

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO**

In re: BENJAMIN LAWRENCE WALKER and
LINDA LEE WALKER,

No. 7-13-14158 JA

Debtors.

BENJAMIN LAWRENCE WALKER and
LINDA LEE WALKER,

Plaintiffs,

v.

Adversary No. 14-1077 J

CHRISTOPHER MARR, President; TIMONTY MARTIN,
Vice-President; et al, Agents Board Members and Officers of
CubSMART TRS, Inc. and its LLCs; TROY MCLUEN,
District Manager; LINDA DELAPENA, General Manager of
CubSMART TRS, Inc. and its LLCs of New Mexico; and
CUBESMART TRS, INC. and its LLCs of New Mexico,

Defendants.

**ORDER ON DEFENDANTS' RENEWED MOTION FOR
SANCTIONS, MOTION FOR PROTECTIVE ORDER**

THIS MATTER is before the Court on Defendants' Renewed Motion for Sanctions, Motion for Protective Order ("Motion"). *See* Docket No. 44. Defendants assert that Plaintiffs failed to comply with the Court's Order Granting, in part, and Denying, in part, Defendants' Motion to Compel and for Sanctions ("Order Compelling Discovery") requiring Plaintiffs to respond to Defendants' discovery requests no later than Monday, March 30, 2015. *See* Docket No. 34. Plaintiffs oppose the Motion. *See* Docket No. 48. Defendants filed a reply. *See* Docket No. 49.

Defendants request the Court to sanction Plaintiffs for their alleged failure to comply with the Order Compelling Discovery by dismissing this adversary proceeding with prejudice and awarding Defendants their costs and attorneys' fees. Defendants also request the Court to

enter a protective order excusing Cubesmart TRS, Inc. (“Cubesmart”) from having to respond to Plaintiffs’ pending request for production of documents. After considering the Motion, Plaintiffs’ response, and the reply, and being otherwise sufficiently informed, the Court finds that although Plaintiffs failed to strictly comply with the Order Compelling Discovery, it is not appropriate to sanction the Plaintiffs as Defendants request. The Court will, however, impose restrictions on the evidence Plaintiffs’ will be permitted to present at trial.

DISCUSSION

A. Procedural History

Plaintiffs filed this adversary proceeding on July 28, 2014. Defendants served discovery requests on Plaintiffs that were due December 29, 2014. *See* Docket No. 16. When Plaintiffs failed to timely respond to the Defendants’ discovery requests, Defendants filed a Motion to Compel and for Sanctions. *See* Docket No. 17. Following an initial pre-trial conference held February 3, 2015, the Court entered an order requiring Plaintiffs to serve their discovery responses on counsel for Defendants no later than February 13, 2015. *See* Docket No. 21.

Plaintiffs did not serve their discovery responses by the February 13, 2015 deadline but instead filed a motion seeking a further extension of time. *See* Motion for Extension of Time to File Objections to Answer Interrogatories— Docket No. 26. Plaintiffs also filed a motion seeking to enlarge the time to complete discovery and requesting the Court to deny the Defendants’ Motion to Compel and for Sanctions. *See* Docket No. 28. The Court denied Plaintiffs’ motion for an extension of time to file objections to interrogatories, granted Plaintiffs’ motion to enlarge the time to complete discovery for the limited purposes of serving a subpoena on Cricket Wireless Corporate Owned Store (“Cricket”) and serving a request for production on CubeSmart TRS, Inc. (“CubeSmart”), and entered the Order Compelling Discovery, which

granted, in part, Defendants' Motion to Compel and for Sanctions. *See* Docket Nos. 34, 35, and 36.

The Order Compelling Discovery gave Plaintiffs one last extension of time to respond to Defendants' discovery requests. The Order Compelling Discovery expressly required Plaintiffs to "fully answer each interrogatory and request for admission and respond to each request for production . . . and serve on Defendants' counsel their discovery responses no later than Monday, March 30, 2015," but allowed Plaintiffs to make good faith objections to Interrogatory Nos. 3, 4, and/or 11. *See* Order Compelling Discovery, p.4, ¶ 2 – Docket No. 34. The Order Compelling Discovery emphasized that "[n]o further extension will be granted." *Id.* (emphasis in Order). The Order Compelling Discovery provided further that Plaintiffs should supplement their discovery responses if they later obtain additional documents or information responsive to Defendants' discovery requests. The Court did not award Defendants any sanctions as part of its Order Compelling Discovery.

B. Service of Discovery Responses

Defendants assert that Plaintiffs failed to comply with the Order Compelling Discovery by failing to serve Defendants' counsel with Plaintiffs' discovery responses by the March 30, 2015 deadline. In response, Plaintiffs assert that the Court granted them permission to serve Defendants with their discovery responses through the Court's electronic filing system. *See* Docket 48.

By local rule, discovery responses do not get filed with the Court as a matter of course. *See* NM-LBR 7026-1(c) ("Discover requests and responses shall not be filed in the bankruptcy case or an adversary proceeding except in connection with a motion to compel, for a protective order, or for discovery responses."). Plaintiffs nevertheless submitted their discovery responses

to the Court for electronic filing. The docket reflects that Plaintiffs' Response to Request for Admissions, Answers to Defendants' Interrogatories, and Response to Request for Production (collectively, "Plaintiffs' Discovery Responses") together with the produced documents were filed on March 30, 2015, the deadline fixed by the Court in the Order Compelling Discovery. *See* Docket Nos. 45, 46 and 47. However, even though the Plaintiffs' Discovery Responses and the produced documents were "filed" on the docket on March 30, 2015, they were not "entered" on the docket until March 31, 2015. *See* Docket Nos. 45, 46 and 47. Plaintiffs submitted their discovery responses to the Clerk for filing just before the Clerk's office closed on March 30, 2015. The Clerk stamped the documents as filed when submitted, but did not upload the documents to the docket until the next business day. *Id.* Upon the electronic entry of the Plaintiffs' Discovery Responses and the produced documents on the docket, all counsel of record in the adversary proceeding received a notice of electronic filing and could access the documents filed of record through the Court's electronic filing system. Based on the time stamp reflected on the bottom of Plaintiffs' Discovery Requests and on the docket entry associated with those documents, Defendants' counsel had electronic access to Plaintiffs' Discovery Requests as of 3:09 p.m. on March 31, 2015. *See*, Response to Request for Production, Docket No. 47 (reflecting a time of 15:08:56).

At the scheduling conference held February 3, 2015, the Court stated on the record that Plaintiffs would be allowed to submit their portion of the pre-trial order to the Clerk's office for electronic filing, even though pre-trial orders are ordinarily transmitted to Defendants' counsel by email. *See* Audio Recording of the hearing held February 3, 2015 – Docket No. 51. Plaintiffs apparently misunderstood that statement to mean that they could also serve their discovery responses on Defendants through the Court's electronic filing system by submitting the

responses in paper to the Clerk's office notwithstanding the discussion on the record concerning when Plaintiffs would be in a position to mail their discovery responses to Defendants' counsel.

Id.

C. Claimed Deficiencies in Plaintiffs' Responses

In their reply, Defendants direct the Court to several alleged deficiencies in the Plaintiffs' Discovery Responses, including incomplete, inaccurate, or bad faith responses. For example, in response to Defendants' requests for production numbered 4, 7, 8, and 9, Plaintiffs' response was "Unavailable." *See* Docket No. 47. Request for Production No. 4 sought "documents of any kind evidencing the damages, if any, you claim resulting from any actions of any of the Defendants." *See* Request for Production No. 4 attached to Defendants' Motion to Compel and for Sanctions ("First Motion for Sanctions") – Docket No. 17. Plaintiffs did not produce any documentation in response to Request for Production Nos. 4, 7, 8, or 9.

Plaintiffs are only required to produce responsive documents within their possession, custody or control. It is not clear whether Plaintiffs use of the terms "Unavailable" means they assert the requested documents are not within their possession, custody or control or whether they mean something else. The Court will require Plaintiffs to amend their response to Requests for Production Nos. 4, 7, 8, and 9 either to state, if true, the requested documents or not within their possession, custody or control, or if they mean something else by Unavailable to clarify what they mean by that term.¹

¹A document is in a party's possession, custody or control not only if a party has actual possession of the document but also if the party has the practical ability to easily obtain the documents from a third-party source. *See Ice Corp. v. Hamilton Sundstrand Corp.*, 245 F.R.D. 513, 517 (D.Kan. 2007)(observing that Rule 34(a) requires production of documents beyond a party's actual possession if the party can easily obtain them from a third party source)(citations omitted). Thus, for example, a document is within a party's control if the party can obtain the document by requesting a copy from the party's attorney or accountant. *See* 8B Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2210 (2010 ed.)

Defendants' Request for Production No. 2 requests

complete copies of all correspondence, notices, email correspondence, facsimiles, memoranda, documents and communications of any type between you and any Defendant regarding any claims that were the subject of this lawsuit,

In response, Plaintiffs stated that they will produce additional email correspondence, but that they are currently troubleshooting their account. *See* Docket No. 47. Similarly, in response to Defendants' Request for Production No. 3 seeking documentation of "any telephone contact between you and any Defendant regarding any claim[s] that are the subject of this lawsuit," Plaintiffs stated that they served a subpoena on Cricket Cellular to obtain their cellular phone records. *See* Docket No. 47. The documents Plaintiffs did produce in response to Defendants' requests for production Nos. 1, 5, 6 and 10 were not labeled or grouped to correspond with the itemized requests for production. *See* Docket No. 47.

Defendants' Interrogatory No. 9 asks Plaintiffs to

[d]escribe in detail each and every item you claim was in the storage unit made the basis of this action on January 7, 2014, including a description of each item, when and how it was obtained by you (whether by purchase, gift or otherwise), each item's purchase price or other value, whether any item has ever been appraised and if so, when and by whom.

See First Motion for Sanctions, p. 10.

Plaintiffs complain that Defendants wrongfully sold Plaintiffs' personal property from the storage facility Plaintiffs had rented from Defendants. *See* Complaint –Docket No. 1. In response to Defendants' discovery requests concerning an itemization for the items in question, and any documentation supporting Plaintiffs' claimed value for those items, Plaintiffs only provided Defendants with a copy of their Schedule C filed in their bankruptcy case. Schedule C lists items of personal property with a corresponding value for those items Plaintiffs claim Defendants wrongfully sold from the storage facility, but provides no basis for the values.

Plaintiffs have provided no documentation or description of when or how any of the items were purchased.

Defendants also complain that Plaintiffs' response to Interrogatory No. 5 regarding lawsuits in which Plaintiffs have been involved is incomplete. Defendants identify two lawsuits that Plaintiffs failed to include in their response, and point out further that Plaintiffs did not identify any legal matters in Texas or Arizona despite having identified civil citations in those states in their bankruptcy statements and schedules.

D. Plaintiffs' Objections to Interrogatory Nos. 3, 4, and 11

As part of the Order Compelling Discovery, the Court authorized Plaintiffs to make a good faith objection to Interrogatory Nos. 3, 4, and/or 11 in lieu of responding to those requests. *See* Docket No. 34. Plaintiffs objected to Interrogatory Nos. 3, 4, and 11. *See* Docket No. 46. Because Defendants did not move to compel answers to Interrogatory Nos. 3 or 4 in their Motion or reply, the Court need not rule on Plaintiffs' objections to those interrogatories.

Interrogatory No. 11 requests the following:

Interrogatory No. 11: Please provide the names, current addresses and phone numbers of all businesses where you have contracted for the rental of a storage unit or units during the past ten (10) years and state the terms and date(s) of each rental.

Plaintiffs objected to Interrogatory No. 11 as being "overly cumbersome" and stated further that Plaintiffs do not "have sufficient information or references to form a list." *See* Answers to Defendants' Interrogatories – Docket No. 46. In their reply, Defendants assert that the information requested in Interrogatory No. 11 is relevant to the claims asserted in this adversary proceeding in light of the number of times the Plaintiffs have moved between New Mexico and Arizona; Defendants therefor complaint that Plaintiffs' objection to Interrogatory No. 11 was not made in good faith. *See* Reply, ¶ c.— Docket No. 49.

The Court sustains Plaintiffs' objection to Interrogatory No. 11. Interrogatory No. 11 requested information concerning Plaintiffs' past storage unit rentals going back ten years. Defendants' explanation for why this information is relevant does not tie the requested information directly to the Defendants or the factual allegations in the Complaint. Plaintiffs will not be required to supplement their response to Interrogatory No. 11.

E. Sanctions under Fed.R.Civ.P. 37(b)

Rule 37(b)(2) contains a non-exclusive list of possible sanctions the Court may impose upon a disobedient party for failing to comply with an order compelling discovery, including dismissal of the action with prejudice. *See* Fed.R.Civ.P. 37(b)(2)(A)(v), made applicable to adversary proceedings by Fed.R.Bankr.P. 7037. However, “[b]ecause dismissal with prejudice defeats altogether a litigant’s right to access to the courts, it should be used as a weapon of last, rather than first, resort.” *Erenhaus v. Reynolds*, 965 F.2d 916, 920 (10th Cir. 1992)(internal quotation marks and citation omitted).² Other potential sanctions include: 1) “directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;” and 2) “prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence.” Fed.R.Civ.P. 37(b)(A)(i) and (ii). Rule 37(b)(2)(C) further provides that the Court must order a disobedient party to pay “reasonable expenses, including attorney’s fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.” Fed.R.Civ.P. 37(b)(2)(C).

² A dismissal sanction requires the Court first to consider the following factors:

- (1) the degree of actual prejudice to the defendant;
- (2) the amount of interference with the judicial process;
- (3) the culpability of the litigant;
- (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and
- (5) the efficacy of lesser sanctions.

Jones v. Thompson, 996 F.2d 261, 264 (10th Cir. 1993)(quoting *Erenhaus*, 965 F.2d at 921).

Failure to Label and Organize Documents

Plaintiffs did not label and organize the documents they produced or produce them as kept in the usual course of business as required by Fed.R.Civ.P. 34(b)(2)(E)(i), made applicable to adversary proceedings by Fed.R.Bankr.P. 7034. But, contrary to Defendants' contention that Plaintiffs' responses "can only be described as a document dump of 71 unorganized pages . . . that may or may not be responsive to the request" the documents Plaintiffs provided can be easily and quickly categorized as 1) bankruptcy filings; 2) rental account ledgers, summaries, and payment receipts; 3) various correspondence and notices from CubeSmart; 4) storage unit rental agreements; and 5) property insurance certificates. The first two pages of the Response to Request for Production of Documents include a written response to each request. *See* Docket No. 47. The Court will not impose sanctions based on Plaintiffs' failure to separately label and organize the documents produced.

Failure to Produce Documents

If there were any documents in Plaintiffs possession, custody or control as of March 30, 2015 responsive to CubeSmart's requests for production of documents that Plaintiffs did not produce, then Plaintiffs violated the Order Compelling Discovery by not producing the documents. Plaintiffs also violated the Order Compelling Discovery to the extent they failed to promptly produce documents after additional documents came into their position after March 30, 2015.³ As a sanction for any such violation, Plaintiffs will not be allowed to present any documentary evidence at trial responsive to CubeSmart's requests for production of documents other than 1) the documents Plaintiffs have already produced; and 2) documents that first came into Plaintiffs' possession, custody, or control after March 30, 2015 that Plaintiffs produce to

³ Fed.R.Civ.P. 26(e), made applicable by Fed.R.Bankr.P. 7026, requires a party to supplement a production of documents with responsive additional documents the party obtains after the initial production was made if the requesting party does not already have the additional documents.

CubeSmart within the later of September 14, 2015, or 21 days after Plaintiffs obtain the documents.

Plaintiffs did not provide much of the information requested by Interrogatory No. 9. If Plaintiffs have any such responsive information, they violated the Order Compelling Discovery requiring Plaintiffs to fully answer each interrogatory. As a sanction for any such violation, Plaintiffs will not be permitted to give any testimony or present other evidence responsive to Interrogatory No. 9 that exceeds the scope of their answer. For example, Plaintiffs will not be permitted to testify or offer evidence (i) that items of personal property in addition to those listed on Schedule C were in the storage unit and sold by CubeSmart; (ii) of an appraised value of any item of personal property; (iii) regarding the purchase price of any item of personal property, or (iv) when or how Plaintiffs obtained any item of personal property. Notwithstanding these probable violations of the Order Compelling Discovery, the Court finds that an award of expenses under the circumstances surrounding such violations would be unjust.

Failure to Serve Discovery Responses

The Court also will not award Defendants their reasonable attorneys' fees and expenses even though Plaintiffs did not serve Defendants' counsel with their discovery responses by mail or by hand-delivery by the March 30, 2015 deadline. The rules for service applicable to adversary proceedings in bankruptcy court allow for service in person, by mail, or by electronic means. *See* Fed.R.Civ.P. 5(b)(2), made applicable to adversary proceedings by Fed.R.Bankr.P. 7005. Had Plaintiffs mailed their discovery responses on the March 30, 2015 deadline, Defendants might not have received them until a day or two later. Yet Defendants filed their Motion on March 31, 2015 based on their belief that Plaintiffs had failed to comply with the Order Compelling Discovery. Defendants' position is understandable given that Plaintiffs

apparently told Defendants' counsel that they had submitted the responses to the Bankruptcy Court Clerk's office on March 30, 2015, yet Plaintiffs' Responses to Discovery did not appear on the docket until late in the afternoon on March 31, 2015. The Court will not, however, award Defendants their attorneys' fees incurred in preparing the Motion.

WHEREFORE, IT IS HEREBY ORDERED:

1. By September 21, 2015, Plaintiffs must provide CubeSmart with copies of all documents, if any, responsive to Defendants' Request for Production No. 3⁴ that Plaintiffs have already received from Cricket in response to Plaintiffs' subpoena. If Plaintiffs did not receive any documents from Cricket, they must file a document of record by September 21, 2015 so stating. If Plaintiffs obtain the documents from Cricket after the date of entry of this order, they must provide CubeSmart with copies of the documents within 14 days after receipt.
2. By September 21, 2015, Plaintiffs must supplement their responses to Requests for Production Nos. 2, 4, 7, 8, and 9⁵ to clarify what they meant by "Unavailable" in their responses to CubeSmart's request for production.⁶ If Plaintiffs do not have requested

⁴ Request for Production No. 3 requests the following:

Please produce all statements, records, correspondence, notices, email correspondence, facsimiles, memoranda and communications of any type that you claim evidences any telephone contact between you and any Defendant regarding any claim[s] that are the subject of this lawsuit.

⁵ Request for Production No. 2 requests the following:

Please produce complete copies of all correspondence, notices, e-mail correspondence, facsimiles, memoranda, documents and communications of any type between you and any Defendant regarding any claims that are the subject of this lawsuit.

Request for Production No. 4 requests the following:

Please produce all documents of any kind evidencing the damages, if any, you claim resulting from any actions of any of the Defendants

Request for Production No.7 requests the following:

Please produce each and every statement made by any of the Defendants, their agents or representatives, or any other party, or any other person with knowledge concerning any of the matters set forth in this lawsuit.

Request for Production No. 8 requests the following:

Please produce all tape, video recordings, photographs, correspondence, notes, memorandum, diaries, journals, calendars, or other documents (whether written or in electronic form) that you have pertaining to any of the matters set forth in this lawsuit.

Request for Production No. 9 requests the following:

Please produce any reports of any experts, including the curriculum vitae for any expert witnesses, which you rely upon for the allegations of your Complaint, or which you intend to call as an expert in the trial of this case.

⁶ A party responding to a request for production through discovery need only produce documents that are within the party's possession, custody or control. See *In re Lozano*, 392 B.R. 48, 54 (Bankr.S.D.N.Y. 2008) (observing that "a party is not obligated to produce, at the risk of sanctions, documents that it does not possess or cannot obtain.") (quoting *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 138 (2nd Cir. 2007)). Documents within a party's possession, custody, or control include existing documents the party has the legal right to obtain on demand. *Lozano*, 392 B.R. at 55 (acknowledging that "control" for purposes of requiring production of documents exists when the party has the legal right or practical ability to obtain the documents from other sources)(citations omitted).

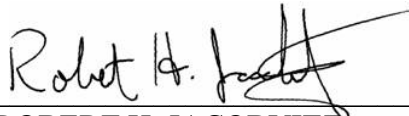
documents within their possession, custody, or control that are responsive to Requests for Production Nos. 2, 4, 7, 8 and 9, they must provide explanation in their supplemental response, such as “none exist” or “None of the requested documents are within our possession, custody or control.” If they meant something else by “Unavailable” they must explain what they meant. An unexplained response of “unavailable” is not satisfactory and may subject Plaintiffs to sanctions. The Court may supplement this Order after Plaintiffs supplement their responses to the Requests for Production.

3. Plaintiffs will not be permitted put in evidence any documentary evidence at trial other than: a) documents Plaintiffs have already produced to CubeSmart; b) documents not requested by CubeSmart; c) documents responsive to CubeSmart requests for production that first came into Plaintiff’s possession, custody or control after March 30, 2015 and that Plaintiffs produce to Cubesmart within the later of September 21, 2015 or 21 days after Plaintiffs obtain the documents; and d) documents CubeSmart produces to Plaintiffs pursuant to this Order.
4. Plaintiffs will not be permitted to give any testimony or present other evidence responsive to Interrogatory No. 9 that exceeds the scope of their answer. For example, Plaintiffs will not be permitted to testify or offer evidence (i) that items of personal property in addition to those listed on Schedule C were in the storage unit and sold by CubeSmart; (ii) of an appraised value of any item of personal property; (iii) regarding the purchase price of any item of personal property; or (iv) when or how Plaintiffs obtained any item of personal property.
5. Defendants’ request for protective order is DENIED. CubeSmart must respond or object to Plaintiffs’ discovery requests no later than September 30, 2015.

ORDERED FURTHER, that Plaintiffs’ objection to Interrogatory No. 11 is sustained. No further supplement to Interrogatory No. 11 is required.

ORDERED FURTHER that all other relief requested in the Motion is DENIED.

ORDERED FINALLY, that a scheduling conference before the Honorable Robert H. Jacobvitz will be held on **Monday, October 5, 2015 at 10:00 a.m.** in the judge’s Hearing Room, thirteenth floor, Dennis Chavez Federal Building and United States Courthouse, 500 Gold Ave. SW, Albuquerque, New Mexico to set a deadline to submission of the pre-trial order, a pre-trial conference and trial date, and to address any other pre-trial matters the parties may wish to discuss.



ROBERT H. JACOBVITZ
United States Bankruptcy Judge

Date entered on docket: August 31, 2015

COPY TO:

Benjamin Lawrence Walker
414 Pine S.E. Apt 1
Albuquerque, NM 87106

Linda Lee Walker
414 Pine S.E. Apt 1
Albuquerque, NM 87106

John E. Farrow
R Thomas Dawe
Nathan H. Mann
Gallagher, Casados & Mann, PC
Attorneys for Defendants Christopher Marr and CubeSmart TRS, Inc.
4101 Indian School Road NE, Suite 200 N
Albuquerque, NM 87110