21-7805 ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM PAUL BURCH,

PETITIONER

v.

SELECT PORTFOLIO SERVICING, INCORPORATED

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS FOR THE FIFTH CIRCUIT
20-11171

PETITION FOR WRIT OF CERTIOTATI

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I. QUESTION(S) PRESENTED

William Paul Burch ("Burch") filed his appeal to the circuit court on Novem 24, 2020 as an appeal of the district court ruling on in forma pauperis. On May 03, 2021, Burch began receiving compensation for an injury during the Vietnam War. Burch reasoned as a pro-se that the honest thing to do was to notify the court of the meager income increase and ask that the court remand the case to the district court where he could now pay the filing fee so that the case could either be remanded to state court or be heard on the merits. Instead, the circuit court dismissed the IFP and the Motion to pay fees as frivolous and sanctioned Burch for almost two months of the increase in income. He was further warned that this type of action was not allowed, and he must remove all his pending real estate cases.

The questions presented are:

1. The legal definition of frivolous is incomplete. What should the complete legal definition of frivolous be?
2. On an appeal to the circuit court regarding a motion to proceed in forma pauperis, if the appellant gets a small increase in income as compensation for a Vietnam War era injury and the appellant seeks to remand the case to the district court and pay the filing fee, is that justification for the circuit court to dismiss the case as frivolous?

3. If a state trial court accepts an affidavit of pauper status, should the federal court continue to honor it after the defendant removes the case to federal court or, if denied on appeal, should the circuit court remand the case with instructions to pay the filing fee?

4 Did the actions of the Fifth Circuit and the District Court interfere with Burch's right to free speech under the First Amendment and Due Process under the Fifth Amendment and Texas Constitution Article 1 Sections 13 and 19 by not allowing Burch to have a hearing on the merits despite qualifying for IFP under the Texas Constitution and offering to pay the filing fee due to an increase in income from injuries during the Vietnam War?

IV PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to these proceedings include Plaintiff William Paul Burch; and Defendant Select Portfolio Servicing, Inc. Pursuant to this Court's Rule 29.6, undersigned pro-se states that Select Portfolio Servicing, Inc is a wholly owned subsidiary of Credit Suisse Group AG of Zürich, Switzerland and Credit Suisse Group AG is a publicly held corporation and not a subsidiary of any entity. Based solely on SEC filings regarding beneficial ownership of the stock of Credit Suisse Group AG, There is no record of any shareholder who beneficially owns more than 10% of Credit Suisse Group AG's outstanding stock. Credit Suisse has been at the center of multiple controversies relating to its choice of clients and climate change,

including support of Russian oligarchs during the 2022 Russian invasion of Ukraine.

III STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the Court of Appeals for the Fifth Circuit.

19-11197 Burch v Freedom Mortgage Corp., Dismissed June 16, 2021

20-10498 Burch v Freedom Mortgage Corp et al, Dismissed February 2, 2021

20-10651 Burch v Freedom Mortgage Corp, et al pending

20-10709/20-10828 Burch v Areya Holder Aurzada, pending

20-10850 Burch v Bank of America, pending

20-11035 Burch v Areya Holder Aurzada, pending

20-11040 Burch v Areya Holder Aurzada, dismissed April 21, 2022 $500 Sanction

20-11057 Burch v Homeward Residential, pending

20-11058 Burch v Ocwen Loan Servicing Company,

dismissed April 30, 2022 $500 Sanction

20-11074 Burch v America's Servicing Company,

dismissed November 12, 2021, $100 Sanction

20-11106 Burch v Mark X. Mullin, dismissed May 2, 2022 $500 Sanction

20-11117 Burch v America's Servicing Company, dismissed for lack of jurisdiction

20-11132 Burch v Mark X. Mullin, pending

20-11239 Burch v dismissed Homeward Residential,

dismissed April 30, 2022 $500 Sanction

20-11240 Burch v America's Servicing Company, Motion to reopen

denied on April 27, 2021 $500 Sanction

21-10054 Burch v Chase Bank of Texas, N.A., pending

The sanctions are because Burch refuses to withdrawal his cases and he put forth a Motion to pay the filing fee so the case could be heard on the merits.

IV. TABLE OF CONTENTS

V. TABLE OF APPENDIX

VI. TABLE OF AUTHORITIES

Cases

Constitutional Provisions:

Statutes and Rules:

VII. PETITION FOR WRIT OF CERTIORARI

William Burch, a resident of Grand Prairie, Texas as a pro-se litigant respectfully petitions this court for a writ of certiorari to review the judgment of the Fifth Circuit Court of Appeals.

VIII. OPINIONS

The opinion of the United States Court of Appeals/highest state court to review the merits appears at App. 1 in the appendix to this petition and is unpublished].

The opinion of the United States District Court for the Northern District of Texas appears at App. 2 and is unpublished.

The opinion of the United States Bankruptcy Court for the Northern District of Texas appears at App. 3 and is unpublished.

IX. JURISDICTION.

A timely petition for rehearing was denied by the United States Court of Appeals on February 17,2022, and a copy of the order denying rehearing appears at Appendix 1. The jurisdiction of this Court is invoked under **28 U. S. C. § 1254(1).**

X. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. 1 provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute ... of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.

U.S. Const. amend. 5 provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Tex. Const. Article 1 Sec 13 provides:

> EXCESSIVE BAIL OR FINES; CRUEL OR UNUSUAL PUNISHMENT; OPEN COURTS; REMEDY BY DUE COURSE OF LAW. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law. (Feb. 15, 1876.)

Tex. Const. Article 1 Sec 19 provides:

> DEPRIVATION OF LIFE, LIBERTY, PROPERTY, ETC. BY DUE COURSE OF LAW. No citizen of this State shall be deprived of life, liberty, property,

privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land. (Feb. 15, 1876.)

Tex. Const. Article 16 Sec 50(c) provides:

> No mortgage, trust deed, or other lien on the homestead shall ever be valid unless it secures a debt described by this section, whether such mortgage, trust deed, or other lien, shall have been created by the owner alone, or together with his or her spouse, in case the owner is married. All pretended sales of the homestead involving any condition of defeasance shall be void.

11 U.S. Code § 1141 provides:

> (a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.
>
> (b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.
>
> (c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.
>
> (d)
>
> > (1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan—
> >
> > > (A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not—
> > >
> > > > (i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;
> > > >
> > > > (ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) A discharge under this chapter does not discharge a debtor who is an individual from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if—

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(5) In a case in which the debtor is an individual—

(A) unless after notice and a hearing the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan;

(B) at any time after the confirmation of the plan, and after notice and a hearing, the court may grant a discharge to the debtor who has not completed payments under the plan if—

(i) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 on such date;

(ii) modification of the plan under section 1127 is not practicable; and

(iii) subparagraph (C) permits the court to grant a discharge; and

(C) the court may grant a discharge if, after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge, the court finds that there is no reasonable cause to believe that—

(i) section 522(q)(1) may be applicable to the debtor; and

(ii) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B);and if the requirements of subparagraph (A) or (B) are met.

(6) Notwithstanding paragraph (1), the confirmation of a plan does not discharge a debtor that is a corporation from any debt—

(A) of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit, or owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar State statute; or

(B) for a tax or customs duty with respect to which the debtor—

(i) made a fraudulent return; or

(ii) willfully attempted in any manner to evade or to defeat such tax or such customs duty.

Texas Business and Commerce Code Title 3 Insolvency, Fraudulent Transfers, and Fraud, Chapter 26 Statute of frauds (TBCC) Section 26.01 provides:

Sec. 26.01. PROMISE OR AGREEMENT MUST BE IN WRITING.

(a) A promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is

(1) in writing; and

(2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.

(b) Subsection (a) of this section applies to:

(1) a promise by an executor or administrator to answer out of his own estate for any debt or damage due from his testator or intestate;

(2) a promise by one person to answer for the debt, default, or miscarriage of another person;

(3) an agreement made on consideration of marriage or on consideration of nonmarital conjugal cohabitation;

(4) a contract for the sale of real estate;

(5) a lease of real estate for a term longer than one year;

(6) an agreement which is not to be performed within one year from the date of making the agreement;

(7) a promise or agreement to pay a commission for the sale or purchase of:

(A) an oil or gas mining lease;

(B) an oil or gas royalty;

(C) minerals; or

(D) a mineral interest; and

(8) an agreement, promise, contract, or warranty of cure relating to medical care or results thereof made by a physician or health care provider as defined in Section 74.001, Civil Practice and Remedies Code. This section shall not apply to pharmacists.

TBCC Section 26.02 provides:

Sec. 26.02. LOAN AGREEMENT MUST BE IN WRITING.

(a) In this section:

(1) "Financial institution" means a state or federally chartered bank, savings bank, savings and loan association, or credit union, a holding company, subsidiary, or affiliate of such an institution, or a lender approved by the United States Secretary of Housing and Urban Development for participation in a mortgage insurance program under the National Housing Act (12 U.S.C. Section 1701 et seq.).

(2) "Loan agreement" means one or more promises, promissory notes, agreements, undertakings, security agreements, deeds of trust or other documents, or commitments, or any combination of those actions or documents, pursuant to which a financial institution loans or delays repayment of or agrees to loan or delay repayment of money, goods, or

another thing of value or to otherwise extend credit or make a financial accommodation. The term does not include a promise, promissory note, agreement, undertaking, document, or commitment relating to:

(A) a credit card or charge card; or

(B) an open-end account, as that term is defined by Section 301.002, Finance Code, intended or used primarily for personal, family, or household use.

(b) A loan agreement in which the amount involved in the loan agreement exceeds $50,000 in value is not enforceable unless the agreement is in writing and signed by the party to be bound or by that party's authorized representative.

(c) The rights and obligations of the parties to an agreement subject to Subsection (b) of this section shall be determined solely from the written loan agreement, and any prior oral agreements between the parties are superseded by and merged into the loan agreement.

(d) An agreement subject to Subsection (b) of this section may not be varied by any oral agreements or discussions that occur before or contemporaneously with the execution of the agreement.

(e) In a loan agreement subject to Subsection (b) of this section, the financial institution shall give notice to the debtor or obligor of the provisions of Subsections (b) and (c) of this section. The notice must be in a separate document signed by the debtor or obligor or incorporated into one or more of the documents constituting the loan agreement. The notice must be in type that is boldface, capitalized, underlined, or otherwise set out from surrounding written material so as to be conspicuous. The notice must state substantially the following:

"This written loan agreement represents the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous, or subsequent oral agreements of the parties.

"There are no unwritten oral agreements between the parties.

_____ _____

"Debtor or Obligor Financial Institution"

(f) If the notice required by Subsection (e) of this section is not given on or before execution of the loan agreement or is not conspicuous, this section does

not apply to the loan agreement, but the validity and enforceability of the loan agreement and the rights and obligations of the parties are not impaired or affected.

(g) All financial institutions shall conspicuously post notices that inform borrowers of the provisions of this section. The notices shall be located in such a manner and in places in the institutions so as to fully inform borrowers of the provisions of this section. The Finance Commission of Texas shall prescribe the language of the notice.

TBCC 3.501 provides:

SUBCHAPTER E. DISHONOR, PRESENTMENT.

(a) "Presentment" means a demand made by or on behalf of a person entitled to enforce an instrument to:

(1) pay the instrument made to the drawee or a party obliged to pay the instrument or, in the case of a note or accepted draft payable at a bank, to the bank; or

(2) accept a draft made to the drawee.

(b) The following rules are subject to Chapter 4, agreement of the parties, and clearing-house rules and the like:

(1) Presentment may be made at the place of payment of the instrument and must be made at the place of payment if the instrument is payable at a bank in the United States. Presentment may be made by any commercially reasonable means, including an oral, written, or electronic communication. Presentment is effective:

(A) when the demand for payment or acceptance is received by the person to whom presentment is made; and

(B) if made to any one of two or more makers, acceptors, drawees, or other payors.

(2) On demand of the person to whom presentment is made, the person making presentment must:

(A) exhibit the instrument;

(B) give reasonable identification and, if presentment is made on behalf of another person, reasonable evidence of authority to do so; and

(C) sign a receipt on the instrument for any payment made or surrender the instrument if full payment is made.

(3) Without dishonoring the instrument, the party to whom presentment is made may:

(A) return the instrument for lack of a necessary indorsement; or

(B) refuse payment or acceptance for failure of the presentment to comply with the terms of the instrument, an agreement of the parties, or other applicable law or rule.

(4) The party to whom presentment is made may treat presentment as occurring on the next business day after the day of presentment if the party to whom presentment is made has established a cutoff hour not earlier than 2 p.m. for the receipt and processing of instruments presented for payment or acceptance and presentment is made after the cutoff hour.

TRCP Rule 145 provides:

(a) General Rule. A party who files a Statement of Inability to Afford Payment of Court Costs cannot be required to pay costs except by order of the court as provided by this rule. After the Statement is filed, the clerk must docket the case, issue citation, and provide any other service that is ordinarily provided to a party. The Statement must either be sworn to before a notary or made under penalty of perjury. In this rule, "declarant" means the party filing the Statement.

(b) Supreme Court Form; Clerk to Provide. The declarant must use the form Statement approved by the Supreme Court, or the Statement must include the information required by the Court-approved form. The clerk must make the form available to all persons without charge or request.

(c) Costs Defined. "Costs" mean any fee charged by the court or an officer of the court that could be taxed in a bill of costs, including, but not limited to, filing fees, fees for issuance and service of process, fees for a court-appointed professional, and fees charged by the clerk or court reporter for preparation of the appellate record.

(d) Defects. The clerk may refuse to file a Statement that is not sworn to before a notary or made under penalty of perjury. No other defect is a ground for refusing to file a Statement or requiring the party to pay costs. If a defect

or omission in a Statement is material, the court - on its own motion or on motion of the clerk or any party - may direct the declarant to correct or clarify the Statement.

(e) Evidence of Inability to Afford Costs Required. The Statement must say that the declarant cannot afford to pay costs. The declarant must provide in the Statement, and, if available, in attachments to the Statement, evidence of the declarant's inability to afford costs, such as evidence that the declarant:

(1) receives benefits from a government entitlement program, eligibility for which is dependent on the recipient's means;

(2) is being represented in the case by an attorney who is providing free legal services to the declarant, without contingency, through:

(A) a provider funded by the Texas Access to Justice Foundation,

(B) a provider funded by the Legal Services Corporation; or

(C) a nonprofit that provides civil legal services to persons living at or below 200% of the federal poverty guidelines published annually by the United States Department of Health and Human Services;

(3) has applied for free legal services for the case through a provider listed in (e)(2) and was determined to be financially eligible but was declined representation; or

(4) does not have funds to afford payment of costs.

(f) Requirement to Pay Costs Notwithstanding Statement. The court may order the declarant to pay costs only as follows:

(1) On Motion by the Clerk or a Party. The clerk or any party may move to require the declarant to pay costs only if the motion contains sworn evidence, not merely on information or belief:

(A) that the Statement was materially false when it was made; or

(B) that because of changed circumstances, the Statement is no longer true in material respects.

(2) On Motion by the Attorney Ad Litem for a Parent in Certain Cases. An attorney ad litem appointed to represent a parent under Section

107.013, Family Code, may move to require the parent to pay costs only if the motion complies with (f)(1).

(3) On Motion by the Court Reporter. When the declarant requests the preparation of a reporter's record but cannot make arrangements to pay for it, the court reporter may move to require the declarant to prove the inability to afford costs.

(4) On the Court's Own Motion. Whenever evidence comes before the court that the declarant may be able to afford costs, or when an officer or professional must be appointed in the case, the court may require the declarant to prove the inability to afford costs.

(5) Notice and Hearing. The declarant may not be required to pay costs without an oral evidentiary hearing. The declarant must be given 10 days' notice of the hearing. Notice must either be in writing and served in accordance with Rule 21a or given in open court. At the hearing, the burden is on the declarant to prove the inability to afford costs.

(6) Findings Required. An order requiring the declarant to pay costs must be supported by detailed findings that the declarant can afford to pay costs.

(7) Partial and Delayed Payment. The court may order that the declarant pay the part of the costs the declarant can afford or that payment be made in installments. But the court must not delay the case if payment is made in installments.

(g) Review of Trial Court Order.

(1) Only Declarant May Challenge; Motion. Only the declarant may challenge an order issued by the trial court under this rule. The declarant may challenge the order by motion filed in the court of appeals with jurisdiction over an appeal from the judgment in the case. The declarant is not required to pay any filing fees related to the motion in the court of appeals.

(2) Time for Filing; Extension. The motion must be filed within 10 days after the trial court's order is signed. The court of appeals may extend the deadline by 15 days if the declarant demonstrates good cause for the extension in writing.

(3) Record. After a motion is filed, the court of appeals must promptly send notice to the trial court clerk and the court reporter requesting preparation of the record of all trial court proceedings on the

declarant's claim of indigence. The court may set a deadline for filing the record. The record must be provided without charge.

(4) Court of Appeals to Rule Promptly. The court of appeals must rule on the motion at the earliest practicable time.

(h) Judgment. The judgment must not require the declarant to pay costs, and a provision in the judgment purporting to do so is void, unless the court has issued an order under (f), or the declarant has obtained a monetary recovery, and the court orders the recovery to be applied toward payment of costs.

Amended by order of Aug. 31, 2016, eff. Sept. 1, 2016.

Comment to 2016 Change: The rule has been rewritten. Access to the civil justice system cannot be denied because a person cannot afford to pay court costs. Whether a particular fee is a court cost is governed by this rule, Civil Practice and Remedies Code Section 31.007, and case law.

The issue is not merely whether a person can pay costs, but whether the person can afford to pay costs. A person may have sufficient cash on hand to pay filing fees, but the person cannot afford the fees if paying them would preclude the person from paying for basic essentials, like housing or food. Experience indicates that almost all filers described in (e)(1)-(3), and most filers described in (e)(4), cannot in fact afford to pay costs.

Because costs to access the system - filing fees, fees for issuance of process and notices, and fees for service and return - are kept relatively small, the expense involved in challenging a claim of inability to afford costs often exceeds the costs themselves. Thus, the rule does not allow the clerk or a party to challenge a litigant's claim of inability to afford costs without sworn evidence that the claim is false. The filing of a Statement of Inability to Afford Payment of Court Costs - which may either be sworn to before a notary or made under penalty of perjury, as permitted by Civil Practice and Remedies Code Section 132.001 - is all that is needed to require the clerk to provide ordinary services without payment of fees and costs. But evidence may come to light that the claim was false when made. And the declarant's circumstances may change, so that the claim is no longer true. Importantly, costs may increase with the appointment of officers or professionals in the case, or when a reporter's record must be prepared. The reporter is always allowed to challenge a claim of inability to afford costs before incurring the

substantial expense of record preparation. The trial court always retains discretion to require evidence of an inability to afford costs.

28 U.S. Code § 2072 provides:

(a)The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b)Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

(c)Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

11 U.S.C. 1129(b)(2)(A)(iii). provides:

the condition that a plan be fair and equitable with respect to a class includes the following requirements for the realization by such holders of the indubitable equivalent of such claims.

FRCP Rule 12(b)(6). provides:

Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: (6) failure to state a claim upon which relief can be granted; A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

FRAP 12.1 provides:

Remand After an Indicative Ruling by the District Court on a Motion for Relief That Is Barred by a Pending Appeal

(a) Notice to the Court of Appeals. If a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a substantial issue.

(b) Remand After an Indicative Ruling. If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal. If the court of appeals remands but retains jurisdiction, the parties must promptly notify the circuit clerk when the district court has decided the motion on remand.

FRCP 62.1 provides:

Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) Notice to the Court of Appeals. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) Remand. The district court may decide the motion if the court of appeals remands for that purpose.

XI. STATEMENT OF THE CASE

On January 18, 2007, Burch bought two properties for cash. One, located at 1169 Meadow Creek in Lancaster, Texas, and the second property was located at 3805 Wrentham in Arlington, Texas.

On March 2, 2007, Burch obtained a business equity loan from Credit Suisse Financial Corporation using the Meadow Creek property as collateral and on March 5, 2007, Burch obtained a business equity loan from Credit Suisse Financial Corporation using the Wrentham property as collateral. Unknown to Burch at the time was that the loans were not valid because Burch had not signed them.

In December 2008, Burch filed for a Chapter 11 business bankruptcy due to his properties decreasing in value below the loan's balance owed. The lien holder at this point was Select Portfolio Servicing, Inc. (SPS). In December 2009, the Chapter 11 business bankruptcy plan was confirmed pursuant to **11 U.S. Code § 1141**. As defined by the Fifth Circuit in ***Elixir Indus., Inc. v. City Bank & Trust Co.* (In re Ahern Enterprises, Inc.), 507 F.3d 817 (5th Cir. 2007)**, the Fifth Circuit held that four conditions must be met for a lien to be voided under section **1141(c): (i)** the plan must be confirmed; (ii) the collateral must be dealt with by the plan; (iii) the lien holder must participate in the reorganization; and (iv) the lien must not be preserved under the plan. Other courts have similarly required secured creditor participation in the case as a condition to lien extinguishment under section 1141(c). See, e.g., ***Airadigm Communications, Inc. v. FCC (In re Airadigm Communications, Inc.)*, 519 F.3d 640 (7th Cir. 2008); *FDIC v. Union Entities (In re Be-Mac Transport Co.)*, 83 F.3d 1020 (8th Cir. 1996); *Penrod*, 50 F.3d at 463; *Exide Techs. v. Enersys Delaware, Inc. (In re Exide Techs.)*, 2013 BL**

5423 (Bankr. D. Del. Jan. 8, 2013); *In re Omega Optical, Inc.*, 476 B.R. 157 (Bankr. E.D. Pa. 2012). This case met all the criteria as shown below, therefore the lien was extinguished.

1. The bankruptcy was confirmed on December 9, 2009. thus, part one of the Fifth Circuit requirement was met.
2. "the Debtors shall surrender the Meadow Creek in full satisfaction of the debt pursuant to **11 U.S.C. 1129(b)(2)(A)(iii).** Based on the Debtors' current value of the Wrentham property, the Debtors **will enter into a New Wrentham Note** in the original principal amount of $113,621 (or such amount as determined by the Court) (New Wrentham Note"). The New Wrentham Note shall bear interest at the rate of 7% per annum. The Debtor shall pay the New Wrentham Note in 360 equal monthly payments of $755 commencing on the effective date. The Class 11 Creditor is impaired under this Plan." Thus, the second part of the Fifth Circuit requirement was met.
3. "The creditor participated in negotiating the terms of the plan therefore the third part of the Fifth Circuit requirement was met.

4. With respect to liens and security interests, section **1141(c)** of the bankruptcy code means that "unless the plan of reorganization, or the order confirming the plan, says that a lien is preserved, it is extinguished by the confirmation." ***In re Penrod*, 50 F.3d 459, 463 (7th Cir. 1995); *accord JCB, Inc. v. Union Planters Bank, NA*, 539 F.3d 862 (8th Cir. 2008).** The fourth and final part of the Fifth Circuit requirement was met.

Now that we have the lien extinguished, we turn to the **Texas Business and Commerce Code 26 "Statute of Frauds" Section 26.01 and Section 26.02.**

This requires:

"PROMISE OR AGREEMENT MUST BE IN WRITING."

(a) A promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is

(1) in writing; and

(2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.

The New Mortgage Note was never written. In fact, Burch even wrote a notation regarding the new terms and the bankruptcy plan number on the accompanying letter. By not properly crediting the payments and instead crediting the payments under the old note, SPS never acknowledged the new note as being valid.

On January 31, 2011, Burch sent a "Presentment Letter" as required by **TBCC 3.501.** In the letter Burch gave SPS 30 days to comply or remove any encumbrance

to the property. As of March 31, 2011, these properties were legally 100% owned by Burch due to the failure of SPS to perform. At this point two things are certain. The first is that Burch does have a case that deserves to be heard on the merits and second that the defendant must do everything it could to prevent the case from being heard on the merits.

On March 26, 2020, Burch filed a petition in the 48th District Court of Tarrant County, Texas, accompanied by a **Statement of Inability to Afford Payment of Court Costs or an Appeals Bond**. This was case number 048-316135-20. On April 30, 2020, Chief Justice Nathan L. Hecht transferred the case from Chief Judge David Evans to Chief Judge Bruce McFarling but retained the Court assignment. **At no time did SPS challenge Burch's pauper status.** In ***Campbell v. Wilder*, 487 SW 3d 146.152 - Tex: Supreme Court 2016,** the Texas Supreme Court ruled, "It is an abuse of discretion for any judge, including a family law judge, to order costs in spite of an uncontested affidavit of indigence."

On May 1, 2020, SPS paid a fee to remove the case **based on diversity** to the United States District Court (4:20-cv-00423-O-BP) where it was assigned to Judge Reed O'Conner. The **Erie Doctrine** requires that for state filed cases removed to federal court, federal procedural rules will apply, and state substantive rules will apply. **28 U.S. Code § 2072 (b)'s** requirement that federal procedural rules "not abridge, enlarge or modify any substantive right" means that a Rule must "really

regulat[e] procedure, — the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them," ***Sibbach v. Wilson & Co.*, 312 U.S. 1, 14, 61 S.Ct. 422, 85 L.Ed. 479.** Though a Rule may incidentally affect a party's rights, it is valid so long as it regulates only the process for enforcing those rights, and not the rights themselves, the available remedies, or the rules of decision for adjudicating either. **(*Shady Grove Orthopedic Associates v. Allstate Ins.*, 559 US 393, 1434-1435 - Supreme Court 2010)**

On July 1, 2020, the case was transferred to the Bankruptcy Court as 12-46959-mxm-7, Adversary No. 4:20-04048-mxm. On October 2, 2020, the Bankruptcy Court dismissed the case pursuant to **FRCP Rule 12(b)(6).** This ruling was even though these two properties were not part of a second bankruptcy, were on state law issues, and Burch presented the cause of action along with supporting law, cases, and written evidence. At no point did defendant ever produce a valid lien even when asked.

On October 16, 2020, Burch appealed to the District Court for the Northern District of Texas, Fort Wort Worth Division as 4:20-cv-01145-O. On October 19, 2020, Burch filed a Motion to Proceed In Forma Pauperis with the Bankruptcy Court. On October 24, 2020, The Bankruptcy Court denied Burch's Motion to proceed In Forma Pauperis (IFP) even though the state district court had accepted Burch's

unchallenged motion. The bankruptcy judge ***did not certify the IFP as frivolous.*** On October 31, 2020, Burch filed a Motion with the District Court to proceed IFP. It was this court who took all of Burch's money, making him a pauper, by forcing him into a Chapter 7 plan rather than allowing him to complete his bankruptcy in what would have been half the time allowed. The ruling was based on untruthful statements by the lawyers for one of the defendants in another case. The lawyers were sued by Burch for their actions, but the bankruptcy court gave them immunity. That is why Burch is a pauper, he had to go on social security to survive.

On November 2, 2020, The District Court denied Burch's Motion to proceed IFP. The district court judge erred in that he did not grant the IFP as required in **TRCP Rule 145. Rule 145** is but one manifestation of the open courts guarantees that "every person ... shall have remedy by due course of law." (**TEX. CONST. art. 1, § 13**) Due process is also guaranteed under **Tex. Const. art 1, § 19.** It is an abuse of discretion for any judge, including a family law judge, to order costs in spite of an uncontested affidavit of indigence. See ***In re Villanueva*, 292 S.W.3d 236, 246** (**Tex.App.-Texarkana 2009**, orig. proceeding) (concluding that family court abused its discretion when it ordered indigent divorce litigant to pay costs despite uncontested affidavit of indigency). **In *Barshop v. Medina County Underground Water Conservation Dist*, 925 S.W.2d 618, 636-37 (Tex. 1996)** the Texas Supreme Court Ruled that, "The Texas Constitution provides the following 'open courts' guarantee: . . This provision includes three separate constitutional rights: (1)

courts must actually be available and operational; (2) the Legislature cannot impede access to the courts through unreasonable financial barriers; and (3) meaningful remedies must be afforded, 'so that the legislature may not abrogate the right to assert a well-established common law cause of action unless the reason for its action outweighs the litigants' constitutional right of redress.'" If this case stayed in state court the indigency status would have remained through appeal and legally should do so in federal court. **The district judge did not certify the appeal to the circuit court as frivolous.**

On November 24, 2020, Burch appealed the IFP decision by the district court to the United States Court of Appeals for the Fifth Circuit and filed a Motion to Proceed In Forma Pauperis on December 16, 2020. At some point in 2021 Burch was determined to be a disabled veteran by the Veterans Administration due to an injury during his military service. The amount awarded was small, but Burch made a motion on September 28, 2021, to remand the case and pay the filing fee under **FRAP 12.1.** Nine days later, on October 9, 2021, Burch filed a motion under **FRCP 62.1** requesting that the case be remanded and the filing fee to be paid by Burch. On January 24, 2022, the Court dismissed the case as frivolous and sanctioned Burch. The Fifth Circuit panel stated that Burch should have been able to pay the filing fee based upon his Motion to pay the Filing Fee due to his increase in income even though the increase in income came ***after*** filing the motion. Also, Burch filed the **FRAP 12.1** days before he filed the **FRCP 62.1** even though it was four months

later that the Fifth Circuit issued its ruling. The District Court ruled in the **Rule 62.1** Motion that the case was closed. It appears that the district court did not understand the wording of the 62.1 motion anymore that Pro-se Burch.

The court relied on **§ 1915(e)(2)(B)(i).** This rule say, "Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that the action or appeal is frivolous or malicious." But the basis for the courts frivolous determination is "because Burch effectively has not identified any error in the dismissal without prejudice of his bankruptcy appeal for failing to pay the filing fee in the district court, he has not shown a nonfrivolous issue on appeal. Accordingly, the motion to proceed IFP is denied, and the appeal is dismissed as frivolous". Yet Burch clearly wrote, "Based on the Courts own statute cited, ***Auffant v. Paine, Webber, Jackson & Curtis, Inc.*, 538 F.Supp. 120, 1202 (D.P.R. 1982),** "court should consider overall financial situation of applicant as well as assets and liabilities of spouse.

Burch also wrote, "Because Burch receives **five dollars a week** more than allowed for IFP, the District Court Judge dismissed Burch's appeal thus robbing Burch of due process under the **Fifth and Fourteenth Amendment of the United States Constitution and Sections thirteen and nineteen of the Texas Constitution**." And Burch wrote, "In the SCOTUS ruling in ***Coppedge V. United States*, 369 U.S. 438 .444-445 (1962)** The requirement that an appeal *in forma*

pauperis be taken "in good faith" is satisfied when the defendant seeks appellate review of **any** issue that is not frivolous. ***Id.*****446** If it appears from the face of the papers filed in the Court of Appeals that the applicant will present issues for review which are not clearly frivolous, the Court of Appeals should grant leave to proceed *in forma pauperis.*

In ***Neitzke v. Williams*****, 490 US 319.325 - Supreme Court 1989 (as stated in *Anders v. California*, 386 U. S. 738 (1967).** this court defines frivolous as an appeal on a matter of law is frivolous where "[none] of the legal points [are] arguable on their merits." ***Id.*****, at 744.**

The only issue in the Burch motion to remand and pay the filing fee was Burch's request to have the case remanded to the district court with instructions for the court to accept his filing fee and move forward with the case to either rule on the merits of the case or remand the case to the State District Court. There is no precedence for a ruling on changing an appeal from accepting the case as in forma pauperis to paying the filing fee due to a change in income. However, This court did rule in ***Denton v. Hernandez*****, 504 US 25.31 - Supreme Court 1992, "**In enacting the federal *in forma pauperis* statute, Congress "intended to guarantee that no citizen shall be denied an opportunity to commence, prosecute, or defend an action, civil or criminal, in any court of the United States, solely because . . . poverty makes

it impossible . . . to pay or secure the costs" of litigation. ***Adkins* v. *E. I. DuPont de Nemours & Co.*, 335 U. S. 331, 342 (1948)** (internal quotation marks omitted). At the same time that it sought to lower judicial access barriers to the indigent, however, Congress recognized that "a litigant whose filing fees and court costs are assumed by the public, unlike a paying litigant, lacks an economic incentive to refrain from filing frivolous, malicious, or repetitive lawsuits." ***Neitzke, supra*, at 324**. In response to this concern, Congress included subsection (d) as part of the statute, which allows the courts to dismiss an *in forma pauperis* complaint "if satisfied that the action is frivolous or malicious." It must be understood that Burch, on his own and with obvious honesty, requested that he be allowed to pay the filing fee but the court turned him down. This act of honesty appears to have been the catalyst for the denial of due process.

The Fifth Circuit denied the IFP seemingly due to an increase in income that happened after the fact. The Fifth Circuit again denied Burch the opportunity to pay the fee either on remand or upon dismissing the IFP. This is an obvious denial of Burch's Due Process rights under The 5th Amendment to the U. S. Constitution, Article 1, Sections 13 and 19 of the Texas Constitution, and Burch's right to Free Speech as guaranteed under the First Amendment of the U. S. Constitution.

X. REASONS FOR GRANTING THE PETITION

The court has set an incomplete basis for determining if a petitioner should be granted in forma pauperis on appeal. As it currently stands the following holds true:

1. If from the face of the papers he has filed, it is apparent that the applicant will present issues for review not clearly frivolous, the Court of Appeals should then grant leave to appeal in forma pauperis". ***Coppedge v. United States*, 369 US 438.446 - Supreme Court 1962,** "

2. **28 U. S. C. § 1915,** is designed to ensure that indigent litigants have meaningful access to the federal courts. ***Adkins v. E. I. DuPont de Nemours & Co.*, 335 U. S. 331, 342-343 (1948).**

3. An appeal on a matter of law is frivolous where "[none] of the legal points [are] arguable on their merits." ***Anders v. California*, 386 U. S. 738 U. S.744 (1967)**

There remain undecided aspects of the question of frivolous and IFP they are:

1. In a case that is removed from state court under diversity the Erie Doctrine requires state substantive rules apply. Does this mean that if a state court does not deny a pauper status, then the IFP is automatically approved?

2. Is it frivolous for an appellant to motion for a remand and pay filing fee if the financial position of the appellant should change? This question

will also apply the other way around if the appellant loses income and can no longer pay the filing fee.

The definition of frivolous must be expanded to take into account these issues. Until then due process rights cannot be served and freedom of speech will be denied.

Because of the definition remaining unanswered it has led to Burch, currently a pauper, losing millions of dollars in property to the defendants who cannot show a valid lien and have refused to show any ownership are interest in a loan or deed of trust on these 22 properties. The courts have been used by the defendants to summarily and unjustifiably take assets away from Burch and have used procedure and disregard for the law in the taking of these properties.

The order given by the panel had the following on page 3, "Burch is again warned that additional frivolous or abusive filings in this court, the district court, or the bankruptcy court will result in the imposition of further sanctions. Burch is once again admonished to review any pending appeals—particularly those in which he requests leave to proceed IFP from an order dismissing his bankruptcy appeal in the district court for failure to pay the filing fee and moves in this court to remand based on new financial resources—and to withdraw any appeals that are frivolous."

By Burch wanting to save the court, the defendant, and himself time and money the case Burch had his Due Process rights taken away from him and he was thus forced to shut up based on the courts statement that could not be heard on the merits. This denied Burch his constitutional right to free speech under the **First Amendment** and his right to due process as guaranteed under the **Fifth Amendment.**

Because both the district court and Burch were confused as to the order of filing the **FRAP 12.1** and **FRCP 62.1** the court needs to clarify that the district court should be allowed to reopen the case temporarily to rule on the **FRCP 62.1** motion or that the district court has the authority to rule on a **FRCP 62.1** motion even though the case in the district court is closed.

XI. CONCLUSION

For the foregoing reasons, Burch respectfully requests that this Court issue a writ of certiorari to review the Order of the Court of Appeals for the Fifth Circuit.

DATED this 2nd day of May 2022

Respectfully submitted,

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