APPENDICES

APPENDIX A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
April 19, 2022
Lyle W. Cayce
Clerk

No. 20-10872
Summary Calendar

IN THE MATTER OF: WILLIAM PAUL BURCH

Debtor,

WILLIAM PAUL BURCH,

Appellant,

versus

BANK OF AMERICA, N.A.,

Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:20-CV-620

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

PER CURIAM:*

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

William Paul Burch has appealed from 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 the 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, his 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) (per curiam). Burch's motion to withdraw the motion to remand is also denied.

Additionally, Burch moves to proceed in forma pauperis (IFP) on appeal. To proceed IFP, a litigant must be economically eligible, and his appeal must not be frivolous. *Carson v. Polley*, 689 F.2d 562, 586 (5th Cir. 1982). If the appeal is frivolous, this court will dismiss it. *See* 28 U.S.C. § 1915(e)(2)(B)(i); 5TH CIR. R. 42.2.

Even before Burch's concessions regarding his improved financial situation, we held that Burch was not financially eligible to proceed IFP on appeal. *See Burch v. Freedom Mortg. Corp. (Matter of 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 district court's dismissal of his bankruptcy appeal for failing to pay the filing fee, 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* § 1915(e)(2)(B)(i); 5TH CIR. R. 42.2.

In prior instances, we have issued sanction warnings and directed Burch to review his pending appeals and withdraw any that were frivolous.

See, e.g., *Burch v. Freedom Mortg. Corp.*, 850 F. App'x 292, 294 (5th Cir. 2021); *Matter of Burch*, 835 F. App'x at 749. Because Burch failed to heed our warnings, we previously imposed monetary sanctions. *Burch v. Select Portfolio Servicing, Inc.* (*Matter of Burch*), No. 20-11171, 2022 WL 212836, *1 (5th Cir. Jan. 24, 2022) (unpublished) ($250 sanction); *Burch v. America's Servicing Co.* (*Matter of Burch*), No. 20-11074, 2021 WL 5286563, *1 (5th Cir. Nov. 12, 2021) (unpublished) ($100 sanction).

Burch, who has paid the above-mentioned monetary sanctions, has repeatedly ignored our admonitions, and we conclude that an additional monetary sanction is warranted. Burch is hereby ordered to pay $500.00 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 imposed in this matter is paid in full.

We again warn Burch 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 and to withdraw any that are frivolous.

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

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

April 19, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 20-10872 Burch v. Bank of Amer
USDC No. 4:20-CV-620

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH CIR. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5TH CIR. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

The judgment entered provides that Appellant pay to Appellee the costs on appeal. A bill of cost form is available on the court's website www.ca5.uscourts.gov.

Sincerely,

LYLE W. CAYCE, Clerk

Christina Rachal

By:_____
Christina C. Rachal, Deputy Clerk

Enclosure(s)

Mr. William Paul Burch
Mr. Richard Dwayne Danner
Ms. Connie Flores Jones

APPENDIX B

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

WILLIAM PAUL BURCH	§	
	§	
VS.	§	ACTION NO. 4:20-CV-620-Y
	§	
BANK OF AMERICA, N.A.	§	

ORDER OF DISMISSAL

In an order filed on June 24, 2020, the Court directed Appellant to pay the required filing fee no later than July 24, 2020, or this bankruptcy appeal would be dismissed. The order noted that the bankruptcy court previously denied Appellant's motion to proceed in forma pauperis on appeal, having concluded both that Appellant's household income is sufficient to warrant payment of the filing fee and that the appeal is not taken in good faith.

On July 16, Appellant filed a response to this Court's order, in which he persists in his request to proceed in forma pauperis on appeal. His response wholly fails, however, to demonstrate that he is financially unable to afford the appellate filing fee, that his appeal is taken in good faith, or that the bankruptcy court's conclusions otherwise were erroneous. Indeed, the only case he cites in support of his request is a criminal case. (Appellant's Resp. (doc. 5) 2 (citing *Coppedge v. U.S.*, 369 U.S. 438 (1962).) But criminal defendants may appeal their convictions, and are entitled to counsel to assist them with that appeal, as of right.

As a result, the Court concludes that this appeal should be and hereby is DISMISSED.

SIGNED August 20, 2020.

Terry R. Means
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

APPENDIX C

The following constitutes the ruling of the court and has the force and effect therein described.

Signed June 2, 2020

Mark X. Mullin

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FT. WORTH DIVISION

In re:	§	
	§	
William Paul Burch,	§	Case No. 12-46959-mxm-7
	§	
Debtor.	§	Chapter 7
	§	

	§	
William Paul Burch,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Adversary No. 20-4037-mxm
	§	(Formerly District Court Civil Action No.
Bank of America, N.A.,	§	4:19-cv-01030-P)
	§	
Defendant.	§	
	§	
	§	
	§	

ORDER GRANTING MOTION TO DISMISS

[Relates to Adv. ECF No. 3-8]

Before the Court is the motion to dismiss (the "***Motion to Dismiss***") under Federal Civil Rule 12(b)(6), filed by defendant Bank of America, N.A. ("***BANA***").[1] BANA asks the Court to dismiss for failure to state a claim *Plaintiff's Original Petition* (the "***Complaint***"),[2] 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 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[3]

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 713 Timberline Drive in Kennedale, Texas (the "***Timberline Property***").[4]

On June 8, 2009, BAC Home Loans Servicing, FKA Countrywide Home Loans Servicing, L.P., filed proof of claim number 54-1 in the 2008 Bankruptcy Case, asserting a claim for

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[1] Adv. ECF No. 3-8, at 1/50 (Civil Action Doc. No. 9); *see also* Adv. ECF No. 3-8, at 18/50 (Civil Action Doc. No. 9-1) (Appendix).

[2] Adv. ECF No. 3, at 8/45 (Civil Action Doc. No. 1-1).

[3] 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.").

[4] *See* Case No. 08-45761-RFN-11.

$92,563.81 secured by a mortgage on the Timberline Property. Attached to the proof of claim were copies of the note and mortgage (together, the "***Timberline 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***"),[5] which confirmed the Debtors' *Fourth Amended Plan of Reorganization* (the "***2008 Bankruptcy Case Chapter 11 Plan***")[6] that is attached as Exhibit A to the 2008 Bankruptcy Case Confirmation Order. Section 5.9 of the 2008 Bankruptcy Case Chapter 11 Plan provided for treatment of the claims of "Countrywide Home Loans," which the plan listed as the "mortgage holder" on several properties.[7] The specific treatment as to the Timberline Property was as follows:

> Based upon the Debtors' current value of the Timberline property, the Debtors will enter into a New Timberline Note in the original principal amount of $89,602 ("New Timberline Note"). The New Timberline Note shall bear interest at the rate of 5% per annum. The Debtors shall pay the New Timberline Note in 360 equal monthly payments of $472.40 commencing on the Effective Date.[8]

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***").[9] The 2012 Bankruptcy Case was converted to Chapter 11 on December 23, 2013.[10]

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[5] ECF No. 246, Case No. 08-45761-RFN-11.

[6] *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.

[7] 2008 Bankruptcy Case Chapter 11 Plan § 5.9.

[8] *Id.*

[9] ECF No. 1, Case No. 12-46959.

[10] *Order Converting Case from Chapter 13 to Chapter 11*, ECF No. 100, Case No. 12-46959.

On May 7, 2013, the Debtor's counsel filed proof of claim number 21-1 on behalf of "Bank of America" in the 2012 Bankruptcy Case, asserting a secured claim for $88,000.[11]

On March 27, 2015, BANA, as servicer, filed proof of claim number 34-1 on behalf of "DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE UNDER THE POOLING AND SERVICING AGREEMENT RELATING TO IMPAC SECURED ASSETS CORP., MORTGAGE PASSTHROUGH CERTIFICATES, SERIES 2006-5 NOTEHOLDER," asserting a secured claim for $140,258.62. The Timberline Loan Documents were attached to this proof of claim.

On January 5, 2016, the Plaintiff filed an amended Chapter 11 plan of reorganization (the "***2012 Bankruptcy Case Chapter 11 Plan***"),[12] and on February 1, 2016, the Court entered an order confirming that plan (the "***2012 Bankruptcy Case Confirmation Order***").[13] The 2012 Bankruptcy Case Chapter 11 Plan provided the following treatment of the secured claim of BANA/Deutsche Bank:

Class	Claim No.	Collateral	Amount of claim
3	34	713 Timberline	$140,258.62

> The Class 3 Allowed Secured Claim of Deutsche Bank National Trust Company, as Trustee under the Pooling and Servicing Agreement Relating to Impac Secured Assets Corp., Mortgage Pass-Through Certificates, Series 2006-5 (hereinafter "Deutsche") shall retain its lien on the property located at 713 Timberline Drive, Kennedale, Texas 76060 (the "Timberline Property"). Debtor shall retain the Timberline Property by paying the sum of $89,000.00 with four and one-half percent (4.5%) interest per annum in 360 equal monthly payments with the first being made on the first day of the month after the effective date of the Plan. Debtors shall resume making payment to Deutsche for escrow of taxes for the

[11] Claim 21-1, Case No. 12-46959.

[12] *William Paul Burch's Amended Plan of Reorganization*, ECF No. 186, Case No. 12-46959.

[13] *Order Confirming Debtor's Plan of Reorganization*, ECF No. 188, Case No. 12-46959.

> Timberline Property. The Debtor shall maintain physical damage insurance covering the Timberline Property with Deutsche as the loss payee. Deutsche shall retain the right to declare a default, accelerate payments and foreclose its lien should the Debtor fail to make any payment within thirty (30) days of its due date.[14]

The 2012 Bankruptcy Case Confirmation Order contained the same language regarding the treatment of the claim secured by the Timberline Property.[15] Nothing in the 2012 Bankruptcy Case Chapter 11 Plan or Confirmation Order provided, or even suggested, that the secured claim against the Timberline Property was void or disallowed because of language in the 2008 Bankruptcy Case Chapter 11 Plan or because of events that took place after confirmation of the 2008 Bankruptcy Case Chapter 11 Plan.

On October 20, 2016, the Plaintiff filed a motion to enforce the 2012 Bankruptcy Case Chapter 11 Plan (the "***Second Motion to Enforce***"), alleging that lenders on various of the Plaintiff's properties were not complying with the plan.[16] With respect to the Timberline Property, the Plaintiff alleged the following in the Second Motion to Enforce:

> F. TIMBERLINE-Bank of America 73604509 800-658-0395
>
> On the Amended Plan page 12, the Court approved a value: $89,000. The servicer for the Secured Lender has not provided a proper payoff amount based on the actual terms of the Amended Plan. The Debtor seeks to have the Court require that the approved value be honored by the Secured Lender and seeks restitution in the form of further reduction of the mortgage balance to cover the additional costs of taxes, plus court costs and legal fees. The Debtor also requests an extension of the no payment-sales period for six months following the entry on an order on this Motion.[17]

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[14] 2012 Bankruptcy Case Chapter 11 Plan, at 12.

[15] 2012 Bankruptcy Case Confirmation Order, at 10-11.

[16] *Debtor's Second Motion to Enforce Plan*, ECF No. 217, Case No. 12-46959. The Plaintiff's first motion to enforce the 2012 Bankruptcy Case Chapter 11 Plan did not deal with the Timberline Property. *See Debtor's Motion to Enforce Plan* (dealing with property at 1713 Enchanted, Lancaster, TX 75146), ECF No. 196, Case No. 12-46959.

[17] Second Motion to Enforce, at 5-6.

In the Court's November 22, 2016 order (the "***Order Enforcing 2012 Bankruptcy Case Chapter 11 Plan***") [18] granting (in part) the Second Motion to Enforce, the Court ruled that the payoff balance on the Timberline Property was $89,000 and that there would be a no-payment selling period for six months on the Timberline Property.[19]

Nothing in the Second Motion to Enforce or in the Order Enforcing 2012 Bankruptcy Case Chapter 11 Plan provided, or even suggested, that the secured claim against the Timberline Property was void or disallowed because of language in the 2008 Bankruptcy Case Chapter 11 Plan or because of 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.[20]

B. The Plaintiff's claims against BANA related to the Timberline Property and BANA's related motion to dismiss

On November 11, 2019, the Plaintiff filed the Complaint in the 96th Judicial District Court of Tarrant County, Texas under Cause No. 096-313204-19 (the "***State Court Lawsuit***"). In the Complaint, the Plaintiff asserted claims against BANA (i) under Texas Property Code § 53.160 for an allegedly invalid lien; (ii) under Texas Civil Practice and Remedies Code section 12.003 for an allegedly fraudulent lien; (iii) under Texas Business and Commerce Code section 27.01 for statutory fraud; (iv) for breach of contract; (v) for trespass to try title; (vi) under Texas Civil Practice and Remedies Code section 41.008 for gross negligence and punitive damages; and (vii)

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[18] *Order Granting Debtor's Second Motion to Enforce Plan*, ECF No. 232, Case No. 12-46959.

[19] Order Enforcing 2012 Bankruptcy Case Chapter 11 Plan, at 2.

[20] *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.

although not a separate count, for violations of the 2008 Bankruptcy Case Chapter 11 Plan and 2008 Bankruptcy Case Confirmation Order. All of the Plaintiff's claims stem from the servicing of the mortgage encumbering the Timberline Property. The Plaintiff also sought actual and punitive damages, pre- and post-judgment interest, and attorney's fees.

On December 13, 2019, BANA 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,[21] thereby initiating District Court Civil Action No. 4:19-cv-01030 (the "***Civil Action***").

On December 20, 2019, BANA filed the Motion to Dismiss, asking the District Court to dismiss the Complaint pursuant to Federal Civil Rule 12(b)(6).

On January 13, 2020, the Plaintiff filed his *Response to Defendants [sic] Motion to Dismiss* (the "***Response***").[22]

On January 27, 2020, BANA filed its reply brief in support of its Motion to Dismiss.[23]

On May 13, 2020, the District Court referred the Civil Action to this Court based on the Plaintiff's Chapter 7 bankruptcy.[24]

The Court has reviewed the parties' filings, and the matter is now ripe for decision.

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

[21] Adv. ECF No. 3, at 1/45 (Civil Action Doc. No. 1).

[22] Adv. ECF No. 3-22 (Civil Action Doc. No. 19).

[23] Adv. ECF No. 3-25 (District Court Doc. No. 22).

[24] *Order*, Adv. ECF No. 3-29 (District Court Doc. No. 26).

light most favorable to the plaintiff."[25] 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."[26] 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 Timberline Property. Paragraph 9.A of the Complaint first cites section 5.9 of the 2008 Bankruptcy Case Chapter 11 Plan (providing for payment of the "New Timberline Note" in 360 equal monthly payments) for the proposition that "[t]he Mortgage Note was voided, and BOA was ordered to make a new Mortgage Note and Deed of Trust."[27] Paragraph 9B of the Complaint then appears to cite sections 13.4 of the 2008 Bankruptcy Case Chapter 11 Plan for the proposition that "BOA had six months to replace the Note or lose the opportunity to do so permanently. (EXHIBIT C)"[28]

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

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[25] *Stokes v. Gann*, 498 F. 3d 483, 484 (5th Cir. 2007).

[26] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

[27] Complaint ¶ 9.A.

[28] Complaint ¶ 9.B.

Timberline Property if new loan documents are not signed within six months. It is true that section 5.9 of the plan states that "the Debtors will enter into a New Timberline 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,"[29] and with respect to the "Allowed Secured Claims of Countrywide Home Loans," the plan specifies the interest rate on the debt, the number of monthly payments (360), and the monthly payment amount ($472.40).[30] The plan also contains notice and cure provisions dealing with payment defaults by the Plaintiff under the plan.[31] Moreover, the letter the Plaintiff alleges he sent on January 15, 2010 (attached to the Complaint as Exhibit D) suggests that the Plaintiff likewise believed the payment terms were addressed in the 2008 Bankruptcy Case Chapter 11 Plan.

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 Timberline 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.[32] This is a common provision in 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.

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[29] 2008 Bankruptcy Case Chapter 11 Plan § 2.1.

[30] *Id.* § 5.9.

[31] *See id.* §§ 9.2, 9.3.

[32] 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.").

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 Timberline 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.[33]

The Plaintiff has made the same bankruptcy arguments in at least seventeen similar adversary proceedings. This adversary proceeding is one of seventeen similar adversary proceedings[34] pending or formerly pending in this Court. Although the seventeen adversary proceedings involve lawsuits filed by the Plaintiff regarding different real properties and secured lender defendants, each lawsuit shares a similar litigation history and involves the same legal theory that the liens encumbering the applicable real property (typically rental property) were somehow invalidated by previous bankruptcy court orders entered in either the 2008 Bankruptcy Case or the 2012 Bankruptcy Case.[35] Most of the adversary proceedings have already been dismissed for failure to state a claim or on summary-judgment grounds.

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[33] 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).

[34] *See* Adv. Nos. 18-4172; 18-4176; 19-4039; 19-4068; 19-4074; 19-4075; 19-4079; 19-4084; 19-4105; 19-4106; 19-4120; 20-4007; 20-4029; 20-4031; 20-4037; 20-4039; and 20-4040.

[35] The Plaintiff's original or amended petitions can be found at the following docket references for each Adversary Proceeding: Adv. No. 18-4172, ECF No. 1-3, at 183; Adv. No. 18-4176, ECF No. 1-3, at 3; Adv. No. 19-4039, ECF No. 1-17; Adv. Proc. No. 19-4068, ECF No. 3-6; Adv. Proc. No. 19-4074, ECF No. 1-3, at 49; Adv. No. 19-4075, ECF No. 1-3, at 51; Adv. No. 19-4079, ECF No. 4-6; Adv. No. 19-4084, ECF No. 3-5; Adv. No. 19-4105, ECF No. 2, at 10; Adv. No. 19-4106, ECF No. 2, at 13; Adv. No. 19-4120, ECF No. 2, at 13; Adv. No. 20-4007, ECF No. 1-2, at 6; Adv. No. 20-4029, ECF No. 1-6, at 2; Adv. No. 20-4031, ECF No. 1-3, at 2; Adv. No. 20-4037, ECF No. 3-8, at 1; Adv. No. 20-4039, ECF No. 1-3, at 7; and Adv. No. 20-4040, ECF No. 1-2, at 2.

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

B. Count 1: Texas Property Code § 53.160 Invalid Lien

This count alleges statutory violations of section 53.160 of the Texas Property Code based on alleged actions concerning the allegedly invalid note and mortgage on the Timberline Property.

First, as explained above, nothing in the Plaintiff's bankruptcy cases invalided the debt or lien associated with the Timberline Property, so the Plaintiff's arguments about violations of Texas Property Code section 53.160 stemming from the allegedly invalid note and mortgage have no merit.

Second, section 53.160 of the Texas Property Code establishes a procedure for a property owner to have the validity of a mechanic's, contractor's, or materialmen's lien adjudicated on an expedited basis by filing a verified motion. The summary-motion procedure can be used only when asserting an objection based upon the seven grounds specified in section 53.160(b).[36] At least six of the seven grounds apply exclusively to mechanic's, contractor's, or materialmen's liens.[37] The Plaintiff does not allege the lien he challenges is a mechanic's, contractor's, or materialmen's lien. The seventh ground for which the summary-motion procedure is available is where "the claimant executed a valid and enforceable waiver or release of the claim or lien claimed in the affidavit."[38] The Complaint is devoid of allegations that would show that BANA executed a valid and enforceable waiver or release of its claim or lien.

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[36] TEX. PROP. CODE § 53.160(b) ("The grounds for objecting to the validity or enforceability of the claim or lien for purposes of the motion are limited to the following . . . .").

[37] TEX. PROP. CODE § 53.160(b)(1)-(6).

[38] TEX. PROP. CODE § 53.160(b)(7).

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

C. Count 2: Texas Civil Practice and Remedies Code section 12.003 - Fraudulent Lien

This count alleges that BANA 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 Timberline Property. As explained above, nothing in the Plaintiff's bankruptcy cases invalided the debt or lien associated with the Timberline 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 BANA violated section 12.003 of the Texas Civil Practice and Remedies Code.

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

D. Count 3: 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 Timberline Property.

First, as explained above, nothing in the Plaintiff's bankruptcy cases invalided the debt or lien associated with the Timberline Property, so the Plaintiff's arguments about violations of the 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.[39] The Complaint is devoid of any meaningfully specific allegations that would show BANA made any such false representation or false promise.

[39] TEX. BUS. & COMM. CODE § 27.01(a).

Finally, although there is not a separate count for common-law fraud, paragraph 27 of the Complaint (found within the Count 3—Statutory fraud section) contains a reference to common-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.[40] 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 BANA took any action, or failed to take any action, that would constitute common-law fraud.

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

E. Count 4: Breach of Contract

This count alleges that BANA breached a contract through its actions in connection with the allegedly invalid note and mortgage on the Timberline Property. As explained above, nothing in the Plaintiff's bankruptcy cases invalided the debt or lien associated with the Timberline 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 BANA breached any contract.

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

F. Count 5: Trespass to Try Title

[40] *In re First Merit Bank, N.A.*, 52 S.W.3d 749, 758 (Tex. 2001).

This count alleges that the Plaintiff is the fee simple owner of the Timberline Property due to the allegedly invalid note and mortgage on the Timberline Property. As explained above, nothing in the Plaintiff's bankruptcy cases invalided the debt or lien associated with the Timberline 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 prevail on his trespass-to-try-title claim.

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

G. Count 6: 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 BANA due to BANA's allegedly fraudulent and malicious conduct in connection with the Timberline Property. As explained above, nothing in the Plaintiff's bankruptcy cases invalided the debt or lien associated with the Timberline 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 6 of the Complaint fails to state a plausible claim for relief against BANA.

H. The balance of the Complaint fails to state a claim for relief

The balance of the Complaint (including its request for pre- and post-judgment interest and attorney's fees) is devoid of allegations that would show the Plaintiff is entitled to any relief whatsoever under any legal theory.

I. The Plaintiff's Response has no merit

In his Response, the Plaintiff argues that this Court lacks jurisdiction. But as noted in the District Court's referral order, this Court unquestionably has bankruptcy jurisdiction over the Complaint.

IV. CONCLUSION

For the reasons described above, and for the additional well-taken arguments made in the Motion to Dismiss, the Complaint fails to state a claim upon which relief can be granted. The Court concludes that it would be futile to allow the Plaintiff to replead given the multiple opportunities he has had to assert his bankruptcy arguments in at least seventeen adversary proceedings. Therefore, the Court **ORDERS** as follows:

1. The Motion to Dismiss [Adv. ECF No. 3-8, at 1/50 (Civil Action Doc. No. 9)] is **GRANTED WITH PREJUDICE TO REFILING.**
2. The Court will enter a separate final judgment consistent with this Order.

End of Order # #

APPENDIX D

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

WILLIAM PAUL BURCH,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No. 4:19-cv-01030-P-BP**
	§	
BANK OF AMERICA, N.A.,	§	
	§	
Defendant.	§	

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

Before the Court is the Findings, Conclusions, and Recommendation of the United States Magistrate Judge (ECF No. 14), filed January 1, 2020, Plaintiff William Paul Burch's ("Plaintiff") 28 U.S.C. § 636(b)(1) Response and Objections thereto (ECF No. 15), filed January 12, 2020, Defendant Bank of America, N.A.'s ("Defendant") Response (ECF No. 20), filed January 22, 2020, and Plaintiff's Reply (ECF No. 24), filed February 9, 2020.

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. 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 is a core proceeding arising under Title 11 or arising in a case under Title 11, or, alternatively, "relates to" a bankruptcy proceeding, and, therefore, should be referred to United States Bankruptcy Judge Mark X. Mullin pursuant to the Court's Miscellaneous Order No. 33. *See* 28 U.S.C. § 157(a), (c).

After conducting a de novo review of all relevant matters of record in this case and the applicable law, 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. Accordingly, this matter is **WITHDRAWN** from United States Magistrate Judge Hal R. Ray, Jr. and **REFERRED** to United States Bankruptcy Judge Mark X. Mullin pursuant to this Court's Miscellaneous Order No. 33.

SO ORDERED on this **13th day** of **May, 2020**.

Mark T. Pittman
UNITED STATES DISTRICT JUDGE

APPENDIX E

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

WILLIAM PAUL BURCH,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No. 4:19-cv-01030-P-BP**
	§	
BANK OF AMERICA, N.A.,	§	
	§	
Defendant.	§	

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

Before the Court is the Plaintiff's Original Petition, ECF No. 1-1 at 3, filed by Plaintiff William Paul Burch ("Burch") on November 11, 2019 in the 96th Judicial District Court of Tarrant County, Texas. Defendant Bank of America, N.A. ("BOA") removed the case to this Court on December 13, 2019. 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. 3.

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 two other foreclosure-related cases pending before United States District Judge Mark T. Pittman in which 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 each of those cases, Judge Pittman accepted the Findings, Conclusions, and Recommendation, withdrew the cases from the undersigned, and referred them to Judge Mullin.

By Order dated December 18, 2019, the undersigned ordered the parties in this case to show cause why Judge Pittman should not similarly withdraw the reference here and refer the case to Judge Mullin. ECF No. 8. BOA filed its response on December 27, 2019, arguing that the district judge should withdraw the reference of the case to the undersigned and refer it to Judge Mullin. ECF No. 11. Burch responded in opposition on January 4, 2020. ECF No. 12.

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. Accordingly, the undersigned **RECOMMENDS** that United States District Judge Mark T. Pittman withdraw the case from the undersigned and refer it to Judge Mullin pursuant to this Court's Miscellaneous Order No. 33.

I. BACKGROUND

In 2006, Burch obtained a loan from BOA's predecessor in interest, American Brokers Conduit, a subsidiary of American Home Mortgage, Inc., on property located at 713 Timberline Drive, Kennedale, Texas ("the Timberline Property"). ECF No. 1-1, at 2. Burch alleges that American Home Mortgage, Inc. sold the loan to BOA in 2008. *Id.* In December 2008, he filed for Chapter 11 bankruptcy to prevent foreclosure on multiple properties that he owned, including the Timberline Property. *Id. See also* Cause No. 08-45761-rfn11. On December 9, 2009, the bankruptcy court approved a plan of reorganization that allegedly voided the terms of the original loan. *Id.* at 5-7. The plan also set out new terms for the loan. *Id.* BOA later allegedly sold the loan to Select Portfolio Services. *Id.* at 7. In dispute is whether BOA had a valid lien on the Timberline Property. *Id.* at 7.

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 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 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 BOA's lien on the Timberline Property and claims that it is invalid under § 53.160 of the Texas Property Code, fraudulent under § 12.003 of the Texas Civil Practice and Remedies Code and § 27.01 of the Texas Business and Commerce Code, and the basis for an alleged breach of contract, trespass to try title suit, and negligence claim. ECF No. 1-1 at 5-20. He claims that BOA's lien was void, asserts his rights in trespass to try title, and seeks to recover substantial actual and punitive damages. *Id.*

BOA argues that because Burch's petition asserts claims based on his first plan of reorganization and challenges the validity of its lien on the Timberline Property, this case constitutes a "core proceeding arising in or related to a case under Title 11." ECF No. 11 at 2

(citing 28 U.S.C. 157(b)(2)(K)). BOA further urges referral of the case to Judge Mullin because under Miscellaneous Order No. 33 the case is "at least 'related to' the bankruptcy proceeding" pending in his court. ECF No. 11 at 3.

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 challenge his plan of reorganization in bankruptcy and the validity of BOA's lien on the Timberline 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 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. 1-1 at 5-20. After reviewing Burch's petition, the undersigned has not identified any unsettled questions of law presented by his claims. Indeed, BOA's Motion to Dismiss, ECF No. 9, indicates that the application of well-settled law should resolve Burch's claims. Accordingly, 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.

2003 WL 23109906 at *4.

Like the 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 BOA's lien 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 suits challenging the validity of liens outside of his bankruptcy case. 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 this Court has jurisdiction over bankruptcy cases, Burch's claims in the case should be heard in the bankruptcy court. The undersigned therefore **RECOMMENDS** that United States District Judge Mark T. Pittman 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 January 6, 2020.

Hal R. Ray, Jr.
Hal R. Ray, Jr.
UNITED STATES MAGISTRATE JUDGE

APPENDIX F

11 U.S. Code § 105

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court, on its own motion or on the request of a party in interest—

(1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, may issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that—

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title—

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

APPENDIX G

11 U.S. Code § 1141

(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.

APPENDIX H

28 U.S. Code § 1446 - Procedure for removal of civil actions

(a) Generally. —
A defendant or defendants desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.
(b) Requirements; Generally. —
(1)
The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
(2)
(A)
When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.
(B)
Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.
(C)
If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.
(3)
Except as provided in subsection (c), if the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.
(c) Requirements; Removal Based on Diversity of Citizenship. —
(1)
A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by section 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.
(2) If removal of a civil action is sought on the basis of the jurisdiction conferred by section 1332(a), the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that—
(A) the notice of removal may assert the amount in controversy if the initial pleading seeks—
(i)
nonmonetary relief; or
(ii)
a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded; and
(B)

removal of the action is proper on the basis of an amount in controversy asserted under subparagraph (A) if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a).
(3)
(A)
If the case stated by the initial pleading is not removable solely because the amount in controversy does not exceed the amount specified in section 1332(a), information relating to the amount in controversy in the record of the State proceeding, or in responses to discovery, shall be treated as an "other paper" under subsection (b)(3).
(B)
If the notice of removal is filed more than 1 year after commencement of the action and the district court finds that the plaintiff deliberately failed to disclose the actual amount in controversy to prevent removal, that finding shall be deemed bad faith under paragraph (1).
(d) Notice to Adverse Parties and State Court. —
Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.
(e) Counterclaim in 337 Proceeding. —
With respect to any counterclaim removed to a district court pursuant to section 337(c) of the Tariff Act of 1930, the district court shall resolve such counterclaim in the same manner as an original complaint under the Federal Rules of Civil Procedure, except that the payment of a filing fee shall not be required in such cases and the counterclaim shall relate back to the date of the original complaint in the proceeding before the International Trade Commission under section 337 of that Act.
(g)
[1] Where the civil action or criminal prosecution that is removable under section 1442(a) is a proceeding in which a judicial order for testimony or documents is sought or issued or sought to be enforced, the 30-day requirement of subsection (b) of this section and paragraph (1) of section 1455(b) is satisfied if the person or entity desiring to remove the proceeding files the notice of removal not later than 30 days after receiving, through service, notice of any such proceeding.

APPENDIX I

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

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.

APPENDIX J

CIVIL PRACTICE AND REMEDIES CODE

TITLE 2. TRIAL, JUDGMENT, AND APPEAL

SUBTITLE A. GENERAL PROVISIONS

CHAPTER 11. VEXATIOUS LITIGANTS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 11.001. DEFINITIONS. In this chapter:

(1) "Defendant" means a person or governmental entity against whom a plaintiff commences or maintains or seeks to commence or maintain a litigation.

(2) "Litigation" means a civil action commenced, maintained, or pending in any state or federal court.

(3) Repealed by Acts 2013, 83rd Leg., R.S., Ch. 1224, Sec. 10, eff. September 1, 2013.

(4) "Moving defendant" means a defendant who moves for an order under Section 11.051 determining that a plaintiff is a vexatious litigant and requesting security.

(5) "Plaintiff" means an individual who commences or maintains a litigation pro se.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Amended by:

Acts 2011, 82nd Leg., 1st C.S., Ch. 3 (H.B. 79), Sec. 9.01, eff. January 1, 2012.

Acts 2013, 83rd Leg., R.S., Ch. 1224 (S.B. 1630), Sec. 1, eff. September 1, 2013.

Acts 2013, 83rd Leg., R.S., Ch. 1224 (S.B. 1630), Sec. 10, eff. September 1, 2013.

Sec. 11.002. APPLICABILITY. (a) This chapter does not apply to an attorney licensed to practice law in this state unless the attorney proceeds pro se.

(b) This chapter does not apply to a municipal court.

Added by Acts 2013, 83rd Leg., R.S., Ch. 1224 (S.B. 1630), Sec. 2, eff. September 1, 2013.

SUBCHAPTER B. VEXATIOUS LITIGANTS

Sec. 11.051. MOTION FOR ORDER DETERMINING PLAINTIFF A VEXATIOUS LITIGANT AND REQUESTING SECURITY. In a litigation in this state, the defendant may, on or before the 90th day after the date the defendant files the original answer or makes a special appearance, move the court for an order:

(1) determining that the plaintiff is a vexatious litigant; and

(2) requiring the plaintiff to furnish security.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Sec. 11.052. STAY OF PROCEEDINGS ON FILING OF MOTION. (a) On the filing of a motion under Section 11.051, the litigation is stayed and the moving defendant is not required to plead:

(1) if the motion is denied, before the 10th day after the date it is denied; or

(2) if the motion is granted, before the 10th day after the date the moving defendant receives written notice that the plaintiff has furnished the required security.

(b) On the filing of a motion under Section 11.051 on or after the date the trial starts, the litigation is stayed for a period the court determines.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Sec. 11.053. HEARING. (a) On receipt of a motion under Section 11.051, the court shall, after notice to all parties, conduct a hearing to determine whether to grant the motion.

(b) The court may consider any evidence material to the ground of the motion, including:

(1) written or oral evidence; and

(2) evidence presented by witnesses or by affidavit.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Sec. 11.054. CRITERIA FOR FINDING PLAINTIFF A VEXATIOUS LITIGANT. A court may find a plaintiff a vexatious litigant if the defendant shows that there is not a reasonable probability that the plaintiff will prevail in the litigation against the defendant and that:

(1) the plaintiff, in the seven-year period immediately preceding the date the defendant makes the motion under Section 11.051, has commenced, prosecuted, or maintained at least five litigations as a pro se litigant other than in a small claims court that have been:

(A) finally determined adversely to the plaintiff;

(B) permitted to remain pending at least two years without having been brought to trial or hearing; or

(C) determined by a trial or appellate court to be frivolous or groundless under state or federal laws or rules of procedure;

(2) after a litigation has been finally determined against the plaintiff, the plaintiff repeatedly relitigates or attempts to relitigate, pro se, either:

(A) the validity of the determination against the same defendant as to whom the litigation was finally determined; or

(B) the cause of action, claim, controversy, or any of the issues of fact or law determined or concluded by the

final determination against the same defendant as to whom the litigation was finally determined; or

(3) the plaintiff has previously been declared to be a vexatious litigant by a state or federal court in an action or proceeding based on the same or substantially similar facts, transition, or occurrence.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1224 (S.B. 1630), Sec. 3, eff. September 1, 2013.

Sec. 11.055. SECURITY. (a) A court shall order the plaintiff to furnish security for the benefit of the moving defendant if the court, after hearing the evidence on the motion, determines that the plaintiff is a vexatious litigant.

(b) The court in its discretion shall determine the date by which the security must be furnished.

(c) The court shall provide that the security is an undertaking by the plaintiff to assure payment to the moving defendant of the moving defendant's reasonable expenses incurred in or in connection with a litigation commenced, caused to be commenced, maintained, or caused to be maintained by the plaintiff, including costs and attorney's fees.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Sec. 11.056. DISMISSAL FOR FAILURE TO FURNISH SECURITY. The court shall dismiss a litigation as to a moving defendant if a plaintiff ordered to furnish security does not furnish the security within the time set by the order.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Sec. 11.057. DISMISSAL ON THE MERITS. If the litigation is dismissed on its merits, the moving defendant has recourse to the security furnished by the plaintiff in an amount determined by the court.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

SUBCHAPTER C. PROHIBITING FILING OF NEW LITIGATION

Sec. 11.101. PREFILING ORDER; CONTEMPT. (a) A court may, on its own motion or the motion of any party, enter an order prohibiting a person from filing, pro se, a new litigation in a court to which the order applies under this section without permission of the appropriate local administrative judge described by Section 11.102(a) to file the litigation if the court finds, after notice and hearing as provided by Subchapter B, that the person is a vexatious litigant.

(b) A person who disobeys an order under Subsection (a) is subject to contempt of court.

(c) A litigant may appeal from a prefiling order entered under Subsection (a) designating the person a vexatious litigant.

(d) A prefiling order entered under Subsection (a) by a justice or constitutional county court applies only to the court that entered the order.

(e) A prefiling order entered under Subsection (a) by a district or statutory county court applies to each court in this state.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Amended by:

Acts 2011, 82nd Leg., 1st C.S., Ch. 3 (H.B. 79), Sec. 9.02, eff. January 1, 2012.

Acts 2013, 83rd Leg., R.S., Ch. 1224 (S.B. 1630), Sec. 4, eff. September 1, 2013.

Sec. 11.102. PERMISSION BY LOCAL ADMINISTRATIVE JUDGE. (a) A vexatious litigant subject to a prefiling order under Section 11.101 is prohibited from filing, pro se, new litigation in a court to which the order applies without seeking the permission of:

(1) the local administrative judge of the type of court in which the vexatious litigant intends to file, except as provided by Subdivision (2); or

(2) the local administrative district judge of the county in which the vexatious litigant intends to file if the litigant intends to file in a justice or constitutional county court.

(b) A vexatious litigant subject to a prefiling order under Section 11.101 who files a request seeking permission to file a litigation shall provide a copy of the request to all defendants named in the proposed litigation.

(c) The appropriate local administrative judge described by Subsection (a) may make a determination on the request with or without a hearing. If the judge determines that a hearing is necessary, the judge may require that the vexatious litigant filing a request under Subsection (b) provide notice of the hearing to all defendants named in the proposed litigation.

(d) The appropriate local administrative judge described by Subsection (a) may grant permission to a vexatious litigant subject to a prefiling order under Section 11.101 to file a litigation only if it appears to the judge that the litigation:

(1) has merit; and

(2) has not been filed for the purposes of harassment or delay.

(e) The appropriate local administrative judge described by Subsection (a) may condition permission on the furnishing of

security for the benefit of the defendant as provided in Subchapter B.

(f) A decision of the appropriate local administrative judge described by Subsection (a) denying a litigant permission to file a litigation under Subsection (d), or conditioning permission to file a litigation on the furnishing of security under Subsection (e), is not grounds for appeal, except that the litigant may apply for a writ of mandamus with the court of appeals not later than the 30th day after the date of the decision. The denial of a writ of mandamus by the court of appeals is not grounds for appeal to the supreme court or court of criminal appeals.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Amended by:

Acts 2011, 82nd Leg., 1st C.S., Ch. 3 (H.B. 79), Sec. 9.03, eff. January 1, 2012.

Acts 2013, 83rd Leg., R.S., Ch. 1224 (S.B. 1630), Sec. 5, eff. September 1, 2013.

Sec. 11.103. DUTIES OF CLERK. (a) Except as provided by Subsection (d), a clerk of a court may not file a litigation, original proceeding, appeal, or other claim presented, pro se, by a vexatious litigant subject to a prefiling order under Section 11.101 unless the litigant obtains an order from the appropriate local administrative judge described by Section 11.102(a) permitting the filing.

(b) Repealed by Acts 2013, 83rd Leg., R.S., Ch. 1224, Sec. 10, eff. September 1, 2013.

(c) If the appropriate local administrative judge described by Section 11.102(a) issues an order permitting the filing of the litigation, the litigation remains stayed and the defendant need not plead until the 10th day after the date the defendant is served with a copy of the order.

(d) A clerk of a court of appeals may file an appeal from a prefiling order entered under Section 11.101 designating a person a vexatious litigant or a timely filed writ of mandamus under Section 11.102.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Amended by:

Acts 2011, 82nd Leg., 1st C.S., Ch. 3 (H.B. 79), Sec. 9.04, eff. January 1, 2012.

Acts 2013, 83rd Leg., R.S., Ch. 1224 (S.B. 1630), Sec. 6, eff. September 1, 2013.

Acts 2013, 83rd Leg., R.S., Ch. 1224 (S.B. 1630), Sec. 7, eff. September 1, 2013.

Acts 2013, 83rd Leg., R.S., Ch. 1224 (S.B. 1630), Sec. 10, eff. September 1, 2013.

Sec. 11.1035. MISTAKEN FILING. (a) If the clerk mistakenly files litigation presented, pro se, by a vexatious litigant subject to a prefiling order under Section 11.101 without an order from the appropriate local administrative judge described by Section 11.102(a), any party may file with the clerk and serve on the plaintiff and the other parties to the litigation a notice stating that the plaintiff is a vexatious litigant required to obtain permission under Section 11.102 to file litigation.

(b) Not later than the next business day after the date the clerk receives notice that a vexatious litigant subject to a prefiling order under Section 11.101 has filed, pro se, litigation without obtaining an order from the appropriate local administrative judge described by Section 11.102(a), the clerk shall notify the court that the litigation was mistakenly filed. On receiving notice from the clerk, the court shall immediately stay the litigation and shall dismiss the litigation unless the plaintiff, not later than the 10th day after the date the notice is filed, obtains an order from the appropriate local

administrative judge described by Section 11.102(a) permitting the filing of the litigation.

(c) An order dismissing litigation that was mistakenly filed by a clerk may not be appealed.

Added by Acts 2013, 83rd Leg., R.S., Ch. 1224 (S.B. 1630), Sec. 8, eff. September 1, 2013.

Sec. 11.104. NOTICE TO OFFICE OF COURT ADMINISTRATION; DISSEMINATION OF LIST. (a) A clerk of a court shall provide the Office of Court Administration of the Texas Judicial System a copy of any prefiling order issued under Section 11.101 not later than the 30th day after the date the prefiling order is signed.

(b) The Office of Court Administration of the Texas Judicial System shall post on the agency's Internet website a list of vexatious litigants subject to prefiling orders under Section 11.101. On request of a person designated a vexatious litigant, the list shall indicate whether the person designated a vexatious litigant has filed an appeal of that designation.

(c) The Office of Court Administration of the Texas Judicial System may not remove the name of a vexatious litigant subject to a prefiling order under Section 11.101 from the agency's Internet website unless the office receives a written order from the court that entered the prefiling order or from an appellate court. An order of removal affects only a prefiling order entered under Section 11.101 by the same court. A court of appeals decision reversing a prefiling order entered under Section 11.101 affects only the validity of an order entered by the reversed court.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Amended by:

Acts 2011, 82nd Leg., 1st C.S., Ch. 3 (H.B. 79), Sec. 9.05, eff. January 1, 2012.

Acts 2013, 83rd Leg., R.S., Ch. 1224 (S.B. 1630), Sec. 9, eff. September 1, 2013.

APPENDIX K

TRCP Rule 145

(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.

APPENDIX L

Erie Doctrine

The Erie doctrine is a binding principle where federal courts exercising diversity jurisdiction apply federal procedural law of the Federal Rules of Civil Procedure, but must also apply state substantive law.

Pre-Erie Doctrine:

The Erie doctrine derives from the landmark 1938 U.S. Supreme Court case, Erie Railroad Co. v. Tompkins (1938). The Rules Decision Act of 1789, codified as 28 U.S.C. § 1652, laid the foundation for how federal courts should operate when exercising diversity jurisdiction, and provided that the "laws of the several states" apply in federal court. Prior to Erie, federal courts followed Swift v. Tyson (1842), which interpreted the "laws of the several states" to include only state statutes and local custom, and not the state common law. This meant that federal courts were free to ignore state substantive law established by common law through that state's judiciary when exercising diversity jurisdiction and could apply what they saw as the true general common law. In Swift, for example, the Court disregarded New York commercial law established by the state judicial precedent, and instead saw its role as "express[ing] our own opinion of the true result of the commercial law upon the question." The proper law to apply, the Court believed, "may be truly declared in the languages of Cicero, adopted by Lord Mansfield in Luke v. Lyde [citation omitted], to be in a great measure not the law of a single country only, but of the commercial world." This reasoning reflects the view that there was one true and accurate body of laws that can be ascertained regardless of a polity's laws, i.e. natural law.

Erie Railroad Co. v. Tompkins:

The U.S. Supreme Court in Erie Railroad Co. v. Tompkins, is an opinion by Justice Brandeis, departed from Swift and held that the language in the Rules Decision Act stating that federal courts when exercising diversity jurisdiction shall apply the "laws of the several states" includes state common law. Specifically, in Erie, Tompkins lost his arm while walking on a footpath alongside a railroad track when a train car's door came loose and injured him. Under Pennsylvania state common law, Tompkins was a trespasser on the railroad's property and could not recover,

but under the general common law he was not a trespasser and could recover. The Court refused to apply the general common law, stating "there is no federal general common law," and instead applied the law of the state where the injury occurred to deny Tompkins' recovery.

In denying that federal courts can apply federal common law, Justice Brandeis largely focused on the policy impact of allowing federal courts to apply federal common law in diversity cases. For one, it encouraged forum shopping, because, since federal and state courts applied different laws, diverse plaintiffs could select which law was more favorable to their claim. This also led to unequal administration of the law, because diverse citizens could remove state actions to federal court and potentially take advantage of more favorable laws, thus disadvantaging litigants suing in their home state. Furthermore, Justice Brandeis found constitutional issues with federal courts applying federal common law. First, it offended federalism, as the judiciary should not have the power to essentially create substantive law since Congress cannot even create substantive law in the circumstances where the judiciary applied general common law. It also offended principles of separation of power, as Congress is the branch tasked with making law, and the judiciary usurped lawmaking power by applying federal common law as they saw fit. In general, Brandeis's opinion signals a shift from federal courts shifting from applying natural law to adopting a perspective of legal realism.

Post-Erie Doctrine:

While the principle that federal courts must apply the substantive law of the state where they are located is relatively straightforward, the delineation of substantive law and procedural law is hardly so simple and presented post-Erie courts with many challenges. An early case, Sibbach v. Wilson, ruled that a court ordering a medical examination under the Federal Rules of Civil Procedure was truly procedural, finding that it fell under 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." Later cases focused on whether the law has the potential to determine the outcome of the litigation. For example, in Guaranty Trust Co. v. York, the U.S. Supreme Court was concerned with whether ignoring a state statute of limitations would significantly alter the outcome of litigation and held that statutes of limitations are substantive law. Specifically, the Court stated that "[t]he outcome of the litigation in the federal court should be substantially the same. . . as it would be if tried in a State court." Subsequent courts

have narrowed this analysis, focusing on whether applying federal procedural law to an issue would determine the outcome in light of its potential impact on forum shopping and inequitable administration of the laws—i.e. the aims of the Erie Doctrine. In Hanna v. Plumer, the U.S. Supreme Court ruled that the federal rules of service trumped the state's requirement of in-hand service for the type of claim because the federal rule in question was arguably procedural and the federal service rule would not have affected the forum choice ex ante.