UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Modesto, California

July 15, 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.	14-90503-D-13 RDG-2 **Final ruling:**	CARLOS/ARACELI MARTINEZ	OBJECTION TO DEBTORS' CLAIM OF EXEMPTIONS 5-30-14 [23]

This is the trustee's objection to the debtors' claim of exemptions. On May 29, 2014, the debtors filed an amended Schedule C. As a result of the filing of the amended Schedule C, the trustee's objection is moot. The objection will be overruled as moot by minute order. No appearance is necessary.

2.	13-90204-D-13 CJY-4	LEONARDO/JESUSA MANGROBANG	MOTION TO SELL 6-13-14 [89]

3. 11-90705-D-13 JDP-1 — JESUS/ANNETTE DOMINGUEZ — MOTION TO VALUE COLLATERAL OF OCWEN 6-11-14 [43]

Final ruling:

The matter is resolved without oral argument. This is the debtors' motion to value the secured claim of OCWEN 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 debtors' 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 OCWEN's secured claim at $0.00 by minute order. No further relief will be afforded. No appearance is necessary.

4. 11-94405-D-13 TOG-10 — LEONARDO VASQUEZ AND MARIA MELENDEZ — MOTION TO MODIFY PLAN 5-27-14 [101]

5. 10-92306-D-13 TEJ-4 — GERARDO TEJEDA — MOTION TO MODIFY PLAN 6-5-14 [52]

Final ruling:

This is the debtor's motion to confirm a modified chapter 13 plan. The motion will be denied because "attached list of creditors" referred to in the proof of service is not attached; thus, the court cannot determine whether all creditors were served, as required by Fed. R. Bankr. P. 2002(b), and at the correct addresses, as required by Fed. R. Bankr. P. 2002(g). As a result of this service defect, the motion will be denied by minute order. No appearance is necessary.

6. 14-90607-D-13 RDG-2 — DEMESIA SCARBOROUGH — OBJECTION TO CONFIRMATION OF PLAN BY RUSSELL D. GREER 6-13-14 [18]

Final ruling:

This case was dismissed on June 20, 2014. As a result the objection will be overruled by minute order as moot. No appearance is necessary.

7. 14-90611-D-13 JAMES BURGAN
DEF-1

MOTION TO VALUE COLLATERAL OF SPRINGLEAF FINANCIAL SERVICES, INC.
6-5-14 [13]

Final ruling:

The matter is resolved without oral argument. This is the debtor's motion to value the secured claim of Springleaf Financial Services, Inc. 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 Springleaf Financial Services, Inc.'s secured claim at $0.00 by minute order. No further relief will be afforded. No appearance is necessary.

8. 14-90722-D-13 MICHAEL/JANEEN OWEN
BPC-1

MOTION TO VALUE COLLATERAL OF WELLS FARGO BANK, N.A.
6-13-14 [17]

Final ruling:

The matter is resolved without oral argument. This is the debtors' 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 debtors' 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.

9. 14-23424-D-13 CARL JUBB
SJS-2

MOTION TO CONFIRM PLAN
5-29-14 [34]

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 service list attached to the proof of service is for an entirely different case. Thus, the moving party failed to serve all creditors in this case, as required by Fed. R. Bankr. P. 2002(b). Second, this is a Sacramento Division case, and the notice of hearing gives the location of the hearing as the Sacramento courthouse, whereas the moving party set the matter for hearing on the court's calendar for Modesto Division cases. As a result of these service and notice defects, the motion will be denied, and the court need not reach the issues raised by the trustee at this time.

The motion will be denied by minute order. No appearance is necessary.

10. 14-90727-D-13 FRADON/TITANIA TOMA — MOTION TO VALUE COLLATERAL OF U.S. BANK, N.A.
TOG-1 — 6-5-14 [8]

Final ruling:

The matter is resolved without oral argument. This is the debtors' motion to value the secured claim of U.S. 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 debtors' 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 U.S. Bank, N.A.'s secured claim at $0.00 by minute order. No further relief will be afforded. No appearance is necessary.

11. 14-90628-D-13 DAVID/KARYN GARCIA — OBJECTION TO CONFIRMATION OF PLAN BY RUSSELL D. GREER
RDG-1 — 6-16-14 [25]

12. 10-93236-D-13 GREGORY/JANICE ANDERSON — MOTION FOR CONTEMPT
CWC-6 — 6-17-14 [138]

Final ruling:

This is the debtors' motion for an order requiring Bank of America (the "Bank") to show cause why it should be not adjudged in civil contempt and, following appropriate proceedings, for an order holding the Bank in civil contempt of this court and requiring it to (1) reconvey a deed of trust against the debtors' residence, and (2) pay certain sums to the debtors. The motion will be denied because the moving parties failed to serve the Bank in strict compliance with Fed. R. Bankr. P. 7004(h), as required by Fed. R. Bankr. 9014(b). The moving parties served the Bank (1) in care of BAC Home Loans Servicing, LP, at a post office box address, with no attention line; (2) in care of Home Loan Servicing, at a post office box address, with no attention line; (3) at a street address, with no attention line; and (4) addressed as Bank of America California, N.A., at a street address, with no attention line. All four methods were insufficient because, as an FDIC-insured institution, Bank of America was required to be served by certified mail to the attention of an officer (and only an officer – compare Fed. R. Bankr. P. 7004(h) with Fed. R. Bankr. P. 7004(b)(3)), whereas here, service was made by first-class mail, and not to the attention of an officer.[1]

The court is also concerned that the moving parties are seeking relief by motion that is available only by way of an adversary proceeding. See Fed. R. Bankr. P. 7001(2) [proceeding to determine the validity, priority, or extent of a lien]. The motion seeks an order requiring Bank of America to show cause why it should not be held in civil contempt for failing to comply with RESPA – 12 U.S.C. § 2605, Cal. Civ. Code § 2941, and § 524 of the Bankruptcy Code. However, the motion provides no authority for the proposition that the failure to comply with the first two of those sections constitutes civil contempt, and as to the third, no authority for the proposition that the failure to record a deed of reconveyance constitutes a violation of the discharge order. These are matters that will need to be addressed in any subsequent motion.

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

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1 The court also cautions the moving parties' counsel that the motion and notice of hearing contain conflicting addresses for the property securing the deed of trust the debtors seek to have reconveyed.

13. 14-90836-D-13 MC-1 — BRIAN MOOREHEAD — MOTION TO VALUE COLLATERAL OF CITIBANK, N.A. 6-17-14 [10]

Final ruling:

The matter is resolved without oral argument. This is the debtor's motion to value the secured claim of Citibank, 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 Citibank, N.A.'s secured claim at $0.00 by minute order. No further relief will be afforded. No appearance is necessary.

14. 14-90836-D-13 MC-2 — BRIAN MOOREHEAD — MOTION TO AVOID LIEN OF CITIBANK, N.A. 6-17-14 [15]

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 debtor is entitled. As a result, the court will grant the debtor's motion to avoid the lien. Moving party is to submit an appropriate order. No appearance is necessary.

15. 11-93837-D-13 JDP-1 — VICENTE RUIZ MONTIEL AND ROXANNA RUIZ — MOTION TO VALUE COLLATERAL OF BANK OF THE WEST 6-11-14 [37]

Final ruling:

The matter is resolved without oral argument. This is the debtors' motion to value the secured claim of Bank of the West 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 debtors' 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 Bank of the West's secured claim at $0.00 by minute order. No further relief will be afforded. No appearance is necessary.

16. 09-90739-D-13 JDP-1 — MARIA BASULTO — MOTION TO VALUE COLLATERAL OF BANK OF AMERICA, N.A. 6-11-14 [120]

Final ruling:

The matter is resolved without oral argument. This is the debtor's motion to value the secured claim of Bank of America, 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 Bank of America, N.A.'s secured claim at $0.00 by minute order. No further relief will be afforded. No appearance is necessary.

17. 12-91246-D-13 CJY-15 — BARRY/ELIZABETH WORTHAM — MOTION TO MODIFY PLAN 5-20-14 [189]

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. 12-91246-D-13 CJY-16 — BARRY/ELIZABETH WORTHAM — MOTION FOR COMPENSATION BY THE LAW OFFICE OF FRIEND YOUNGER, PC FOR CHRISTIAN J. YOUNGER, DEBTORS' ATTORNEY(S) 5-20-14 [196]

Tentative ruling:

This is the motion of the debtors' counsel in this case ("Counsel") for additional attorney's fees. Counsel requests approval of $4,827.50 in addition to the $3,500 Counsel has already received. Although no party has filed opposition, the court has an independent duty to review all requests for compensation and to determine their reasonableness pursuant to § 329 of the Bankruptcy Code.

Section 330 of the Code sets out the standards by which courts should determine the reasonableness of fees under § 329; reasonableness is determined by looking at the nature, extent, and value of the services rendered. See In re Eliapo, 298 B.R. 392, 401 (9th Cir. BAP 2003). Section 330(a)(3) of the Code states that in determining the amount of reasonable compensation, the court should consider the nature, extent, and value of the services performed, taking account of all relevant factors, including the time spent on the services, the rates charged, and the customary compensation of comparably skilled attorneys in other cases.

Reviewing fee applications on a line-by-line basis is an undesirable task. However, in cases such as this, where requested fees for a chapter 13 case exceed the "no-look" fee applicable at the time the case was filed by such a significant amount ($8,327 versus $3,500), the court must take a close look at the fees charged to determine their reasonableness, regardless as to how desirable the task may be.

In motions filed by Counsel earlier this year in other cases, the court found that Counsel's hourly rate, $250, was reasonable, but took issue with certain other practices, including billing in increments of quarters of an hour (and then sixths of an hour), as opposed to tenths of an hour; billing excessive time for particular tasks; and billing for legal assistants' time for services that were secretarial in nature and not compensable. In several cases, the court reduced Counsel's requested fees on account of those problems. With the present motion, Counsel has remedied those problems. However, for the time charged in this case, beginning in February of 2012, Counsel has billed for its attorneys' time at $275 per hour for services beginning in October 2012, whereas in the other cases just referred to, Counsel billed for its attorneys, through the beginning of 2014, at just $250 per hour. Counsel has failed to explain why the firm billed $275 per hour in this case, throughout 2012 and 2013, whereas in the cases the court reviewed earlier this year, Counsel was billing at $250 per hour in those years for the same attorneys. It appears Counsel has retroactively increased its hourly rate to compensate for its inability, due to the court's rulings in the other cases, to bill for secretarial services and for excessive time.

This discrepancy also calls into question the statement in Counsel's application that "Applicant's normal billing rate at all times while he was retained in this case was $275.00 per hour." If that statement is accurate, Counsel will need to explain why it billed in this particular case at a higher rate than it was simultaneously billing in other cases. If the statement is inaccurate, and if

Counsel's normal billing rate during this case was actually $250, and was only retroactively increased to $275, then this increased hourly rate will not be allowed by the court.

The court notes also that seven different statements in the supporting declaration of Christian J. Younger appear to be inaccurate. In those seven statements, Mr. Younger itemizes the time "he" spent in the case, by category. For example, he states, "I completed 5.4 hours of Case Administration work at a billing rate of $275.00 per hour . . . ." And, "I completed 1.2 hours of Meeting of Creditor work at a billing rate of $275.00 per hour . . . ." However, it appears Mr. Younger performed none of the services in this case except preparation of this fee application. The remaining services were all performed by the other attorneys in the firm and the firm's legal assistants. The court is concerned that Mr. Younger's declaration appears to be a template utilized regardless of who actually performed the services described.

For the reasons stated, the court finds that the hourly rate charged for Counsel's attorney time, $275, although it may be reasonable standing on its own, does not reflect the rate at which the services were billed at the time they were performed, and does not reflect the rate charged by Counsel in other cases during the same time period. Thus, the court will reduce the fee request by the total number of hours billed at that rate, 28.7, multiplied by $25 per hour, reflecting the difference between the $275 rate billed and the $250 rate billed in other cases, a total of $717.50. Thus, the court will approve additional fees of $4,110. The court will hear the matter.

19. 10-90154-D-13 ROBERT/DENNELL CALLAGHER MOTION TO MODIFY PLAN
SDM-10 5-22-14 [210]

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.

20. 13-91554-D-13 ROBERT/ELISSA HART MOTION TO CONFIRM PLAN
TPH-6 5-29-14 [83]

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.

21. 14-90654-D-13 ANGEL/TABATHA GARCIA — AMENDED MOTION TO VALUE COLLATERAL OF WELLS FARGO HOME MORTGAGE, INC.
LRR-1 — 5-15-14 [12]

Final ruling:

This is the debtors' motion to value collateral of Wells Fargo Home Mortgage, Inc. (the "creditor"), which is not an FDIC-insured institution. The motion will be denied because the moving parties failed to serve the creditor in strict compliance with Fed. R. Bankr. P. 7004(b)(3), as required by Fed. R. Bankr. P. 9014(b). The moving parties served the creditor by certified mail to the attention of an officer, whereas the rule requires that service on a corporation, partnership, or other unincorporated association that is not an FDIC-insured institution be by first-class mail. See preamble to Fed. R. Bankr. P. 7004(b). The moving parties also served Wells Fargo Bank (the "Bank"), which is not the creditor named in the motion. However, assuming without deciding that service on the Bank is sufficient to accomplish service on the creditor, the attempted service on the Bank, an FDIC-insured institution, was improper. The moving parties served the Bank by first-class mail to the attention and at the address of its registered agent for service of process, whereas service on an FDIC-insured institution must be by certified mail, and must be to the attention of an officer, and only an officer. Fed. R. Bankr. P. 7004(h).

This distinction is important. For service on a corporation, partnership, or other unincorporated association that is not an FDIC-insured institution, the rule requires service to the attention of an officer, managing or general agent, or agent for service of process. Fed. R. Bankr. P. 7004(b)(3). If service on an FDIC-insured institution to the attention of an agent for service of process were appropriate, the distinction in the manner of service, as between the two rules, would be superfluous. Further, the rule requires service on an officer, whereas it is not likely an officer of the Bank is to be found at the location of the Bank's agent for service of process.

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

22. 10-93460-D-13 ALEX/LORENA GARCIA — MOTION TO MODIFY PLAN
CJY-2 — 6-3-14 [39]

23.	14-90568-D-13 RDG-3	VICENTE CRISANTOS AND MARIA CARNEIRO-CRISANTOS	OBJECTION TO CONFIRMATION OF PLAN BY RUSSELL D. GREER, CHAPTER 13 TRUSTEE 6-13-14 [26]

24.	10-92172-D-13 14-9017 CHURCH ET AL V. ASHLOCK ET AL	RICKY/CONNIE CHURCH	MOTION TO DISMISS ADVERSARY PROCEEDING 6-4-14 [17]

Tentative ruling:

This is the motion of defendant Bob Reeve (the "defendant") to dismiss the plaintiffs' complaint for failure to state a claim upon which relief can be granted. The plaintiffs have not filed opposition. However, that does not by itself entitle the moving party to the relief requested. "[I]t is black-letter law that entry of default does not entitle a plaintiff to judgment as a matter of right or as a matter of law." All Points Capital Corp. v. Meyer (In re Meyer), 373 B.R. 84, 88 (9th Cir. BAP 2007), citing Fed. R. Civ. P. 55(b)(2), incorporated herein by Fed. R. Bankr. P. 7055. "Settled precedent establishes that default judgment is a matter of discretion in which the court is entitled to consider, among other things, the merits of the substantive claim, the sufficiency of the complaint, the possibility of a dispute regarding material facts, whether the default was due to excusable neglect, and the 'strong policy' favoring decisions on the merits." Id., citing Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir. 1986). Thus, the court will consider the merits of the motion.

First, the court notes that at the time this motion was filed, the default of the defendant himself had already been entered. (He has filed a motion to set aside the default, set for August 5, 2014.) In general, a party in default has no right to dispute the issue of liability. Salomon v. Davis (In re Salomon), 2008 Bankr. LEXIS 4681, *18 (9th Cir. BAP 2008), citing Geddes v. United Fin. Group, 559 F.2d 557, 560 (9th Cir. 1977) ("[U]pon default the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true."]; see also Fed. R. Civ. P. 8(b)(6), incorporated herein by Fed. R. Bankr. P. 7008(a). However, a party in default may challenge a complaint for failure to state a claim upon which relief can be granted. Salomon, 2008 Bankr. LEXIS 4681 at *19, citing DirecTV, Inc. v. Hoa Huynh, 503 F.3d 847, 854 (9th Cir. 2007) (a defaulting defendant is not held to have admitted facts that are not well pleaded). Thus, despite the entry of the defendant's default in this adversary proceeding, the court may consider this motion.

The plaintiffs in this adversary proceeding are the debtors in the underlying chapter 13 case. In their complaint, they allege that defendant Roy Keith Ashlock ("Ashlock") and his attorney, Bob Reeve (the moving party here), filed a personal injury action against them in state court in violation of the automatic stay; that this court later granted Ashlock relief from stay to proceed with the state court

action, on condition that he pursue only insurance proceeds; and that when it granted relief from stay, the court acknowledged that it was not granting retroactive relief from stay, and that the plaintiffs could address in an adversary proceeding their claim that the defendants had violated the stay when they filed the state court complaint. The plaintiffs allege that the personal injury claim was then settled for, they believe, $150,000.[1] The plaintiffs claim that "[a]s a result of the stay violation, Defendant Ashlock realized a $150,000.00 windfall" (Compl., filed March 31, 2014, at 4:24-25), and "Defendant Reeve realized a sizeable fee" from that windfall. Id. at 5:9.

By this motion, the defendant seeks dismissal of the plaintiffs' complaint pursuant to Fed. R. Civ. P. 12(b)(6), made applicable in this proceeding by Fed. R. Bankr. P. 7012(b), for failure to state a claim upon which relief can be granted. He contends the complaint makes only conclusory allegations about both defendants, without alleging specific facts. The defendant focuses solely on the plaintiffs' allegations as to what findings this court made concerning retroactive relief from stay. The plaintiffs allege in their complaint that the court "acknowledged that retroactive relief from stay was not being granted" (Compl. at 4:5-6); the defendant contends that allegation is speculative. Citing the court's minute order and the formal order granting the relief from stay motion, the defendant contends the court made no statement on the record as regards retroactive relief from stay. He concludes that "[a]t no time did the court state on the record that (1) retroactive relief from stay was denied; (2) filing of the state court action was a stay violation; and (3) debtors could address [the alleged stay violation] in an adversary proceeding once the personal injury lawsuit was resolved." Mot., filed June 4, 2014, at 3:12-16.

Thus, the defendant contends, the plaintiffs' complaint should be dismissed because it "relies on the unsupported assertion that the U.S. Bankruptcy Court on August 21, 2012, had concluded in dicta to the effect that retroactive relief from stay was not being granted and therefore could subject the moving party of two years ago, Ashlock, and his counsel, to criminal sanctions at some future date. But the criminal [adversary] complaint provides absolutely no factual support for this legal conclusion." Mot. at 6:15-19.

First, the court is not convinced that what it said about retroactive relief from stay has any bearing on this adversary proceeding. But assuming it does, the problem with this motion is that it challenges not the sufficiency of the plaintiffs' allegations but their accuracy. The defendant refers to the minute order and the formal order on the relief from stay motion – neither referred to retroactive relief, either to grant it or to deny it; however, the defendant has not submitted a transcript of the hearing. Thus, neither the plaintiffs nor the defendant has established the truth of the plaintiffs' allegations about what the court said at the hearing about retroactive relief. But the plaintiffs are not required at the pleading stage to prove the truth of their allegations. Thus, the complaint does not fail for the reason asserted by the defendant to state a claim on which relief can be granted.

In essence, the defendant's motion to dismiss requests a determination as to what the court ruled or found or stated regarding retroactive relief from the stay. Thus, the motion presents a matter outside the pleadings, and the court must treat the motion as a motion for summary judgment. Fed. R. Civ. P. 12(d), incorporated herein by Fed. R. Bankr. P. 7012(b). Ordinarily, the court would continue the hearing to give all parties an opportunity to present all the material that is pertinent to the motion. See id. However, the court has its own concern about the

sufficiency of the plaintiffs' complaint.

"A court 'may act on its own initiative to note the inadequacy of a complaint and dismiss it for failure to state a claim.'" Whitfield v. Bowman Asphalt Co., 2014 U.S. Dist. LEXIS 80332, *4 (E.D. Cal. June 10, 2014), quoting Wong v. Bell, 642 F.2d 359, 361 (9th Cir. 1981). Assuming without deciding that the plaintiffs' complaint alleges liability sufficiently to state a claim for violation of the automatic stay, it does not sufficiently allege that the plaintiffs suffered any compensable damage from the conduct alleged to have violated the stay. The complaint states only that "[a]s a result of the stay violation, Defendant Ashlock [the plaintiff in the underlying personal injury action] realized a $150,000.00 windfall" (Compl. at 4:24-25), and that "[a]s a result of the willful violation, Defendant Reeve [Ashlock's attorney] realized a sizeable fee from Defendant Ashlock's $150,000.00 windfall." Id. at 5:8-10. The complaint alleges on information and belief that the personal injury action settled for $150,000; however, the plaintiffs do not allege they paid any portion of the settlement amount.

The complaint also alleges that after relief from stay was granted, "Ashlock appeared in front of Plaintiff Connie Church's place of employment, heckling and sneering at her through the front window, in front of others. This intimidating behavior resulted in discomfort, uneasiness, embarrassment and distress to Plaintiff Connie Church." Compl. at 4:9-13. The complaint does not, however, tie this behavior to the alleged stay violation. Further, the behavior is not so egregious and the resulting alleged "discomfort, uneasiness, embarrassment, and distress" is not so significant as to entitle the plaintiff to damages for emotional distress under applicable Ninth Circuit standards.

"To be entitled to damages for emotional distress under § 362(h) [now § 362(k)(1)], an individual must (1) suffer significant harm, (2) clearly establish the significant harm, and (3) demonstrate a causal connection between that significant harm and the violation of the automatic stay . . . ." Dawson v. Wash. Mut. Bank (In re Dawson), 390 F.3d 1139, 1149 (9th Cir. 2004). "Fleeting or trivial anxiety or distress does not suffice . . . ." Id. Here, the alleged conduct – heckling and sneering – is not particularly egregious, and not such that it is obvious a reasonable person would suffer significant emotional distress as a result. See id. at 1150. The alleged results of the conduct – discomfort, uneasiness, embarrassment, and distress, when viewed in light of the alleged conduct, do not rise to the level of significant emotional distress. Thus, the complaint does not contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'" (al-Kidd v. Ashcroft, 580 F.3d 949, 949 (9th Cir. 2009) (citations omitted)), and as to the element of damages for violation of the automatic stay, the complaint fails to state a claim upon which relief can be granted. For the same reasons, the complaint fails to state a claim upon which an award of punitive damages, as requested by the plaintiffs, can be made.

Finally, the complaint seeks an award of attorney's fees and costs. However, the Ninth Circuit Court of Appeals has held that "a damages action for a stay violation is akin to an ordinary damages action, for which attorney fees are not available under the American Rule." Sternberg v. Johnston, 595 F.3d 937, 948 (9th Cir. 2010). "[T]he proven injury is the injury resulting from the stay violation itself. Once the violation has ended, any fees the debtor incurs after that point in pursuit of a damage award would not be to compensate for 'actual damages' under § 362(k)(1)." Id. at 947. The Sternberg court referred to the two purposes of the automatic stay – "enabling the debtor to try to reorganize during a break from

collection efforts and protecting creditors by preventing one creditor from pursuing its own remedies to the detriment of its co-creditors." Id. "We have never said the stay should aid the debtor in pursuing his creditors, even those creditors who violate the stay. The stay is a shield, not a sword." Id. at 948.

Thus, in this case, even if the plaintiffs had alleged facts sufficient to state a claim for damages for violation of the automatic stay, an award of attorney's fees would not be permissible under Sternberg. Where, as here, a plaintiff fails to allege facts sufficient to state a claim for actual damages, the request for attorney's fees is even less viable.

For the reasons stated, the court concludes that the plaintiffs' complaint fails to state a claim upon which relief can be granted, and thus, that the complaint should be dismissed. Where a court on its own raises the question whether a complaint states a claim upon which relief can be granted, it must give the plaintiff notice of its intention to dismiss the complaint and an opportunity to respond, "unless the 'plaintiff[] cannot possibly win relief.'" Sparling v. Hoffman Constr. Co., 864 F.2d 635, 638 (9th Cir. 1988), quoting Wong, 642 F.2d at 362. The court is not prepared to conclude that the plaintiffs cannot possibly state a claim to relief; thus, the court will hear the matter to determine whether the plaintiffs wish to respond to this notice of the court's intention to dismiss the complaint or whether they wish to seek leave to amend the complaint.

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1 In support of the present motion, the defendant testifies that the settlement funds, in an amount he does not state, came exclusively from the plaintiffs' insurance company.

25.	14-90572-D-13 RDG-1	DOUGLAS/DEBORAH TOBIN	OBJECTION TO CONFIRMATION OF PLAN BY RUSSELL D. GREER 6-13-14 [16]

26.	14-90479-D-13 CJY-1	HOMERO/MIDESSLAVA CAMPOZANO	MOTION TO CONFIRM PLAN 6-2-14 [20]

Final ruling:

This is the debtors' motion to confirm an amended chapter 13 plan. The motion will be denied because the service list attached to the proof of service is for an entirely different case; thus, with one exception, the moving parties failed to serve any of the creditors in this case, as required by Fed. R. Bankr. P. 2002(b). As a result of this service defect, the motion will be denied by minute order. No appearance is necessary.

27. 14-90781-D-13 STEVE/FRANCES MONTELONGO — MOTION TO VALUE COLLATERAL OF ONEWEST BANK
SFM-1 — 6-13-14 [11]

Final ruling:

This is the debtors' motion to value collateral of OneWest Bank (the "Bank"), an FDIC-insured institution. The motion will be denied because the moving parties 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 parties served the Bank (1) by first-class mail at a post office box address with no attention line; (2) by certified mail to the attention of an officer, managing or general agent, or person authorized to receive service of process; (3) by certified mail to the attention of an officer, managing or general agent, or person authorized to receive service of process at the address of the registered agent for service of process of IndyMac Financial Services. The first method was insufficient because service on an FDIC-insured institution must be made by certified mail to the attention of an officer. The second and third methods were insufficient because service on an FDIC-insured institution must be directed to the attention of an officer, and only an officer. Fed. R. Bankr. P. 7004(h).

This distinction is important. For service on a corporation, partnership, or other unincorporated association that is not an FDIC-insured institution, the rule requires service to the attention of an officer, managing or general agent, or agent for service of process. Fed. R. Bankr. P. 7004(b)(3). If service on an FDIC-insured institution to the attention of an officer, managing or general agent, or person authorized to receive service of process were appropriate, the distinction in the manner of service, as between the two rules, would be superfluous. Finally, assuming without deciding that service on IndyMac Financial Services is sufficient to accomplish service on the Bank, the attempted service on IndyMac Financial Services was improper because it is not an FDIC-insured institution; thus, service was required to be by first-class mail. See preamble to Fed. R. Bankr. P. 7004(b).

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

28. 10-92582-D-13 AGNES DURGUN — MOTION TO APPROVE LOAN MODIFICATION
JTN-3 — 6-5-14 [50]

29. 09-92984-D-13 LINDA GERTHS — MOTION FOR ENTRY OF DEFAULT JUDGMENT
14-9013 PLC-1 — 6-6-14 [19]
GERTHS V. U.S. BANK, N.A.

Tentative ruling:

This is the motion of the plaintiff, Linda June Gerths, who is also the debtor in the chapter 13 case in which this adversary proceeding is pending (the "debtor"), for entry of a default judgment against defendant U.S. Bank, N.A. (the "Bank"). For the following reasons, the motion will be granted in part.

By this motion, the debtor seeks a judgment in a form suitable for recording extinguishing the Bank's deed of trust against the debtor's real property, a deed of trust that was determined in the debtor's chapter 13 case to have a value of $0. (The debtor has completed her plan payments and received a chapter 13 discharge, but the Bank has not recorded a deed of reconveyance of the deed of trust.) The debtor also requests an award of costs and attorney's fees, along with certain statutory penalties, and an order requiring the Bank "to remove all inaccurate derogatory information they have reported to the credit bureaus they report to and that any failure to do so may subject U.S. Bank, N.A. to contempt." Motion for Default Judgment, filed June 6, 2014, at 5:21-23.

A different department of this court has recently issued a Memorandum Decision supporting entry of a default judgment in a different case that is factually very similar to this one. That case is Luchini v. JPMorgan Chase Bank, N.A. (In re Luchini), AP No. 13-2321, 2014 Bankr. LEXIS 2510 (Bankr. E.D. Cal. June 4, 2014). With one exception, this department agrees with that decision, and adopts the court's findings and conclusions in that decision as supporting entry of a default judgment in this case on the debtor's third and fourth claims for relief, and also as supporting denial of the debtor's motion as to her first, second, fifth, sixth, and eighth claims for relief.

The complaint in the Luchini case did not contain a claim for relief similar to the seventh claim for relief in this case – for violation of the California Consumer Credit Reporting Agencies Act. However, for the reasons set forth in the Luchini decision regarding the seventh claim for relief in that case – violation of the federal Fair Credit Reporting Act, which is the eighth claim for relief in this case, the court here finds that the debtor's seventh claim for relief has not been sufficiently pleaded, and there has been no credible evidence submitted to support the claim for relief. In short, the debtor has not alleged what derogatory, incomplete, or inaccurate information the defendant is reporting to the consumer credit reporting agencies, and no evidence of the reporting of any such information has been submitted. Thus, no relief will be afforded on account of the seventh claim for relief. On the third and fourth claims for relief, the court will issue a judgment determining that the defendant's deed of trust is void, unenforceable, and of no force and effect.

The court concludes that the debtor is entitled to an award of reasonable attorney's fees pursuant to the attorney's fee clause in the deed of trust and Cal. Civ. Code § 1717(a), but departs from the Luchini decision in that this court finds that a deduction should be made for the attorney's fees incurred that are attributable to the several claims for relief on which the court is denying the relief requested. The court has found that those claims for relief were not sufficiently pleaded and were not supported by any evidence. Thus, the court will reduce the requested fee award, $5,462.50, by 25%, and will award fees totaling $4,096.87.[1] The court will award costs comprised of $19 for copying and postage,

[1]

$33 for recording fees, and $40 for a single courier fee to obtain a certified copy of the judgment and to record it, for a total of $92. The court will also award a statutory penalty of $500 pursuant to Cal. Civ. Code § 2941(d), for a total monetary award of $4,688.87.

Finally, the court notes that the complaint in the Luchini case contained allegations that the plaintiff had, prior to commencing the adversary proceeding, served a demand for reconveyance on the defendant, and that the defendant had ignored the demand. No such allegations appear in the complaint in this case. It appears from the fact that the defendant allowed its default to be entered in this case that an earlier demand for reconveyance would have been futile. However, for future reference in other cases, counsel is cautioned that if a reconveyance is recorded after the filing of a complaint but before a default is entered or other substantive action is taken, the assessment of the reasonableness of attorney's fees will include a consideration of whether an earlier demand for reconveyance was made.

The court will hear the matter.

1While the court is not making a line-by-line analysis of the plaintiff's counsel's billing statement, counsel is cautioned that the billing statement appears to include services that are clerical in nature, and therefore, not compensable. See Sousa v. Miguel, 32 F.3d 1370, 1374 (9th Cir. 1994).

30. 08-92590-D-13 JDP-1 — BOBBY/ANGELA CLEMENTS — MOTION TO VALUE COLLATERAL OF LVNV FUNDING, LLC 6-4-14 [131]

Final ruling:

The matter is resolved without oral argument. This is the debtors' motion to value the secured claim of LVNV Funding, LLC 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 debtors' 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 LVNV Funding, LLC's secured claim at $0.00 by minute order. No further relief will be afforded. No appearance is necessary.

31. 11-93492-D-13 JHW-1 — KEVIN/BOBBIE YOUNG — CONTINUED MOTION FOR RELIEF FROM AUTOMATIC STAY 5-1-14 [111]
TD AUTO FINANCE, LLC VS.

32. 08-92198-D-13 RUSSELL/VIVIAN JANTZ MOTION FOR CONTEMPT
CWC-10 6-17-14 [171]

Final ruling:

This is the debtors' motion for an order requiring Citibank, N.A. (the "Bank") to show cause why it should be not adjudged in civil contempt and, following appropriate proceedings, for an order holding the Bank in civil contempt of this court and requiring it to (1) reconvey a deed of trust against the debtors' residence, and (2) pay certain sums to the debtors. The motion will be denied because the moving parties failed to serve the Bank in strict compliance with Fed. R. Bankr. P. 7004(h), as required by Fed. R. Bankr. 9014(b). The moving parties served the Bank at two different street addresses, with no attention line. This was insufficient because, as an FDIC-insured institution, Citibank, N.A. was required to be served by certified mail to the attention of an officer (and only an officer - compare Fed. R. Bankr. P. 7004(h) with Fed. R. Bankr. P. 7004(b)(3)), whereas here, service was made by first-class mail, and not to the attention of an officer.

The court is also concerned that the moving parties are seeking relief by motion that is available only by way of an adversary proceeding. See Fed. R. Bankr. P. 7001(2) [proceeding to determine the validity, priority, or extent of a lien]. The motion seeks an order requiring Bank of America to show cause why it should not be held in civil contempt for failing to comply with RESPA - 12 U.S.C. § 2605, Cal. Civ. Code § 2941, and § 524 of the Bankruptcy Code. However, the motion provides no authority for the proposition that the failure to comply with the first two of those sections constitutes civil contempt, and as to the third, no authority for the proposition that the failure to record a deed of reconveyance constitutes a violation of the discharge order. These are matters that will need to be addressed in any subsequent motion.

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

33. 09-91699-D-13 VICTOR/ELAINE LARA MOTION TO VALUE COLLATERAL OF
JDP-1 GREENPOINT MORTGAGE FUNDING
6-11-14 [101]

Final ruling:

The matter is resolved without oral argument. This is the debtors' motion to value the secured claim of Greenpoint Mortgage Funding 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 debtors' 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 Greenpoint Mortgage Funding's secured claim at $0.00 by minute order. No further relief will be afforded. No appearance is necessary.

34.	13-92199-D-13 RDG-1	MARK THOMPSON	OBJECTION TO CONFIRMATION OF PLAN BY RUSSELL D. GREER 6-13-14 [39]
35.	14-90536-D-13 RDG-1	RICHARD/WILBERTA BLESSING	CONTINUED OBJECTION TO CONFIRMATION OF PLAN BY RUSSELL D. GREER 5-30-14 [24]
36.	14-90536-D-13 APN-1	RICHARD/WILBERTA BLESSING	CONTINUED AMENDED OBJECTION TO CONFIRMATION OF PLAN BY WELLS FARGO BANK 5-29-14 [22]
37.	13-92155-D-13 HWW-1	GEORGE/JENNIE DELGADO	MOTION TO SELL 7-1-14 [20]