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5 IN THE UNITED STATES BANKRUPTCY COURT
6 FOR THE DISTRICT OF ARIZONA
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8
9 In re RYSE CONSTRUCTION, INC.,

10
11
12 Debtor.

Chapter 11

Case No. 11-26778-SSC

(Not for Publication- Electronic Docketing
ONLY)

MEMORANDUM DECISION

13 I. INTRODUCTION

14 This matter comes to the Court on a motion by the Internal Revenue Service to
15 vacate the order confirming Ryse Construction’s plan of reorganization pursuant to Rule
16 60(b)(4) and (b)(6). On November 7, 2012, Ryse Construction filed “Debtor’s Response to the
17 Motion Seeking Revocation of the Order Confirming the Plan of Reorganization.”¹ The Court
18 held a hearing on the matter on January 9, 2013 and took the matter under advisement at that
19 time.
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21 II. FACTUAL BACKGROUND

22 **1.** Although the Debtor styles the IRS motion as a “Motion Seeking Revocation of the
23 Order Confirming the Plan of Reorganization,” the IRS does not seek to revoke the order
24 pursuant to 11 U.S.C. § 1144. Instead, the IRS is arguing that the Plan is void—that it did not
25 have force or effect to begin with—because of the deficiencies in notice as discussed in this
26 decision. Courts have recognized this important procedural distinction. In re Rideout, 86 B.R.
27 523, 530 (Bankr. N.D. Ohio 1988); *see also* In re Downtown Inv. Club III, 89 B.R. 59, 62-63
(B.A.P. 9th Cir. 1988)(voiding a modification to a chapter 11 plan for lack of sufficient notice).
Thus, the Court does not need to address the Debtor’s arguments relating to revocation of the
discharge under § 1144.

1 This bankruptcy proceeding was initiated on September 20, 2011 when Ryse
2 Construction, Inc. (“Ryse”) filed its chapter 11 petition. On September 28, 2011, the Bankruptcy
3 Noticing Center sent out notice of the Meeting of Creditors, using the recipient names and
4 addresses submitted by the Debtor. The attached list to the notice included the “Internal Revenue
5 Service, P.O. Box 9941, Stop 5300, Ogden, Utah 84409.” On October 18, 2011, Ryse filed its
6 schedules, listing the Internal Revenue Service as a creditor holding an unsecured priority claim
7 in an unknown amount. The mailing address on the Schedules simply states “Ogden, UT.” The
8 November 9, 2011 certificate of notice from the Bankruptcy Noticing Center provides a mailing
9 address for the IRS in Philadelphia, Pennsylvania, and also notes that the address filed with the
10 court was Ogden, Utah. Despite this notation, Debtor apparently continued to use the Utah
11 address throughout the bankruptcy proceeding. The IRS did not make any appearances at
12 hearings or file any motions, but did file a proof of claim on October 7, 2011 and an amended
13 proof of claim on September 20, 2012. The address listed by the IRS on its proof of claim (and
14 later the amended proof of claim) as the proper place for notices to be sent was “Internal
15 Revenue Service, P.O. Box 7346, Philadelphia, PA 19101-7346,” the same address substituted
16 by the Bankruptcy Noticing Center.

17 Ryse filed its original disclosure statement and plan of reorganization December
18 20, 2011. The IRS contends that this plan provided for payment in full of the IRS claim. While it
19 is true that the original plan proposed to pay tax claims in full, the related disclosure statement
20 specifies that the IRS priority claim would not be paid because the IRS proof of claim was
21 "internally inconsistent and factually inaccurate" and "barred by the applicable statute of
22 limitations." Regardless, the Court held a hearing on the disclosure statement on May 15, 2012,
23 and after counsel for Ryse discussed possible resolution of various issues, the Court ordered
24 Ryse to file a new disclosure statement by June 15, 2012. The hearing on the amended disclosure
25 statement was continued to July 12, 2012.

26 Ryse filed a “First Amended Disclosure Statement” and “First Amended Chapter
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1 2. Whether the IRS made a timely objection to the confirmation order.

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3 IV. DISCUSSION

4 Federal Rule of Civil Procedure 60(b), made applicable to bankruptcy
5 proceedings through Federal Rule of Bankruptcy Procedure 9024, provides that on motion
6 within one year of the entry of the judgment, and just terms, a court may relieve a party from a
7 final judgment or order. However, this power is not to be exercised lightly. Relief from a
8 judgment “applies only in the rare instance where a judgment is premised either on a certain type
9 of jurisdictional error or on a violation of due process that deprives a party of notice or the
10 opportunity to be heard. United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 130 S.Ct.
11 1367, 1377, 176 L. Ed. 2d 158 (2010). Bankruptcy courts, as courts of equity, have power to
12 reconsider, modify, or vacate their previous orders only so long as no intervening rights have
13 become vested in reliance on such orders. In re Int'l Fibercom, Inc., 503 F.3d 933, 940 (9th Cir.
14 2007).

15 **1. Whether the IRS did not receive notice such that it was deprived of due
16 process**

17 A court may exercise its power to relieve parties of a judgment when a judgment
18 is void or “any other reason that justifies relief.” Fed. R. Civ. P. 60(b)(2), (4) (2013). A judgment
19 is void if a court lacks jurisdiction due to defective notice. In re Center Wholesale, Inc., 759 F.2d
20 1440, 1448 (9th Cir. 1985); In re Levoy, 182 B.R. 827, 832 (B.AP. 9th Cir. 1995). Personal
21 jurisdiction is lacking in these instances because the deficient notice deprives the party in interest
22 of its constitutional due process rights. Center Wholesale, 759 F.2d at 1448. There is, however,
23 a distinction between violations of the due process clause and mere violations of statutory notice
24 requirements. Id. A violation of statutory notice requirements is not necessarily a violation of
25 due process. In re Manchester Center, 123 B.R. 378, 381 (Bankr. C.D. Cal. 1991)

26 Therefore, the party seeking relief under Rule 60(b)(4) must not only identify a
27 technical inadequacy in the notice provided, but must also establish the denial of right to due
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1 process. Center Wholesale, 759 F.2d at 1448, Manchester Center, 124 B.R. at 381. Failing to
2 comport with statutory notice requirements under the Bankruptcy Code and the Federal Rules of
3 Bankruptcy Procedure may or may not deprive the party of its constitutional due process rights.
4 *Compare* Manchester Center, 123 B.R. 378 (holding that, despite non-compliance with
5 Bankruptcy Rule 4001(d), the creditor was afforded notice sufficiently comporting with the
6 requirements of due process) *with* In re Villar, 317 B.R. 88 (B.A.P. 9 th Cir. 2004)(recognizing
7 that due process may be satisfied in some instances when a party does not comply with the
8 statutory notice requirements, but ultimately finding that no evidence existed to show that the
9 objecting party received actual notice satisfying due process requirements in that instance). The
10 Court must first consider whether the Debtor in this case complied with the relevant statutory
11 notice requirements, and, if not, must then determine whether the Debtor's failure to comply
12 deprived the IRS of its due process rights.

13 **A. Whether Ryse Construction Complied with the Relevant Statutory Notice**
14 **Requirements**

15 The IRS contends that it did not receive notice pursuant to Fed. R. Bankr. P.
16 2002(b) (requiring 28 days notice to parties in interest for filing objections and the hearing to
17 consider confirmation of a chapter 11 plan), 2002(g)(1)(A) (requiring notice be sent to the
18 address designated by a creditor in its proof of claim), and 2002(j) (requiring notice to the IRS in
19 a chapter 11 case be sent to the address set out in the register maintained under Rule 5003(e)).

20 From the very beginning of the case, Ryse sent notices to an IRS address in
21 Ogden, Utah. It apparently continued to do so throughout the case, despite the fact that (1) the
22 IRS proof of claim designated the Philadelphia address as the proper address where notices
23 should be sent and (2) the Clerk of the Court for the U.S. Bankruptcy Court for the District of
24 Arizona has properly listed the same Philadelphia address pursuant to Rule 5003(e). Thus, Ryse
25 did not comply with the statutory notice requirements by failing to mail notices, including those
26 relating to the Amended Plan of Reorganization and related hearings, to the Philadelphia
27 address.

1 disclosure statement and received the disclosure statement, because it argued that it had received
2 the Plan and believed that it would be paid in full. The Disclosure Statement, however, does
3 provide that the Debtor had a specific objection to the IRS proof of claim. Regardless, the IRS'
4 acknowledgment of treatment under the original plan is important for two reasons. First, it
5 indicates that the IRS had notice of that plan, even though the Debtor had apparently continued
6 to use the Utah address. Second, the notice of the original disclosure statement and plan placed
7 the IRS on notice that its claim might be disputed. The IRS did not respond to the original
8 disclosure statement or plan in any way. It also did not object to service at the Utah address for
9 the following nine months.

10 The IRS had actual notice of its treatment under the Plan and yet failed to timely
11 object. Ryse filed a certificate of mailing that states that the amended disclosure statement,
12 amended plan, ballots for voting on the plan, and notice to the creditors were mailed to the
13 creditors listed on the master mailing list. The IRS concedes that it received copies of the
14 amended plan, amended disclosure statement, and notice of the confirmation hearing at the Utah
15 address, but argues that these documents had to be rerouted and, as a result, were not received by
16 the IRS bankruptcy specialist overseeing the case until after the confirmation hearing. One could
17 argue that the IRS received actual notice of this case, especially considering that the IRS
18 accepted notice from the Debtor at the Utah address without objection throughout the case, based
19 on this admission alone.

20 The Court, however, has found additional evidence that the IRS had actual notice
21 prior to the Court entering the confirmation order. The Debtor contends that the bankruptcy
22 specialist for the IRS assigned to this case called Ryse's counsel on September 13, 2012—two
23 days after the confirmation hearing— and spoke with a paralegal who informed the bankruptcy
24 specialist that the plan had been conditionally confirmed and that an order would be submitted
25 shortly. Ryse also contends that counsel for the Debtor spoke with the same IRS employee on
26 September 18, 2012, and that Debtor's counsel informed her that the confirmation order had

1 been submitted, that the order would probably be signed shortly, and that the Debtor would make
2 its first payment to the IRS on October 15, 2012. Both the Debtor's counsel and the paralegal
3 filed affidavits to this effect, and the IRS has not contradicted the assertions. The Court does note
4 that the September 11, 2012 Minute Entry incorrectly states that the IRS was to execute the
5 confirmation order,³ agreeing to its treatment in the Order. This may have led to some confusion
6 on the part of the IRS, but the IRS filed no affidavit stating that the bankruptcy specialist who
7 spoke with the Debtor's counsel actually relied on the Minute Entry and believed that the
8 confirmation order could not be signed until the IRS signed.⁴ Furthermore, the mistake does not
9 relate to the deprivation of notice such that it would offend the IRS' due process rights and void
10 a judgment under Rule 60(b)(4). If anything, it could be argued that this constitutes a mistake
11 that would justify relief from the order pursuant to Rule 60(b)(1), but this has not been pled or
12 argued, and the IRS has not placed sufficient facts on the record to justify a sua sponte finding
13 by this Court.

14 **2. Whether the IRS made a timely objection to the confirmation order.**

15 The Court must also consider whether, notwithstanding any purported
16 deficiencies in notice, it may void the confirmation order in light of the subsequent
17 developments in the case, such as payments made to creditors. Bankruptcy courts, as courts of
18 equity, have power to reconsider, modify, or vacate their previous orders only so long as no
19 intervening rights have become vested in reliance on such orders. In re Int'l Fibercom, Inc., 503
20 F.3d 933, 940 (9th Cir. 2007). Once a plan of reorganization is confirmed, res judicata binds all
21 parties as to all questions that could have been raised pertaining to the plan. Trulis v. Barton, 107

22 _____
23 **3.** In fact, it was ordered that the Arizona Department of Revenue execute the
24 confirmation order as to its treatment.

25 **4.** At the January 9, 2013 hearing on the IRS motion to vacate, counsel for the IRS stated
26 that it was the bankruptcy specialist's understanding—at the time she received notice of the
27 proposed confirmation order—that the IRS had to sign off on the order. Still, the IRS has not filed
an affidavit to this effect, and the bankruptcy specialist was not in the court to confirm or deny
the statements made.

1 the Court continued the disclosure statement hearing to July 12, 2012. The amended disclosure
2 statement and plan, filed on June 15, 2012, propose to pay the IRS a priority claim of
3 \$214,543.64 rather than nothing at all. After the July 12 hearing, Ryse made some minor changes
4 to the amended disclosure statement unrelated to the IRS claim, which was then approved on
5 July 26, 2012. The plan was conditionally confirmed at the September 11, 2012 hearing, and
6 confirmed on September 21, 2012 by court order.

7 In this four-month period between the initial hearing on the disclosure statement
8 and the order confirming the plan on September 21, the IRS took no action other than filing an
9 amended proof of claim on September 20, 2012. The Court carefully analyzed the issues of plan
10 confirmation with the Debtor at the September 11 hearing. Unfortunately, the IRS was not
11 present to dispute the factual assertions by Ryse that the IRS priority claim amounted to
12 \$214,543.64, significantly less than that claimed by the IRS in its proof of claim. Nor did the IRS
13 file any objections after the September 11 hearing when counsel for the Debtor informed the IRS
14 bankruptcy specialist that an order approving the plan had been submitted and would be
15 approved shortly. Instead, the IRS waited until October 19, 2012—more than a month after the
16 confirmation hearing and nearly a month after the Court entered the order confirming the plan—to
17 file its motion to vacate the confirmation order. Since the time of confirmation, Ryse has
18 commenced its plan and made plan payments to many creditors. Significantly, Ryse made
19 substantial payments to the IRS predicated on the latter’s priority claim, and the IRS accepted
20 these payments. The IRS now demands that the Court reconsider the order confirming the plan.

21 The IRS received actual notice of the Debtor’s treatment of the IRS priority claim
22 long before the September 11 hearing. Moreover, it received actual notice of the September 11
23 hearing by receiving the notice at the Utah address. Therefore, the IRS is barred by res judicata
24 from re-litigating the confirmation issues addressed by the Court at the September 11 hearing.
25 This includes the factual determination of the amount of the IRS priority claim. Moreover, the
26 IRS received actual notice by at least September 18, before the Court entered its order

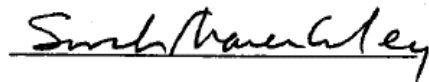
1 confirming the plan on September 24, and yet the IRS failed to object for more than a month
2 after the time that it received such actual notice. Considering its dilatoriness in the preceding
3 months since the filing of the original plan and disclosure statement as well as failure to timely
4 object prior to the confirmation order, the IRS “slept on its rights” and forfeited its rights to
5 object to deficiencies in service. Finally, bankruptcy courts, as courts of equity, are limited in
6 approving motions to reconsider when intervening rights have become vested in reliance on
7 those orders. In re Int'l Fibercom, Inc., 503 F.3d 933, 940 (9th Cir. 2007). Voiding the
8 confirmation order at this point would interfere with the vested rights of the creditors, including
9 the IRS, who have received payments under the plan.

10 V. CONCLUSION

11 Based upon the foregoing, the Court concludes that the IRS Motion to Vacate
12 must be denied.

13 The Debtor is directed to lodge an order consistent with the Court’s Memorandum
14 Decision.

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17 DATED this 29th day of March, 2013.

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21 Honorable Sarah Sharer Curley
22 United States Bankruptcy Judge
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