

## **APPENDICES**

APPENDIX A

App 1

United States Court of Appeals  
for the Fifth Circuit

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No. 20-11171

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IN THE MATTER OF: WILLIAM PAUL BURCH,

*Debtor,*

WILLIAM PAUL BURCH,

*Appellant,*

*versus*

SELECT PORTFOLIO SERVICING, INCORPORATED,

*Appellee.*

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 4:20-CV-1145

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ON PETITION FOR REHEARING

Before ELROD, OLDHAM, and WILSON, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

App 2

***United States Court of Appeals***

FIFTH CIRCUIT  
OFFICE OF THE CLERK

LYLE W. CAYCE  
CLERK

TEL. 504-310-7700  
600 S. MAESTRI PLACE,  
Suite 115  
NEW ORLEANS, LA 70130

February 17, 2022

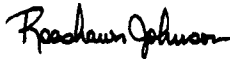
MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 20-11171 Burch v. Select Portfolio Servicing  
USDC No. 4:20-CV-1145

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk



By: \_\_\_\_\_  
Roeshawn Johnson, Deputy Clerk  
504-310-7998

Mr. William Paul Burch  
Mr. Matthew Kyle Hansen  
Mr. Thomas F. Loose  
Ms. Karen S. Mitchell  
Mr. Thomas George Yoxall

APPENDIX B

App 2

United States Court of Appeals  
for the Fifth Circuit

United States Court of Appeals  
Fifth Circuit

**FILED**

January 24, 2022

Lyle W. Cayce  
Clerk

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No. 20-11171  
Summary Calendar

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IN THE MATTER OF: WILLIAM PAUL BURCH,

*Debtor,*

WILLIAM PAUL BURCH,

*Appellant,*

*versus*

SELECT PORTFOLIO SERVICING, INCORPORATED,

*Appellee.*

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 4:20-CV-1145

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Before ELROD, OLDHAM, and WILSON, *Circuit Judges*.

PER CURIAM:\*

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\* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

App 3

No. 20-11171

William Paul Burch appeals the district court's dismissal for failure to pay the filing fee of his appeal of a judgment of the bankruptcy court for the Northern District of Texas. Burch has filed a motion to remand this matter to the district court, stating that he is now able to pay the filing fee. Because the record does not establish that the district court issued a statement or indicative ruling in accordance with Federal Rule of Civil Procedure 62.1 and Federal Rule of Appellate Procedure 12.1, upon which Burch relies, Burch's motion for remand is denied. *See* FED. R. APP. P. 12.1; FED. R. CIV. P. 62.1; *cf. Moore v. Tangipahoa Par. Sch. Bd.*, 836 F.3d 503, 504 (5th Cir. 2016).

The motion for remand concedes that Burch does not currently meet the financial eligibility requirements to proceed IFP in this appeal. *See* FED. R. APP. P. 24(a); 28 U.S.C. § 1915(a)(1); *Carson v. Polley*, 689 F.2d 562, 586 (5th Cir. 1982); *see also Burch v. Freedom Mortg. Corp. (In re Burch)*, 835 F. App'x 741, 749 (5th Cir.), *cert. denied*, 142 S. Ct. 253 (2021), *rehearing denied*, No. 21-5069, 2021 WL 5763451 (U.S. Dec. 6, 2021). Furthermore, 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. *See* 5TH CIR. R. 42.2; § 1915(e)(2)(B)(i).

On prior instances, we issued a sanction warning and directed Burch to review his pending appeals and withdraw any that were frivolous. *Burch v. Freedom Mortg. Corp. (In re Burch)*, 850 F. App'x 292, 294 (5th Cir. 2021); *Burch*, 835 F. App'x at 749. In a comparable recent appeal, we determined that Burch had not heeded our warnings and filed another frivolous appeal. *Burch v. America's Servicing Co. (Matter of Burch)*, No. 20-11074, 2021 WL 5286563, \*1 (5th Cir. Nov. 12, 2021) (unpublished). This court imposed a sanction of \$100, again warned of sanctions, and once more admonished Burch to review his pending appeals and to withdraw any frivolous ones. *Id.*

App 4

No. 20-11171

Because Burch has ignored these admonishments, we conclude that an additional sanction is warranted. Burch is hereby ordered to pay \$250.00 to the clerk of this court. The clerk of this court and the clerks of all courts subject to the jurisdiction of this court are directed to return to Burch unfiled any submissions he should make until the sanction is paid in full. 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.

MOTION DENIED; APPEAL DISMISSED AS FRIVOLOUS; SANCTION IMPOSED; ADDITIONAL SANCTION WARNING ISSUED.

APPENDIX C

App 5

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

WILLIAM PAUL BURCH,

Debtor/Appellant,

v.

SELECT PORTFOLIO SERVICING,  
INC.,

Appellee.

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Civil Action No. 4:20-cv-01145-O

**ORDER**


On October 27, 2020, the Court issued an Order requiring that Appellant pay the filing fee for his appeal in this case. *See* Order, ECF No. 4. The deadline for Appellant's filing fee payment was October 30, 2020. As of the date of this Order, however, Appellant has not paid the fee. Instead, Appellant moved for leave to proceed *in forma pauperis*. *See* Motion, ECF Nos. 5–6.

A district court can waive an appellant's filing fee "if the court determines that such individual has income less than 150 percent of the income official poverty line . . . applicable to a family of the size involved and is unable to pay that fee in installments." 28 U.S.C. § 1930(f)(1), (2). According to the Department of Health and Human Services, "150 percent of the income official poverty line" for a family of two living in the contiguous United States is \$25,860. Annual Update of the HHS Poverty Guidelines, 85 Fed. Reg. 12, 3060 (Jan. 17, 2020). Burch's social security income for his wife and him is \$2177 per month, equaling \$26,124 annually. *Aff. 2*, ECF No. 6. Thus, Burch's annual income exceeds 150 percent of the income official poverty line, and he does not qualify for a fee waiver.

App 6

Accordingly, the Court **DENIES** Appellant's Motion for Leave to Proceed *in forma pauperis* and **ORDERS** Appellant to pay his filing fee on or before **November 9, 2020** or risk dismissal of his appeal.

**SO ORDERED** on this **2nd day** of **November 2020**.

  
Reed O'Connor  
UNITED STATES DISTRICT JUDGE





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## App 8

Before the Court is the amended motion to dismiss (the “*Amended Motion to Dismiss*”) under Federal Civil Rules 12(b)(6) and 9(b), filed by defendant Select Portfolio Servicing, Inc. (“*SPS*”).<sup>1</sup> SPS asks the Court to dismiss for failure to state a claim *Plaintiff’s Original Petition* (the “*Complaint*”),<sup>2</sup> filed by plaintiff William Paul Burch (the “*Plaintiff*” or the “*Debtor*”). For the reasons described below, the Court agrees that the Complaint fails to state a claim upon which relief can be granted, so the Amended Motion to Dismiss is granted.

### I. JURISDICTION AND VENUE

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334(b) and 157(a). This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper pursuant to 28 U.S.C. § 1409(a).

### II. PROCEDURAL BACKGROUND<sup>3</sup>

#### A. The Debtor’s bankruptcy filings and confirmed plans

On December 1, 2008, the Debtor and Juanita Burch filed for Chapter 11 bankruptcy (the “*2008 Bankruptcy Case*”) to prevent foreclosure on multiple properties, including property located at 1169 Meadow Creek Drive, Lancaster, Texas (the “*Meadow Creek Property*”)<sup>4</sup> and property located at 3805 Wrentham Drive, Arlington, Texas (the “*Wrentham Property*”).

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<sup>1</sup> *Defendant’s Amended Motion to Dismiss Plaintiff’s Original Petition*, Adv. ECF No. 15. The Court also considered the *Plaintiff’s Response to Defendants Motion to Dismiss*, Adv. ECF No. 10; and the *Defendant’s Reply in Support of its Motion to Dismiss*, Adv. ECF No. 12 (the “*Reply*”).

<sup>2</sup> Adv. ECF No. 3, at 19/30.

<sup>3</sup> The documents cited in this section are either referred to in, or attached to, the Complaint, or are matters of which this Court can take judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2008) (directing courts to “consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice”); *Norris v. Hearst Trust*, 500 F.3d 454, 461 n.9 (5th Cir. 2007) (“[I]t is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record.”).

<sup>4</sup> See Case No. 08-45761-RFN-11.

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App 9

On February 10, 2009, SPS filed proof of claim number 37-1 in the 2008 Bankruptcy Case, asserting a claim for \$87,157.73 secured by a mortgage on the Meadow Creek Property.<sup>5</sup> Various loan documents were attached to the proof of claim, including a note and deed of trust (together, the “*Meadow Creek Loan Documents*”).

On February 20, 2009, SPS filed proof of claim number 45-1 in the 2008 Bankruptcy Case, asserting a claim for \$105,908.61 secured by a mortgage on the Wrentham Property.<sup>6</sup> Various loan documents were attached to the proof of claim, including a note and deed of trust (together, the “*Wrentham Loan Documents*”).

On December 9, 2009, the Court entered an *Order Confirming Debtor’s Third Amended Plan of Reorganization* (the “*2008 Bankruptcy Case Confirmation Order*”),<sup>7</sup> which confirmed the Debtors’ *Fourth Amended Plan of Reorganization* (the “*2008 Bankruptcy Case Chapter 11 Plan*”) <sup>8</sup> that is attached as Exhibit A to the 2008 Bankruptcy Case Confirmation Order. Section 5.12 of the 2008 Bankruptcy Case Chapter 11 Plan provided for treatment of the claims of “Select Portfolio Services,” which the plan listed as the “mortgage holder” on the Wrentham Property and the Meadow Creek Property.<sup>9</sup>

The specific treatment as to the Meadow Creek Property was as follows:

The Debtor shall surrender the Meadow Creek in full satisfaction of the debt pursuant to 11 U.S.C. 1129(b)(2)(A)(iii).<sup>10</sup>

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<sup>5</sup> Claim 37-1, Case No. 08-45761-RFN-11.

<sup>6</sup> Claim 45-1, Case No. 08-45761-RFN-11.

<sup>7</sup> ECF No. 246, Case No. 08-45761-RFN-11.

<sup>8</sup> *Fourth Amended Plan of Reorganization of William & Juanita Burch Pursuant to Section 1125 of the Bankruptcy Code Dated October 16, 2009*, ECF No. 244, Case No. 08-45761-RFN-11.

<sup>9</sup> 2008 Bankruptcy Case Chapter 11 Plan § 5.12.

<sup>10</sup> *Id.*

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## App 10

The specific treatment as to the Wrentham Property was as follows:

Based upon the Debtors' current value of the Wrentham property, the Debtors will enter into a New Wrentham Note in the original principal amount of \$113,621.64 (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 Debtors shall pay the New Wrentham Note in 360 equal monthly payments of \$755 commencing on the Effective Date.<sup>11</sup>

No party appealed the 2008 Bankruptcy Case Confirmation Order. The 2008 Bankruptcy Case was closed on September 11, 2012.

On December 28, 2012, Burch filed for Chapter 13 bankruptcy (the "**2012 Bankruptcy Case**").<sup>12</sup> The 2012 Bankruptcy Case was converted to Chapter 11 on December 23, 2013.<sup>13</sup>

Nothing in the 2012 Bankruptcy Case Chapter 11 Plan or Confirmation Order provided, or even suggested, that the Debtor was retaining any causes of action related to the Meadow Creek Property or Wrentham Property, including any claims related to language in the 2008 Bankruptcy Case Chapter 11 Plan or related to events that took place after confirmation of the 2008 Bankruptcy Case Chapter 11 Plan.

The 2012 Bankruptcy Case was converted to Chapter 7 on January 30, 2018 based in part on the Plaintiff's material defaults under the 2012 Bankruptcy Case Chapter 11 Plan.<sup>14</sup>

The Meadow Creek property was surrendered to SPS and sometime after the 2008 Bankruptcy Case was closed but prior to the 2012 Bankruptcy Case filing, SPS foreclosed its liens and security interests in the Wrentham Property and in the Meadow Creek Property.

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<sup>11</sup> *Id.*

<sup>12</sup> *Voluntary Petition*, ECF No. 1, Case No. 12-46959.

<sup>13</sup> *Order Converting Case from Chapter 13 to Chapter 11*, ECF No. 100, Case No. 12-46959.

<sup>14</sup> *Order Granting Specialized Loan Servicing LLC's Motion to Dismiss with Prejudice or to Convert to Chapter 7*, ECF No. 354, Case No. 12-46959; *see also* ECF No. 390, Transcript of 1/25/18 hearing on conversion, at 46-51.

**B. The Plaintiff's claims against SPS related to the Meadow Creek Property and/or the Wrentham Property and SPS's related motions to dismiss**

On March 26, 2020, the Plaintiff filed his Complaint<sup>15</sup> in the 48<sup>th</sup> Judicial District Court of Tarrant County, Texas under Cause No. 048-316135-20 (the "*State Court Lawsuit*"). In the Complaint, the Plaintiff asserted claims against SPS (i) under Texas Civil Practice and Remedies Code section 12.003 for an allegedly fraudulent lien; (ii) under Texas Business and Commerce Code section 27.01 for statutory fraud; (iii) for breach of contract; (iv) for trespass to try title; (v) under Texas Civil Practice and Remedies Code section 41.008 for gross negligence and punitive damages; and (vi) although not a separate count, for violations of the 2008 Bankruptcy Case Chapter 11 Plan and 2008 Bankruptcy Case Confirmation Order. All the Plaintiff's claims stem from the servicing of the mortgage encumbering the Meadow Creek and/or Wrentham Property. The Plaintiff also sought actual and punitive damages, pre- and post-judgment interest, and the production of documents.

On May 1, 2020, SPS removed the lawsuit to the United States District Court for the Northern District of Texas, Fort Worth Division, based on diversity jurisdiction under 28 U.S.C. §§ 1332, 1441, and 1446<sup>16</sup> thereby initiating District Court Civil Action No. 4:20-cv-00423-O (the "*Civil Action*").

On May 28, 2020, United States Magistrate Judge Hal R. Ray, Jr. recommended to the District Court that the Civil Action be referred to this Court based on the Plaintiff's Chapter 7

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<sup>15</sup> Adv. ECF No. 3, at 19/30.

<sup>16</sup> *Notice of Removal*, Filed at Adv. ECF No. 3, at 1/30.

bankruptcy.<sup>17</sup> On July 1, 2020, based on that recommendation, the District Court referred the Civil Action to this Court.<sup>18</sup>

On August 5, 2020, SPS filed its original motion to dismiss (the “*Original Motion to Dismiss*”)<sup>19</sup> under Federal Civil Rules 12(b)(6) and 9(b), asking the Court to dismiss the Complaint for failure to state a claim. Even though the Complaint dealt with the Wrentham Property and the Meadow Creek Property, the Original Motion to Dismiss asked this Court to dismiss the Plaintiff’s claims against SPS as they relate to the Meadow Creek Property and a property identified as 5947 Waterford Drive, Grand Prairie, Texas (the “*Waterford Property*”).<sup>20</sup> In the interest of judicial economy, the Court declined to address the Original Motion to Dismiss as filed because it did not address the Wrentham Property, which is one of the subjects of the Complaint, and because it addressed the Waterford Property, which is not the subject of the Complaint. Therefore, the Court denied the Original Motion to Dismiss without prejudice to the filing of an amended motion to dismiss.<sup>21</sup>

On September 15, 2020, SPS filed its Amended Motion to Dismiss (as it now correctly relates to the Wrentham Property and the Meadow Creek Property) under Federal Civil Rules 12(b)(6) and 9(b), asking the Court to dismiss the Complaint for failure to state a claim.

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<sup>17</sup> *Findings, Conclusions, and Recommendation of the United States Magistrate Judge*, Adv. ECF No. 3-11 (Civil Action Doc. No. 9).

<sup>18</sup> *Order Accepting Findings, Conclusions, and Recommendation of the United States Magistrate Judge*, Adv. ECF No. 1 (Civil Action Doc. No. 11).

<sup>19</sup> Adv. ECF No. 7.

<sup>20</sup> Original Motion to Dismiss at 7/19.

<sup>21</sup> *Order Denying Motion to Dismiss*, Adv. ECF No. 13 (allowing SPS to file an amended motion by September 15, 2020, and allowing the Debtor to file a response by September 25, 2020).

The Court has reviewed the parties' filings, and the matter is now ripe for decision.<sup>22</sup>

### III. ANALYSIS

Under the applicable standard for Federal Civil Rule 12(b)(6) motions, the Court must review the Complaint by "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff."<sup>23</sup> Viewing the facts in the light most favorable to the Plaintiff, the Court must dismiss the Complaint if it fails "to state a claim to relief that is plausible on its face."<sup>24</sup> Applying this standard, the Court will review each count in the Complaint to determine whether any count states a plausible claim for relief.

#### A. Preliminary observations and conclusions: Plaintiff's erroneous bankruptcy-related arguments

Before reaching the specific counts, the Court first will address allegations in the Complaint that infect the entire document with the Plaintiff's erroneous notions of an invalid or void note and deed of trust on the Wrentham Property. Throughout the Complaint, the Plaintiff alleges that new mortgage notes were to be delivered to the Plaintiff. Paragraph 22 of the Complaint then cites section 13.4 of the 2008 Bankruptcy Case Chapter 11 Plan for the proposition that "if the mortgage companies failed to produce a new mortgage note, defying the Court Order, they would lose their lien as compensation to Bill."<sup>25</sup>

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<sup>22</sup> Although the Plaintiff did not file a response to the Amended Motion to Dismiss, the Court—as noted above—has also considered the *Plaintiff's Response to Defendants Motion to Dismiss*, Adv. ECF No. 10, and the *Defendant's Reply in Support of its Motion to Dismiss*, Adv. ECF No. 12.

<sup>23</sup> *Stokes v. Gann*, 498 F. 3d 483, 484 (5th Cir. 2007).

<sup>24</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

<sup>25</sup> Complaint ¶ 22 & n.4 (attaching as Exhibit D page 18 of the 2008 Bankruptcy Case Plan; section 13.4 of that plan is the only provision that mentions six months).

The Plaintiff's interpretation of the 2008 Bankruptcy Case Chapter 11 Plan is mistaken, and equally important, his arguments are foreclosed by the 2012 Bankruptcy Case Chapter 11 Plan and Confirmation Order.

*Plaintiff's erroneous interpretation of 2008 Bankruptcy Case Chapter 11 Plan.* First, the plan provisions do not support the Plaintiff's allegation that there will be no claim or lien on the Wrentham Property if new loan documents are not signed within six months. It is true that section 5.12 of the plan states that "the Debtors will enter into a New Wrentham Note," but the plan does not require that separate loan documents be drawn up. Instead, the 2008 Bankruptcy Case Chapter 11 Plan provides that "all Claims and Debts will receive the treatment afforded in Articles of this Plan,"<sup>26</sup> and with respect to the "Allowed Secured Claims of Select Portfolio Services," the plan specifies that "[t]he Debtor shall surrender the Meadow Creek in full satisfaction of the debt," and with respect to the Wrentham Property, the Plan specifies the interest rate on the debt (7%), the number of monthly payments (360), and the monthly payment amount (\$755).<sup>27</sup> The plan also contains notice and cure provisions dealing with payment defaults by the Plaintiff under the plan.<sup>28</sup>

Notwithstanding the plan provisions that dealt with payment terms and defaults, the Plaintiff cites section 13.4 of the 2008 Bankruptcy Case Chapter 11 Plan as evidence that the claim and lien on the Wrentham Property are somehow voided if new loan documents are not drafted within six months. The Plaintiff completely misconstrues this plan provision, which provides for the forfeiture of distributions that are unclaimed for six months.<sup>29</sup> This is a common provision in

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<sup>26</sup> 2008 Bankruptcy Case Chapter 11 Plan § 2.1.

<sup>27</sup> *Id.* § 5.12.

<sup>28</sup> *See id.* §§ 9.2, 9.3.

<sup>29</sup> 2008 Bankruptcy Case Chapter 11 Plan § 13.4 ("Any distribution pursuant to this Plan which remains unclaimed for a period of six (6) months from the due date of such distribution is forfeited.").



Chapter 11 plans and deals with the situation where a debtor mails a distribution check to a creditor on account of an allowed claim, and the creditor does not negotiate the check for six months. In that scenario, the distribution is forfeited back to the debtor. Section 13.4 has nothing at all to do with voiding a creditor's entire secured claim and lien.

In short, there is nothing in the 2008 Bankruptcy Case Chapter 11 Plan that provides for the voiding or disallowance of the claim and lien related to the Wrentham Property.

*The Plaintiff's arguments are foreclosed by the 2012 Bankruptcy Case Chapter 11 Plan and Confirmation Order.* In the Complaint, the Plaintiff alleges various claims based on actions or inactions that occurred after confirmation of the 2008 Bankruptcy Case Chapter 11 Plan. Even if such claims had merit (and as explained above, they do not), no such claims were preserved in the 2012 Bankruptcy Case Chapter 11 Plan, so the Plaintiff cannot raise them now.<sup>30</sup>

With these observations and conclusions in mind, the Court now turns to the specific counts in the Complaint.

**B. Count 1: Texas Civil Practice and Remedies Code section 12.003 - Fraudulent Lien**

This Count alleges that SPS violated section 12.003 of the Texas Civil Practice and Remedies Code based on alleged actions concerning the allegedly invalid note and mortgage on the Wrentham Property. To properly allege a fraudulent lien claim pursuant to Texas Civil Practice & Remedies Code § 12.002(a), a plaintiff must allege sufficient facts to demonstrate that (1) the defendant made, presented, or used a document with knowledge that it was a fraudulent court record or a fraudulent lien or claim against real or personal property; (2) the defendant intended

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<sup>30</sup> 11 U.S.C. § 1123(b)(3)(B) (providing for the "retention and enforcement" of claims in a plan); *see also In re United Operating, LLC*, 540 F.3d 351, 355-56 (5th Cir. 2008) (debtor lacks standing to pursue claims that are not specifically and unequivocally preserved in confirmed Chapter 11 plan).

that the document be given legal effect; and (3) the defendant intended to cause plaintiff physical injury, financial injury, or mental anguish.<sup>31</sup>

As explained above, nothing in the Plaintiff's bankruptcy cases invalidated the debt or lien associated with the Wrentham Property, so the Plaintiff's arguments about the allegedly invalid note and mortgage have no merit. The Complaint is devoid of allegations that would show SPS violated sections 12.002 or 12.003 of the Texas Civil Practice and Remedies Code.

Count 1 of the Complaint fails to state a plausible claim for relief against SPS.

**C. Count 2: Texas Business and Commerce Code section 27.01(a) - Statutory Fraud**

The Plaintiff's "Statutory Fraud" count alleges statutory violations of section 27.01 of the Texas Business and Commerce Code based on alleged actions concerning the allegedly invalid note and mortgage on the Wrentham Property.

First, as explained above, nothing in the Plaintiff's bankruptcy cases invalidated the debt or lien associated with the Wrentham Property, so the Plaintiff's arguments about violations of section 27.01 of the Texas Business and Commerce Code stemming from the allegedly invalid note and mortgage have no merit.

Second, to state a claim under section 27.01(a), a plaintiff must plead facts showing a false representation or false promise.<sup>32</sup> The Complaint is devoid of any meaningfully specific allegations that would show SPS made any such false representation or false promise.

Finally, although there is not a separate count for common-law fraud, paragraph 38 of the Complaint (found within the Count 2—Statutory fraud section) contains a reference to common-

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<sup>31</sup> TEX. CIV. PRAC. & REM. CODE § 12.002(a).

<sup>32</sup> TEX. BUS. & COMM. CODE § 27.01(a).

law fraud. To the extent the Plaintiff is asserting such a claim, it also fails. The elements of common-law fraud are (1) the defendant made a material representation to the plaintiff; (2) the representation was false; (3) the defendant knew the representation was false or made the misrepresentation recklessly, without knowledge of the truth; (4) the defendant intended for the plaintiff to act on the misrepresentation; (5) the plaintiff acted on the misrepresentation; and (6) the plaintiff incurred damages.<sup>33</sup> Any argument about fraud stemming from the allegedly invalid note and mortgage have no merit, as explained above. Moreover, the Complaint is devoid of allegations that would show SPS took any action, or failed to take any action, that would constitute common-law fraud.

Count 2 of the Complaint fails to state a plausible claim for relief against SPS.

**D. Count 3: Breach of Contract**

This Count alleges that SPS breached a contract through its actions in connection with the allegedly invalid note and mortgage on the Wrentham Property. As explained above, nothing in the Plaintiff's bankruptcy cases invalidated the debt or lien associated with the Wrentham Property, so the Plaintiff's arguments about the allegedly invalid note and mortgage have no merit. The Complaint is devoid of any other meaningfully specific allegations that would show SPS breached any contract.

Count 3 of the Complaint fails to state a plausible claim for relief against SPS.

**E. Count 4: Trespass to Try Title**

This count alleges that the Plaintiff is the fee simple owner of the Wrentham Property due to the allegedly invalid note and mortgage on the Wrentham Property. To prevail on a trespass to

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<sup>33</sup> *In re First Merit Bank, N.A.*, 52 S.W.3d 749, 758 (Tex. 2001).

try title claim, a plaintiff must prove title to the property by: (1) regular chain of conveyances from the sovereign; (2) superior title out of a common source; (3) limitations; or (4) prior possession coupled with proof that possession was not abandoned.<sup>34</sup> A plaintiff must prevail on the superiority of his title, not on the weakness of a defendant's title.<sup>35</sup>

As explained above, nothing in the Plaintiff's bankruptcy cases invalidated the debt or lien associated with the Wrentham Property, so the Plaintiff's arguments about the allegedly invalid note and mortgage have no merit. In addition, the public record reflects that neither party to this litigation has an interest in the Wrentham Property,<sup>36</sup> so there is no controversy between the parties. The Complaint is devoid of allegations that would show the Plaintiff is entitled to prevail on his trespass-to-try-title claim.

Count 4 of the Complaint fails to state a plausible claim for relief against SPS.

**F. Count 5: Texas Civil Practice and Remedies Code section 41.008(a) – Gross Negligence and Punitive Damages**

This Count alleges that the Plaintiff is entitled to punitive and exemplary damages against SPS due to SPS's allegedly fraudulent and malicious conduct in connection with the Wrentham Property. As explained above, nothing in the Plaintiff's bankruptcy cases invalidated the debt or lien associated with the Wrentham Property, so the Plaintiff's arguments about the allegedly invalid note and mortgage have no merit. The Complaint is devoid of allegations that would show the Plaintiff is entitled to any exemplary or punitive damages.

Count 5 of the Complaint fails to state a plausible claim for relief against SPS.

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<sup>34</sup> See *Richardson v. Wells Fargo Bank, N.A.*, 873 F. Supp. 2d 800, 816 (N.D. Tex. June 29, 2012) (citing *Caress v. Lira*, 330 S.W. 3d 363, 364 (Tex. App.-San Antonio 2010, pet. denied)).

<sup>35</sup> *Warren v. Bank of America, N.A.*, 566 F. App'x 379, 382 (5th Cir. 2014).

<sup>36</sup> See Amended Motion to Dismiss ¶ 9 (attaching deeds to third party as Exhibits 4-5).

APPENDIX E

App 20

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

WILLIAM PAUL BIRCH,

Plaintiff,

v.

SELECT PORTFOLIO SERVICING,  
INC.,

Defendant.

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Civil Action No. 4:20-cv-00423-O

**ORDER ACCEPTING THE FINDINGS, CONCLUSIONS, AND RECOMMENDATION  
OF THE UNITED STATES MAGISTRATE JUDGE**

After conducting a de novo review of all relevant matters of record in this case, including the Findings, Conclusions, and Recommendation of the United States Magistrate Judge (ECF No. 9), filed May 28, 2020, and Plaintiff's Objections thereto (ECF No. 10), filed June 9, 2020, in accordance with 28 U.S.C. § 636(b)(1), the Court determines that the Findings and Conclusions of the Magistrate Judge are correct, and they are **ACCEPTED** as the Findings and Conclusions of the Court.<sup>1</sup>

Accordingly, it is **ORDERED** that the case is **WITHDRAWN** from United States Magistrate Judge Hal R. Ray, Jr. and **REFERRED** to United States Bankruptcy Judge Mark X.

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<sup>1</sup> Plaintiff has filed objections to the Magistrate Judge's Findings, Conclusions, and Recommendation, which the Court has liberally construed in light of Plaintiff's pro se status. *See* Pl.'s Obj. (ECF No. 10) Following a de novo review, the Court **overrules** the Objections, as none of the Objections alters the Magistrate Judge's finding and conclusion that this case, at a minimum, "relates to" a bankruptcy proceeding, and, therefore, should be referred to United States Bankruptcy Judge Mark X. Mullin pursuant to this Court's Miscellaneous Order No. 33. Plaintiff is entitled to a trial by jury for all issues so triable and his right to a jury trial is deemed preserved. Plaintiff in his Objections states he does not consent to the Bankruptcy Court conducting a jury trial in this proceeding. As a result, the Bankruptcy Court may not try any issues that are triable by a jury. The reference shall be withdrawn *if and when* this matter is ready for trial. The reference shall remain with the Bankruptcy Court as to all pretrial matters, including dispositive motions such as motions for summary judgment. The court will wait until *if and when* the case is ready to go to trial before withdrawing the reference because allowing the bankruptcy court to resolve pretrial issues and enter findings of fact and recommendations of law on dispositive issues is consistent with Congress' intent to let expert bankruptcy judges determine bankruptcy matters to the greatest extent possible.

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Mullin, presiding judge in Cause No. 12-46959-mxm7, pursuant to this Court's Miscellaneous Order No. 33.<sup>2</sup>

**SO ORDERED** this **1st day of July, 2020**.

  
Reed O'Connor  
UNITED STATES DISTRICT JUDGE

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<sup>2</sup> Miscellaneous Order No. 33 provides that "any or all cases under Title 11 and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11 . . . are referred to the Bankruptcy Judges of this district for consideration and resolution consistent with law." Miscellaneous Order No. 33, Order of Reference of Bankruptcy Cases and Proceedings *Nunc Pro Tunc* (N.D. Tex. Aug. 3, 1984).

APPENDIX F  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION

WILLIAM PAUL BURCH,

Plaintiff,

v.

SELECT PORTFOLIO SERVICING,  
INC.,

Defendant.

§  
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Civil Action No. 4:20-cv-00423-O-BP

**FINDINGS, CONCLUSIONS, AND RECOMMENDATION**  
**OF THE UNITED STATES MAGISTRATE JUDGE**

Before the Court is the Plaintiff's Original Petition, ECF No. 1-5 at 2, filed by Plaintiff William Paul Burch ("Burch") on March 26, 2020 in the 48<sup>th</sup> Judicial District Court of Tarrant County, Texas. Defendant Select Portfolio Servicing, Inc. ("SPS") removed the case to this Court on May 1, 2020. ECF No. 1. On that same day, the case was automatically referred to the undersigned for pretrial management pursuant to Special Order 3. ECF No. 4.

The Court is aware that Burch has previously filed for bankruptcy protection. On July 2, 2019, the undersigned entered Findings, Conclusions, and Recommendation in another foreclosure-related case, *Burch v. Freedom Mortgage Corp.*, No. 4:18-cv-01015-O-BP, recommending that United States District Judge Reed O'Connor withdraw the case from the undersigned and refer it to United States Bankruptcy Judge Mark X. Mullin, the presiding judge in Burch's bankruptcy case. By Order dated July 10, 2019, Judge O'Connor accepted the Findings, Conclusions, and Recommendation, withdrew the *Freedom Mortgage* case from the undersigned, and referred it to Judge Mullin.

Since that time, the undersigned entered Findings, Conclusions, and Recommendation recommending similar withdrawals of reference in four other foreclosure-related cases pending

before United States District Judge Mark T. Pittman. In two of those cases Burch was the plaintiff and Chase Bank of Texas, N.A., was the defendant. Those cases bore cause numbers 4:19-cv-00521-P-BP and 4:19-cv-00523-P-BP. In the two other cases Burch was the plaintiff and Bank of America, N.A. ("BOA") was the defendant. Those cases bore cause numbers 4:19-cv-00351-P-BP and 4:19-cv-01030-P-BP. In each of these cases, Judge Pittman accepted the Findings, Conclusions, and Recommendation, withdrew the cases from the undersigned, and referred them to Judge Mullin.

On May 21, 2020, the undersigned entered Findings, Conclusions, and Recommendation recommending a similar withdrawal of reference in another foreclosure-related case pending before Judge O'Connor. In that case, Burch was the plaintiff and BOA was the defendant. That case bore cause number 4:20-cv-00387-O-BP.

By Order dated May 5, 2020, the undersigned ordered the parties in this case to show cause why Judge O'Connor should not similarly withdraw the reference here and refer the case to Judge Mullin. ECF No. 6. Burch responded on May 24, 2020, ECF No. 7, and SPS responded on May 26, 2020, ECF No. 8. Both parties agreed that the district judge should not withdraw the reference of the case to the undersigned and refer it to Judge Mullin.

In this and all the other cases just listed, Burch alleges that various lenders and lienholders wronged him. Although SPS focuses on the Court's power to adjudicate Burch's claims here despite the Bankruptcy Code's automatic stay, the Court is persuaded that this case is best heard in the bankruptcy court along with the other lawsuits concerning his investment properties. Because this case constitutes a core proceeding arising under title 11 or arising in a case under title 11, it should be referred to the bankruptcy judge who is presiding over Burch's bankruptcy case. Accordingly, the undersigned **RECOMMENDS** that Judge O'Connor withdraw the case from the undersigned and refer it to Judge Mullin pursuant to this Court's Miscellaneous Order No. 33.



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**I. BACKGROUND**

In 2007, Burch obtained a loan from SPS's predecessor in interest, Credit Suisse Financial Corporation ("CSFC"), on property located at 3805 Wrentham Drive, Arlington, Texas ("the Wrentham Property"). ECF No. 1-5, at 12. He also obtained a loan from CSFC on property located at 1169 Meadow Creek Drive, Lancaster, Texas ("the Meadow Creek Property"). *Id.* at 13. Burch alleges that at some point the mortgage notes were purchased or managed by SPS. *Id.* In December 2008, Burch filed for Chapter 11 bankruptcy. *See* Cause No. 08-45761-rfn11. The bankruptcy court approved a plan of reorganization that allegedly voided the terms of the original loan. ECF No. 1-5 at 13. The plan also set out new terms for the loan. *Id.* at 14-17. In dispute is whether SPS had valid liens on the Wrentham Property and the Meadow Creek Property. *Id.* at 19-21.

The following facts are taken from the Court's previous Findings, Conclusions, and Recommendation in the *Freedom Mortgage* case. *See* No. 4:18-cv-01015-O-BP, ECF No. 45 at 2. Burch's 2008 bankruptcy case was closed on September 11, 2012. *Id.* On December 28, 2012, Burch filed for Chapter 13 bankruptcy, and the case converted to Chapter 11 in 2013. *Id.* On February 1, 2016, the bankruptcy court entered an order confirming Burch's plan of reorganization ("the Plan"). *Id.* The order provided "that the [bankruptcy court] shall retain jurisdiction to the maximum extent possible to enforce the Plan, interpret the Plan, and provide for all proceedings and matters for which jurisdiction is preserved by the Plan, and otherwise . . . ." *Id.* The case then converted to Chapter 7 on January 30, 2018. *Id.* Burch's bankruptcy case, originally filed in 2012, is still open. *Id.*

**II. LEGAL STANDARD**

Under 28 U.S.C. § 157(a), "each district court may provide that proceedings arising under title 11 as core proceedings or arising in or related to a case under title 11, shall be referred to the bankruptcy judges for the district." The Fifth Circuit has held that a proceeding is "core" if "it

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invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case.” *Wood v. Wood (In re Wood)*, 825 F.2d 90, 97 (5th Cir. 1987). The district court may also refer a case to the bankruptcy judge if the case is related to a bankruptcy case. *Id.* at 93. A case is “related” to a bankruptcy proceeding if “the outcome of [the non-bankruptcy] proceeding could conceivably have any effect on the estate being administered in bankruptcy.” *Id.* (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)).

The Court should refer a case to the bankruptcy court if two conditions are met: (1) the Court would normally refer the case to the bankruptcy court under Miscellaneous Order No. 33 for the Northern District of Texas; and (2) the Court would be unlikely to withdraw the reference under 28 U.S.C. § 157(d). *Texas United Hous. Program, Inc. v. Wolverine Mortg. Partner Ret.*, No. 3:17-CV-977-L, 2017 WL 3822754, at \*3 (N.D. Tex. July 18, 2017). A district court may permissively withdraw the reference from the bankruptcy court for cause shown. 28 U.S.C. § 157(d). Withdrawal to the district court is mandatory, however, if on a timely motion by a party the court determines “resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.” *Id.*

### III. ANALYSIS

#### A. Burch’s Case Normally would be Referred to the Bankruptcy Court.

Miscellaneous Order No. 33 provides that “any or all cases under Title 11 and any or all proceedings arising under Title 11 or arising in or related to a case under Title 11 . . . are referred to the Bankruptcy Judges of this district for consideration and resolution consistent with law.” Miscellaneous Order No. 33, Order of Reference of Bankruptcy Cases and Proceedings *Nunc Pro Tunc* (N.D. Tex. Aug. 3, 1984). Because Miscellaneous Order No. 33 and 28 U.S.C. § 1334(b) are texturally similar, “it is necessary only to determine whether a matter is at least ‘related to’ the

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bankruptcy” proceeding to determine if it should be normally referred. *In re U.S. Brass Corp.*, 301 F.3d 296, 303–04 (5th Cir. 2002) (quoting *In re Wood*, 825 F.2d at 93).

Here, Burch challenges the validity of SPS’s liens on the Wrentham Property and the Meadow Creek Property. He asserts that they are fraudulent under § 12.003 of the Texas Civil Practice and Remedies Code and § 27.01 of the Texas Business and Commerce Code, and are central to his breach of contract, trespass to try title suit, and negligence claims. ECF No. 1-5 at 12-73. He alleges that SPS’s liens were void, asserts his rights in trespass to try title, and seeks to recover substantial actual and punitive damages. *Id.*

Because Burch is a *pro se* litigant, the Court must liberally construe his pleadings. *Johnson v. Atkins*, 999 F.2d 99, 100 (5th Cir. 1993). The undersigned finds that Burch’s petition challenges his plan of reorganization in bankruptcy and the validity of SPS’s liens on the Wrentham Property and the Meadow Creek Property. Such challenge constitutes a “core proceeding” “arising in or related to a case under Title 11” because it requires a “determination[] of the validity, extent, or priority of liens.” 28 U.S.C. § 157(b)(2)(K). The case complies with Miscellaneous Order No. 33 because it is “at least ‘related to’ the bankruptcy proceeding” pending before Judge Mullin. Therefore, the case should be “referred to [Judge Mullin] of this district for consideration and resolution consistent with law.” Misc. Order No. 33.

**B. The District Court is Unlikely to Withdraw the Reference.**

**1. Mandatory Withdrawal is Inapplicable.**

A “district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.” 28 U.S.C. § 157(d). Assuming either party timely files a motion to withdraw the reference, the question then turns on whether Burch’s claims concern “both title 11 and other laws of the United

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States regulating organizations or activities affecting interstate commerce.” *Id.* Consistent with the majority view in the Fifth Circuit, “consideration” as used in 28 U.S.C. § 157(d) means “substantial and material consideration.” *Texas United*, 2017 WL 3822754 at \*7 (citing *Rodriguez v. Countrywide Home Loans, Inc.*, 421 B.R. 341, 347 (S.D. Tex. 2009) (collecting cases)). To determine whether consideration is “substantial and material,” a “court must undertake analysis of significant open and unresolved issues regarding the non-title 11 law.” *Id.* at 348.

Burch asserts additional claims in his petition for statutory fraud, breach of contract, the creation of an invalid or fraudulent lien, trespass to try title, and gross negligence. ECF No. 1-5 at 12-73. After reviewing Burch’s petition, the undersigned has not identified any unsettled questions of law presented by his claims. The application of well-settled law should resolve Burch’s claims, and mandatory withdrawal is inapplicable.

## 2. Permissive Withdrawal is Inapplicable.

The Court in *United States v. Miller* held that Miscellaneous Order No. 33 “does not preclude a district court from exercising its jurisdiction.” No. CIV. A. 5:02-CV-0168-C, 2003 WL 23109906, at \*4 (N.D. Tex. Dec. 22, 2003). As 28 U.S.C. § 157(d) provides, “[t]he district court may withdraw, in whole or in part, any case or proceeding referred . . . for cause shown.” The Fifth Circuit has determined that the district court should not withdraw reference to the bankruptcy court of a core proceeding unless its withdrawal was based on a “sound, articulated foundation.” *Holland Am. Ins. Co. v. Succession of Roy*, 777 F.2d 992, 998 (5th Cir. 1985). In *Miller*, Judge Cummings summarized the factors mentioned by the Fifth Circuit in *Holland America* in determining whether the withdrawal is based on an adequate foundation as follows:

(1) whether or not the proceedings were ‘core’ proceedings; (2) the effect of the withdrawal on judicial efficiency; (3) uniformity in bankruptcy administration; (4) reduction in forum shopping; (5) fostering the economical use of the debtors’ and creditors’ resources; (6) expediting of the bankruptcy process; and (7) whether or not there is a jury demand.

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2003 WL 23109906 at \*4.

Like the factual situation in *Miller*, an order confirming the bankruptcy plan in Burch's 2012 bankruptcy case was entered. Although Burch demanded a jury in his petition in this case, the remaining factors described in *Holland America* weigh in favor of referring this matter to the bankruptcy court. First, Burch's claims appear to constitute core proceedings. Core proceedings include, among others, "determinations of the validity, extent, or priority of liens." 28 U.S.C. § 157(b)(2)(K). Burch's challenges to the validity of SPS's liens and additional claims call for "determinations of the validity, extent, or priority of liens." *Id.*

Second, none of the other *Holland America* factors weigh toward withdrawing the reference. Judicial efficiency is promoted because the bankruptcy court is in a better position to efficiently decide the case as Judge Mullin already confirmed a bankruptcy plan, and Burch's assets are currently pending in his bankruptcy case. Further, consolidating Burch's claims with his 2012 bankruptcy case will streamline administration of both cases "by bringing all matters related to the debtor and his assets into a single forum." *See Eggers v. TVZ Records, LLC, et al.*, No. A-08-CA-668-SS, 2010 WL 11506652, at \*2 (W.D. Tex. Jan. 22, 2010). That is particularly so here since Burch has filed several other suits challenging the validity of liens outside of his bankruptcy case that are now pending before Judge Mullin. Accordingly, neither party is likely to establish cause for permissive withdrawal.

Therefore, the case should be referred to the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division, as a case related to *In re Burch*, No. 12-46959-mxm7 (Bankr. N.D. Tex.).

#### RECOMMENDATION

Although the Court has jurisdiction over bankruptcy cases, Burch's claims in this case should be heard in the bankruptcy court. The undersigned therefore **RECOMMENDS** that United

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States District Judge Reed O'Connor withdraw the reference of the case to the undersigned and refer it to the Honorable Mark X. Mullin, presiding judge in Cause No. 12-46959-mxm7, pending in the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division.

A copy of this report and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of this report and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b)(1). 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 aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

Signed May 28, 2020.

  
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Hal R. Ray, Jr.  
UNITED STATES MAGISTRATE JUDGE