**UNITED STATES BANKRUPTCY COURT**
Eastern District of California

Honorable Robert S. Bardwil
Bankruptcy Judge
Sacramento, California

**February 19, 2014 at 10:00 a.m.**

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**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.**

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| 1. | 13-34517-D-7<br>GMW-1 | EDWARD/LISA LIZARRAGO | MOTION TO AVOID LIEN OF FIRST NATIONAL BANK OF OMAHA<br>1-22-14 [18] |

**Final ruling:**

**This is the debtors' motion to value collateral of First National Bank of Omaha (the "Bank"). The motion will be denied because the moving parties failed to serve the Bank in strict compliance with Fed. R. Bankr. P. 7004(h), as required by Fed. R. Bankr. P. 9014(b). The moving parties served the Bank (1) through the attorneys who obtained the Bank's abstract of judgment; and (2) by certified and first-class mail to the attention of an "Officer, managing or general agent, or agent for service of process." The first method was a good idea, see All Points Capital Corp. v. Meyer (In re Meyer), 373 B.R. 84, 94 (9th Cir. BAP 2007) (Klein, J., concurring), but by itself, it was not sufficient. Id. at 92, citing Beneficial Cal., Inc. v. Villar (In re Villar), 317 B.R. 88, 92-94 (9th Cir. BAP 2004).**

**The second method was not sufficient because service on an FDIC-insured institution, such as the Bank, must be to the attention of an officer, and only an officer. This distinction is important. Fed. R. Bankr. P. 7004(b)(3), which**

**governs service on a corporation, partnership, or other unincorporated association that is not an FDIC-insured institution, requires service to the attention of an officer, managing or general agent, or agent for service of process. By contrast, Fed. R. Bankr. P. 7004(h), which governs service on an FDIC-insured institution, requires service of the attention of an "officer." If service to the attention of an "Officer, managing or general agent, or agent for service of process" were appropriate for service on an FDIC-insured institution, the distinction between subsections (b)(3) and (h) of Fed. R. Bankr. P. 7004 would be superfluous.**

**As a result of this service defect, the motion will be denied by minute order. No appearance is necessary.**

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| 2. | 13-34020-D-7<br>NLG-1<br>SETERUS, INC. VS. | DARA FORTNEY | MOTION FOR RELIEF FROM AUTOMATIC STAY<br>1-14-14 [12] |

**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 debtor's Statement of Intentions indicates she 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.**

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| 3. | 13-35327-D-12 | LAURA BRANDON | CONTINUED CHAPTER 12 VOLUNTARY PETITION<br>12-3-13 [1] |

**Tentative ruling:**

**This is a second continued status conference in this chapter 12 case. Although the debtor has now retained counsel to represent her, the court has several concerns about the case that will need to be addressed before the status conference can be concluded.**

**First, the court's Order to (1) File Status Report; and (2) Attend Status Conference (the "Scheduling Order") has not been served, as expressly required by the Scheduling Order. Second, although the debtor has now filed a status report and served it, along with notice of continued hearing, the debtor failed to serve several of the parties required by the Scheduling Order to be served. The debtor served the chapter 12 trustee, the United States Trustee, and one of the two parties who have requested special notice in this case. The debtor failed to serve: (1) the party requesting special notice on December 23, 2013; (2) the six secured creditors listed on the debtor's Schedule D; and (3) the creditors filing Claim Nos. 1 and 3 (neither of which was listed on the debtor's schedules, but which constitute the only unsecured creditors in this case, and therefore are among the 20 largest unsecured creditors and required by the Scheduling Order to be served). The debtor was expressly required by the Scheduling Order to serve all those parties.**

**Second, the debtor has filed a motion to employ counsel, which is defective for two reasons. First, the application is supported only by a declaration of the debtor describing her prior connections with counsel, and not by a declaration of counsel, as required by Fed. R. Bankr. P. 2014(a) and LBR 2014-1. Further, there is**

**no evidence of service on the United States Trustee, as required by Fed. R. Bankr. P. 2014(a).**

**Finally, with regard to cash collateral issues, the debtor's status report states only: "No cash collateral orders or adequate protection orders have been issued." Debtor's Status Report, filed Feb. 5, 2014, at 2:13. The debtor's Schedule D indicates she has six secured creditors; counsel should be prepared to advise the court whether the debtor intends to use cash collateral of any of these creditors, and if so, when the debtor intends to file a motion to allow the use of cash collateral.**

**The court will hear the matter as scheduled on February 5, 2014. However, the court also intends to continue the status conference once again; the debtor will be required to file a notice of continued hearing and to serve it, together with a copy of the Scheduling Order and the debtor's status report, on all parties required by the Scheduling Order to be served.**

4. 13-29030-D-7 WILLIAM/JANET CHENG — MOTION TO SET ASIDE 12/13/13 ORDER SHUTTING DWON CHENG'S BUSINESS
12-24-13 [180]

**Final ruling:**

**The court finds that a hearing will not be helpful and is not necessary. The debtors call this motion a motion to set aside a December 13, 2013 order shutting down the debtors' business. In actuality, it is a motion to set aside an order denying an earlier motion of the debtors to set aside the order shutting down their business. On September 24, 2013, on the motion of the chapter 7 trustee, the court entered an order requiring the debtors to shut down their business known as Desert Sands Motel and any other businesses they are operating. The debtors filed written opposition to that motion and appeared at the September 18, 2013 hearing, at which the court announced its decision to grant the motion. The order was signed on September 24, 2013. On October 7, 2013, the debtors filed a motion to set aside the September 24, 2013 order. A hearing on that motion was held December 11, 2013, as scheduled by the debtors. The debtors did not appear, and their motion was denied by minute order dated December 13, 2013 (the "Order"). That appears to be the order the debtors now seek to set aside.**

**The court will construe the motion as a motion to alter or amend the Order, pursuant to Fed. R. Civ. P. 59(e), incorporated herein by Fed. R. Bankr. P. 9023, or in the alternative, as a motion for relief from the Order, pursuant to Fed. R. Civ. P. 60(b)(6), incorporated herein by Fed. R. Bankr. P. 9024. A Rule 59(e) motion "should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999). "[A] motion for reconsideration is not permitted (a) to assert new legal theories that could just as well have been raised before the initial hearing; (b) to present new facts which could have been presented before the initial hearing; or (c) to rehash the same arguments made the first time or simply express an opinion that the court was wrong." In re Greco, 113 B.R. 658, 664 (D. Hawaii 1990).**

Although Rule 60(b) should be liberally applied to accomplish justice, Zurich Am. Ins. Co. v. Int'l Fibercom, Inc. (In re Int'l Fibercom, Inc.), 503 F.3d 933, 941 (9th Cir. 2007), at the same time, it should be "used sparingly as an equitable remedy to prevent manifest injustice and is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." Id. (citations omitted, internal quotation marks omitted).

The debtors state in the present motion (DN 180) that they were not present for the December 11, 2013 hearing for the following reason. They claim debtor Janet Cheng was at the entrance door to Department D (that is, the entrance to this department's courtroom) at 9:38 a.m., before the 10:00 a.m. start time for the court's calendar. She claims the court called the debtors' case "before the scheduled time and Chengs case scheduled item number." Motion to Set Aside, filed Dec. 24, 2013, DN 180 (the "Motion"), at 1:22-23. She adds: "Cheng Janet has a fatal allergy reaction to cigaret. A pack of unopen digaret [sic] can trigger Janet Cheng fatal allergy reaction. Janet Cheng was waiting at the dept D entrance door bench for Chengs scheduled item and Chengs scheduled time." Id. at 1:24-27. According to the debtors, "[t]he court called item #1 Chengs case and made the rulings motions and trustee Richards motions etc, etc. Chengs were not present at the rulings of all motions of Chengs case. Chengs case were not item #1. The court called Chengs case before the scheduled time." Id. at 2:2-6. Thus, the debtors contend, their due process rights, civil rights, Fourth Amendment rights, privacy rights, and property rights were all violated, and the court's ruling "inflicts irreversible harms and irreversible damages" on the debtors. Id. at 2:20-21.

This argument fails for several reasons. First, the court does not commence any of its calendars before the scheduled time, and there is no evidence it did so on December 11, 2013. Second, there is no indication why debtor William Cheng, who is also representing himself in this case and who was a moving party on the motion to set aside the September 24, 2013 order, was not present in the courtroom when the first of the matters in the debtors' case was called.[1] Third, there is no indication debtor Janet Cheng's allergy had anything to do with her failure to be in the courtroom when the matter was called. Fourth, the debtors appear to be suggesting that the court called their matters out of order; that is, not in the numerical order they appeared on the court's calendar. Assuming that occurred, it is routine for a court to call matters on its calendar out of numerical order; litigants, even those representing themselves, have the responsibility to be present at the beginning of the calendar on which their matter appears and until their matter is called.[2] In short, the court rejects the debtors' argument that their rights were violated because they were not present for the hearing.

Next, the debtors reiterate an argument they have made before in this case – that the chapter 7 trustee "affirmed and reaffirmed Chengs dismissal of Chengs Chapter 7 petition and all post petition bankruptcy issues etc." Motion at 2:22-24. The court has addressed this argument in its rulings on other motions in this case, and reiterates here that it was not within the trustee's power to dismiss the case (or to "affirm" the debtors' purported dismissal of the case), and he did not do so. The debtors also argue that the Order must be set aside because debtor William Cheng did not sign the petition commencing this case. The court has rejected this argument when the debtors have raised it in support of other motions, most notably their motion to dismiss the case; for the same reasons as set forth in its rulings on those earlier motions, the court rejects the argument here.

Finally, the debtors' request for a stay pending appeal, contained in their

motion, will be denied. The debtors have failed to demonstrate (1) that they are likely to succeed on the merits of their appeal, and that there is a possibility of irreparable injury to them if the Order is not stayed; or (2) that there are serious questions going to the merits and that a balance of hardships tips sharply in their favor, as required for issuance of a stay pending appeal. See Cadance Design Sys. v. Avant! Corp., 125 F.3d 824, 826 (9th Cir. 1997).

For the reasons stated, the court concludes that the debtors have failed to present newly discovered evidence, to show that the court committed clear error, or to show that there has been an intervening change in the controlling law, and have failed to make any other showing that the Order should be set aside. Accordingly, the motion will be denied.

The motion will be denied by minute order. No appearance is necessary.

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1 An individual representing himself or herself without an attorney must appear personally and may not delegate that duty to any other individual, including husband or wife. Local Dist. Court Rule 183(a), incorporated herein by LBR 1001-1(c).

2 "District courts have 'inherent power' to control their dockets." S. Cal. Edison Co. v. Lynch, 307 F.3d 794, 807 (9th Cir. 2002) (citation omitted)

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| 5. | 13-29030-D-7 | WILLIAM/JANET CHENG | MOTION TO SET ASIDE 12/13/13 ORDER RE CREDITOR DENNIS BRENING'S OBJECTION TO CLAIM OF EXEMPTIONS<br>12-27-13 [186] |

Final ruling:

The court finds that a hearing will not be helpful and is not necessary. This is the debtors' motion to set aside the court's December 13, 2013 minute order (the "Order") sustaining the objection of Dennis C. Brenning and the Dennis C. Brenning Trust (the "Brennings") to the debtors' claim of exemption of the real property at 623 16th Street, Sacramento, California (the "Property"). In advance of the December 11, 2013 hearing on the Brennings' objection, the court issued a tentative ruling, which, following the hearing, it adopted as its final ruling. That ruling, in which the court considered the debtors' written opposition to the objection, is found in the court's minutes on the Brennings' objection, DN 164. The debtors now seek to set aside the Order.

The court will construe the motion as a motion to alter or amend the Order, pursuant to Fed. R. Civ. P. 59(e), incorporated herein by Fed. R. Bankr. P. 9023, or in the alternative, as a motion for relief from the Order, pursuant to Fed. R. Civ. P. 60(b)(6), incorporated herein by Fed. R. Bankr. P. 9024. A Rule 59(e) motion "should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999). "[A] motion for reconsideration is not permitted (a) to assert new legal theories that could just as well have been raised before the initial hearing; (b) to present new facts which could have been presented before the initial hearing; or (c) to rehash the same arguments made the first time or simply express an opinion that the court was wrong." In re Greco, 113 B.R. 658, 664 (D. Hawaii 1990).

Although Rule 60(b) should be liberally applied to accomplish justice, Zurich Am. Ins. Co. v. Int'l Fibercom, Inc. (In re Int'l Fibercom, Inc.), 503 F.3d 933, 941 (9th Cir. 2007), at the same time, it should be "used sparingly as an equitable remedy to prevent manifest injustice and is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." Id. (citations omitted, internal quotation marks omitted).

The debtors contend in the present motion (DN 186) (1) they were not present for the hearing, and thus, the Order should be set aside based on their due process rights; (2) the last meeting of creditors was held August 13, 2013, whereas the Brennings did not object to the debtors' claim of exemptions for more than five months; (3) the chapter 7 trustee dismissed this bankruptcy case on August 13, 2013; and (4) the Brennings are "invalid creditors." The first of these is not explained in the motion; however, the court assumes the explanation is the same as the one the debtors made in their motion to set aside the order requiring them to shut down their businesses, Item 4 on this calendar.

In that motion, the debtors stated they were not present for the December 11, 2013 hearings for the following reason. They claim debtor Janet Cheng was at the entrance door to Department D (that is, the entrance to this department's courtroom) at 9:38 a.m., before the 10:00 a.m. start time for the court's calendar. She claims the court called the debtors' case "before the scheduled time and Chengs case scheduled item number." Motion to Set Aside, filed Dec. 24, 2013, DN 180, at 1:22-23. She adds: "Cheng Janet has a fatal allergy reaction to cigaret. A pack of unopen digaret [sic] can trigger Janet Cheng fatal allergy reaction. Janet Cheng was waiting at the dept D entrance door bench for Chengs scheduled item and Chengs scheduled time." Id. at 1:24-27. According to the debtors, "[t]he court called item #1 Chengs case and made the rulings motions and trustee Richards motions etc, etc. Chengs were not present at the rulings of all motions of Chengs case. Chengs case were not item #1. The court called Chengs case before the scheduled time." Id. at 2:2-6. Thus, the debtors contend, their due process rights, civil rights, Fourth Amendment rights, privacy rights, and property rights were all violated, and the court's ruling "inflicts irreversible harms and irreversible damages" on the debtors. Id. at 2:20-21.

This argument fails for several reasons. First, the court does not commence any of its calendars before the scheduled time, and there is no evidence it did so on December 11, 2013. Second, there is no indication why debtor William Cheng, who is also representing himself in this case and who was a moving party on the motion to set aside the September 24, 2013 order, was not present in the courtroom when the first of the matters in the debtors' case was called.[1] Third, there is no indication debtor Janet Cheng's allergy had anything to do with her failure to be in the courtroom when the matter was called. Fourth, the debtors appear to be suggesting that the court called their matters out of order; that is, not in the numerical order they appeared on the court's calendar. Assuming that occurred, it is routine for a court to call matters on its calendar out of numerical order; litigants, even those representing themselves, have the responsibility to be present at the beginning of the calendar on which their matter appears and until their matter is called.[2] In short, the court rejects the debtors' argument that their rights were violated because they were not present for the hearing.

The debtors' second and fourth arguments – that the Brennings waited too long to file their objection to exemptions and that they are "invalid creditors" – were expressly addressed in the court's ruling on the objection to exemptions, and the

**debtors have added nothing of significance here.[3] The debtors' third argument – that the trustee dismissed this case on August 13, 2013 – has previously been made by the debtors and rejected by this court; it is simply not a viable argument. Finally, the debtors' statement that a court-appointed interpreter is required by them for the hearing is rejected, as it has been in the past.**

**For the reasons stated, the court concludes that the debtors have failed to present newly discovered evidence, to show that the court committed clear error, or to show that there has been an intervening change in the controlling law, and have failed to make any other showing that the Order should be set aside. Accordingly, the motion will be denied.**

**The motion will be denied by minute order. No appearance is necessary.**

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**1 An individual representing himself or herself without an attorney must appear personally and may not delegate that duty to any other individual, including husband or wife. Local Dist. Court Rule 183(a), incorporated herein by LBR 1001-1(c).**

**2 "District courts have 'inherent power' to control their dockets." S. Cal. Edison Co. v. Lynch, 307 F.3d 794, 807 (9th Cir. 2002) (citation omitted).**

**3 The debtors have added with this new motion that they did not attend any meeting of creditors after the one held August 13, 2013. As indicated in the court's ruling on the objection to exemptions, the deadline for objecting runs from the date the meeting of creditors is concluded. The decision to conclude the meeting of creditors is the trustee's, not the debtor's; a debtor cannot control the date the meeting is concluded simply by failing or refusing to appear at continued sessions of the meeting.**

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| 6. | 13-29030-D-7 | WILLIAM/JANET CHENG | MOTION TO SET ASIDE 12/19/13 ORDER COMPELLING DEBTORS TO AMEND SCHEDULES, APPEAR AT 341 MEETING, PROVIDE PROPERTY INFORMATION, ETC.<br>12-27-13 [189] |

**Final ruling:**

**The court finds that a hearing will not be helpful and is not necessary. This is the debtors' motion to set aside this court's order dated December 19, 2013 (the "Order") on the trustee's motion to compel the debtors to amend their schedules and to appear at a continued session of the meeting of creditors with proof of their social security numbers, to compel them to provide information regarding property of the estate, to authorize the trustee to obtain a credit report on the debtors, and to allow the trustee to amend the debtors' schedules if necessary (the "motion to compel"). The debtors filed written opposition to the motion, but did not appear at the December 11, 2013 hearing.**

**The court will construe the motion as a motion to alter or amend the Order, pursuant to Fed. R. Civ. P. 59(e), incorporated herein by Fed. R. Bankr. P. 9023, or in the alternative, as a motion for relief from the Order, pursuant to Fed. R. Civ. P. 60(b)(6), incorporated herein by Fed. R. Bankr. P. 9024. A Rule 59(e) motion "should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." 389 Orange St. Partners v.**

Arnold, 179 F.3d 656, 665 (9th Cir. 1999). "[A] motion for reconsideration is not permitted (a) to assert new legal theories that could just as well have been raised before the initial hearing; (b) to present new facts which could have been presented before the initial hearing; or (c) to rehash the same arguments made the first time or simply express an opinion that the court was wrong." In re Greco, 113 B.R. 658, 664 (D. Hawaii 1990).

Although Rule 60(b) should be liberally applied to accomplish justice, Zurich Am. Ins. Co. v. Int'l Fibercom, Inc. (In re Int'l Fibercom, Inc.), 503 F.3d 933, 941 (9th Cir. 2007), at the same time, it should be "used sparingly as an equitable remedy to prevent manifest injustice and is to be utilized only where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." Id. (citations omitted, internal quotation marks omitted).

The debtors contend in the present motion (DN 189) (1) they were not present for the hearing, and thus, the Order should be set aside based on their due process rights; (2) the chapter 7 trustee dismissed this bankruptcy case on August 13, 2013, and the actions he has taken since then, including filing the motion to compel, have been an abuse of the bankruptcy rules and in violation of the debtors' privacy rights, civil rights, and Fourth Amendment rights; (3) debtor William Cheng did not sign the petition commencing the case; (4) the trustee's demands for certain documents, including the debtors' bank statements and rental agreements, would violate their and their tenants' privacy rights; and (5) the Order would "force [the debtors] to file a new bankruptcy proceedings disguised as amended schedules etc [and] force [the debtors] to attend a new 341 meeting disguised as continued 341 meeting." Motion to Set Aside, filed Dec. 27, 2013, DN 189, at 4:12-14. The first of these is explained only briefly in the motion; however, the court assumes the explanation is the same as the one the debtors made in their motion to set aside the order requiring them to shut down their businesses, Item 4 on this calendar.

In that motion, the debtors stated they were not present for the December 11, 2013 hearings for the following reason. They claim debtor Janet Cheng was at the entrance door to Department D (that is, the entrance to this department's courtroom) at 9:38 a.m., before the 10:00 a.m. start time for the court's calendar. She claims the court called the debtors' case "before the scheduled time and Chengs case scheduled item number." Motion to Set Aside, filed Dec. 24, 2013, DN 180, at 1:22-23. She adds: "Cheng Janet has a fatal allergy reaction to cigaret. A pack of unopen digaret [sic] can trigger Janet Cheng fatal allergy reaction. Janet Cheng was waiting at the dept D entrance door bench for Chengs scheduled item and Chengs scheduled time." Id. at 1:24-27. According to the debtors, "[t]he court called item #1 Chengs case and made the rulings motions and trustee Richards motions etc, etc. Chengs were not present at the rulings of all motions of Chengs case. Chengs case were not item #1. The court called Chengs case before the scheduled time." Id. at 2:2-6. Thus, the debtors contend, their due process rights, civil rights, Fourth Amendment rights, privacy rights, and property rights were all violated, and the court's ruling "inflicts irreversible harms and irreversible damages" on the debtors. Id. at 2:20-21.

This argument fails for several reasons. First, the court does not commence any of its calendars before the scheduled time, and there is no evidence it did so on December 11, 2013. Second, there is no indication why debtor William Cheng, who is also representing himself in this case and who was a moving party on the motion to set aside the September 24, 2013 order, was not present in the courtroom when the first of the matters in the debtors' case was called.[1] Third, there is no indication debtor Janet Cheng's allergy had anything to do with her failure to be in

**the courtroom when the matter was called. Fourth, the debtors appear to be suggesting that the court called their matters out of order; that is, not in the numerical order they appeared on the court's calendar. Assuming that occurred, it is routine for a court to call matters on its calendar out of numerical order; litigants, even those representing themselves, have the responsibility to be present at the beginning of the calendar on which their matter appears and until their matter is called.[2] In short, the court rejects the debtors' argument that their rights were violated because they were not present for the hearing.**

**The debtors' second argument – that the trustee dismissed this case on August 13, 2013 – has previously been made by the debtors and rejected by this court; it is simply not a viable argument. Their third argument – that debtor William Cheng did not sign the petition commencing this case – has been rejected when the debtors have raised it in support of other motions, most notably their motion to dismiss the case; for the same reasons as set forth in its rulings on those earlier motions, the court rejects the argument here. The debtors' fourth argument – that requiring turnover of certain documents, including the debtors' bank statements and rental agreements, would violate the debtors' and their tenants' privacy rights – overlooks the fundamental duty of a bankruptcy debtor to turn over all information and documents pertaining to his or her financial affairs absent a specific evidentiary privilege. The debtors have cited no such privilege here. The Fourth Amendment does not protect debtors from turning over the types of documents covered by the Order. As to the tenants' rights, the debtors have no standing to assert them. The debtors have cited no authority for the proposition that their credit report is protected by a right of privacy when sought by a bankruptcy trustee for the purpose of discovering information about their financial affairs the debtors themselves were required to provide, but failed or refused to provide in their schedules or otherwise in response to the trustee's legitimate demands.**

**The debtors' fifth argument – that the Order would force them to file a new bankruptcy disguised as amended schedules, and would force them to attend a new meeting of creditors disguised as a continued meeting – are simply untrue. As explained at length in the court's ruling on the motion to compel (DN 167), the debtors' schedules filed in this case fall far short of compliance with their duty to provide true, complete, and accurate information; their failure to turn over information and documents requested by the trustee about their assets falls short of compliance with their duty to cooperate with the trustee in the performance of his duties. As to the meeting of creditors, the debtors seem to be under the mistaken impression that they are the ones to decide when the meeting has been completed, and that they may not be compelled to attend continued sessions of the meeting. It is fundamental to the bankruptcy process that the trustee be able to control the number and length of sessions of the meeting, and it is common that a meeting will be continued, sometimes multiple times, where, as in this case, the debtors have failed to comply with their duties. Finally, the debtors' statement that a court-appointed interpreter is required by them for the hearing is rejected, as it has been in the past.**

**For the reasons stated, the court concludes that the debtors have failed to present newly discovered evidence, to show that the court committed clear error, or to show that there has been an intervening change in the controlling law, and have failed to make any other showing that the Order should be set aside. Accordingly, the motion will be denied.**

**The motion will be denied by minute order. No appearance is necessary.**

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**1 An individual representing himself or herself without an attorney must appear personally and may not delegate that duty to any other individual, including husband or wife. Local Dist. Court Rule 183(a), incorporated herein by LBR 1001-1(c).**

**2 "District courts have 'inherent power' to control their dockets." S. Cal. Edison Co. v. Lynch, 307 F.3d 794, 807 (9th Cir. 2002) (citation omitted).**

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| 7. | 10-42050-D-7 | VINCENT/MALANIE SINGH | CONTINUED MOTION TO COMPEL ABANDONMENT<br>12-24-13 [442] |

**Tentative ruling:**

**This is the hearing on the motion of approximately twenty creditors (the "Movants") for an order compelling the trustee to abandon an adversary proceeding that is pending in this case that the trustee is pursuing. All of the Movants are themselves defendants in separate similar adversary proceedings pending in this case.**

**The motion will be denied due to service defects. The motion was served only on the trustee, trustee's counsel and the U.S. Trustee, but not on the creditors of the estate. This court interprets Fed. Rule of Bankr. Proc. 6007 and Bankruptcy Code § 554 to require service of a motion to compel abandonment on all creditors of the estate. Accordingly, the court will deny the motion for insufficient service. The court also notes that the proof of service is attached to the motion in violation of Local Bankruptcy Rule 90-1(e)(3).**

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| 8. | 10-42050-D-7<br>12-2489<br>BURKART V. XIE | VINCENT/MALANIE SINGH<br>CDH-1 | CONTINUED MOTION TO AMEND COMPLAINT<br>12-11-13 [77] |

**Tentative ruling:**

**This is the motion of the plaintiff, who is the chapter 7 trustee in the bankruptcy case in which this adversary proceeding is pending (the "trustee"), for leave to file an amended complaint, pursuant to Fed. R. Civ. P. 15(a)(2), incorporated herein by Fed. R. Bankr. P. 7015. The defendant has filed opposition, and the trustee has filed a reply.[1] For the following reasons, the motion will be granted.**

**By his original complaint, the trustee sought to recover as fraudulent transfers certain payments made to the defendant by the debtor in the underlying bankruptcy case, Vincent Singh (the "debtor"), either directly or through a related individual or entity. The trustee alleged the payments were made as part of a Ponzi scheme initiated and run by the debtor. The trustee's original complaint alleged that between August 27, 2009 and August 19, 2010 (the date of filing of the debtor's chapter 7 petition), the debtor made payments to the defendant totaling at least**

$5,000, "plus such other amounts, if any, as may be subsequently discovered by or disclosed to [the trustee]." Complaint for Avoidance and Recovery of Fraudulent Transfer; Objection to Claim, filed August 16, 2012 (the "original complaint"), at 2:27-3:1. The amended complaint the trustee seeks leave to file lists five different payments allegedly made to the defendant totaling $22,754, and moves the beginning date of the time period during which the payments are alleged to have been made back to August 19, 2008, which is the date two years before the date of filing of the debtor's petition. Thus, the amended complaint seeks to recover payments that were not alleged specifically; that is, by date and amount, in the original complaint (the "additional payments").

Under the rule that governs this motion, "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). The courts are to apply the rule "with extreme liberality," Forsyth v. Humana, Inc., 114 F.3d 1467, 1482 (9th Cir. 1997), in light of the following factors: "(1) undue delay; (2) bad faith; (3) futility of amendment; and (4) prejudice to the opposing party." Id. These factors are not to be given equal weight, Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995); thus, "it is the consideration of prejudice to the opposing party that carries the greatest weight." Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003). "Absent prejudice, or a strong showing of any of the remaining . . . factors, there exists a presumption under Rule 15(a) in favor of granting leave to amend." Eminence Capital, LLC, 316 F.3d at 1052.

Beginning with the element of undue delay, the defendant contends that before the trustee filed the original complaint, he either "(a) knew of the [additional payments] and decided to exclude them; or (b) did not conduct a diligent investigation and was dilatory in identifying the claims . . . ." Defendant's Opposition, filed Dec. 23, 2013 ("Opp."), at 5:14-16. Neither conclusion is supported by the evidence, and in fact, the trustee's investigation and discovery of the additional payments were hampered by the defendant himself.

First, the defendant cites four bank statements of the debtor the defendant claims the trustee has had from the time the debtor's case was commenced. However, the bank statements merely list a large number of account transfers, wire transfers, electronic withdrawals, cash withdrawals, and especially (in terms of numbers and amounts) checks – by check number, date, and amount. As with any bank statement, the ones the defendant points to as proof of the trustee's knowledge do not disclose any identifying information about the payees of the checks or other transfers. Thus, the bank statements do not support the conclusion for which the defendant cites them – that the trustee knew about the additional payments before he filed the original complaint.

The trustee has submitted a declaration of his counsel in reply to the defendant's opposition – counsel testifies to the significant difficulties the trustee faced in light of the debtor's failure to keep records of the thousands of transactions the trustee alleges comprised the alleged Ponzi scheme. The trustee employed a forensic accountant as early as October of 2010 to assist him in evaluating records of the various payments made to and by the debtor. The trustee's counsel testifies to having analyzed records from some 40 different bank accounts in order to identify the payments on which the original complaint and the trustee's complaints against well over 100 other alleged transferees are based. Information developed from one source led the trustee to other sources, all in a process that has required a significant amount of time. Considering all of these circumstances, the charge that the trustee should have discovered the additional payments made to this defendant before he filed the original complaint simply does not hold up.

The defendant admits that as late as May of 2013, nine months after the original complaint was filed, he himself identified in a discovery response a payment that had not been known to the trustee – a $5,450 payment the defendant says he "was able to recall after a time-consuming and costly review of his records." Opp. at 6:8-9. Thus, he concludes that at the very latest, the trustee should have known of all the payments to the defendant by May of 2013, and has unreasonably delayed seeking to amend the complaint since that time. The court disagrees.

In June of 2013, just after he brought to the trustee's attention the $5,450 payment the trustee had been unaware of, the defendant produced over 250 pages of documents, including bank statements, he had not previously produced, although he knew the trustee had, for many months, been trying to identify all the payments the defendant received from the debtor. In July of 2013, the defendant filed a motion for summary judgment, in support of which he testified under oath: "I was only ever paid $5,450 and $5,000 in connection with my Investments [with the debtor]." Baio Xie Decl., filed July 1, 2013, at 5:18-19.[2] He added: "I do not believe that I received any other funds from [the debtor] or any of his business[es] except for [the $5,450 and $5,000 payments]. I have reviewed all of my bank account statements for this period of time and do not believe that any other deposits reflected in my bank statements are funds paid to me from [the debtor] or any of his entities or relatives." Id. at 6:9-13.

The trustee chose not to take the defendant's word for that, and between July and October of 2013, sought by subpoena from the banks additional records about the deposits into the defendant's accounts. The records the trustee received from the banks revealed that, in stark contrast to the defendant's testimony in both his responses to the trustee's discovery requests and his declaration filed with the court, the defendant had received payments from the debtor totaling $220,384. (The $22,754 the trustee seeks to recover is apparently the total of the payments made to the defendant within the two years prior to the debtor's bankruptcy filing.) Thus it is clear the defendant himself repeatedly hampered the trustee's efforts to identify all the payments he had received from the debtor; the defendant's present charge that the trustee was dilatory in discovering them is ironic at best. For these reasons, the court concludes that the undue delay factor weighs in favor of the trustee and against the defendant in the analysis.

For similar reasons, the bad faith factor weighs against the defendant as well. The defendant accuses the trustee of bad faith, as follows:

> The Trustee has, from the start, engaged in a strategy of refusing to plead and prove his own case, forcing the Defendant to guess as to the claims brought against him. The Trustee, on the other hand, has had that information or the ability to obtain that information for the past 3½ years, but has declined to share it with Defendant. Instead, the Trustee has embarked on a pattern of gamesmanship, withholding information from the Defendant until after he took the Defendant's deposition and discovery was closed.

Opp. at 2:11-17. Thus, the defendant complains the trustee "ambushed" him at his deposition "with documentation and information that [the defendant] did not have" (id. at 29:5-6); the defendant claims he withdrew his motion for summary judgment "because of information withheld by the Trustee, and after [the defendant] had spent significant legal fees defending the Trustee's original Complaint . . . ." Id. at 29:7-8. The irony here is glaring. The defendant blames the trustee for failing to discover sooner highly significant information the defendant had, despite legitimate

discovery requests, and in direct contravention of his duty to provide full and complete responses, either failed or refused to produce – information concerning deposits into the defendant's own bank accounts – information highly contradictory to testimony the defendant had previously submitted to this court.

The defendant's excuses are not credible. First, he claims he was unable to obtain from his banks the records of the deposits into his accounts – records the trustee, when forced to seek them, was able to obtain; the defendant also claims he was unable to get the records from his ex-wife. By contrast, in the same declaration in which he testified he had reviewed all of his bank statements and believed none of the deposits other than the $5,000 and the $5,450 were from the debtor, he testified with precision about each of the eight payments he made to the debtor as investments, listing them by date and amount, and providing copies of the wire transfer instructions and bank statements evidencing each payment. The court does not accept the implicit contention that although the defendant kept meticulous records of his payments to the debtor, he kept no records of his payments from the debtor. Second, concerning the deposition, the defendant maintains he "had neither any memory nor any record of those transfers that the Trustee questioned him about at his deposition" (the payments from the debtor to the defendant totaling over $220,000). Opp. at 6:17-18. It is difficult to believe, and the court does not believe, the defendant remembered a total of $220,000 as being less than 5% of that amount.

Thus, on the issue of bad faith, given what is now known about the amounts the defendant received – over $220,000, and considering that the trustee discovered the truth only after extensive discovery, including having to subpoena from the banks themselves the records of the deposits into the defendant's accounts, when the defendant might reasonably have been presumed to have that information from the beginning, the court is persuaded that the bad faith factor tips strongly against the defendant.

Turning to the next factor, the most important one according to the Ninth Circuit, the defendant claims he will be prejudiced if the trustee is allowed to file the amended complaint to include the additional payments. The defendant has the burden of proof on this issue. DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 187 (9th Cir. 1987). His claim of prejudice is this:

> Much discovery has been done, and discovery is now concluded. It is simply too late to try to add new claims. It is very prejudicial to the Defendant who has approached this case, mounted a defense, and paid substantial costs in defending the Complaint, all based on the allegations in the Complaint. The Defendant has now spent 1½ years of his life defending the Trustee's Complaint, and in incurring legal fees and costs paid to banks at the insistence of the Trustee who has sought to force the Defendant to do the Trustee's work for him. The failure of the Trustee to identify the transfers in the original Complaint, the delay in seeking to amend the Complaint, and all of the costs that the Trustee has caused the Defendant to incur as a result of his dilatory conduct have prejudiced the Defendant.

Opp. at 9:25-10:5. First, concerning the claim that the trustee has forced the defendant to do his work for him, the court must return to the question of why the defendant was able to so accurately recount his payments to the debtor but could not identify his payments from the debtor. Second, and most important, the amended complaint would not vary the trustee's legal theories in any way, require proof of

significantly different facts, or significantly alter the defendant's litigation strategy, if at all. Cf. AmerisourceBergen Corp. v. Dialysist West, Inc., 465 F.3d 946, 953 (9th Cir. 2006) [amendment not allowed that would advance different legal theories and require proof of different facts]; Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990) [amendment "would greatly change the nature of the litigation."].

Here, the original complaint referred several times to the fact that the trustee was seeking recovery of payments totaling at least $5,000, but including the amounts of other payments that might be discovered later. The defendant has not shown that the mere fact that the total would now include such payments discovered later, or that the time period during which the payments were made would be expanded, will be significant in terms of extra litigation costs, or prejudicial in any other way.

Finally, the defendant contends that allowing the amendment would be futile, for two reasons: first, because the trustee will, as a substantive matter, be unable to prevail on any of his claims, and second, because the trustee's claims for recovery of the additional payments do not relate back to the original complaint, and thus, are barred by the statute of limitations. As to the former, the trustee is correct: the defendant is attempting to try the merits of the case as if this were a motion for summary judgment. That is not generally the court's role in ruling on a motion for leave to amend. "[A] proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988) (citations omitted). Thus, the "proper test to be applied when determining the legal sufficiency of a proposed amendment is identical to the one used when considering the sufficiency of a pleading challenged under Rule 12(b)(6))." Id. (citation omitted). "Ninth Circuit law also supports denial of an amendment if a claim is frivolous, has no basis in law, or does not plead with particularity all the required elements to the support the claim." Kelley v. JPMorgan Chase Bank, N.A. (In re Kelley), 2012 Bankr. LEXIS 433, *10 (Bankr. N.D. Cal. 2012), citing Albrecht v. Lund, 845 F.2d 193, 195 (9th Cir. 1988) (frivolous claims); Partington v. Bugliosi, 56 F.3d 1147, 1162 (9th Cir. 1995) (failure to plead elements). The court sees nothing about the adding of the additional payments that would, under any of these tests, defeat the legal sufficiency of the original complaint, which itself is not at issue in this motion.[3]

Turning to the relation-back issue, "[a]n amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading . . . ." Fed. R. Civ. P. 15(c)(1)(B), incorporated by Fed. R. Bankr. P. 7015. The crux of the matter is notice to the defendant; thus, the court is to consider "whether the original and amended pleadings share a common core of operative facts so that the adverse party has fair notice of the transaction, occurrence, or conduct called into question." Martell v. Trilogy, Ltd., 872 F.2d 322, 325 (9th Cir. 1989).

The trustee's original and amended complaints are based on a common core of operative facts – the Ponzi scheme allegedly run by the debtor; all the payments – those included in the original total and the additional payments – are alleged to have been part of that scheme. This factual scenario is similar to those in several cases where relation back has been found. In Hill v. Oria (In re Juliet Homes, LP), 2011 Bankr. LEXIS 5116, * 22-23 (Bankr. S.D. Tex. 2011), new transfers alleged in an amended complaint, like the transfers alleged in the original complaint, were found

to be part of an "overall Ponzi scheme." Thus, all the transfers were found to be part of the same course of conduct, and the amended complaint related back to the original complaint. Id. In Adelphia Recovery Trust v. Bank of Am., N.A., 624 F. Supp. 2d 292, 333 (S.D.N.Y. 2009), the court permitted a creditors' committee to amend its complaint to add $95 million in allegedly fraudulent transfers to the $85 million alleged in the original complaint. The court found that the $95 million in transfers arose out of the same loan facilities as the transfers originally alleged, id., and emphasized that the original complaint put the defendants on notice the plaintiff "was seeking repayment of monies related to the margin loans broadly." Id. at 334 (emphasis added).

McMullen Oil Co. v. Crysen Ref., Inc. (In re McMullen Oil Co.), 251 B.R. 558 (Bankr. C.D. Cal. 2000), was an action against a bank for damages for accepting checks deposited without the payee's endorsement to an account not belonging to the payee. The court found that an amended complaint adding 13 checks to those described in the original complaint related back to the original complaint. The court held that the following language in the original complaint provided sufficient notice to the defendant: "The [plaintiff] believes that other checks intended for the Debtor may also have been improperly deposited into one or more bank accounts . . . ." Id. at 577.[4]

In the present case, the trustee's original complaint referred to payments "totaling at least $5,000, plus such other amounts, if any, as may be subsequently discovered by or disclosed to [the trustee]." Original Complaint, at 3:1-2. It stated that "[the trustee] believes the aggregate amount of the Payments may be in excess of the above-stated amount, and may amend this Complaint as and when the exact amount of the transfers to Defendant has been ascertained." Id. at 3:7-9. Thus, the trustee prayed for an award of $5,000 "or such other amount as may be proven at trial." Id. at 7:9-10. Thus, the original complaint was sufficient to give notice to the defendant that the trustee sought recovery not only of the total amount stated but also of the amounts of payments discovered later. The payments comprising the total listed in the original complaint and the additional payments are all part of a common core of operative facts, and the defendant had fair notice additional payments might be discovered and added to the original total.

For the reasons stated, the motion will be granted. The trustee will have 30 days from the date of entry of the order in which to file an amended complaint. If the trustee files a timely amended complaint, the defendant shall file an answer or other response within the time fixed by applicable rules. The court will hear the matter.

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1 The court has also reviewed the trustee's notice of errata to his reply and the defendant's response to the notice of errata: neither is relevant to this decision. The court would add, though, that the inflammatory remarks in the defendant's response, like those in his opposition to the motion, are not helpful to the discussion.

2 In response to the trustee's earlier discovery requests, the defendant had testified, first, that he "may have received approximately $5,000" (C. Hughes Decl., filed Jan. 1, 2014, at 3:20); he later supplemented that response with the statement he included in his declaration supporting his summary judgment motion – that he had only ever received two payments – the $5,450 and $5,000 payments.

**3 The defendant's argument that the trustee's usury and constructive fraudulent transfer claims are in conflict with the allegations of a Ponzi scheme fails for the same reason – the sufficiency of the original complaint is not at issue in this motion, only the question whether the trustee should be permitted to amend to include the additional payments. The court also agrees with the trustee's response that the matter is governed by Fed. R. Civ. P. 8(d)(2) and (3), incorporated herein by Fed. R. Bankr. P. 7008(a), permitting the pleading of alternative and inconsistent claims.**

**4 The court cited Siegel v. Converters Transp., Inc., 714 F.2d 213, 216 (2nd Cir. 1983), in which the court permitted an amended complaint that extended backwards the time period for which the plaintiff could seek recovery of illegal shipping charges.**

> **In this case the initial complaint made it clear that Converters sought recovery for all unpaid shipping services it had rendered Elks and all the "commissions" paid to the various defendants. The "conduct" or "transaction" in question was therefore the agreement to violate the tariff filed with the ICC by means of "free" shipments and "commissions." . . . The gist of both the original suit and the amended complaint was the unlawful agreement to pay lower freight charges and commissions, and its continuing performance, not a series of agreements as to unrelated shipments.**

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| 9. | 14-20161-D-7 | CATHIE PREAZA | MOTION FOR WAIVER OF THE CHAPTER 7 FILING FEE OR OTHER FEE<br>1-8-14 [5] |

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| 10. | 13-27362-D-7<br>KER-1 | PATRICIA GARCIA<br>U.S. BANK, N.A. VS. | MOTION TO CONFIRM TERMINATION OR ABSENCE OF STAY AND/OR MOTION FOR RELIEF FROM AUTOMATIC STAY<br>1-22-14 [26] |

**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 for order confirming termination of stay or in the alternative for relief from automatic stay is supported by the record. As such the court will grant the request in the motion for an order confirming the automatic stay is no longer in effect pursuant to 11 U.S.C. § 362(c)(3). Moving party is to submit an appropriate order. No appearance is necessary.**

11. 13-23371-D-11 JUAN/MARGARITA RAMIREZ
TCS-4

CONTINUED MOTION TO VALUE COLLATERAL OF THE BANK OF NEW YORK MELLON
11-13-13 [95]

12. 13-35972-D-7 THOMAS/TONYA ROGERS
DJD-1
SETERUS, INC. VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY
1-24-14 [11]

13. 12-39878-D-7 DAVID/RENEE SMITH
DRE-3

CONTINUED MOTION TO AVOID LIEN OF GRANITE COMMUNITY BANK, N.A., PREMIERWEST BANK, CALMAT CO. AND COLONIAL PACIFIC LEASING CORPORATION
8-23-13 [100]

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

**Tentative ruling:**

**The court will use this hearing as a further status conference.**

14. 13-31379-D-12 DAVID/DENEILLE LIND
GMW-4

CONTINUED COUNTER MOTION TO DISMISS CASE
12-23-13 [77]

15. 13-30483-D-7 GARY/SHARON SPARKS — CONTINUED MOTION TO DISMISS CASE
TOG-3 — 1-6-14 [78]

**Final ruling:**

**The debtors' motion to convert their case to a Chapter 13 was granted on February 7, 2014. As such, this motion will be denied as moot by minute order. No appearance is necessary.**

16. 11-22685-D-7 BLUE RIBBON STAIRS, INC. — MOTION FOR RELIEF FROM AUTOMATIC STAY
JHW-1 — 1-21-14 [1072]
PERRIS CLC, LLC VS.

**Final ruling:**

**This matter is resolved without oral argument. This is Perris CLC, LLC's motion seeking relief from automatic stay to pursue available insurance proceeds. The court's records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is cause for granting limited relief from stay to allow the moving party to proceed with litigation, as is necessary, to collect against available insurance proceeds. Accordingly, the court will grant limited relief from stay to allow the moving party to proceed to judgment against the debtor for the limited purpose of pursuing any available insurance proceeds. There will be no further relief afforded. Moving party is to submit an appropriate order. No appearance is necessary.**

17. 11-22685-D-7 BLUE RIBBON STAIRS, INC. — MOTION FOR RELIEF FROM AUTOMATIC STAY
WSH-7670 — 1-8-14 [1061]
KB HOME COASTAL, INC. VS.

**Final ruling:**

**This matter is resolved without oral argument. This is KB Home Coastal, Inc.'s motion seeking relief from automatic stay to pursue available insurance proceeds. The court's records indicate that no timely opposition has been filed. The motion along with the supporting pleadings demonstrate that there is cause for granting limited relief from stay to allow the moving party to proceed with litigation, as is necessary, to collect against available insurance proceeds. Accordingly, the court will grant limited relief from stay to allow the moving party to proceed to judgment against the debtor for the limited purpose of pursuing any available insurance proceeds. There will be no further relief afforded. Moving party is to submit an appropriate order. No appearance is necessary.**

18. 10-51390-D-7 CURT/WENDY DOWHOWER — MOTION FOR RELIEF FROM AUTOMATIC STAY
NATIONSTAR MORTGAGE, LLC VS. — 1-14-14 [77]

**Final ruling:**

**The motion is denied for the following reasons: (1) the moving party failed to include an appropriate docket control number as required by LBR 9014-1(c); and (2) the notice of hearing failed to include information required by LBR 9014-1(d)(2). As a result of these procedural defects, the court will deny the motion by minute order. No appearance is necessary.**

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| 19. | 11-49708-D-7<br>HSM-11 | RICHARD/NOEME SILVA | MOTION FOR COMPENSATION FOR GONZALES AND SISTO, LLP, ACCOUNTANT(S), FEES: $4,655.00, EXPENSES: $5.60<br>1-27-14 [214] |
| 20. | 11-49708-D-7<br>HSM-12 | RICHARD/NOEME SILVA | MOTION FOR COMPENSATION BY THE LAW OFFICE OF HEFNER, STARK & MAROIS, LLP FOR HOWARD S. NEVINS, TRUSTEE'S ATTORNEY(S), FEES: $81,810.75, EXPENSES: $1,017.65<br>1-27-14 [219] |
| 21. | 13-20823-D-11<br>MHK-11 | MELVIN/DARLENE SHIMADA | MOTION TO USE CASH COLLATERAL<br>1-30-14 [316] |
| 22. | 13-20823-D-11<br>MHK-12 | MELVIN/DARLENE SHIMADA | MOTION TO USE CASH COLLATERAL<br>1-30-14 [310] |

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| 23. | 13-29928-D-7 | ARMANDO SANCHEZ | APPLICATION FOR WAIVER OF REOPEN FEE<br>1-27-14 [65] |
| 24. | 13-35828-D-7<br>MRL-1 | AARON/JESSIE PLUBELL | MOTION TO CONVERT CASE TO CHAPTER 13<br>2-4-14 [13] |
| 25. | 13-35134-D-7<br>HSM-2 | HESS ROAD STORAGE LLC | MOTION TO ABANDON<br>1-28-14 [19] |
| 26. | 13-34135-D-7 | BALBIR SANDHU | TRUSTEE'S MOTION TO DISMISS FOR FAILURE TO APPEAR AT SEC. 341(A) MEETING OF CREDITORS<br>1-21-14 [16] |

27. 13-35561-D-7 GAM-1 — RAYMUNDO/MARTHA CAMACHO — CONTINUED MOTION TO COMPEL ABANDONMENT
12-23-13 [10]

28. 09-29162-D-11 SH-242 — SK FOODS, L.P. — MOTION TO EMPLOY ROBERT C. GREELEY AS ESTATE PROFESSIONAL - RECEIVER
1-28-14 [4650]

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

**Tentative ruling:**

**This is the motion of Bradley Sharp, the Chapter 11 trustee in this case, to employ Robert C. Greeley as a professional to render services on behalf of the estate. The motion seeks authority to employ Mr. Greeley to manage and sell real property assets of entities that have been substantively consolidated with the debtor. The motion was brought pursuant to LBR 9014-1(f)(2); thus, the court will entertain opposition, if any, at the hearing. However, the court has preliminary concerns.**

**The services that Mr. Greeley is to perform appear to be services that the trustee himself should perform. The management and sale of the real property assets that are at issue are now assets of the estate and should be managed, and if sold, by the trustee. Is appears that employing Mr. Greeley to perform work the trustee should be doing, will unnecessarily result in higher administrative costs to the estate. The trustee and his counsel should be prepared to address these issues at the hearing.**

29. 09-29162-D-11 SH-243 — SK FOODS, L.P. — MOTION TO EMPLOY MARK A. SERLIN AS SPECIAL COUNSEL
1-28-14 [4655]

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

**Tentative ruling:**

**This is the motion of Bradley Sharp, the Chapter 11 trustee in this case, for approval to employ Mark Serlin as special counsel for the purpose of advising Robert Greeley (See calendar item no. 28 above.). The motion was brought pursuant to LBR 9014-1(f)(2); thus, the court will entertain opposition, if any, at the hearing. However, the court has preliminary concerns.**

**For the reasons stated in the tentative ruling to calendar item no. 28 above, the employment of Mr. Serlin as special counsel appears to be an administrative cost that is unwarranted. The trustee and his counsel should be prepared to address these issues at the hearing.**

30. 09-29162-D-11 SK FOODS, L.P. MOTION TO EMPLOY SCHUIL & ASSOCIATES REAL ESTATE, INC. AS BROKER(S)
MAS-1 2-5-14 [4672]

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

**Tentative ruling:**

**This is the motion of proposed estate professional Robert C. Greeley for approval of five listing agreements with Schuil and Associates Real Estate Inc. ("Schuil") for five real properties located in Kings County, California. The motion was brought pursuant to LBR 9014-1(f)(2); thus, the court will entertain opposition, if any, at the hearing. However, the court has a preliminary concern.**

**In essence, the motion seeks approval of the employment of Schuil as a professional acting on behalf of the estate. Although § 327(a) technically requires the trustee to employ only persons who do not hold or represent an interest adverse to the estate and who are disinterested persons, whereas here, it is not the trustee who proposes to employ Schuil, the court believes the same standards should apply to Schuil's employment. The only evidence as to Schuil's status as a disinterested person and a person who does not hold or represent an interest adverse to the estate is Mr. Greeley's testimony that he has questioned Schuil about its relationship, if any, with the debtor, and that Schuil informed him it has not represented any of the entities that were the subject of the receivership estate or their principals, and has not represented the trustee prior to this engagement.**

**Even if this testimony were not hearsay, it would be insufficient because it does not touch on all the connections required by Fed. R. Bankr. P. 2014(a) to be disclosed. Absent a declaration containing admissible evidence, disclosing all of Schuil's connections with all the entities listed in Fed. R. Bankr. P. 2014(a), and concluding with the statement required by LBR 2014-1, the court is inclined to deny the motion.**

**The court will hear the matter.**

31. 13-35762-D-12 JOSE DASILVA CONTINUED MOTION TO EMPLOY FRED A. SILVA AS SPECIAL COUNSEL
MF-3 1-10-14 [30]

**Final ruling:**

**This motion has been granted by order entered on February 14, 2014. As such, this hearing is removed from calendar.**

32. 13-35762-D-12 JOSE DASILVA
MF-4

CONTINUED AMENDED MOTION TO USE CASH COLLATERAL
2-5-14 [70]

33. 13-28369-D-7 EDWIN GERBER
14-2006 SAC-1
BELL V. DEWALD

MOTION TO DISMISS ADVERSARY PROCEEDING
1-22-14 [9]

**Tentative ruling:**

**This is the motion of defendant Dan DeWald, dba DeWald Equipment Leasing (the "defendant") to dismiss the plaintiff's complaint in this adversary proceeding (the "complaint") pursuant to Fed. R. Civ. P. 12(b)(6), made applicable herein by Fed. R. Bankr. P. 7012(b), for failure to state a claim upon which relief can be granted. Plaintiff John Bell, the chapter 7 trustee in the underlying case in which this adversary proceeding is pending (the "trustee"), has filed opposition, and the defendant has filed a reply. For the following reasons, the motion will be granted in part.[1]**

**The trustee's complaint is based on certain transactions within the two years preceding the filing of the underlying bankruptcy case whereby the defendant claims to have purchased a variety of vehicles from Edwin Gerber (the "debtor") for $127,900, and whereby the same vehicles were allegedly leased back to the debtor by the defendant.[2] The trustee claims some, if not all, of the vehicles were not actually transferred to the defendant, and that the vehicles were in the possession and under the control of the debtor at the time of his bankruptcy filing. The trustee alleges the leases "were in furtherance of a scheme by the Debtor and [the defendant] to hinder, delay, and/or defraud the creditors of the Debtor by placing the Personal Property of the Debtor outside the reach of creditors." Trustee's Complaint, filed Jan. 6, 2014 ("Compl."), at 6:18-21.**

**The trustee seeks a determination that the vehicles were not actually transferred to the defendant, that they are property of the estate, and that the leases are not true leases but disguised security agreements. He also seeks (1) avoidance of the transfers of the vehicles, if there were actual transfers, as fraudulent transfers, under both federal and state law; (2) disallowance of the defendant's claims in the parent case; (3) avoidance of a post-petition transfer; (4) damages for violation of the automatic stay; (5) turnover of property and an accounting; (6) avoidance of unperfected security interests; and (7) avoidance of alleged preferential transfers. The defendant attacks these causes of action in groups.**

**The First, Sixth, Seventh, and Eighth Causes of Action**

**The defendant contends, first, that there is no actual controversy, and therefore, no basis for declaratory relief, as to whether the transactions called leases by the debtor and the defendant were true leases or disguised security agreements. There is no actual controversy, according to the defendant, because either way, the automatic stay was terminated and the vehicles were removed from the estate pursuant to §§ 362(h), 365(d)(1), and 365(p)(1). (Unless otherwise indicated, all statutory references are to the Bankruptcy Code, Title 11, United States Code.)**

**Although the moving papers do not flesh out the theory or the facts underlying it, they appear to be as follows. Pursuant to § 521(a)(2), if a debtor's schedules include debts secured by property of the estate, the debtor must, by a certain deadline, file a statement of his intentions with respect to such property, and by a later deadline, perform such intentions. If he or she fails to comply with either of these requirements by the applicable deadline, the automatic stay is terminated with respect to personal property securing the debt or subject to an unexpired lease, "and such personal property shall no longer be property of the estate . . ." § 362(h)(1).[3] The trustee may prevent this result by filing, before the applicable § 521(a)(2) deadlines, a motion for a determination that the personal property is of consequential value or benefit to the estate, which is granted by the court along with orders providing adequate protection to the creditor and requiring the debtor to turn over the property. § 362(h)(2).**

**The court takes judicial notice of the fact that the debtor filed a statement of intentions with his petition, on June 21, 2013. He did not list any of the vehicles described in the trustee's complaint, and did not amend the statement within the following 30 days (or at all).[4] Under the defendant's theory, this triggered § 362(h)(1), such that the vehicles were no longer property of the estate. The trustee did not file a motion for a determination that the vehicles were of consequential value or benefit to the estate; thus, § 362(h)(2) did not come into play to keep the vehicles in the estate.**

**As indicated, § 362(h)(1) applies whether the debtor's agreements with the defendant were true leases, as the defendant contends, or disguised security agreements, as the trustee claims. Thus, in either event, the defendant contends, the vehicles are no longer property of the estate, and the trustee's first cause of action -- for a declaration that the leases were disguised security agreements and the vehicles are property of the estate -- fails to state a claim upon which relief can be granted. The defendant claims the trustee's sixth, seventh, and eighth causes of action also fail -- because they all depend on the premise that the vehicles continue to be property of the estate.[5]**

**In response, the trustee states only that he disputes the defendant's conclusions that the automatic stay was terminated by the debtor's failure to list the vehicles in his statement of intentions and that the vehicles were therefore no longer property of the estate. The trustee takes the position these are issues to be determined after discovery and trial.**

**These issues may also be appropriate for determination on a motion for summary judgment, and but for one fact, the court would likely treat this motion as such pursuant to Fed. R. Civ. P. 12(d), incorporated herein by Fed. R. Bankr. P. 7012(b). However, it appears as a matter of law that § 362(h)(1) was <u>not</u> triggered in this**

case, and that it does matter whether the transactions were true leases or disguised security agreements; thus, as to the trustee's first, sixth, seventh, and eighth causes of action, the defendant's motion will be denied.

The defendant cites Samson v. Western Capital Partners, LLC (In re Blixseth), 684 F.3d 865, 871-72 (9th Cir. 2012), correctly, as holding that a debtor's failure to comply with the requirements of § 521(a)(2) triggers § 362(h)(1) even as to property not scheduled by the debtor. However, the court in that case also addressed the trustee's concern that this result would deprive the estate of personal property in every instance where the debtor omits the property from his schedules, which would unfairly harm creditors. The court's response was this:

> The Trustee ignores that §§ 521(a)(2) and 362(h) apply only if the schedules list debts secured by personal property. As long as a debt is scheduled as secured, it provides notice to other creditors and the trustee that there is a creditor with a security interest in personal property of the estate. If there is a concern about the benefit that property may have for the estate, the trustee has the ability to keep the property protected by filing a motion under § 362(h).

Id. at 872.

In the present case, the debtor did not schedule any secured debt to the defendant; instead, he listed him (by his dba, DeWald Equipment Leasing) on Schedule F; that is, as an unsecured creditor, with no indication of the consideration for the debt. In the column where the amount of the debt was to be listed, the debtor stated "Notice Only." The debtor did list the vehicles in his Statement of Financial Affairs as having been the subject of leases with DeWald Equipment Leasing under which the debtor defaulted on March 4, 2013; he also listed the vehicles as having been repossessed by or returned to DeWald within the year prior to the bankruptcy filing. However, there was no way to determine from the debtor's schedules of creditors that the defendant (or anyone else) might have a security interest in the vehicles, and under Blixseth, § 362(h)(1) was not triggered.[6]

Returning to the true lease versus disguised security agreement question, the trustee's first cause of action sets up that issue as an actual controversy, which, as indicated by the present motion, it clearly is. Determination of the issue is necessary to the determination of whether the vehicles are property of the estate, and thus, the issue is appropriate for declaratory relief. As discussed above, the defendant's theory that either way, § 362(h)(1) was triggered and the vehicles are no longer property of the estate is incorrect. The defendant's theory is the same for the first, sixth, seventh, and eighth causes of action of the complaint; thus, as to all of those, the motion will be denied.[7]

The Second, Third, and Fourth Causes of Action

Having initially pled that the vehicles were not actually transferred by the debtor to the defendant, the trustee seeks, in the alternative, to avoid the transfers of the vehicles as fraudulent transfers (second and third causes of action) and to disallow the defendant's claims filed in the parent case pursuant to § 502(d) (fourth cause of action). The trustee alleges the transfers were made with the actual intent to hinder, delay, or defraud creditors of the debtor.

The defendant's challenge to these causes of action depends on the following statement in his supporting memorandum: "The Trustee acknowledges that [the

defendant] paid [the debtor] $127,900 for the [vehicles]." Memorandum of Points and Authorities, filed Jan. 22, 2014 ("Mem."), at 8:21-22. Thus, in the defendant's view,

> [t]he Trustee must plead facts explaining how buying the property for $127,900 could be a fraud on the creditors. While the Trustee could plead that the property was worth more than $127,900, he will not do so because the property has been appraised and it appears that the appraised value is less than $127,900. In other words, the Trustee cannot make this allegation and still comply with Rule 9011 of the Federal Rules of Bankruptcy Procedure.

Id. at 9:8-12.

The problem with this argument is simply that the language in the complaint cited for the proposition that the trustee acknowledges the payments, ¶¶ 17 and 26, does not support that proposition. Paragraph 17 states: "[The defendant] claims to have purchased a variety of motorcycles, classic cars, a golf cart, trailers, and boats from the Debtor on or about August 8, 2011 for $107,900. The Debtor did not disclose an alleged sale to DeWald on his Statement of Financial Affairs." Compl., ¶ 17 (emphasis added). Paragraph 26 states: "On or about February 1, 2012, [the defendant] allegedly purchased a 1999 Ford Truck from the Debtor for $20,000." Compl., ¶ 26 (emphasis added). For this reason, as to these causes of action, the motion will be denied.

The Fifth Cause of Action

By this cause of action, the trustee seeks to avoid as unperfected any lien the defendant may have in the two Rolex watches. The defendant contends (1) the trustee has not pled any facts that would suggest the lien was not perfected, and (2) the lien was perfected by the defendant taking possession.[8] According to the defendant, "[i]f the Trustee contends the liens were not perfected, then he must plead that [the defendant] did not have possession. The Trustee will not make this allegation because to do so would violate Rule 9011 of the Federal Rules of Bankruptcy Procedure." Mem. at 10:20-22. The problem with this argument is that in earlier paragraphs incorporated into the fifth cause of action, shortly after pleading that the debtor pledged the two watches (and some vehicles) to the defendant as additional collateral, the trustee pled that (1) "[a]t all times, the Debtor has maintained control over the Personal Property" (Compl., ¶ 36); and (2) "[t]he Personal Property was not actually transferred from the Debtor to [the defendant]" (Compl., ¶ 45). These allegations, taken as true, are sufficient to plausibly suggest that the trustee is entitled to the relief sought in the fifth cause of action. See Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965, 167 L. Ed. 2d 929, 945 (2007). Thus, as to the fifth cause of action, the motion will be denied.

The Ninth Cause of Action

The trustee's ninth cause of action is virtually identical to the fifth, except that it states (referring to the alleged leases) that the defendant "did not properly perfect his interest in certain personal property therein by taking possession of said property or by filing a UCC-1 Financing Statement." Compl. at 15:9-11. (Because the watches were, together with some vehicles, the subject of one of the alleged leases, this cause of action appears to duplicate the fifth, as to the watches.) The defendant contends that "[w]ith respect to the vehicles, the exclusive method for perfection is the issuance of a certificate of title by the

Department of Motor Vehicles listing [the defendant] as lienholder." Mem. at 12:11-12. The defendant is correct.[9] He is also correct about the allegations of the complaint, which nowhere suggests that the defendant failed to perfect a security interest by filing with the Department of Motor Vehicles the appropriate certificate of title naming himself as lienholder.[10] Thus, as to the ninth cause of action, the complaint, taken as true, does not plausibly suggest that the trustee is entitled to the relief sought, and the motion will be granted.

The Tenth Cause of Action

Finally, the trustee's tenth cause of action incorporates all the prior paragraphs of the complaint, and then alleges that within 90 days of the bankruptcy filing, the debtor transferred to the defendant "certain Personal Property on account of an antecedent debt." Compl. at 15:26-16:2. The cause of action adds, in conclusory terms only, that the transfer was made while the debtor was insolvent and enabled the defendant to receive more than he would have in a chapter 7 liquidation.

The defendant is correct -- there are no factual allegations anywhere in the complaint suggesting that a transfer took place within the 90 days prior to the filing of the debtor's petition; there are no facts suggesting the debtor was insolvent at the time, and none suggesting the defendant received more by way of the transfer than he would have received in a chapter 7 case. "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009), citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

The trustee's response is unavailing. He merely suggests he has "alleged sufficient facts to meet the facial plausibility standard," and adds that he "is not aware of all of the facts surrounding the transactions . . ., and accordingly needs to conduct discovery to fill in these facts." Trustee's Opposition, filed Feb. 5, 2014, at 11:19-21. He is incorrect -- his complaint contains no factual allegations at all; it merely recites the elements of a preference cause of action. "Rule 8 [Fed. R. Civ. P. 8] marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." Iqbal, 556 U.S. at 678-79. Thus, as to the tenth cause of action, the motion will be granted.

To conclude, as to the first through eighth causes of action, the motion will be denied. As to the ninth and tenth causes of action, the court will conditionally grant the motion. The trustee may file an amended complaint within 20 days from the date of the order on the motion; if he does not, those causes of action will be dismissed without further notice or hearing. If the trustee files an amended complaint within 20 days from the date of the order, the defendant shall file an answer or other response in accordance with applicable rules.

The court will hear the matter.

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1 As a preliminary matter, the court rejects the trustee's argument that the motion should be denied because the original notice of hearing incorrectly listed the hearing time as 1:30 p.m., and the amended notice, which was, like the original, a notice under LBR 9014-1(f)(1), was served with only 23 days' notice.

2 There were two alleged leases transactions, one or the other of which included

motorcycles, classic cars, a golf cart, trailers, boats, at least one truck, and several other vehicles, as well as two Rolex watches. In addition, the first lease is alleged to have been modified to replace certain of the items with others. These nuances are not important for this decision. (For the sake of simplicity, the court will refer to the vehicles, watches, and other items as simply the vehicles.)

3 Although § 521(a)(2) does not refer to property subject to an unexpired lease, § 362(h)(1) does -- it provides that the stay is terminated with respect to personal property subject to an unexpired lease, and such property shall no longer be property of the estate, if the debtor fails to timely file a statement of intention with respect to such property indicating his intention whether to assume the unexpired lease under § 365(p) if the trustee does not do so.

4 He also did not list any of the vehicles on his Schedule B.

5 The sixth cause of action is to avoid a post-petition transfer of the vehicle that was the subject of the second lease; the seventh, for damages for violation of the automatic stay when the defendant obtained a certificate of title naming him as the owner of that vehicle; and the eighth, for turnover of all the vehicles.

6 It is arguable the statement in Blixseth that "§§ 521(a)(2) and 362(h) apply only if the schedules list debts secured by personal property" (684 F.3d at 872) was dictum. If so, however, the court agrees with the conclusion, finding that it comports with the plain language of the statute:

> The debtor shall . . . if [his] schedule of assets and liabilities includes debts which are secured by property of the estate -- (A) [by a specified deadline] file with the clerk a statement of his intention with respect to the retention or surrender of such property . . . .

§ 521(a)(2) (emphasis added).

7 In two summary sentences (Compl. at 2:1-2, 13:7-9), the trustee includes the fifth cause of action in this group. However, the trustee's argument as to the fifth cause of action (Compl. at 10:11-23) is a different argument; it will be separately discussed below.

8 While this second argument might be appropriate for a summary judgment motion, it is not appropriate for a Rule 12(b)(6) motion, and will not be further considered.

9 With exceptions not relevant here, "no security interest in any vehicle registered under this code . . . is perfected until the secured party . . . has deposited . . . with the [Department of Motor Vehicles] . . . a properly endorsed certificate of ownership to the vehicle subject to the security interest showing the secured party as legal owner . . . and upon payment of the fees as provided in this code." Cal. Veh. Code § 6300. With the same exceptions, "the method provided in this chapter for perfecting a security interest on a vehicle registered under this code is exclusive, but the effect of such perfection, and the creation, attachment, priority and validity of such security interest shall be governed by the Uniform Commercial Code." Cal. Veh. Code § 6303.

10 In fact, the complaint alleges that as of the time of the bankruptcy filing, the certificates of title to the vehicles listed the defendant as the lienholder.

34. 13-23371-D-11 JUAN/MARGARITA RAMIREZ
TCS-7

CONTINUED MOTION TO VALUE COLLATERAL OF THE BANK OF NEW YORK MELLON
11-13-13 [107]

**Final ruling:**

**This motion has been resolved by stipulated order entered February 7, 2014. Accordingly, the hearing is removed from calendar. No appearance is necessary.**

35. 13-35671-D-11 CARLYLE STATION LLC

CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION
12-13-13 [1]

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

36. 13-35671-D-11 CARLYLE STATION LLC
SJK-1
HERITAGE BANK OF COMMERCE
VS.

MOTION FOR RELIEF FROM AUTOMATIC STAY
1-28-14 [30]

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

37. 13-35671-D-11 CARLYLE STATION LLC
TMP-2

CONTINUED MOTION TO USE CASH COLLATERAL O.S.T.
1-27-14 [26]

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

38. 13-35082-D-7 CSL-1 — SANTAREJAI/DASHANNA BROWN — MOTION FOR RELIEF FROM AUTOMATIC STAY
MINZHU TANG VS.
1-31-14 [38]

**Final ruling:**

**The motion is denied for the following reasons: (1) the notice of hearing does not include the information required by LBR 9014-1(d)(2); and (2) moving party failed to file a relief from stay cover sheet as required by LBR 4001-1(a)(3). As a result of these defects, the court will deny the motion by minute order. No appearance is necessary.**

39. 14-20196-D-11 — LABOUR OF LOVE CHURCH OF GOD IN CHRIST — CONTINUED ORDER TO SHOW CAUSE
1-15-14 [11]

40. 14-20196-D-11 JWC-1 — LABOUR OF LOVE CHURCH OF GOD IN CHRIST — MOTION FOR RELIEF FROM AUTOMATIC STAY
2-4-14 [19]
COMERICA BANK VS.

41. 14-20196-D-11 — LABOUR OF LOVE CHURCH OF GOD IN CHRIST — CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION
1-9-14 [1]