, in terms of identification of the indebtedness of the reorganized debtor, would be greatly eroded and the effectiveness of Chapter 11 would be inhibited. These concerns are not present in a Chapter 13 "wage earner" case.

The Court will not apply the rationale of the Simmons case to this Chapter 11 case. Even if the Court were to extend the Simmons

rule, i.e., requiring separate objections to each secured claim, the Chapter 11 cases, it would not alter its decision in this case because, as previously noted, Central Steel did file an objection to the allowance of Plaintiff's claims.

C. Constitutional Issues--Fifth Amendment Due Process and Takings Concerns

Plaintiffs urge the Court to resort to its general equitable authority to reinstate the lien lost by confirmation under Central Steel's Plan or risk violating the Fifth Amendment's procedural due process and takings clause. The Court's equitable authority, while broad, is not without limits. A fundamental principle of equity jurisprudence is that equity follows the law. In re Shoreline Concrete Co., Inc., 831 F.2d 903, 905 (9th Cir. 1987). The Court is no more entitled to ignore the law than any other court of equity. Id. The Court's equitable powers can only be exercised within the confines of the Bankruptcy Code. Northwest Bank Worthington v. Ahlers, 108 S.Ct. 968-69 (1988). The Court must effectuate Plaintiffs' decision to have accepted Central Steel's Plan. Id. at 969. As a result, the Court is not willing to ignore the confines of the Bankruptcy Code or the time-honored principle of *res judicata* under the guise of equity.

The effectuation of Plaintiffs' decision to accept Central Steel's Plan, which included the stipulated treatment of their claims without preserving any pre-confirmation lien, does not run afoul of the Fifth Amendment. The due process clause of the Fifth Amendment

provides in relevant part as follows:

No person shall...be deprived of life, liberty  
or property without due process of law....

U.S.C.A. Const. Amend. V, §3 (1988). A fundamental and elementary requirement of due process is that a person be given notice and an opportunity to be heard before being deprived of a property interest.

In the case at bar, Clinton County, by its agents the Plaintiffs, cannot assert a due process violation because it is not a "person" within the meaning of the Fifth Amendment. City of Sault Ste. Marie, Mich. v. Andrus, 532 F.Supp. 157, 167 (D.D.C. 1980); see also South Carolina v. Katzenbach, 383 U.S. 301, 323 (1966) (holding states are not "persons"). Clinton County, like the City of Sault Ste. Marie, is a subdivision of the state and lacks the independence from the state which qualifies a private corporation for status as a "person" under the Fifth Amendment. Brown v. Davis County, 196 Iowa 1341, 1349, 195 N.W. 363, 366 (1923); see Iowa Code §331.301 (1987). Clinton County "is not a corporation in the ordinary sense. It is a political body or subdivision." Brown, 196 Iowa at 1349, 195 N.W. at 366. Counties are "subordinate governmental instrumentalities created by the state to assist in carrying out state governmental functions." Mandicino v. Kelly, 158 N.W.2d 754, 758 (Iowa 1968). As a result, Plaintiffs' due process challenge to the operation of §1141(c) must fail based on their lack of standing.

Assuming arguendo Plaintiffs had standing as a "person" for purposes of the Fifth Amendment, the requirement of an opportunity



for a hearing prior to the alleged deprivation of rights was fully satisfied in the instant case. Plaintiffs were provided with notice of the filing of Central Steel's Chapter 11 case; notice of the bar date for filing claims in said case; notice of Central Steel's objection to Plaintiffs' proofs of claim; notice of the hearing on said objection; and notice of the hearing on the confirmation of the Plan. Moreover, Plaintiffs appeared and participated, through their attorney, in the confirmation hearing at which time the objection to claims was resolved by stipulation between the parties. Plaintiffs had the opportunity for a meaningful hearing prior to the alleged deprivation of property. They waived that opportunity by failing to file an objection to the confirmation of the Plan or otherwise litigating their claim in the contested matter initiated by Central Steel's objection to the proof of claims. Having failed to do so, Plaintiffs are estopped from litigating the questions that could have been raised, and the application of *res judicata* is not violative of their due process rights.

Plaintiffs' assertion that the application of the doctrine of *res judicata* and §1141 to discharge their lien would constitute a taking without just compensation is also unpersuasive. The "takings" clause of the Fifth Amendment provides in pertinent part:

Nor shall private property be taken for public use without just compensation....

U.S.C.A. Const. Amend. V. (1988). The case law relied upon by Plaintiffs involved the retroactive application of legislation to

property interests in existence prior to the enactment of that legislation. United States v. Sec. Indus. Bank, 459 U.S. 70 (1982); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935). Plaintiffs, however, challenge the prospective application of congressional legislation. Section 1141(c) was in existence prior to the creation of the lien which allegedly secured payments of the taxes claimed by Plaintiffs. Plaintiffs had constructive notice as to what was necessary to preserve their lien. This advance notice has been repeatedly relied upon in upholding the constitutionality of bankruptcy laws. Matter of Bevill, Bresler & Schulman, Inc., 83 B.R. 880, 897 (D.N.J. 1988) (citations omitted); see In re Ashe, 712 F.2d 864, 868 (3rd Cir. 1983). It was Plaintiffs' failure to object to the confirmation of Central Steel's Plan that resulted in the extinguishment of their lien. As noted by the court in In re Bevel, Bresler & Schulman, Inc.:

Parties must bear the burden of their own erroneous interpretations of United States law.

It would be a perversion of the takings clause to hold that it protects parties against their own mistakes, and prohibits avoidance under the bankruptcy laws whenever a recipient of a transfer incorrectly believed that the transfer was not voidable.

Id. at 897. The takings clause of the Fifth Amendment does not protect Plaintiffs from their own mistakes in sleeping on their rights. Plaintiffs waived their lien for repayment of the taxes owing Clinton County as well as their claim that extinguishment of the lien violates the takings clause of the Fifth Amendment. See

Hoffman v. H.U.D., 519 F.2d 1160, 1165 (5th Cir. 1975)(plaintiffs waived their right to be heard by failure to respond to delinquency notices); Sittenfeld v. Tobriner, 459 F.2d 1137, 1139 (D.C. Cir. 1972) (plaintiffs waived right to "just compensation" after hearing by virtue of their settlement with the government).

The application of §1141(c) to Plaintiffs' claims does not constitute a taking for the governments' own benefit. The application of §1141(c) involves economic regulation, i.e., the adjustment of the benefits and burdens of economic life to promote the common good. See Penn-Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978). Congress must have the freedom to adjust benefits and burdens when it acts pursuant to its bankruptcy powers.

The Fifth Amendment takings clause does not require Congress to be the guarantor of defaulting debtors. In re Gifford, 688 F.2d 447, 460 (7th Cir. 1982).

D. Modification of Plan and Revocation of Confirmation Order

In the "Prayer for Relief" section of the complaint, Plaintiffs ask the Court to amend or revise Central Steel's confirmed Plan to exclude its claims or, alternatively, to declare the Plan null and void. Upon review of the relevant Code sections and case law, the Court concludes neither modification of Central Steel's Plan nor revocation of the confirmation order are available to Plaintiff.

Concerning modification, §1127(b) grants standing to seek modification only to the plan proponent or the reorganized debtor. 11 U.S.C. §1127(b). Since Plaintiffs are neither, they lack standing

to seek modification of Central Steel's Plan. In addition, the provision for revocation of a confirmation order is similarly unavailable to Plaintiffs. 11 U.S.C. §1144. Section 1144 and Bankruptcy Rules 9024 and 9006(b)(2) impose a strict 180-day limitation period following entry of the confirmation order upon a party seeking revocation. In Re Emmer Bros. Co., 52 B.R. 385, 391 (D. Minn. 1985) ("the six months statute of limitations provided for in section 1144...has been strictly enforced even in those cases where the alleged fraud of the debtor is not discovered until after the limitations period."). Plaintiffs' complaint was filed October 15, 1987, well outside the 180-day period following the November 27, 1985 confirmation order. Therefore, Plaintiffs are barred by the statute of limitations in §1144 from seeking revocation of the confirmation order.

#### CONCLUSION AND ORDER

WHEREFORE, based on the foregoing analysis, the Court concludes KAL is entitled to summary judgment as there are no genuine issues as to any material fact and judgment can be entered in favor of KAL as a matter of law. Plaintiffs are not entitled to modification of the Plan, to revoke confirmation of the Plan, or to relitigate the issue of their entitlement to a lien upon the property of Central Steel. Plaintiffs are barred by the operation of 11 U.S.C. §1141 and the doctrine of *res judicata* from asserting a lien on the property of Central Steel transferred to KAL.

IT IS ACCORDINGLY ORDERED that KAL's motion for summary judgment

is sustained.

IT IS FURTHER ORDERED that Plaintiffs' counter-motion for summary judgment is denied.

IT IS FURTHER ORDERED that Plaintiffs' complaint is dismissed with prejudice and that Plaintiffs' claims are hereby declared not to constitute a lien on the real property of Central Steel conveyed to KAL.

IT IS FURTHER ORDERED that all pending matters under advisement in this complaint are rendered moot by this Order.

Dated this 1st day of May, 1989.

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RUSSELL J. HILL  
U.S. BANKRUPTCY JUDGE