UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Sacramento, California

March 23, 2023 at 10:30 a.m.

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1. **10-27435-E-7** **DNL-13** | **THOMAS GASSNER** **Richard Chan** | **MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH GEORGENE GASSNER, MEPCO LABEL SYSTEMS, LAURA STROMBOM, CAROL L. GASSNER AND ALFRED M. GASSNER**
3-2-23 [247]

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors that have filed claims, parties requesting special notice, and Office of the United States Trustee on March 2, 2023. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (requiring twenty-one days' notice).

The Motion for Approval of Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Chapter 7 Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion for Approval of Compromise is granted.

Kimberly J. Husted, the Chapter 7 Trustee, ("Movant"), in her capacity as Chapter 7 Trustee for the bankruptcy estate of the decedent Thomas A. Gassner ("Decedent-Debtor"), requests that the court approve a compromise and settle competing claims and defenses with Georgene Gassner ("Spouse") individually as surviving spouse of the Decedent-Debtor and in her capacity as Successor Trustee for the Thomas Gassner and Georgene Family Trust, MEPCO Label Systems ("MEPCO"), Laura Strombom ("Strombom") individually and as a trustee of Thomas A. Gassner Trust ("TAG Trust"), and Carol L. Gassner and Alfred M. Gassner (collectively "Trustors"). Spouse, MEPCO, Strombom, TAG Trust, and Trustors will be referred to collectively as "Settlors."

Decedent-Debtor's bankruptcy Estate asserts having an interest in TAG Trust, which in turn owns an interest in MEPCO, of 2,000.00 shares of Class B common stock. The claims and disputes to be resolved by the proposed settlement are summarized as follows:

1. **Adversary Proceeding, Case No. 19-02006**

    a. Movant filed a complaint against MEPCO, Strombom, and Trustors, collectively, "Gassner Parties," seeking the turnover of the Estate's interest in MEPCO and dissolution of a closely held corporation.

    b. The Gassner Parties seek trust reformation, declaratory relief, and contract breach damages.

2. **Adversary Proceeding 2, Case No. 19-02038**

    a. Spouse has a complaint against the Trustors and Strombom seeking injunctive relief, damages, and declaratory relief based on an alleged violation of the automatic stay and discharge injunction.

3. **Value of Shares**

    a. There is an additional dispute as to the value of the 2,000.00 shares of MEPCO stock linked to the Estate.

    b. The estate's appraiser valued the stock at $606.46 per share, resulting in a $1,212,900.00 value for all 2,000.00 shares.

    c. The Gassner Parties' appraiser asserted that the same stock shares have a "fair value" of $428.67 per share, and alternatively, a "fair market value" of $135.00 per share, resulting in either a $857,340.00 or $270,000.00 valuation for all 2,000.00 shares.

    d. The Gassner Parties oppose all relief asserted by the Estate, and contend that the $270,000.00 value of the estate's interest in MEPCO is completely offset by their own damage claims.

Movant and Settlors have resolved these claims and disputes, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the MEPCO Settlement Agreement filed as Exhibit A in support of the Motion, Dckt. 250):

1. **Settlement Payment**

    a. Within fourteen days of entry of the approval order, Gassner Parties shall pay $200,000.00 to the Spouse for her interest in KAB Limited Partnership ("KAB"), and $900,000.00 to the Movant for the Estate's interest in MEPCO.

2. **Transfer of KAB and MEPCO stock**

    a. Within five days of the Settlement Payments to the Spouse and to the Movant, Spouse shall transfer all of her interest in KAB to Alfred and Carol Gassner ("Trustors"). Movant, Decedent-Debtor, and Spouse shall transfer all of their interest in the 2,000 class B shares of MEPCO stock to MEPCO.

3. **Dismissal**

    a. Within fourteen days of the entry of the Bankruptcy Court's approval order:

        i. Proof of Claim 3-1 and 4-1 shall be deemed withdrawn with prejudice,

        ii. Adversary proceedings 19-02006 and 19-02038, along with the Petition for Order for Modification of the Thomas Gassner Trust Due to Changed Circumstances, the Instructions to Suspend Distribution Pending Hearing, and the Instructions Approving Trustee's Proposed Action re Sale of Trust Property (case no. STK-PR-TR-2016-595 "Petition for Modification") shall be dismissed with prejudice and the parties shall each bear their own attorney's fees and costs.

4. **Indemnification**

    a. The MEPCO shall indemnify and reimburse Strombom for all attorney fees and costs reasonably incurred in connection with adversary proceedings 19-02006 and 10-02038.

5. **Releases**

    a. The settling parties will exchange broad releases of all claims.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Constr.)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

3. The complexity of the litigation involved and the expense, inconvenience, and delay necessarily attending it; and

4. The paramount interest of the creditors and a proper deference to their reasonable views.

In re A & C Props., 784 F.2d 1377, 1381 (9th Cir. 1986); *see also In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Movant argues that the four factors have been met.

Under the terms of the settlement, all claims of the Estate, including any pre-petition claims of Decedent-Debtor, are fully and completely settled, with all such claims released. Settlors have granted a corresponding release.

Probability of Success

Movant argues that this factor supports approving the compromise because the expected result of litigation is uncertain. The Gassner parties contend that their asserted damage claims could reduce Movant's recovery to $0.00. The proposed $900,000.00 payment to the Movant represents near 75% of the $1.2 million value asserted by the Movant's appraiser.

Difficulties in Collection

Movant argues that this factor is neutral, as the Movant is not aware of any issues relating to uncertainty of collection.

Expense, Inconvenience, and Delay of Continued Litigation

Movant argues that this factor supports approving the compromise, because any further litigation would require time and expense that is avoidable by the compromise. Such litigation would generate expenses even if successful.

Paramount Interest of Creditors

Movant argues that this factor supports approving the compromise, as the proposed settlement will pay claims in full and return a surplus to the Spouse of the Decedent-Debtor.

Consideration of Additional Offers

At the hearing, the court announced the proposed settlement and requested that any other parties interested in making an offer to Movant to purchase or prosecute the property, claims, or interests of the estate present such offers in open court. At the hearing ----------.

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate because the settlement will avoid the further dangers and expenses of litigation, while also paying claims in full. The Motion is granted.

The court shall issue an order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Approve Compromise filed by Kimberly J. Husted, the Chapter 7 Trustee, ("Movant") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion for Approval of Compromise between Movant and Settlors is granted, and the respective rights and interests of the parties are settled on the terms set forth in the executed Settlement Agreement filed as Exhibit A in support of the Motion (Dckt. 250).

2. **10-27435-E-7** **THOMAS GASSNER** **CONTINUED PRE-TRIAL CONFERENCE**
19-2006 **RE: AMENDED COMPLAINT**
6-3-20 [98]

HUSTED V. MEPCO LABEL SYSTEMS
ET AL

2 thru 3

Plaintiff's Atty: J. Russell Cunningham; Kristen Ditlevsen
Defendant's Atty:
Charles L. Hastings [Laura Strombom]
Scott G. Beattie [Carol L. Gassner; Alfred M. Gassner; Mepco Label Systems]

Adv. Filed: 1/7/19
Answer:
2/5/19 [Alfred M. Gassner; Carol L. Gassner; Mepco Label Systems]
2/5/19 [Laura Strombom]
1st Amd Cmplt Filed: 6/3/20
Answer:
6/17/20 [Laura Strombom]
6/19/20 [Alfred M. Gassner; Carol L. Gassner; Mepco Label Systems]
Counterclaim of Alfred M. Gassner; Carol L. Gassner; Mepco Label Systems filed 6/19/20
Answer: 7/9/20

Nature of Action:
Recovery of money/property - turnover of property

Notes:
Continued from 3/7/23 to be conducted in conjunction with the hearing on the Motion to Approve Compromise for the convenience of all Parties in interest, as well as the court.

The Status Conference is xxxxxxx

MARCH 23, 2023 STATUS CONFERENCE

The Parties have presented the court with a global settlement that resolves all issues in Adversary Proceeding 19-2006 and 19-2038. The hearing for approval of the Settlement was conducted in the Thomas Gassner Bankruptcy Case, 10-27435 on March 23, 2023. The court **xxxxxxx**

3. **10-27435-E-7** **THOMAS GASSNER** **CONTINUED STATUS CONFERENCE RE: AMENDED COMPLAINT**
19-2038
CAE-1 **7-12-19 [20]**

GASSNER V. GASSNER ET AL

Plaintiff's Atty: Paul J. Pascuzzi
Defendant's Atty:
Scott G. Beattie [Carol L. Gassner; Alfred M. Gassner]
Charles L. Hastings [Laura Strombom]

Adv. Filed: 3/12/19
Answer: 4/11/19 [Laura Strombom]
4/11/19 [Alfred M. Gassner; Carol L. Gassner]
Amd. Cmplt. Filed: 7/12/19
Answer: 8/5/19 [Alfred M. Gassner; Carol L. Gassner]
8/13/19 [Laura Strombom]
Amd. Answer: 8/13/19 [Alfred M. Gassner; Carol L. Gassner]
8/26/19 [Alfred M. Gassner; Carol L. Gassner]

Notes:
Continued from 3/7/23 to be conducted in conjunction with the hearing on the Motion to Approve Compromise for the convenience of all Parties in interest, as well as the court.

The Status Conference is xxxxxxx

MARCH 23, 2023 STATUS CONFERENCE

The Parties have presented the court with a global settlement that resolves all issues in Adversary Proceeding 19-2006 and 19-2038. The hearing for approval of the Settlement was conducted in the Thomas Gassner Bankruptcy Case, 10-27435 on March 23, 2023. The court **xxxxxxx**

4. 22-21864-E-11 DEF-1

DAVID FOYIL
David Foyil

MOTION TO VALUE COLLATERAL OF UNITED STATES DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE
2-21-23 [67]

4 thru 5

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on attorneys of record, parties requesting special notice, other parties in interest, and Office of the United States Trustee on February 21, 2023. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

The Motion to Value Collateral and Secured Claim has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion to Value Collateral and Secured Claim of the Internal Revenue Service is xxxxxxxxxxxxxx

The Motion filed by David Foyil ("Debtor") to value the secured claim of the Internal Revenue Service ("IRS" or "Creditor") is accompanied by Debtor's declaration. Declaration, Dckt. 69. Debtor is the owner of real property commonly known as 130 Poppy Lane, Ione, California ("Property"). The court notes that Debtor's Declaration states Debtor owns the real property commonly described as 2945 Hartvickson Land, Valley Springs, California. Declaration, Dckt. 69 at ¶ 2. This appears to be a typographical error, as all other references to property reference the Poppy Lane address. Debtor seeks to value the Property at a replacement value of $700,000.00 as of the petition filing date.

Creditor filed Proof of Claim No. 10-1 on October 25, 2022. The Proof of Claim asserts that ($250,647.93) is secured by the Property, that ($426,267.40) is a priority unsecured claim, and that ($446,358.89) is a general unsecured claim.

In Debtor's prior bankruptcy cases, he has stated that the Property has values on Schedule A/B as follows:

1. 18-27524 (filed December 1, 2018)

    a. $650,000 (Original and Amended Schedules A/B; Dckt. 20 at 3, 71 at 3.)

2. 18-26678 (filed October 23, 2018)

    a. No Schedule A/B Filed.

3. 16-22194 (filed April 6, 2016)

    a. $550,000 (Schedule A/B; Dckt. 23 at 1)

4. 14-20670 (filed October 29, 2014)

    a. $375,000 (Schedule A/B; Dckt. 15 at 3)

As has been disclosed, in filing proofs of claim, the IRS makes its own calculation for purposes of 11 U.S.C. § 506(a) based upon Debtor's assets and then bifurcates the secured and unsecured portions of its claim. The IRS appears to have followed that procedure here.

Creditor's Opposition

Creditor filed an objection on March 9, 2023. Dckt. 87. Creditor objects to Debtor's valuation of their residence on the grounds that the opinion is "conclusory and speculative, and such it is improper opinion testimony that is more prejudicial than probative." *Id.* at 3:19-21 (citing Fed. R. Evid. 401, 702).

Creditor states they have not independently value Debtor's real and personal property, however, according to Zillow search, the property is valued between $966,000 and $1,160,000. Creditor has not provided any evidence of this Zillow search, through exhibits or otherwise, nor have they provided any evidence of how the Zillow search is admissible hearsay.

Creditor further states that the Amador County Assessor values the Property for tax purposes at $1,087,909 for the 2022 tax year. Again, Creditor offers no evidence of this fact.

Additionally, Creditor raises doubts to Debtor's credibility. Creditor states Debtor's "previous behavior and lack of evidence to support his valuation" should cause their valuation to be rejected.

Creditor's Counsel provides no declaration of the Creditor or other evidence was filed to support those assertions.

At a very basic level, every law student is taught that the court relies on properly authenticated, admissible evidence to establish facts in any proceeding–the court cannot and does not merely take counsel at their word. Apart from the practical effect that the court has been given a request for relief without any established factual basis, the Local Rules also affirmatively require that evidence be filed along with every motion and request for relief. LOCAL BANKR. R. 9014-1(d)(3)(D). Failure to comply with the Local Rules is grounds for an appropriate sanction. LOCAL BANKR. R. 1001-1(g).

DISCUSSION

As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004). Additionally, what Creditor may be unaware of, is Debtor is also a licensed real estate broker with "Gold Rush Realty Group." [FN. 1.] As a broker, Debtor's testimony as if provided as an expert as to the value of the Property would be more credible, rather than a lay-witness testimony.

FN. 1. As of March 20, 2023, Debtor is still a licensed real estate broker, License No. 01403801, with an expiration date of December 18, 2025; https://www2.dre.ca.gov/PublicASP/pplinfo.asp.

The Declaration provided by Debtor (Dckt. 69) "merely" offers Debtor's opinion as the owner of the Property that it is worth $700,000. No analysis or information to provide the court assistance in determining the value is provided as would an expert testifying as provided in Federal Rules of Evidence 702 and 703.

In his Declaration, Debtor testifies that his opinion as to value is based on:

> 7. In my opinion, the replacement value of the real property commonly described as 130 Poppy Lane, Ione, California is seven hundred thousand dollars ($700,000). The value is based upon my opinion. I am familiar with the value of similarly situated properties in the immediate area, and his opinion is based upon the sales within the last six months and listing prices of similar homes within the area. The value takes into consider deferred maintenance which is required, including, the replacement of flooring, cabinetry repair, painting, outdoor hardscape and landscape maintenance and repairs.

Dec., ¶ 7; Dckt. 69.

This testimony is that of an expert, in which he states his final opinion, but leaves out all of the necessary information as to how he reaches that opinion. Testimony of an expert witness is not to dictate an opinion or conclusion to the court but:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> > (a) the expert's scientific, technical, or other specialized knowledge **will help the trier of fact to understand the evidence or to determine a fact in issue**;
> >
> > (b) the **testimony is based on sufficient facts or data**;
> >
> > (c) the testimony is the product of reliable principles and methods; and

> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702 (emphasis added). Merely telling the court that he concludes, after looking at the undisclosed comparable (which appear to be just listing prices and not actual sales) and considering undisclosed repairs and deferred maintenance, and considering the undisclosed costs for doing the deferred maintenance and repairs; Debtor has an opinion of value. There is no evidence for the court to "understand" in the court making the court's determination as to value. Rather, merely Debtor's stated opinion.

Even if the court considered the Declaration as "merely" that of an owner of the Property, which is the most ephemeral evidence of value, the court finds it insufficient. An owner's opinion testimony is permitted as provided in Federal Rule of Evidence 701, which states (emphasis added):

> If a **witness is not testifying as an expert**, testimony in the form of an opinion is limited to one that is:
>
> > (a) rationally based on the witness's perception;
> >
> > (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
> >
> > (c) **not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.**

Fed. R. Evid. 701. The testimony is based on specialized knowledge of determining what are comparable properties, identifying the comparable properties, making adjustments for the size, nature, location, age, lot size, and the like for the comparables; then evaluating the condition of the Property and computing the costs and expenses for repairs and maintenance.

Thus, Debtor has not presented the court with sufficient evidence as to the current value of the Property. Looking at Debtor's prior bankruptcy cases, Debtor (who is a real estate professional in addition to being a lawyer) states that Property had a value of $650,000 as of December 1, 2018. Now, taking the value stated in the Schedules in this current case filed July 28, 2022, three and one half years later, of $700,000, Debtor asserts that the property increased in value by only $50,000 from December 2018 to July 2022. That is only a 7.7% increase.

It is common knowledge in this District and California, as well as demonstrated in a myriad of cases filed, that during the period December 2018 to July 2022 real estate properties dramatically increased. Even an owner of property stating that in his or her non-expert opinion, not relying on comparable and expenses for deferred maintenance and repairs, that property increase only 7.7% for that period would not be: (1) rationally based on the witness' perception and is not helpful for the court in determining the value of the Property.

But the Debtor is not alone in failing to comply with the Federal Rules of Evidence adopted by the U.S. Supreme Court and required to be complied with in Federal Court. The United States merely throws hearsay statements at the court, provides no authentication for the exhibit filed (Fed. R. Evid. 901 et seq.), and merely chooses to argue what the "facts" should be for the United States to win. That is not sufficient.

Creditor has filed Proof of Claim 10-1 asserting a secured claim in the amount of ($250,000), which is treated as *prima facie* validity of a proof of claim. The opposing party must then present counter evidence of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

There is nothing filed with Proof of Claim 10-1 indicating how the $250,000 secured claim amount is computed. Absent from the Proof of Claim is a statement as to the value of the property - both real and personal - that is asserted to secure the IRS Claim. POC 10-1, § 9. Creditor merely states the amount asserted to be secured.

In the battle of evidence, both Debtor and the IRS fail to provide the court with credible, substantial evidence of value. To the extent that the IRS asserts that stating ($250,000) on the proof of claim form for the secured claim, for which there is real and personal property collateral, it is sufficiently rebutted by Debtor stating a value for the property, though it is not sufficient for the court to determine the value of the Property.

At the hearing, XXXXXXXXXX

The court shall issue an order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value Collateral and Secured Claim filed by David Foyil ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion is xxxxxx

5. 22-21864-E-11 DEF-2 | **DAVID FOYIL** **David Foyil** | **MOTION TO VALUE COLLATERAL OF CALIFORNIA FRANCHISE TAX BOARD 2-21-23 [72]**

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on attorneys of record, parties requesting special notice, other parties in interest, and Office of the United States Trustee on February 21, 2023. By the court's calculation, 30 days' notice was provided. 28 days' notice is required.

The Motion to Value Collateral and Secured Claim has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered.

The Motion to Value Collateral and Secured Claim of the California Franchise Tax Board is xxxxxxx.

The Motion filed by David Foyil ("Debtor") to value the secured claim of the California Franchise Tax Board ("FTB" or "Creditor") is accompanied by Debtor's declaration. Declaration, Dckt. 74. Debtor is the owner of real property commonly known as 130 Poppy Lane, Ione, California ("Property"). Debtor seeks to value the Property at a replacement value of $700,000.00 as of the petition filing date. The court notes, Debtor's Declaration states Debtor owns the real property commonly described as 2945 Hartvickson Land, Valley Springs, California. Declaration, Dckt. 74 at ¶ 2. This appears to be a typographical error, as all other references to property reference the Poppy Lane address. Debtor seeks to value the Property at a replacement value of $700,000.00 as of the petition filing date. As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004).

Creditor filed Proof of Claim No. 11-1 on November 10, 2022. The Proof of Claim asserts that ($251,973.15) is secured by the Property, that ($51,315.05) is a priority unsecured claim, and that ($24,604.88) is a general unsecured claim.

As has been disclosed, in filing proofs of claim, the FTB makes its own calculation for purposes of 11 U.S.C. § 506(a) based upon Debtor's assets and then bifurcates the secured and unsecured portions of its claim. The FTB appears to have followed that procedure here.

DISCUSSION

As the owner, Debtor's opinion of value is evidence of the asset's value. *See* FED. R. EVID. 701; *see also Enewally v. Wash. Mut. Bank (In re Enewally)*, 368 F.3d 1165, 1173 (9th Cir. 2004). Additionally, what Creditor may be unaware of, is Debtor is also a licensed real estate broker with "Gold Rush Realty Group." [FN. 1.] As a broker, Debtor's testimony as if provided as an expert as to the value of the Property would be more credible, rather than a lay-witness testimony.

FN. 1. As of March 20, 2023, Debtor is still a licensed real estate broker, License No. 01403801, with an expiration date of December 18, 2025; https://www2.dre.ca.gov/PublicASP/pplinfo.asp.

The Declaration provided by Debtor (Dckt. 74) "merely" offers Debtor's opinion as the owner of the Property that it is worth $700,000. No analysis or information to provide the court assistance in determining the value is provided as would an expert testifying as provided in Federal Rules of Evidence 702 and 703.

In his Declaration, Debtor testifies that his opinion as to value is based on:

> 7. In my opinion, the replacement value of the real property commonly described as 130 Poppy Lane, Ione, California is seven hundred thousand dollars ($700,000). The value is based upon my opinion. I am familiar with the value of similarly situated properties in the immediate area, and his opinion is based upon the sales within the last six months and listing prices of similar homes within the area. The value takes into consider deferred maintenance which is required, including, the replacement of flooring, cabinetry repair, painting, outdoor hardscape and landscape maintenance and repairs.

Dec., ¶ 7; Dckt. 74.

This testimony is that of an expert, in which he states his final opinion, but leaves out all of the necessary information as to how he reaches that opinion. Testimony of an expert witness is not to dictate an opinion or conclusion to the court but:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> > (a) the expert's scientific, technical, or other specialized knowledge **will help the trier of fact to understand the evidence or to determine a fact in issue**;
> >
> > (b) the **testimony is based on sufficient facts or data**;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702 (emphasis added). Merely telling the court that he concludes, after looking at the undisclosed comparable (which appear to be just listing prices and not actual sales) and considering undisclosed repairs and deferred maintenance, and considering the undisclosed costs for doing the deferred maintenance and repairs; Debtor has an opinion of value. There is no evidence for the court to "understand" in the court making the court's determination as to value. Rather, merely Debtor's stated opinion.

Even if the court considered the Declaration as "merely" that of an owner of the Property, which is the most ephemeral evidence of value, the court finds it insufficient. An owner's opinion testimony is permitted as provided in Federal Rule of Evidence 701, which states (emphasis added):

> If a **witness is not testifying as an expert**, testimony in the form of an opinion is limited to one that is:
>
> (a) rationally based on the witness's perception;
>
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
>
> (c) **not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.**

Fed. R. Evid. 701. The testimony is based on specialized knowledge of determining what are comparable properties, identifying the comparable properties, making adjustments for the size, nature, location, age, lot size, and the like for the comparables; then evaluating the condition of the Property and computing the costs and expenses for repairs and maintenance.

Thus, Debtor has not presented the court with sufficient evidence as to the current value of the Property. Looking at Debtor's prior bankruptcy cases, Debtor (who is a real estate professional in addition to being a lawyer) states that Property had a value of $650,000 as of December 1, 2018. Now, taking the value stated in the Schedules in this current case filed July 28, 2022, three and one half years later, of $700,000, Debtor asserts that the property increased in value by only $50,000 from December 2018 to July 2022. That is only a 7.7% increase.

It is common knowledge in this District and California, as well as demonstrated in a myriad of cases filed, that during the period December 2018 to July 2022 real estate properties dramatically increased. Even an owner of property stating that in his or her non-expert opinion, not relying on comparable and expenses for deferred maintenance and repairs, that property increase only 7.7% for that period would not be: (1) rationally based on the witness' perception and is not helpful for the court in determining the value of the Property.

Creditor has filed Proof of Claim 11-1 asserting a secured claim in the amount of ($251,973), which is treated as *prima facie* validity of a proof of claim. The opposing party must then present counter evidence of probative force equal to that of the creditor's proof of claim. *Wright v. Holm (In re Holm)*, 931

F.2d 620, 623 (9th Cir. 1991); *see also United Student Funds, Inc. v. Wylie (In re Wylie)*, 349 B.R. 204, 210 (B.A.P. 9th Cir. 2006).

There is nothing filed with Proof of Claim 11-1 indicating how the ($251,973) secured claim amount is computed. Absent from the Proof of Claim is a statement as to the value of the property - both real and personal - that is asserted to secure the IRS Claim. POC 11-1, § 9. Creditor merely states the amount asserted to be secured.

In the battle of evidence, both Debtor and the FTB fail to provide the court with credible, substantial evidence of value. To the extent that the FTB asserts that stating ($251,973) on the proof of claim form for the secured claim, it is sufficiently rebutted by Debtor stating a value for the property, though it is not sufficient for the court to determine the value of the Property.

It may be that Creditor has concluded that it's tax lien is junior to that of the Internal Revenue Service, and therefore the IRS will soak up any value in excess of the other senior liens on the Property. U.S. Bank, N.A. has filed Proof of Claim 6-1 asserting a secured claim ($778,030.15) for which the property is the collateral pursuant to a Deed of Trust recorded on November 14, 2006. POC 6-1, Attachment p. 9. Even if the Property has a $1,000,000 value as asserted by the IRS, the U.S. Bank, N.A. secured claim and the IRS senior tax lien (if the FTB determined that the IRS is senior) would exhaust all of the value of the Property.

Even though unopposed, Debtor has failed to provide the court with sufficient, credible evidence that complies with the Federal Rules of Evidence for the court to determine that the value of the Property is $700,000.

At the hearing, **XXXXXXX**

The court shall issue an order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Value Collateral and Secured Claim filed by David Foyil ("Debtor") having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion pursuant to 11 U.S.C. § 506(a) is **XXXXXXX**