

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

October 21, 2014 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.	10-53107 -D-13	JOSE/NELLY FERNANDEZ	OBJECTION TO CLAIM OF JPMORGAN
	TOG-11		CHASE BANK, N.A., CLAIM NUMBER
			14-1
			9-17-14 [111]

Final ruling:

This is the debtors' objection to the claim of JPMorgan Chase Bank (the "Bank"), Claim No. 14. The objection will be overruled for the following reasons. First, the notice of hearing lists the debtors by their correct names in the caption, but by completely different names in the text. Second, the moving parties served the objection on the Bank at the address listed on its proof of claim, as required by LBR 3007-1(c), but failed to also serve the Bank at the address listed on the debtors' Schedule F, as required by the same rule. Third, the moving parties gave only 34 days' notice of the hearing rather than 44 days', as required by LBR 3007-1(b)(1) for notices such as this one, which purports to require the filing of written opposition 14 days prior to the hearing date. Fourth, the moving parties served the objection and exhibits, but not the notice of hearing or the supporting declaration.

Finally, the objection is not supported by sufficient evidence to overcome the

presumption of validity afforded the claim by Fed. R. Bankr. P. 3001(f). The proof of claim states the basis of the claim as "deficiency balance on a mortgage." Claim No. 14, filed April 8, 2011, ¶ 2. Attached to the proof of claim is a copy of an Interest-Only Period Adjustable Rate Note identifying the "property address" as 13112 Goldstone St., Lathrop, California. The debtors' objection to the claim indicates the claim was secured by a first mortgage, and that the lender foreclosed on the property in 2009. (This case was filed December 20, 2010.) The objection adds that under California law, a first mortgage holder cannot collect the debt following foreclosure, and notes that the debtors listed the foreclosure where required on their statement of financial affairs. However, although the evidence submitted by the debtors - the declaration of debtor Jose Fernandez - states that he and his wife lost the property at 13112 Goldstone St. to foreclosure in 2009, he does not testify that the Bank's mortgage was in first position. Without admissible evidence that the deed of trust the Bank foreclosed under was in first position, the court has an insufficient basis on which to conclude that the Bank is not entitled to a claim for the deficiency balance.

For the reasons stated, the objection will be overruled by minute order. No appearance is necessary.

2.	<u>14-21913</u> -D-13	ELAINE WOODS	OBJECTION TO CLAIM OF FINANCIAL CENTER CREDIT UNION, CLAIM NUMBER 4 9-4-14 [<u>15</u>]
	JCK-1		

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 objection is supported by the record. Accordingly, the court will sustain the debtor's objection to claim of Financial Center Credit, Claim No. 4 by minute order. No appearance is necessary.

3.	<u>14-26614</u> -D-13	VALERIA LABORDE	OBJECTION TO CONFIRMATION OF PLAN BY DANIEL CARLOS CHIRAMBERRO LARRATEGUI 9-24-14 [<u>30</u>]
	BJF-1		

4.	<u>14-26614</u> -D-13	VALERIA LABORDE	OBJECTION TO CONFIRMATION OF PLAN BY RUSSELL D. GREER 9-19-14 [<u>27</u>]
	RDG-1		

5. [12-39615](#)-D-13 AMETRIUS SIDNEY MOTION TO MODIFY PLAN
TBK-4 9-10-14 [[68](#)]

Final ruling:

The relief requested in the motion is supported by the record and no timely opposition to the motion has been filed. Accordingly, the court will grant the motion by minute order and no appearance is necessary. The moving party is to lodge an order confirming the plan, amended plan, or modification to plan, and shall use the form of order which is attached as Exhibit 2 to General Order 05-03. The order is to be signed by the Chapter 13 trustee approving its form prior to the order being submitted to the court.

6. [13-28721](#)-D-13 VICKIE MURPHY MOTION TO MODIFY PLAN
JCK-2 9-2-14 [[28](#)]

Final ruling:

The relief requested in the motion is supported by the record and no timely opposition to the motion has been filed. Accordingly, the court will grant the motion by minute order and no appearance is necessary. The moving party is to lodge an order confirming the plan, amended plan, or modification to plan, and shall use the form of order which is attached as Exhibit 2 to General Order 05-03. The order is to be signed by the Chapter 13 trustee approving its form prior to the order being submitted to the court.

7. [14-28125](#)-D-13 CYNTHIA BREED CONTINUED OBJECTION TO
PPR-1 CONFIRMATION OF PLAN BY BANK OF
AMERICA, N.A.
8-29-14 [[17](#)]

8. [14-28026](#)-D-13 MIGUEL/MARTHA GOMEZ OBJECTION TO CONFIRMATION OF
MDP-1 PLAN BY CREDITOR CATERPILLAR
FINANCIAL SERVICES CORPORATION
9-24-14 [[32](#)]

9. [14-28026](#)-D-13 MIGUEL/MARTHA GOMEZ OBJECTION TO CONFIRMATION OF
RDG-1 PLAN BY TRUSTEE RUSSELL D.
GREER
9-19-14 [[23](#)]
10. [11-48830](#)-D-13 RENNE DEVINE MOTION TO MODIFY PLAN
TBK-7 9-8-14 [[92](#)]
11. [11-40232](#)-D-13 CHRISTOPHER/IMELDA MOTION TO MODIFY PLAN
GMW-5 ELLENBERGER 9-10-14 [[97](#)]

Tentative ruling:

This is the debtors' motion to confirm a modified chapter 13 plan. The trustee has filed opposition, and the debtors have filed a declaration of their attorney in reply to the opposition. For the following reasons, the motion will be denied.

The debtors' current confirmed plan, as amended by the order confirming it, calls for 60 monthly plan payments of \$2,818.82 each, from which the trustee was to make the debtors' ongoing mortgage payments of \$2,239 per month. The plan called for a 1.5% dividend on general unsecured claims. According to the present motion, the debtors' ongoing mortgage payment was decreased in December 2013 (ten months ago) to \$1,202. The motion states: "Accordingly, the Debtors' plan payments decreased from \$2,818.82 to \$1,667.00 per month." Thus, the debtors unilaterally and without court approval decreased their plan payment by \$1,151 per month. They now propose a plan to increase the \$1,667 plan payment to \$1,850 for the remaining 25 months of their plan, which is a decrease of \$968 per month from the plan payment the debtors made the first 26 months of the plan. They propose this decrease despite substantial increases in both debtors' income and a substantial decrease in

their monthly mortgage payment. They justify this by a budget in which they have increased their living expenses by \$3,031 per month over those they were able to afford when the case was commenced.

After the debtors unilaterally decided to decrease their plan payment to \$1,667, and when they failed to propose a modified plan to address that reduction, the trustee, on April 22, 2014, contacted the debtors' attorney, who agreed the debtors would file a modified plan within three weeks. They did not. The trustee contacted the debtors' attorney again on June 16, 2014, and when no modified plan had been filed by July 7, 2014, the trustee requested copies of the debtors' 2011 through 2013 tax returns and W-2's, as well as pay advices for the first six months of 2014. When he received and reviewed those documents, the trustee discovered that debtor Christopher Ellenberger, who was receiving unemployment benefits when this case was filed, over three years ago, has been employed since 2012. An amended Schedule I filed September 10, 2014 indicates he had been employed for two years as of that date. The debtors failed to report to the trustee that Mr. Ellenberger had gotten a job, although the order confirming their plan required them to immediately notify the trustee of any changes in their employment.

The trustee reports that Mr. Ellenberger's paystubs indicate he makes approximately \$4,870 per month. (The debtors have reported only \$4,300 gross on their amended Schedule I, a discrepancy they will need to explain.) The trustee goes on:

This income far exceeds the \$1,784.00 in monthly unemployment income that Debtor provided for on Schedule I at the inception of the case. Debtors' failure to modify their plan upon Mr. Ellenberger's employment allowed Debtors' to keep \$3,086.00 of dispensable monthly income for the better part of the past two years at the expense of the unsecured creditors. This, coupled with Debtors' failure to timely modify their plan upon the significant reduction in their monthly mortgage payment, afforded Debtors approximately \$4,200.00 in monthly income that was not being paid into the plan for the benefit of Debtors' unsecured creditors.¹

Of the \$3,086 in additional income, a portion undoubtedly went to tax and insurance withholdings. However, a sizeable portion must have remained. According to the debtors' original and amended Schedules I, and assuming the debtors' figure of \$4,300 gross is correct, rather than the figure shown by the debtor's paystubs, \$4,870, Mr. Ellenberger's net income is higher by \$1,414 per month than at the outset of the case. The court notes also that debtor Imelda Ellenberger has had a new job with Ghiradelli Chocolate for two years, which nets her \$712 per month more than she was making at the job she had at the outset of the case. Thus, the debtors have at least \$2,126 per month in net income over what they were making when the case was filed. On top of that, since about December of 2013, the debtors have enjoyed \$1,037 per month in savings on their mortgage payment. These several changes - both debtors' jobs, which they have had for two years, and their mortgage loan modification, which occurred almost a year ago - have afforded the debtors at least \$3,163 per month in extra income (net of tax and insurance deductions) that they have, as a result of their failure to seek to modify their plan, not been paying into the plan.

Although the debtors mentioned the decrease in their mortgage payment in the present motion, they did not mention the increases in their income.² Instead, they focused solely on the increases in their expenses, reported on an amended Schedule J, most of which they attribute to the birth of their baby boy in July of 2013. In

addition to adding \$700 per month in child care costs to their budget, the debtors claim the baby's birth has resulted in increases in their food, clothing, utilities, home maintenance, and personal care expenses. They have provided no specifics except as to the child care expense, and although increases in food, clothing, and medical costs are obvious with a new child, increases in electricity and gas costs, water and sewer bills, telephone, cell phone, Internet, satellite, and cable services, and home maintenance costs are less obvious. The debtors have provided no documentary support for their claim that all those expenses have increased, some of them by significant amounts.

The trustee "concedes that Debtors' new child requires significant increases in Debtors' monthly expenses." Opp. at 2:27-28. However, he "requests that Debtors provide an accounting of the almost \$85,000.00 of undisclosed income that Debtor has failed to pay into their Chapter 13 plan." Id. at 2:28-3:1. Given the size of the increases in their income and the magnitude of the savings on their mortgage payment, together with the fact that the debtors failed to notify the trustee when they got their new jobs and unilaterally decided to lower their plan payment so as to retain for themselves all the savings from their mortgage loan modification, the court agrees an accounting is necessary. In his declaration in reply to the trustee's opposition, the debtors' attorney states that Mr. Ellenberger is willing to provide "a detailed accounting and/or explanation of his income and expenses during th[e] period" since he got his new job. The accounting will need to encompass the increases in Mrs. Ellenberger's income as well, along with proof of their increased expenses since the two of them got new jobs.

In addition, as the trustee points out, the debtors' amended Schedule J includes \$300 per month for property taxes, whereas their earlier amended Schedule J (filed December 22, 2011) included no property taxes. In reply, the debtors' attorney states in his declaration that this expense is not paid as part of their mortgage payment. Aside from that statement being clear hearsay, if the mortgage payment for the past three years has not included a payment toward property taxes, the debtors will need to explain how they have been able to afford to pay those taxes when their amended Schedule J filed December 22, 2011 did not include them.

Finally, the debtors have also added \$355 to their budget for a car payment. They state in their declaration that they had been paying \$355 per month for their Toyota (although that payment did not appear on their original or December 22, 2011 Schedule J), that they have "let this vehicle go," and that they are now paying Mrs. Ellenberger's brother \$355 per month for the use of a 2008 Nissan he purchased. There is no indication that \$355 per month is the amount the brother is paying for the Nissan or that it represents the fair rental value of the vehicle.

For the reasons stated, the court concludes that the debtors have failed to satisfy their burden of demonstrating that the plan has been proposed in good faith, and the motion will be denied. The court will hear the matter.

1 Trustee's Opposition, filed Sept. 29, 2014 ("Opp."), at 2:20-26.

2 The motion states that Mr. Ellenberger was receiving unemployment benefits of \$1,780 per month when the case was filed, and that he is now employed. The motion does not say when he obtained that employment or how much he is making.

12. [14-28732](#)-D-13 ALFREDO GOMEZ AND MARIA MOTION TO VALUE COLLATERAL OF
MCN-1 PENA BANK OF THE WEST
8-29-14 [[8](#)]

13. [13-26034](#)-D-13 GARY/SABRINA SCHWARTZ MOTION TO MODIFY PLAN
TBK-6 9-9-14 [[97](#)]

14. [14-27834](#)-D-13 DORELLE WYATT OBJECTION TO CONFIRMATION OF
RDG-1 PLAN BY RUSSELL D. GREER
9-22-14 [[22](#)]

Final ruling:

Objection withdrawn by moving party. Matter removed from calendar.

15. [13-22336](#)-D-13 ROGER HAVERKAMP MOTION TO MODIFY PLAN
WW-3 9-8-14 [[46](#)]

Final ruling:

The relief requested in the motion is supported by the record and no timely opposition to the motion has been filed. Accordingly, the court will grant the motion by minute order and no appearance is necessary. The moving party is to lodge an order confirming the plan, amended plan, or modification to plan, and shall use the form of order which is attached as Exhibit 2 to General Order 05-03. The order is to be signed by the Chapter 13 trustee approving its form prior to the order being submitted to the court.

16. [14-28039](#)-D-13 MARCO PIEDRA OBJECTION TO CONFIRMATION OF
RDG-2 PLAN BY RUSSELL D. GREER
9-22-14 [[32](#)]

17. [12-33940](#)-D-13 JOHN/EVA PAYAN
JCK-4

MOTION TO MODIFY PLAN
9-2-14 [[45](#)]

Final ruling:

The relief requested in the motion is supported by the record and no timely opposition to the motion has been filed. Accordingly, the court will grant the motion by minute order and no appearance is necessary. The moving party is to lodge an order confirming the plan, amended plan, or modification to plan, and shall use the form of order which is attached as Exhibit 2 to General Order 05-03. The order is to be signed by the Chapter 13 trustee approving its form prior to the order being submitted to the court.

18. [14-24140](#)-D-13 JESUS/AMY SALES
SJS-4

MOTION TO SHORT SELL REAL
PROPERTY
9-15-14 [[50](#)]

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 to short sell real property is supported by the record. As such the court will grant the motion and approve the sale pursuant to § 363(b) of the Bankruptcy Code by minute order. No appearance is necessary.

19. [14-28442](#)-D-13 PAUL MILLER
CAH-1

MOTION TO VALUE COLLATERAL OF
WELLS FARGO BANK, N.A.
9-9-14 [[15](#)]

Final ruling:

The matter is resolved without oral argument. This is the debtor's motion to value the secured claim of Wells Fargo Bank, N.A. at \$0.00, pursuant to § 506(a) of the Bankruptcy Code. The creditor's claim is secured by a junior deed of trust on the debtor's residence and the amount owed on the senior encumbrance exceeds the value of the real property. 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 set the amount of Wells Fargo Bank, N.A.'s secured claim at \$0.00 by minute order. No further relief will be afforded. No appearance is necessary.

20. [14-28442](#)-D-13 PAUL MILLER
CAH-2

MOTION TO AVOID LIEN OF
AMERICAN EXPRESS CENTURION BANK
9-9-14 [[20](#)]

Final ruling:

This is the debtor's motion to avoid a judicial lien held by American Express Centurion Bank (the "Bank"). The motion will be denied because 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). The moving party served the Bank (1) through the attorneys who obtained its abstract of judgment; an (2) at the address of the Bank's headquarters, as listed by the FDIC, but without an attention line. The first method was insufficient because there is no evidence the attorneys who obtained the Bank's abstract of judgment are authorized to accept service of process on the Bank's behalf in bankruptcy contested matters pursuant to Fed. R. Bankr. P. 7004(h) and 9014(b). See In re Villar, 317 B.R. 88, 93 (9th Cir. BAP 2004). The second method was insufficient because service on an FDIC-insured institution such as the Bank must be to the attention of an officer, whereas here, there was no attention line.

As a result of this service defect, the motion will be denied by minute order. No appearance is necessary.

21.	11-47947 -D-13	MARK RUSHING	MOTION TO MODIFY PLAN
	JCK-3		9-12-14 [42]

Final ruling:

The relief requested in the motion is supported by the record and no timely opposition to the motion has been filed. Accordingly, the court will grant the motion by minute order and no appearance is necessary. The moving party is to lodge an order confirming the plan, amended plan, or modification to plan, and shall use the form of order which is attached as Exhibit 2 to General Order 05-03. The order is to be signed by the Chapter 13 trustee approving its form prior to the order being submitted to the court.

22.	12-23550 -D-13	KATHLEEN HARRIS	MOTION TO APPROVE LOAN
	RAS-2		MODIFICATION
			9-5-14 [84]

23.	13-32850 -D-13	FAY/A POLLINO	MOTION TO AVOID LIEN OF CAPITAL
	PGM-2		ONE BANK (USA), N.A.

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. The court finds the judicial lien described in the motion impairs an exemption to which the debtors are entitled. As a result, the court will grant the debtors' motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.

24. [14-21455](#)-D-13 ABRAHAM/SILVIA MAGALLANEZ MOTION TO MODIFY PLAN
JCK-3 9-4-14 [[44](#)]

Final ruling:

The relief requested in the motion is supported by the record and no timely opposition to the motion has been filed. Accordingly, the court will grant the motion by minute order and no appearance is necessary. The moving party is to lodge an order confirming the plan, amended plan, or modification to plan, and shall use the form of order which is attached as Exhibit 2 to General Order 05-03. The order is to be signed by the Chapter 13 trustee approving its form prior to the order being submitted to the court.

25. [11-92260](#)-D-13 MACKKINLEY MARTIN AND MOTION TO MODIFY PLAN
FF-3 MONIQUE GENTRY-MARTIN 9-4-14 [[67](#)]

Final ruling:

The relief requested in the motion is supported by the record and no timely opposition to the motion has been filed. Accordingly, the court will grant the motion by minute order and no appearance is necessary. The moving party is to lodge an order confirming the plan, amended plan, or modification to plan, and shall use the form of order which is attached as Exhibit 2 to General Order 05-03. The order is to be signed by the Chapter 13 trustee approving its form prior to the order being submitted to the court.

26. [14-20864](#)-D-13 JOAQUIN/MARTHA RAMON MOTION TO VALUE COLLATERAL OF
TOG-3 BANK OF AMERICA, N.A.
8-29-14 [[59](#)]

Final ruling:

This case was dismissed on July 2, 2014. As a result the motion will be denied by minute order as moot. No appearance is necessary.

27. [14-28464](#)-D-13 CRISANTO/ANNA DE CASTRO MOTION TO AVOID LIEN OF CAPITAL
ADR-1 ONE BANK (USA), N.A.
9-24-14 [[22](#)]

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. The court finds the judicial lien described in the motion impairs an exemption to which the debtors are entitled. As a result, the court will grant the debtors' motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.

28. [14-28464](#)-D-13 CRISANTO/ANNA DE CASTRO MOTION TO AVOID LIEN OF
ADR-2 HOUSEHOLD FINANCE CORPORATION
OF CALIFORNIA
9-24-14 [[27](#)]

Final ruling:

This is the debtors' motion to avoid a judicial lien held by Household Finance Corp. of California ("Household"). The motion will be denied because the moving parties failed to serve Household in strict compliance with Fed. R. Bankr. P. 7004(b)(3), as required by Fed. R. Bankr. P. 9014(b). The moving parties served Household (1) by first-class mail through the attorneys who obtained its abstract of judgment; (2) by certified mail to the attention of an officer; and (3) by certified mail to its agent for service of process, as registered with the California Secretary of State. The first method was insufficient because there is no evidence the attorneys who obtained Household's abstract of judgment are authorized to accept service of process on Household's behalf in bankruptcy contested matters pursuant to Fed. R. Bankr. P. 7004(b)(3) and 9014(b). See In re Villar, 317 B.R. 88, 93 (9th Cir. BAP 2004). The second and third methods were insufficient because service on a corporation such as Household that is not an FDIC-insured institution must be by first-class mail, not certified mail.

This distinction is important. Whereas service on an FDIC-insured institution must be by certified mail (Fed. R. Bankr. P. 7004(h), service on a corporation that is not an FDIC-insured institution must be by first-class mail (preamble to Fed. R. Bankr. P. 7004(b)). If service by certified mail on a corporation that is not an FDIC-insured institution were appropriate, the distinction between the two rules would be superfluous.

As a result of this service defect, the motion will be denied by minute order. No appearance is necessary.

29. [11-37368](#)-D-13 JOHN/VIRGINIA VASQUEZ MOTION TO EXCUSE DEBTOR JOHN
MLP-2 GONSALEZ VASQUEZ FROM
COMPLETING THE 11 U.S.C. 1328
CERTIFICATE OR 11 U.S.C. 522
EXEMPTION CERTIFICATE
9-24-14 [[106](#)]

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 to excuse debtor John Gonzalez Vasquez from completing the 11 U.S.C. 1328 certificate or the 11 U.S.C. 522 certificate is supported by the record. As such the court will

grant the motion. Moving party is to submit an appropriate order. No appearance is necessary.

30. [14-27568](#)-D-13 MELANIA OLVERA
KK-1
OBJECTION TO CONFIRMATION OF
PLAN BY GREEN TREE SERVICING,
LLC
9-10-14 [[16](#)]

31. [14-27568](#)-D-13 MELANIA OLVERA
RDG-1
OBJECTION TO CONFIRMATION OF
PLAN BY RUSSELL D. GREER
9-19-14 [[20](#)]

32. [14-26371](#)-D-13 VICTOR/VICKI CHAO
HN-1
MOTION TO APPROVE LOAN
MODIFICATION
9-23-14 [[48](#)]

Final ruling:

This is the debtors' motion for approval to enter into a loan modification. The motion will be denied for the following reasons. First, the notice of hearing gave inaccurate information about when and how to oppose the motion. Although the notice referred to LBR 9014-1, it incorrectly advised potential respondents that the rule prescribes the following procedures:

that any objection to the requested relief, or a request for hearing on the matter, must be filed and served on the initiating party within 14 days of mailing of the notice; . . . That if there is not a timely objection to the requested relief or a request for hearing, the Court may enter an order granting the relief by default; and That the initiating party will give at least 14 days written notice of hearing to the objecting or requesting party, and to any trustee or committee appointed in the case, in the event an objection or request for hearing is timely made.

Notice and Opportunity to Object, filed Sept. 23, 2014, at 2:4-12. Those are not

the procedures prescribed by the rule. The rule provides that opposition, if any, shall be in writing and shall be filed and served at least 14 days before the hearing date, not 14 days from the mailing of the notice. The rule does not provide for use of the notice of opportunity for hearing procedure for motions such as this one. See LBR 9014-1(k)(1). Finally, the moving parties' notice of hearing does not include the caution required by LBR 9014-1(d)(3).

Second, the proof of service does not sufficiently evidence service on the chapter 13 trustee or the United States Trustee. The proof of service states that service on those parties was made "pursuant to the Court's Electronic Case Filing Procedures," with no indication the parties were served by e-mail, and with no indication of the e-mail addresses at which they were served, if they were served by e-mail. It appears instead that the moving parties simply relied on the court's CM/ECF system to provide service, whereas this court's local rules do not permit service in that manner. Pursuant to Fed. R. Civ. P. 5(b)(3), incorporated herein by Fed. R. Bankr. P. 7005, a party may rely on the court's transmission facilities to make electronic service, if a local rule so authorizes. However, this court's local rules provide that service by electronic means pursuant to Fed. R. Civ. P. 5(b)(2)(E) must be actual service by e-mail; the rules do not permit parties to rely on the court's CM/ECF system to accomplish service. See LBR 7005-1(d).

Third, the "attached service list" referred to in the proof of service was not attached, but was filed separately. Fourth, the moving parties failed to serve any of the creditors who have filed claims in this case at the addresses on their proofs of claim, as required by Fed. R. Bankr. P. 2002(g). Fifth, the moving parties failed to serve the party that has requested special notice in this case at its designated address, as required by the same rule.

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

33. [14-28171](#)-D-13 JOSE/FLORA OCHOA
RDG-1

OBJECTION TO CONFIRMATION OF
PLAN BY RUSSELL D. GREER
9-25-14 [[15](#)]

Final ruling:

Objection withdrawn by moving party. Matter removed from calendar.

34. [13-34172](#)-D-13 WILLIAM/JENNIFER MURRAY
TBK-2

CONTINUED OBJECTION TO CLAIM OF
GREEN TREE SERVICING, LLC,
CLAIM NUMBER 2
8-5-14 [[25](#)]

Final ruling:

The court finds that a hearing will not be helpful and is not necessary. This is the debtors' objection to a \$398.57 portion of the claim of Green Tree Servicing, LLC ("Green Tree"), Claim No. 2, alleged to be a pre-petition arrearage on account of an escrow account shortage. Green Tree has filed opposition. For the following reasons, the objection will be sustained, and the arrearage portion of the claim will be disallowed.

The debtors contend that Green Tree's own escrow analysis shows the debtors' actual escrow account balance as \$1,809.83 in November of 2013, which is the month in which the debtors' petition was filed (November 2, 2013). The debtors are correct. The Annual Escrow Account History attached to Green Tree's proof of claim, with an "Analysis Date" of November 11, 2013 (the "Account History"), shows the actual escrow account balance as of November 2013 as \$1,809.83; that is, it shows a surplus in the account, not a shortage. Although the Account History does contain the word "Shortage" and the figure <\$392.31>, it is impossible to determine from the running totals that appear above that section of the Account History where that figure came from. Next to that figure appears a handwritten calculation, as follows: "392.31 + 6.26 = 398.57," with the notation "prepet esc shtg adv" beneath it. As with the figure \$392.31, it is impossible to determine where the \$6.26 figure came from or how it was determined that the debtors had a shortage in their escrow account of \$398.57, when the month-by-month listing on the Account History shows a positive figure, \$1,809.83, as of November 2013.

Green Tree opposes the objection, stating it is in the process of obtaining additional information to resolve the objection. In support of its claim, Green Tree relies solely on its proof of claim: "As presented in the Proof of Claim, Debtor's escrow shortage is \$398.57. The filed Proof of Claim confirms this shortage." Opposition, filed Oct. 7, 2014, at 1:27-2:1. Thus, Green Tree requests the objection be overruled or the hearing continued to allow it to obtain additional supporting documentation.

The request will be denied. Although the objection was not served on Green Tree at the addresses required by LBR 3007-1(c), Green Tree did, ultimately, receive the objection, and on September 9, 2014, a month after the objection was filed, Green Tree entered into a stipulation with the debtors to continue the hearing to this date, October 21, 2014. Almost a month after the stipulation was filed, Green Tree still has come up with no additional supporting documentation to refute what clearly appears from Green Tree's own Account History to be a positive escrow account balance as of the petition date. The evidence of the Account History alone, with its "shortage" figure of \$392.31 standing by itself and unsupported by the running totals listed above it, and with its handwritten calculation adding another \$6.26, without explanation, renders the claim for an escrow shortage facially deficient. Green Tree has had ample time to locate additional supporting documentation if it has any. For the reasons stated, the court concludes that the proof of claim, to the extent it purports to state a claim for an escrow shortage, is facially deficient, and as such, is not entitled to the presumption of validity ordinarily afforded by Fed. R. Bankr. P. 3001(f). Accordingly, the objection will be sustained and that portion of the claim will be disallowed. The debtors are to submit an order consistent with this ruling.

No appearance is necessary.

35. [14-27673](#)-D-13 HEATHER OUK
RDG-1

OBJECTION TO CONFIRMATION OF
PLAN BY RUSSELL D. GREER
9-22-14 [[15](#)]

Final ruling:

Objection withdrawn by moving party on October 10, 2014. Matter removed from calendar.

36. [10-25580](#)-D-13 ADRIAN/EDITA GONZALEZ
TOG-6

MOTION TO MODIFY PLAN
8-25-14 [[83](#)]

37. [12-26983](#)-D-13 FRANK DAY
LRR-2

CONTINUED MOTION TO APPROVE
REVERSE MORTGAGE
8-1-14 [[42](#)]

38. [12-26983](#)-D-13 FRANK DAY
LRR-5

MOTION TO AVOID LIEN OF CAPITAL
ONE BANK (USA), N.A.
9-10-14 [[67](#)]

Tentative ruling:

This is the debtor's motion to avoid a judicial lien held by Capital One Bank (USA), N.A. (the "Bank"). An earlier motion for the same relief was denied because of a service defect. That service defect has been corrected with this motion, and the court is prepared to grant the motion in part, but not, for the reason discussed in the court's ruling on the earlier motion, in total.

The court's ruling on the earlier motion (see minutes for hearing dated Sept. 9, 2014, DN 65) included the following:

The court notes also that applying the formula set forth in § 522(f) (2) (A) of the Bankruptcy Code to the figures set forth in the motion and on the debtor's schedules, there is equity in the property of \$750 over and above the sum of the judicial lien, all other liens, and the amount of the exemption the debtor has claimed in the property. Thus, that portion of the judicial lien that is over the amount of \$750 impairs the debtor's exemption; however, to the extent of \$750, the lien does not impair the exemption. In other words, even if the Bank had been properly served, the court would be in a position to grant the motion only in part.

The debtor has failed to address this issue in the present motion, instead again requesting that the property "be declared free and clear of any claim" of the Bank. Motion filed Sept. 10, 2014 ("Mot."), at 4:16. The court will therefore expand on the issue because, based on the debtor's claim of exemption as it now

stands, the motion can be granted only in part.

The Bank's judicial lien is in the amount of \$11,212. The debtor valued his property at \$220,000 at the time the case was filed, and scheduled two deeds of trust against it on which a total of \$143,250 is owed. The debtor has claimed an exemption of \$76,000 in the property. Deducting the amount due on the deeds of trust (\$143,250) and the amount of the debtor's exemption (\$76,000) from the value of the property (\$220,000) leaves \$750 in equity in the property to support the Bank's judicial lien. Viewed another way, applying the formula set forth in § 522(f)(2)(A), the total of the judicial lien, \$11,212, the amount owed on the deeds of trust, \$143,250, and the amount of the debtor's exemption, \$76,000, is \$230,462. A judicial lien is considered to impair an exemption only to the extent that this total amount exceeds the value the debtor's interest in the property would have in the absence of any liens; in this case, that value is \$220,000. The total of the judicial lien, the mortgage liens, and the exemption exceeds the value of the property by only \$10,462; thus, the judicial lien impairs the exemption only to that extent. As to the balance of the amount secured by the judicial lien, \$750, the lien does not impair the exemption, and the lien, to the extent of \$750, would remain attached to the property.

The debtor incorrectly makes the calculation using not the amount of the exemption he has actually claimed, but the amount of "the bankruptcy exemptions offered under Homestead exemptions (\$175,000.00)." Mot. at 2:24. Thus, he concludes that "[t]here is nothing left in this case." Id. at 2:25. However, the amount of an exemption offered by the applicable exemption statute is not the issue under § 522; instead, the issue is the amount of an exemption the particular debtor could claim. See § 522(f)(2)(A)(iii). "There are four basic elements of an avoidable lien under § 522(f)(1)(A): First, there must be an exemption to which the debtor would have been entitled under subsection (b) of this section. 11 U.S.C. § 522(f). Second, the property must be listed on the debtor's schedules and claimed as exempt. Third, the lien must impair that exemption. Fourth, the lien must be . . . a judicial lien. 11 U.S.C. § 522(f)(1)." In re Goswami, 304 B.R. 386, 390-91 (9th Cir. BAP 2003), citing In re Mohring, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992) (emphasis added). In this case, the Bank's lien impairs the exemption actually claimed by the debtor to the extent of only \$10,462; the other \$750 does not impair that exemption. Thus, the court will grant the motion in part, avoiding the lien to the extent of \$10,462, but leaving the lien attached to the property to secure a debt in the amount of \$750.

The court will hear the matter.

39. [14-27983](#)-D-13 JOSE CADIS

OBJECTION TO CONFIRMATION OF
PLAN BY THE BANK OF NEW YORK
MELLON
9-24-14 [[20](#)]

40. [14-27983](#)-D-13 JOSE CADIS OBJECTION TO CONFIRMATION OF
RDG-1 PLAN BY RUSSELL D. GREER
9-19-14 [[17](#)]

41. [10-24284](#)-D-13 JAMES HOLLOWAY AND CONTINUED MOTION TO VACATE
PLG-2 MARCELLA GALANTE DISMISSAL OF CASE
8-14-14 [[65](#)]

CASE DISMISSED 7/30/14

42. [14-27887](#)-D-13 KENNY JENSEN OBJECTION TO CONFIRMATION OF
RDG-2 PLAN BY RUSSELL D. GREER
9-19-14 [[15](#)]

43. [14-26588](#)-D-13 SCOTT/NANETTE SPEAKER MOTION TO CONFIRM PLAN
MSM-1 9-2-14 [[21](#)]

Final ruling:

This is the debtors' motion to confirm an amended chapter 13 plan. The court will not consider the motion at this time, because the moving parties failed to serve the U.S. Dept. of Education at its address on the Roster of Governmental Agencies, as required by LBR 2002-1(b). Scheduled by the debtors with claims totaling \$234,655, the U.S. Dept. of Education is the largest unsecured creditor in

this case.

As a result of this service defect, the court will continue the hearing to December 16, 2014, at 10:00 a.m. and require the moving parties to file a notice of continued hearing, giving the required 42 days' notice, and serve it, together with the motion, amended plan, and supporting declaration, on the U.S. Dept. of Education at its Roster address. No appearance is necessary on October 21, 2014.

44. [14-28090](#)-D-13 JOSEPH CLARK
JAB-1
OBJECTION TO CONFIRMATION OF
PLAN BY PROVIDENT SAVINGS BANK
9-24-14 [[20](#)]
45. [11-49091](#)-D-13 FRANK/MARIA OLASO
RAC-3
MOTION TO MODIFY PLAN
9-11-14 [[53](#)]
46. [14-28124](#)-D-13 PAUL BREED
USA-1
OBJECTION TO CONFIRMATION OF
PLAN BY INTERNAL REVENUE
SERVICE
10-1-14 [[19](#)]
47. [14-28125](#)-D-13 CYNTHIA BREED
USA-1
OBJECTION TO CONFIRMATION OF
PLAN BY INTERNAL REVENUE

SERVICE
10-1-14 [[31](#)]

48. [09-40432](#)-D-13 CARLOS/TINA WILSON
JDP-1

MOTION TO INCUR DEBT
10-7-14 [[63](#)]

49. [14-29755](#)-D-13 ANITA TROTTY
DEREK MCCULLUM VS.

MOTION FOR RELIEF FROM
AUTOMATIC STAY AND/OR MOTION
FOR ADEQUATE PROTECTION
10-7-14 [[12](#)]

50. [14-25073](#)-D-13 JOSE HERNANDEZ
PLL-4

MOTION TO CONFIRM PLAN
9-25-14 [[61](#)]

Final ruling:

This is the debtor's motion to confirm an amended chapter 13 plan. The motion will be denied for the following reasons. First, the motion is entitled a motion to confirm a fourth modified plan filed on September 24, 2014; however, the first sentence of the motion states that the debtor moves the court to confirm his second modified plan filed on August 19, 2014. Second, although the notice of hearing contains admonitions about the failure to file timely written opposition, it does not contain the specific admonition required by LBR 9014-1(d)(3). Third, the proof of service is attached to the motion, rather than being filed separately, as required by LBR 9014-1(e)(3), and does not contain a caption or the other information required by the Revised Guidelines for the Preparation of Documents, EDC 2-901 (Rev. 1/17/14).

Fourth, the proof of service of the motion fails to state the date of service, and inexplicably refers to the first-class postage being "attached hereto." The

proof of service also refers to an "Additional mailing list attached," but no such list is attached; thus, there is no evidence of service on creditors. In addition, the proof of service refers to service of "the within and foregoing document," and is attached to the motion; however, for the following reason, there is no evidence of service of the plan itself. The motion states that a copy of the plan "is attached hereto," but no such copy is attached. Thus, the proof of service attached to the motion, which purports to evidence service of "the within and foregoing document," refers to the motion only, and not the plan itself, and there is no separate evidence of service of the plan itself.

Fifth, although there is a mailing list attached to the proof of service of the notice of hearing, the moving party failed to serve either of the creditors who have filed claims in this case at the addresses on their proofs of claim, as required by Fed. R. Bankr. P. 2002(g). The moving party also failed to serve the creditor requesting special notice at DN 22 at its designated addresses, as required by the same rule. Sixth, the moving party gave only 28 days' notice of the hearing rather than 42 days', as required by LBR 3015(d)(1) and applicable rules. Finally, the plan does not state the plan term.

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

51. [12-27294](#)-D-13 MARK/ANGELA HERSMAN
JCK-5

MOTION TO INCUR DEBT
10-3-14 [[41](#)]

52. [14-91312](#)-D-13 MAURICE MOODY
FF-1

CONTINUED MOTION TO EXTEND
AUTOMATIC STAY
9-29-14 [[10](#)]