



Honorable Mike K. Nakagawa  
United States Bankruptcy Judge



Entered on Docket  
July 21, 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: July 8, 2020
Debtors.	)	Time: 9:30 a.m.
	)	

**ORDER ON SECOND MOTION FOR ATTORNEY FEES AND COSTS FOR  
RUSHMORE'S CONTINUING STAY VIOLATION IN FILING  
ADVERSARY NO. 19-1090-MKN<sup>1</sup>**

On July 8, 2020, the court heard the Second Motion for Attorney Fees and Costs for Rushmore's Continuing Stay Violation in Filing Adversary No. 19-1090-MKN ("Second Fee Motion"), brought in the above-captioned case. The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

**BACKGROUND**

On March 26, 2013, a joint Chapter 13 petition ("Petition") was filed by Willie N. Moon and Adnette M. Gunnels-Moon ("Debtors") through their initial bankruptcy counsel. (ECF No. 1). The case was assigned to Chapter 13 panel trustee Rick A. Yarnall ("Trustee").

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<sup>1</sup> In this Order, 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 "Bankruptcy Rule" are to the Federal Rules of Bankruptcy Procedure. All references to "Civil Rule" are to the Federal Rules of Civil Procedure.

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 in favor of Rushmore Mortgage.

On September 25, 2013, Debtors filed a motion to value the Residence (“Valuation Motion”). (ECF No. 29). 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 Plan #1 as an unsecured claim.

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.

On February 14, 2014, Debtors again filed an amended Chapter 13 Plan #2 (“Plan #2”) and a notice of confirmation hearing. (ECF Nos. 42 and 43).

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).”<sup>2</sup> As a result of

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<sup>2</sup> Bankruptcy Rule 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

1 completing plan payments, the Debtors would receive a discharge of their prepetition unsecured  
2 debts, including the debt owed to Rushmore, and could retain their Residence by maintaining  
3 their loan payments to the holder of the first deed of trust. Section 6.01 of Plan #2 provided that  
4 “Debtors have filed a motion to value collateral and strip off the second deed of trust, in favor of  
5 Rushmore and the motion was duly granted.”

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

8 On August 19, 2016, the Trustee filed a final report indicating, *inter alia*, that all Chapter  
9 13 plan payments had been made over thirty-eight months and that Rushmore had a scheduled  
10 unsecured claim of \$73,000 for which it had been paid \$0.00. (ECF No. 68).

11 On August 27, 2016, Debtors filed an amended certificate of compliance with Chapter 13  
12 discharge conditions. (ECF No. 74).

13 On September 28, 2016, an order of discharge of the Debtors (“Discharge Order”) after  
14 completion of Chapter 13 plan payments was entered.<sup>3</sup> (ECF No. 76).

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

16 On January 4, 2019, an order was entered reopening the bankruptcy case. (ECF No. 81).

17 On January 18, 2019, attorney Christopher P. Burke (“Attorney Burke”) filed on behalf  
18 of the Debtors a Motion to Hold Creditor, Rushmore Loan Management in Contempt for  
19 Violation of the Automatic Stay Under §362(a) and for Violation of the Discharge Injunction  
20 Under 11 U.S.C. §524(a)(2) and to Hold Creditor SN Servicing Corporation in Contempt for  
21 Violating the Discharge Injunction Under 11 U.S.C. §524(a)(2) and for Actual Damages,  
22 Emotional Distress Damages, Punitive Damages and Attorney Fees, and Sanctions Against Both  
23 Creditors, Rushmore Loan Management and SN Servicing Corporation (“First Contempt  
24 Motion”). (ECF No. 84).

25  
26 lien has been released under the terms of the confirmed plan. Section 5.06 of Plan #2 required  
27 Rushmore to release its lien within 30 days after the Debtors receive their discharge.

28 <sup>3</sup> As a result of the discharge, Section 5.06 of Plan #2 required the second deed of trust  
against the Residence to be released no later than October 28, 2016.

1 On February 8, 2019, a response in opposition to the First Contempt Motion was filed on  
2 behalf of Rushmore Loan Management Services LLC, its assignees and/or successors  
3 (“Rushmore”). (ECF No. 90).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 On September 4, 2019, Rushmore commenced an adversary proceeding against the  
18 Debtors, denominated Adversary Proceeding No. 19-01090 ("Rushmore Adversary"). (ECF No.  
19 126). The adversary complaint ("Rushmore Complaint") (AECF No. 1)<sup>4</sup> names only the Debtors  
20 as defendants. In its prayer, Rushmore seeks judgment against the Debtors as follows: (1) that  
21 the court strike the First Contempt Motion as a result of a constitutional deprivation of notice to  
22 Rushmore, (2) that the court strike the First Contempt Motion as a result of unclean hands by the  
23 Debtors in not providing any notice to Rushmore, (3) that the court declare that Rushmore was  
24 never personally served on this bankruptcy and that all mailing prior to the First Contempt  
25 Motion were not even mailed to Rushmore at a valid address, (4) that the court strike its prior  
26 order avoiding the second deed of trust because it is void as a deprivation of due process as well  
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28 <sup>4</sup> In this Order, all references to "AECF No." are to the numbers assigned to the documents appearing on the docket maintained in the Rushmore Adversary.

as personal jurisdiction, (5) that Rushmore in the alternative be granted monetary damages for the full value of the second deed of trust,<sup>5</sup> and (6) that Rushmore be awarded all costs and attorney's fees for the Rushmore Adversary as well as the First Sanctions Motion resulting from Debtors' failure to properly serve Rushmore prior to stripping a second lien. See Rushmore Complaint at 6:4-19. On the same date it filed the Rushmore Adversary, it requested issuance of summons for both Debtors. (AECF Nos. 3 and 4). An initial scheduling conference in the Rushmore Adversary also was set for January 9, 2020.

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

On September 5, 2019, the summons requested by Rushmore for the Rushmore Adversary were issued by the clerk of the court.<sup>6</sup> (AECF No. 6).

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).

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).

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<sup>5</sup> Because the second deed of trust itself secured a debt that was discharged through the Chapter 13 proceeding, it is uncertain why Rushmore would seek recovery of monetary damages from the Debtors after having actual knowledge of the discharge.

<sup>6</sup> Under Bankruptcy Rule 7004(e), service made under Civil Rule 4(e) "shall be by delivery of the summons and complaint within 7 days after the summons is issued. If service is by any authorized form of mail, the summons and complaint shall be deposited in the mail within 7 days after the summons is issued." In this instance, the summons issued to Rushmore was required to be served no later than September 12, 2019.

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

3 On September 13, 2019, Rushmore filed an opposition to the motion in limine. (ECF No.  
4 143).

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

7 On September 16 and 17, 2019, the Evidentiary Hearing was conducted, and the First  
8 Contempt Motion was taken under submission.

9 On September 21, 2019, Rushmore personally served a summons and the Rushmore  
10 Complaint upon the Debtors at their Residence. (AECF Nos. 10 and 11).

11 On October 17, 2019, Rushmore filed a notice of its intent to take a default against the  
12 Debtors. (AECF No. 12).

13 On October 22, 2019, Attorney Burke filed on behalf of the Debtors a motion to dismiss  
14 the Rushmore Adversary ("Dismissal Motion") that was noticed to be heard on December 4,  
15 2019. (AECF Nos. 14 and 15).

16 On November 14, 2019, Rushmore filed an opposition to the Dismissal Motion that also  
17 included a summary judgment motion ("SJ Motion"). (AECF Nos. 18 and 19). Attached to the  
18 combined opposition at SJ Motion are copies of many, if not all, of the exhibits that Rushmore  
19 offered into evidence at the Evidentiary Hearing on the First Contempt Motion.

20 On November 19, 2019, Rushmore noticed the hearing on its SJ Motion to be held on  
21 January 7, 2020. (AECF No. 20).

22 On November 27, 2019, Debtors filed a reply in support of their Dismissal Motion and  
23 also in response to the SJ Motion. (AECF No. 22).

24 On December 4, 2019, the hearings on the Dismissal Motion and the SJ Motion, along  
25 with the initial scheduling conference, were continued for status to January 29, 2020, pending the  
26 outcome of the First Contempt Motion.

27 On January 27, 2020, the hearings on the Dismissal Motion and the SJ Motion, along  
28 with the initial scheduling conference, were further continued for status to February 26, 2020.

1 On February 25, 2020, a Memorandum Decision After Evidentiary Hearing  
2 (“Memorandum Decision”) was entered, along with a separate Order After Evidentiary Hearing  
3 (“First Contempt Order”). (ECF Nos. 157 and 158). The First Contempt Order awarded to the  
4 Debtors under Section 362(k)(1) actual damages of \$100,742.10 and punitive damages of  
5 \$200,000.00 on a finding that Rushmore had willfully violated the automatic stay. The First  
6 Contempt Order also denied any award of damages under Sections 524(a)(2) and 105(a) on a  
7 finding that Debtors’ had not sustained their burden to show a specific date on which Rushmore  
8 received notice of the Debtors’ discharge. The First Contempt Order further directed that  
9 attorney’s fees and costs under Section 362(k)(1) are awarded in an amount to be determined by  
10 the court. The First Contempt Order directed Attorney Burke to serve and file an itemized  
11 billing statement and supporting declaration with respect to attorney’s fees and costs incurred in  
12 connection with the First Contempt Motion. Rushmore was provided an opportunity to object to  
13 the attorney’s fees and costs sought by Attorney Burke. Finally, the First Contempt Order  
14 specified that the deadline for Rushmore to comply with the payment requirement of the First  
15 Contempt Order would be set forth in a supplemental order addressing attorney’s fees and costs.

16 On February 26, 2020, the hearings of the Dismissal Motion and SJ Motion, along with  
17 the initial scheduling conference, were continued to May 7, 2020, with opposition to the SJ  
18 Motion due by April 16, 2020, and any reply due by April 30, 2020.

19 On March 4, 2020, Rushmore filed a notice of appeal of the First Contempt Order. (ECF  
20 No. 162).

21 On March 6, 2020, Debtors timely filed a Motion for Attorney Fees and Costs from  
22 Order on Motion for Contempt (Dkt.# 158) that was noticed to be heard on April 8, 2020 (“First  
23 Fee Motion”). (ECF Nos. 169 and 170).

24 On March 11, 2020, Debtors filed an amendment to the First Fee Motion. (ECF No.  
25 179).

26 On March 14, 2020, Debtors filed a Motion for Contempt Against Rushmore Loan  
27 Management Services for Violation of the Courts Order Confirming Plan #2 Against Creditor,  
28 Rushmore Loan Management Services, LLC and for its Continuing Violation of the Stay and

1 Damages for Both and to Confirm Avoidance of Rushmores Second Mortgage Under  
2 Bankruptcy Rule 5009(d) (“Second Contempt Motion”) that was noticed to be heard on April 15,  
3 2020. (ECF Nos. 180 and 181).

4 On March 16, 2020, Rushmore filed a motion to continue the hearing on the First Fee  
5 Motion, to which the Debtors filed opposition. (ECF Nos. 184 and 194).

6 On March 31, 2020, an order was entered granting Rushmore’s motion to continue,  
7 rescheduling the hearing on the First Fee Motion to April 15, 2020. (ECF No. 203).

8 On April 1, 2020, Rushmore filed its opposition to the First Fee Motion as amended.  
9 (ECF No. 204).

10 On April 2, 2020, Rushmore filed an amended opposition to the Second Contempt  
11 Motion. (ECF No. 209).

12 On April 8, 2020, Debtors filed their reply in support of the Second Contempt Motion.  
13 (ECF No. 212).

14 On April 10, 2020, Debtors filed their reply in support of the First Fee Motion. (ECF No.  
15 212).

16 On April 15, 2020, the Second Contempt Motion was heard and taken under submission.

17 On April 16, 2020, Debtors filed their opposition to the SJ Motion (“SJ Opposition”).  
18 (AECF No. 34).

19 On April 30, 2020, Rushmore filed a reply in support of its SJ Motion. (AECF No. 37).

20 On April 30, 2020, an interim order was entered on the Second Contempt Motion. (ECF  
21 No. 223).

22 On May 6, 2020, Debtors filed a motion for leave to file a supplement to their SJ  
23 Opposition (“Debtors Adversary Supplement Motion”). (AECF No. 38). Attached to the motion  
24 is a copy of a declaration of Michael J. Dawson (“Dawson”), prior bankruptcy counsel to the  
25 Debtors, as well as copies of various certified mail return receipts.

26 On May 7, 2020, the hearing on the SJ Motion and the Dismissal Motion, along with the  
27 initial scheduling conference, were continued to June 4, 2020, to allow Rushmore until May 28,  
28 2020, to respond to the Debtors Adversary Supplement Motion.

1 On May 22, 2020, Rushmore filed a Notice of Voluntary Dismissal of Adversary  
2 Proceeding with Prejudice (“Voluntary Dismissal”). (AECF No. 42).

3 On May 29, 2020, an order was entered on the First Fee Motion (“First Fee Order”).  
4 (ECF No. 231).

5 On June 4, 2020, counsel for the Debtors and Rushmore appeared for the hearings on the  
6 SJ Motion and Dismissal Motion, as well as the initial scheduling conference, because the  
7 matters had not been taken off calendar through the Voluntary Dismissal. Neither counsel  
8 objected to vacating any further proceedings in the Rushmore Adversary.

9 On June 5, 2020, Debtors filed the instant Second Fee Motion that was noticed to be  
10 heard on July 8, 2020. (ECF Nos. 242 and 243).

11 On June 10, 2020, Rushmore filed an appeal of the First Fee Order. (ECF No. 247).

12 On June 12, 2020, Debtors filed a Motion for Leave to Supplement the Moons Second  
13 Motion for Contempt Against Rushmore Loan Management Services (Dkt. #180) that was  
14 noticed to be heard on July 15, 2020 (“Debtors Sanction Supplement Motion”). (ECF Nos. 254  
15 and 255).

16 On June 24, 2020, Rushmore filed opposition to the instant Second Fee Motion  
17 (“Rushmore Opposition”). (ECF No. 265).

18 On July 1, 2020, Rushmore filed opposition to the Debtors Sanction Supplement Motion.  
19 (ECF No. 277).

20 On July 1, 2020, Debtors filed their reply in support of the instant Second Fee Motion  
21 (“Reply”). (ECF No. 281).

22 On July 8, 2020, Debtors filed their reply in support of the Debtors Sanction Supplement  
23 Motion. (ECF No. 287).

## 24 DISCUSSION

25 Attached to the instant Second Fee Motion is a copy of Attorney Burke’s supporting  
26 declaration (“First Burke Declaration”) and a billing statement (“Billing Statement”) for services  
27 rendered to the Debtors from September 4, 2019, through July 8, 2020. During that period,  
28 Attorney Burke billed 25.7 hours at two different hourly rates: \$500.00 per hour from September

1 4, 2019 through December 31, 2019, and \$595.00 per hour from January 1, 2020 through July 8,  
2 2020. He seeks fees of \$4,700.00 at the \$500.00 rate, and fees of \$9,698.50 at the \$595.00  
3 hourly rate. The total amount of attorney's fees requested is \$14,398.50. The Billing Statement  
4 also lists costs in the total amount of \$12.00, for total fees and expenses in the amount of  
5 \$14,410.50.

6 Attached to the Reply is a copy of another supporting declaration from attorney Burke  
7 ("Second Burke Declaration") that includes additional or revised time entries for 6/24/20,  
8 6/29/20, and 7/08/20. Id. at ¶9. The total amount of fees reflected by those time entries, at a  
9 \$595.00 hourly rate, is \$2,439.50.<sup>7</sup>

10 The First Contempt Motion sought sanctions against Rushmore for violation of the  
11 automatic stay and for violation of the discharge injunction. The court concluded that Rushmore  
12 violated the automatic stay after receiving notice of the Debtors' bankruptcy case on December  
13 20, 2014, and entered the First Contempt Order awarding damages under Section 362(k)(1)  
14 through the expiration of the automatic stay on September 28, 2016. The court also concluded  
15 that after the discharge was entered on September 28, 2016, Rushmore violated the discharge  
16 injunction by attempting to collect the underlying debt as a personal liability of the Debtors. The  
17 court declined to award damages, however, because the Debtors failed to prove the actual date  
18 on which Rushmore received notice of the discharge. For the automatic stay violation and the  
19 prosecution of the First Contempt Motion, the court also entered the First Fee Order awarding  
20 attorney's fees and costs in favor of the Debtors.

21 The Second Contempt Motion seeks sanctions against Rushmore for violation of the Plan  
22 #2 Confirmation Order and for continued violation of the automatic stay through a failure to  
23 release the second deed of trust. That motion was argued on April 15, 2020 and taken under  
24 submission. It remains under submission because the Debtors sought to add to the record on the  
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26 <sup>7</sup> The time entry for 7/08/20 replaces a time entry for the same date that appeared on the  
27 Billing Statement. The revised total amount of attorney's fees requested is \$14,815.00. The  
28 revised total amount of fees and expenses requested is \$14,827.00. A comparison of the billing  
statements submitted in support of the First Fee Motion and the Second Fee Motion reflects no  
duplicate entries.

1 Second Contempt Motion through their Debtors Sanction Supplement Motion. That matter was  
2 noticed to be heard on July 15, 2020.

3 Through the instant Second Fee Motion, Debtors now argue that Rushmore continued to  
4 violate the automatic stay when it filed the Rushmore Complaint on September 4, 2019 and  
5 continued to prosecute the action until its voluntary dismissal on May 22, 2020. See Second  
6 Contempt Motion at 4:6-15. Debtors maintain that the automatic stay violation commencing on  
7 December 20, 2014, continued even after the discharge was entered on September 28, 2016. Id.  
8 at 3:13 to 4:16, citing, e.g., Snowden v. Check Into Cash of Washington, Inc. (In re Snowden),  
9 769 F.3d 651 (9th Cir. 2014). Debtors rely primarily on a decision by the bankruptcy court for  
10 the Eastern District of California in In re LeGrand, 612 B.R. 604 (Bankr. E.D. Cal. 2020). See  
11 Second Fee Motion at 3:17 to 4:5.<sup>8</sup>

12 Rushmore maintains that the automatic stay simply does not prohibit the filing of an  
13 adversary proceeding in the bankruptcy court where a debtor's case is pending. See Opposition  
14 at 3:16 to 5:8. Additionally, Rushmore argues that the Voluntary Dismissal was permissible as a  
15 matter of right under Civil Rule 41(a)(1) because the Debtors had not filed an answer. Id. at 5:14  
16 to 6:16, citing Amer. Soccer Co. v. Score First Enterprises, 187 F.3d 1108 (9th Cir. 1999).  
17 Rushmore therefore maintains that commencing the Rushmore Adversary and voluntarily  
18 dismissing the proceeding did not constitute a willful violation of the automatic stay required for  
19 an award of attorney's fees under Section 362(k)(1).<sup>9</sup>

20 Debtors do not disagree that the mere filing of the Rushmore Adversary was not an  
21 independent violation of the automatic stay. Rather, they maintain that the filing and prosecution

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22 <sup>8</sup> Debtors also cite the Ninth Circuit's decision in America's Servicing Co. v. Schwartz-  
23 Tallard (In re Schwartz-Tallard), 803 F.3d 1095 (9th Cir. 2015) (allowing an individual debtor to  
24 recover attorney's fees incurred in defending an award of sanctions under Section 362(k)(1)).  
25 See Second Fee Motion at 4:9-12.

26 <sup>9</sup> Under the "American Rule," parties to litigation are required to bear their own  
27 attorney's fees and costs, unless an applicable statute or contract provision states otherwise. See  
28 Baker Botts L.L.P. v. ASARCO LLC, 576 U.S. 121, 126 (2015). Debtors do not assert that they  
have a contract with Rushmore that would permit recovery of their litigation expenses, nor do  
they assert any statute other than Section 362(k)(1) that would permit recovery of their attorney's  
fees and costs through the instant motion.

1 of the Rushmore Adversary was a continuing violation of the automatic stay. Debtors likewise  
 2 do not disagree that Rushmore had the right to voluntarily dismiss the Rushmore Adversary on  
 3 May 22, 2020.<sup>10</sup> Debtors argue, however, that until the Voluntary Dismissal, prosecution of the  
 4 Rushmore Adversary was part of a continuing violation of the automatic stay that began when  
 5 Rushmore received notice of the Debtors' bankruptcy on December 20, 2014.<sup>11</sup>

6 Having considered the written and oral arguments of counsel, along with the extensive  
 7 history in this case, the court concludes that the instant Second Fee Motion must be denied.

8 The court has considered the circuit's decision in both Snowden and Schwartz-Tallard.  
 9 Neither decision addressed what happens when the automatic stay expires as a result of the  
 10 individual debtor's discharge, but the automatic stay violation is not pursued until years later.  
 11 Ordinarily, any act taken in violation of the automatic stay is void *ab initio*. See U.S. v.  
 12 Schwartz (In re Schwartz), 954 F.2d 569, 571 (9th Cir. 1992). For example, a party that  
 13 purchases an asset owned by a bankruptcy estate in violation of the automatic stay receives title  
 14 that is legally void. See 40235 Washington St. Corp. v. Lusardi (In re 40235 Washington St.  
 15 Corp.), 329 F.3d 1076, 1080 (9th Cir. 2003). In this instance, Debtors do not allege that  
 16 Rushmore has committed or taken any act that is void as a matter of law. In other words, they do  
 17 not seek to rescind or unwind any act previously taken by Rushmore. Rather, Debtors simply  
 18 seek attorney's fees and costs incurred as a result of the commencement and dismissal of the  
 19 Rushmore Adversary years after the automatic stay expired, and years after the discharge was  
 20 entered.

21 While Snowden and Schwartz-Tallard do not address what happens when a creditor  
 22 commences an adversary proceeding after a bankruptcy discharge is entered, LeGrand does. The  
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24 <sup>10</sup> Although the Voluntary Dismissal provides for the Rushmore Adversary to be  
 25 dismissed "with prejudice," the issue of Rushmore's notice of the automatic stay was never  
 26 litigated in that proceeding. As a result, there are no factual issues that were actually litigated  
 27 between the parties and issue preclusive effect cannot be given to the Voluntary Dismissal with  
 28 prejudice. See Amadeo v. Principal Mut. Life Ins. Co., 290 F.3d 1152, 1159 (9th Cir. 2002);  
Board of Trustees v. Noorda (In re Noorda), 2018 WL 1568679, at \*3 (D. Nev. Mar. 30, 2018).

<sup>11</sup> Other than the First Burke Declaration, Second Burke Declaration, and Billing  
 Statement, no other evidence is offered in support of the instant Second Fee Motion.

1 bankruptcy court decision in LeGrand, however, is easily distinguishable. In that proceeding, a  
2 creditor holding a money judgment obtained an earnings withholding order (“EWO”) on the  
3 individual debtor’s wages. After the individual filed a voluntary Chapter 7 petition that  
4 scheduled the creditor, the creditor did not terminate the EWO. Unaware of the bankruptcy,  
5 debtor’s employer continued to honor the EWO even after the Chapter 7 discharge was entered.  
6 Only after the discharge was entered and only after the debtor filed a motion for sanctions did the  
7 creditor terminate the EWO. Only after the EWO was terminated was the threat of wage  
8 garnishment eliminated. 612 B.R. at 608-612. Judge Klein observed that where the creditor’s  
9 conduct is “merely continuation of pre-discharge conduct that violated the automatic stay,  
10 § 362(k)(1) continues to provide stronger, more explicit, and more definite statutory remedies  
11 that are more adequate to the task than the least-possible-exercise-of-power restriction on civil  
12 contempt.” Id. at 613. Under those circumstances, the court concluded that “an automatic stay  
13 violation that continues post-discharge remains eligible for § 362(k)(1) remedies, including  
14 actual damages and attorneys’ fees, and punitive damages, until the stay violation is purged by  
15 actual restitution.” Id., citing Snowden, 769 F.3d at 659 & 662, and Sundquist v. Bank of  
16 America, N.A. (In re Sundquist), 566 B.R. 563, 586 (Bankr. E.D. Cal. 2017) (emphasis added.).

17 In the instant case, commencement of the Rushmore Adversary was a discrete and  
18 perhaps unnecessary act undertaken as a belated response to the First Contempt Motion. Debtors  
19 do not suggest that Rushmore was in possession of any payments or other property of the  
20 Debtors at the time the Rushmore Adversary was commenced. No suggestion is made that  
21 Rushmore obtained possession of any payments or other property from the Debtors while the  
22 adversary proceeding was pending. No suggestion is made that Rushmore even had the ability to  
23 obtain any additional property from the Debtors without admittedly violating the discharge  
24 injunction. In other words, there was no unjust enrichment or even a threat of unjust enrichment  
25 requiring restitution as a result of Rushmore’s act of commencing the Rushmore Adversary. In  
26 essence, a “purge by actual restitution” describes nothing that would be relevant to the instant  
27 proceeding. Thus, sanctions under Section 362(k)(1) for a continuing violation of the automatic  
28 stay are not warranted even under the authority cited by the Debtors.

In connection with the First Contempt Motion, the court already determined that Rushmore violated the discharge injunction but declined to award civil contempt sanctions due to the Debtors' failure to prove the date on which Rushmore received notice of the discharge. In connection with the Second Contempt Motion, the court has determined that the Debtors have failed to prove that they sustained damages for Rushmore's violation of the Plan #2 Confirmation Order. In connection with the instant Second Fee Motion, Debtors do not request contempt sanctions under Section 105(a) nor under the court's inherent authority. In short, there is no basis to award attorney's fees and costs to Attorney Burke for his services to the Debtors in responding to the Rushmore Adversary. Under these circumstances, the American Rule applies, and Debtors are not permitted to recover the litigation expenses requested by this Second Fee Motion.<sup>12</sup>

**IT IS THEREFORE ORDERED** that the Second Motion for Attorney Fees and Costs for Rushmore's Continuing Stay Violation in Filing Adversary No. 19-1090-MKN, brought by the above-captioned Debtors, Docket No. 242, be, and the same hereby is, **DENIED**.

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<sup>12</sup> Under 28 U.S.C. §1927, "Any attorney . . . admitted to conduct cases in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct." Rushmore's response to the First Contempt Motion was to deny that it ever received notice of the Debtors' bankruptcy case, the Valuation Order, the Plan #2 Confirmation Order, and the Discharge Order. All of the relief sought in the prayer of the Rushmore Complaint is predicated on an assertion that Rushmore did not receive notice. Because identical factual issues already were being addressed during the impending Evidentiary Hearing on the First Contempt Motion, commencement of the Rushmore Adversary appears to have been an unnecessary multiplication of proceedings. It is unknown whether the legal expenses incurred by Attorney Burke would have been sought more appropriately under 28 U.S.C. §1927. But see Miller v. Cardinale (In re Deville), 361 F3d 539 (9th Cir. 2004) (a bankruptcy court is not a "court of the United States" within the meaning of 28 U.S.C. §1927). As previously discussed at 10, supra, Rushmore filed its Voluntary Dismissal only after the Debtors offered evidence containing certified mail receipts addressing notice of the Valuation Order. As a further result of the Voluntary Dismissal, any sanctions that the Debtors might have sought under Bankruptcy Rule 9011 were rendered moot.

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