UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

Pursuant to District Court General Order 617, no persons are permitted to appear in court unless authorized by order of the court. All appearances of parties and attorneys shall be telephonic through CourtCall, which advises the court that it is waiving the fee for the use of its service by *pro se* (not represented by an attorney) parties through June 1, 2020. **The contact information for CourtCall to arrange for a phone appearance is: (866) 582-6878**.

May 5, 2020 at 1:30 p.m.

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1. **16-22214-E-13** **LYDIA RAMIREZ** **MOTION FOR RELIEF FROM AUTOMATIC STAY**
RAS-1 **Eric Schwab** **4-6-20 [62]**

REVERSE MORTGAGE FUNDING, LLC VS.

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 Debtor, Debtor's Attorney, Chapter 13 Trustee, and Office of the United States Trustee on April 6, 2020. By the court's calculation, 29 days' notice was provided. 28 days' notice is required.

The Motion for Relief from the Automatic Stay 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 for Relief from the Automatic Stay is xxxxxxxxxx.

Reverse Mortgage Funding, LLC ("Movant") seeks relief from the automatic stay with respect to Lydia Alvarado Ramirez's ("Debtor") real property commonly known as 2 Dakota Court, Sacramento, California ("Property"). Movant has provided the Declaration of Rigoberto Corona to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues Debtor has failed to maintain post-petition flood insurance on the subject property. Declaration, Dckt. 64. Creditor was forced to advance payment in the amount of $1,167.48 to cover flood insurance policy dated July 31, 2017 through September 29, 2017 and flood insurance policy dated September 29, 2019 through September 29, 2020. *Id*.

Movant also argues that Debtor lists the value of the Property on Schedule A to be $242,150.00, which the obligation owed to Movant is currently ($337,098.08). Further, that the Property is the Debtor's residence and not an income source to fund a plan.

CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on April 20, 2020. Dckt. 68. Trustee asserts that Debtor is current under the confirmed plan and has paid a total of $25,310.00 to date. *Id*. at p.1. Further, Trustee points out that creditor Champion Mortgage Company (Nationstar Mortgage LLC, DBA) filed a Proof of Claim, which has been provided for and paid. *Id*. at pp.1-2. No transfer of claim has been reported on PACER; however, Movant's exhibits include the assignment of the deed of trust from Champion Mortgage Company to Movant. *Id*. at p.1.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be $337,098.08 (Declaration, Dckt. 64), while the value of the Property is determined to be $242,150.00, as stated in Schedules B and D filed by Debtor.

11 U.S.C. § 362(d)(1): Grant Relief for Cause

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because "cause" is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff'd sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

11 U.S.C. § 362(d)(2)

A debtor has no equity in property when the liens against the property exceed the property's

value. *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity in property, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective rehabilitation. 11 U.S.C. § 362(g)(2); *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 375–76 (1988); 3 COLLIER ON BANKRUPTCY ¶ 362.07[4][b] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (stating that Chapter 13 debtors are rehabilitated, not reorganized). Based upon the evidence submitted to the court, and no opposition or showing having been made by Debtor or the Chapter 13 Trustee, the court determines that there is no equity in the Property for either Debtor or the Estate.

Ruling on Relief Requested

The cause grounds are that Movant has been forced to advance to protect its secured claim the modest, though required to be paid, amount for flood insurance in the sum of $1,167.48. It is asserted that Debtor has not cured this amount or that they will maintain the insurance going forward.

As the Trustee has noted, Debtor has made substantial payments under the Plan. Debtor is now starting year five of the plan, which may be blown-up over this modest amount. It appears that the only reason this case exists is to address Movant's claim defaults.

The Modified Plan in this case was confirmed in 2018 without a hearing due to no opposition having been filed. Civil Minutes, Dckt. 56. In looking back at the financial information filed in support of such motion, Debtor's expense information appears questionable. (Debtor was represented at the time by a difference counsel than is representing her now.)

On her statement of expenses, Exhibit B (Dckt. 49 at 4-5), Debtor lists having a family unit of two persons - the Debtor and a 54 year old child who is a dependent. There is no income contribution (whether from wages, Social Security, or other benefits) from the 54 year old child. The monthly expenses of ($1,433) appear to be significantly understated for a family unit of two persons.

This Motion may be bringing to light a bigger issue concerning this Debtor, who in light of having a now 57 year old child, would appear to be a "senior citizen."

For Movant, this modest arrearage is now forcing it to incur a substantial loss on reverse mortgage. Having a claim of $337,098.08, but with the property worth only $242,150.00, the downside appears to be:

FMV	$242,150.00
Foreclosure costs and expenses, property taxes, insurance and security for the period having to hold the property for marketing and sale	($20,000.00)
Costs of Sale (without taking into account repairs)	($19,372.00)
Projected Recovery from Collateral	$202,778.00

Thus, it appears that Movant will end up suffering a 40% loss if it proceeds against the collateral.

It appears that there are better alternatives for everyone concerning this property and the obligation.

At the hearing, counsel for the Debtor reported to the court concerning the Debtor's abilities to handle her finances and prosecute this case, **xxxxxxxxxx**

~~The court shall issue an order terminating and vacating the automatic stay to allow Movant, and its agents, representatives and successors, and all other creditors having lien rights against the Property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the Property.~~

Request for Attorneys' Fees

In the Motion, Movant requests that it be allowed attorneys' fees. The Motion asserts contractual grounds for the fees, specifically Movant points to the Loan Documents (Section 7(C) of the Note) which provide that Movant is entitled to its costs and expenses in enforcing its interest to the extent not prohibited by applicable law. See Exhibit 1, Dckt. 65. Movant requests $1,081.00 in attorney's fees, including the $181.00 filing fee.

Commonly a request for attorney's fees and related nontaxable expenses is made by a post-judgment (which includes an order) motion unless the substantive law requires those fees to be proved at trial as an element of damages. FED. R. CIV. P. 54(d)(2)(A); FED. R. BANKR. P. 7054, 9014.

However, in some contested matters, including the request with a motion for a contested matter can be a cost effective, expense reducing (for both the creditor and debtor) practice.

Here, the Motion clearly states the grounds upon which the request for attorney's fees is based, identifying the contractual provision. The amounts of the fees, $900, and the costs, $181 filing fee, are reasonable. Though the Declaration provided by Movant does not state that the attorney's fees incurred with connection with this Motion is at least $900, the court will, for this motion, find the pleading in the Motion to be sufficient for the request to be for attorney's fees that Movant will actually pay its counsel.

Attorney's fees of $900 and costs of $181 are awarded to Movant.

Request for Waiver of Fourteen-Day Stay of Enforcement

Federal Rule of Bankruptcy Procedure 4001(a)(3) stays an order granting a motion for relief from the automatic stay for fourteen days after the order is entered, unless the court orders otherwise. Movant requests that the court grant relief from the Rule as adopted by the United States Supreme Court.

Movant has pleaded adequate facts and presented sufficient evidence to support the court waiving the fourteen-day stay of enforcement required under Federal Rule of Bankruptcy Procedure 4001(a)(3), and this part of the requested relief is granted.

Request for Prospective Injunctive Relief

Movant makes an **additional request stated in the prayer**, for which no grounds are clearly stated in the Motion. Movant's further relief requested in the prayer is that this court make this order, **as opposed to every other order issued by the court**, binding and effective despite any conversion of this case to another chapter of the Code. Though stated in the prayer, no grounds are stated in the Motion for grounds for such relief from the stay. The Motion presumes that conversion of the bankruptcy case will be reimposed if this case were converted to one under another Chapter.

As stated above, Movant's Motion does not state any grounds for such relief. Movant does not allege that notwithstanding an order granting relief from the automatic stay, a stealth stay continues in existence, waiting to spring to life and render prior orders of this court granting relief from the stay invalid and rendering all acts taken by parties in reliance on that order void.

No points and authorities is provided in support of the Motion. This is not unusual for a relatively simple (in a legal authorities sense) motion for relief from stay as the one before the court. Other than referencing the court to the legal basis (11 U.S.C. § 362(d)(3) or (4)) and then pleading adequate grounds thereunder, it is not necessary for a movant to provide a copy of the statute quotations from well known cases. However, if a movant is seeking relief from a possible future stay, which may arise upon conversion, the legal points and authorities for such heretofore unknown nascent stay is necessary.

As noted by another bankruptcy judge, such request (unsupported by any grounds or legal authority) for relief of a future stay in the same bankruptcy case:

> [A] request for an order stating that the court's termination of the automatic stay will be binding despite conversion of the case to another chapter unless a specific exception is provided by the Bankruptcy Code is a common, albeit silly, request in a stay relief motion and does not require an adversary proceeding. Settled bankruptcy law recognizes that the order remains effective in such circumstances. Hence, the proposed provision is merely declarative of existing law and is not appropriate to include in a stay relief order.
>
> Indeed, requests for including in orders provisions that are declarative of existing law are not innocuous. First, the mere fact that counsel finds it necessary to ask for such a ruling fosters the misimpression that the law is other than it is. Moreover, one who routinely makes such unnecessary requests may eventually have to deal with an opponent who uses the fact of one's pattern of making such requests as that lawyer's concession that the law is not as it is.

In re Van Ness, 399 B.R. 897, 907 (Bankr. E.D. Cal. 2009) (citing *Aloyan v. Campos (In re Campos)*, 128 B.R. 790, 791–92 (Bankr. C.D. Cal. 1991); *In re Greetis*, 98 B.R. 509, 513 (Bankr. S.D. Cal. 1989)).

As noted in the 2009 ruling quoted above, the "silly" request for unnecessary relief may well be ultimately deemed an admission by Movant and its counsel that all orders granting relief from the automatic stay are immediately terminated as to any relief granted Movant and other creditors represented by counsel, and upon conversion, any action taken by such creditor is a *per se* violation of the automatic stay.

~~No other or additional relief is granted by the court.~~

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 for Relief from the Automatic Stay filed by Reverse Mortgage Funding, LLC ("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 automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Movant, its agents, representatives, and successors, and trustee under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed that is recorded against the real property commonly known as 2 Dakota Court, Sacramento, California ("Property") to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale to obtain possession of the Property.

IT IS FURTHER ORDERED that the fourteen-day stay of enforcement provided in Federal Rule of Bankruptcy Procedure 4001(a)(3) is waived for cause.

IT IS FURTHER ORDERED that Movant is awarded attorneys' fees in the amount of $1,081.00 pursuant to the Note.

No other or additional relief is granted.

2.	**15-28400-E-13** **DPC-2**	**HEATHER URBAN** **Lucas Garcia**	**MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION TO CONFIRM TERMINATION OR ABSENCE OF STAY** **4-6-20 [88]**
	TOM AMON VS.		

APPEARANCES OF:

Lucas Garcia, Esq., Counsel for Debtor
and
Craig A. Diamond, Counsel for Movants

REQUIRED FOR MAY 5, 2020 HEARING

TELEPHONIC APPEARANCE ONLY

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.

Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on the Honorable Ronald H. Sargis and Marsha A. Burch on April 3, 2020. By the court's calculation, 32 days' notice was provided. 14 days' notice is required.

The Proof of Service for the Motion for Relief from the Automatic Stay does not document that the pleadings were properly served on the Debtor, the Chapter 13 Trustee, or the U.S. Trustee. The Chapter 13 Trustee and Debtor responding, and effectively waiving any defect in service, as discussed below, the court considers the Motion at the May 5, 2020 hearing.

The Motion for Relief from the Automatic Stay is denied without prejudice.

PRELIMINARY MATTERS

The present Motion has been filed using Docket Control No. DPC-2. That number was first used by the Chapter 13 Trustee, David P. Cusick, for a Motion to Dismiss this bankruptcy case filed on December 11, 2019. It has now been reused by the Movants, Tom and Lolita Amon, for the present

Motion for Relief From the Stay.

The moving party is reminded that the Local Rules require the use of a new Docket Control Number with each motion. LOCAL BANKR. R. 9014-1(c). Here, the moving party reused a Docket Control Number that was previously used by Trustee. This is not correct use of the docket control function. The Court will consider the motion, but counsel is reminded that not complying with the Local Rules is cause, in and of itself, to deny the motion. LOCAL BANKR. R. 1001-1(g), 9014-1(l).

Service of Process

The moving party filed a United States Bankruptcy Court for the Central District of California Proof of Service form. Dckt. 92. Jil Gustafson has signed the Proof of Service stating under penalty of perjury that the service has been conducted as stated therein.

First, Ms. Gustafson states that the documents have been served on the judge in chambers in the manner and form required by Local Bankruptcy Rule 5005-2(d) and were served by United States Mail. Eastern District of California Local Bankruptcy Rule requires attorneys to file documents with the court electronically. L.B.R.(d)(2) provides that a request for a waiver from electronic filing may be requested by ex parte motion by an attorney. It does not provide for sending documents to a judge by U.S. Mail. [FN. 1]

FN. Local Bankruptcy Rule 5005-2(d) for the U.S. Bankruptcy Court for the Central District of California does require the filing, whether electronically or non-electronically, a copy of all documents marked "Judge's Copy" and it be served on the judge's chambers.

The Proof of Service also states that the pleadings were served on a Marsha Burch, an attorney in Grass Valley, California. Marsha Burch is not an attorney who has appeared in this case or counsel of record for anyone in this case.

The Proof of Service does not attest to service of the pleadings on the Debtor, Debtor's Counsel, or the Chapter 13 Trustee.

Both the Chapter 13 Trustee and the Debtor have filed responses to the present motion, resolving the issue of failure of service. The court considers the Motion on its merits.

REVIEW OF THE MOTION

Tom and Lolita Amon ("Movant") seeks relief from the automatic stay to allow what they refer to as State Court Action to Enforce Settlement in the County of Nevada City (the "State Court Litigation") to be concluded. Movant has provided the Declaration of Craig A. Diamond ("Movant's Counsel") to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by Heather Lynn Urban ("Debtor"). Counsel later filed the Declaration of Movant Lolita Amon to introduce evidence regarding their claims. Dckt. 103.

Movants argue that relief is needed because Debtor entered into a settlement agreement without notifying Movants that she was in bankruptcy until after Movants had done what was required of them and when they tried to enforce the settlement when she refused to perform, Debtor invoked the protection of this bankruptcy court. Declaration, Dckt. 103.

The Motion recounts a long series of events leading to the present Motion seeking relief from the automatic stay. It is necessary for the court to review this grounds stated to put the present proceeding into context.

Review of Events as Stated With Particularity in the Motion

Movants begin stating that they own residential property on 14784 Lewis Road in Nevada City, California ("Movant's Property"). They do not state when they acquired their property. The Motion states that Debtor owns the immediately adjacent property on Bourbon Hill Road in Nevada City, California ("Debtor's Property"), on which Debtor operates a daycare business.

It is stated in the Motion that in March 1989 a "Surveyor's Statement" was filed with Nevada County showing the boundaries between Movants' Property and Debtor's Property. A copy of that Statement is identified as Exhibit A to the Motion. Motion ¶ 3; Dckt. 88. [FN. 2]

FN. 2. The court cannot identify any exhibits having been filed by Movants.

The Motion continues, alleging that in August 2015, a survey was conducted of the Movants' Property and Debtor's Property by Judy Rodgers, a copy of which is provided as Exhibit B. *Id.* No declaration of Judy Rogers is provided, though after this sentence is the parenthetical "(Diamond Decl. ¶ 2)." The "Diamond Decl." is a reference to a declaration filed by Movants' counsel, which, as discussed below, is merely a cut and paste of the allegations stated in the Motion, devoid of anything showing that Movants' counsel has personal knowledge for which he may provide testimony under penalty of perjury. Fed. R. Evid. 601, 602.

The Motion continues, stating that in 2015 Movant's predecessor in interest (which appears to indicate that Movant's did not own Movants' property prior to 2015) gave Debtor "temporary permission" for "use of her encroachments onto what is now known to be [Movants' Property]. . . ." *Id.*, ¶ 4. It is further stated that when Movants' purchased Movant's Property in August 2015, they too gave Debtor "temporary permission for use of her encroachments" on it. *Id.* Reference is made to the evidence for this allegation being Movants; counsel's declaration, into with paragraph 4 of the Motion has been cut and pasted. No testimony is provided for how Movants' Counsel has personal knowledge of the permission given five years ago.

The Motion then recounts purported conversations between Movants and Debtor in September 2015, again, the evidence of which is stated to be Movants' counsel's declaration. *Id.*, ¶ 5. No personal knowledge of counsel provided in the Declaration.

It is then alleged that in September 2017, Movants rescinded the permission for Debtor to use the "encroachment" on Movants' Property, with a letter for such rescission provided as Exhibit C. (No exhibits filed.) *Id.*, ¶ 6.

The Motion continues, alleging that Movants made numerous requests for Debtor to remove her personal property from Movants' Property (the latest being in 2018), but she has refused. Instead, Debtor has made statements to Movants that she claims an interest in Movants' Property and has a right to occupy it. *Id.*, ¶¶ 7,8.

Movants then began posting No Trespassing signs, which Debtor removed and has not returned to Movants. When Movants attempted to install water lines on Movants' Property, Debtor chased the surveyor and contractor off of Movants' Property. Debtor has threatened to have Movants arrested if they go on the portion of Movants' Property in which Debtor asserts an interest. *Id.* ¶¶ 9-11.

Debtor continues to operate her child daycare business, continuing to use a portion of Movants' Property. Debtor and persons connected with Debtor continually park their vehicles on the access road to obstruct Movants access to Movants' Property.

It was alleged that Debtor and Movants came to an agreement for Debtor to remove her personal property from Movants' Property, with that deadline missed by approximately one year. *Id.*, ¶ 17.

Ultimately a settlement was reached (no documentation of such settlement was provided with the Motion) that Debtor was to remove her personal property by midnight on November 30, 2018. *Id.*, ¶ 18. It makes reference to a hearing before a Judge *Pro Tem*, but no legal proceeding is identified. It further states that if the personal property is removed, then Debtor is to pay $1,000.00 a day until the personal property is removed. Reference is then made to Movants dismissing "their complaint" and Debtor dismissing her "cross-complaint" once the personal property has been removed.

It is stated that Movants have performed their part of the settlement, but Debtor did not until December 2019, which would be more a year after the above stated November 30, 2018 deadline.

In a court's (it is not identified which court and no copy of an order is provided as an exhibit) order, the $1,000.00 a day penalty was determined to be an enforceable provision; thus, Movants compute that Debtor owes $331,000.00 in enforceable penalties.

It is stated that Debtor had not disclosed to Movants that she was in bankruptcy "at this point," appearing to indicate sometime in early 2020. (It appears that this part of the Motion is a cut and paste from a motion filed in another court for enforcement of the settlement agreement, and is making references to statements made in another motion but not made in this Motion.)

It is then alleged that two days before "the hearing" (not identifying what hearing) a new counsel for Debtor advised Movants that Debtor had filed bankruptcy. It is then stated that a review of the bankruptcy file indicated that a motion to dismiss the bankruptcy case had been filed, but that there were no further orders. (This too appears to be a cut and paste from some other motion, using terms to identify the Movants and Debtor different from those previously used in this Motion.) [FN. 3]

FN. 3. A review of the Docket in this case discloses that the Trustee filed a Motion to Dismiss on December 11, 2019 and the order on that Motion was filed on January 28, 2020. Dckts. 75, 85. Thus, it appears that the unidentified proceedings in another court were occurring in the January 2020, prior to the 28th day of that month.

Reply Filed by Movants

After reviewing the Debtor's Response, Movants filed a Reply on April 29, 2020. Dckt. 102. It states that Movants did not serve the pleadings on all required parties. Additionally, that Movants

were not aware of the docket control numbering requirements and "inadvertently" "miss-numbered" the papers.

In reply to the objection to Movants' counsel providing testimony under penalty of perjury as to facts, the Reply states that a Declaration signed by moving party Lolita Amon has been filed. It appears that this "personal knowledge" declaration is a copy and paste of Movants' counsel's declaration, including Ms. Amon providing testimony under penalty of perjury about the 1989 "Surveyor's Statement" that was filed in 1989. Ms. Amon provides her "testimony" that Debtor has not "disclosed" that she is in bankruptcy and "testifies" to what appear to be excerpts from portions of motion(s) filed in other courts.

CHAPTER 13 TRUSTEE'S RESPONSE

David Cusick ("the Chapter 13 Trustee") filed a Response on April 20, 2020. Dckt. 94. Trustee states that Debtor is current under the confirmed plan, Movants were not listed as creditors in the original schedules or listed on the master address list (required for them to have received notice of the bankruptcy from the court and service by other parties). However, Movants are now listed in amended schedules as "contingent, unliquidated, and disputed." *Id.* ¶ 1. The Amended Schedules and Amended Master Address List were filed on March 2, 2020 - four years and five months after this bankruptcy case had been filed.

The Chapter 13 Trustee also notes that under the terms of the confirmed Chapter 13 Plan, all property of the bankruptcy estate revested in the Debtor upon the commencement of the bankruptcy case. *Id.*, ¶ 2.

DEBTOR'S RESPONSE

Debtor has filed a response, in which she first attacks the deficiency in the Proof of Service. Response, Dckt. 97. Debtor also points to the Declaration of Movants' counsel, in which he purports to testify under penalty of perjury as to a number of facts, which facts he fails to show a basis for having personal knowledge.

Debtor states that the boundary line dispute existed prior to the filing of this bankruptcy case in 2015, so it has been subject to this bankruptcy case and anything done outside of this court, or without the authorization of this court is improper.

While making the above statement, and taking a swipe at Movants' counsel, Debtor's experienced counsel offers no statement as to why this serious dispute or interest in Movants' Property, which Debtor argues pre-dates this bankruptcy case, is not included in the Schedules and Statement of Financial Affairs filed under penalty of perjury by Debtor. Or why Movants, if she was in dispute with them, were not listed on the Schedules or the Master Mailing List.

Debtor offers no declaration in response to the Motion.

DISCUSSION

This Motion presents the court with a series of pre-petition and post-petition events, transactions, and unidentified litigation intentionally prosecuted by both Movants and Debtor, one against the other.

As is well established in the Ninth Circuit, an act taken in violation of the automatic stay is void, not merely voidable. *Far Out Productions, Inc. v. Oskar et al.*, 247 F.3d 986, 995 (9th Cir. 2001); (*In re Schwartz*),954 F.2d 569, 571 (9th Cir. 1992). Movant's motion as drafted requests the court prospective relief, that either there is no stay for the subject liability or to provide relief from the stay. If that is the only relief granted, then whatever has happened in the past would still be void.

However, Congress also provide in 11 U.S.C. § 362 the power of the bankruptcy court to annul the automatic stay so as to render what was void to not be void. Retroactive annulment of the automatic stay is within the discretion of the court. *Nat'l Envtl. Waste Corp. v. City of Riverside* (*In re Nat'l Envtl. Waste Corp.*), 129 F.3d 1052, 1054 (9th Cir. 1997). The court, in making a case-by-case review, must balance the equities to determine if annulment is justified. *Id.* at 1055.

The Motion as drafted, does not appear to seek such an annulment of the stay.

Additionally, the Trustee points the court to the confirmed Chapter 13 Plan in this case which provides for all property of the estate to revest in the Debtor. Second Modified [Amended] Plan, ¶ 5.01; Dckt. 50. If property is no longer property of the bankruptcy estate that may be of legal significance. That issue is not addressed.

DENIAL OF MOTION WITHOUT PREJUDICE

The court denies the Motion without prejudice. Though it appears that Debtor has willingly and intentionally engaged in litigation in non-bankruptcy courts over the past several years concerning disputes about property that may have revested in the Debtor upon confirmation, what Movants appear to be seeking to accomplish (going forward to enforce agreements in unidentified non-bankruptcy court litigation) is not the relief sought in the Motion.

Additionally, it is very troubling Movants' and Movants' counsel's cavalier appearing attitude to testifying under penalty of perjury in court. Counsel's declaration and Lolita Amon's declaration contain multiple examples of making statements for which no basis of personal knowledge is given. The Motion allegations are merely cut and pasted into a "declaration" to be "testimony" under penalty of perjury. Some of the cut and pasted paragraphs are taken from what appears to be motions filed in other unidentified court. Testimony under penalty of perjury is not merely the opportunity to argue allegations that if true would "let me/my client win!"

While the court can envision different ways that a motion could be advanced by Movants and defended by Debtor, it is not the court's role to so advocate for one party or the other, or both. While it is incumbent on the court to get the law correct (notwithstanding an incorrect or non-response by a party), it must be based on the evidence properly presented to the court and within the scope of the relief requested. *See United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 1381 n.14, 176 L. Ed. 2d 158, 173 n.14 (2010); *see also Varela v. Dynamic Brokers, Inc. (In re Dynamic Brokers, Inc.)*, 293 B.R. 489, 499 (B.A.P. 9th Cir. 2003) (citing *Everett v. Perez (In re Perez)*, 30 F.3d 1209, 1213 (9th Cir. 1994)).

Here, the court does not have sufficient evidence to issue a final order granting or denying the relief. The relief requested is inconsistent with what appears to be sought in the body of the Motion.

The Motion is denied without prejudice.

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 for Relief from the Automatic Stay filed by Tom and Lolita Amon ("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 Relief is denied without prejudice.