UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

November 13, 2013 at 10:00 a.m.

INSTRUCTIONS FOR PRE-HEARING DISPOSITIONS

1. Matters resolved without oral argument:

Unless otherwise stated, the court will prepare a civil minute order on each matter listed. If the moving party wants a more specific order, it should submit a proposed amended order to the court. In the event a party wishes to submit such an Order it needs to be titled "Amended Civil Minute Order."

If the moving party has received a response or is aware of any reason, such as a settlement, that a response may not have been filed, the moving party must contact Nancy Williams, the Courtroom Deputy, at (916) 930-4580 at least one hour prior to the scheduled hearing.

2. The court will not continue any short cause evidentiary hearings scheduled below.

3. If a matter is denied or overruled without prejudice, the moving party may file a new motion or objection to claim with a new docket control number. The moving party may not simply re-notice the original motion.

4. If no disposition is set forth below, the matter will be heard as scheduled.

1.	13-33102-D-11	DBS AIR, LLC	STATUS CONFERENCE RE: VOLUNTARY PETITION 10-8-13 [1]

This matter will not be called before 10:30 a.m.

2. 12-34306-D-7 JACK/BARBARA MCKARSON — MOTION FOR COMPENSATION FOR
BLL-4 — BYRON LEE LYNCH, TRUSTEE'S
ATTORNEY(S), FEES: $3,955.00,
EXPENSES: $132.00
10-10-13 [76]

Tentative ruling:

This is the motion of Byron Lee Lynch for a first and final allowance of compensation as counsel for the chapter 7 trustee in this case. The notice of hearing gives the hearing date and time as November 13, 2013, 10:00 a.m. in the caption, but November 3, 2013, 9:30 a.m., in the text. As the motion was noticed under LBR 9014-1(f)(1), the inconsistent dates may have affected the interpretation of the due date for opposition. The notice of hearing is also confusing because, although it states that opposition, if any, must be filed and served at least 14 days before the date of the hearing, it also states (on p. 2) that if you mail your response, you must mail it early enough so the court will receive it "on or before that date required by the hearing date."

As a result of these notice defects, the motion will be denied. In the alternative, the court will continue the hearing to allow the moving party to serve a notice of continued hearing to correct these defects. The court will hear the matter.

3. 13-31312-D-7 LUIS/MARY CONTRERAS — MOTION FOR RELIEF FROM
MBB-1 — AUTOMATIC STAY
BANK OF AMERICA, N.A. VS. — 10-9-13 [15]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the motion is supported by the record. As such the court will grant relief from stay. As the debtors' Statement of Intentions indicates they will surrender the property, the court will also waive FRBP 4001(a)(3) by minute order. There will be no further relief afforded. No appearance is necessary.

4. 12-40315-D-11 OLUSEGUN/YVONNE LERAMO — MOTION FOR RELIEF FROM
APN-1 — AUTOMATIC STAY
TOYOTA MOTOR CREDIT — 10-9-13 [93]
CORPORATION VS.

Final ruling:

This matter is resolved without oral argument. This is Toyota Motor Credit Corporation's motion for relief from automatic stay. The court's records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and debtors are not making post petition payments. The court finds there is cause for relief from stay, including lack of adequate protection of the moving party's interest. Accordingly, the court will grant relief from stay by minute order. As the debtors are not making post-petition payments and the creditor's collateral is a depreciating asset, the court will also waive FRBP 4001(a)(3). There will be no further relief afforded. No appearance is necessary.

5. 12-40315-D-11 OLUSEGUN/YVONNE LERAMO
PD-1
WESTLAKE FINANCIAL SERVICES, INC. VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY
10-10-13 [100]

Final ruling:

This matter is resolved without oral argument. This is Westlake Financial Services, Inc.'s motion for relief from automatic stay. The court's records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is no equity in the subject property and debtors are not making post petition payments. The court finds there is cause for relief from stay, including lack of adequate protection of the moving party's interest. Accordingly, the court will grant relief from stay by minute order. As the debtors are not making post-petition payments and the creditor's collateral is a depreciating asset, the court will also waive FRBP 4001(a)(3). There will be no further relief afforded. No appearance is necessary.

6. 13-28020-D-7 ROGER/BONNIE TURNER
HSM-3

MOTION TO EXTEND TIME
10-3-13 [23]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed and the relief requested in the Trustee's Motion for Order Extending Time to File Objections to Debtors' Claims of Exemptions is supported by the record. As such the court will grant the Trustee's Motion for Order Extending Time to File Objections to Debtors' Claims of Exemptions. Moving party is to submit an appropriate order. No appearance is necessary.

7. 12-33722-D-7 RICHARD/ETELVINA CALDRON
SLF-8

CONTINUED MOTION TO SELL
9-18-13 [66]

8. 10-47422-D-7 DENNIS/SHERYL LANCASTER
13-2028 HSM-2
FARRAR V. CORSARO

MOTION TO COMPROMISE CONTROVERSY/APPROVE SETTLEMENT AGREEMENT WITH ROBERT CORSARO
10-15-13 [35]

Final ruling:

The matter is resolved without oral argument. There is no timely opposition to the trustee's motion to approve compromise of controversy, and the trustee has demonstrated the compromise is in the best interest of the creditors and the estate. Specifically, the motion demonstrates that when the compromise is put up against the factors enumerated in In re Woodson, 839 F.2d 610 (9th Cir. 1988), the likelihood of success on the merits, the complexity of the litigation, the difficulty in collectability, and the paramount interests of creditors, the compromise should be approved. Accordingly, the motion is granted and the compromise approved. The moving party is to submit an appropriate order. No appearance is necessary.

9.	13-32524-D-7	BOBBY/MONIKA BLACK	MOTION FOR WAIVER OF THE CHAPTER 7 FILING FEE OR OTHER FEE 9-26-13 [5]

10.	13-30226-D-7 NMB-1	CHRISTIAN/VERONICA STARR PROF-2012-S1 HOLDING TRUST I VS.	CONTINUING MOTION FOR RELIEF FROM AUTOMATIC STAY 9-3-13 [9]

Final ruling:

The matter is resolved without oral argument. This motion was noticed under LBR 9014-1(f)(2). However, the debtors' Statement of Intentions indicates they intend to surrender the collateral and the trustee has filed a Report of No Assets. Accordingly, the court finds a hearing is not necessary and will grant relief from stay by minute order. There will be no further relief afforded. No appearance is necessary.

11.	12-39943-D-7 DMW-1	LARRY/CYNTHIA BROBERG	MOTION TO SELL 10-9-13 [22]

12.	12-41158-D-7 SSA-4	ROBERTO/CONSOLACION BAUTISTA	MOTION TO SELL 10-16-13 [108]

Tentative ruling:

This is the trustee's motion for authorization to liquidate the debtors' investment account with E*Trade. By this, the court presumes the trustee intends simply to sell the stocks and other investment instruments in the account on the open market, rather than to sell the account to a third party. However, the trustee's declaration adds that he seeks "to either liquidate the account or allow the purchase of the account by a third party investor." If the latter is intended, would the trustee not need to notice the sale such that the debtors, creditors, and other third parties could bid on it? The trustee's memorandum of points and authorities adds the further gloss that the trustee may sell the stock "to an investor willing to pay the Trustee a price, in the Trustee's discretion, determined

to be fair and reasonable for the bankruptcy estate." The trustee has offered no authority for the proposition that he should be free to set the price for this asset in his own discretion, free of notice to the court or parties-in-interest, and free of court approval.

No party-in-interest has filed opposition to the motion, and the court is prepared to grant it to the extent that the trustee seeks to liquidate the investments in the account on the open market. The trustee will need to clarify whether he seeks another form of relief, and provide authority for the same. The court will hear the matter.

13. 05-38263-D-7 EDWARD EMERICK
JRR-4

MOTION FOR COMPENSATION FOR GENE A. GONZALES, ACCOUNTANT(S), FEES: $1,576.60, EXPENSES: $0.00
10-7-13 [81]

Final ruling:

The matter is resolved without oral argument. The court's records indicate that no timely opposition has been filed. The record establishes, and the court finds, that the fees and costs requested are reasonable compensation for actual, necessary, and beneficial services under Bankruptcy Code § 330(a). As such, the court will grant the motion by minute order. No appearance is necessary.

14. 13-28369-D-7 EDWIN GERBER
FWP-1
MONTICELLO BANKING COMPANY
VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY AND/OR MOTION FOR ADEQUATE PROTECTION
10-16-13 [31]

Tentative Ruling:

This is Monticello Banking Company's (the "Movant") motion for relief from stay. The Movant asserts that its claim is secured by a 2003 Summerset Houseboat owned by the debtor (the "Houseboat"), that there is no equity in the Houseboat and that the Houseboat is not necessary for an effective reorganization. Alternatively, the Movant asserts that its interest in the Houseboat is not adequately protected. As a result of the above, the Movant asserts that relief from stay is appropriate under Bankruptcy Code ("Code") §§ 362(d)(1) and (2). John Bell, the Chapter 7 trustee, opposes the motion and asserts, (1) that the Movant has not met its burden of establishing that there is no equity in the Houseboat; and (2) that the Movant's security interest in the Houseboat is not perfected and thus voidable under certain provisions of the Code. Pursuant to Code § 362(g) the Movant has the burden of proof to demonstrate that there is no equity in the Houseboat and the trustee has the burden of proof on all other issues.

The only evidence before the court regarding the value of the Houseboat is the evidence submitted by the Movant and that evidence values the Houseboat at between $230,000 and $250,000 (Declaration of Gordon Light, docket no. 33). Further, the record shows the amount owing to the Movant exceeds $250,000. Although the trustee takes issue with the Movant's valuation, the trustee has submitted no evidence of his own to establish the value of the Houseboat. Accordingly, based on the declaration of Gordon Light, the court finds that the value of the Houseboat does not exceed $250,000 and that the Movant has met its burden of initially establishing that there is no equity in the property. Further, as this is a Chapter 7 case, the Houseboat is not necessary for reorganization.

The trustee also opposes the motion based on his assertion that the Movant's security interest in the Houseboat is not perfected. In fact, the trustee has filed an adversary proceeding to determine the extent, nature, and priority of the Movant's lien in the Houseboat. However, the trustee's challenge as to the perfection of the Movant's security interest is not a meritorious basis for opposing relief from stay. Stay litigation is limited in scope to issues of adequate protection, equity in the property, and whether the property is necessary for an effective reorganization. The validity of the claim, or underlying perfection of a security interest, is not litigated during the relief from stay process. In re Johnson, 759 F.2d 738 (9th Cir. 1985). Stay relief hearings do not involve a full adjudication on the merits of the claim, defenses, or counter-claims, but simply a determination as to whether the creditor has a colorable basis for relief from stay. In re Robins, 310 B.R. 626 (9th Cir. BAP 2004).

As the court has determined that there is no equity in the Houseboat and the Houseboat is not necessary for an effective reorganization, relief from stay is appropriate under Code § 362(d)(2). Further, as a result of the debtor's and/or the estate's failure to pay the expenses associated with the Houseboat (such as the property taxes and slip fees) coupled with the Houseboat being a depreciating asset, the Movant's interest in the Houseboat is not adequately protected. Accordingly, relief from stay is also appropriate under Code § 362(d)(1).

With the above said, as the trustee has an adversary proceeding pending regarding the priority, nature, and extent of Movant's security interest in the Houseboat, the court will inquire of the parties whether they have discussed allowing a sale of the Houseboat with the proceeds to be segregated pending resolution of the trustee's adversary proceeding.

Based on the foregoing the court intends to grant relief from stay. The court will hear the matter.

15. 13-31379-D-12 DAVID/DENEILLE LIND — CONTINUED STATUS CONFERENCE RE: CHAPTER 12 VOLUNTARY PETITION 8-29-13 [1]

16. 13-29991-D-7 HLG-2 RANDALL/FLORA BUSK — MOTION TO AVOID LIEN OF FIA CARD SERVICES, N.A. 10-7-13 [20]

Final ruling:

The court finds a hearing will not be helpful and is not necessary. This is the debtors' motion to avoid a judicial lien under § 522(f)(1)(A) of the Bankruptcy Code. The motion will be denied for two reasons.

First, the moving parties failed to serve the creditor, FIA Card Services, N.A. ("FIA"), in strict compliance with Fed. R. Bankr. P. 7004(h), as required by Fed. R.

Bankr. P. 9014(b). The moving parties served FIA, which is an FDIC-insured institution, as follows: (1) by certified mail to the attention of an "Officer, a managing or general agent for service of process"; (2) by first-class mail to a post-office box address, with no attention line; and (3) by first-class and certified mail to the attorneys who obtained FIA's abstract of judgment. The first method was insufficient because service on an FDIC-insured institution, such as FIA, must be to the attention of an officer, and only an officer.

This distinction is important. Fed. R. Bankr. P. 7004(b)(3) requires that service on a corporation, partnership, or other unincorporated association that is not an FDIC-insured institution must be to the attention of an officer, managing or general agent, or agent for service of process. See preamble to Fed. R. Bankr. P. 7004(b). If service to the attention of an "Officer, a managing or general agent for service of process" were sufficient for service on an FDIC-insured institution, the distinction made by Fed. R. Bankr. P. 7004(h), requiring service to the attention of an officer, would be superfluous.

The second method was insufficient because service on an FDIC-insured institution must be to the attention of an officer, whereas here, there was no attention line, and also because service must be by certified mail, not first-class mail. The third method was insufficient because there is no evidence the attorneys who obtained FIA's abstract of judgment are authorized by FIA to receive service of process on its behalf in bankruptcy contested matters pursuant to Fed. R. Bankr. P. 7004.

The motion will be denied for the independent reason that the motion incorrectly analyzes the extent of impairment of an exemption the debtors could claim in the absence of liens against the property because it refers to the value of the property after deduction of hypothetical costs of sale. The motion states that the debtors "placed an approximate value of $132,798.00 on this asset as of the date of the petition" (debtors' motion filed October 7, 2013, at 2:11-12); that is the figure the debtors used in their § 522(f)(2)(A) computation. However, according to the debtors' Schedule A, that value is "per zillow - value is [$]141,275 less 6% cost of sale." Debtors' Schedule A, filed July 30, 2013.

"[I]t is inappropriate to deduct hypothetical costs of sale from the amount of a secured claim when the debtor retains possession of a residence." Taffi v. United States (In re Taffi), 68 F.3d 306, 310 (9th Cir. 1995); Lomas Mortgage USA v. Wiese, 980 F.2d 1279, 1285 (9th Cir. 1992), vacated on other grounds, 113 S.Ct. 2925 (1993). The Taffi and Lomas Mortgage cases involved determinations of the amounts of secured claims under § 506(a); this court finds that the same logic applies to an analysis under § 522(f). Further, there is nothing in the language of § 522(f)(2)(A) that would allow a debtor to deduct hypothetical costs of sale. See § 522(f)(2)(A) [referring to "the value that the debtor's interest in the property would have in the absence of any liens"]. The debtors' motion used the formula set forth in § 522(f)(2)(A), but with the value of the property after deduction of costs of sale, which was inappropriate. If the correct figure is used; that is, the value without deduction of costs of sale, FIA's lien impairs the debtors' exemption, but not in its entirety and not to the extent claimed by the debtors.

For the reasons stated, the motion will be denied by minute order. No appearance is necessary.

17. 11-31394-D-7 PATTI GRANGER MOTION TO COMPEL
13-2083 PLO-3 10-8-13 [52]
ABDALLAH V. GRANGER

This matter will not be called before 11:00 a.m.

Tentative ruling:

This is the plaintiff's motion to compel the defendant to comply with an earlier court order which, in turn, required the defendant to provide further responses to the plaintiff's interrogatories and request for production of documents. The motion was noticed pursuant to LBR 9014-1(f)(1); the defendant has not filed opposition. For the following reasons, the motion will be granted in part.

On September 9, 2013, the court issued an order requiring the defendant, within 14 days from the date of service of the order, to serve full and complete answers to the plaintiff's Interrogatories Nos. 1 to 3, to amend her response to the plaintiff's Request for Production of Documents, Nos. 1 and 2, and to produce all documents responsive to those requests (the "Order").[1] The plaintiff served the Order on the defendant and both of her attorneys in this case [2] on September 9, 2013. Thus, pursuant to the Order, the defendant was required to serve further responses and produce all responsive documents no later than September 23, 2013. As explained below, she did not do so.

First, although the court-ordered deadline for further answers and responses was September 23, 2013, the defendant served nothing until October 4, 2013, when she served "further responses" to the interrogatories and an "amended response" to the request for production of documents, and produced some 70 pages of documents. Both of the responses indicated they were being made pursuant to the Order. However, the further responses to the interrogatories, like the original ones, were signed by the defendant's attorney, Mr. Clinco, and not by the defendant herself, as required by Fed. R. Civ. P. 33(b)(1) and (5), and they were not signed under oath, as required by Fed. R. Civ. P. 33(b)(3). The court's ruling on the original motion to compel, which formed the basis for the Order, explicitly pointed out these two defects in the original answers; thus, it appears the defendant and/or her attorneys chose to simply ignore that portion of the ruling and the court's conclusion that the original answers were in effect no answers at all because of those two defects. As with the original answers, the further responses to the interrogatories do not qualify as such, and thus, the defendant has failed to provide any effective answers to interrogatories that were originally served on her over six months ago (on May 1, 2013), to which her answers were required over five months ago (May 31, 2013). The defendant's counsel's vague reference in his e-mails to the plaintiff's counsel to an accident (apparently sometime in September) that required the defendant's jaw to be wired shut is not a satisfactory excuse.

The defendant's amended response to the request for production of documents was also defective,[3] and, as with the further responses to the interrogatories, it reflects an apparently deliberate intention to ignore the court's ruling. In its ruling, the court expressly noted that Fed. R. Civ. P. 34(a)(1) requires the production of all documents in the responding party's possession, custody, <u>or</u> control; the court found that the defendant's response that she would produce all documents in her possession, custody, <u>and</u> control was incomplete. Despite that ruling, the defendant's amended response states that she is producing, concurrently

with the amended response, all documents in her possession, custody, and control. The correct phrase, "possession, custody, or control," is broader in scope than the phrase the defendant and/or her attorney has twice chosen to use, "possession, custody, and control." The amended response, because it is limited to the documents in the defendant's "possession, custody, and control," is inadequate and not in compliance with the Order.

Next, it appears the court has created confusion for the parties by its striking of certain language in the plaintiff's proposed order on her original motion to compel; namely, the language quoted from the plaintiff's instructions in the interrogatories and request for production as to (1) identification of the storage device, street address, and owner of the document and storage device; and (2) the organization of and format in which the documents are to be produced. By striking that language from the Order, the court meant to indicate that an order to provide responses to discovery should generally be sufficient, unless otherwise indicated, to encompass the whole of the discovery request, including instructions. In this case, the plaintiff's request for production of documents contained several definitions and instructions as to the organization and format of documents to be produced, only a small portion of which were included in the plaintiff's proposed order. The court's striking of the particular language in the proposed order should not have been taken, as it apparently was by the defendant and/or her attorneys, to mean that the definitions and instructions in the request for production itself (to which the defendant never objected) could be disregarded.

Courts have recognized that organizing a production to reflect how the information is kept "in the usual course of business" may require the producing party to include different identifying information according to the type of document or file produced. As one court observed,

> A party demonstrates that it has produced documents in the usual course by revealing information about where the documents were maintained, who maintained them, and whether the documents came from one single source or file or from multiple sources or files. A party produces emails in the usual course when it arranges the responsive emails by custodian, in chronological order and with attachments, if any. For non-email ESI, a party must produce the files by custodian and by the file's location on the hard drive-directory, subdirectory, and file name.

City of Colton v. Am. Promotional Events, Inc., 277 F.R.D. 578, 585 (C.D. Cal. 2011) (citations omitted).

It is clear from the history of this discovery dispute, as presented by the plaintiff, and in the absence of any response from the defendant, either to the original motion to compel or to this one, that there has been considerable confusion about the locations of the various documents to be produced by the defendant, confusion that is described in the plaintiff's motion and in her counsel's e-mails to the defendant's counsel. The court notes also that, as regards the location of the documents, the defendant's original responses to Request for Production Nos. 1 and 2 differ from her amended responses. Finally, it appears from the examples cited in the motion that there are documents responsive to the request for production that the defendant has not produced at all. It is significant in this regard that the defendant has not opposed this motion and has not indicated in the e-mails submitted as exhibits by the plaintiff that she has produced all the responsive documents.

Given these circumstances, the court is convinced the documents that have been produced have not been accompanied by sufficient identifying information, which is what the plaintiff was seeking by way of her instructions, and that there are documents that would be responsive to the request for production that have not been produced or identified in response to the request. In short, the court is persuaded the defendant has failed to comply with the Order, as to either the interrogatories or the request for production of documents; thus, the motion, to the extent it seeks to compel the defendant to comply with the Order, will be granted.

The plaintiff requests three forms of sanctions against the defendant for her non-compliance: (1) that any discovery by the defendant be stayed until the defendant has fully complied with the Order; (2) that the defendant be required to hire an independent vendor to collect responsive documents; and (3) that the defendant be ordered to pay the plaintiff's attorney's fees for this and/or her earlier motion to compel discovery responses. The court is inclined to grant the first of these and, to the limited extent discussed below, the third. For the first motion, including his meet and confer efforts, the plaintiff's counsel testifies he spent 29.5 hours, and for the second, 22.1 hours, for a total of 51.6 hours, for which he charges $450 per hour. Thus, the plaintiff would have the court award $23,220 in attorney's fees as a sanction for the defendant's non-compliance with the plaintiff's discovery requests and the Order. The plaintiff suggests that the court's decision to defer her request for an award of attorney's fees on her first motion to compel until the time of trial may be the reason the defendant has deferred complying with the Order.

The plaintiff's suggestion that she is entitled to an award of $23,220 in attorney's fees for the two motions to compel is quite troubling and brings the court to a serious concern about this adversary proceeding generally. The named plaintiff seeks a judgment for restitution of the amounts she paid for her daughter's enrollment in the Barbizon School of Sacramento, a modeling school previously owned and operated by the defendant. The plaintiff also seeks a determination that the judgment for restitution is not dischargeable, pursuant to § 523(a)(2) and (a)(3)(B) of the Bankruptcy Code. According to her complaint, the total paid by the named plaintiff was $1,195, roughly 5% of the amount she now seeks as an award of attorney's fees for the two motions to compel.

The plaintiff apparently justifies the size of the attorney's fee award she now seeks by two circumstances. First, her complaint includes an allegation that she is part of a class of persons having similar claims against the defendant; thus, she seeks an order certifying the class and directing that the adversary proceeding go forward as a class action. Second, the complaint purports to name 100 Doe defendants, alleging that the conduct of the named defendant and the Doe defendants violates the Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, et seq., and seeking injunctive and equitable relief, including a constructive trust. In the eight months this adversary proceeding has been pending, the plaintiff has taken no steps to obtain certification of a class. Thus, at this stage, the court has no basis on which to determine that the action is suitable for treatment as a class action. Further, up to this time, the plaintiff has taken no steps to put a name to any of the Doe defendants, and the court has serious doubts that either (1) there are Doe defendants in existence over whom this court would have jurisdiction as to the claims stated in the plaintiff's complaint, or (2) if it would have such jurisdiction, that it should exercise such jurisdiction.

The court is aware of no authority that would require this court to exercise jurisdiction over this matter as a class action lawsuit, and under the circumstances

of this case, the court would, in its discretion, decline to hear and determine the issues raised by the plaintiff's complaint as a class action lawsuit. For this reason, and absent a determination that this court would have and should exercise jurisdiction over any Doe defendants; that is, over any defendant other than the presently-named defendant, which the court believes is highly unlikely, this matter should not go forward, at least not in this court. Thus, the court intends to grant this motion in part, by issuing an order compelling the defendant to comply with the Order within 14 days or face terminating sanctions in the form of (1) an order striking the defendant's answer, (2) a judgment for the named plaintiff against the named defendant in the amount of $1,195, and determining such judgment to be nondischargeable pursuant to § 523(a)(2) and (a)(3)(B), and (3) an order dismissing the remainder of the action.

Finally, for the defendant's failure to provide discovery responses initially, the court must consider, pursuant to Fed. R. Civ. P. 37(a)(5)(A), incorporated herein by Fed. R. Bankr. P. 7037, whether to award attorney's fees in the plaintiff's favor for the first motion, and if so, in what amount. The court must not award fees if (1) the plaintiff filed the motion before attempting in good faith to resolve the matter; (2) the defendant's failure to provide the discovery was substantially justified; or (3) other circumstances make such an award unjust. As discussed in the court's ruling on the first motion, at DN 43, the court is not convinced the plaintiff made sufficient efforts in good faith to resolve the matter without court intervention. The court granted the motion despite that circumstance, although the court was and is not convinced that had further efforts been made to have an actual meeting with the defendant's counsel, the matter would still have required court action. As to the second element, because the defendant's attorney had taken the trouble to prepare responses and to sign them, but had not troubled to have them signed by the defendant, as was plainly required by the rules, the failure to provide at least that portion of the discovery was without substantial justification.

Finally, however, the court considers (1) the truly nominal amount of the restitution award sought by the named plaintiff against the named defendant, (2) the fact that the defendant was willing to offer judgment in virtually the entire amount sought by the named plaintiff herself well before the first motion to compel was filed,[4] and (3) the fact that the plaintiff chose to pursue this essentially scorched-earth discovery policy before ascertaining whether her action can properly be expanded beyond the nominal amount she herself is seeking from the named defendant. The court concludes that these circumstances make an award of attorney's fees for the first motion, at least as against the defendant herself, unjust.[5]

For the defendant's failure to comply with the Order, the court must consider, pursuant to Fed. R. Civ. P. 37(b)(2)(C), whether to award attorney's fees for the second motion, and if so, in what amount. The court is not to award fees if the defendant's failure to obey the Order was substantially justified or if other circumstances make an award unjust. As to the named defendant herself, the court finds that the circumstances discussed above with respect to the first motion also make an award of fees for the second motion unjust. As to Mr. Clinco, who signed the discovery responses himself, both times without obtaining the defendant's signature, the court finds his failure to comply, first with the original discovery requests and then with the Order, to be without substantial justification. The court finds that a reasonable fee for seeking to remedy that particular defect would be $1,000 for each motion; thus, the court will award $2,000 in sanctions as against Mr. Clinco. As to the balance of the fees sought by the plaintiff, for the reasons discussed above, the court finds that such an award would be unjust.

The court will hear the matter.

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1 The motion refers to two orders requiring further discovery responses – DNs 43 and 45, whereas there has been only one order, the Order, which appears at DN 45. The ruling that appears in the civil minutes, DN 43, was simply the court's findings and conclusions on which the Order was based.

2 Attorney Peter Clinco has signed all the documents filed in this adversary proceeding on the defendant's behalf – the answer to complaint, and so on. However, attorney Daniel Weiss has filed a notice of appearance as attorney for the defendant, DN 9.

3 Except that it omitted the original boilerplate objections, which the court ruled have been waived, the amended response was, in essence, identical to the defendant's original response to the plaintiff's request – the response the court had, by way of its ruling on the plaintiff's motion to compel, found inadequate. The original response was that "All documents in the possession, custody and control of Defendant will be produced." Declaration of Ethan Preston, filed Aug. 6, 2013, Ex. D. The amended response is that "All documents in the possession, custody and control of Defendant Granger are being produced concurrently with this Response." Declaration of Ethan Preston, filed Oct. 8, 2013, Ex. D.

4 On July 11, 2013, the defendant made an offer of judgment in the amount of $875 plus costs, pursuant to Fed. R. Civ. P. 68, made applicable herein by Fed. R. Bankr. P. 7068. On August 7, 2013, the defendant increased the offer to $1,195 plus costs. In light of this increase, it appears the defendant intended her first offer to be in the full amount prayed for by the plaintiff, but misinterpreted the "two monthly fees of $350" described in the complaint to mean a total of $350 rather than two fees of $350 each. The original offer of judgment was made almost a month before the plaintiff's first motion to compel was filed; the second, the day after the motion to compel was filed. The difference between the amounts offered was less than 2% of the attorney's fees the plaintiff's counsel billed for preparing the first motion to compel.

5 Based on the same circumstances, the court declines to grant the plaintiff's request that the defendant be required to hire an independent vendor to collect responsive documents.

18.	13-31195-D-7 AF-1	GEM BARRIA	CONTINUED MOTION FOR SANCTIONS FOR VIOLATION OF THE AUTOMATIC STAY 9-2-13 [9]

Final ruling:

Motion withdrawn by moving party. Matter removed from calendar.

19.	09-26096-D-7 BHS-5	TOP NOTCH LIMOUSINE AND EXECUTIVE SERVICES	CONTINUED OBJECTION TO CLAIM OF LINDA CASEY, CLAIM NUMBER 38 8-26-13 [154]

Tentative ruling:

This is the trustee's objection to the claim of Linda Casey (the "Claimant"), Claim No. 38 on the court's claims register. The claim is for $17,192; it asserts it is both an administrative claim and a claim entitled to priority under § 507(a)(4) of the Bankruptcy Code. Prior to the initial hearing, the Claimant filed a declaration and exhibits in response to the trustee's objection. In connection with the initial hearing, the court issued a tentative ruling, and at the initial hearing, it was agreed the Claimant would file supplemental evidence and the trustee would have an opportunity to file a reply. On October 23, 2013, the Claimant filed and served a Notice of Request for Allowance of Chapter 11 Administrative Expense (the "Request"), by which she noticed all creditors of her intention to seek allowance of an administrative claim. Pursuant to that notice, the court will entertain opposition by creditors, if any, at the hearing. However, for the guidance of the parties, the court issues this tentative ruling. For the following reasons, the trustee's objection will be sustained.

The court will begin by incorporating herein its tentative ruling for the October 16, 2013 hearing, which appears in the civil minutes, at DN 175. Among the issues raised by the court in that tentative ruling were the discrepancies between the Claimant's testimony that the claim is on account of various expenses she paid on the debtor's behalf, on the one hand, and the evidence of the proof of claim the Claimant purported to amend by way of her Claim No. 38, on the other hand, which showed that the claim was on account of a 10% commission on the sale of Kings tickets. The court also noted in its tentative ruling that, for various reasons, the court could not verify the amount of the claim from the invoices and receipts submitted by the Claimant in response to the trustee's objection. The court gave the Claimant until October 23, 2013 to supplement the record; she has not done so. (Except for the Request, the Claimant has filed nothing since the initial hearing.) Thus, for the reasons stated in the October 16, 2013 tentative ruling, the objection will be sustained.

The court will hear the matter.

20.	09-26096-D-7 BHS-7	TOP NOTCH LIMOUSINE AND EXECUTIVE SERVICES	CONTINUED OBJECTION TO CLAIM OF JOHN DEREK CASEY, CLAIM NUMBER 40 8-26-13 [162]

Tentative ruling:

This is the trustee's objection to the claim of John Derek Casey (the "Claimant"), Claim No. 40 on the court's claims register. The claim is for $13,787.12; it asserts it is both an administrative claim and a claim entitled to priority under § 507(a)(4) of the Bankruptcy Code. Prior to the initial hearing,

the Claimant filed a declaration and exhibits in response to the trustee's objection. In connection with the initial hearing, the court issued a tentative ruling, and at the initial hearing, it was agreed the Claimant would file supplemental evidence and the trustee would have an opportunity to file a reply. On October 23, 2013, the Claimant filed and served a Notice of Request for Allowance of Chapter 11 Administrative Expense, by which he noticed all creditors of his intention to seek allowance of an administrative claim. Pursuant to the notice, the court will entertain opposition by creditors, if any, at the hearing. However, for the guidance of the parties, the court issues this tentative ruling. For the following reasons, the trustee's objection will be overruled, and the claim will be allowed, albeit in a slightly reduced amount, as discussed below.

The court will begin by incorporating herein its tentative ruling for the October 16, 2013 hearing, which appears in the civil minutes, at DN 177. The court ruled in the Claimant's favor on all the issues raised by the trustee, except that the claim does not qualify as a priority claim under § 507(a)(4) of the Bankruptcy Code. (The Claimant has not challenged that conclusion.) The court found that the evidence submitted by the Claimant was sufficient to demonstrate that the claim was incurred post-petition, that the Claimant is entitled to a commission of 10% of the amount of the trips he booked, and that his services in booking the trips resulted in keeping the debtor operational; that is, in preserving the estate. Thus, the court indicated it would overrule the trustee's objection, except that the claim would be allowed in the slightly reduced amount of $13,599.37, per the Claimant's declaration. The court determined that the claim would be allowed as a chapter 11 administrative expense.

The Claimant has now filed a supplemental declaration, in which he testifies:

> There is no written contract for commissions between myself and [the debtor]. The agreement with ownership was verbal, awarding a 10% commission on any new business brought to the company by employees. All employees were offered the commission, and this policy was in effect from the date I was first hired in 2003 until the company was sold in 2009.

Supplemental Declaration of John Derek Casey, filed Oct. 23, 2013, at 1:18-23.

In response to this declaration, the trustee has filed a supplemental objection, in which he complains that there is no proof the trips booked by the Claimant were actually paid for by Rumsey Rancheria and Christian Brothers (the customers for whom the trips were booked). The trustee adds that this objection "assum[es] commissions are only paid once [the debtor] receives payment." This is not an objection the trustee raised originally; thus, if the trustee convinces the court that the evidence of record to date is not sufficient to allow the claim, the court will afford the Claimant an opportunity to respond. However, the court is tentatively of the opinion that the evidence of record is sufficient to demonstrate that the commissions were earned.

The Claimant testified in his original declaration in response to the trustee's objection that "[his] commission income was set at 10.00% of the trips [he] booked." Declaration of John Derek Casey, filed Oct. 2, 2013, at 1:28. He did not indicate that his commission was based on trips he booked that were actually paid for by the customers. He added that during the time period in question, he "booked trips which generated revenue for the Debtor totaling $135,993.77" (id. at 2:3), thus earning a commission of $13,599.37. The exhibits to the Claimant's Claim No. 26, which he amended by way of Claim No. 40, are very detailed reservations summaries, with the

trip dates, times, description of passengers, routing details, driver names, description of vehicle, amount charged, and method of payment. In the column headed "Status," which appears to refer to the trip status, almost every trip is marked "Done." (In a couple of instances, the status is marked "Cancelled," and the charge is $0. It appears no charge for the cancelled trips was included in the total on which the Claimant bases his 10% commission.)

The trustee has presumably had access to the debtor's books and records for a long period of time (he was appointed in February of 2010), but has provided no evidence to suggest that either (1) the commission was earned only after the debtor received payment for the trip, or (2) the trips on which the Claimant bases his commission were not actually paid for. In these circumstances, and for the reasons stated in the October 16, 2013 tentative ruling, the trustee's objection will be overruled, and the claim will be allowed as an administrative expense in the amount of $13,599.37.

The court will hear the matter.

21.	13-30496-D-7 JRR-1	EDWARD/LORRAINE KURATA	MOTION TO SELL 10-15-13 [43]

22.	13-31597-D-11 TMP-2	FREDRICK HODGSON	MOTION TO IMPOSE AUTOMATIC STAY 10-3-13 [45]

Final ruling:

The court finds that a hearing will not be helpful and is not necessary. This is the motion of the debtor-in-possession to "initiate" the automatic stay pursuant to § 362(c)(4)(B) of the Bankruptcy Code. East Bay Investors, LLC ("East Bay"), has filed opposition. For the following reason, the motion will be denied.

Section 362(c)(4)(B) provides that if, within 30 days after the filing of the case, a party in interest requests, the court may order the stay to take effect, after notice and a hearing, "only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed . . . ." A case is presumptively not filed in good faith if the debtor was a debtor in two or more prior cases pending within the year preceding the filing of the present case. § 362(c)(4)(D)(i)(I). The debtor does not dispute that the presumption arises in this case.

The presumption may be rebutted by clear and convincing evidence that this case was filed in good faith. § 362(c)(4)(D). The debtor's motion refers to a declaration of James Macklin "filed concurrently herewith" (Debtor's motion, filed Oct. 3, 2013, at 4:12) and a declaration of Frederick Hodgson, also "filed

concurrently herewith" (id. at 5:2); however, no such declarations were filed or, according to East Bay, served. The proof of service of the moving papers purports to evidence service of the motion, notice of hearing, and "Declaration of Frederick Hodgson in Support" (albeit not to a declaration of James Macklin), yet, again, no such declaration is on file.

Thus, not only is there no clear and convincing evidence on file to support a conclusion that this case was filed in good faith, there is no evidence at all. The debtor had ample opportunity to support his motion with admissible evidence; indeed, he was required to do so by the court's local rules. See LBR 9014-1(d)(6) ["Every motion shall be accompanied by evidence establishing its factual allegations and demonstrating that the movant is entitled to the relief requested."]

Because the debtor has failed to overcome, by clear and convincing evidence, the presumption that this case was not filed in good faith, the motion will be denied, and the court need not reach the other issues raised by East Bay. The motion will be denied by minute order. No appearance is necessary.

23.	13-33102-D-11 WW-3	DBS AIR, LLC	MOTION TO SELL 10-22-13 [36]

This motion will not be called before 10:30 a.m.

24.	13-33404-D-7	GERENDA WETTSTEIN	MOTION FOR WAIVER OF THE CHAPTER 7 FILING FEE OR OTHER FEE

Final ruling:

The court entered an order allowing for the filing fee to be paid in installments. As a result, this motion will be denied by minute order as moot. No appearance is necessary.

25.	12-36811-D-7 EJS-1	MICHAEL PATMAS	MOTION TO COMPEL ABANDONMENT 10-28-13 [27]

26. 13-29928-D-7 ARMANDO SANCHEZ
CONTINUED TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS
10-3-13 [15]

27. 13-33238-D-7 ALEX ROLDAN
JMA-1
IH2 PROPERTY WEST, L.P. VS.
MOTION FOR RELIEF FROM AUTOMATIC STAY
10-24-13 [20]

28. 13-32540-B-13 CARLOS/VANESSA MORALES
DNL-2
MOTION FOR AUTHORITY TO OPERATE BUSINESS
10-29-13 [18]

Final ruling:

This case was converted to a case under Chapter 13 on October 31, 2013. As a result the motion will be denied by minute order as moot. No appearance is necessary.

29. 09-29162-D-11 SK FOODS, L.P.
SH-231
MOTION FOR ENTRY OF ORDER FIXING BAR DATES FOR FILING PROOFS OF CLAIM OR INTEREST AGAINST SUBSTANTIVELY CONSOLIDATED ENTITIES AND APPROVING THE FORM AND MANNER OF NOTICE THEREOF
10-30-13 [4495]

This matter will not be called before 10:30 a.m.

30. 11-38664-D-7 TJW-2 — KAMLESH/REKHA PATEL — MOTION TO AVOID LIEN OF WESSCO COMPANY LLC
10-28-13 [30]

31. 11-22685-D-7 TGM-4 — BLUE RIBBON STAIRS, INC. — MOTION FOR COMPENSATION BY THE LAW OFFICE OF BOUTIN JONES INC. FOR THOMAS G. MOUZES, SPECIAL COUNSEL(S), FEE: $28887.50, EXPENSES: $433.44.
10-18-13 [1018]

32. 13-32187-D-7 — DEVINDER SINGH — ORDER TO SHOW CAUSE - FAILURE TO PAY FEES
10-22-13 [19]

This motion will not be called before 10:45 a.m.

33. 13-32187-D-7 — DEVINDER SINGH — CONTINUED MOTION FOR WAIVER OF THE CHAPTER 7 FILING FEE OR OTHER FEE
9-17-13 [5]

This motion will not be called before 10:45 a.m.

34. 12-33698-D-11 2 ANTIOCH, LLC — ORDER TO SHOW CAUSE RE DISMISSAL
10-24-13 [136]

Final ruling:

The hearing on this order to show cause is continued to November 27, 2013 at 10:00 a.m. No appearance is necessary on November 13, 2013.

35. 13-21199-D-7 JAMES SCOTT — CONTINUED MOTION BY JEANETTE E. MCPHERSON TO WITHDRAW AS ATTORNEY
JEM-1
9-26-13 [195]

36. 13-32187-D-7 DEVINDER SINGH — MOTION FOR RELIEF FROM AUTOMATIC STAY O.S.T.
HSM-1
FIRST-CITIZENS BANK & TRUST COMPANY VS.
11-1-13 [26]

37. 13-32187-D-7 DEVINDER SINGH — MOTION TO EXCUSE TURNOVER BY RECEIVER O.S.T.
HSM-2
11-1-13 [31]

This motion will not be called before 10:45 a.m.

38.	13-32187-D-7 HSM-3	DEVINDER SINGH	MOTION TO COMPEL ABANDONMENT O.S.T. 11-1-13 [37]

This motion will not be called before 10:45 a.m.

39.	13-32470-D-7 MPD-1	BLAKE/JENNIFER UHLES	TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS 10-23-13 [9]

40.	11-49543-D-7	ONESIMO/VANESSA DE LA TORRE	MOTION TO AVOID LIEN OF BUTTE COUNTY CREDIT BUREAU AND OF NETWORK COMMERCIAL SERVICE INC. 10-16-13 [18]

Tentative ruling:

This is the debtors' motion to avoid judicial liens held by Butte County Credit Bureau and Network Commercial Service, Inc. (the "Creditors"). The motion will be denied because the moving parties failed to comply with applicable local rules governing motion procedure; because they failed to serve the Creditors in strict compliance with applicable federal rules; because they failed to claim the property as exempt, as required for them to avoid the liens as impairing their exemption; and because they failed to provide information sufficient to allow the Creditors to determine whether to oppose the motion.

First, the court directs the moving parties' attention to LBR 9014-1, which the moving parties can view on the court's website, www.caeb.uscourts.gov, or obtain at the office of the Clerk of the Court. The moving parties failed to include a docket control number on their moving papers, as required by LBR 9014-1(c). In addition, the moving parties failed to set the motion on a minimum of 14 days' notice, as required by LBR 9014-1(f)(2), and in fact, so far as the record reveals, gave no notice at all to the Creditors (there is no proof of service of the notice of hearing). The notice of hearing does not contain the information required by LBR 9014-1(d)(3). (As to the appropriate language to be included in the notice regarding the filing of written opposition, the debtors should review LBR 9014-1(f)(1) and (2).) The "Certificate of Service" at the end of the motion is not signed under oath, as required by 28 U.S.C. § 1746, and does not contain the name of the person who served the motion. Further, the certificate of service should have been filed as a separate document (LBR 9014-1(e)(3)), not as a part of the motion.

Second, the moving parties failed to serve the motion in strict compliance with Fed. R. Bankr. P. 7004(b)(3), as required by Fed. R. Bankr. P. 9014(b). The moving parties served each of the Creditors at a street address, but failed to serve either Creditor to the attention of an officer, managing or general agent, or agent for service of process, as required by Rule 7004(b)(3). (And as regards any future motion, the debtors must serve not only the motion but the notice of hearing and any other documents they may file in support of the motion.)

Next, the moving papers and the debtors' schedules filed in this case, of which the court takes judicial notice, do not demonstrate that the moving parties are entitled to the relief requested. "There are four basic elements of an avoidable lien under § 522(f)(1)(A): First, there must be an exemption to which the debtor would have been entitled under subsection (b) of this section. 11 U.S.C. § 522(f). Second, the property must be listed on the debtor's schedules and claimed as exempt. Third, the lien must impair that exemption. Fourth, the lien must be . . . a judicial lien. 11 U.S.C. § 522(f)(1)." In re Goswami, 304 B.R. 386, 390-91 (9th Cir. BAP 2003), citing In re Mohring, 142 B.R. 389, 392 (Bankr. E.D. Cal. 1992) (emphasis added).

As indicated, in order for a debtor to avoid a judicial lien, the property to which the lien attaches must be claimed as exempt by the debtor, even if the value of the claimed exemption is only a nominal amount, such as $1.00. In this case, the property is listed on the debtors' Schedule A; however, they did not claim any exemption in the property on their Schedule C, and that schedule has never been amended. (For future reference, the debtors should note that an amended schedule must be accompanied by a properly-executed amendment cover sheet, Form EDC 2-015, which, like the local rules, can be obtained on the court's website or from the Clerk's office.) Finally, the moving papers do not provide sufficient information to demonstrate that the moving parties are entitled to the relief requested, and do not provide sufficient information to enable the Creditors to determine whether to oppose the motion. In order to avoid a judicial lien under § 522(f)(1) of the Bankruptcy Code, the debtors must demonstrate that the sum of the judicial lien, all other liens on the property, and the amount of the exemption the debtors could claim if there were no liens on the property exceeds the value the debtors' interest in the property would have in the absence of any liens. § 522(f)(2)(A). Generally, a debtor may accomplish this by showing the value of the property and the amounts of liens against the property that cannot be avoided, such as deeds of trust. In this case, the debtors' Schedule D shows their opinion of the value of the property as $305,000 and the amount secured by the deed of trust against the property as $342,834. In these circumstances, it appears the judicial liens would impair the debtors'
exemption in the property, if they had claimed an exemption. However, the information concerning the value of the property and the amount secured by the deed of trust against it was not provided to the Creditors in the moving papers. Thus, the moving parties have not provided sufficient information to enable to the Creditors to determine whether to oppose the motion.

For the reasons stated, the motion will be denied. The court will hear the matter.