Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
February 25, 2020

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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In re:	)	Case No.: 13-12466-MKN
	)	Chapter 13
WILLIE N. MOON and ADNETTE M. GUNNELS-MOON,	)	
	)	Date: September 16 and 17, 2019
Debtors.	)	Time: 9:30 a.m.

MEMORANDUM DECISION AFTER EVIDENTIARY HEARING[1]

On September 16 and 17, 2019, the court conducted an evidentiary hearing on the Motion to Hold Creditor, Rushmore Loan Management in Contempt for Violation of the Automatic Stay Under §362(a) and for Violation of the Discharge Injunction Under 11 U.S.C. §524(a)(2) and to Hold Creditor SN Servicing Corporation in Contempt for Violating the Discharge Injunction Under 11 U.S.C. §524(a)(2) and for Actual Damages, Emotional Distress Damages, Punitive Damages and Attorney Fees, and Sanctions Against Both Creditors, Rushmore Loan Management and SN Servicing Corporation ("Contempt Motion"), brought by Willie N. Moon and Adnette M. Gunnels-Moon ("Debtors"). The appearances of counsel were noted on the record. At the conclusion of the evidentiary hearing, the matter was taken under submission.

[1] In this Memorandum, all references to "ECF No." are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to "Section" are to provisions of the Bankruptcy Code, 11 U.S.C. §§ 101, et seq., unless otherwise indicated. All references to "FRBP" are to the Federal Rules of Bankruptcy Procedure. All references to "Local Rule" are to the bankruptcy provisions of the Local Rules of Practice for the District of Nevada.

BACKGROUND

On March 26, 2013, a joint Chapter 13 petition ("Petition") was filed by the Debtors through their initial bankruptcy counsel. (ECF No. 1). The case was assigned to Chapter 13 panel trustee Rick A. Yarnall ("Trustee"). Attached to the Petition was a list of creditors and addresses ("Creditor Matrix") that included Rushmore Mortgage at one address: P.O. Box **82708**, Irvine, CA 92619. On the same date, the clerk's office issued a Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines ("Bankruptcy Notice"). (ECF No. 3). The Bankruptcy Notice specified a deadline of August 12, 2013, for general creditors to file proofs of claim, and an extended deadline for governmental entities. The Bankruptcy Notice was sent by first class mail to the creditors set forth on the Creditors Matrix. (ECF No. 9).

On May 6, 2013, Debtors filed their schedules of assets and liabilities, along with their statement of financial affairs. (ECF Nos. 14 and 17). On their real property Schedule "A," Debtors listed a personal residence ("Residence") having a value of $120,000 located at 3391 Eagle Bend Street, Las Vegas, NV 89122. On their Schedule "D," Debtors listed a second deed of trust against their Residence securing a claim in the amount of $73,000[2] in favor of Rushmore Mortgage at one address: P.O. Box **52708**, Irvine, CA 92619. On the same Schedule, Debtors listed a first deed of trust against their Residence securing a claim in the amount of $154,000 in favor of Chase Home Finance.

On May 6, 2013, Debtors filed a proposed Chapter 13 Plan #1 ("Plan #1"). (ECF No. 18). Section 5.06 of Plan #1 provided that a holder "of a claim shall retain its lien until the earlier of (a) the payment of the underlying debt determined under non-bankruptcy law or (b) discharge under Section §1328… After either one of the foregoing events has occurred, creditor shall release its lien and provide evidence and/or documentation of such release within 30 days to Debtor(s)." Section 6.01 of Plan #1 provided that "Debtors intend to file a motion to value collateral and strip off the second deed of trust, in favor of Rushmore Mortgage, which encumbers their Residence at 3391 Eagle Bend Street, Las Vegas, NV 89122."

[2] Debtors designated that claim as a joint obligation rather than a debt of the marital community or separate obligation of either spouse.

On May 7, 2013, a notice was filed scheduling a hearing on confirmation of Plan #1 to be conducted on June 6, 2013 ("Plan #1 Confirmation Hearing Notice"). (ECF No. 19). On the same date, Debtors' counsel filed a certificate of service attesting that Plan #1 and the Plan #1 Confirmation Notice were served by first class mail to, *inter alia*, Rushmore Mortgage at two addresses: P.O. Box **82708**, Irvine, CA 92619, and 2020 Jackson Blvd., Suite 4, Rapid City, SD 57117.[3] (ECF No. 20).[4]

On September 25, 2013, Debtors filed a motion to value the Residence ("Valuation Motion"). (ECF No. 29). On the same date, a notice was filed scheduling a hearing on the Valuation Motion to be heard on November 7, 2013 ("Valuation Hearing Notice"). (ECF No. 30). The Valuation Motion sought a determination, *inter alia*, that Rushmore Mortgage had only an unsecured claim under Section 506(a) because the value of the Residence did not exceed the claim of Chase Home Finance that was secured by the first deed of trust. As a result, Rushmore Mortgage's claim would be reclassified under the Chapter 13 plan as an unsecured claim.

On September 26, 2013, Debtors' counsel filed a certificate of service attesting that the Valuation Motion and Valuation Hearing Notice were sent by certified mail, return receipt requested, to Rushmore Mortgage, Attn: Officer, Managing or General Agent, to the following four addresses: P.O. Box **82708**, Irvine, CA 92619; 1508 Mount Rushmore Road, Rapid City, SD 57702; 2020 Jackson Blvd., #4, Rapid City, SD 57702; and 1220 Mount Rushmore Road, Rapid City, SD 57702. (ECF No. 32).

On December 5, 2013, an order was entered granting the Valuation Motion ("Valuation Order"). (ECF No. 34). The Valuation Order provided that the claim of Rushmore Mortgage was classified from a secured claim to an unsecured claim and would receive pro rata payment along with other general unsecured creditors.

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[3] Under the "mailbox rule," a proof of mailing ordinarily creates a rebuttable presumption that the mailed document was received by the addressee. See Mahon v. Credit Bureau of Placer Cty., Inc., 171 F.3d 1197, 1202 (9th Cir. 1999); Moody v. Bucknum (In re Bucknum), 951 F.2d 204, 206-07 (9th Cir. 1991). The mailbox rule assumes, of course, that the address used by the mailing party is accurate.

[4] It is not clear why an additional address for Rushmore in South Dakota was included in the certificate of service filed by Debtors' counsel.

On December 12, 2013, Debtors' counsel filed a notice of entry of the Valuation Order ("Valuation Order Notice") along with a certificate of service. (ECF Nos. 36 and 37). The certificate of service indicates that the Valuation Order Notice was sent by first class mail to Rushmore Mortgage at two addresses: P.O. Box **82708**, Irvine, CA 92619; and 2020 Jackson Blvd., Suite 4, Rapid City, SD 57702.

On February 12, 2014, Debtors filed an amended Chapter 13 Plan #2 and a notice of confirmation hearing. (ECF Nos. 39 and 40). Neither document was served.

On February 14, 2014, Debtors again filed an amended Chapter 13 Plan #2 ("Plan #2") and a notice of confirmation hearing ("Plan #2 Confirmation Hearing Notice"). (ECF Nos. 42 and 43). The confirmation hearing was noticed to be held on March 27, 2014. The certificate of service filed by Debtors' counsel indicates that Plan #2 and the Plan #2 Confirmation Hearing Notice were served by first class mail on Rushmore Mortgage at two addresses: P.O. Box **82708**, Irvine, CA 92619, and 2020 Jackson Blvd., Suite 4, Rapid City, SD 57702. (ECF No. 45).

On April 7, 2014, an order was entered confirming Plan #2 ("Plan #2 Confirmation Order"). (ECF No. 49). Section 2.12.2 of Plan #2 provided for a prepetition arrearage in the amount of $517.51 to secured creditor Wilmington Trust National Association, apparently as successor in interest to Chase Home Finance, to be paid through the plan. Section 5.06 of Plan #2 provided that a holder "of a claim shall retain its lien until the earlier of (a) the payment of the underlying debt determined under non-bankruptcy law or (b) discharge under Section §1328… After either one of the foregoing events has occurred, creditor shall release its lien and provide evidence and/or documentation of such release within 30 days to Debtor(s)."[5] As a result of completing plan payments, the Debtors would receive a discharge of their prepetition unsecured debts, including the debt owed to Rushmore, and could retain their Residence by maintaining their loan payments to the holder of the first deed of trust. Section 6.01 of Plan #2 provided that

[5] FRBP 5009(d) became effective on December 1, 2017. It provides that if a claim in a Chapter 13 case is secured by property of the bankruptcy estate, the debtor may request the bankruptcy court to enter an order declaring that the claim has been satisfied and the lien has been released under the terms of the confirmed plan. Section 5.06 of Plan #2 requires Rushmore to release its lien within 30 days after the Debtors receive their discharge.

"Debtors have filed a motion to value collateral and strip off the second deed of trust, in favor of Rushmore and the motion was duly granted."

On May 5, 2014, the Trustee sent notice of a proposed distribution to creditors ("Distribution Notice"), including a payment of $0.00 to Rushmore Mortgage at one address: P.O. Box **82708**, Irvine, CA 92619. (ECF No. 51).

On May 7, 2014, the Trustee filed a certificate of service indicating that the Distribution Notice was sent by first class mail to Rushmore Mortgage to two addresses: P.O. Box **82708**, Irvine, CA 92619, and 2020 Jackson Blvd., Suite 4, Rapid City, SD 57702. (ECF No. 53).

On July 13, 2016, the Trustee filed a final account and report ("Final Account") indicating that $0.00 had been paid to Rushmore. (ECF No. 64).

On July 14, 2016, the Trustee filed a certificate of service indicating that a copy of the Final Account was sent by first class mail to Rushmore Mortgage at two addresses: P.O. Box **82708**, Irvine, CA 92619, and 2020 Jackson Blvd., Suite 4, Rapid City, SD 57702. (ECF No. 65).

On August 19, 2016, the Trustee filed a final report indicating, *inter alia*, that all Chapter 13 plan payments had been made over thirty-eight months and that Rushmore had a scheduled unsecured claim of $73,000 for which it had been paid $0.00. (ECF No. 68).

On August 27, 2016, Debtors filed an amended certificate of compliance with Chapter 13 discharge conditions ("Discharge Compliance Certificate"). (ECF No. 74). On the same date, Debtors filed a certificate of service indicating that a copy of the Discharge Compliance Certificate was sent by first class mail to Rushmore Mortgage at two addresses: P.O. Box **82708**, Irvine, CA 92619, and 2020 Jackson Blvd., Suite 4, Rapid City, SD 57702. (ECF No. 75).

On September 28, 2016, an order of discharge of the Debtors after completion of Chapter 13 plan payments ("Discharge Order") was entered. (ECF No. 76).

On September 30, 2016, a certificate of notice was filed indicating that the Discharge Order had been entered. (ECF No. 77). That certificate indicates that notice was given by first class mail to Rushmore Mortgage at two addresses: P.O. Box **82708**, Irvine, CA 92619, and 2020 Jackson Blvd., Suite 4, Rapid City, SD 57702.

On October 3, 2016, a final decree was entered closing the case. (ECF No. 78).

On January 4, 2019, Debtors filed an ex parte motion to reopen the bankruptcy case through new counsel ("Ex Parte Reopening Motion"). (ECF No. 79). On the same date, an order was entered reopening the case. (ECF No. 81).

On January 7, 2019, a certificate of service was filed indicating the Ex Parte Reopening Motion was served by first class mail to Rushmore Loan Management, Attn: Managing Agent, at two addresses: P.O. Box **62708**, Irvine, CA 92619, and 15480 Laguna Canyon Road, Suite 100, Irvine, CA 92618. (ECF No. 82). On the same date, an amended certificate of service was filed indicating that the Ex Parte Reopening Motion was served by first class mail to Rushmore Loan Management, Attn: Managing Agent, at four addresses: P.O. Box **52708**, Irvine, CA 92619, 15480 Laguna Canyon Road, Suite 100, Irvine, CA 92618, P.O. Box 51707, Los Angeles, CA 90015-4707, and P.O. Box 55604, Irvine, CA 92619-5004. (ECF No. 83).

On January 18, 2019, Debtors filed the instant Contempt Motion seeking to hold Rushmore Loan Management ("Rushmore") in contempt for violation of the automatic stay arising under Section 362(a) and for violation of the discharge injunction arising under Section 524(a)(2). (ECF No. 84). The motion also seeks to hold SN Servicing Corporation ("SNS") in contempt for violation of the discharge injunction. Attached to the Contempt Motion are twenty-six separately marked exhibits, including a declaration of Willie N. Moon. Based on the alleged violations, Debtors seek actual damages, including emotional distress, in addition to punitive damages, as well as the recovery of their attorney's fees. Debtors noticed their Contempt Motion to be heard on February 20, 2019. (ECF No. 85). Debtors' new counsel filed a certificate of service indicating that the Contempt Motion and notice of hearing were served by first class mail to Rushmore Loan Management Services LLC, Attn: Managing Agent, at 15480 Laguna Canyon Road, Suite 100, Irvine, CA 92618. The certificate also indicates that the Contempt Motion and notice of hearing were served by first class mail on Rushmore at three addresses: P.O. Box

52708,[6] Irvine, CA 92619; P.O. Box 51707, Los Angeles, CA 90015-4707; and P.O. Box 55604, Irvine, CA 92619-5004. It also indicates that SNS was served by first class mail.

On February 8, 2019, a request for special notice on behalf of Rushmore was filed by the law firm of McCarthy & Holthus, LLP ("M&H Firm"). (ECF No. 89). On the same date, a response to the Contempt Motion was filed by the M&H Firm, indicating, *inter alia*, that Rushmore needed at least 45 days to research and substantively respond. (ECF No. 90).

On February 13, 2019, Debtors filed a reply indicating that they did not object to an allowance of time for Rushmore to file its substantive response to the Contempt Motion. (ECF No. 91).

On February 20, 2019, an initial hearing was conducted on the Contempt Motion, at which counsel appeared for the Debtors, Rushmore, and SNS. At the initial hearing, an evidentiary hearing on the Contempt Motion was scheduled for September 16 and 17, 2019 ("Evidentiary Hearing"). Various deadlines were set for the submission of declarations, exhibits, and additional briefs, as well as the submission of documents to the courtroom deputy prior to the evidentiary hearing.

On March 6, 2019, an order was entered scheduling the Evidentiary Hearing and memorializing the various deadlines agreed to at the initial hearing on the Contempt Motion. (ECF No. 94).

On March 15, 2019, a motion to withdraw as counsel for the Debtors was filed by their original bankruptcy counsel and noticed to be heard on April 18, 2019. (ECF Nos. 97 and 98).

On March 28, 2019, Rushmore filed a substitution of counsel for the law firm of Akerman LP ("Akerman Firm") to represent it in place of and instead of the M&H Firm in the instant proceeding. (ECF No. 102).

On April 15, 2019, an order was entered approving the substitution of counsel for Rushmore. (ECF No. 103).

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[6] P.O. Box **52708**, Irvine, CA 92619 is the same mailing address for Rushmore that appears on the Debtors' secured creditor Schedule "D." All other certificates of service previously filed by Debtors' original bankruptcy counsel reflected the mailing address that appears on the Creditor Matrix: P.O. Box **82708**, Irvine, CA 92619.

On May 9, 2019, an order was entered granting the motion to withdraw filed by the Debtors' original bankruptcy counsel. (ECF No. 104).

On May 17, 2019, Debtors filed a motion to compel Rushmore to respond to certain discovery that had been propounded on February 8, 2019, to the M&H Firm. (ECF No. 106). By stipulation, the hearing on the motion was continued to July 10, 2019. (ECF No. 110)

On June 24, 2019, Rushmore filed a motion for a protective order regarding certain Rushmore manuals setting forth its bankruptcy policies and procedures from 2013 to 2017. (ECF No. 113).

On July 9, 2019, a stipulated protective order was entered to place the Rushmore manuals under seal.[7] (ECF No. 116).

On July 29, 2019, a stipulated order was entered withdrawing the Contempt Motion as to SNS. (ECF No. 118 and 119).

On August 27, 2019, Debtors filed copies of the declarations in support of the Contempt Motion. (ECF No. 120).

On August 28, 2019, the Akerman Firm filed a motion to continue the Evidentiary Hearing. (ECF No. 121).

On August 29, 2019, an order was entered granting Rushmore's request to have their continuance motion heard on an emergency basis. (ECF No. 123).

On September 4, 2019, Debtors filed an opposition to the continuance motion. (ECF No. 127).

On September 5, 2019, Rushmore filed a reply in support of its continuance motion. (ECF No. 128).

On September 5, 2019, Debtors filed their trial brief in support of the Contempt Motion ("Debtors' Trial Brief"). (ECF No. 129).

On September 6, 2019, Rushmore filed the affidavit of its proposed witness in opposition to the Contempt Motion, along with its list of witnesses and exhibits. (ECF Nos. 130 and 131).

[7] Instead of Rushmore manuals from 2013 to 2017 that the Debtors sought in discovery, Rushmore produced manuals dated 01/17/2019 and 12/28/2018.

On September 7, 2019, an order was entered denying the continuance motion because, *inter alia*, the date of the Evidentiary Hearing had been known since February 20, 2019, and Rushmore had ample opportunity to conduct discovery. (ECF No. 132).

On September 10, 2019, Debtors filed a motion in limine seeking to strike Rushmore's proposed witness, witness list and exhibits. (ECF No. 135).

On September 11, 2019, an order was entered granting Debtors' request to have the motion in limine heard on an emergency basis. (ECF No. 139).

On September 13, 2019, Rushmore filed an opposition to the motion in limine. (ECF No. 143).

On September 13, 2019, an order was entered denying Debtors' motion in limine. (ECF No. 145).

THE EVIDENTIARY RECORD

Forty-one exhibits were admitted into evidence at the Evidentiary Hearing, and four witnesses presented written and oral testimony. All witnesses were subject to cross-examination.

A. The Exhibits Admitted into Evidence.

At the outset of the hearing, counsel for the parties stipulated that all the exhibits would be admitted into evidence, while Rushmore reserved certain objections with respect to Debtors' exhibits 16 and 17. Debtors' exhibits 16 and 17, however, appear to be identical to Rushmore's exhibits JJ and KK, which were admitted without objection. It therefore appears that Rushmore effectively waived its objections. Additionally, most of the documents offered by Rushmore as its exhibits U through MM appear to be identical to almost all the exhibits offered and admitted on behalf of the Debtors.

1. Debtors' Exhibits.[8]

No.	Date	Document
1	1/15/2013 – 9/11/2018	Collection Letters from Rushmore (pg.1-451)

[8] The table below reflects the exhibit numbers and document descriptions provided by the Debtors in their exhibit log, but the date or date range of each exhibit is described by the court.

2	1/27/2012 – 10/25/2018	Rushmore's Call Log (pg.452-477)
3	1/1/2000 – 12/31/2018	Rushmore's Customer Account Activity Statement (pg.478-483)
4		Discovery Response from Rushmore (pg.484-510)
5	1/5/2015	Moons letters to Attorney Michael J. Dawson (pg.511-562)
6	11/29/2013 – 9/16/2015	Rushmore's Envelopes and payment coupon with envelopes (pg.563-594)
7	9/12/2013 – 9/11/2018	Rushmore's collections letters one for each year from October 2013 to October 2018 (pg.595-622)[9]
8	9/25/2013 - 12/5/ 2013	Motion to Value Collateral and Avoid Second Deed of Trust of Rushmore Mortgage (account ending in 1649) Pursuant to U.S.C. §506(a), §1322 and Objection to Claim Pursuant to F.R.B.P. 3007 (Dkt.#29); and Order (Dkt. #34) (pg.623-635)
9	4/7/2014	Confirmation Order Amended Chapter 13 Plan No. 2 Dkt. #49 (pg.636-645)
10	8/8/2019	Adnette M. Gunnels-Moon Experian Credit Report (pg.M646-M683)[10]
11	8/8/2019	Willie N. Moon Experian Credit Report (pg.M684-M713)
12	10/2018 – 3/2016	Adnette M. Gunnels-Moon Medication List(pg.M714)
13	10/2013 – 7/2019	Willie N. Moon Medication List (pg.M715-M722)
14	8/27/2019	Willie N. Moon Declaration (pg.M723-M727)
15	8/27/2019	Adnette M. Gunnels-Moon Declaration (pg.M728-M756)
16	8/27/2019	John Rao Declaration (pg.M757-M770)
17	3/2012 – 8/2015	Appendix H-30 (pg.M771-M774)
18	1/2014 – 11/2017	Actual size Collection letters (pg.M775-M802)

[9] Exhibit 7 described as "Rushmore's Collections Letters" and marked as M595 through M622, appear to be duplicates of the documents found in Exhibit 1 and marked as M017-M018, M085-M088, M152-M156, M244-M248, M286-M290, and M421-M427.

[10] Included in Exhibit 10 at M668 to M683, appears to be a copy of a Credco Instant Merge Credit Report for both Debtors, dated 07/11/2019.

19	12/28/2018 – 1/17/2019	Policy and Procedures Manuals (pg. RUSH 715-842)

2. Rushmore's Exhibits.[11]

Letter	Date	Document
A	3/2013 – 9/2019	Docket report
B	3/26/2013	Bankruptcy Petition, (Dkt #1)
C	3/29/2013	Certificate of notice to creditors, (Dkt #9)
D	5/6/2013	Amendment to bankruptcy petition, (Dkt #14)
E	5/7/2013	Certificate of service of Chapter 13 plan no. 1 along with notice of confirmation hearing, (Dkt #20)
F	9/25/2013	Motion to value collateral and avoid second deed of trust of Rushmore Mortgage (account ending in 1649) pursuant to U.S.C. §506(a), §1322 and objection to claim pursuant to F.R.B.P. 3007, (Dkt #29)
G	9/25/2013	Notice of hearing on motion to value collateral and avoid second deed of trust of Rushmore Mortgage (account ending in 1649) pursuant to U.S.C. §506(a), §1322 and objection to claim pursuant to F.R.B.P. 3007, (Dkt #30)
H	9/25/2013	Certificate of service on motion to value collateral and avoid second deed of trust of Rushmore Mortgage (account ending in 1649) pursuant to U.S.C. §506(a), §1322 and objection to claim pursuant to F.R.B.P. 3007, (Dkt #32)
I	12/5/2013	Order avoiding second deed of trust of Rushmore Mortgage (account ending in 1649) pursuant to U.S.C. §506(a), §1322 and objection to claim pursuant to F.R.B.P. 3007, (Dkt #34)
J	12/12/2013	Notice of entry of order avoiding second deed of trust of Rushmore Mortgage (account ending in 1649) pursuant to U.S.C. §506(a),

[11] The table below reflects the exhibit letters and document descriptions provided by Rushmore in its exhibit log, but the date or date range of each exhibit is described by the court.

		§1322 and objection to claim pursuant to F.R.B.P. 3007, (Dkt #36)
K	12/12/2013	Certificate of service of notice of order avoiding second deed of trust of Rushmore Mortgage (account ending in 1649) pursuant to U.S.C. §506(a), §1322 and objection to claim pursuant to F.R.B.P. 3007, (Dkt #37)
L	2/14/2014	Certificate of service of Chapter 13 plan no. 2 with notice of confirmation hearing, (Dkt #45)
M	9/28/2016	Order of discharge, (Dkt #76)
N	9/30/2016	Certificate of notice of order of discharge, (Dkt #77)
O	10/3/2016	Final decree, (Dkt #78)
P	1/4/2019	Exparte motion to reopen Chapter 13 under 11 U.S.C. § 350 and F.R.B.P. 5010, (Dkt #79)
Q	1/7/2019	Certificate of service on exparte motion to reopen Chapter 13 under 11 U.S.C. § 350 and F.R.B.P. 5010 and order granting exparte motion to reopen Chapter 13 under 11 U.S.C. § 350 and F.R.B.P. 5010, (Dkt #82)
R	1/7/2019	Amended certificate of service on exparte motion to reopen Chapter 13 under 11 U.S.C. § 350 and F.R.B.P. 5010 and order granting exparte motion to reopen Chapter 13 under 11 U.S.C. § 350 and F.R.B.P. 5010, (Dkt #83)
S	1/18/2019	Motion to hold creditor, Rushmore Loan Management in contempt for violation of the automatic stay under § 362(a) and for violation of the discharge injunction under 11 U.S.C. § 524(a)(2) and to hold creditor SN Servicing Corporation in contempt for violating the discharge injunction under 11 U.S.C. § 524(a)(2) and for actual damages, emotional distress damages, punitive damages and attorney fees, and sanctions against both creditors, Rushmore Loan Management and SN Servicing Corporation, (Dkt #84)
T	1/18/2019	Certificate of service on notice of motion to hold creditor, Rushmore Loan Management in contempt for violation of the automatic stay under § 362(a) and for violation of the discharge injunction under 11 U.S.C. § 524(a)(2) and to hold creditor SN Servicing Corporation in contempt for violating the

		discharge injunction under 11 U.S.C. § 524(a)(2) and for actual damages, emotional distress damages, punitive damages and attorney fees, and sanctions against both creditors, Rushmore Loan Management and SN Servicing Corporation, (Dkt #86)
U	1/15/2013 - 9/24/2018	Collection letters, M1-M451[12]
V	1/27/2012 – 10/25/2018	Rushmore's call log and telephone recordings, M452-M477[13]
W	1/1/2000 – 12/31/2018	Rushmore's customer account activity statement, M478-M483
X	3/11/19	Rushmore's discovery responses, M484-M510
Y	1/5/2015	Letters to attorney Michael J. Dawson, M511-M562
Z	11/29/2013 – 12/16/2017	Rushmore's envelopes and payment coupon with envelopes, M563-M594
AA	9/2013 – 10/2018	Collections letter one for each year from October 2013 to October 2018, M595-M622
BB	9/25/2013 – 12/5/2013	Motion to value collateral and avoid second deed of trust of Rushmore Mortgage (Dkt #29) and order granting motion (Dkt #34), M623-M635
CC	4/7/2014	Confirmation order and amended Chapter 13 plan no. 2 (Dkt #49), M636-M645

[12] Debtors describe the documents in their Exhibit 1 as "collection letters" while Rushmore also describes the same documents in its Exhibit U as "collection letters." Debtors also describe the documents in their Exhibit 7 as collection letters, see note 9, supra, but those documents also are found in Exhibit U as well as in Exhibit AA, below. All of the documents were sent by Rushmore to the borrower. Some of the common documents marked M001 through M031 provide "Account Information" while most of the common documents marked M033 through M451 are entitled "Mortgage Statement." Interspersed amongst the Account Information documents and Mortgage Statements is other correspondence or notices from Rushmore to the borrower.

[13] Debtors describe the document in their Exhibit 2 as "Rushmore's Call Log" while Rushmore describes the same document in its Exhibit V as "Rushmore's call log and telephone recordings." The actual title of the document is "Consolidated Notes Log" and it appears to reflect a variety of information collected by Rushmore, including telephone calls made to the borrower, undelivered billing statements, late charges, messages left with the borrower, and the like. Each of the entries is accompanied by a date of the activity and a column containing an acronym that denotes the department at Rushmore that conducted the activity. For purposes of this memorandum decision, the court will refer to the exhibit as the Consolidated Notes Log.

DD	8/8/2019	Adnette M. Gunnels-Moon credit reports, M646-M683
EE	8/8/2019	Willie N. Moon credit report, M684-M713
FF	10/2008 – 3/2016	Adnette M. Gunnels-Moon medication list, M714
GG	10/2013 – 7/2019	Willie N. Moon medication list, M715-M722
HH	8/27/2019	Willie N. Moon declaration, M723-M727
II	8/27/2019	Adnette M Gunnels-Moon declaration, M728-M756
JJ	8/27/2019	John Rao declaration, M757-M769
KK	3/2012 – 8/2015	Appendix H-30, M770-M774
LL	1/2014 – 11/2017	Actual size collection letters, M775-M802
MM	1/17/2019 12/28/2018	Confidential policy and procedure manuals, RUSH715-RUSH842
NN	12/20/2014 3/28/2016	Telephone recordings, (12/20/14 and 3/28/16)
OO	9/6/2019	Affidavit of Anthony Younger

B. The Witness Testimony.

The alternate direct testimony procedure under Local Rule 9017 was used at the Evidentiary Hearing. Affidavits or declarations under penalty of perjury were offered by the parties to provide the direct testimony of each witness. Each witness was present at the Evidentiary Hearing and was subject to cross-examination regarding their direct testimony. A summary of some of their testimony follows.

1. Anthony Younger

The affidavit of Anthony Younger ("Younger") was submitted by Rushmore and admitted into evidence as Exhibit OO. Younger has been employed by Rushmore since January 2014 as a legal proceeding specialist. His job consists of reviewing the information appearing in the business records of Rushmore and to testify in legal proceedings concerning the accuracy of the information in the records. Younger does not create the business records, and he is not

personally involved in the transactions reflected in the records.[14] He testified that he started reviewing the Debtors' loan file a day or two before signing his affidavit.

Younger testified that Adnette N. Gunnels-Moon ("Adnette") is the borrower on the subject loan, but Willie N. Moon ("Willie") is not. He stated that Rushmore was the servicer of the loan from January 1, 2012, until October 15, 2018. Younger testified that none of the following addresses are correct for Rushmore: (a) Rushmore Mortgage, P.O. Box 82708, Irvine, CA 92619, (b) Rushmore Mortgage, 1508 Mount Rushmore Road, Rapid City, SD, 57702, (c) Rushmore Mortgage, 2020 Jackson Blvd., #4, Rapid City, SD 57702, and (d) Rushmore Mortgage, 1220 Mount Rushmore Road, Rapid City, SD 57702.[15] He testified that the correct address for Rushmore is P.O. Box **52708**, Irvine, CA 92619, and that Rushmore "was never served in connection with this bankruptcy." Younger testified that Rushmore was not aware that its second deed of trust against the Debtors' residence was avoided during the bankruptcy case until the Contempt Motion was filed in January 2019.[16]

Younger conceded that Rushmore's records, including its Consolidated Notes Log, reflects that Willie informed a Rushmore representative during a December 20, 2014, phone call that the Debtors were in bankruptcy. He explained that the abbreviation "SER" on the

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[14] Younger is a legal proceeding specialist whose job is to testify on Rushmore's behalf. His testimony is based on his review of business records. Other representatives of Rushmore dealt directly with the Debtors. Other than what may be reflected in Rushmore's business records, Younger has no personal knowledge of the communications that may have occurred between Rushmore representatives and the Debtors. No Rushmore representatives with personal knowledge of those communications were called to testify.

[15] These addresses appear in the proof of service filed in connection with the Valuation Motion. See discussion at 3, supra.

[16] In his affidavit, Younger testified that Rushmore never received any of the pleadings in the Debtors' bankruptcy case until the Contempt Motion was filed in January 2019. In its response to the Debtors' discovery, however, Robert Montoya, an assistant secretary for Rushmore, represented under penalty of perjury that Rushmore first learned of the bankruptcy, the confirmed Chapter 13 plan, the discharge, and the avoidance of the second mortgage, on February 6, 2019, when Rushmore received a copy of the Contempt Motion. (Exhibit 4 and Exhibit X, at M500-M501).

Consolidated Notes Log refers to activity by Rushmore's loan servicing department and that "COL" refers to actions by Rushmore's collection department. Younger testified that the Consolidated Notes Log reflected various daily strategies used by Rushmore's departments in servicing the borrower's loan after a default has occurred, depending on whether the particular department wanted to leave a message on an answering machine, or wanted to reach a live person. He explained that Rushmore may have had communications with the borrower prior to the loan going into default, such as a call that occurred in February 2012, but such communications would not be reflected in the Consolidated Notes Log.

Younger testified that Rushmore "properly" trains its employees in "properly" adhering to its bankruptcy policies and procedures.[17] He acknowledged that Rushmore's bankruptcy policy manual[18] states that Rushmore will act promptly in response to a notice of any nature that a borrower is in bankruptcy. Younger also testified, however, that Willie is not a party authorized to speak to Rushmore about the servicing of the loan because Willie is not a borrower. He explained that representatives of Rushmore are not to discuss anything about a loan account with an unauthorized party. Younger testified that Rushmore deems an unauthorized third party to be an unreliable and unverifiable source. He testified that even a borrower's spouse would be an unauthorized party if authorization is not given by the borrower. Younger stated that an unverified third party is a person whose relationship to the borrower has not been verified by Rushmore. He testified that Rushmore would have to verify with the borrower that the third party is authorized to speak about a Rushmore account. Younger also testified that after the December 20, 2014 phone call with Willie, Rushmore made multiple phone calls to the borrower, during which the bankruptcy filing could have been verified.

[17] It is not clear how a legal proceeding specialist has personal knowledge of how other Rushmore employees were trained or to express an opinion on the meaning of proper adherence to Rushmore's policies.

[18] Younger started working for Rushmore in January 2014, and the Rushmore manuals produced in this case were updated in December 2018 and January 2019. He testified that he believes the policies and procedures reflected in the manuals were in effect in 2013.

Younger further stated that if an unauthorized party informs a Rushmore representative that a borrower is in bankruptcy, the representative makes a notation in the file memorializing that the comment was received but does not conduct a PACER search. He testified that Rushmore did not conduct a PACER search in the Debtors' case to confirm or deny the existence of a bankruptcy filing, because notice of a potential bankruptcy case from an "unauthorized" third party is not one of the five methods of notice included in Rushmore's bankruptcy procedures manual.

Younger testified that Rushmore's procedures limit its communications with borrowers that are in bankruptcy. Under its approved communications, he testified that the monthly billing statements for a borrower in bankruptcy should not include a due date, a payment coupon, a past due amount, or late charges. Younger testified that transmitting such statements to a borrower in bankruptcy would be a violation of Rushmore's policies.[19]

2. John Rao

The declaration of John Rao ("Rao") was submitted by the Debtors as expert testimony and admitted into evidence as Debtors' Exhibit 16 and as Rushmore's Exhibit JJ. At its request, Rushmore conducted a voir dire of Rao and objected to his testimony as an expert witness. The

[19] On redirect examination, Younger was questioned about a delinquency letter dated August 9, 2016, that Rushmore mailed to the borrower. (Exhibit 1 and Exhibit U, at M237). He testified that that the letter would not have been sent by Rushmore had it actually known of the borrower's bankruptcy. That testimony is questionable, however, in light of the "State Specific Notices" that apparently was transmitted with that letter. (Id., at M238). The "Additional Notices" appearing at the bottom of that page states: "Rushmore Loan Management Services LLC is a Debt Collector, who is attempting to collect a debt. Any information obtained will be used for that purpose. However, if you are in Bankruptcy or received a Bankruptcy Discharge of this debt, this letter is being sent for informational purposes only, is not an attempt to collect a debt and does not constitute a notice of personal liability with respect to the debt." (Emphasis added). The bankruptcy disclaimer routinely included in Rushmore's monthly billing statements, see note 12, supra, was included in the August 9, 2016 delinquency letter. Contrary to the suggestion of Rushmore's witness, the act of sending a delinquency letter that includes a bankruptcy disclaimer creates no inference that the loan servicer is unaware of a borrower's bankruptcy.

objection was overruled inasmuch as Rao's testimony was reliable and relevant to the court's understanding of the evidence presented in the matter.[20]

Rao is an attorney at the National Consumer Law Center, and his testimony was presented to discuss Rushmore's actions vis-à-vis the standards of the mortgage servicing industry. He testified that his recitation of industry standards was formed by reviewing other servicers' policies and procedures and by speaking with other servicers on matters unrelated to this case. In his declaration, Rao presented opinions based on his education and experience and his review of various documents and records related to this matter, including Rushmore's policies and procedures. He clarified that his opinions regarding Rushmore's alleged violations of industry standards assumed that Rushmore acted with prior knowledge of the pendency of the Chapter 13 case.

Rao testified that Rushmore's policies were consistent with industry standards as to a loan servicer's conduct upon receipt of notice of a borrower's bankruptcy. He testified that Rushmore's policies and procedures appear to be consistent with this industry standard upon being notified of a potential bankruptcy case from a "Borrower phone call." Rao believed that it was implausible but not impossible, that Rushmore did not receive notice in any of the ways identified in their policies and procedures manual.

Rao testified that Rushmore received actual notice of this Chapter 13 bankruptcy case from Willie during his conversation with a Rushmore representative on December 20, 2014, after which time the Rushmore representative notated Adnette's account to reflect that an "unknown person stated account was in Chapter 13 bankruptcy." He testified that upon being notified of a borrower's bankruptcy case from any source, the standard in the mortgage industry would be to

[20] As elicited during Rao's testimony, some of Rao's opinions in his declaration were case-determinative legal conclusions that are within the province of this court to determine without the benefit of expert testimony. Inasmuch as Rushmore's witness expressly testified that Rushmore's representatives are properly trained, however, Rao's testimony as to the standards of the loan servicing industry was material in assessing Rushmore's actual conduct in connection with the borrower's loan in this case.

notify a supervisor or bankruptcy specialist and/or attempt to verify the existence of a bankruptcy case through PACER.

Rao testified that Rushmore sent account statements to Adnette during the pendency of her Chapter 13 case that contravened mortgage servicing industry standards. He testified that Rushmore also sent account statements to Adnette after she had received her discharge. Rao testified that Rushmore was subject to exemptions under the Truth in Lending Act and was not obligated to send periodic statements to Adnette after the commencement of her Chapter 13 case and after entry of the discharge. He testified that Rushmore's own policies and procedures reflected this industry standard regarding exemptions. Rao elaborated that these exemptions did not foreclose a servicer's right to send periodic statements, although, in his experience, servicers normally do not send such statements in scenarios where a mortgage loan has been discharged and the mortgage lien has been avoided.

Rao testified that Rushmore also sent several other letters to Adnette after entry of the discharge, including some for loss mitigation, that continued to list an ongoing indebtedness under the mortgage loan. Rao testified that such letters were not modified to reflect the current state of Adnette's loan, her Chapter 13 case, or the discharge. Rao opined that those letters were inconsistent with the standards of the mortgage servicing industry. He testified that due to concerns about the automatic stay and the discharge injunction, mortgage servicers in his experience do not send such letters to borrowers in pending bankruptcy cases or who have received a bankruptcy discharge of a mortgage loan.

Rao also testified that Rushmore's communications log indicates that Rushmore called Adnette more than one hundred times after December 20, 2014. He observed that these communications were completely inconsistent with the standards of the mortgage industry for the servicing of an account in bankruptcy or following a discharge of a mortgage loan.

3. Willie N. Moon

Willie's declaration was submitted by the Debtors and admitted into evidence as Exhibit 14 and as Rushmore's Exhibit HH. Willie testified that he and his wife, Adnette, filed a joint Chapter 13 bankruptcy case and listed Rushmore as a creditor holding a mortgage lien on their

resident. Willie testified that Debtors listed the notice address for Rushmore from bills they received from Rushmore. Willie conceded, however, that the address listed on the initial Creditor Matrix was not one of the addresses included in a Rushmore bill dated March 14, 2013 and admitted into evidence as part of Exhibit 1 and Exhibit U, marked as M005-M006. Willie testified that he would not have intentionally signed his bankruptcy petition if he knew that it contained an incorrect address for Rushmore.

Willie testified that after he retired in 2007, he was home every day and took over managing the bills for the household. He gathered, opened, and read the mail each day. Willie testified that because he was home each day, he was the one who would answer the telephone. He testified that Rushmore called the Debtors' phone number almost daily during the Chapter 13 case and would sometimes leave a message for Adnette. During one such phone call in December 2014, he testified that he informed the Rushmore representative that the Debtors were involved in a Chapter 13 bankruptcy case. During another phone call in March 2016, Willie testified that he told the Rushmore representative to contact the Debtors' bankruptcy attorney.[21] During another phone call after the Debtors received their discharge, he testified that a Rushmore representative named Ariel "very rudely told me, 'I am not calling your attorney's phone number and I will call your home whenever I want to' and that he 'didn't care about our discharge.'"[22] Willie testified that between 2014 and 2017 he informed Rushmore representatives of the Debtors' bankruptcy case approximately ten times.

Willie testified that the Debtors filed a motion and a Chapter 13 plan seeking to avoid Rushmore's lien, both of which were approved by the court. He testified that Rushmore

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[21] Attached to the Consolidated Notes Log at M477 is a transcription of a telephone call that took place on March 28, 2016, between "Ariel" and Willie.

[22] Exhibit 1 and Exhibit U include the written communications from Rushmore to the borrower that the parties describe as "collection letters." The correspondence dated September 22, 2015 (M160), March 22, 2016 (M195), March 23, 2016 (M207), March 25, 2016 (M210), September 15, 2016 (M249), August 14, 2017 (M274), August 16, 2017 (M277), August 29, 2017 (M280), February 20, 2018 (M316), and August 13, 2018 (M392) are all signed on Rushmore's behalf by Ariel Villela or identify Ariel Villela as the loss mitigation specialist, relationship manager, point of contact, or in some similar capacity in connection with the loan.

nevertheless continued to call the Debtors' phone number and send them collection letters during the bankruptcy case and even after the Debtors obtained their discharge. Willie estimates that Rushmore called the Debtors more than 400 times between 2013 and 2018, though Willie conceded that he did not keep or review any records to verify this estimate. He testified that he soon came to recognize Rushmore's phone number, and he did not answer the phone when they called. Willie testified that Rushmore would sometimes leave messages on the answering machine, but he did not save these messages because he did not anticipate having to come to court regarding this matter. He further testified that he returned some of Rushmore's written bills and communications, and, on at least one occasion, he included a note informing Rushmore of the Debtors' bankruptcy case and discharge. Willie testified that the record does not contain a copy of any such note or notes he sent to Rushmore, but he did identify his handwriting on one envelope showing that it was marked "Return" and sent back to Rushmore.

Willie is seventy-four years old and testified that being involved in a bankruptcy case was a stressful experience. He stated that this stress, which was further exacerbated by Rushmore's actions, led to arguments between he and his wife. At one point, the arguments created by the stress caused the Debtors to consider divorce, but Willie testified that he and his wife were able to work things out and avoid dissolving their marriage.

Willie testified that he is a veteran of the Vietnam War who was exposed to Agent Orange[23] during his tour of duty. He testified that he was diagnosed with post-traumatic stress disorder ("PTSD") in approximately 2007.[24] Willie testified that he attends meetings with other

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[23] "Agent Orange is a chemical defoliant used by the United States Armed Forces in Vietnam to clear dense jungle land during the war. It contains the toxic substance dioxin. Since its use, Agent Orange has been statistically linked with the occurrence of many diseases in those exposed, including prostate cancer." Nehmer v. Veterans' Admin. of Government of U.S., 284 F.3d 1158, 1160 (9th Cir. 2002).

[24] Willie was not asked to describe his diagnosis. As described by one panel in this circuit:

> PTSD is a leading mental health disorder diagnosis for those veterans. According to Dr. Arthur Blank, a psychiatric expert who testified before the district court, this disorder is a "psychological condition that occurs when people are exposed to extreme, life-threatening circumstances, or [when they are in] immediate contact

Vietnam veterans, all of whom have PTSD. He testified that his health professionals have not been able to determine a trigger for his PTSD symptoms. However, Willie attributed some of his post-petition PTSD symptoms to Rushmore's attempts to collect the loan, though he conceded that he never discussed Rushmore during his weekly meetings and that there are no medical records attributing any of his PTSD symptoms to Rushmore's communications. He testified that in 2017 he was hospitalized six or seven times for PTSD or anxiety, but that his PTSD problems subsided in 2018.

Willie testified that he was diagnosed with chronic obstructive pulmonary disease ("COPD") sometime prior to 2013, for which he uses a rescue inhaler. He did not attribute any of his COPD symptoms to the Rushmore communications. However, Willie attributed some of his post-petition stress to the Rushmore communications, and he further testified that he has difficulty breathing when he becomes stressed. Willie attributed this Rushmore-related stress to an increase in his blood pressure, though he conceded that there are no medical records attributing that increase to Rushmore's communications. He testified that he also suffers from diabetes, high cholesterol, and asthma. Willie takes numerous prescribed and over-the-counter medications to alleviate his various medical conditions, which are described in a list of his medications. (Exhibit 13). He acknowledged that his doctors have suggested a variety of lifestyle changes to reduce his diabetes, blood pressure and cholesterol issues, and that he has never told any doctor about Rushmore's communications.

> with death and/or gruesomeness, such as [what] occurs in combat, severe vehicular accidents or natural disasters. It produces a complex of psychological symptoms which may endure over time." Those symptoms include anxiety, persistent nightmares, depression, uncontrollable anger, and difficulties coping with work, family, and social relationships. From 2002 to 2003 there was a 232 percent increase in PTSD diagnoses among veterans born after 1972. A 2008 study by the RAND Institute shows that 18.5 percent of U.S. service members who have returned from Iraq and Afghanistan currently have PTSD, and that 300,000 service members now deployed to Iraq and Afghanistan "currently suffer PTSD or major depression." Delays in the treatment of PTSD can lead to alcoholism, drug addiction, homelessness, anti-social behavior, or suicide.

Veterans for Common Sense v. Shinseki, 644 F.3d 845, 853 (9th Cir. 2011) (footnote omitted), vacated on other grounds, 678 F.3d 1013 (9th Cir. 2012), cert. denied, 568 U.S. 1086 (2013).

Willie testified that he and his wife have suffered damages as a result of Rushmore's actions. Specifically, he testified that he and his wife were unable to refinance their mortgage because of the lien Rushmore continues to assert against their real property. Willie further testified that he incurred approximately $150,000 in medical bills, though he conceded the absence of any evidence in the record to corroborate this estimate. He further testified that all of these medical bills were paid by his insurance company and did not come out of his pocket. Willie finally testified that he and his wife paid $260 to reopen this case, but he has not made any other payments to his current attorney, Christopher Burke. He further testified that he has not received any invoices from Mr. Burke and does not otherwise have an agreement with Mr. Burke providing for the payment of attorney's fees and costs.

4. Adnette N. Gunnels-Moon

Adnette's declaration was submitted by the Debtors and admitted into evidence as Exhibit 15 and as Rushmore's Exhibit II. She testified that she stopped paying Rushmore on the mortgage loan sometime in 2012, which prompted Rushmore to call her house and send her mail regarding the delinquency.

Adnette testified that she is seventy-two years old and has been married to Willie since December 31, 1998. She testified that she and Willie filed a joint Chapter 13 bankruptcy case and listed Rushmore as a creditor holding a mortgage lien on their residence. Adnette testified that she provided copies of Rushmore's billing statements, which included Rushmore's address, to her bankruptcy attorney. Her bankruptcy attorney thereafter utilized these billing statements to complete the Creditor Matrix. Adnette testified that her review of the Creditor Matrix and bankruptcy petition consisted of simply glancing at the documents to ensure that the creditors had been listed, but not checking if her bankruptcy attorney used the correct addresses appearing on the creditors' billing statements. She testified that she never contacted Rushmore herself to inform it that she had filed a bankruptcy or that she had received a bankruptcy discharge.

Adnette testified that she and Willie filed a motion to avoid Rushmore's second deed of trust, which the court approved. She testified that she nevertheless received no less than fifty[25] "collection letters" during the bankruptcy case and no less than twenty-six[26] "collection letters" after the entry of discharge on September 28, 2016. By these "collection letters," Rushmore continued to assert a balance owed on the mortgage loan and sought payment from Adnette.

Adnette testified that she never answered any calls from Rushmore, but that Rushmore called the Debtors' phone number "hundreds of times between 2013 and 2018." She testified that Willie answered the phone because she was working. Adnette testified that Willie opened the mail, including all of the statements in Exhibit 1 and Exhibit U, but that she also reviewed the mail. She testified that she received a letter dated September 24, 2018, informing her that the servicing of her loan was transferred from Rushmore to SN Servicing Corporation.[27] Adnette testified that Willie answered some of Rushmore's phone calls, though she could not recall whether she was present at any time when Willie spoke with Rushmore. Adnette testified that she did not keep records of, or record, any of these phone calls, though she referred to Rushmore's call logs in support of some of these phone calls. She further testified that she did not save any of Rushmore's messages left on her answering machine.

Adnette testified that she never called Rushmore to inform them of her bankruptcy case or discharge. She did, however, inform her bankruptcy attorney of Rushmore's communications

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[25] Adnette testified that she received these fifty "collection letters" between November 25, 2013 and September 15, 2016. Copies of these letters are included in Exhibit 1 and Exhibit U, and marked as M026, M031, M033, M038, M051, M058, M063, M067, M071, M074, M077, M081, M085, M089, M093, M098, M103, M108, M113, M119, M124, M129, M134, M139, M144, M152, M157, M160, M163, M168, M173, M180, M185, M190, M195, M207, M210, M217, M222, M227, M232, M237, M239, M244, M249 and M434. Thirty of those letters are dated between December 20, 2014, and September 28, 2016.

[26] Adnette testified that she received these twenty-six "collection letters" between October 11, 2016 and September 24, 2018. Copies of these letters are included in Exhibit 1 and Exhibit U, and marked as M258, M263, M266, M272, M274, M277, M280, M286, M291, M296, M301, M306, M311, M316, M346, M352, M358, M363, M368, M373, M378, M385, M392, and M421.

[27] A copy of that letter from Rushmore to Adnette was included in Exhibit 1 and Exhibit U, and marked as M428, and indicates that the servicing was transferred effective October 15, 2018.

on at least four[28] occasions and asked him to assist in stopping Rushmore's "nonstop harassment." Adnette testified that she faxed a letter to her bankruptcy attorney on January 5, 2015, which is part of Exhibit 5 and Exhibit Y, marked as M512. She testified that other than sending a fax to her attorney, she made no other efforts to confirm that Rushmore knew of the bankruptcy because Willie had already told Rushmore of the bankruptcy. Adnette testified that shortly before the discharge, she received a letter dated August 9, 2016, informing her that she was delinquent on her loan and another letter dated October 11, 2016, advising her of Rushmore's efforts to contact her.[29] She explained that she saw no reason to respond to Rushmore because the discharge would be or had been entered. Adnette acknowledged receiving another letter from Rushmore dated July 6, 2017,[30] but felt no need to respond because she had already received her discharge.

Adnette testified that at the beginning of her bankruptcy case, she did not feel any specific emotional distress or stress when she received Rushmore's letters because she was under the impression that Rushmore knew that she was in bankruptcy and was simply sending statements. However, she testified that even though her bankruptcy attorney assured her that he handled the Rushmore communications, her stress increased after the discharge because she could not understand why Rushmore was continuing to send letters to her. Adnette testified that it was stressful for her to open Rushmore's letters asking her to pay money. She testified that Rushmore's communications caused marital issues with Willie—her husband of 21 years—

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[28] Adnette testified that she faxed and/or wrote to her bankruptcy attorney regarding Rushmore's communications on January 5, 2015, August 25, 2015, April 5, 2016, and September 23, 2016. Copies of those communications were admitted as Exhibit 5 and Exhibit Y. Marked as M531 is a transmittal letter to her bankruptcy counsel on August 25, 2015, wherein she enclosed a copy of notice from the Rushmore collection department (M537) that was placed on the door of the Residence on Saturday, August 22, 2015. In pertinent part, that notice states: "IMPORTANT. PLEASE CALL RMLM Collection Dept. 888-504-7200. PLEASE BE READY TO GIVE YOUR ACCOUNT NUMBER. WE ARE EXPECTING YOUR CALL TODAY."

[29] Copies of those letters are included in Exhibit 1 and Exhibit U and marked as M237 and M256.

[30] A copy of that letter is included in Exhibit 1 and Exhibit U and marked as M272.

which resulted in her wanting a divorce at one point in time. Adnette testified that the stress caused by the Rushmore communications, among other everyday stressors, exacerbated her pre-existing high cholesterol, high blood pressure, and asthma, although she conceded that there are no medical records attributing her stress or other medical conditions to Rushmore's communications. She takes numerous prescribed and over-the-counter medications to alleviate her various medical conditions, which are described in a list of her medications. (Exhibit 12).

Adnette testified that she has suffered damages as a result of Rushmore's actions. Specifically, she hired her current attorney, Mr. Burke, in January 2019 at the suggestion of her prior bankruptcy attorney. She testified that she does not have an agreement with Mr. Burke regarding the payment of his attorney's fees and expenses, and Mr. Burke has not provided her with a billing statement. Adnette testified that she does not know how much Mr. Burke's attorney's fees and costs will be, though she is asking the court to hold Rushmore responsible to pay any such fees and costs.

Adnette testified that she has spent approximately $100 on copies made on her own copier and on gas utilized to travel to and from Mr. Burke's office, though she does not have receipts regarding these expenses. She testified that she has also missed approximately 30 hours of work from January 2019 to the date of the Evidentiary Hearing. Adnette also testified that she attempted to refinance her first mortgage in June 2019 to reduce her interest rate from 7.7 percent to 4.00 percent. She testified that her attempt to refinance, however, was put in suspension due to Rushmore's incorrect notations on her credit report regarding the existence of a lien and a delinquency under the mortgage loan.

DISCUSSION

Debtors seek an award of damages against Rushmore on two separate theories: that Rushmore violated the automatic stay in effect during their Chapter 13 case, and that Rushmore violated the discharge injunction in effect after completion of their Chapter 13 case.[31] Each theory involves different legal standards and different standards of proof.

[31] Debtors do not allege that Rushmore received any loan payments, before bankruptcy, during the bankruptcy, and after discharge, that must be returned. In other words, there is no restitution component to the Debtors' claim, nor a suggestion of a continuing violation of the

A. Applicable Legal Standards.

1. Automatic Stay Violations.

The automatic stay under Section 362(a) generally arises as soon as a bankruptcy petition is filed.[32] Congress has stated:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his [or her] creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1978), *reprinted in* 1978 U.S.Code.Cong. & Admin.News 5787, 5963, 6296-97, *quoted in* Schwartz v. United States (In re Schwartz), 954 F.2d 569, 571 (9th Cir. 1992) (emphasis added). See also 3 COLLIER ON BANKRUPTCY, ¶362.03 (Richard Levin and Henry J. Sommer, eds., 16th ed. 2019) ("The stay provides the debtor with relief from the pressure and harassment of creditors seeking to collect their claims. It protects property that may be necessary for the debtor's fresh start and, in terms of a debtor in a chapter 11, 12 or 13 case, provides breathing space to permit the debtor to focus on rehabilitation or reorganization.").

The automatic stay precludes all entities from committing "any act to…enforce any lien against property of the estate." 11 U.S.C. § 362(a)(4). It also applies to "any act to …enforce against property of the debtor any lien to the extent such a lien secures a claim that arose before the commencement" of the bankruptcy case. 11 U.S.C. § 362(a)(5). Additionally, the automatic stay bars "any act to collect, assess, or recover a claim against the debtor that arose before the commencement" of the bankruptcy case. 11 U.S.C. § 362(a)(3). Because the stay arises

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automatic stay or of the discharge injunction as of the Evidentiary Hearing. Compare Snowden v. Check Into Cash of Washington, Inc. (In re Snowden), 769 F.3d 651 (9th Cir. 2014) (creditor's failure to return funds taken from Chapter 7 debtor's bank account postpetition constituted continuing violation of automatic stay that was not remedied until debtor's sanction motion was resolved).

[32] Notable exceptions exist when an individual debtor has had two or more bankruptcy cases dismissed within the previous year, see 11 U.S.C. § 362(c)(4), and where in rem relief from stay has been ordered in a prior bankruptcy encompassing the same real property. See 11 U.S.C. § 362(d)(4). Neither exception applies in the Debtors' case.

"automatically" upon the filing of a bankruptcy petition, it applies regardless of whether a party has actual knowledge or even notice that the bankruptcy petition was filed. See generally 3 COLLIER ON BANKRUPTCY, supra, ¶362.02.

Section 362(k) provides that an individual debtor injured by a willful violation of the automatic stay shall recover actual damages, including costs and attorneys' fees, and, may recover, in appropriate circumstances, punitive damages. 11 U.S.C. §362(k)(1). A violation is willful if a movant shows by a preponderance of the evidence that a party knew of the automatic stay, and its actions in violation of the stay were intentional. See Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210, 1215 (9th Cir. 2002); In re Paxton, 596 B.R. 686, 694 (Bankr. N.D. Cal. 2019), amended in part on reconsideration, 2019 WL 2462797 (Bankr. N.D. Cal. June 12, 2019). "Knowledge of the bankruptcy filing is the legal equivalent of knowledge of the automatic stay." Ozenne v. Bendon (In re Ozenne), 337 B.R. 214, 220 (B.A.P. 9th Cir. 2006). "No specific intent is necessary, and a creditor's good faith belief that it was not violating the stay is irrelevant to the issue of willfulness." Paxton, 596 B.R. at 694, citing Morris v. Peralta (In re Peralta), 317 B.R. 381, 389 (B.A.P. 9th Cir. 2004).[33] Upon a determination that a willful violation has caused injury to an individual, Section 362(k)(1) expressly provides that the individual "shall recover" the types of damages and attorney's fees specified in the statute.

2. Discharge Injunction Violations.

A discharge entered in any bankruptcy case "operates as an injunction against the commencement or continuation of…an act, to collect, recover or offset any such debt as a personal liability of the debtor…" 11 U.S.C. § 524(a)(2). Parties who violate the statutory

[33] In Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178 (9th Cir. 2003), the circuit panel stated the following regarding a bankruptcy court's findings that a creditor violated the automatic stay in bad faith: "Nor need we decide whether the bankruptcy court must find bad faith by clear and convincing evidence or under a preponderance of the evidence standard, a question not yet resolved in this circuit." Id. at 1197 n.20. There appears to be some confusion in the caselaw regarding the use of civil contempt authority to remedy a violation of the automatic stay. For example, in In re Matthews, 2017 WL 2821532, at *3 (Bankr. C.D. Cal. June 29, 2017), the court acknowledged that a clear and convincing standard applies for civil contempt but applied a preponderance standard under Section 362(k) and a clear and convincing standard under Section 105(a) for an alleged violation of the discharge order.

injunction imposed by Section 524(a)(2) may be held in contempt under Section 105(a).[34] See Taggart v. Lorenzen, 139 S.Ct. 1795, 1801 (2019) ("In our view, these provisions authorize a court to impose civil contempt sanctions when there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful under the discharge order.").

"To find a party in civil contempt, the movant must prove by clear and convincing evidence that the alleged contemnor violated a specific and definite order of the court." Bateman v. GemCap Lending I, LLC (In re Bateman), 2019 WL 3731532, at *6 (B.A.P. 9th Cir. Aug. 7, 2019), citing In re Dyer, 322 F.3d at 1190-91.[35]

"The bankruptcy court must also find that the contemnor had sufficient notice of the order's terms and the fact that sanctions would follow a failure to comply." In re Bateman, 2019 WL 3731532, at *6, citing Hansbrough v. Birdsell (In re Hercules Enters., Inc.), 387 F.3d 1024, 1028 (9th Cir. 2004).

"Once a contemnor's noncompliance with a court order is established, the burden shifts, and [the contemnor] must produce sufficient evidence of its inability to comply to raise a question of fact." Bateman, 2019 WL 3731532, at *6, citing Kismet Acquisition, LLC v. Diaz-Barba (In re Icenhower), 755 F.3d 1130, 1139 (9th Cir. 2014). "This is because a 'contemnor in violation of a court order may avoid a finding of civil contempt only by showing it took all reasonable steps to comply with the order.'" Bateman, 2019 WL 3731532, at *6, quoting Kelly v. Wengler, 822 F.3d 1085, 1096 (9th Cir. 2016).

"Whether the contemnor violated a court order is not based on subjective beliefs or intent in complying with the order, 'but [based on] whether in fact [the] conduct complied with the order at issue.'" Bateman, 2019 WL 3731532, at *6, quoting Dyer, 322 F.3d at 1191. "The standard for evaluating civil contempt, thus, is an objective one." Bateman, 2019 WL 3731532,

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[34] In pertinent part, that statute authorizes a court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code. 11 U.S.C. § 105(a).

[35] "[C]lear and convincing evidence 'indicat[es] that the thing to be proved is highly probable or reasonably certain. This is a greater burden than a preponderance of the evidence,…but less than evidence beyond a reasonable doubt…'" U.S. v. Jordan, 256 F.3d 922, 930 (9th Cir. 2001), quoting Black's Law Dictionary 577 (7th ed. 1999).

at *6, citing Taggart, 139 S.Ct. at 1804. The Supreme Court has explained "'that a party's subjective belief that she was complying with an order ordinarily will not insulate her from civil contempt if that belief was objectively unreasonable.'" Freeman v. Nationstar Mortg. LLC (In re Freeman), 608 B.R. 228, 234 (B.A.P. 9th Cir. 2019), quoting Taggart, 139 S.Ct. at 1802. "That said, subjective intent is not always irrelevant: 'Our cases suggest, for example, that civil contempt sanctions may be warranted when a party acts in bad faith.'…On the other hand, a party's good faith, even if it does not prevent a finding of civil contempt, might help determine the appropriate sanction." Freeman, 608 B.R. at 234, quoting Taggart, 139 S.Ct. at 1802.

B. Violation of the Automatic Stay.

1. Rushmore Had Notice of the Debtors' Bankruptcy Proceeding.

It is not disputed that Rushmore was included on the Creditor Matrix submitted by the Debtors. It also is not disputed that the Debtors received at least three Account Information statements from Rushmore, dated January 15, 2013, February 12, 2013, and March 14, 2013, before they filed their Petition. (Exhibit 1 and Exhibit U, at M001, M003, M005).[36] Page 2 of those statements provides the contact information for a borrower to communicate with Rushmore concerning the subject loan. (Id., at M002, M004, M006). The left side of the page lists various telephone and facsimile numbers where Rushmore can be reached for customer service, home retention assistance, payoff statements/information, hazard/homeowners insurance, property tax information/assistance, and collection department. The left side of the page also includes code information for the borrower to make payments through Western Union, as well as the information to access the Rushmore website. The right side of the page lists various mailing

[36] On each of those statements, the following language appears: "THIS COMMUNICATION IS FROM A DEBT COLLECTOR AND ANY INFORMATION RECEIVED WILL BE USED FOR THAT PURPOSE. THIS DOES NOT IMPLY THAT RUSHMORE LOAN MANAGEMENT SERVICES IS ATTEMPTING TO COLLECT MONEY FROM ANYONE WHOSE DEBT HAS BEEN DISCHARGED PURSUANT TO (OR WHO IS UNDER THE PROTECTION OF) THE BANKRUPTCY LAWS OF THE UNITED STATES; IN SUCH CIRCUMSTANCES, IT IS INTENDED SOLELY FOR INFORMATIONAL PURPOSES." Modified versions of this language appear in the statements dated from January 16, 2014 through March 12, 2015, and in the statements from April 10, 2015, through August 10, 2018.

addresses for Rushmore to receive various communications from the borrower. The listed items are as follows:

OVERNIGHT PAYMENT ADDRESS:
Rushmore Loan Management Services
15480 Laguna Canyon Rd., Suite 100
Irvine, California 92618

SEND TAX BILLS FOR ESCROWED/IMPOUNDED LOANS TO:
Rushmore Loan Management Services
P.O. Box 2505
Covina, CA 91722

SEND INSURANCE BILLS AND POLICIES TO:
Rushmore Loan Management Services
P.O. Box 692409
San Antonio, TX 78269-2409

SEND CORRESPONDENCE TO:
Rushmore Loan Management Services
Customer Service Department
P.O. Box 55004
Irvine, California 92619-5004

SEND QUALIFIED WRITTEN REQUEST TO:
Rushmore Loan Management Services
Compliance Department
P.O. Box 52262
Irvine, California 92319-2262

PAYMENTS WITH COUPONS:
Rushmore Loan Management Services LLC
P.O. Box 514707
Los Angeles, California 90051-4707

PAYMENTS WITHOUT COUPONS:
Rushmore Loan Management Services LLC
P.O. Box 52708
Irvine, CA 92619-2708

(Emphasis added). At the bottom of the list on the right side of the page appears a "FEE SCHEDULE" setting forth a $25.00 fee for a borrower's returned check. At the bottom of the entire page is a form for the borrower to inform Rushmore of a change of the borrower's mailing address and phone number.

It also is not disputed that the Debtors received multiple Account Information or Mortgage Statements from Rushmore after they filed their Petition. It is not disputed that the face of all of the Account Information or Mortgage Statements reflect that they were sent by Rushmore from an address of "PO Box **52708**, Irvine, CA 92619," while the payment coupon at the bottom of each statement instructs the borrower to send payments to Rushmore at "P.O. Box 514707, Los Angeles, CA 90051-4707."

It also is not disputed, however, that one of those statements is dated October 11, 2013. (Exhibit 1 and Exhibit U, at M019). Page 2 of that statement also provides contact information for a borrower to communicate with Rushmore concerning the subject loan. (Id., M020). Unlike the statements for the prior months, the right side of Page 2 no longer included any information or a mailing address for the borrower to make "PAYMENTS WITHOUT COUPONS," but continued to include the same information and mailing address for the borrower to "SEND CORRESPONDENCE TO" Rushmore.

It is not disputed that one of those Mortgage Statements is dated January 18, 2014. (Ex. 1, M033; Ex. U, M033). Page 2 of that statement also provides contact information for a borrower to communicate with Rushmore concerning the subject loan. (Id., at M034). Unlike the Account Information Statements for the prior months, the right side of Page 2 no longer included any information or a mailing address for the borrower to make "PAYMENTS WITHOUT COUPONS," "PAYMENTS WITH COUPONS," or to "SEND QUALIFIED WRITTEN REQUEST TO" Rushmore. Instead of that information, the right side of Page 2 added information to "SEND NOTICE OF ERROR RESOLUTION AND INFORMATION REQUEST TO" along with an address of "Rushmore Loan Management Services, Compliance Department, P.O. Box 52262, Irvine, California 92619-2262."

It is not disputed that all of the subsequent Mortgage Statements sent to the borrower by Rushmore include the same contact information and mailing addresses set forth in the January 18, 2014 statement. Based on Rushmore's own Account Information and Mortgage Statements sent to their borrowers, it appears that at all relevant times, P.O. Box 52708, Irvine, California 92619, has never been a designated mailing address for Rushmore to receive correspondence or

legal notices of any kind. Instead, for a brief period of time, Rushmore instructed its borrowers to use the P.O Box 52708 address only if sending a payment without using a coupon that appears at the bottom of each statement. For all relevant times, Rushmore has instructed its borrowers to send correspondence to P.O. Box 55004, Irvine, California 92619-5004.[37]

It is not disputed that the P.O. Box 52708 address for Rushmore appears on Schedule "D" filed by the Debtors, but that address does not appear on the Creditor Matrix. It is not disputed that the only mailing address for Rushmore that appears on the Creditor Matrix is P.O. Box 82708, Irvine, CA 92619. As a result, none of the other mailing addresses specified on Page 2 of the Account Information and Mortgage Statements appear on the Creditor Matrix. It also is not disputed that none of those addresses appear on any of the certificates of service, or proofs of service, for any of the motions, applications, notices of hearing, court orders, documents, or other papers filed by the Debtors, the Trustee, the clerk of the court, or any party in interest during the Chapter 13 case.[38] In other words, it appears that none of the documents filed during the Chapter 13 case were served by first class or certified mail to Rushmore at the P.O. Box 52708 address, or any other addresses set forth in the Account Information and Mortgage Statements.

It also is undisputed, however, that a Rushmore representative had a telephone conversation with Willie during the Chapter 13 proceeding. It also is undisputed that Willie informed the Rushmore representative that there was a pending Chapter 13 proceeding. It further is undisputed that the Rushmore representative noted that telephone conversation in the Consolidated Notes Log as occurring on December 20, 2014. On cross-examination, Rushmore's only witness acknowledged that Willie informed a Rushmore representative during

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[37] The other documents found amongst the parties' common "collection letters" include correspondence sent by Rushmore from the P.O. Box 52708 address (Exhibit 1 and Exhibit U, at M021, M025, M026, M043, M056, M113, M160, M178, M207, M210, M237, M249, M256, M272, M274, M346, M352, M428), or from P.O. Box 55004, Irvine, CA 92618 (Id., at M149, M157, M195, M263, M266, M277, M280, M316, M321, M392).

[38] At the Evidentiary Hearing, Debtors made no effort to suggest that the mailing address appearing on the Creditor Matrix was correct. Nor did the Debtors suggest that Rushmore was effectively given notice through any of the mailing addresses used during the case.

a December 20, 2014, phone call that the Debtors were in bankruptcy. Rushmore's witness attested, however, that Willie is not a party authorized to speak to Rushmore about the servicing of the loan because Willie is not a borrower. Rushmore's witness explained that its representatives are not to discuss anything about a loan account with an unauthorized party. He further explained that if a Rushmore representative receives information from an unauthorized party that a borrower is in bankruptcy, the representative only makes a notation in the file memorializing that the comment was received. In spite of the notation being made in the borrower's file, Rushmore's witness testified that Rushmore did not conduct a PACER search to confirm or deny the existence of its borrower's bankruptcy case. Rushmore's witness testified that under Rushmore's policies and procedures, receipt of information from an unauthorized party of a borrower's potential bankruptcy is not one of the five methods for receipt of notice specified in the Rushmore manuals.

A redacted copy of the Rushmore manuals, specifying its bankruptcy policies and bankruptcy procedures, was filed under seal, but offered into evidence by both parties. (Exhibit 19 and Exhibit MM). The Rushmore manuals consist of two separate documents: a 13-page manual of "Bankruptcy Policy" ("Policy Manual") and a 115-page manual of "Bankruptcy Procedures" ("Procedures Manual").[39] Page 7 of the Policy Manual states, in full, as follows:

> **Identification of a Borrower in Bankruptcy**
>
> **Notice Regarding Borrower in Bankruptcy**
>
> Rushmore will act promptly in respect to a notice of any nature, whether written or oral (telephonic or in person), that a borrower has filed for bankruptcy protection under any Policy of the Bankruptcy Code. Rushmore shall utilize procedures designed to ensure prompt identification of borrowers in bankruptcy, including requiring that bankruptcy notices be processed immediately upon receipt, with a protocol for where and to whom such notice must be sent.
>
> Rushmore shall subscribe to, and review on a daily basis, an automated notification service that provides alerts of consumer

[39] As previously mentioned in note 7, supra, Debtors requested copies of the Rushmore manuals in effect from 2013 through 2017, but the manuals produced by Rushmore were from late 2018 and early 2019. Rushmore's witness testified that he believed the policies and procedures in those manuals were in place in 2013.

> bankruptcy filings. Upon notification of such a filing Rushmore shall take steps to confirm the identity of the debtor and/or property and match it to a Rushmore loan record. Upon confirmation Rushmore shall immediately implement the actions set forth below consistent within approved procedures.
>
> **Action upon Notice of Filing**
>
> Upon verification of a bankruptcy filing by a borrower with respect to that borrower and the property securing the borrower's loan, Rushmore shall immediately:
>
> - Transfer the borrower's file to personnel trained to handle files subject to bankruptcy protection;
> - Notify departments involved in servicing of the loan to stop all collection activities and refrain from further communications with the debtor through designated stops and flags set at loan level; and
> - Notify third party vendors, including outside counsel, to cease any and all collection activities with respect to the debtor.
>
> **The Automatic Stay**
>
> While the automatic stay is in effect, Rushmore shall not engage in any form of collection activity to attempt to collect the debt, including but not limited to lawsuits, letters, phone calls, threats of criminal proceedings or other adverse actions intended to bring about repayment.

(Emphasis added). Rushmore's own Policy Manual expressly acknowledges that notice of a borrower's bankruptcy can be of any nature, written or oral, and by telephone or in person. Its Policy Manual also expressly provides that upon any such notice of any nature, it will use procedures designed to ensure prompt identification of borrowers in bankruptcy. Its Policy Manual also expressly provides that it will immediately transfer the borrower's file to personnel trained in bankruptcy matters and will refrain from any further collection activities or communications with the debtor in bankruptcy. Rushmore's Policy Manual also acknowledges

the automatic stay's prohibition on any form of collection activity to collect the debt, including letters and phone calls to the debtor.[40]

Despite the glowing language of its express bankruptcy policies, Rushmore's witness testified that Rushmore has adopted its own standard for determining when it has received notice of a borrower's bankruptcy. According to its witness, notice of a bankruptcy filing is not acknowledged by Rushmore unless it receives information through one of the five methods set forth in its own bankruptcy procedures. Page 2 of the Procedures Manual expressly provides as follows:

> **Notification**
>
> Notification of a new bankruptcy filing can come through the following sources:
>
> - Foreclosure Specialist
> - Foreclosure Attorney
> - Borrower phone call
> - Mail
> - ACCER Notification
>
> Upon receipt of a bankruptcy notification, the bankruptcy specialist will verify the information received by accessing the Public Access to Court Electronic Records (PACER) website.

(Emphasis added).[41] Rushmore's witness testified that the December 20, 2014 telephone call between the borrower's spouse and the Rushmore representative was not one of the five

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[40] The top of page 8 of the Policy Manual is entitled "Communications with Borrowers in Bankruptcy." Rushmore's policy states: "Only approved communications may be sent to a borrower in bankruptcy and should generally include a disclaimer, described more fully in the Bankruptcy Procedures, that the communication is not an attempt to collect a debt in violation of the automatic stay, or an attempt to collect discharged amounts in violation of the discharge order." Rushmore appears to include such disclaimer language in its monthly billing statements irrespective of whether it has knowledge of a borrower's bankruptcy status. See note 36, supra.

[41] The text of the Procedures Manual consists of 110 pages, but the information in pages 22 to 91 and 100 to 110 is completely redacted, even in the copy provided to the court under seal. Pages 92 through 99 are not redacted. Page 93 describes the permissible treatments of a junior lienholder's claim in Chapter 13. Pages 94 through 98 describe the process of cramdown

notification sources specified in the Procedures Manual because Willie was an "unauthorized" third party. Because the telephone call with Willie did not fall into one of those five categories, Rushmore's witness testified that the loan file does not reflect that a PACER search was conducted, or that any other steps were taken to verify that the borrower had filed for bankruptcy relief.

Rushmore's own procedures describe the process of accessing the PACER system at page 8 of the Procedures Manual, and then describes the capabilities of that system at page 9:

> **PACER Search Capability**
>
> PACER Case Locator allows you to search nationwide by case number, party name, complete or last four digits of a social security number, case filing dates, etc. The search criteria vary by court type, depending on the relevancy of the search information.
>
> **Search Options**
>
> - All Court Types
> - Appellate
> - Bankruptcy
> - Civil
> - Criminal
> - Multi-District Litigation

(Emphasis added). According to Rushmore's Procedures Manual, the PACER system has the ability to conduct a nationwide search under a borrower's name and/or social security number to confirm the borrower's bankruptcy history. In describing the "Search Results," page 10 of the Procedures Manual states: "The search produces a list of cases that match the criteria entered. (The party name, court where the case is located, case number, filing date, chapter, closing date, etc.)." In discussing the PACER verification process, page 13 of the Procedures Manual also states: "Once PACER verification is completed, the bankruptcy specialist activates the

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of a junior lien in Chapter 13 and the bankruptcy court's determination of the fair market value of the real property securing the claim.

Bankruptcy Workstation in MSP and determines the appropriate course of action based on Chapter and due date."

Disclaimers of intent to violate bankruptcy protections are a common method by which debt collectors attempt to limit their liability to individual debtors. See, e.g., In re Vanamann, 561 B.R. 106 (Bankr. D.Nev. 2016) (inclusions of disclaimers in letters, notices, mortgage statements and informational statements insufficient to avoid sanctions). Disclaimers of notice of bankruptcy is another common method by which debt collectors attempt to limit their liability. See, e.g., In re Bush, 2019 WL 5875705 (Bankr. D.Nev. Mar. 1, 2019) (unscheduled creditor in a Chapter 7 no asset case sanctioned for violation of discharge injunction). From the evidence presented, it appears that Rushmore's policy is to disclaim any intention to violate a borrower's bankruptcy protections, see note 36, supra, while its procedures function to disclaim that it received notice of a borrower's bankruptcy. In this particular instance, Rushmore's witness acknowledges that its representative received oral notice of the borrower's bankruptcy on December 20, 2014, during a telephone call with Willie, but Rushmore did nothing to verify the bankruptcy filing because of Rushmore's internal procedures. Moreover, after the Rushmore representative memorialized the information that the borrower was in bankruptcy by making a notation in the loan file, no one else at Rushmore followed up on the information.[42] Thus, in spite of Rushmore's expressly stated policy that it "will act promptly in response to notice of any nature, whether written or oral (telephonic or in person), that a borrower has filed for bankruptcy

[42] The Consolidated Notes Log and one of the transcripts attached at M477 confirms that Rushmore's representative named "Ariel" had a telephone conversation with Willie on March 28, 2016, during which Willie implored him that the Debtors had a lawyer who should be contacted. Thus, Rushmore's own record reflects an entry on December 20, 2014, that the borrower's husband had represented that a bankruptcy was filed, and another entry on March 28, 2016, that the borrower's husband had represented that the Debtors' attorney should be called. Despite these two entries, Rushmore's witness testified that until Rushmore received the Contempt Motion in January 2019, it never had notice of the Debtors' bankruptcy or of their discharge.

protection," its express procedures prevented Rushmore's representative from doing so in this specific case.[43]

Moreover, the explanation provided by Rushmore's witness for why this occurred in the Debtors' case is unpersuasive at best. He testified that Willie is not the borrower and therefore is an unauthorized party with whom Rushmore representatives were prohibited from discussing the borrower's loan account. The sources of notification specified in Rushmore's procedures, however, are not limited to the borrower. A "Foreclosure Specialist" or a "Foreclosure Attorney" would not be the actual borrower.[44] "Mail" is not limited to information from the borrower.[45] "ACCER" is a data mining service that provides public bankruptcy information regarding a borrower rather than information from a borrower.[46] To suggest that a borrower's

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[43] Rushmore's witness testified that there are no less formal communications from the borrower in the loan file, such as an email, but he also testified that a facsimile transmission would not constitute a notification of a borrower's bankruptcy under Rushmore's internal procedures. While Rushmore's policy expressly contemplates that oral notice of bankruptcy may be provided in person, Rushmore's express procedures contemplate that a borrower may provide oral notice only through a phone call. There is, of course, a visual absurdity of an in-person, face-to-face meeting between a borrower and a Rushmore representative that requires the borrower to speak to the representative through a telephone. It also is not clear whether a "Borrower phone call" to a Rushmore representative would rule out a borrower's use of a smartphone device to provide a bankruptcy notification by text, email, or social media platform.

[44] Rushmore's witness testified that the Foreclosure Specialist or Foreclosure Attorney would be informed of a bankruptcy filing by the borrower or borrower's attorney, and then the Foreclosure Specialist or Foreclosure Attorney would then provide the bankruptcy notification to Rushmore. In either event, however, the Foreclosure Specialist or Foreclosure Attorney still would be a non-borrower, third-party.

[45] It is unclear whether Rushmore has ever taken steps under Section 342(f) to provide an address to bankruptcy courts for notice to be sent by first class mail in all Chapter 13 and Chapter 7 cases in which it is listed as a creditor. The "preferred" address so designated by a creditor typically is identified with the symbol "(p)" on certificates of service generated by the bankruptcy noticing center ("BNC"). None of the BNC certificates filed in this case reflect a preferred address for Rushmore. Moreover, it is not clear whether Rushmore's reference to "Mail" is limited to information received through the United States Postal Service, or if it also includes bankruptcy information received through other delivery services such as Federal Express ("FedEx"), United Parcel Service, or similar providers.

[46] As previously discussed at 34-35, supra, Rushmore's Policy Manual specifically requires it to "subscribe to, and review on a daily basis, an automatic notification service that

spouse would be an unauthorized third party, while multiple non-borrower third party sources would be authorized sources of notification under Rushmore's express written procedures,[47] is absurd at best.[48]

Moreover, the court is not aware of any authority that would permit creditors to create a shield of ignorance to protect themselves from liability for violating the bankruptcy laws. Compare Gonzalez-Servin v. Ford Motor Co., 662 F.3d 931, 934 (7th Cir. 2011) ("The 'ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is as unprofessional as it is pointless.'"). In this instance, Rushmore is not ignorant of bankruptcy law, but has adopted procedures to remain ignorant of a borrower's resort to bankruptcy relief. As attested by its own witness, Rushmore's representatives are instructed not to follow up on information unless it is provided through five specific sources. As previously discussed, the information from four of the five sources specified in Rushmore's Procedures Manual are not required to originate from the borrower at all, and the fifth source limits a borrower to communication by telephone. Those five sources are under-inclusive at best regardless of whether they comply with industry standards. To allow any institutional creditor to

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provides alerts of consumer bankruptcy filings." There appears to be no dispute that Rushmore was listed as a creditor in the Debtors' bankruptcy case and that notice of various matters during the case was mailed to multiple addresses. It is unclear why an automatic notification service would not have reported to Rushmore that a bankruptcy had been filed by the borrower, even if an incorrect mailing address for Rushmore had been used. ACCER apparently is the service that Rushmore was required to engage to comply with its own policy. The affidavit submitted by Rushmore's witness did not discuss ACCER but he did testify at the hearing that no ACCER notification appears in the loan file.

[47] Nowhere in Rushmore's Policy Manual or Procedure Manual is there a reference to or mention of an "authorized third party" or an "unauthorized third party" whose information would or would not qualify as a source of bankruptcy notification.

[48] During cross-examination of Rao, Rushmore's counsel suggested that Rushmore would have complied with industry standards if only Adnette had given it the opportunity by returning its phone calls or letters. Rao agreed that another opportunity might have arisen but observed that it is unknown whether Rushmore would have complied.

insulate itself from notice[49] of a bankruptcy proceeding would deny debtors of bankruptcy's most fundamental protections: the automatic stay and the discharge of personal liability.

Based on the evidence presented, the court concludes that the Debtors have established by a preponderance of the evidence that Rushmore received notice of the Debtors' bankruptcy proceeding on December 20, 2014.[50] Rushmore's decision not to take steps to verify the Debtors' bankruptcy filing was entirely its own choice.[51]

2. Rushmore Intentionally Acted to Collect the Loan.

Debtors received their Chapter 13 discharge on September 28, 2016, at which time the automatic stay terminated under Section 362(c)(2)(C). During the 648-day period between December 20, 2014, and September 28, 2016, Rushmore mailed at least fifty Account

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[49] Resort to epistemology might provide an explanation for Rushmore's behavior. In the context of the automatic stay, however, limiting the sources of knowledge of a bankruptcy is as foolish as it is perilous: acts in violation of the automatic stay are void *ab initio* even if the actor is unaware of the bankruptcy case. See In re Schwartz, 954 F.2d at 571 (IRS tax assessment while unaware of debtors' prior Chapter 11 was void and without effect in debtors' subsequent Chapter 13 proceeding). So it is unclear to the court why a loan servicer, in the interests of its lender clients, would not use all available means to verify a borrower's bankruptcy upon the receipt of any information whatsoever.

[50] After December 20, 2014, Debtors do not dispute that they contacted their original bankruptcy counsel by facsimile on at least four occasions seeking assistance of counsel to stop Rushmore's postpetition collection efforts. See note 28, supra. Rushmore did not call the Debtors' former bankruptcy counsel as a witness and it is unclear whether actions by such counsel could have prevented the automatic stay and discharge violations that are the subject of this proceeding.

[51] Rushmore does not suggest that the PACER system is an unreliable means to verify the existence of a bankruptcy filing. In this case, Rushmore's witness testified that its representatives attempted to call the borrower to verify the bankruptcy filing despite its stated policy that "[w]hile the automatic stay is in effect, Rushmore shall not engage in any form of collection activity, including but not limited to…letters [and] phone calls…or other adverse actions intended to bring about payment." See discussion at 16, supra. Debtors' expert testified that this policy statement is consistent with loan servicing industry standards, but that when the Rushmore representative received bankruptcy information from the borrower's husband during the December 20, 2014 phone call, industry standards also required notification to be given to a supervisor or bankruptcy specialist and/or an attempt to verify the existence of a bankruptcy case through PACER.

Information and Mortgage Statements, and other collection letters to the Debtors and made hundreds of telephone calls to the Residence.[52] It is not disputed that Rushmore did not seek or obtain relief from the automatic stay at any time during the Chapter 13 proceeding.

Rushmore's only witness offered no evidence or suggestion that the Account Information and Mortgage Statements and other letters were not sent by Rushmore or received by the borrower. Rushmore's only witness did not dispute that all of the Account Information and Mortgage Statements included a statement of the amount due, a deadline for payment, a past due amount, a late charge amount, and a payment coupon. The same witness testified that transmitting such statements to a borrower in bankruptcy would be a violation of Rushmore's own policies.

Rushmore's only witness also testified that the various telephone calls made by Rushmore's representatives are accurately identified by date in the Consolidated Notes Log and that the "COL" abbreviation would reflect a communication from the collections department as opposed to a communication from the loan servicing department bearing the "SER" abbreviation.[53] The Consolidated Notes Log reflects that Rushmore made 68 telephone calls to the Debtors during the 648-day period between December 20, 2014, and September 28, 2016. Of those calls, the Consolidated Notes Log also indicates that 58 were made from the collections department and 10 appear to have been made from the loss mitigation department.[54]

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[52] Between the commencement of their Chapter 13 proceeding on March 26, 2013 and the entry of discharge on September 28, 2016, the automatic stay was in effect for 1,284 days. For 648 of those days, or roughly fifty percent of statutory duration of the automatic stay, Rushmore continued its efforts to collect the loan and asserts that it was not aware that the borrower was in bankruptcy.

[53] The abbreviation "LMT" also appears in the same column of the Consolidated Notes Log where SER and COL appear. The court assumes that LMT refers to Rushmore's loss mitigation department.

[54] The Consolidated Notes Log contains a multiple of entries with respect to Rushmore's telephonic communications with the borrower. In addition to identifying if the call was made from the collections department or loss mitigation department, the Consolidated Notes Log indicates whether the call was made to the borrower's residence, cell phone, or some other number. The Consolidated Notes Log also indicates whether a call was answered or connected, whether there was a busy signal, whether a message was left on an answering machine, and

Although Rushmore maintains that it never intended to violate the automatic stay, there is no dispute that Rushmore intended its communications with the Debtors. Those communications attempted to collect a prepetition debt. Because the automatic stay was in place until the Debtors received their Chapter 13 discharge, no more is required for a willful violation of the automatic stay to be established under Section 362(k). Accordingly, the court concludes that the Account Information and Mortgage Statements sent by Rushmore during the 648-day period between December 20, 2014 and September 28, 2016, as well as the collection calls during the same period, were in willful violation of the automatic stay.

C. Violation of the Discharge Injunction.

As previously discussed, it appears that none of the documents filed or entered on the docket during the Chapter 13 case were mailed to Rushmore, by first class mail or certified mail, providing constructive notice of the Debtors' bankruptcy case. The Discharge Order was entered on September 28, 2016, but notice by first class mail was sent to Rushmore only at the P.O. Box 82708 address as well as another address in Rapid City, South Dakota. Debtors have not offered evidence that either of those addresses were effective to provide notice of the Discharge Order to Rushmore.[55]

Unlike the December 20, 2014 telephone conversation acknowledged by Rushmore and confirmed by its Consolidated Notes Log, the only direct evidence of Rushmore's knowledge of the Discharge Order consists of Willie's testimony. He testified that sometime after the

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whether a party answered the call and hung up. Debtors testified that they did not keep any voicemail messages that had been left by Rushmore.

[55] Notice, of course, must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). See, e.g., Deutsche Bank Nat'l Trust Co. v. SFR Inv. Pool 1, LLC, 2019 WL 4280041, at *6 (D.Nev. Sept. 9, 2019). Serving a party at an incorrect or non-existent address hardly meets the Mullane standard. Moreover, Debtors never offered testimony from their former bankruptcy counsel as to whether any of the notices sent to the addresses used were returned as undeliverable. Similarly, neither party offered evidence that materials mailed to Rushmore at other addresses were forwarded and received by Rushmore at any of the addresses listed by Rushmore in its Account Information and Mortgage Statements.

discharge was entered on September 28, 2016, he had another telephone conversation with a Rushmore representative. Willie testified that he informed the representative that a discharge had been received by the Debtors, but that he was rebuffed by the Rushmore representative. The Consolidated Notes Log does not include any notations describing such a telephone conversation. Rather, the Consolidated Notes Log reflects that after the entry of discharge on September 28, 2016, Rushmore made 52 telephone calls to the Debtors. Of those calls, the log indicates that Rushmore's calls to the Debtors at a number other than the Residence, were answered five times (March 20, 2018, March 30, 2018, April 17, 2018, May 18, 2018, and October 2, 2018), but the answering party had hung up. No description of the content of those calls appears in the Consolidated Notes Log, but the "COL" abbreviation appears for all of the calls made after the Discharge Order was entered. Thus, it appears from Rushmore's own records that a total of 52 collection calls were made by Rushmore after the discharge injunction arose under Section 524(a)(2).

Likewise, it appears that during the 747-day period between entry of the discharge on September 28, 2016, and when Rushmore ceased servicing the loan on October 15, 2018, see note 27, supra, Rushmore transmitted twenty-six Mortgage Statements and other collection letters to the Debtors after the Discharge Order was entered. See note 26, supra. Rushmore does not dispute that these communication efforts, in addition to the telephone calls, were done intentionally. It does not dispute that such efforts would be in violation of the Debtors' discharge if it was aware of the discharge. Thus, Rushmore does not suggest that there would be an "objectively reasonable basis for concluding that [Rushmore's] conduct might be lawful under the discharge order." Taggart, 139 S.Ct. at 1801.

Other than the telephone call with a Rushmore representative attested to by Willie, however, there is no written record or percipient witness offered to corroborate that call. Rushmore did not offer any witness who actually spoke to the Debtors at any time during or after bankruptcy case, nor did the Debtors call any representatives from Rushmore to testify. Willie testified that he returned certain mail received from Rushmore and indicated on the return mail that he and Adnette had filed for bankruptcy relief and received a discharge. Debtors apparently

did not retain any copies of the returned mail from which to confirm that information. Likewise, Rushmore's records apparently do not include any returned mail from the Debtors where any bankruptcy information had been written on the envelopes.[56]

During the 747-day period between the entry of the Discharge Order on September 28, 2016, and Rushmore's cessation of loan servicing on October 15, 2018, the most that can be said is that Rushmore was informed of the Debtors' discharge at some point during the period.[57] Willie testified that he returned mail to Rushmore and informed it of the bankruptcy by including a note advising of the discharge, but neither a copy of the returned mail nor the note was retained. Likewise, Willie did not offer any testimony as to when that note was sent to Rushmore. Willie expressly testified that he does not know when his contentious phone call with the Rushmore representative actually took place. His testimony was credible, but even he does not know when it occurred. Adnette did not witness or participate in the call.

No witnesses were called by either side to corroborate the call or to establish when the telephone call occurred.[58] If the mail was returned or the telephone call took place shortly after

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[56] Both sides admitted copies of the envelopes received by Rushmore as Exhibit 6 and Exhibit Z, but none of the envelopes reflect any bankruptcy information. Some of the envelopes are colorful and reflect express deliveries by FedEx. Two of the envelopes marked as M589 and M590 have the word "Return" written on them, but do not indicate on the envelope the date that the mail was returned. In both exhibits, however, the page marked as M591 appears to consist of a copy of a payment coupon and payment envelope for a loan payment due by November 1, 2017. If the page marked as M591 reflects what was included in the page marked as M590, then it appears that the envelope would have been sent back by the Debtors to Rushmore sometime in late 2017, after the Debtors received their Chapter 13 discharge and the automatic stay had already terminated.

[57] At the Evidentiary Hearing, Rushmore's witness acknowledged that the Consolidated Notes Log does not include reference to a telephone call that Adnette had placed to Rushmore on February 2, 2012. The transcript of that call is marked as M471.

[58] As previously discussed at note 22, supra, the collection letters admitted as Exhibit 1 and Exhibit U include ten items dated between September 22, 2015 and August 13, 2018. All of those items are signed by Ariel Villela or identify Ariel Villela as the person for the borrower to call with respect to the loan. Willie testified that after the discharge was entered on September 28, 2016, he had his contentious telephone call with Ariel in which he informed Ariel of the Chapter 13 discharge. Apparently, Ariel was still employed by Rushmore as of August 13, 2018. If the "Ariel" mentioned in the collection letters is the same person that Willie spoke to by

the discharge was entered, Rushmore's continued servicing of the loan to effectuate collection constituted a violation of the discharge injunction over a significant period. If the mail was returned or the telephone call took place shortly before Rushmore discontinued servicing of the loan, Rushmore's communications did not constitute a violation of the discharge injunction over a significant period of time. While the court finds Willie's testimony to be credible, Debtors' failure under a clear and convincing evidence standard to establish when Rushmore was informed of the Chapter 13 discharge precludes the court from awarding damages.[59]

D. Damages and Attorney's Fees.

Having concluded that the Debtors were injured by a willful violation of the automatic stay, they are entitled under Section 362(k)(1) to recover their actual damages and attorney's fees, as well as punitive damages if appropriate. An award of actual and punitive damages, however, will be allocated to the period from which Rushmore had knowledge of the bankruptcy on December 20, 2014, and the termination of the automatic stay on September 28, 2016.

1. **Actual Damages.**

Actual damages for an automatic stay violation may include an award for any pain and suffering, as well as any emotional distress, caused by the violation. See Dawson v. Wash. Mut. Bank, F.A. (In re Dawson), 390 F.3d 1139, 1146-49 (9th Cir. 2004), abrogration on other grounds recognized in Gugliuzza v. FTC (In re Gugliuzza), 852 F.3d 883 (9th Cir. 2017). Any pecuniary losses also may be recovered. See Sundquist v. Bank of Am., N.A. (In re Sundquist), 566 B.R. 563, 587 (Bankr. E.D. Cal. 2017). In this case, the evidence of any pain and suffering, emotional distress, and pecuniary losses was offered only by the Debtors. In addition to their

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telephone, his testimony might be able to establish, confirm, or dispute the date, if any, on which the call occurred. Neither Rushmore nor the Debtors offered Ariel as a witness.

[59] Based on the record, the court has found under a preponderance of the evidence standard that Rushmore had notice of the Debtors' bankruptcy and intended its collection efforts while the automatic stay was in effect. While the court can find under a clear and convincing evidence standard that Rushmore intended its collection efforts after the discharge was entered, the court cannot find that Rushmore received notice of the Debtors' discharge on a particular date. Absent sufficient proof of the date when Rushmore received notice of the discharge, the court concludes that there is a "fair ground of doubt as to the wrongfulness" of Rushmore's post-discharge conduct. See Taggart, 139 S.Ct. at 1801.

individual testimony, Debtors admitted into evidence copies of the separate lists of medications that they had been taking to treat various conditions, as well as copies of their separate credit reports (Exhibits 10 and 11; Exhibits DD and EE). No written or live testimony from any treating physicians or medical professionals were offered or admitted into evidence. No written or live testimony from any expert witnesses were offered or admitted to corroborate or contradict the Debtors' testimony concerning their pain, suffering, or emotional distress. No written or live testimony for any source was offered by either party to explain the impact of Rushmore's actions on the Debtors' finances or their ability to obtain refinancing of their Residence. No written or live testimony from any lender was offered to establish that any lien in favor of Rushmore or any information reported by Rushmore has prevented the Debtors from refinancing the loan obligation owed to their primary lender.

Willie testified that the Chapter 13 proceeding has been stressful, and that Rushmore's violation of the automatic stay exacerbated his stress. He testified that the additional stress caused breathing difficulties and increased blood pressure. Willie testified that the additional stress also created marital strife with Adnette, but they were able to work things out. He testified that he is a Vietnam veteran who was diagnosed with PTSD in 2007 and believes that some of his PTSD symptoms after commencement of his bankruptcy case can be attributed to Rushmore's attempts to collect the loan. Willie conceded that there are no medical records attributing his symptoms, including his increased blood pressure, to the actions of Rushmore. He testified that he was diagnosed with COPD before the bankruptcy was filed but does not believe that any subsequent COPD symptoms are attributable to Rushmore's violation of the automatic stay. In addition to PTSD and COPD, Willie testified that he suffers from diabetes, high cholesterol, and asthma.

Willie testified that the Residence could not be refinanced because of Rushmore's continued lien. He testified that he incurred $150,000 in medical bills that were covered by his health insurance. Willie attested that $260 was paid to reopen the Chapter 13 proceeding, but he has made no payments to Mr. Burke for his legal services in connection with the Contempt Motion.

Adnette testified that she did not participate in any telephone calls with Rushmore after the Petition was filed. She also testified that the Account Information and Mortgage Statements sent by Rushmore caused some stress, but not a lot because she had just filed for bankruptcy. Adnette testified that the Mortgage Statements did not cause her stress to increase until after she received the Chapter 13 discharge. She explained that she could not understand why the documents continued to be sent after the bankruptcy discharge. Adnette testified that she filed for Chapter 13 so that she could eliminate having to pay both the first and second loans on the Residence. She stated that after the discharge was entered, the frustration caused by Rushmore's continuing collection calls led to additional conflict with Willie, and thoughts of obtaining a divorce.

Adnette stated that her asthma is triggered by stress and that she would see her physician but was never hospitalized. Between 2013 and 2018, she had breathing problems or asthma two or three times and would see her primary care physician or go to an urgent care facility. Adnette did not identify when those incidents occurred.

Adnette testified that she had many "every-day stressors" of which Rushmore's actions were a part. She testified that she has high blood pressure and high cholesterol, in addition to asthma. Adnette testified that those maladies are stress-related and that she believed Rushmore's actions contributed to them in some fashion. She acknowledged that she has no medical records specifying that her medical problems were stress-related and that her doctor never told her that the problems were the result of Rushmore's actions. Adnette also testified that she never informed her physician about Rushmore either.[60] She testified that she has made various

[60] At closing argument, Rushmore's counsel took an unusual position regarding the Debtors' failure to discuss with their physicians the physical and emotional symptoms allegedly caused by Rushmore. Because the Debtors admittedly never discussed such matters with their medical providers, Rushmore argued that the Debtors did not actually suffer the injuries alleged. Rushmore maintained that patients are expected to fully disclose all such information to their medical professionals in order to obtain effective treatment. While the argument may explain the theoretical basis for the doctor-patient and similar evidentiary privileges, it is of little assistance in assessing the credibility of a live witness. Consumers generally do not consider evidentiary privileges during ordinary conversation, and occasionally withhold information even from their own attorneys, physicians, accountants, and other professionals. Rushmore had ample

lifestyle changes to address her asthma, high blood pressure and high cholesterol, all of which existed before she filed bankruptcy.

Adnette testified that approximately $100 was spent on photocopying documents and traveling to see Mr. Burke. She testified that she works full time at $16.07 per hour and missed approximately 30 hours of work from January 2019 to the Evidentiary Hearing date. Adnette attested that she attempted to reduce the interest rate on her first mortgage from 7.7 percent to 4.00 percent by refinancing the obligation in June 2019 but was unable to do so due to inaccurate credit reporting by Rushmore. She testified that Rushmore's lien on the Residence resulted in her refinancing application being suspended.[61]

(a) Emotional Distress.

Emotional distress damages from an automatic stay violation requires proof by a preponderance of the evidence that the individual (1) suffered significant harm, (2) that the significant harm has been clearly established, and (3) there is a causal connection between the

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opportunity to conduct discovery regarding the Debtors' medical conditions and to call appropriate witnesses to contradict the Debtors' testimony.

[61] When the Debtors sought to refinance in June 2019, the second mortgage in favor of Rushmore still appeared on the Debtors' credit report obtained by the refinancing lender. Section 5.06 of Plan #2 requires the lien to be released within 30 days after the Debtors received their discharge. The Discharge Order was entered on September 28, 2016, and Section 5.06 obligated the lien to be released no later than October 28, 2016. Rushmore's witness testified that Rushmore never knew that its lien had been avoided in bankruptcy until it received the Contempt Motion in January 2019. If that is correct, there is no explanation for the apparent failure of Rushmore or its successor-in interest to take steps to have the junior lien against the Residence released after the Contempt Motion was received. Because the Debtors did not seek to refinance their primary loan until June 2019, Rushmore or its successor-in-interest had several months available to comply with Section 5.06 of Plan #2 before the Debtors' credit reports were obtained by the refinancing lender. If Rushmore or its successor-in-interest still has not complied with Plan #2, nothing appears to prevent the Debtors from seeking an order under FRBP 5009(d), see note 5, supra, declaring the junior lien to have been satisfied. (As previously mentioned at 8, supra, Debtors reached a stipulation with SNS, the apparent successor to Rushmore, to withdraw the Contempt Motion. The stipulation does not specify whether SNS was required to release the junior lien against the Residence.) Moreover, the instant Contempt Motion alleges only that Rushmore violated the automatic stay and the discharge injunction, rather than alleging a violation of the Plan #2 Confirmation Order. Whether the Debtors separately could seek contempt sanctions against Rushmore or its success-in-interest for having violated the Plan #2 Confirmation Order is not before the court.

significant harm and the automatic stay violation. See In re Dawson, 390 F.3d at 1149. Such harm may be clearly established through corroborating medical evidence or testimony from percipient parties who witness the mental anguish of the injured party, see id. at 1149-1150, or, through proof of circumstances that make it obvious a reasonable person would suffer significant emotional harm. Id. at 1150. See, e.g., In re Sundquist, 566 B.R. at 608-609 ($200,000 and $100,000 damage awards for emotional distress to wife and husband for multiple, egregious actions to foreclose on debtors' family residence during Chapter 13 proceeding); America's Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard), 438 B.R. 313, 321 (D.Nev. 2010) ($40,000 damage for emotional distress damage award affirmed where reasonable person would suffer emotional distress if threatened with eviction from family residence during Chapter 13 proceeding when not in default).

The bankruptcy process is inherently stressful for individuals as they attempt to obtain a discharge of personal liability from their pre-bankruptcy debts. See In re Dawson, 390 F.3d at 1149. The bankruptcy process is more stressful in Chapter 13 because a discharge is not entered until payments under a confirmed plan are completed. See 11 U.S.C. § 1328(a). Payments under a Chapter 13 plan often occur over three to five years. See 11 U.S.C. § 1325(b)(4). Thus, unlike a Chapter 7 debtor, a Chapter 13 debtor must confirm a proposed payment plan and then remains under bankruptcy scrutiny until the plan payments are completed.

Individual debtors commonly seek relief under Chapter 13 because they are able to retain their principal residence by maintaining current payments and to cure any missed payments in manageable amounts over the life of their plan. Moreover, in this circuit, Chapter 13 debtors who have "wholly unsecured" junior liens against their principal residence, are able to "strip" the junior liens from title by obtaining a discharge through completion of their Chapter 13 plan payments. See Zimmer v. PSB Lending Corp. (In re Zimmer), 313 F.3d 1220 (9th Cir. 2002). See generally Keith M. Lundin, LUNDIN ON CHAPTER 13, §§ 74.13, 119.2 and 162.4, LundinOnChapter13.com (last visited February 19, 2020). In this case, the Debtors sought this very relief: to retain their Residence by curing the modest arrearage owed to the holder of the first deed of trust and to "strip" the lien of the holder of the second deed of trust. Debtors filed

their Petition on March 26, 2013, confirmed their plan on April 7, 2014, and after completing their plan payments in thirty-eight months, they obtained their bankruptcy discharge on September 28, 2016. There is nothing in the record indicating that the Debtors ever missed a single Chapter 13 plan payment.[62] Because the Debtors were doing exactly what they were supposed to do in Chapter 13, the court concludes that Rushmore's continued collection attempts during the proceeding resulted in significant additional stresses beyond those inherent to the bankruptcy process. For these Debtors, however, their testimony reflects that their stress levels were very different.

Adnette was clear that Rushmore's actions were a factor in her stress levels, but she did not become concerned until Rushmore continued to seek collection after the discharge was entered. In other words, even if significant harm is proven under a higher clear and convincing evidence standard, her testimony does not establish a causal connection to Rushmore's violation of the automatic stay under a lower preponderance of the evidence standard. Rather, Adnette's testimony clearly points to the discharge violation as a cause of her asserted injury. Thus, even if an increase in an individual's stress and anxiety levels are a sufficient basis for a finding of emotional distress, an award of compensation for emotional distress cannot be granted to Adnette upon this record. The same conclusion does not apply to Willie.

Willie was clear that he bore the brunt of Rushmore's collection activity because he was at the Residence when Rushmore's representatives called, and he was the one who opened the correspondence that was sent by first class mail and FedEx. Adnette confirmed that Willie dealt with the telephone calls from Rushmore and was responsible for retrieving and opening the mail. No one disputes that Willie was diagnosed with PTSD in 2007 and no one questioned his testimony that he suffers from COPD as well. He testified that he attends weekly or bi-weekly meetings of Vietnam veterans who also suffer from PTSD. Willie testified that the stress of the

[62] Rushmore admitted into evidence as Exhibit A a copy of the docket in the Debtors' bankruptcy proceeding. When a Chapter 13 debtor fails to commence or defaults on required plan payments, the assigned Chapter 13 trustee typically files an objection to confirmation of an initial or modified plan, or a motion to dismiss for failure to make plan payments. According to the docket, no such objections or motions were filed by the Chapter 13 trustee.

post-bankruptcy collection communications from Rushmore caused an increase in his blood pressure and breathing problems, as well as marital strife to the point where divorce was contemplated. Adnette acknowledged that Rushmore's communication led to arguments and marital strife, but that they had worked through those problems. No percipient witnesses were called to corroborate or contradict the testimony of either Debtor. No expert witnesses were called to corroborate or contradict Willie's testimony. Having considered the audio recordings played in open court and observing Willie's demeanor on the witness stand, together with the transcripts of the telephone calls attached to the Consolidated Notes Log, the court finds Willie's testimony to be credible. Having observed Adnette's demeanor on the witness stand, the court also finds her testimony to be credible.

For the entire 1,284-day period between the Chapter 13 filing and the entry of discharge, the Consolidated Notes Log reflects that Rushmore made at least 458 calls to the Residence. Of those calls, sixty-eight were made by Rushmore during the 648-day period between December 20, 2014, and the entry of discharge. For the entire 1,284-day period between the Chapter 13 filing and the entry of discharge, the record also reflects that Rushmore transmitted at least fifty Account Information and Mortgage Statements, along with other collection correspondence, to the Residence. See note 25, supra. Of those written communications, thirty were made by Rushmore during the 648-day period between December 20, 2014, and the entry of discharge. Id.[63]

On this record, the court finds that Willie suffered significant harm that was caused by Rushmore's violation of the automatic stay. His previously diagnosed PTSD was never disputed and his testimony attributing additional PTSD symptoms[64] to Rushmore's collection efforts also was not disputed.[65] Willie does not attribute any of his COPD symptoms to Rushmore's

[63] As discussed in note 28, supra, during this period, Rushmore also had someone visit the Residence and physically place on the Debtors' door a notice advising them to call Rushmore's collection department.

[64] As discussed at note 24, supra, Willie was not asked to describe his particular PTSD symptoms, but Rushmore did not dispute the significance of the PTSD diagnosis.

[65] Adnette was not asked by Rushmore to testify regarding Willie's symptoms.

violation of the automatic stay, but he was denied the breathing spell and peace of mind that the automatic stay is intended to provide. Chapter 13 debtors who are current on their court approved plan payments have a reasonable expectation that creditors will not continue to seek payments not required by their confirmed plans. Willie is no different, but the court finds that his mental and physical condition made him more susceptible to harm from such conduct. Because Rushmore's willful violation of the automatic stay occurred during the 648-day period between December 20, 2014, and the entry of discharge on September 28, 2016, the court will limit the award to that period only, rather than the entire 1,284-day bankruptcy period. The record establishes that Rushmore attempted to collect the subject loan by making no fewer than ninety-eight communications to the Residence, by telephone and mail, all of which were experienced by Willie. Those communications were intentional and occurred over a prolonged period. Under the circumstances, the court finds by a preponderance of the evidence that the amount of $100,000.00 constitutes appropriate compensation for the emotional distress suffered by Willie during this period.

(b) Pecuniary Losses.

In seeking redress for Rushmore's violation of the automatic stay and the discharge injunction, Adnette missed 30 hours of full time work for which she is paid $16.07 per hour. The sum total for lost wages is $482.10. Debtors paid a filing fee of $260.00 to reopen the bankruptcy case so that they could file the Contempt Motion. No evidence has been presented as to any additional fee to file the Contempt Motion, nor of any additional out-of-pocket expenses incurred as a result of Rushmore's conduct.[66]

When the Debtors received their Chapter 13 discharge on September 28, 2016, the automatic stay terminated as a matter of law. When the Debtors sought to refinance in June 2019, the second mortgage in favor of Rushmore still appeared on the Debtors' credit report

[66] Although Willie testified that $150,000 in medical bills were incurred as a result of Rushmore's conduct, he also testified that those expenses were covered by his medical insurance. Rushmore did not dispute that testimony. Unlike the emotional distress damages, attorney's fees, and punitive damages sought in the prayer of the Contempt Motion and the Debtors' Trial Brief, however, Debtors have not sought recovery of Willie's medical bills as actual damages under Section 362(k). For that reason, no such actual damages are awarded.

obtained by the refinancing lender. Section 5.06 of Plan #2 requires the lien to be released within 30 days after the Debtors received their discharge. The Discharge Order was entered on September 28, 2016, and Section 5.06 of Plan #2 obligated the lien to be released no later than October 28, 2016.

Rushmore's witness testified that Rushmore never knew that its lien had been avoided in bankruptcy until it received the Contempt Motion in January 2019. If that is correct, there is no explanation for Rushmore's apparent failure to reconvey its second deed of trust or to record a lien release for the Residence after it received the Contempt Motion. Because the Debtors did not seek to refinance their primary loan until June 2019, Rushmore had several months available to comply with Section 5.06 of Plan #2 before the Debtors' credit reports were obtained by the refinancing lender. If Rushmore still has not complied with Plan #2, nothing appears to prevent the Debtors from seeking an order under FRBP 5009(d) declaring Rushmore's lien to have been satisfied.

The instant Contempt Motion alleges only that Rushmore violated the automatic stay and the discharge injunction, rather than alleging a violation of the Plan #2 Confirmation Order. Whether the Debtors separately could seek contempt sanctions against Rushmore for violating the Plan #2 Confirmation Order is not before the court. Under these circumstances, the court will award actual damages for pecuniary losses in the total amount of $742.10.

2. **Attorney's Fees.**

Attorney's fees and costs shall be recovered under Section 362(k)(1) for a willful violation of the automatic stay, including the fees incurred in seeking sanctions from the court. See America's Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard), 803 F.3d 1095, 1101 (9th Cir. 2015), overruling Sternberg v. Johnston, 595 F.3d 937 (9th Cir. 2010). The court having concluded that Rushmore willfully violated the automatic stay will allow attorney's fees and costs to the Debtors for prosecuting the instant Contempt Motion. Debtors' counsel, Mr. Burke, will be required to submit a declaration or affidavit along with an hourly billing statement for his services in connection with this matter. After the billing statement is filed, Rushmore will be allowed to submit objections to the fees requested, if any, and Debtors' counsel may submit a

written response. Thereafter, the court will issue a supplemental order with respect to the allowance of attorney's fees and costs.

3. **Punitive Damages.**

Punitive damages also may be awarded under Section 362(k)(1) for a willful violation of the automatic stay "in appropriate circumstances." A reckless or callous disregard for the law or the rights of others warrants an award of punitive damages under the statute. See Goichman v. Bloom (In re Bloom), 875 F.2d 224, 228 (9th Cir. 1989); In re Stefani, 2019 WL 762661, at *8 (Bankr. S.D. Cal. Feb. 15, 2019). An award of punitive damages typically bears a relationship to the amount of compensatory damages awarded and may take the form of a multiplier of the compensatory damage award. See Philip Morris USA v. Williams, 549 U.S. 346, 353 (2007). A punitive damages award may not be based on perceived injuries to parties that are not before the court. Id. at 353-54. An award of punitive damages should take into consideration (1) the degree of reprehensibility of the defendant's conduct, (2) the disparity between the harm suffered by the plaintiff and the amount of the punitive damages award, and (3) the difference between the punitive damage award and the civil penalties authorized or imposed in comparable cases. See Arizona v. ASARCO LLC, 773 F.3d 1050, 1054 (9th Cir. 2014), citing State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 418 (2003).

Rushmore's witness testified that its representatives followed its established procedures and that they were properly trained to do so. There is no apparent dispute that Rushmore's representatives who dealt with the Debtors' loan did exactly what Rushmore taught them to do. According to Rushmore, there are no rogue employees in this case who breached Rushmore's established procedures. The record indeed reflects, however, that the Rushmore representatives acted intentionally, if not instinctively, to discount, if not completely ignore, the December 20, 2014, notation on the Consolidated Notes Log: "UNKNWN PERSON STATED ACCT WAS IN CHAPTER 13 BNK[.] STATED RLMS CALLS ARE BECOMING HARRASING[.] WHIL HAVE ATTORNEY FAX OVER DOCS AGIN TO UPDATE ACCT OF THIS[.]"

Rushmore recorded this particular telephone call and produced a written transcript attached to its Consolidated Notes Log. The complete transcript of the December 20, 2014 call states as follows:

> Willie Moon: Hello?
>
> Tracy: Yes, may I speak with, um, um, let me see how to pronounce it…Mr. Ent…My [inaudible] with Adanette?
>
> Willie Moon: Adnette? "Ad-nette….Ad"
>
> Tracy: Ok, just say it all together…don't try to break it up. OK, Adnette
>
> Willie Moon: Ah, ok she went out to the store and she is getting ready for her thing today…. they're having a little thing at the bowling alley…who's this?
>
> Tracy: Ok, this is Tracy with Rushmore, can I leave her a message?
>
> Willie Moon: Ah, yes you can.
>
> Tracy: Ok, could you have her call Tracy with Rushmore…
>
> Willie Moon: Well Tracy, you'll not really supposed to calling here…we're in a Chapter 13, did you know that?
>
> Tracy: No I don't see that on the notes, I don't see that information sir, at all…
>
> Willie Moon: I don't know why you don't, because my lawyer has sent you guys all that paperwork there…
>
> Tracy: Ok, I will notate the account, but this there…
>
> Willie Moon: Ok, but I'll have him send you more paperwork because it is really and truly becoming harassment…
>
> Tracy: Ok, well that's if we would had the information, then it would be…but if we don't have it, its not. But, I'll notate it in the account, because, no, it would not even allow me to call you if it was in our system. But ok, I'll….
>
> Willie Moon: Well I'll send it…your system, because I…but now, I'll gonna have him to send it and we gonna have you sign for it because....you know, you calling me and we've been in Chapter 13 for a year, almost 2 years…

> Tracy: Ok, you can have that done…yeah, that'll be fine….yeah…no problem.
>
> Willie Moon: Ok, bye.

(Exhibit 2 and Exhibit V, at M476). (Emphasis added). There was no suggestion by the Rushmore representative that Willie was an unauthorized third party or that bankruptcy "notice of any nature" would exclude information from a borrower's spouse. There was no suggestion that when Willie informed the Rushmore representative that "we've been in Chapter 13 for a year," she did not understand that both Willie and his spouse were in bankruptcy. There was no suggestion by the Rushmore representative to Willie that there was a "problem" with the information he provided. Rushmore never produced or introduced into evidence the Procedures Manual, if any, that was in effect in 2014. Nothing in its current Policy Manual or Procedures Manual excludes its consideration of bankruptcy information received from non-borrowers inasmuch as four out of five approved sources are not required to be the actual borrower.

The evidence presented in the instant case reflects the reprehensible nature of Rushmore's conduct. Rushmore's own policies acknowledge the fundamental importance of the automatic stay to its borrowers, putting Rushmore on fair notice of the consequences under Section 362(k). Yet Rushmore adopted express procedures to narrow the sources of bankruptcy information that it is willing to acknowledge and does not even tell its borrowers what those sources are. Ironically, Rushmore goes so far as to prevent its written procedures to be publicly disclosed even when it relies on them in defending public claims brought by its own borrowers.[67] Rushmore's witness testified that Rushmore has an apparently unwritten policy or procedure for deeming sources to be "unauthorized" parties whose information will not deter or prevent it from violating the bankruptcy protections of its borrowers. Rushmore's witness even testified that after a borrower defaults, its servicing and collection departments are allowed to employ various strategies to verify whether who they are authorized to speak to about a bankruptcy filing. That

[67] Unfortunately, the Debtors are not special in this regard because the Procedures Manual apparently applies to all consumer residential loans that are serviced by Rushmore. In assessing whether to award punitive damages, the court cannot award punitive damages based on the impact of Rushmore's procedures on other consumer debtors who are not before the court.

strategy apparently excludes the method that Rushmore itself considers to be reliable: using the borrower's name and social security number to conduct a PACER search. The procedures formalized by Rushmore in its Procedures Manual were used in this case to maintain a veil of ignorance of the Chapter 13 proceeding of its borrower. The creation and application of such policies and procedures is reprehensible enough in the present case, but more so due to its apparently universal application to all loans serviced by Rushmore.

The court has concluded that an award of actual damages in the amount of $100,742.10 is appropriate for Rushmore's violation of the automatic stay. An award of punitive damages in a single-digit ratio to actual damages typically falls within the permissible range, even though a higher ratio may be used in appropriate circumstances. See State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. at 425 ("Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in the rate of 500 to 1,…or, in this case, 145 to 1."). Compare Arizona v. ASARCO, 773 F.3d at 1058-59 ($300,000 punitive damages appropriate where jury awarded only $1.00 in nominal damages for Title VII violation). In this instance, the court will not apply a large multiplier because, unlike other cases, Rushmore did not formally initiate nor complete foreclosure proceedings on the Residence. Compare America's Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard), 438 B.R. 313, 315-16 (D.Nev. 2010) (post-petition foreclosure proceedings commenced in violation of the automatic stay); In re Sundquist, 566 B.R. at 574 (lender's completion of foreclosure sale after transferring loan to bankruptcy department).

In other cases in this district, the amount of punitive damages awarded for an automatic stay violation have been proportional to the amount of actual damages and, of course, limited to the amount necessary to deter future misconduct. See, e.g., Page Ventures, LLC v. Ventura-Linenko (In re Ventura-Linenko),2011 WL 1304464, at *9-10 (D.Nev. Apr. 1, 2011) ($3,500 punitive damages); In re Schwartz-Tallard, 438 B.R. at 316 ($20,000 punitive damages); In re Trueman, 2015 Bankr.LEXIS 4573, at *35 (Bankr. D.Nev. Feb. 12, 2015) ($15,000 punitive damages). The court looks to such awards as a guidepost because the automatic stay is a statutory injunction and there are no applicable civil penalties in comparable matters otherwise

imposed by statute. See, e.g., Arizona v. ASARCO, 773 F.3d at 1059-1060 (comparison to punitive damage awards upheld in other Title VII cases). In the instant case, Rushmore's witness as well as its consciously adopted Procedures Manual have established that this loan servicer will simply ignore information concerning a borrower's potential bankruptcy by limiting the sources of information it will recognize. Because this is not a situation involving a rogue employee, but the acts of representatives that Rushmore touts as properly trained, the court will apply a modest multiplier to deter this loan servicer's future conduct.

Under these circumstances, the court concludes that punitive damages are appropriate in the amount of $200,000.00.

In summary, the court finds under a preponderance of the evidence standard that Rushmore willfully violated the automatic stay under Section 362(k), and awards actual damages of $100,742.10, punitive damages of $200,000.00, and attorney's fees in an amount to be determined. The court also finds under a clear and convincing evidence standard that Rushmore violated the discharge injunction under Section 524(a)(2) but does not award damages for civil contempt under Section 105(a).

CONCLUSION

This memorandum decision constitutes the court's findings of fact and conclusions of law entered pursuant to FRBP 7052.

A separate order has been entered concurrently herewith.

Copies sent via CM/ECF ELECTRONIC FILING

Copies sent via BNC to:
WILLIE N. MOON
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# # #