Appendix A

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Appendix A

Rule 14.1(i)(i)—Appellate Opinion/Order

Fifth Cir. (July 8, 2019) – Aff'd with Sanctions.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-40272
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
July 8, 2019
Lyle W. Cayce
Clerk

HARMON L. TAYLOR,

Plaintiff-Appellant

v.

CITY OF SHERMAN, a Municipal Corporation; BRANDON SHELBY, City Attorney, officially and individually; CODY SHOOK, Police Officer, officially and individually; ASSISTING OFFICER, FNU LNU, Police Officer, officially and individually; ZACHARY FLORES, Chief of Police, officially; BOB UTTER TOWING, Driver; BOB UTTER TOWING, Driver's Assistant; MIDWAY STORAGE FACILITY; WHITNEY BREWSTER, Executive Director, Texas Department of Motor Vehicles, officially and individually,

Defendants-Appellees

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:17-CV-488

Before DENNIS, CLEMENT, and OWEN, Circuit Judges.

PER CURIAM:*

Harmon L. Taylor, proceeding pro se, appeals the district court's sua sponte dismissal without prejudice of his federal civil rights suit pursuant to [⊥ 2] Federal Rule of Civil Procedure 41(b) for want of prosecution and failure to obey the court's orders. We review for abuse of discretion. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633 (1962).

Despite receiving notice of his obligations under court orders, Taylor failed to participate in an ordered Federal Rule of Civil Procedure 26(f) attorney conference, failed to appear at the January 19, 2018 Federal Rule of Civil Procedure 16 management conference, and failed to appear at the subsequent February 1, 2018 show cause hearing as ordered. Taylor's refusal to participate in the case was based on his incorrect belief that the referral to the magistrate judge (MJ) for pretrial proceedings was unlawful without his consent. We have held that a litigant's consent is not required prior to referral before a MJ where, as here, "the ultimate decision-

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

making authority [is] retained by the district court." *Jackson v. Cain*, 864 F.2d 1235, 1242 (5th Cir. 1989). Dismissal for failure to prosecute and comply with court orders under these facts was not an abuse of discretion. *See* FED. R. CIV. P. 41(b); *McCullough*, 835 F.2d at 1127.

Appellees City of Sherman, Bob Utter Towing, and Midway Storage Facility contend that they are entitled to recover costs and attorney's fees against Taylor in light of our previous sanction warning against Taylor in Taylor v. Hyde [Hale], 396 F. App'x [Fed. Appx.] 116, 117 (5th Cir. 2010). These appellees fail to show entitlement to compensatory sanctions. *Fleming & Assocs. v. Newby & Tittle*, 529 F.3d 631, 639 (5th Cir. 2008).

However, Taylor's brief does contain numerous instances of inflammatory and derogatory language directed toward law enforcement in general and the United States District Court for the Eastern District of Texas and its judges in particular, in violation of our prior order. While a pro se litigant's pleadings are entitled to liberal construction, we "simply will not [⊥ 3] allow liberal pleading rules and pro se practice to be a vehicle for abusive documents." *Theriault v. Silber*, 579 F.2d 302, 303 (5th Cir, 1978).

Accordingly, sanctions are imposed against Taylor in the amount of $500, payable to the Clerk of this court. *See Coghian v. Starkey*, 852 F.2d 806, 808 (5th Cir. 1988). Taylor is barred from filing any pro se civil appeal in this court or any pro se initial civil pleading in any court which is subject to this court's jurisdiction, without the advance written permission of a judge of the forum court or of this court, until the sanction is paid in full. *See id.* Taylor is also

cautioned that any future filings containing abusive, disparaging and contemptuous language may result in the imposition of further sanctions, including further restrictions on his ability to file appeals or pleadings in this court or in any court which is subject to this court's jurisdiction.

AFFIRMED; SANCTIONS IMPOSED.

Rule 14.1(i)(ii)—Additional Orders

E.D.Tex. (Feb. 28, 2018) – Denying relief in equity and Dismissing w/o Prejudice.

Case 4:17-cv-00488-ALM-CAN Document 76 Filed 02/28/18 Page 1 of 2 PageID #: 556

United States District Court
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

HARMON L. TAYLOR	§
	§
v.	§
	§
CITY OF SHERMAN, ET AL.	§
	§
	§ Civil Action No. 4:17-CV-488
	§ (Judge Mazzant/Judge Nowak)
	§
	§

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Came on for consideration the report of the United States Magistrate Judge in this action, this matter having been heretofore referred to the Magistrate Judge pursuant to 28 U.S.C. § 636. On February 1, 2018, the report of the Magistrate Judge (Dkt. #72) was entered containing proposed findings of fact and recommendations that Plaintiff Harmon L. Taylor's claims be dismissed pursuant to Federal Rule of Civil Procedure 41. Plaintiff acknowledged receipt of the report on February 5, 2018 (Dkt. #74).

Having received the report of the United States Magistrate Judge, and no objections thereto having been timely filed, this Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and adopts the Magistrate Judge's report as the findings and conclusions of the Court.

It is, therefore, **ORDERED** that Plaintiff's claims against Defendants are **DISMISSED WITHOUT PREJUDICE**.

All relief not previously granted is **DENIED**, including specifically Plaintiff's Motions for Temporary Restraining Order (Dkts. #2, #24) and Motions for Preliminary Injunction (Dkts. #3, #25). [⊥ 2]

The Clerk is directed to **CLOSE** this civil action.

IT IS SO ORDERED.

SIGNED this 28th day of February, 2018.

/s/ Amos Mazzant
AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

E.D.Tex. (Feb. 1, 2018) – Unconsented-to magistrate report.

Case 4:17-cv-00488-ALM-CAN Document 72 Filed 02/01/18 Page 1 of 4 PageID #: 549

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS SHERMAN DIVISION

HARMON L. TAYLOR, Plaintiff,	§
v.	§
CITY OF SHERMAN, ET AL., Defendants.	§
	§ CIVIL ACTION NO. 4:17-CV-00488-ALM-CAN

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pro se Plaintiff Harmon L. Taylor filed this action on July 7, 2017 [Dkt. 1]. The case was referred to the undersigned United States Magistrate Judge for pre-trial purposes in accordance with 28 U.S.C. § 636. Subsequent to filing, Plaintiff has failed to prosecute

this action and has failed to comply with court orders: Plaintiff failed to participate in the Rule 26(f) meeting, failed to appear at the Rule 16 Management Conference and Motions Hearing, and failed to appear at the subsequent Show Cause hearing ordered by the Court.

More specifically, on January 9, 2018, the Court set each of Plaintiff Harmon L. Taylor's Motions for Temporary Restraining Order [Dkts. 2, 24], and Motions for Preliminary Injunction [Dkts. 3, 25], and Defendant City of Sherman, Texas's Rule 12(b)(6) Motion to Dismiss [Dkt. 18], Defendant Whitney Brewster's Motion to Dismiss on the Basis of Official, Qualified, Eleventh Amendment Immunity and Absence of Jurisdiction [Dkt. 19] and Rule 12(b)(1) and 12(b)(6) Motion to Dismiss [Dkt. 21], Defendants Bob Utter Towing and Midway Storage Facility's Rule 12(b)(6) Motion to Dismiss [Dkt. 20] for hearing on Friday, January 19, 2018, at 2:00 p.m., at the United States Courthouse Annex, 200 N. Travis Street, Chase Bank Building, Mezzanine Level, Sherman, Texas 75090. The Court also scheduled the Rule 16 Management Conference [⊥ 2] for that same date. [1] Plaintiff and Counsel for each of defendants were directed to appear. Plaintiff acknowledged receipt of the Order setting hearing on January 12,

[1] In its Order Governing Procedures, in addition to setting the Rule 16 Conference, the Court ordered Plaintiff and Defendants to "confer and attempt in good faith to agree on a proposed scheduling order and to electronically file a joint report outlining their proposals" [Dkt. 22 at 2]. Plaintiff also refused to participate in the Rule 26(f) Joint Conference [Dkt. 57].

2018 [Dkt. 67]. Notwithstanding Plaintiff's receipt of the Order, Plaintiff failed to comply.

Indeed, on January 19, 2018, counsel for Defendants City of Sherman, Whitney Brewster, Bob Utter Towing and Midway Storage appeared in person. Plaintiff failed to appear, despite being ordered to do so. Neither the Court, nor the clerk's office were contacted by Plaintiff with any excuse or other reason for Plaintiff's failure to appear; the Court delayed the start of the hearing for forty-five (45) minutes to allow Plaintiff an opportunity to appear.

On January 22, 2018, the Court ordered Plaintiff to appear in person on February 1, 2018 at 1:30 p.m., and show cause for his failure to prosecute this action and comply with Court's Orders, and explain why he failed to appear at the Rule 16 Management Conference and Motions Hearing scheduled for January 19, 2018 [Dkt. 68]. The Court specifically cautioned Plaintiff that his failure to comply with the Court's Show Cause Order would "result in a recommendation for the dismissal of the claims filed by Plaintiff without further notice." Delivery was made of the Court's Show Cause Order to Plaintiff's residence on January 31, 2018 [*see* Dkt. generally].

Plaintiff failed to appear at the February 1 Hearing. The Court allowed a thirty-five (35) minute delay to allow Plaintiff an opportunity to appear. Further, neither the Court nor the Clerk's Office was contacted by Plaintiff with any excuse or other reason for Plaintiff's failure to appear.

Under Rule 41(b), a court may order the dismissal of an action "[i]f the plaintiff fails to prosecute or to comply with these rules or a court order." FED. R.

CIV. P. 41(b); *see also* Local Rule CV-41 (authorizing the district court to dismiss an action for want of prosecution *sua sponte* [⊥ 3] whenever necessary to achieve the orderly and expeditions disposition of cases); *Larson v. Scott*, 157 F.3d 1030, 1031 (5th Cir. 1998); *see generally McCullough v. Lynaugh*, 835 F.2d 1126 (5th Cir. 1988) (a district court may dismiss an action for failure to prosecute or to comply with an order of the court); *Magnuson v. Elec. Data Sys. Corp.*, 252 F.3d 436, 2001 WL 360841 (5th Cir. 2001); *Beard v. Experian Info. Sols. Inc.*, 214 F. App'x 459 [Fed. Appx.] (5th Cir. 2007); FED. R. CIV. P. 41(b). "This authority [under Rule 41(b)] flows from the court's inherent power to control its docket and prevent undue delays in the disposition of pending cases." *Boudwin v. Graystone Ins. Co., Ltd.*, 756 F.2d 399, 401 (5th Cir. 1985) (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962)). The exercise of the power to dismiss for failure to prosecute is committed to the sound discretion of the Court and appellate review is confined solely to whether the Court's discretion was abused. *Green v. Forney Eng'g Co.*, 589 F.2d 243, 248 (5th Cir. 1979); *Lopez v. Aransas County Indep. Sch. Dist.*, 570 F.2d 541, 544 (5th Cir. 1978).

The Court recommends the instant suit be dismissed for want of prosecution and/or failure to obey Court Orders. Here, Plaintiff failed to participate in the Rule 26(f) conference or appear for the January 19 Rule 16 Management Conference and Motions Hearing. Moreover, Plaintiff failed to appear for the Show Cause Hearing, despite the Court's explicit warning that failure to do so would result in a recommendation of dismissal. By failing

to appear for the 26(f) conference, Rule 16 Management Conference, Motions Hearing, and Show Cause Hearing scheduled in this action, notwithstanding direct Orders from this Court, Plaintiff has both failed to diligently prosecute this case, and has failed to obey the Court's Orders.

CONCLUSION AND RECOMMENDATION

Accordingly, the Court recommends that this case be dismissed pursuant to Federal Rule of Civil Procedure 41(b); and that each of Plaintiff's claims against Defendants be **DISMISSED WITHOUT PREJUDICE**. [⊥ 4]

Within fourteen (14) days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th

Cir. 1996) (en banc), superseded by statute on other grounds, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

SIGNED this 1st day of February, 2018.

/s/ *CAN*
Christine A. Nowak
UNITED STATES MAGISTRATE JUDGE

E.D.Tex. (Dec. 19, 2017) – Denying Mot. Disqualify/Transfer.

Case 4:17-cv-00488-ALM-CAN Document 65 Filed 12/19/17 Page 1 of 16 PageID #: 515

United States District Court
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

HARMON L. TAYLOR	§
	§
Plaintiff,	§
	§
V.	§
	§
CITY OF SHERMAN, ET AL.	§
	§
Defendants,	§

§
§
§
§
§ CASE NO. 4:17cv488
§ Judge Mazzant/Judge Nowak
§
§
§

ORDER DENYING PLAINTIFF'S MOTION TO TRANSFER DISTRICTS DUE TO DISQUALIFICATION OF THE ENTIRE EASTERN DISTRICT

At the time of filing, the above-referenced case was assigned to the undersigned and referred to Magistrate Judge Christine A. Nowak for pretrial purposes in accordance with 28 U.S.C. § 636(b)(1)(A). Plaintiff Harmon L. Taylor, proceeding pro se ("Plaintiff") has filed a Motion to Transfer Districts Due to the Disqualification of the Entire Eastern District (Dkt. #42). In his motion, Plaintiff asserts the judges of the Eastern District of Texas are disqualified because of the district-wide policy of magistrate judge "referral" at the time of case filing in violation of 28 U.S.C. § 636. Thus, Plaintiff seeks a transfer of the above case to the Northern District of Texas, Dallas Division. Also before the Court are the following related motions seeking to strike orders entered by Magistrate Judge Nowak in this case:

(1) Motion to Strike Non-Consented to Magistrate "Orders" (17, 18) (Dkt. # 26);

(2) Motion to Strike Non-Consented to Magistrate "Order" (22-1) (Dkt. # 43);

(3) Motion to Strike Non-Consented to Magistrate "Order" (30-1) (Dkt. # 47);

(4) Motion to Strike Non-Consented to Magistrate "Order" (41-1) (Dkt. # 48); and

(5) Motion to Strike Non-Consented to Magistrate "Order" (58-1) (Dkt. # 63). [⊥ 2]

The Court, having carefully reviewed the relevant briefing, is of the opinion Plaintiff's motions should be **DENIED**.

FACTUAL BACKGROUND

On July 7, 2017, Plaintiff filed the above case against the City of Sherman; Brandon Shelby, individually and in his official capacity as city attorney; Cody Shook, individually and in his official capacity as police officer; Zachary Flores, in his official capacity as chief of police; Bob Utter Towing; Midway Storage Facility; and Whitney Brewster, Executive Director of the Texas Department of Motor Vehicles, in both her individual and official capacities. [1] (Dkt. # 1). In his complaint, Plaintiff asserts this matter contains a federal question in that the subject matter concerns Plaintiff's right to be free from unreasonable seizure. *Id.*, ¶ 2.

According to Plaintiff, on June 18, 2017, he was stopped by City of Sherman police officer Cody Shook ("Shook") for the "alleged want of a DMV-approved tag on the rear of the car." *Id.*, ¶¶ 19, 20. According to Plaintiff, as the conversation developed, "Shook

[1] Plaintiff also sued three unknown defendants (assistant police officer, driver, and driver's assistant).

made inquiry about insurance. There is none." *Id.*, ¶ 22. Shook informed Plaintiff that "city policy" requires him to order towed all "uninsured vehicles." *Id.*, ¶ 23. Plaintiff further alleges as follows:

> As the conversation developed, [Plaintiff] informed the ASSISTING OFFICER, in the presence of SHOOK (the TICKETING OFFICER), that their semantics were accurate but that their facts were missing. [Plaintiff] informed them that his car was/is not a 'vehicle.'

Id., ¶ 24.

Plaintiff alleges Shook called a tow truck and "requested" Plaintiff give him the keys to the car, which Plaintiff provided. *Id.*, ¶ 27. Shook issued Plaintiff a ticket with four Transportation Code [⊥ 3] charges. [2] *Id.*, ¶ 30. Plaintiff claims he was allowed to remove groceries from his car and petty cash from the glove box. *Id.*, ¶ 33. According to Plaintiff, one of the officers saw his expired "registration" that had been left in the glove box and asked about it. *Id.*, ¶ 34.

Plaintiff alleges Bob Utter Towing showed up, and Plaintiff gave notice to the tow truck driver and his assistant (who claimed to be his daughter) that

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[2] According to the City of Sherman's Rule 12(b)(6) motion to dismiss, while Plaintiff attempts to frame this suit as a Fourth Amendment violation, "Plaintiff makes no further reference to the Fourth Amendment but instead seeks the return of his vehicle that was lawfully impounded after Plaintiff was cited by the City of Sherman Police for: 1. No driver's license; 2. No license plate on his vehicle; 3. Expired registration; and 4. No proof of financial responsibility." (Dkt. # 18 at 1).

they were stealing his car. *Id.*, ¶ 37. Plaintiff alleges they drove off with his car on a flatbed, and some time later, Plaintiff's mom received a notice in the mail "demanding ransom for the return of the car, to her, including a per/day storage cost." *Id.*, ¶¶ 38, 39. According to Plaintiff, in September of 2016, Plaintiff's mom "had terminated the 'Certificate of Title' trust, A-46, which trusts are set up clandestinely to the benefit of DMV and for which the car was the trust *res* when the original Manufacturer's Statement of Origin (MSO) is traded for the "Certificate of Title.'" *Id.*, ¶ 40. Plaintiff asserts when the MSO goes "in," and the "Certificate of Title" comes back "out," a trust is created "for which the car is the trust res and DMV holds the 'equitable title.'" *Id.*, ¶ 41. Plaintiff claims he is the only owner of the car, and he acquired full title to it from his mom in exchange for silver after she had terminated the "Certificate of Title" trust. *Id.*, ¶ 42.

Plaintiff claims that at no time was he transporting people or cargo "for hire," and he did not "consent to being regulated per 'transportation' standards, including the Transp. Code or any municipal ordinance or policy." *Id.*, ¶¶ 43-44. Plaintiff states he has demanded the return of his car, but as of the date of filing, his car had not been returned to him. *Id.*, ¶¶ 46-47. Plaintiff claims the [⊥ 4] City of Sherman and its agents or employees, along with Bob Utter Towing and Midway Storage Facility, were all acting under color of law. *Id.*, ¶ 29. Plaintiff requests a Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction to address the "emergency of getting [his] car returned to him immediately." *Id.*, ¶ 48. He also requests

equity in the form of an Order compelling Defendant Brewster to remove his car from DMV's property inventory roll. *Id.*, ¶ 49. He also requests costs. *Id.*, ¶ 51.

PROCEDURAL BACKGROUND

As noted above, at the time of filing, Plaintiff's case was assigned to the undersigned and referred to Magistrate Judge Nowak for the handling of pretrial matters. [3] Plaintiff's original complaint notes at the top "No Consent to Non-Judicial Decision-Making." On the same day he filed his complaint, Plaintiff filed a motion for temporary restraining order and a motion for preliminary injunction. (Dkt. #s 2 & 3). Plaintiff also paid the $400 filing fee.

It is the general policy of the Sherman Division for the docketing clerk to provide to pro se plaintiffs at the time of filing a "Notice of Case Assignment" to a District Judge, along with a Notice of "Magistrate Referral." On July 14, 2017, Plaintiff filed a Motion to Strike Standing Order. (Dkt. # 13).

In that motion, Plaintiff moved to strike the referral of his case to Magistrate Judge Nowak, making clear he does not consent to what he called "non-judicial decision-making." (Dkt. # 13 at 1). According to Plaintiff, the "Notice delivered at filing by the Clerk suggests that there's a magistrate referral, already." *Id.* Plaintiff reiterated he does not

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[3] The assignment to District Judge Mazzant and referral to Magistrate Judge Nowak went into effect on July 7, 2017, the date of filing. However, the Notices were not docketed by the clerk of the Court until August 9, 2017. (Dkt. # 28).

consent. He challenged the Court's "Standing [⊥ 5] Order" regarding referral, stating it purports to compel Plaintiff's consent in direct opposition to his assertion of non-consent. *Id.* at 2. Plaintiff requested the Court strike its Standing Order and reevaluate its pre-filing policy of magistrate judge referral. *Id.* at 3. According to Plaintiff:

> For there to be a form provided at filing to be submitted by those who consent, is, of course, great. Where not all the forms come back, the issue is resolved against referral. Where all the forms come back providing consent, the issue is resolved in favor of referral.

Id. However, according to Plaintiff, where the original complaint overtly states, as his does, "No Consent to Non-Judicial Decision-Making," there should be no activation of any referral policy. *Id.*
On July 19, 2017, Magistrate Judge Nowak entered an order denying Plaintiff's Motion to Strike Standing Order. (Dkt. # 16). According to Magistrate Judge Nowak, Plaintiff "conflates pretrial referral with consent to have a magistrate judge enter final judgment." *Id.* at 1. Magistrate Judge Nowak noted that although parties in a case have a right to consent to a magistrate judge entering final judgment in the case pursuant to 28 U.S.C. § 636(c), she explained "consent is not needed for pre-trial referral." *Id.* Consent is required only when a magistrate judge is appointed to conduct proceedings and enter judgment and is not required when the district judge merely refers pretrial matters to a magistrate judge for a determination of whether to hold a hearing and to make findings and recommendations. *Id.* at 1-2. According to Magistrate

Judge Nowak, to the extent Plaintiff's motion raised an objection to the case being assigned to her for final judgment or decision, such had not occurred; and to the extent Plaintiff objected to referral for pretrial proceedings, such objection was without merit. *Id.* at 2.

On August 4, 2017, Plaintiff filed the first of five Motions to Strike Non-Consented to Magistrate "Orders" (Dkt. # 26). According to Plaintiff, for civil matters, the entirety of a magistrate [⊥ 6] judge's participation in the case "is 100% based on unanimous consent," and because he did not consent, there cannot be a lawful referral at any time for any reason. (Dkt. # 26 at 2). Plaintiff sought to strike the orders previously entered by Judge Nowak at Docket Entries #17 and #18. On August 14, 2017, Plaintiff filed his current motion to transfer districts due to the disqualification of the entire Eastern District of Texas, along with a motion to strike Magistrate Judge Nowak's order entered at Docket Entry # 22. Then on August 22, Plaintiff filed two separate motions to strike Magistrate Judge Nowak's orders docketed as Docket Entries #30 and #41. Finally on September 13, 2017, Plaintiff filed a motion to strike Magistrate Judge Nowak's September 7 Order canceling the Rule 16 Management Conference pending disposition of Plaintiff's current motion to transfer districts.

PLAINTIFF'S MOTION

Plaintiff seeks the transfer of his case to another district and "proposes the practical solution of transferring this one to Dallas, which is expected to be the next closest U.S. trial court that's not tainted

by the Eastern District's compelled-consent policy." (Dkt. # 42 at 10). Plaintiff relies on the disqualification standard provided in 28 U.S.C. § 455, asserting all of the judges of this district should be disqualified based on the district-wide policy of magistrate judge referral at the time of filing. *Id.* at 10-12. Specifically, Plaintiff asserts the Court's General Order 16-10 is directly at odds with the Court's Local Rule CV-72, which provides as follows:

> **(d) Assignment of Matters to Magistrate Judges.**
> The method for assignment of duties to a magistrate judge and for the allocation of duties among the several magistrate judges of the court shall be made in accordance with orders of the court or by special designation of a district judge.
>
> **(e) Disposition of Civil Cases by Consent of the Parties – 28 U.S.C. § 636(c).**
> (1) The clerk of the court shall notify the parties in all civil cases that they may [⊥ 7] consent to have a magistrate judge conduct any or all proceedings in the case and order the entry of a final judgment. Additional notices may be furnished to the parties at later stages of the proceedings, and may be included with pretrial notices and instructions.
> (2) The clerk shall not file consent forms unless that have been signed by all the parties or their respective counsel in a case. No consent form will be made available, nor will the contents be made known to any judge, unless all parties have consented to the reference to a magistrate judge.
> ...

Local Rule CV-72 (d) & (e). [4]

General Order 16-10 was signed by Chief Judge Clark on September 1, 2016 and addresses "divisional assignment and apportionment of cases among United States Magistrate Judges" in the Eastern District of Texas. Among other things, General Order 16-10 "referred and assigned" to the specific magistrate judges in each division a percentage of the pro se non-prisoner cases. The result is that 100% of all pro se non-prisoner cases will be referred to a magistrate judge for pretrial handling. [5] Plaintiff takes issue with the Eastern

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[4] According to Plaintiff, although Local Rule 72(d) is a "little vague" by referencing "assignment" rather than "designation" or "reference," it is still "fairly consistent" with 28 U.S.C. § 636(c) in that "assignment of duties" may reasonably be understood as "referral." (Dkt. # 42 at 13).

[5] Many of the district judges also have specific referral orders for civil actions assigned to them. For example, District Judge Rodney Gilstrap's Referral Order RG 72-1 provides that 50% of all civil actions filed in the Marshall Division that are assigned to Judge Gilstrap are referred to Magistrate Judge Payne for all pretrial proceedings; 40% of all civil actions filed in the Texarkana Division are referred to Magistrate Judge Craven for all pretrial proceedings; and 60% of all civil actions filed in the Tyler Division are referred equally to Magistrate Judges Love and Mitchell for all pretrial proceedings. Judge Gilstrap's Referral Order RG 72-1 provides that it does not affect any General Order or other established procedures for referral to magistrate judges of special category cases.

District of Texas' policy regarding magistrate judge referral of pretrial matters at the time of filing pursuant to General Order 16-10, stating this is not about "designation" (at the time of filing) but rather "reference" (at the time of filing). (Dkt. # 42 at 13). Plaintiff states he has overtly objected to any magistrate judge referral, and he further asserts [⊥ 8] the "referral at filing" policy defies the plan [plain] language of § 636 and the Court's own Local Rules. *Id.* at 14-15.

Specifically, Plaintiff argues the Court's magistrate referral policy: (1) violates the right not to contract/agree/consent; (2) violates civil and criminal law; (3) violates fundamental and statutory rights of Due Process and Structural Due Process; (4) violates fundamental right of access; and (5) violates the fundamental right to a fair trial. According to Plaintiff, these alleged violations raise a "presumption of bias throughout the District" because the entire district is subject to the "compelled-consent policy." (Dkt. # 42 at 34-35). Plaintiff argues all locations in the district are disqualified, and the case must be transferred to a different district.

APPLICABLE LAW REGARDING DISQUALIFICATION

Pursuant to 28 U.S.C. § 455(a), a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Recusal under § 455 includes all federal judges. Section 455(a) requires judicial recusal "if a reasonable person, knowing all the circumstances, would believe it improper for the judge to sit in the

case in question." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 861 (1988). A party proceeding under this section "must show that, if a reasonable man knew of all the circumstances, he would harbor doubts about the judge's impartiality." *Chitimacha Tribe v. Harry L. Laws Co.*, 690 F.2d 1157, 1165 (5th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983). Recusal is required only if actual prejudice or bias is proved by compelling evidence. *Andrade v. Chojnacki*, 338 F.3d 448, 454-55 (5th Cir. 2003). A motion to disqualify is committed to the sound discretion of the judge. *Id.* at 1166.

DISCUSSION

Plaintiff argues for disqualification of every judge in the Eastern District of Texas based on [⊥ 9] the district-wide policy of district judges referring pro se cases to magistrate judges at the time of filing for the purpose of handling all pretrial matters. Plaintiff characterizes this policy as "compelled-consent" in violation of 28 U.S.C. § 636.

Pursuant to 28 U.S.C. § 636(b)(1)(A) & (B), a magistrate judge may hear and determine pretrial matters, and also may make recommendations on the disposition of dispositive motions. In delineating a magistrate judge's authority to determine a matter, § 636 distinguishes between dispositive and non-dispositive pretrial motions. *See* 28 U.S.C. § 636(b)(1)(A)–C). For non-dispositive motions, a magistrate judge's orders are "self-operating" and thus "valid when entered." *United States v. Brown*, 79 F.3d 1499, 1503 (7th Cir. 1996); *see also In re U.S. Healthcare*, 159 F.3d 142, 145 (3d Cir. 1998) ("[I]n general, a magistrate judge, without the consent of

the parties, has the power to enter orders which do not dispose of the case.").

For dispositive motions, in lieu of directly ruling on the matter, the magistrate judge will submit a report and recommendation to the district court judge. *Roper v. Board of County Comm'n. of Brevard County*, No. 6:06-cv-1551-Orl-19JGG, 2007 WL 4336170, at *4 (M.D. Fl. Dec. 7, 2007). These orders are "non-self-operating" in that the orders are not valid "until the district judge accepts the magistrate's report and recommendation and enters an order or judgment." Brown, 79 F.3d at 1503.

In line with this authority, the Local Rules of the Eastern District of Texas make clear that **with the consent** of all the parties a magistrate judge can conduct **all proceedings in a civil trial**, including conducting the trial and entering final judgment. Local Rule CV-72(a)(1)(C) (emphasis added). The Local Rules further provide, in accordance with 28 U.S.C. § 636, that a judge may designate a magistrate judge to hear and determine nondispositive matters and issue reports [⊥ 10] containing proposed findings of fact and recommendations for the disposition of dispositive matters. Local Rule CV-72(a)(1)(F). [6]

General Order 16-10 does not contradict either

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[6] Local rule CV-72(a)(1)(F) provides that a magistrate judge is authorized to "[i]ssue any preliminary orders and conduct any necessary hearings or other appropriate proceedings in all nonprisoner civil cases, and submit to a district judge a report containing proposed findings of fact and recommendations for the disposition of the case by the district judge."

the Local Rules or the Federal Rules. Rather, it is the Court's method for assignment of duties to the magistrate judges of the Eastern District of Texas, and it assigns for pretrial purposes only, all pro se civil cases to the appropriate magistrate judges within each division. *See* Local Rule CV-72(d) (Assignment of Matters to Magistrates [sic] Judges); *see also Yates v. Arkin*, 242 Fed.Appx. 478, 481(10th Cir. May 22, 2007) ("District courts have broad discretion to assign cases to particular judges.").

The initial pretrial referral to a magistrate judge does not encompass those things for which consent would be required, i.e. final orders on dispositive motions, conducting the trial, and entering final judgment. Like magistrate judges throughout the United States, magistrate judges in the Eastern District of Texas, without the consent of the parties, have the authority to enter orders involving nondispositive motions and can make recommended findings regarding the disposition of dispositive motions. Plaintiffs' arguments to the contrary are without merit and have been repeatedly rejected by other courts.

In *United States v. Fleming*, No. 3:09cv153-J-34HTS, 2009 WL 10671227 (M.D. Fl. Dec. 1, 2009), the United States of America initiated an action to reduce to judgment the unpaid tax liabilities of the defendants and to foreclose on federal tax liens on real property belonging to the defendants. *Id.* at *1. One of the defendants filed a motion for extension of time to respond to the [⊥ 11] suit. In accordance with the Local Rules for the United States District Court, Middle District of Florida, the motion was referred to a magistrate judge, who granted the motion and also

entered an order "directing the parties to comply with the Federal Rules of Civil Procedure, Local Rules of the Middle District of Florida, and any applicable statutes and regulations." *Id.* In response, the defendants filed a motion to strike the magistrate judge's orders and to strike certain Local Rules, requesting the magistrate judge handling the case "be relieved of all duties" in the matter and that the court strike his previously entered orders. *Id.* Additionally, the defendants requested the court "strike Local Rules 3.01(c)(1)(A) and (B), as well as Local Rule 6.01(a)" because they had not consented and had in fact actively withheld their consent to the participation of magistrate judges in the handling of the case. [7] *Id.* According to the defendants, "because the Local Rules automatically refer certain motions to magistrate judges, without the parties' consent, thereby compelling their involuntary consent, these Local Rules violate the due process and separation of powers doctrines." *Id.*

The court noted that pursuant to 28 U.S.C. § 636(b)(1)(A), a district court judge "may designate a magistrate judge to hear and determine any pretrial matter pending before the court." *Id.* at * 2 (quoting 28 U.S.C. § 636(b)(1)(A)). According to the court, "[t]he consent of the parties is not required for referral of a pre-trial matter. Consent is only required when the [m]agistrate [j]udge conducts a trial." *Fleming*, 2009 WL 10671227, at *2 (quoting Roper, 2007 WL 4336170, *4). The court stated magistrate judges in the Middle District of Florida

[7] It appeared to the court that the defendants objected to the participation of any magistrate judge in the case. *Fleming*, 2009 WL 10671227, at *1.

"enjoy the broadest grant of authority permissible under the statute." *Fleming*, 2009 WL 10671227, at *2. [⊥ 12]

Specifically, although consent of the parties is required when a magistrate judge conducts a civil trial, the Middle District of Florida's "Local Rule 6.05(h) specifically provides that the rule requiring consent for civil trials shall not be construed to limit or affect the right of any judge or judges of the Court to assign judicial duties or responsibilities to a United States magistrate judge or magistrate judges pursuant to Rule 6.01, or any standing order entered under that rule, with or without the consent of the parties." *Id.* (internal quotations omitted). Thus, despite the defendants' arguments to the contrary, the consent of the parties was not required in order for the magistrate judge to rule on the motion for extension. *Fleming*, 2009 WL 10671227, at *2 (citing *Cheshire v. Bank of Amer.*, No. 09–10099, 2009 WL 3497732, at *1 (11th Cir. Oct. 30, 2009)). According to the court, "the referral of the Motion for Extension to the Magistrate Judge was accomplished by way of the Local Rules, thus the Court did not need to make a formal order of referral. As such, the Motion for Extension, a pretrial matter, was properly before the Magistrate Judge." *Fleming*, 2009 WL 10671227, at *2.

Because the motion for extension was a nondispositive, pretrial motion, the court held the magistrate judge had the authority to enter an order on the matter. *Id.* According to the court, the magistrate judge also "had the authority to enter the Order advising the [defendants], as pro se litigants, of certain rules and procedures and directing them to

act in accordance with the Federal Rules of Civil Procedure and the Court's Local Rules." *Id.*

In *Lusick v. City of Philadelphia*, 549 Fed.Appx. 56 (3d Cir. Oct. 9, 2013), a prisoner appealed from orders entered in his civil rights action in the United States District Court for the Eastern District of Pennsylvania. His appeal challenged the authority of the magistrate judge to deny his motion to clarify the case status, correct the caption, and recommend his complaint be dismissed [⊥ 13] without prejudice. *Id.* at 56. Contrary to Lusick's argument, the Third Circuit Court of Appeals held a magistrate judge's authority under subsection (b) of 28 U.S.C. § 636 does not depend on the "consent of the parties." *Id.* The Third Circuit further held the magistrate judge "acted properly within his statutory authority." *Id.* Further, the Supreme Court has recognized that:

> The Federal Magistrates Act, 28 U.S.C. § 631 et seq. (2000 ed. and Supp. V), permits district courts to assign designated functions to magistrate judges. ... They [] may hear and determine, when designated to do so, any pretrial matter pending before the district court, with the exception of specified motions.

Gonzalez v. U.S., 128 S.Ct. 1765, 1767 (2008).

Here, pursuant to General Order 16-10, the Court designated Magistrate Judge Nowak "to conduct pretrial proceedings and submit proposed findings of fact and recommendations for rulings on dispositive motions – something entirely consistent with the statutory scheme." *Yates*, 242 Fed.Appx. at 482; *see also Fleming*, 2009 WL 10671227, at *2 ("Moreover, the referral of the Motion for Extension to the Magistrate Judge was accomplished by way of the

Local Rules, thus the Court did not need to make a formal order of referral. As such, the Motion for Extension, a pretrial matter, was properly before the Magistrate Judge."). The undersigned remains the presiding judge assigned to Plaintiff's case because not all parties have consented to the magistrate judge for all purposes. The undersigned will enter final orders on any dispositive motions, conduct the trial, and enter final judgment.

Magistrate Judge Nowak has acted properly within her statutory authority. All of her orders which Plaintiff seeks to strike have been entered on nondispositive or case management issues. [8] [⊥ 14] Thus, Plaintiff's motions to strike Judge Nowak's orders (Dkt. #s 26, 43, 47, 48 & 63] are denied.

Plaintiff's argument that the Eastern District of Texas' magistrate referral policy compels consent is also without merit. (Dkt. # 42 at 10). Contrary to Plaintiff's assertions, the Court's policy regarding magistrate judge pretrial referral does not compel or coerce consent. Parties have the option to consent, but they are free to withhold it without adverse consequences. Local Rule CV-72(e) specifically provides that no consent forms will be made available, nor will the contents be made known

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[8] The Court notes that even orders entered by a magistrate judge on nondispositive issues can be appealed to the District Judge by way of a motion for reconsideration. *See* 28 U.S.C. § [⊥ 14] 636(b)(1)(A)(A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law."); *see also* Local Rule 72(b).

to any judge, unless all parties have consented to the assignment of the entire case to a magistrate judge.

As noted by Magistrate Judge Nowak in her July 19, 2017 Order, "Plaintiff's request [to strike her orders] conflates pre-trial referral with consent to have a magistrate judge enter final judgment." (Dkt. # 16 at 1). Plaintiff does not have the right to object to the referral of pretrial matters to a magistrate judge. *See Franklin v. City of South Bend*, 153 Fed. Appx. 395, 396 (7th Cir.2005) (The Seventh Circuit rejected an argument that the district court denied him due process by assigning a magistrate judge without his consent, stating "[t]he magistrate judge's involvement here, however, was limited to nondispositive matters such as granting a motion for extension of time to file an answer ...; these pretrial matters are the sort of tasks that Congress has authorized magistrate judges to make without the parties' consent."). Plaintiff's consent was unnecessary for the referral of his case to Magistrate Judge Nowak for pretrial purposes, thus Plaintiff's due process and other arguments fail. *See Fleming*, 2009 WL 10671227, at *3 (rejecting the defendants' arguments that the Local Rules allowing for magistrate judge pretrial referral violated due process [⊥ 15] and separation of power doctrines). The Court's procedure for referring cases to magistrate judges for pretrial handling complies with 28 U.S.C. § 636 and the case law surrounding that statute's application. Thus, there has been no violation of due process, civil or criminal law, right of access, right to a fair trial, or the "right not to contract/agree/consent" as urged by Plaintiff. Plaintiff's arguments do not provide a basis for

recusal or disqualification. As noted above, Plaintiff relies on 28 U.S.C. § 455(a), which provides that a judge is required to recuse himself "in any proceeding in which his impartiality might reasonably be questioned." Plaintiff argues the "Eastern District excuses itself from its oaths of office ... to abide by the inapplicable legal standards so as to do as it pleases, even in defiance of its very own Local Rules, thereby giving rise to [Plaintiff's] questioning of the Eastern District's impartiality." (Dkt. # 42 at 17).

There being no "defiance of its very own Local Rules," or failure to abide by legal standards, the Court's impartiality is not called into question by the magistrate judge referral procedures. Plaintiff's assertions are insufficient to demonstrate that a reasonable person, knowing all the circumstances, would believe it improper for the judges of the Eastern District of Texas, more specifically the undersigned and Magistrate Judge Nowak, to oversee proceedings in this case based on their implementation of the Court's referral policy. *See Liljeberg*, 486 U.S. at 861. The Court's impartiality has not reasonably been called into question.

Additionally, the Supreme Court has held the "extrajudicial source" doctrine applies to § 455(a). *Liteky v. United States*, 510 U.S. 540, 554 (1994). The "extrajudicial source" doctrine, which the *Liteky* Court termed as one factor to consider in determining whether recusal is necessary rather than a doctrine, provides that "matters arising out of the course of judicial proceedings are not a proper basis for recusal." *Id.* The Court further explained in *Liteky* that "judicial rulings alone [⊥ 16] almost

never constitute a valid basis for a bias or partiality motion." *Id.*, citing *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). Here, the Court's actions, all of which occurred in the course of these judicial proceedings, do not display deep-seated and unequivocal antagonism that would render fair judgment impossible. *Liteky*, 510 U.S. at 556.

Plaintiff's motion for disqualification of the entire Eastern District of Texas is denied. Accordingly, Plaintiff's motion to transfer to the Northern District of Texas, Dallas Division, likewise is denied. There being no justification for transfer of this case, it is

ORDERED that Plaintiff's Motion to Transfer Districts Due to the Disqualification of the Entire Eastern District (Dkt. #42) is hereby **DENIED**. It is further

ORDERED that Motion to Strike Non-Consented to Magistrate "Orders" (17, 18) (Dkt. # 26); Motion to Strike Non-Consented to Magistrate "Order" (22-1) (Dkt. # 43); Motion to Strike Non-Consented to Magistrate "Order" (30-1) (Dkt. # 47); Motion to Strike Non-Consented to Magistrate "Order" (41-1) (Dkt. # 48); and Motion to Strike Non-Consented to Magistrate "Order" (58-1) (Dkt. # 63) are **DENIED**.

SIGNED this 19th day of December, 2017.

/s/ Amos Mazzant
AMOS L. MAZZANT
UNITED STATES DISTRICT JUDGE

E.D.Tex. (July 7, 2017) Referral ("at filing"). [1]

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

MAGISTRATE REFERRAL

CIVIL ACTION NO. 4:17cv488

Taylor
v.
City of Sherman, et al.

Pursuant to a Standing Order, certain civil suits are referred at the time of filing equally among magistrate judges. Therefore, the above-titled action has been referred to:

Magistrate Judge Nowak

[1] *See* A-16 n.3.

E.D.Tex. (Sept. 1, 2016) Standing Order No. 16-10.

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GENERAL ORDER NO. 16-10

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

GENERAL ORDER RE: DIVISIONAL ASSIGNMENT AND APPORTIONMENT OF CASES AMONG UNITED STATES MAGISTRATE JUDGES

It is hereby **ORDERED** that matters referred and assigned to United States Magistrate Judges in this district shall be directed and apportioned as follows:

I. Divisional Assignments

Division	Magistrate
Beaumont	Hon. Keith Giblin = 50% Criminal, Prisoner Civil Rights, Social Security, Pro Se Non-Prisoner and 2254 & 2255 Habeas
	Hon. Zack Hawthorn = 50% Criminal, Prisoner Civil Rights, Social Security, Pro Se Non-Prisoner and 2254 & 2255 Habeas

Lufkin	Hon. Keith Giblin = 50% Criminal, Prisoner Civil Rights, Social Security, Pro Se Non-Prisoner and 2254 & 2255 Habeas
	Hon. Zack Hawthorn = 50% Criminal, Prisoner Civil Rights, Social Security, Pro Se Non-Prisoner and 2254 & 2255 Habeas
Texarkana	Hon. Caroline Craven = 100% Criminal, Prisoner Civil Rights, Social Security, Pro Se Non-Prisoner and 2254 & 2255 Habeas
Marshall	Hon. Roy Payne = 100% Criminal, Prisoner Civil Rights, Social Security, Pro Se Non-Prisoner and 2254 & 2255 Habeas
Sherman	Hon. Christine Nowak = 50% Criminal, Prisoner Civil Rights, Social Security, Pro Se Non-Prisoner and 2254 & 2255 Habeas [⊥ 2]
	Hon. Kimberly Johnson = 50% Criminal, Prisoner Civil Rights, Social Security, Pro Se Non-Prisoner and 2254 & 2255 Habeas
Tyler	Hon. John Love = 50% Criminal, Prisoner Civil Rights, Social Security, Pro Se Non-Prisoner and 2254 & 2255 Habeas

Hon. Nicole Mitchell = 50%
Criminal, Prisoner Civil Rights,
Social Security, Pro Se Non-Prisoner
and 2254 & 2255 Habeas

II. Apportionment

In divisions served by more than one magistrate judge, matters shall be referred and assigned as follows:

A. Civil Cases:

1. Prisoner suits shall be referred at the time of filing equally among magistrate judges with concurrent civil case responsibilities except as specified above. Prisoner suits shall automatically be assigned to the magistrate judge to whom the case originally was referred when parties consent to trial and entry of judgment by a magistrate judge.

2. All other civil matters shall be referred or assigned randomly except as specified above or unless a specific order of the court directs otherwise.

B. Criminal Cases:

1. Magistrate judges shall rotate responsibilities for handling unscheduled matters and cases processed through the Central Violations Bureau (CVB) so that

each has equal duty time.

2. Except when governed by General Order 93-6:

   a. Class A misdemeanor cases shall be assigned randomly to a magistrate judge when the case is filed except as specified above.

   b. Class B and Class C misdemeanors and infractions, except CVB cases, shall be assigned to the duty magistrate judge at the time of defendants first appearance in this district. [⊥ 3]

III. Miscellaneous

A Assignment of additional duties to magistrate judges will be made as deemed appropriate.

B. Transfers between magistrate judges to equalize dockets and for other appropriate reasons shall be entered from time to time upon concurrence of the transferee judge.

C. This order supersedes all prior general orders governing divisional assignments and allocation of duties of magistrate judges. Individual district judges ad hoc and standing orders governing specific referrals and assignments of cases to magistrate judges are unaffected by this order.

This general order supersedes its predecessor, General Order 15-17.

SIGNED September 1, 2016.

FOR THE COURT:

_____

Ron Clark
Chief Judge

Rule 14.1(i)(iii)—Rehearing

None.

Rule 14.1(i)(iv)—Judgment of Different Date

None.

Rule 14.1(i)(v)—Statutes

TEX. TRANSP. CODE § 502.001(45) ("vehicle").

"**Vehicle**" means a device in or by which a person or property is or may be transported or drawn [i.e., towed] on a public highway ....

28 U.S.C.A. § 636(c) (in relevant part).

§ 636(c)(1) "Upon the consent of the parties." ... "Upon the consent of the parties."

§ 636(c)(2) If a magistrate judge is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of the court shall, at the time the action is filed, notify the parties **of the availability of a magistrate judge** to exercise such jurisdiction. **The decision of the parties shall be communicated to the clerk of the court.** Thereafter, either the district court judge or the magistrate judge may again advise the parties **of the availability of the magistrate judge**, but in so doing, **shall also advise the parties that they are free to withhold consent without adverse substantive consequences.** ***Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent.***

28 U.S.C.A. § 636(c)(1), (c)(2) (all emphasis added).

Rule 14.1(i)(vi)—Additional materials

Reference to the Record will suffice, in particular, no "transportation," from Doc. [1-1], ROA.12 (A-ii), and no "consent," from Docs. [1-1], ROA.61 (A-46 to A-47), and [23], ROA.208 to .220 (Affid. and, in particular, Exs. A to D).