



Honorable Mike K. Nakagawa  
United States Bankruptcy Judge



Entered on Docket  
March 14, 2022

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

\* \* \* \* \*

In re:	)	Case No.: 09-11241-MKN
	)	Chapter 11
LEON MCKITTRICK (DECEASED),	)	
	)	
Debtor.	)	Date: October 20, 2021
	)	Time: 9:30 a.m.
	)	

**ORDER ON MOTION FOR CONTEMPT FOR VIOLATION OF THE AUTOMATIC STAY AND DISCHARGE INJUNCTION, FAILING TO COMPLY WITH A COURT ORDER AND THE CONFIRMED CHAPTER 11 PLAN AND FOR DAMAGES INCLUDING ATTORNEY[']S FEES AGAINST CREDITORS, BAC HOME LOAN SERVICING, L.P. AND FAY SERVICING, LLC<sup>1</sup>**

On October 20, 2021, the court heard the Motion for Contempt for Violation of the Automatic Stay and Discharge Injunction, Failing to Comply with a Court Order and the Confirmed Chapter 11 Plan and for Damages Including Attorney[']s Fees Against Creditors, BAC Home Loan Servicing, L.P. and Fay Servicing, LLC (“Fourth Sanctions Motion”), brought in the above-captioned case. The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

**BACKGROUND<sup>2</sup>**

<sup>1</sup> In this Order, all references to “ECF No.” are to the number assigned to the documents filed in the above-captioned bankruptcy case as they appear on the docket maintained by the clerk of court. All references to “Section” or “§§ 101-1532” are to the provisions of the Bankruptcy Code. All references to “FRE” are to the Federal Rules of Evidence.

<sup>2</sup> Pursuant to FRE 201(b), the court takes judicial notice of all materials appearing on the docket in the above-captioned bankruptcy case. See U.S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980); see also Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC Trustee

1 On January 30, 2009, Leon McKittrick (“Debtor”) filed a “skeleton” voluntary Chapter  
2 11 petition commencing the above-captioned bankruptcy proceeding. (ECF No. 1).

3 On February 11, 2009, Debtor filed his schedules of assets and liabilities, statement of  
4 financial affairs, and related documents. (ECF Nos. 12-16 and 20).

5 On June 7, 2010, an order was entered confirming Debtor’s Third Modified Plan of  
6 Reorganization Dated March 2, 2010 (“Confirmed Plan”). (ECF No. 542).

7 On August 12, 2010, Debtor filed Exhibit 1 to Amended Order Confirming Debtor’s  
8 Third Modified Plan of Reorganization Dated March 2, 2010. (ECF No. 548).

9 On August 18, 2010, an Amended Order Confirming Debtor’s Third Modified Plan of  
10 Reorganization Dated March 2, 2010, was entered. (ECF No. 549).

11 On August 27, 2010, Debtor’s Third Amended Order Confirming Debtor’s Third  
12 Modified Plan of Reorganization Dated March 2, 2010, was entered (“Plan Confirmation  
13 Order”). (ECF No. 554).

14 On April 22, 2011, an Order Entering Final Decree closing the above-captioned Chapter  
15 11 case was entered. (ECF No. 588).

16 On January 27, 2012, an order was entered vacating the Order Entering Final Decree due  
17 to clerical error, thereby reopening the case. (ECF No. 613).

18 On October 7, 2015, Debtor filed a certification that he had complied with the conditions  
19 for entry of an individual Chapter 11 discharge. (ECF No. 742).

20 On November 7, 2016, Debtor filed a motion for sanctions and civil contempt (“First  
21 Sanctions Motion”) against creditors Bank of America, N.A. (“BOA”), Nationstar Mortgage,  
22 LLC (“Nationstar”), and Select Loan Servicing, LLC, alleging that the Plan Confirmation Order  
23 had been violated. (ECF No. 758). Debtor sought imposition of civil contempt sanctions for a  
24 variety of conduct, but none specifically with respect to violations of the automatic stay under  
25 Section 362(a).

26  
27 Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015) (“The Court may consider the records in this  
28 case, the underlying bankruptcy case and public records.”).

1 On December 21, 2016, Debtor filed another motion for sanctions and civil contempt  
2 against creditor JP Morgan Chase Bank, N.A. (“Chase Bank”). Alleging that the Plan  
3 Confirmation Order had been violated (“Second Sanctions Motion”). (ECF No. 766). Debtor  
4 sought imposition of civil contempt sanctions for a variety of conduct, but none specifically with  
5 respect to violations of the automatic stay under Section 362(a).

6 On January 11, 2017, BOA filed its opposition to the First Sanctions Motion. (ECF No.  
7 770).

8 On February 15, 2017, Nationstar filed its opposition to the First Sanctions Motion, along  
9 with the declarations of Michael Hogue, Esq. and Maida Resare. (ECF Nos. 779-781).

10 On February 22, 2017, Debtor filed a reply to Nationstar’s opposition. (ECF No. 784).

11 On March 15, 2017, Chase Bank filed its opposition to the First Sanctions Motion  
12 without prejudice. (ECF No. 790).

13 On March 22, 2017, Debtor filed a reply to Chase Bank’s opposition. (ECF No. 792).

14 On May 12, 2017, Debtor withdrew his First Sanctions Motion without prejudice. (ECF  
15 No. 805).

16 On June 2, 2017, the court entered an order denying the Second Sanctions Motion  
17 without prejudice. (ECF No. 807).

18 On February 26, 2020, a Suggestion of Death of Debtor was filed indicating that the  
19 Debtor had died on December 26, 2019. (ECF No. 869).

20 On February 27, 2020, counsel for Debtor filed a motion to substitute the Debtor’s  
21 brother, Leo McKittrick (“Leo”), as the bankruptcy estate representative for the purposes of  
22 completing the Confirmed Plan (“Substitution Motion”). (ECF No. 870).

23 On April 1, 2020, an order was entered granting the Substitution Motion. (ECF No. 875).

24 On June 22, 2020, a third motion for sanctions and civil contempt (“Third Sanctions  
25 Motion”) was filed on behalf of the Debtor. (ECF No. 877). Debtor sought imposition of civil  
26 contempt sanctions for a variety of conduct, but none specifically with respect to violations of  
27 the automatic stay under Section 362(a).

1 On June 23, 2020, a motion for entry of discharge and final decree was filed on behalf of  
2 Debtor (“Discharge Motion”). (ECF No. 883). Debtor filed a certificate of mailing attesting to  
3 service by first class mail of the Discharge Motion and accompanying notice of hearing. (ECF  
4 No. 886).

5 On July 15, 2020, creditors Citibank, N.A. (“Citibank”) and Shellpoint Mortgage  
6 Servicing as well as Nationstar, filed oppositions to the Third Sanctions Motion. (ECF No. 893  
7 and 895). On this same day, creditor U.S. Bank, N.A. (“U.S. Bank”) and Wilmington Savings  
8 Fund Society dba Christiana Trust, by and through its servicing agent, Fay Servicing, LLC (“Fay  
9 Servicing”), filed responses to the Third Sanctions Motion. (ECF No. 892 and 894).

10 On July 17, 2020, an order was entered granting a stipulation between Debtor and  
11 creditor Rushmore Loan Management Services, LLC (“Rushmore”), to continue the hearing on  
12 the Discharge Motion. (ECF No. 898).

13 On August 12, 2020, Nationstar filed a supplement to its opposition to the Third  
14 Sanctions Motion. (ECF No. 910). On this same day, Rushmore filed its opposition to the Third  
15 Sanctions Motion as well as to the Discharge Motion, which includes a counter motion for  
16 dismissal of Debtor’s Chapter 11 case (“First Dismissal Motion”). (ECF Nos. 911 and 913).  
17 Furthermore, Chase Bank filed its opposition to the Third Sanctions Motion. (ECF No. 915).

18 On October 6, 2020, BOA filed its opposition to the Third Sanctions Motion. (ECF No.  
19 927).

20 On October 16, 2020, Debtor, Rushmore and Community Loan, stipulated to continue the  
21 hearing on the Discharge Motion as well as the First Dismissal Motion. (ECF No. 935). On this  
22 same day, an order was entered granting the stipulation to continue the Discharge Motion and the  
23 First Dismissal Motion, which also continued the hearing on the Third Sanctions Motion. (ECF  
24 No. 936).

25 On November 4, 2020, Community Loan filed its opposition to the Third Sanctions  
26 Motion. (ECF No. 942).

27 On November 4, 2020, Debtor, Rushmore, and U.S. Bank, as servicer to Rushmore,  
28 stipulated to withdraw (without prejudice) Rushmore’s opposition to the Discharge Motion and

1 the First Dismissal Motion. Additionally, the Third Sanctions Motion was withdrawn without  
2 prejudice as it pertained to Rushmore and U.S. Bank. (ECF No. 943). An order was entered  
3 granting the stipulation the same day. (ECF No. 944).

4 On November 10, 2020, Debtor filed his reply to the various oppositions and responses  
5 filed by BOA, Citibank, Chase Bank, Nationstar, Fay Servicing, with respect to the Third  
6 Sanctions Motion. (ECF No. 945).

7 On November 18, 2020, the court entered an order granting the Discharge Motion. (ECF  
8 No. 949). Thereafter, the court entered an Order of Discharge (“Discharge Order”). (ECF No.  
9 950).

10 On June 2, 2021, Debtor filed a notice of withdrawal on his Third Sanctions Motion  
11 without prejudice. (ECF No. 969).

12 On August 6, 2021, Debtor filed the instant Fourth Sanctions Motion against creditors  
13 Gateway Bank, FSB, BAC Home Loan Servicing, L.P. (“BAC”),<sup>3</sup> and Fay Servicing regarding  
14 the property located at 402 Estella Avenue, Las Vegas, Nevada 89107. (ECF No. 979). Debtor  
15 seeks to impose civil contempt sanctions against each party. There are 14 separate documents  
16 attached as exhibits to the Fourth Sanctions Motion. Exhibit 1 is the declaration of Leo  
17 McKittrick (“Leo Declaration”).

18 On August 25, 2021, Fay Servicing filed its response to the Fourth Sanctions Motion).  
19 (ECF No. 983).

20 On August 26, 2021, Debtor, BOA, and Fay Servicing, stipulated to continue the hearing  
21 on the Fourth Sanctions Motion to October 13, 2021. (ECF No. 984).

22 On August 30, 2021, the court entered an order granting the stipulation. (ECF No. 985  
23 and 988).

24 On September 15, 2021, BOA filed its opposition to the Fourth Sanctions Motion (“BOA  
25 Opposition”). (ECF No. 989).

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27 <sup>3</sup> BAC is the home loans servicing department of BOA. BOA has responded to the  
28 Fourth Sanctions Motion under the name BOA. Debtor refers to BAC throughout its Fourth  
Sanctions Motion. Counsel appear to use the references interchangeably. In this order, the court  
will use the same references made by the parties.

1 On September 16, 2021, Fay Servicing filed its opposition to the Fourth Sanctions  
2 Motion (“Fay Servicing Opposition”). (ECF No. 990).

3 On September 16, 2021, Fay Servicing filed another Motion to Dismiss Bankruptcy Case  
4 Pursuant to 11 U.S.C. [§] 1112 and Bankruptcy Rule 1016 (“Second Dismissal Motion”). (ECF  
5 No. 991).

6 On October 6, 2021, Debtor filed replies to both the BOA Opposition and the Fay  
7 Servicing Opposition regarding the Fourth Sanctions Motion (“Reply BOA”). (ECF Nos. 997-  
8 98).

9 October 6, 2021, Debtor filed his opposition to the Second Dismissal Motion. (ECF No.  
10 999).

11 On October 11, 2021, Debtor, BOA, and Fay Servicing, stipulated to continue the hearing  
12 on the Fourth Sanctions Motion to October 20, 2021. (ECF No. 1000). The following day, an  
13 order was entered approving the stipulation. (ECF No. 1001 and 1004).

14 On October 20, 2021, the court heard both the Fourth Sanctions Motion and the Second  
15 Dismissal Motion. After arguments were presented, the matters were taken under submission.

### 16 **DISCUSSION**

17 Debtor’s latest sanctions motion seeks to hold various creditors in civil contempt as a  
18 basis for an award of monetary damages. As the moving party, Debtor bears the burden of  
19 proving by clear and convincing evidence the acts constituting civil contempt. In this instance,  
20 Debtor alleges that the named creditors violated the automatic stay that arose under Section  
21 362(a) when the Chapter 11 proceeding was commenced. Debtor also alleges that the same  
22 creditors violated the discharge injunction that arose under Section 524(a)(2) when the Debtor  
23 received his Chapter 11 discharge. There is no dispute that the automatic stay arose on January  
24 30, 2009, and the discharge injunction arose on November 18, 2020.

25 The court having considered the written and oral arguments of counsel, along with the  
26 record presented, concludes that the Debtor has failed to meet his burden of proof. Accordingly,  
27 the Fourth Sanctions Motion must be denied.

1 First, the creditors have objected to the admissibility and sufficiency of the evidence  
2 presented. See BOA Opposition at 6-7; Fay Servicing Opposition at 3. In response, Debtor  
3 simply refers to assertions appearing at pages 5 and 11 of the motion, as well as Exhibit 2  
4 attached to the motion. See Reply BOA at 3:15-18. Arguments, of course, are not evidence and  
5 Exhibit 2 appears to be an unredacted and unauthenticated copy of an October 1, 2010, bank  
6 statement.

7 Second, the Leo Declaration does not authenticate any of the other 13 exhibits attached to  
8 the Fourth Sanctions Motion under FRE 901.<sup>4</sup> While Leo apparently has an accounting degree,  
9 see Leo Declaration at ¶ 3, he provides no basis to establish his personal knowledge for  
10 numerous factual statements included in his declaration, e.g., ¶¶ 11, 14, 15, 16, 21, 25, 26, 27,  
11 28, 29, 33, 34, 35, 36, 37, 38, 40, 41, 42, and 44. Many other statements contained in the  
12 declaration are statements of lay opinion.

13 Third, the Leo Declaration does not even purport to address the facts necessary to  
14 establish either actual cause or proximate cause for any emotional and financial strain  
15 experienced by the Debtor. Thus, cumulatively, Debtor has generally failed to overcome the  
16 evidentiary objections, has failed to authenticate the exhibits offered, and has failed to address a  
17 fundamental element necessary to award monetary relief.

18 Finally, even if statutory sanctions for violation of the automatic stay are sought under  
19 Section 362(k), rather than civil contempt sanctions under Section 105(a), Debtor has failed to  
20 meet his burden under a preponderance of the evidence standard.<sup>5</sup> Like his request for contempt  
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22 <sup>4</sup> Leo attests that true and correct copies of “incorrect mortgage statements” are attached  
23 to the motion that his brother received from BOA and Fay Servicing. See Leo Declaration at ¶¶  
24 47 and 48. Even a cursory examination of the exhibits, however, reveals various handwritten  
25 notes made by an unidentified person on almost all of the documents. Moreover, even though  
26 notes merely reflect the Debtor’s disagreements with the servicing of the subject loan and do not  
27 establish the alleged violations.

28 <sup>5</sup> When the Discharge Order was entered on November 18, 2020, the automatic stay  
expired as to the Debtor pursuant to Section 362(c)(2)(C). Debtor maintains, however, that Fay  
Servicing continued to violate the automatic stay “because it never corrected its earlier  
violations.” Fourth Sanctions Motion at 138-139. This court previously rejected an identical  
argument made by the same counsel in another case. See Willie N. Moon and Adnette M. Moon,

1 sanctions, Debtor has not met his threshold burden of providing admissible evidence to award  
2 statutory sanctions.

3 **IT IS THEREFORE ORDERED** that the Motion for Contempt for Violation of the  
4 Automatic Stay and Discharge Injunction, Failing to Comply with a Court Order and the  
5 Confirmed Chapter 11 Plan and for Damages Including Attorney[']s Fees Against Creditors,  
6 BAC Home Loan Servicing, L.P. and Fay Servicing, LLC, Docket No. 979, be, and the same  
7 hereby is, **DENIED**.

8 Copies sent via CM/ECF ELECTRONIC FILING

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10 Copies sent via BNC to:  
11 LEON MCKITTRICK  
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Case No. 13-12466-MKN, "Final Order on Motion for Contempt Against Rushmore Loan Management Services...For its Continuing Violation of the Stay..." Docket No. 295, at 13:4 to 18:14 (Bankr. D. Nev. July 21, 2020).