

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Modesto, California

March 5, 2019 at 10:00 a.m.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. Matters resolved without oral argument:

Unless otherwise stated, the court will prepare a civil minute order on each matter listed. If the moving party wants a more specific order, it should submit a proposed amended order to the court. In the event a party wishes to submit such an Order it needs to be titled 'Amended Civil Minute Order.'

If the moving party has received a response or is aware of any reason, such as a settlement, that a response may not have been filed, the moving party must contact Nancy Williams, the Courtroom Deputy, at (916) 930-4580 at least one hour prior to the scheduled hearing.

2. The court will not continue any short cause evidentiary hearings scheduled below.

3. If a matter is denied or overruled without prejudice, the moving party may file a new motion or objection to claim with a new docket control number. The moving party may not simply re-notice the original motion.

4. If no disposition is set forth below, the matter will be heard as scheduled.

1.	18-90801-D-13	RUBEN/KARINA FLORES	MOTION TO CONFIRM PLAN
	NSV-1		1-28-19 [52]

Final ruling:

This is the debtors' motion to confirm an amended chapter 13 plan. The motion will be denied for two reasons. First, the moving parties failed to serve the Internal Revenue Service, listed on their Schedule E/F as being owed \$14,852 in priority taxes, at all. Thus, they failed to serve all creditors, as required by Fed. R. Bankr. P. 2002(a)(9). The problem arose because the debtors filed their schedules 13 days after they had filed their petition and master address list, and when they filed the schedules, they failed to file an amended master address list. As a result, when the debtors utilized the PACER matrix for the service of this motion, it did not include the IRS. Counsel should note also that the address used on Schedule E/F for the IRS is not its address on the Roster of Governmental Agencies, and thus, the debtors have not complied with LBR 2002-1(c).

Second, the notice of hearing does not contain the language required by LBR 9014-1(d)(3)(B)(ii). The notice contains similar language but the rule does not call for the specified language or similar language; it calls for the specified

language.

As a result of these service and notice defects, the motion will be denied by minute order. No appearance is necessary.

2.	18-90406-D-13	RICHARD/SABRINA SIDA	MOTION TO CONFIRM PLAN
	JBA-2		1-26-19 [49]

3.	18-90411-D-13	ROGER/STORMIE SCHUMACHER	MOTION TO AVOID LIEN OF BALBOA
	DEF-7		CAPITAL CORPORATION
			2-1-19 [112]

Tentative ruling:

This is the debtors' second motion to avoid in part a judicial lien held by Balboa Capital Corporation ("Balboa") against the real property that is the debtors' residence. The lien secures a debt for \$59,151. Balboa has filed opposition. For the following reasons, the motion will be denied.

Some background is in order. This case was filed on June 1, 2018. On their initial Schedule A/B, filed June 29, 2018, the debtors valued the property at \$400,000. Four and a half months later, on November 13, 2018, the debtors filed their first motion to avoid the lien and an amended Schedule A/B on which they valued the property at \$367,234.85. The only evidence in support of the motion was the joint debtor's declaration, in which she stated her opinion that the value of the property was \$367,234.85. Neither the amended schedule nor the moving papers provided any information as to how the debtors had arrived at that very precise figure.

The debtors set the hearing on their first motion two and a half months out, on January 29, 2019. On December 20, 2018, Balboa had an appraisal performed by an appraiser local to Valley Springs, where the property is located. The appraisal was retrospective to the petition date, June 1, 2018, and was an exterior appraisal only, although it was a formal appraisal that included three comparable sales with adjustments. In the appraiser's opinion, the fair market value of the property as of the petition date was \$485,000. The court gave greater weight to the appraiser's professional opinion than the debtors' lay opinion and, based on the formula set forth in § 522(f)(2)(A) of the Code, concluded the debtors had failed to satisfy their burden of proof.

On January 25, 2019, four days before the hearing date, the debtors had an appraisal of their own performed, also by a local appraiser, also retrospective to June 1, 2018. The debtors' appraiser concluded the fair market value of the property on that date was \$405,000. On February 1, 2019, the debtors filed this motion, together with an amended Schedule A/B listing the value of the property as \$405,000.¹

The court includes this background to demonstrate that the debtors' delay in filing the first motion, whether purposeful or not, resulted in both appraisers having to prepare retrospective appraisals. The timing of a motion to avoid a lien is always within the debtor's control, and here, the debtors have made the process more difficult and less reliable. They have also failed to address the question the court raised in its ruling on their first motion - why they valued the property at \$367,234.85 in their first motion and an amended schedule filed four and a half months after their original schedule was filed.

With this second motion, the debtors' appraiser had the opportunity to review and comment on Balboa's appraisal, which was already in the record, but did not. Balboa's appraiser, on the other hand, signed a declaration stating she had reviewed the debtors' appraisal and found the biggest difference between the two to be lot size adjustment and her use of a different comparable - one in Copperopolis, 18 miles from the debtors' property. She states it is typical in rural areas to use comparables from farther distances, a point also noted in the debtors' appraisal.

Balboa's appraiser used the Copperopolis property because she believes it to be "more like the [debtors'] Property than any of the comps in either report." Goulden Decl., filed Feb. 19, 2019, ¶ 12.2 The manufactured homes on the two properties are virtually the same square footage and the properties are similar in lot size, have large outbuildings, and appear to be in similar condition.³ The Copperopolis property sold for \$535,000 three and a half months before the debtors' petition date. Balboa's appraiser also drew comparisons between her appraisal and the debtors' appraisal of a comparable sale both appraisers used, finding the biggest differences to be in the lot size and outbuilding adjustments. As to the outbuildings, Balboa's appraiser states she made no adjustment despite the apparently smaller sizes of the two outbuildings as compared with the debtors' large shop. The debtors' appraiser made a \$20,000 downward adjustment without addressing the respective sizes of the outbuildings.

The biggest difference between the two appraisals is in lot size adjustments. On this issue, the debtors' appraiser states that, "[b]ased on 3 recent sales of similar and proximate unimproved sites, a \$/acre of \$6,000.00 was calculated for sites between 10-50 acres." Debtors' Ex. D, p. 9 of 37. However, she did not use that figure for her comparables. Instead, she says, without further explanation, "[t]he comparables are adjusted at \$3,000.00/acre based on utility of excess land and a residential use in the immediate area." Balboa's appraiser, on the other hand (before the debtors' appraisal was done), researched 17 land sales in the area within the past two years to arrive at an approximate sales price of \$65,678 for 5-acre parcels, \$118,333 for 10-acre parcels, and \$151,250 for 20-acre parcels. Based on these figures, Balboa's appraiser made adjustments of \$10,000 per excess acre between 5 and 10 acres and \$5,000 per excess acre between 10 and 20 acres. If these figures had been used for the comparables in the debtors' appraisal, instead of the \$3,000 figure their appraiser used, her comparable prices would have been significantly higher.⁴

The court is inclined to give greater weight to Balboa's appraisal; however, even splitting the difference between the two appraisals, there is still sufficient equity in the property over and above the amount of the consensual liens and the debtors' exemption to support the full amount of Balboa's lien.⁵ Thus, the court concludes the value of the debtors' property as of the petition date was at least \$445,000, and at that value, the § 522(f)(2)(A) formula yields the conclusion that Balboa's lien does not impair the debtors' exemption.

Accordingly, the motion will be denied. The court will hear the matter.

- 1 The debtors recognize that even at their valuation, \$405,000, there is equity in the property, over and above the amounts of the consensual liens and the debtors' exemption, sufficient to support Balboa's lien to the extent of \$28,647. Thus, they ask that the lien be avoided to the extent it exceeds that amount.
- 2 In fact, the gross total of the adjustments made to this comparable by Balboa's appraiser is far lower than the total of the adjustments made by either appraiser to any other comparable.
- 3 The debtors' appraiser, having inspected the interior of their property, noted several areas of deferred maintenance and needed repairs. The joint debtor's declaration expands on these but all of her additional comments pertain to items that were readily visible and presumably would have been seen and considered by the appraiser, who nevertheless considered the property to be in average condition for the purpose of her adjustments to comparable sales.
- 4 The debtors' property is 15 acres. The area is zoned rural residential, for single-family residences on a minimum of 5 acres. The court is not suggesting the property could necessarily be subdivided, merely that the debtors' appraiser, without sufficient explanation, failed to assign sufficient value to the size of their lot.
- 5

Amount of lien to be avoided:	\$ 59,151
Sum of all other liens:	\$ 276,353
Amt. of exemption debtor could claim if no liens:	\$ 100,000
 Subtotal	 \$ 435,504
 Scheduled value of Debtor's interest:	 \$ 445,000
Amount Subtotal exceeds value of Debtor's interest:	< \$ 9,496 >

4. 18-90416-D-13 JENNI/NICHOLAS DENT
MLP-1

CONTINUED MOTION TO CONFIRM
PLAN
11-27-18 [32]

5. 18-90416-D-13 JENNI/NICHOLAS DENT CONTINUED MOTION TO DISMISS
RDG-3 CASE
1-8-19 [43]
6. 18-90427-D-13 STEVEN/ELVIRA CISNEROS MOTION TO VALUE COLLATERAL OF
BSH-5 CENTRAL STATE CREDIT UNION
2-5-19 [75]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. As such the court will grant the motion and, for purposes of this motion only, sets the creditor's secured claim in the amount set forth in the motion. Moving party is to submit an order which provides that the creditor's secured claim is in the amount set forth in the motion. No further relief is being afforded. No appearance is necessary.

7. 18-90929-D-13 BRENDA STREET OBJECTION TO CONFIRMATION OF
CJO-1 PLAN BY CALIBER HOME LOANS,
INC.
1-31-19 [16]
8. 18-90333-D-13 DAVID LAKIN CONTINUED MOTION TO CONFIRM
YG-4 PLAN
12-5-18 [69]

9. 16-91037-D-13 LAVERGNE COWDEN
DCJ-1

OBJECTION TO CLAIM OF STATE
BOARD OF EQUALIZATION, CLAIM
NUMBER 2
1-18-19 [30]

Final ruling:

The matter is resolved without oral argument. The court's record indicates that no timely opposition/response to the objection has been filed and the debtor's objection to Claim No. 2 of the State Board of Equalization is supported by the record. Accordingly, the court will sustain the debtor's objection to Claim No. 2. Moving party is to submit an appropriate order. No appearance is necessary.

10. 18-90837-D-13 DUY/VANNA TRAN
HWW-6

MOTION TO CONFIRM PLAN
1-29-19 [60]

11. 18-90738-D-13 LARRY FOSTER
SLG-2
2005 RESIDENTIAL TRUST 3-2
VS.

MOTION FOR RELIEF FROM
AUTOMATIC STAY
1-30-19 [51]

12. 19-90047-D-13 ARTHUR MACIAS
TOG-1

MOTION TO VALUE COLLATERAL OF
VALLEY FIRST CREDIT UNION
1-26-19 [10]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. As such the court will grant the motion and, for purposes of this motion only, sets the creditor's secured claim in the amount set forth in the motion. Moving party is to submit an order which provides that the creditor's secured claim is in the amount set forth in the motion. No further relief is being afforded. No appearance is necessary.

13. 18-90751-D-13 CHARLOTTE LOCKARD
MCC-20

MOTION TO CONFIRM PLAN
1-15-19 [50]

14. 15-90860-D-13 FRANCINE BOCKMON-ORTIZ
MLA-2

MOTION TO INCUR DEBT
1-30-19 [52]

15. 18-90862-D-13 JACOB KAISER
RS-1

MOTION TO VALUE COLLATERAL OF
WELLS FARGO DEALER SERVICES
2-4-19 [33]

Final ruling:

This is the debtor's motion to value collateral of Wells Fargo Dealer Services ("Dealer Services"), allegedly a 2013 Dodge Grand Caravan. The motion will be denied because (1) it fails to name the correct lienholder, which, according to its proof of claim, is Wells Fargo Bank (the "Bank"); (2) the moving party failed to serve the Bank in strict compliance with Fed. R. Bankr. P. 7004(h), as required by Fed. R. Bankr. P. 9014(b); and (3) the motion is not accompanied by evidence establishing its factual allegations and demonstrating that the moving party is entitled to the relief requested, as required by LBR 9014-1(d) (3) (D).

The moving party served the moving papers (1) by mail addressed to Wells Fargo Bank NA d/b/a Wells Fargo Auto at a post office box address; and (2) by mail addressed to CSC - Lawyers Incorporating Service, Agent for Service of Process, at a street address in Sacramento. The first method was insufficient because service on an FDIC-insured institution, such as the Bank, must be to the attention of an officer and must be by certified mail (Rule 7004(h)), whereas here, there was no attention line and no indication service was made by certified mail. The second method was insufficient because the California Secretary of State's website shows Dealer Services as a merged out corporation and shows as the most recent filing an Agreement and Plan of Merger pursuant to which Dealer Services was merged into the Bank, which is an FDIC-insured institution. As indicated above, the proof of claim for the claim secured by the vehicle was filed by the Bank. Accordingly, the motion should have been served on the Bank, by certified mail to the attention of an

officer (and only an officer, not an agent for service of process), as required by Rule 7004(h). Service on a former agent for service of process for Dealer Services was insufficient.

The second problem is that the only evidence supporting the debtor's valuation of the vehicle is his own testimony to the effect that he "estimate[d] the value . . . from first-hand knowledge and experience . . . and from reviewing the Kelly Blue Book Value . . .," whereas the moving papers, including the declaration, refer to a 2013 Dodge Grand Caravan but according to the Retail Installment Sale Contract attached to the Bank's proof of claim, the vehicle is a model year 2014. Thus, the debtor's valuation testimony is insufficient to satisfy his burden of proof.

As a result of these service and evidentiary defects, the motion will be denied by minute order. No appearance is necessary.

16. 18-90564-D-13 TIM CORONADO
JBA-1

OBJECTION TO CLAIM OF INTERNAL
REVENUE SERVICE, CLAIM NUMBER 3
1-26-19 [56]

Final ruling:

This is the debtor's objection to the claim of the Internal Revenue Service ("IRS"), Claim No. 3 on the court's claims register. The objection will be overruled for the following reasons. First, the notice of hearing cites LBR 9014-1(f)(1) and purports to require the filing of written opposition at least 14 days prior to the hearing date, but the moving party gave only 38 days' notice of the hearing. The applicable rule is LBR 3007-1, under which, if written opposition is to be required, at least 44 days' notice must be given. LBR 3007-1(b)(1). Second, the moving party served the office of the United States Attorney in Sacramento whereas for Modesto cases, such as this one, service on the United States Attorney in Fresno is required. See LBR 2002-1(a) and (c). Third, the address used for the United States Department of Justice in Washington, DC was Box 683, Ben Washington Station rather than Box 683, Ben Franklin Station.

As a result of these service and notice defects, the objection will be overruled by minute order. No appearance is necessary.

17. 18-90564-D-13 TIM CORONADO
JBA-1

MOTION TO CONFIRM PLAN
1-26-19 [62]

Final ruling:

This is the debtor's motion to confirm an amended chapter 13 plan. The motion will be denied for the two reasons identified by the trustee. First, the moving party has utilized the same docket control number, JBA-001, for at least one prior motion. (The second time identified by the trustee is the moving party's objection to the claim of the IRS, also on this calendar, in which the moving party used the number JBA-001 for the objection but JBA-002 for the notice of hearing and supporting documents.) This duplicate use of the same docket control number is confusing and defeats the purpose behind the use of docket control numbers. In addition, the proof of service does not include a docket control number at all, as required by the court's local rules, which further complicates the matter.

Second, feasibility of the plan is contingent on the outcome of the debtor's objection to the IRS's claim, also on this calendar, whereas the court is overruling the objection by final ruling for service and notice defects.

For the reasons stated, the motion will be denied by minute order. No appearance is necessary.

- | | | | |
|-----|---------------|------------------------------|---|
| 18. | 18-90964-D-13 | GREGORY/CONNIE SASS
MSK-1 | OBJECTION TO CONFIRMATION OF
PLAN BY FREEDOM HOME MORTGAGE
CORPORATION
2-5-19 [30] |
| 19. | 15-90987-D-13 | ALAN/BARBARA PAYNE
JAD-1 | MOTION TO MODIFY PLAN
1-29-19 [33] |
| 20. | 18-90806-D-13 | JULIANA PIERI-BELL
RDG-1 | CONTINUED OBJECTION TO
CONFIRMATION OF PLAN BY RUSSELL
GREER
12-21-18 [16] |

21.	18-90929-D-13 RDG-1	BRENDA STREET	OBJECTION TO CONFIRMATION OF PLAN BY RUSSELL D. GREER 2-11-19 [19]
22.	15-90331-D-13 MSN-1	JEFFREY/HOPE DUFFY	MOTION TO INCUR DEBT 2-15-19 [29]
23.	18-90939-D-13 RDG-1	DARRIN/KIMBERLY HEISTER	OBJECTION TO CONFIRMATION OF PLAN BY RUSSELL D. GREER 2-11-19 [21]
24.	18-90947-D-13 RDG-1	RONALD HOLLIS	OBJECTION TO CONFIRMATION OF PLAN BY RUSSELL D. GREER 2-11-19 [17]

25. 18-90772-D-13 LUIS/RAMONA LOPEZ
RDG-1

OBJECTION TO CONFIRMATION OF
PLAN BY RUSSELL D GREER
2-11-19 [37]

26. 18-90876-D-13 LEONARDO/MELISSA JOSEF
PLG-4

CONTINUED MOTION TO VALUE
COLLATERAL OF ALLY BANK
1-25-19 [37]

Final ruling:

This matter was resolved by a stipulated order entered on February 27, 2019. As such, the matter is removed from calendar. No appearance is necessary.

27. 17-90979-D-13 RORY/SHAMEEMA STEVENS
RKW-11

MOTION TO INCUR DEBT
2-18-19 [149]

Tentative ruling:

This is the debtors' motion to incur debt. The notice of hearing states the motion is brought pursuant to LBR 9014-1(f)(2) and that no written opposition needs to be filed. It goes on to state, however, that "Opposition shall be presented at the hearing on this matter and shall be accompanied by evidence establishing factual allegations." The attempt to require that opposition to a motion brought under subsection (f)(2) of the rule include evidence is improper - no such requirement is provided for in the local rule, and the language might well be viewed as inhibiting interested parties from appearing.

The court will hear the matter.

28. 17-90979-D-13 RORY/SHAMEEMA STEVENS
RKW-12

MOTION TO INCUR DEBT
2-18-19 [154]

Tentative ruling:

This is the debtors' motion to incur debt. The notice of hearing states the motion is brought pursuant to LBR 9014-1(f)(2) and that no written opposition needs to be filed. It goes on to state, however, that "Opposition shall be presented at the hearing on this matter and shall be accompanied by evidence establishing factual allegations." The attempt to require that opposition to a motion brought under subsection (f)(2) of the rule include evidence is improper - no such requirement is provided for in the local rule, and the language might well be viewed as inhibiting interested parties from appearing.

The court will hear the matter.