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ORDER OF THE SUPREME COURT OF TEXAS DENYING PETITION FOR REVIEW (OCTOBER 20, 2017)

IN THE SUPREME COURT OF TEXAS

ALBERT LUTTERODT

v.

EMILY LANE OWNERS ASSOCIATION, INC., ENVISION REALTY GROUP, LLC and JACKSON POTTER

No. 16-1036.

Petitioner's petition for review, filed herein in the above numbered and styled case, having been duly considered, is ordered, and hereby is, denied.

* * *

I, BLAKE A. HAWTHORNE, Clerk of the Supreme Court of Texas, do hereby certify that the above is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appear of record in the minutes of said Court under the date shown.

It is further ordered that petitioner, ALBERT LUTTERODT, pay all costs incurred on this petition.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this the 30th day of November, 2017.

/s/ Blake A. Hawthorne
Clerk

By Monica Zamarripa
Deputy Clerk

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (APRIL 27, 2017)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

ALBERT LUTTERODT

v.

JACKSON POTTER, ENVISION REALTY GROUP, LLC, EMILY LANE OWNERS ASSOCIATION

Civil Action No. 4:17-CV-58
(Judge Mazzant/Judge Nowak)

Before: Amos L. MAZZANT,
United States District Judge

Came on for consideration the report of the United States Magistrate Judge in this action, this matter having been heretofore referred to the Magistrate Judge pursuant to 28 U.S.C. § 636. On March 31, 2017, the report of the Magistrate Judge (Dkt. #40) was entered containing proposed findings of fact and recommendations that Defendant Emily Lane Owners Association's Motion to Remand (Dkt. #13), and Defendants Jackson Potter and Envision Realty Group, LLC's Motion to Remand (Dkt. #17) (collectively, the "Motions to Remand") each be granted. Having received the report and recommendation of the Magistrate Judge

(Dkt. #40), having considered Plaintiff's request for rehearing (Dkt. #38; Dkt. #41) and stated objections (Dkt. #43) (collectively, "Plaintiff's Objections"), and having conducted a de novo review, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and adopts the Magistrate Judge's report (Dkt. #40) as the findings and conclusions of the Court.

Background

Plaintiff's suit presents an unusual procedural history, which is relevant to the consideration of Plaintiff's Objections; accordingly, the Court restates herein pertinent portions of the background set forth in the Magistrate Judge's report and recommendation.

This is a civil action originally filed and tried to verdict in state court. Plaintiff Albert Lutterodt filed suit in Dallas County on October 24, 2012. The state trial court case was styled Cause No. DC-12-12648-G; *Albert Lutterodt v. Envison Realty Group, LLC, Jackson Potter and Emily Lane Owners Association*, in the 134th Judicial District Court of Dallas County, Texas (Dkt. #13). Plaintiff owned a Unit in the Emily Lane Condominiums. Jackson Potter was the property manager for the condominiums and Envision Realty Group, LLC was the management company (Dkt. #13). Plaintiff's Original Petition asserts state law claims related to his right to inspect the books and records of Defendant Emily Lane Owners Association ("Association") (Dkt. #1, Petition to Compel Inspection). Defendant Association, Jackson Potter ("Potter") and Envision Realty Group ("Envision Realty") (collectively, "Defendants") answered Plaintiff's suit on November 20, 2012 (Dkt. #1, Answer). Potter and Envison Realty

asserted counterclaims against Plaintiff, including a claim for defamation (libel and slander). Plaintiff filed an Amended Petition to Compel Inspection of Books and Records and Request Relief on August 5, 2013 (Dkt. #13, Exhibit 6). A jury trial was conducted; and ultimately, final judgments were entered in favor of Defendants, including a judgment specifically in favor of Potter and Envision Realty on their defamation counterclaim (Dkt. #17, Exhibit 4). After denial of Plaintiff's Motion for New Trial, Plaintiff appealed to the Fifth District Court of Appeals in Dallas, Texas (the "court of appeals"). The court of appeals denied Plaintiff's appeal, affirming the trial court judgment on June 16, 2016 (Dkt. #13, Exhibit 2). The court of appeals' opinion specifically addressed the defamation counterclaim, stating "[i]n his fourth issue, Lutterodt asserts the trial court erred by entering judgment against him for defamation because the evidence establishes that his statements were opinion, true or substantially true, protected by the First Amendment, or were not published" (Dkt. #13, Exhibit 2 at 9). The court of appeals found Plaintiff's fourth issue presented nothing for its review. Plaintiff thereafter filed a Motion for Rehearing and also a Motion for Rehearing En Banc, each of which were also denied (Dkt. #13, Exhibit 3). Plaintiff next filed a Motion with the Texas Supreme Court requesting an extension to file his Petition for Review. Plaintiff also filed for Chapter 13 Bankruptcy on January 17, 2017 (Dkt. #1, Bankruptcy Notice). On January 25, 2017, Plaintiff proceeded to file the current Notice of Removal to this Court, citing that he requested removal based on violation of his United States constitutional First Amendment Rights (Dkt. #1).

After considering each of the Motions to Remand, and Plaintiff's Response thereto, on March 31, 2017, the Magistrate Judge entered a report and recommendation concluding that Plaintiff could not invoke the right of removal, and that even if he could, Plaintiff's removal of this case was untimely and the Court lacks jurisdiction (Dkt. #40). The Magistrate Judge further concluded that Plaintiff's pending bankruptcy did not preclude remand. On March 30, 2017, Plaintiff requested that the Court reconsider and/or rehear the Motions to Remand (Dkt. #38; Dkt. #41), and, on April 18, 2017, Plaintiff filed objections to the Magistrate Judge's report and recommendation (Dkt. #43).

Plaintiff's Objections

A party who files timely written objections to a magistrate judge's report and recommendation is entitled to a de novo review of those findings or recommendations to which the party specifically objects. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b)(2)-(3). As an initial matter, the Court notes that no party objects to the Magistrate Judge's finding that Plaintiff's pending bankruptcy (and the application of the automatic stay) does not preclude remand in the instant case. As such, the Court adopts the finding of the Magistrate Judge that Plaintiff's bankruptcy does not preclude remand.

In his objections, Plaintiff states generally that he "objects to the remand" (Dkt. #43), and thereafter asserts a series of objections in support of his request to reconsider, such as:

> (1) Counter-Plaintiffs FRAUDULENTLY presented materials and information that are FAKE, FALSE, AND DECEPTIVE. (2) Counter-Plaintiffs lack sufficiency and

> standing to request or invoke the Court's authority to act or Remand on any basis. (3) Counter-Defendant has the right to exercise his Constitutional First Amendment Rights and Subject-Matter Jurisdiction privileges. Counter-Plaintiffs' remand demand is frivolous. (4) Under Article III of the U.S. Constitution, Federal Courts can hear "ALL Cases, in law and equity, arising under the Constitution and laws of the United States." US Const. Art. III, Sec. 2. The US Supreme Court has interpreted this clause broadly, finding that a Federal Court can hear ANY case in which there is a Federal ingredient.[] (5) For Federal Question Jurisdiction to exist, the requirements of 28 U.S.C. 1331 must also exist. This case meets the requirements. (6) Counter-Plaintiff is NOT a "TRUE-DEFENDANT"—because he sued the Counter-Defendant on a claim that has NOTHING to do with the Original Petition. (7) Federal law completely preempts State law in this case. (8) Under local rules, service of a Complaint is NOT required. The date runs from which the complaint is made available through filing.

Plaintiff also argues that res judicata and the interests of justice and truthfulness estop Defendants from seeking remand (Dkt. #43).

As previously stated, this suit was originally filed in state court, and after trial judgment was granted in favor of Defendants. Following the judgment of the state court, Plaintiff pursued appeal to the court of appeals, and after denial by the court of appeals, Plaintiff made

filings with the Texas Supreme Court and also separately instituted a Chapter 13 Bankruptcy proceeding. Only after filing a request for extension of time to file his Petition for Review with the Texas Supreme Court did Plaintiff seek removal to federal court.

In the present case, the Court concludes that the Magistrate Judge's findings and conclusions are correct. Plaintiff's Objections are baseless and without statutory or legal support. The Magistrate Judge correctly found that Plaintiff submitted himself to the jurisdiction of the state court when he filed his Petition in Dallas County in 2012. The assertion by Defendants of a counterclaim for defamation did not alter this fact. Simply put, Plaintiff is not entitled to and cannot invoke the federal removal statute because he is not a "defendant" as set forth in the statute. 28 U.S.C. § 1441(b). Moreover, Plaintiff's removal was untimely; he removed the case more than four years after the commencement of the original action and no amended pleading filed in the interim made the case removable. The Court also lacks subject matter jurisdiction over this litigation because (1) the parties admittedly are not diverse and the amount in controversy does not meet the jurisdictional limit, and (2) there is no federal question. Plaintiff is incorrect in his blanket assertion that a federal court can hear "ALL Cases, in law and equity, arising under the Constitution and laws of the United States" and/or "ANY case in which there is a Federal ingredient." When a plaintiff's pleadings set forth only state law claims, a federal district court has federal question jurisdiction to entertain the action only if "(1) the state law claims necessarily raise a federal issue or (2) the state law claims are completely preempted by federal law."

Bernhard v. Whitney Nat'l Bank, 523 F.3d 543, 551 (5th Cir. 2008). The presence of a perceived "federal question" in a defensive argument—such as Plaintiff's defense to Defendants' defamation claim here—cannot transform the action into one arising under federal law and/or otherwise confer jurisdiction on the Court. Accordingly, the Court overrules Plaintiff's Objections. This case should be remanded to the court from which it was removed—the Texas Supreme Court.

Conclusion

Having considered Plaintiff's request for rehearing (Dkt. #38, Dkt. #41) and each of Plaintiff's objections (Dkt. #43), and having conducted a de novo review, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and adopts the Magistrate Judge's report (Dkt. #40) as the findings and conclusions of the Court.

Accordingly, it is ORDERED that each of Defendant Emily Lane Owners Association's Motion to Remand (Dkt. #13) and Defendants Jackson Potter and Envision Realty Group, LLC's Motion to Remand (Dkt. #17) are GRANTED and Plaintiff's case is REMANDED to the Texas Supreme Court.

All relief not previously granted is DENIED (including specifically relief sought by and through Dkt. #4; Dkt. #9; Dkt. #18; Dkt. #20, Dkt. #32, and Dkt. #46). The Clerk is directed to CLOSE this civil action.

IT IS SO ORDERED.

SIGNED this 27th day of April, 2017.

/s/ Amos L. Mazzant
United States District Judge

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (MARCH 31, 2017)

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

ALBERT LUTTERODT,

Plaintiff,

v.

JACKSON POTTER, ENVISION REALTY GROUP, LLC, EMILY LANE OWNERS ASSOCIATION,

Defendants.

Civil Action No. 4:17-CV-00058-ALM-CAN

Before: Christine A. NOWAK,
United States Magistrate Judge

Now before the Court is Defendant Emily Lane Owners Association's Motion to Remand [Dkt. 13] and Defendants Jackson Potter and Envision Realty Group, LLC's Motion to Remand [Dkt. 17] (collectively, the "Motions to Remand"). After considering the Motions to Remand, Plaintiff Albert Lutterodt's Response [Dkt. 23] and Motion for Rehearing [Dkt. 38], and all other relevant pleadings, the Court recommends that the Motions to Remand [Dkts. 13; 17] be granted.

Background

This is a civil action originally filed and tried to verdict in state court. Plaintiff Albert Lutterodt ("Plaintiff") filed suit in Dallas County on October 24, 2012. The state trial court case, Cause No. DC-12-12648-G; *Albert Lutterodt v. Envison Realty Group, LLC, Jackson Potter and Emily Lane Owners Association*, originated in the 134th Judicial District Court of Dallas County, Texas [Dkt. 13 at 2]. Plaintiff owned a Unit in the Emily Lane Condominiums. Jackson Potter was the property manager for the condominiums and Envision Realty Group, LLC was the management company. *Id.* Plaintiff's Original Petition asserts state law claims related to his right to inspect the books and records of Defendant Emily Lane Owners Association ("Association") [Dkt. 1-1]. Defendants Association, Jackson Potter ("Potter"), and Envision Realty Group ("Envision Realty") (collectively, "Defendants") answered Plaintiff's suit on November 20, 2012 [Dkt. 1-2].[1] Potter and Envison Realty asserted counterclaims against Plaintiff, including a claim for defamation (libel and slander). Plaintiff filed an Amended Petition to Compel Inspection of Books and Records and Request Relief on August 6, 2013 [Dkt. 13-6].

A jury trial was conducted and, ultimately, final judgments were entered in favor of Potter and Jackson on their counterclaims [Dkt. 17-4].[2] After Plaintiff's

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[1] The Court has not been provided a copy of Defendant Association's Answer; however, at hearing no Party disputed that Defendant Association had timely answered and had asserted no counterclaims against Plaintiff.

[2] The Association avers that the final judgment consists of a July 21, 2014 Amended Judgment in favor of the Association and a

Motion for New Trial was denied, Plaintiff appealed to the Fifth District Court of Appeals in Dallas, Texas. The Fifth Court denied Plaintiff's appeal, affirming the trial court judgment on June 16, 2016 [Dkt. 13-2]. The Fifth Court of Appeals Opinion specifically addressed the defamation counterclaim, stating "[i]n his fourth issue, Lutterodt asserts the trial court erred by entering judgment against him for defamation because the evidence establishes that his statements were opinion, true or substantially true, protected by the First Amendment, or were not published." *Id.* at 9. The Court found Plaintiff's fourth issue presented nothing for its review. *Id.* Plaintiff thereafter filed a Motion for Rehearing and also a Motion for Rehearing En Banc, each of which were also denied [Dkt. 13-3]. Plaintiff next filed a Motion with the Texas Supreme Court requesting an extension to file his Petition for Review. Plaintiff also filed for Chapter 13 Bankruptcy on January 17, 2017 [Dkt. 1-3]. On January 25, 2017 Plaintiff then proceeded to file the current Notice of Removal to this Court, citing that he requested removal "based on violation of [his] Federal United States Constitutional First Amendment Rights" [Dkt. 1].

On February 13, 2017, Defendant Emily Lane Owners Association filed its Motion to Remand [Dkt. 13], asserting that this case should be remanded because removal was improper. On February 16, 2017, Defendants Jackson Potter and Envision Realty Group, LLC also filed a Motion to Remand [Dkt. 17]. Plaintiff responded to each of the Motions to Remand on Feb-

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September 14, 2014 Corrected Final Judgment in favor of Potter and Envision Realty.

ruary 28, 2017 [Dkt. 23]. Relevant to the determination of the Motions to Remand, Plaintiff has also filed a Suggestion of Bankruptcy asserting that this action has been stayed [Dkt. 35]. Defendant Emily Lane Owners Association has filed a Response and briefing related to the Suggestion of Bankruptcy [Dkts. 15; 39]. The Court conducted a hearing on Monday, March 27, 2017, regarding the Motions to Remand and the impact of the Suggestion of Bankruptcy on the Court's ability to grant such remand [Dkt. 36].

Legal Standard

28 U.S.C. § 1441(a) creates the right of removal:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(emphasis added). Accordingly, a defendant may remove any civil action from state court to a district court of the United States which has original jurisdiction. 28 U.S.C. § 1441. District courts have original jurisdiction over all civil actions "arising under the Constitution, laws, or treaties of the United States," or over civil actions that are between citizens of different states and involve an amount in controversy in excess of $75,000.00, exclusive of interest and costs. 28 U.S.C. §§ 1331, 1332. The party seeking removal "bears the burden of establishing that federal jurisdiction exists and that removal was proper." *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002); *Weaver*

v. Zurich Am. Ins. Co., No. H-10-1813, 2010 WL 3910053, at *1 (S.D. Tex. Oct. 1, 2010). The removal statute must "be strictly construed, and any doubt about the propriety of removal must be resolved in favor of remand." *Gasch v. Hartford Accident & Indem. Co.*, 491 F.3d 278, 281-82 (5th Cir. 2007). A district court is required to remand the case to state court if, at any time before final judgment, it determines that it lacks subject matter jurisdiction. *See* 28 U.S.C. § 1447(c); *Groupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 571 (2004).

Analysis

Defendants contend that removal of this case was not proper, and that the case should be remanded, because: (1) a plaintiff cannot invoke the right of removal; (2) removal was untimely (as Plaintiff's claims have already been tried to verdict in state court); and (3) the Court lacks subject matter jurisdiction [Dkts. 13; 17]. Plaintiff argues removal is proper because he asserts violations of his First Amendment rights under the Constitution of the United States; thus, this case presents a federal question [Dkts. 1; 23].

A. Plaintiff Cannot Invoke the Right of Removal

It is well established that a plaintiff/counter-defendant, such as Mr. Lutterodt, cannot remove a case to federal court. *See Callou Corp. v. Berthelot*, No. 13-5437, 2014 WL 2882929, at *1 (E.D. La. June 25, 2014); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) ("We can find no basis for saying that Congress, by omitting from the present statute all reference to 'plaintiffs,' intended to save a right of removal to some plaintiffs and not to others."); *In re Crystal Power Co., LTD.*, 641 F.3d 82, 85 n.10 (5th Cir.

2011) ("[W]hen a party voluntarily enters state-court litigation as a plaintiff, the subsequent filing of a counter-claim or cross-claim against it does not allow that party to invoke the right of removal conferred only on true defendants."). Rather, the right of removal is limited to true defendants. *McKenzie v. United States*, 678 F.2d 571, 574 (5th Cir. 1982) ("[O]nly a defendant, never a plaintiff, may remove a civil action from state to federal court."); 14C WRIGHT, MILLER, & COOPER, FEDERAL PRACTICE AND PROCEDURE, § 3730 (4th ed. 2014) ("[P]laintiffs cannot remove, even when they are in the position of defendants with regard to a counter-claim asserted against them."). "The purpose of restricting the right of removal to the defendant is to restrict removal to the party who had no choice in selection of the forum, generally the defendant." *Scott v. Commc'ns Servs., Inc.*, 762 F. Supp. 147, 149-50 (S.D. Tex. 1991). "No court since 1938 [has] held that the plaintiff may remove a case as counterdefendant, and the well-established rule is that the plaintiff, who chose the forum, is bound by that choice, and may not remove the case." *Id.* Given the foregoing, removal by Plaintiff Lutterodt was improper, and the case must be remanded. This finding is dispositive of the Motions to Remand, notwithstanding, the Court considers the other points raised by the Parties.

B. Removal Is Untimely

Plaintiff's removal also was not timely. As noted *supra*, a defendant can remove to federal court any civil action brought in state court over which the district court would also have had original jurisdiction. 28 U.S.C. § 1441(a). The timing of removal is controlled by 28 U.S.C. § 1446, which provides that if a suit is removable when the initial pleading is filed, the defendant

must file the notice of removal within 30 days after service of the initial pleading. 28 U.S.C. § 1446(b)(1); *Bd. of Regents of Univ. of Tex. Sys. v. Nippon Tel. & Tel. Corp.*, 478 F.3d 274, 278 (5th Cir. 2007). If the suit is not initially removable, the suit may be removed within 30 days after the defendant's receipt of a copy of an amended pleading, motion, order, or other paper from which the defendant can ascertain that the case has become removable. 28 U.S.C. § 1446(b)(3); *Crockett v. R.J. Reynolds Tobacco Co.*, 436 F.3d 529, 532 (5th Cir. 2006). Moreover, the Fifth Circuit has found that a party may lose its right to remove a case by participating in state court proceedings. *Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 428 (5th Cir. 2003). A waiver of the right to remove must be clear and unequivocal; the right to removal is not lost by participating in state court proceedings short of seeking an adjudication on the merits. *Id.* The key inquiry is whether the defendant sought an adjudication on the merits of the case from the state court prior to removal. If so, then removal is improper and remand must be granted. *Id.*

This case presents an unusual procedural posture for purposes of remand analysis. This suit was originally filed in state court, where Plaintiff asserted only state law claims in both the Original Petition, filed on October 24, 2012, and the Amended Petition, filed August 6, 2012 [Dkts. 1-1; 13-6]. Defendants Potter and Envision Realty filed their Answer to the Petition on November 20, 2012, asserting state law counterclaims against Plaintiff, namely "sanctions for violation of TRCP 13[,]" claims for defamation (libel and slander), and claims for injunctive relief [Dkt. 1-2]. The state court action was tried to verdict [Dkt. 13 at

2]. Following the judgments of the state court, Plaintiff filed a motion for new trial and, upon denial, his notice of appeal to the Fifth Court of Appeals for the State of Texas. *Id.* at 3. The Fifth Court affirmed the trial court's judgment. *Id.* Plaintiff then filed a motion for rehearing and a motion for en banc reconsideration, each of which were denied. *Id.* After the Fifth Court affirmed the judgment of the state district court, Plaintiff sought an extension of time to file a petition for review with the Texas Supreme Court. Upon receiving an extension from the Texas Supreme Court, on January 25, 2017, Plaintiff filed his Notice of Removal [Dkt. 1]. Plaintiff seemingly argues that the timeliness of removal should be measured from the date of his filing before the Texas Supreme Court.

Plaintiff is incorrect. Removal must occur within 30 days after the service of the initial pleading or receipt of a copy of an amended pleading, motion, order, or other paper from which the defendant can ascertain that the case has become removable of this action. Plaintiff's Notice of Removal comes more than (4) years after commencement and service of the original action. Plaintiff's alleged "right to free speech" arose in connection with Defendants Potter's and Envision Realty's counterclaim for defamation, which was first asserted in 2012. Moreover, and importantly, there has been an adjudication on the merits as to all claims (and any defenses thereto) asserted in the state trial court action. Plaintiff's contention that judgment against him for his defamatory statements constitutes a violation of his first amendment rights under the Constitution was argued before both the state trial court and on appeal; such contention thus was first raised years before his request for extension to the

Texas Supreme Court. Plaintiff's attempt to remove is, at its heart, an attempted collateral attack on the state court judgment. Accordingly, and for this additional reason, Defendants' Motions to Remand should be granted. To reiterate, even were the removal timely, removal would be improper here because as discussed above, Plaintiff Lutterodt lacked standing to remove.

C. Subject Matter Jurisdiction Does Not Exist

Even if Plaintiff Lutterodt were able to remove the case as plaintiff/counter-defendant, he could only do so if the Court had subject matter jurisdiction. The Court may exercise subject matter jurisdiction over a case where the requirements of either diversity jurisdiction and/or federal question jurisdiction are met. *See* 28 U.S.C. §§ 1331, 1332.

A court has diversity jurisdiction over those cases in which the amount in controversy exceeds the sum of $75,000, exclusive of interest and costs, and which are between citizens of different states. 28 U.S.C. § 1332. At the outset, the Court notes that diversity jurisdiction does not exist in this matter because Plaintiff and at least one Defendant both are Texas citizens; the Parties relevant pleadings, and statements at hearing, further make this clear [Dkts. 1; 13; 17; 23]. Accordingly, Plaintiff's sole potential avenue for removal is the Court's federal question jurisdiction.

Federal question jurisdiction exists when a case or controversy arises under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331. The presence or absence of federal question jurisdiction is governed by the well-pleaded complaint rule, which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's

properly pleaded complaint. *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998). When a plaintiff's pleadings set forth only state law claims, a federal district court has federal question jurisdiction to entertain the action only if "(1) the state law claims necessarily raise a federal issue or (2) the state law claims are completely preempted by federal law." *Bernhard v. Whitney Nat'l Bank*, 523 F.3d 543, 551 (5th Cir. 2008). A defense which raises a federal question and/or that is based on federal law does not establish subject matter jurisdiction. *See, e.g.*, *Caterpillar v. Williams*, 482 U.S. 386 (1987); *Constant v. Webre*, No. 07-3042, 2008 WL 4330251 (E.D. La. Sept. 15, 2008) (citing *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808 (1986)); *Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988); *Vaden v. Discovery Bank*, 556 U.S. 49, 60 (2009) ("[A] suit 'arises under' federal law 'only when the plaintiff's statement of his own cause of actions shows that it is based upon [federal law]' . . . . Federal jurisdiction cannot be predicated on an actual or anticipated defense. . . . Nor can federal jurisdiction rest upon an actual or anticipated counterclaim.")

Here, Plaintiff's Original and Amended Petitions seek relief related to Plaintiff's request to inspect the Association's books and records, including a request for a writ of mandamus, claim for breach of fiduciary duty, and attorneys fees [Dkts. 1-1; 13]. Defendants Potter and Envision Realty filed a counterclaim for violation of TRCP 13, for defamation (libel and slander), and for injunctive relief [Dkt. 1-2]. Each of the asserted causes of action—including the defamation counterclaim against Plaintiff—arise under Texas law: there are no claims that arise under federal law or that depend on the resolution of a question of federal

law in any of the operative pleadings filed before the state trial court. Moreover, the presence of a "federal question" in a defensive argument cannot transform the action into one arising under federal law. Therefore, the Court finds no federal question exists. Accordingly, the Court lacks subject matter jurisdiction over this case, and remand is appropriate for this additional reason.

D. Bankruptcy Stay Does Not Preclude or Prohibit Remand

The remaining issue before the Court is whether remand is appropriate, despite the existing bankruptcy stay. Plaintiff contends the automatic bankruptcy stay issued pursuant to 11 U.S.C. § 362 prohibits remand [Dkt. 35]. The automatic stay provision in Title 11 states, in pertinent part, the following:

> [A] petition filed under Section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of . . . (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. § 362(a). Thus, upon the filing of a bankruptcy proceeding, all other proceedings against the debtor are automatically stayed pursuant to Section 362. The purpose of the automatic stay is "to protect creditors in a manner consistent with the bankruptcy goal

of equal treatment," and to prevent a "chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts." *Robert v. Bell Helicopter Textron, Inc.*, No. 3:01-CV-1576-L, 2002 WL 1268030, at *12 (N.D. Tex. May 31, 2002) (citing *Hunt v. Bankers Tr. Co.*, 799 F.2d 1060, 1069 (5th Cir. 1986)). Notwithstanding the issuance of an automatic stay, courts retain jurisdiction "to determine the applicability of the stay to litigation pending before them, and to enter orders not inconsistent with the terms of the stay." *Id.*[3]

In this case, the circumstances weigh heavily in favor of remand. Removal in the first instance occurred after the stay had been imposed. Plaintiff filed for bankruptcy and relief was ordered on January 17, 2017 [Dkt. 35]. Plaintiff filed his Notice of Removal on January 25, 2017 [Dkt. 1]. Plaintiff's current reliance on the stay did not prevent him from removing the case. And, in any event, the Court has determined removal of this case is wholly improper. Further, a remand would place the Parties in no better or worse position, legally or financially, than the position they occupied at the time of removal. Moreover, numerous other

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[3] Defendants contend that the stay is inapplicable here because it extends only to actions "against the debtor" [Dkt. 15 at 2]. A court determines whether a proceeding is "against the debtor" by "examin[ing] the posture of the case at the initial proceeding." *In re Versoy*, 306 F. App'x 65, 68 (5th Cir. 2009) (per curiam). Accordingly, if the debtor brings the initial claim, generally Section 362 has no effect. *Id.* at 68-69. Defendants argument ignores, however, that Plaintiff is the counter-defendant as to Defendants Potter's and Envision Realty's counterclaim for defamation (for which judgment was entered against Plaintiff in the state court). Notwithstanding, the Court finds upon review of applicable authority that remand remains appropriate.

courts have found that an automatic stay generally does not preclude remand to state court. *See, e.g.*, *Hudgens v. Deer Valley Home Builders, Inc.*, No. 1:09-00417, 2009 WL 2878052 (W.D. La. Sept. 4, 2009); *Verizon Commc'ns, Inc. v. Northpoint Commc'ns Grp., Inc.*, 262 B.R. 891, 892 (D. Del. 2001); *McCratic v. Bristol-Myers Squibb & Co.*, 183 B.R. 113, 115-16 (N.D. Tex. 1995); *Baxter Healthcare Corp. v. Hemex Liquidation Tr.*, 132 B.R. 863, 867 (N.D. Ill. 1991). Accordingly, the Court finds that the automatic stay, resulting from Plaintiff's bankruptcy, does not prevent a remand of this case.

Conclusion

For the foregoing reasons, the Court recommends that Defendant Emily Lane Owners Association's Motion to Remand [Dkt. 13] and Defendants Jackson Potter and Envision Realty Group, LLC's Motion to Remand [Dkt. 17] be GRANTED. Plaintiff lacks standing to remove, removal was untimely, and the Court lacks jurisdiction. The Court further recommends that all other motions not previously ruled on [Dkts. 4; 9; 18; 20; 32] be DENIED as moot.

Within fourteen (14) days after service of the magistrate judge's report, any party must serve and file specific written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's report and recommendation where the disputed deter-

mination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific.

Failure to file specific, written objections will bar the party from appealing the unobjected-to factual findings and legal conclusions of the magistrate judge that are accepted by the district court, except upon grounds of plain error, provided that the party has been served with notice that such consequences will result from a failure to object. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc), superceded by statute on other grounds, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

SIGNED this 31st day of March, 2017.

/s/ Christine A. Nowak
United States Magistrate Judge

ORDER OF THE COURT OF APPEALS OF TEXAS DENYING MOTION FOR REHEARING (OCTOBER 5, 2016)

IN THE COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

ALBERT LUTTERODT,

Appellant,

v.

EMILY LANE OWNERS ASSOCIATION, INC., ENVISION REALTY GROUP, LLC and JACKSON POTTER,

Appellees.

No. 05-14-01329-CV

On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-12-12648-G

Before: Justices MYERS, STODDART, and WHITEHILL

Before the court is appellant's motion for rehearing. The motion is DENIED.

/s/ Craig Stoddart
Justice

ORDER OF THE COURT OF APPEALS OF TEXAS DENYING MOTION FOR EN BANC RECONSIDERATION (NOVEMBER 15, 2016)

IN THE COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

ALBERT LUTTERODT,

Appellant,

v.

EMILY LANE OWNERS ASSOCIATION, INC.,

Appellee.

No. 05-14-01329-CV

On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-12-12648-G

Before: Carolyn WRIGHT, Chief Justice.

Before the Court is appellant's October 24, 2016 motion for en banc reconsideration. Appellant's motion is DENIED.

/s/ Carolyn Wright
Chief Justice

MEMORANDUM OPINION OF THE COURT OF APPEALS OF TEXAS (JUNE 16, 2016)

COURT OF APPEALS OF TEXAS, DALLAS

ALBERT LUTTERODT,

Appellant,

v.

EMILY LANE OWNERS ASSOCIATION, INC., ENVISION REALTY GROUP, LLC, and JACKSON POTTER,

Appellees.

No. 05-14-01329-CV

On Appeal from the 134th Judicial District Court, Dallas County, Texas, Trial Court Cause No. DC-12-12648-G, Dale B. Tillery, Judge

Before: Justices MYERS, STODDART, and WHITEHILL.

Opinion by Justice Stoddart

Albert Lutterodt appeals from an adverse judgment rendered in favor of Emily Lane Owners Association, Inc. (HOA), Envision Realty Group, LLC (Envision Realty), and Jackson Potter. In five issues, Lutterodt argues the trial court erred by denying his motion for judgment notwithstanding the verdict (JNOV)

and motion for new trial, giving the jury an erroneous instruction, entering judgment against him for defamation, and allowing his attorney to withdraw before trial. We affirm the trial court's judgment.

Factual Background

Potter owns Envision Realty, which provided property management services to the HOA. Through an entity, Lutterodt owns several properties at Emily Lane, and was on the board of directors for the HOA from 2009 through 2011. In 2010, Lutterodt served as treasurer of the board; he served as president in 2011.

The dispute among the parties centers around Lutterodt's multiple requests for the HOA's financial records. Lutterodt sought financial documents from Potter, Envision Realty, and the HOA because he was concerned about how money was being spent. He testified he requested documents so that he could "conduct an audit . . . because I couldn't verify where the money was going given the conditions of the community." It is undisputed that the HOA is required to "keep and maintain full and accurate books and records showing all of the receipts, expenses or disbursements" and to permit Owners to examine the records at "any reasonable time."

Lutterodt began requesting financial records in 2008. Once he joined the Emily Lane board in 2009, he began receiving some documents because he was a board member. However, he sought additional information. He directed his oral and written requests for additional documents to the board and Potter.

At trial, Potter and Robert George, a board member, testified that they provided records to Lutterodt.

They explained that Lutterodt sought additional documents but frequently did not specify which records he wanted. Lutterodt also requested records he already had been given. Lutterodt maintained he needed additional documents because the records he received were incomplete and inadequate for him to conduct an audit. At trial, Lutterodt testified he still had not received all of the documents he needed. Potter considered Lutterodt's repeated requests to be harassing and believed Lutterodt was acting unreasonably even though Potter thought he "went above and beyond to try to satisfy Mr. Lutterodt."

The relationship between the parties rapidly deteriorated after Lutterodt lost an election in January 2012 to remain on the board of directors. Lutterodt believed the election was "rigged" by Potter and George, and Lutterodt refused to acknowledge he was no longer on the board.

Lutterodt filed the instant suit. The case was tried to a jury, which found in favor of appellees. Following the trial, the court entered judgment in favor of Potter, Envision Realty, and the HOA.[1] Lutterodt

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[1] The trial court executed two documents on July 21, 2014, reflecting the judgment of the court. Because the law does not require a final judgment be in a particular form, whether a judicial decree is a final judgment is determined from its language and the record in the case. *See Lehmann v. Har–Con Corp.*, 39 S.W.3d 191, 196 (Tex.2001). "In some circumstances, 'a final judgment may consist of several orders that cumulatively dispose of all parties and issues.'" *Onyung v. Onyung*, No. 01–10–00519–CV, 2013 WL 3875548, at *9–10 (Tex.App.–Houston [1st Dist.] July 25, 2013, pet. denied) (mem.op.) (quoting *Noorian v. McCandless*, 37 S.W.3d 170, 173 (Tex.App.–Houston [1st Dist.] 2001, pet. denied)). When read together and in conjunction with the record, it is clear the two documents dated July 21, 2014, form the trial

filed a motion for JNOV and a motion for new trial. The trial court denied both motions, and this appeal followed.

Law & Analysis

A. Jury Question One

Lutterodt makes two arguments with respect to jury question one. In his first issue, he argues the trial court erred by denying his motions for JNOV and for new trial because there is no evidence or insufficient evidence to support the jury's answer to question one. In his third issue, he asserts the trial court improperly instructed the jury regarding jury question one that Lutterodt must "reasonably identify records" when the controlling statute does not contain a requirement of reasonableness.

To preserve a jury charge complaint on appeal, the complaining party must make an objection before the trial court. *Thota v. Young*, 366 S.W.3d 678, 689 (Tex.2012) (citing rule of civil procedure 274 and rule of appellate procedure 33.1). Here, Lutterodt's counsel did not object to the charge at trial. Because Lutterodt did not make his complaint before the trial court, we conclude he has not preserved his third issue for appeal. *See id.*

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court's final judgment and dispose of all issues and parties in the case. *See Hickman–Bey v. Tex. Dept. of Crim. Just.*, No. 07–12–00490–CV, 2014 WL 1464154, at *2 (Tex.App.–Amarillo Apr. 11, 2014, no pet.). The trial court subsequently issued a corrected final judgment on September 15, 2014. In this case, the trial court retained jurisdiction to issue a corrected final judgment because its plenary power was extended by Lutterodt's motion for new trial filed on August 19, 2014. *See* Tex. R. Civ. P. 329b.

In his first issue, Lutterodt asserts the trial court erred by denying his motions for JNOV and for new trial because "there is either no evidence or insufficient evidence" to support the jury's answer to question one.

We review a trial court's decision to grant or deny a motion for JNOV under the legal sufficiency standard of review. *See City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex.2005) (test for legal sufficiency is same for directed verdict, JNOV, and appellate no-evidence review). We credit evidence favoring the jury verdict if reasonable jurors could and disregard contrary evidence unless reasonable jurors could not. *Tanner v. Nationwide Mut. Fire Ins. Co.*, 289 S.W.3d 828, 830 (Tex.2009); *Oncor Elec. Delivery Co., LLC v. Southern Foods Group, LLC*, 444 S.W.3d 699, 703 (Tex.App.–Dallas 2014, no pet.). We will uphold the jury's finding if more than a scintilla of competent evidence supports it. *Tanner*, 289 S.W.3d at 830. "The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *Id.*

To preserve a factual sufficiency challenge, a party must present its complaint to the trial court in a motion for new trial. *See* Tex. R. Civ. P. 324(b)(2). We review the denial of a motion for new trial for an abuse of discretion. *See Hodges v. Rajpal*, 459 S.W.3d 237, 250 (Tex.App.–Dallas 2015, no pet.). A trial court abuses its discretion when its actions are arbitrary or unreasonable or when it acts without reference to any guiding rules or principles. *Id.* Every reasonable presumption will be made on review in favor of the trial court's refusal of a new trial. *El Dorado Motors, Inc. v. Koch*, 168 S.W.3d 360, 368 (Tex.App.–Dallas 2005, no

pet.). When, as here, a party attacks the factual sufficiency of the evidence supporting an adverse finding on an issue on which it had the burden of proof, it must demonstrate that the adverse finding is against the great weight and preponderance of the evidence. *Dow Chemical Co. v. Francis*, 46 S.W.3d 237, 242 (Tex.2001). We consider and weigh all the evidence and set aside the verdict only if the supporting evidence is so weak or if the finding is so against the great weight and preponderance that it is clearly wrong and unjust. *Id.*

When conducting our review of both the legal and factual sufficiency of the evidence, we are mindful that the jury, as fact finder, was the sole judge of the credibility of the witnesses and the weight to be given their testimony. *City of Keller*, 168 S.W.3d at 819; *Hinkle v. Hinkle*, 223 S.W.3d 773, 782 (Tex.App.–Dallas 2007, no pet.). The jury is free to believe some, all, or none of a witness's testimony. *Goggans v. Ford*, No. 05-14-01239 -CV, 2015 WL 8523302, at *2 (Tex.App.–Dallas Dec. 9, 2015, pet. filed). We may not substitute our judgment for the fact finder's. *See Maritime Overseas Corp.*, 971 S.W.2d at 407.

We measure the sufficiency of the evidence against the jury charge as submitted. *See Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex.2000). Jury question one states:

> Did Mr. Lutterodt make a written demand, for a proper purpose, to inspect financial or other records required to be kept by the Association?
>
> You are instructed that a written demand by Mr. Lutterodt must reasonably identify records, which are required to be kept by the Association, for which Mr. Lutterodt demands

> an inspection, and the records demanded by Mr. Lutterodt must be relevant to Mr. Lutterodt's stated purpose.

The jury answered "no."

Lutterodt asserts he made multiple demands in writing for financial records so he could conduct an independent study or audit of the HOA's finances. The HOA concedes that Lutterodt made demands for records. However, it argues, the demands did not reasonably identify the records that were required to be kept and they were not made for a proper purpose.

After reviewing the record, we conclude that an October 19, 2010 email from Lutterodt to Potter and members of the board is the first written demand for financial records identifying specific records Lutterodt sought. In that email Lutterodt requested several documents for the time period of January 1-8, 2010, including cash flow statements, bank statements, income statements, service agreements, and all checks made to vendors and contractors. The email stated he desired to obtain the documents in connection with his role as treasurer of the HOA. If we assume for purposes of this analysis that the October 19 email is a written demand for financial or other records that are required to be kept by the HOA and the written demand reasonably identifies the records he seeks, we nonetheless conclude Lutterodt has not demonstrated that the evidence is legally or factually insufficient to show he had an improper purpose.

On August 20, 2010, two months before making the October 19 request, Lutterodt emailed members of the board and informed them that they had failed to exercise sufficient financial control and management over

the HOA. He stated he was calling for an "INDEPENDENT CPA to look into our finances." He closed the email by stating:

> LET U.S. REMEMBER:
>
> Late president Nixon was a liar and a crook
>
> Ex-president Clinton was a liar. A certified Liar.
>
> Ex-Texas attorney general, Tony Gonzalez [sic] was a liar and a crook.
>
> Robert George, "You know who you are."

George testified that he encouraged Lutterodt to run for a board position, and Lutterodt joined the board in January 2009. However, George explained that while Lutterodt was on the board, he was "very disruptive at [board] meetings, making it difficult to get things done, incredibly emotional outbursts and rants." "We couldn't focus on the issue that we had to deal with." Instead, Lutterodt raised "superfluous issues month after month after month. The board would make a decision on it and he would come right back the next month bringing the same issues up again for reconsideration. We had many difficulties." Even after George gave Lutterodt all the association-related documents he had in 2010, and Lutterodt thanked him for the documents, Lutterodt "proceeded in the succeeding months and times to ask me for the same information" again. When George asked Lutterodt what else Lutterodt wanted, Lutterodt could not answer the question.

Potter testified he initially had a "pretty good relationship" with Lutterodt. But their relationship changed in 2009 when Lutterodt joined the HOA board. Potter explained: "So all of this started in 2009. The requests

were real [sic] frequently. Obviously it kept increasing as the months and days would pass, but obviously from 2009 it was more than monthly." Once he became a member of the board, Lutterodt "was providing [sic] the monthly financial reports. And then obviously at that time he would always want more and more." Potter explained that regardless of what documents he provided, Lutterodt always wanted more. When Lutterodt was asked which specific documents he wanted, he would not answer.

George and Potter both testified that the board's problems with Lutterodt arose after Lutterodt joined the board in 2009. Although there is evidence in the record that the relationship between Lutterodt and the board and Potter became increasingly acrimonious in 2012 and 2013 after Lutterodt lost the election to remain on the board, there also is evidence from which the jury could have concluded that Lutterodt had an improper purpose for requesting documents as early as 2009. George and Potter both testified that they had amicable relationships with Lutterodt before he became a board member, but that once he joined the board, he became "very difficult" to work with, would have "incredibly emotional outbursts and rants," and would bring up "superfluous issues," thus interfering with the board's ability to do its work. The evidence shows Lutterodt made redundant document request as early as 2010 and, although Lutterodt complained he did not receive the documentation needed, he would not articulate which additional documents he wanted. Lutterodt's email inferring that George is a liar and a crook is consistent with George's testimony that Lutterodt had emotional outbursts and rants, and shows

Lutterodt began personally attacking George's character before ever making a proper written document request.

After considering all of the evidence of Lutterodt's actions taken before he sent the October 19 email, we conclude there is more than a scintilla of evidence from which a jury could have found Lutterodt had an improper purpose when making any requests for records in the months and years before the October 19, 2010 email. *See Oncor Elec. Delivery Co.*, 444 S.W.3d at 703. Further, the jury's finding is not so contrary to the evidence as to be clearly wrong and unjust. *See id.* Therefore, viewing the evidence under the appropriate standards for legal and factual sufficiency, we conclude the trial court did not abuse its discretion by denying Lutterodt's motions for JNOV and for new trial. We overrule Lutterodt's first issue.

B. Jury Question Two

In his second issue, Lutterodt argues the trial court erred by overruling his motion for JNOV because he is entitled to judgment in his favor on jury question two. The jury charge states:

> If you answered "Yes" to Question No. 1, answer then [the] following Question; otherwise do not answer the following Question.
>
> QUESTION NO. 2
>
> Did the Association fail to keep financial or other records, required to be kept by the Association, reasonably available at the Association's registered office or its principal office in this state for examination by Mr. Lutterodt after Mr. Lutterodt's written demand, if any?

Lutterodt asserts that because the jury incorrectly answered "no" to jury question one, it did not answer question two even though he was entitled to judgment in his favor on question two.

Following the instructions in the charge, the jury correctly did not answer question two after it answered "no" to question one. To the extent Lutterodt now argues this instruction is erroneous, Lutterodt has not preserved that complaint for appeal. *See Thota*, 366 S.W.3d at 689. We overrule Lutterodt's second issue.

C. Defamation

In his fourth issue, Lutterodt asserts the trial court erred by entering judgment against him for defamation because the evidence establishes that his statements were opinion, true or substantially true, protected by the First Amendment, or were not published. The jury charge listed nine statements made by Lutterodt about Potter and asked the jury to determine whether any of them was defamatory. The jury answered "yes." In his brief, Lutterodt's argument does not challenge the defamatory nature of any of the statements in the jury charge, and does not identify any of the statements as being an invalid basis for recovery. Rather, without citation to any authority, he argues other statements that he made were not defamatory.

Our briefing rules require an appellant's brief to "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." *See* Tex. R. App. P. 38.1(i). Lutterodt's fourth issue does not contain any citations to the record nor any citations to authorities. An issue on appeal unsupported by citation to any legal authority

presents nothing for the court to review. *See Strange v. Continental Cas. Co.*, 126 S.W.3d 676, 678 (Tex.App.–Dallas 2004, pet. denied). This Court does not have a duty to perform an independent review of the record and applicable law to determine whether the error complained of occurred. *See id.* Because Lutterodt's fourth issue does not comply with our briefing rules, we conclude it presents nothing for our review.

D. Attorney Withdrawal

In his fifth issue, Lutterodt asserts the trial court erred by allowing his counsel to withdraw from his representation before the trial without showing good cause. Our briefing rules require an appellant to state facts pertinent to the issues presented on appeal and include an argument with appropriate citations to the record. *See* Tex. R. App. P. 38.1(g), (i). An issue on appeal unsupported by argument or citation to any legal authority presents nothing for the court to review. *See Strange*, 126 S.W.3d at 678. Lutterodt's fifth issue does not include any citations to the record. Although Lutterodt asserts he was unable to quickly obtain new counsel and he announced "not ready" in his "his pretrial order," his brief does not include any record citations to support these statements. We conclude the issue has been inadequately briefed for our review.

Additionally, the record does not support Lutterodt's contentions. The record shows Lutterodt signed the trial court's order granting the motion to withdraw under the word "Agreed." The trial court's judgment reflects the parties, including Lutterodt who was represented by two new lawyers, announced "ready"

for trial; Lutterodt does not argue this statement in the judgment is incorrect.

Conclusion

We affirm the trial court's judgment.

ORDER OF THE DISTRICT COURT DENYING PLAINTIFF'S MOTION FOR NEW TRIAL (SEPTEMBER 16, 2014)

IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
134TH JUDICIAL DISTRICT

ALBERT LUTTERODT

v.

ENVISION REALTY GROUP, LLC,
JACKSON POTTER and EMILY LANE
OWNERS ASSOCIATION, INC

Cause No. DC-12-12648-G

Before: Dale TILLERY, Presiding Judge

On September 15, 2014, came to be heard the Plaintiff's Motion for New Trial ("Motion"). After considering the pleadings, evidence and hearing the arguments of counsel, it appears to the Court that the Motion should in all things be DENIED,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff's Motion is hereby DENIED in its entirety.

Signed September 16, 2014.

/s/ Dale Tillery
Presiding Judge

PLAINTIFF'S AMENDED PETITION TO COMPEL INSPECTION OF BOOKS AND RECORDS AND REQUEST RELIEF (AUGUST 6, 2013)

IN THE DISTRICT COURT OF 134TH JUDICIAL DISTRICT, DALLAS COUNTY, TEXAS

ALBERT LUTTERODT,

Plaintiff,

v.

ENVISION REALTY GROUP, LLC, JACKSON POTTER, ROBERT GEORGE, CHARLIE GUO, GEORGE ELWELL, GARY SCHROEDER, TODD WANG AND EMILY LANE OWNERS ASSOCIATION INC.,

Defendants.

Cause No. DC-12-12648-G

Plaintiff Albert Lutterodt files this Amended Petition to Compel Inspection of Books and Records and Request Relief from defendants Envision Realty Group, LLP, Jackson Potter, Robert George, Charlie Guo, George Elwell, Gary Schroder, Todd Wang and Emily Lane Owners Association, Inc., (collectively the "Defendants").

I. Discovery-Control Plan

1. Discovery is intended to be conducted under Level 2 of Texas Rule of Civil Procedure 190.

II Parties; Citations

2. Plaintiff Albert Lutterodt ("Lutterodt") is an individual residing in Dallas County, Texas. The last three digits of Lutterodt's driver's license number are 813. The last three digits of Lutterodt's Social Security number are 191.

3. Envision Realty Group, LLC ("Envision") is a Texas limited liability company. Envision may be served with process through its registered agent Jackson Potter at 4245 N. Central Expressway, #265, Dallas, Texas 75205. According to the Texas Comptroller of Public Accounts, Envision is not in good standing. Envision has already been served and is before the Court.

4. Jackson Potter ("Potter") is an individual resident of Dallas County. Potter is the sole member of Envision. Potter may be served with process at 7510 Holly Hill Drive, #120, Dallas, TX 75231 or 4245 N. Central Expressway, #265, Dallas, Texas 75231. Potter has already been served and is before the Court.

5. Emily Lane Owners Association, Inc. (the "Association") is a Texas non-profit corporation. The Association may be served through its registered agent Envision Realty Group, LLC at 4245 N. Central Expressway, #265, Dallas, Texas 75231. The Association has already been served and is before the Court.

6. Robert George ("George") is a Texas resident who may be served with process at 1808 Seminary Drive, Plano, Texas 75756-6755.

7. Charlie Guo ("Guo") is a Texas resident who may be served with process at 13217 Emily Road, Bldg. C, Unit 3105, Dallas, Texas 75240-8987

8. George Elwell ("Elwell") is a Texas resident who may be served with process at 2520 K Avenue, #700-715, Plano, Texas 75074-5342.

9. Gary Schroder ("Schroder") is a Texas resident who may be served with process at 725 Carrie Lane, Lakewood Village, Texas 75068-4455.

10. Todd Wang ("Wang") is a Texas resident who may be served with process at 1617 Navarro Drive, Allen, Texas 75013-1187.

III. Venue

11. Venue is proper in Dallas County because it is (i) the county in which all or a substantial part of the events or omissions giving rise to the claim occurred, (ii) the County where the real estate is located, (iii) the County of Potter's residence at the time the cause of action accrued, and (iv) the County of the offices of Envision and the Association's.

IV. Facts

12. The Association is a condominium. Lutterodt has been an owner and a member of the Association since 1996. Lutterodt is also a member of the Association's board of directors. Under the Association's Bylaws, owners are permitted to examine the Association's books and records "at any reasonable time."

13. Envision is the duly elected manager of the Association. Envision has control of books and records of account and minutes of proceedings of Association.

Potter is the sole member of Envision, which, based on information and belief, forfeited its corporation status.

14. George, Guo, Elwell, Schroder, and Wang are the officers and/or directors of the Association.

15. On or about November 17, 2009, August 18, 2010, and December 16, 2011, Lutterodt, as a unit owner, member of the Association, and a member of the board of directors, made a written demand on the Association, Envision and Potter requesting that he be permitted to examine, in person or through Raymond Abbey, CPA and Ivette Rivera, CPA, his duly authorized agent, the books and records of the Association and to make extracts for the purpose of looking at the financial condition of the Association. The requests were made on business days and provided a reasonable time for responses. The Association, its members and directors, Envision, and Potter refused and continue to refuse to allow Lutterodt to examine the records.

16. The HOA Property Management Agreement requires the Association to perform a yearly audit of the Association's finances. Lutterodt, as a unit owner, member of the Association, and a member of the board of directors has requested numerous times that Potter and the Association perform an audit of the Association's finances. However, only two audits have been performed since 2004.

17. Potter has used Association funds to employ family members to perform work for the Association.

V. Cause of Action No. 1: Issuance of Writ of Mandamus

18. Lutterodt is an owner of the Association. Under the Association's bylaws, the Property Code,

and the Business Organization Code, the Association, Envision, and Potter had a duty to permit Lutterodt to inspect the Association's books and records. It is within the Association, Envision, and Potter's power to perform this duty.

19. Lutterodt requested in writing that he be allowed to examine the Association's books and records. The Association, Envision, and Potter refused, breaching their duty under the Association's bylaws, the Property Code, and the Business Organization Code.

20. By that refusal, Lutterodt has been deprived of the right under the Association's bylaws, the Property Code, and the Business Organization Code to inspect the Association's corporate records.

21. Issuance of a writ of mandamus is necessary to obtain performance, as the Association, Envision, and Potter have refused to perform their duties. There is no other adequate and sufficient remedy other than a writ of mandamus.

VI. Cause of Action No. 2: Breach of Fiduciary Duty (Potter, George, Guo, Elwell, Schroder, and Wang)

22. The elements of a cause of action for breach of fiduciary duty are the following: (1) the plaintiff and the defendant had a fiduciary relationship, (2) the defendant breached its fiduciary relationship, and (3) the defendant's breach resulted in (a) injury to the plaintiff; or benefit to the defendant.

23. Members and officers of condominium boards owe fiduciary duties to the unit owners for the members' or officers' acts or omissions, and may be personally liable for monetary damages if: (1) the officer or director breached a fiduciary duty to the association or a

unit owner; (2) the officer or director received an improper benefit; or (3) the act or omission was in bad faith, involved intentional misconduct, or was one for which liability is expressly provided by statute.

24. The Defendants owe Lutterodt fiduciary duties because they serve as members and directors of the condominium association board and Lutterodt is a unit owner.

25. The Defendants breached their fiduciary duties of loyalty, utmost good faith, candor, honest dealing, and full disclosure, as well as the duty to refrain from self-dealing, by: (1) failing to maintain or prohibiting access to the Association's books and records, as they are required to do by both the HOA Property Management Agreement and the Texas Property Code; (2) by failing to perform yearly audits, as Defendants are required to do by both the HOA Property Management Agreement and the Texas Property Code; (3) by self-dealing or failing to take reasonable action to prevent self-dealing with the assets of the Association; (4) by acting in bad faith, violating the terms of the HOA Property Management Agreement and the Texas Property Code; (5) by dealing unfairly and dishonestly with the Plaintiff, concealing and secreting assets; and (6) by converting the Association's assets for their own use and benefit.

26. These acts and omissions have caused Lutterodt damages, and Defendants have benefited as a result. The transactions that have taken place have been unfair and inequitable. As a result, Lutterodt seeks damages individually as a unit owner, including exemplary damages for the intentional breaches of Defendants' fiduciary duties, fee forfeiture, and profit disgorgement from Defendants. Plaintiff also requests

that the court order the fiduciaries to make an accounting to determine the balance that Lutterodt is due.

VII. Cause of Action No, 3: Attorney's Fees

27. Under the Property Code and the Association's bylaws, the Association, the Association's directors and officers, Envision, and Potter had a duty to permit Lutterodt to inspect the Association's books and records. The prevailing party in an action to enforce the bylaws or the Property Code provisions is entitled to recover reasonable attorney's fees and costs of litigation. Lutterodt sues to recover such sums.

VIII. Prayer

WHEREFORE, premises considered, Plaintiff respectfully prays that Defendants be cited to appear and answer, and that upon trial or other final hearing, Plaintiff have judgment against Defendant as set forth above, plus pre-and post-judgment interest as allowed by law and all costs of Court; and that Plaintiff have such other and further relief, general or special, in law or in equity, to which Plaintiff may show himself to be justly entitled.

Plaintiff requests that Defendants be cited to appear and answer this petition for a writ of mandamus, at a time and place designated by this Court, and on final hearing a writ of mandamus be issued by this court commanding, ordering, and directing Envision Realty Group, LLP, Jackson Potter and Emily Lane Owners Association, Inc. and their officers, employees, agents, and servants to allow Plaintiff to inspect the books and records of the corporation and to make extracts and for general relief, attorney's fees and all costs.

Plaintiff requests an order of this court requiring a written statement of account, sworn to and subscribed by Defendants, setting forth in detail:

1. All Association property that has come to Defendants' knowledge or into Defendants' possession that has not been previously listed or inventoried as property of the Association.

2. A complete account of receipts, disbursements, and other transactions regarding the Association property for the period covered by the account, including their source and nature, with receipts of principal and income shown separately.

3. A listing of property being administered, with an adequate description of each asset.

4. The cash balance on hand, and name and location of the depository where the balance is kept.

5. All known liabilities of the Association.

6. Any other and further relief as the court deems just and proper.

Respectfully submitted,

Bennett Weston LaJone & Turner PC

By: /s/ Bruce E. Turner
State Bar No. 20310500
1603 LBJ Freeway, Suite 280
Dallas, TX 75234
Telephone: 972-862-2332
Facsimile: 214-373-2570

VERIFICATION

State of Texas
County of Dallas

BEFORE ME, the undersigned Notary Public, on this day personally appeared Albert Lutterodt, who being by me duly sworn on his oath, deposed and said he has read the above and foregoing document; and that every statement contained in them is within his knowledge and is true and correct.

/s/ Albert Lutterodt
Affiant

SUBSCRIBED AND SWORN TO BEFORE ME on this the 6th day of August, 2013.

/s/ Rosemary Rodriguez Hall
Notary Public in and for the
State of Texas
My Commission Expires
November 10, 2013

DEFENDANTS' ANSWER TO PLAINTIFF'S ORIGINAL PETITION (NOVEMBER 20, 2012)

IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS
134TH JUDICIAL DISTRICT

ALBERT LUTTERRODT,

Plaintiff,

v.

ENVISION REALTY GROUP, LLC
JACKSON POTTER and EMILY LANE
OWNERS ASSOCIATION, INC.,

Cause No. DC-12-12648-G

To the Honorable Judge of Said Court:

Now comes ENVISION REALTY GROUP, LLC and JACKSON POTTER, Defendants, by and through their attorney, David J. Potter, and for their ANSWER TO PLAINTIFF'S ORIGINAL PETITION would respectfully show the court as follows, to wit:

I.

Defendants deny each and every, all and singular, the material allegations of the Plaintiff's claim and, therefore, enters a general denial pursuant to TRCP 92.

II.

Affirmatively, Defendant Jackson Potter would show that he is, and has at all relevant times, been acting as an officer of Envision Realty Group, LLC, and cannot be sued in his personal capacity, as an officer of the LLC, or as the sole member of the LLC. Defendant Potter does not have a contractual relationship with the Emily Lane Owners Association, Inc. The said association has contracted with Envision Really Group, LLC to provide management services to Emily Lane Owners Association, Inc. Therefore, pursuant to TRCP 93.2., Plaintiff asserts by verified pleading that the Defendant Jackson Potter is not liable in the capacity in which he is sued.

III.

Specifically, Defendants would show that the Plaintiff is not a member of the board of directors of Defendant Emily Lane Owners Association, Inc. as alleged in paragraph 7. Furthermore, Defendants have never been provided with any evidence that the Defendant is an owner, though he has been requested to provide such evidence. Therefore, until such evidence has been provided, Defendants deny that the Plaintiff is an owner at Emily Lane Horizontal Property Regime, a member of the association, or a member of the board of directors.

IV.

Over the past several years, the Plaintiff has asserted that he was an owner of property in the association, and has served as a member of the board, during which time monthly and annual accountings have been provided to him for several years. During

the last annual meeting, a new board was elected, and the Plaintiff was not elected and is not serving as a member of the board, although he continues to falsely claim that he is on the board.

V.

Affirmatively, Defendants would show that numerous and repeated production of documents have been made to the Plaintiff and to his chosen accountant, and at no time has any errors, omissions or misconduct been found to exist. In fact, purely to satisfy the Plaintiff who had been alleging theft and misdeeds by the Defendants and other members of the board, the board hired the Plaintiff's accountant to conduct an annual audit. The association had utilized another accounting firm for years, and long before Defendant Envision began to manage the association. The Plaintiff's accountant approved all books, records and reports without any errors, omissions or misconduct found or noted.

VI.

The Plaintiff has engaged in a course of conduct that amounts to harassment of the board members and the Defendants Envision and Potter. His incessant disruptive conduct has become a nuisance to the Defendants, the board of directors and members of the Emily Lane community.

Counter-Claim for Sanctions for Violation of TRCP 13, Damages for Defamation: Libel and Slander and for Injunctive Relief

Now comes the Defendants, Envision Realty Group, LLC and Jackson Potter, and for their Counter-

Claim against the Plaintiff/Counter-Defendant, Albert Lutterodt, would respectfully show the court the following, to wit:

VII. Cause of Action for Violation of TRCP 13

The Plaintiff has a history of unreasonable actions amounting to harassment of the Defendant Envision. This suit is more of the same. It is nothing more than vexatious and frivolous litigation.

VIII.

TRCP 13 provides that the signature of the Party on a pleading operates as a certificate that to the best of the signer's knowledge, formed after reasonable inquiry, that the suit is not groundless or brought in bad faith, or brought for the purpose of harassment. The attorney for the Plaintiff has been apprised in person during a previous lawsuit filed in a court without any jurisdiction that the claims of the Plaintiff are without merit.

IX.

Chapter 10 of the Civil Practice and Remedies Code provides that sanctions may be imposed if pleadings lack evidentiary or legal support, are file for an improper purpose, or without due diligence. Chapter 10 of the CPRC does not require bad motive, although a bad motive, malice, or conduct from which malice can be inferred, appears to be the case here.

In any event, Defendants pray for sanctions to be imposed to punish the vexatious and harassing conduct of the Plaintiff in this case and to prevent such behavior in the future. Because of the baseless and vexatious claim filed by the Plaintiff entirely without

merit, Defendants have been required to retain the undersigned attorney to represent them in this case, as well as the previous lawsuit that was dismissed for lack of jurisdiction. Defendant's pray for a judgment for reasonable attorney's fees against the Plaintiff in an amount to be shown by the evidence as a proper sanction for violation of TRCP 13.

X. Claims for Defamation: Libel and Slander

The Plaintiff has published, in writing to third parties and orally to third persons, false and malicious statements about the Defendants and Counter-Plaintiffs, Envision Realty Group, LLC and Jackson M. Potter, defaming them to other persons. Such written and oral statements by Albert Lutterodt to other persons tended to injure Counter-Plaintiffs' reputation, and thereby exposed them to public hatred, contempt or ridicule, and which caused financial injury. Furthermore, said false and malicious statements impeached the honesty, integrity, virtue, and reputation of the Defendants and Counter-Plaintiffs, Envision Realty Group, LLC and Jackson M. Potter.

XI.

The false statements about the Counter-Plaintiffs was repeatedly and persistently published with the specific intent to injure and harm the Counter-Plaintiffs, both financially and in the esteem of others. Counter-Plaintiffs repeatedly requested that the Counter-Defendant, Albert Lutterodt cease and desist from such conduct, but to no avail. More specifically, Albert Lutterodt sent emails and perhaps other written communications to board members of Emily

Lane Condominiums, and to other owners and residents of Emily Lane Condominiums, stating as a fact that;

1. "Jackson Potter [President and sole member of Envision Realty Group, LLC] is trying to drain and steal funds from EL too." (Email from Lutterodt to Robert George, Charlie Guo, Robert Chiu and Todd Wang on January 3, 2012.)

2. "I received the article below about Jackson Potter. I now believe that Jackson Potter is trying to lie, steal and scam EL the same way he lied to, scammed and stole Association funds from the folks at Holly Oaks Town homes HOA." (Email from Lutterodt to Robert George, Charlie Guo, Robert Chiu and Todd Wang on January 3, 2012 at 9:49 AM.)

3. "It makes me angry that Jackson Potter is trying to drain and steal funds from EL too." (Email from Lutterodt to Robert George, Charlie Guo, Robert Chiu and Todd Wang on January 3, 2012 at 9:49 AM.)

4. Lutterodt republished to the board members of Emily Lane a written version of a local television investigative report which contained false statements and innuendos defaming the reputation of Jackson Potter, Envision Realty Group, LLC, and his family members and their companies and law practice, to wit:

> "The way Don Folkerth sees it, the 2010 fire that destroyed his Dallas condo unit and 10 others at Holly Oaks Townhomes unmasked serious allegations of ongoing conflicts of interest at the homeowners' association.
>
> "My daddy said if it's black-and-white and smells funny, it's a skunk," Fokerth said. "I

think we have the world's biggest skunk, is what I think.

His disgust started when he and others found the HOA's insurance policy would not pay to build out their units beyond the drywall. They had to do the work themselves.

As they looked deeper, residents focused on another issue: The Holly Oaks Townhomes Association Inc. spent $150,000 on the legal work and other legal fees to sue an owner of multiple units.

"Here is a huge lawsuit that a little homeowners' association shouldn't have undertaken, because it's a hardship on everybody," said Cheryl Smith, a Holly Oaks property owner and an attorney.

And then there was the quality and cost of the million dollar reconstruction of the 10 destroyed units.

Smith hired a consultant who found "troubling issues" with the workmanship, and found nothing to support "such a significant cost" of construction.

"Obviously, I'm very frustrated. I'm very angry," Folkerth said.

But owners and residents say the biggest problem with their HOA is this: Their property manager is a man named Jackson Potter. When he and the board hired a lawyer to try their ease, they hired Potter's father, David Potter, an attorney from Texarkana.

> And when Jackson Potter and the HOA board hired a construction company to rebuild the units, they hired a company run by Potter's brother and father.
>
> Jackson Potter declined to be interviewed on camera for this story. Off-camera, he does have answers.
>
> Potter said he and the board members hired Jackson's father, David, as their lawyer because he was the only lawyer who would take their case. He also said his father's construction company did quality work for Holly Oaks.
>
> But Potter said if he had to do it again, he'd hire someone else, to avoid perceived conflicts.
>
> "It once was a very nice place to live, and it can be again," Folkerth said.
>
> This month, Folkerth led a successful takeover of the Holly Oaks board and fired Potter. But he'll still be seeing him around.
>
> While Potter was still property manager at Holly Oaks, he purchased a unit—making him a member of the association he was paid to manage," (Email from Lutterodt to Robert George, Charlie Guo, Robert Chiu and Todd Wang on January 3, 2012 at 9:49 AM.)

The truth in fact is that Jackson did not hire his father to represent the association, the board of directors of Holly Oaks Townhomes Association, Inc. did. Furthermore, the lawsuit was successful with a trial court judgment of approximately $100,000 against an owner of a number of units in Holly Oaks

that for years had not paid condo fees. The case was affirmed on appeal to the Dallas Court of Appeals, with the exception of one small award, and a Application for Review to the Texas Supreme Court was rejected, and the case remanded back to the trial court for a new trial on the issue of attorney's fees, an objective of Attorney David J. Potter with the expectation that a jury trial of the attorney fee issue would result in a judgment of approximately $230,000.

In addition, the board, not Jackson Potter, hired Texas Contracting Company, LLC. The construction work product was excellent, and below the budget approved by the fire insurance company. Furthermore, the statement by Smith that she had hired a consultant who found "troubling issues" with the workmanship and found nothing to support "such a significant cost" of construction" was false. In fact, no consultant had been hired prior to the statement by Smith, and prior to the publication of the television report of her statements. A consultant was subsequently hired and reported that the work product of Texas Contracting was excellent. With the exception of only a few small cosmetic check list items, which were promptly addressed upon notice, any defects noted by their expert was caused by the homeowners themselves and/or their contractors during the finish out of their units, which was not within the contract responsibilities of Texas Contracting Company, LLC.

XII. Counter-claim for Permanent Injunction

The conduct of the Counter-Defendant, Albert Lutterodt, is harmful, abusive, disruptive, incessant and amounts to harassment of Counter-Plaintiffs, En-

vision and Jackson Potter, In addition to being disruptive the business activities of the Counter-Plaintiffs, there is a real possibility, or probability, that the Counter-Defendant will continue his defamation of the Counter-Plaintiffs if not restrained by a permanent injunction of this court. Counter-Plaintiffs would respectfully show that they are without an adequate remedy at law to stop such damaging and abusive conduct.

XIII.

Therefore, the Counter-Plaintiffs requests that this court issue an order permanently enjoining the Counter-Defendant, Albert Lutterodt, from:

1. making any false and derogatory statements about the Counter-Plaintiffs Jackson Potter or any of his Envision Companies, and

2. contacting the Counter-Plaintiffs directly, or through written communications, except as may be relayed by the Board of Directors as a legitimate request of the board.

WHEREFORE, PREMISES CONSIDERED, Defendants pray that the claim of the Plaintiff be dismissed, that Defendant and his counsel be sanctioned under TRCP 13 and appropriate attorney's fees and costs be imposed; for judgment for damages as may be found by the trier of fact for Libel and Slander of the Counter-Plaintiffs against the Counter-Plaintiffs, for punitive/exemplary damages for the malicious publication of said libel and slander, and for a permanent injunction against the Counter-Defendant from 1. making any false and derogatory statements about

the Counter-Plaintiffs Jackson Potter or any of his Envision Companies, and 2. contacting the Counter-Plaintiffs directly, or through written communications, except as may be relayed by the Board of Directors as a legitimate request of the board, plus pre-judgment and post-judgement interest, costs, and all other just and proper relief to which Defendants and Counter-Plaintiffs may show themselves to be entitled, both at law and in equity.

Respectfully Submitted,

/s/ David J. Potter
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VERIFICATION

State of Texas
County of Dallas

Now Before me, a notary public, appeared Jackson M. Potter, individually and as President and Sole Member of Envision Realty Group, LLC, and after being duly sworn executed this document to verify that he had read the above and foregoing pleading and affirms that the factual statements contained therein are true to his personal knowledge.

/s/ Jackson M. Potter

Subscribed and sworn to before me this 20 day of November, 2012.

/s/ Micah Lawson
Notary Public,
in and for the State of Texas
My Comm. Exp. 09-06-16

ORIGINAL PETITION TO COMPEL INSPECTION OF BOOKS RECORDS (OCTOBER 24, 2012)

IN THE DISTRICT COURT OF
DALLAS COUNTY, TEXAS
134TH JUDICIAL DISTRICT

ALBERT LUTTERRODT,

Plaintiff,

v.

ENVISION REALTY GROUP, LLC
JACKSON POTTER and EMILY LANE
OWNERS ASSOCIATION, INC.,

Defendants.

Cause No. DC-12-12648-G

Plaintiff Albert Lutterodt files this Original Petition to Compel Inspection of the Books and Records of defendants Envision Realty Group, LLP, Jackson Potter and Emily Lane Owners Association, Inc.

1. Discovery is intended to be conducted under Level 2 of Texas Rule of Civil Procedure 190.

2. Plaintiff Albert Lutterodt ("Lutterodt") is an individual residing in Dallas County, Texas. The last three digits of Lutterodt's driver's license number are 813. The last three digits of Lutterodt's Social Security number are 191.

3. Envision Realty Group, LLC ("Envision') is a Texas limited liability company. Envision may be served with process through its registered agent Jackson Potter at 4245 N. Central Expressway, #265, Dallas, Texas 75205. According to the Texas Comptroller of Public Accounts, Envision is not in good standing.

4. Jackson Potter ("Potter") is an individual resident of Dallas County. Potter is the sole member of Envision. Potter may be served with process at 7510 Holly Hill Drive, #120, Dallas, TX 75231 or 4245 N. Central Expressway, #265, Dallas, Texas 75231.

5. Emily Lane Owners Association, Inc. (the "Association") is a Texas non-profit corporation. The Association may be served through its registered agent Envision Realty Group, LLC at 4245 N. Central Expressway, #265, Dallas, Texas 75231.

6. Venue is proper in Dallas County because it is the county in which all or a substantial part of the events or omissions giving rise to the claim occurred; the county of Potter's residence at the time the cause of action accrued; and the county of the Envision and the Association's principal office in this state.

I. Facts

7. The Association is a condominium. Lutterodt has been an owner and a member of the Association since 1996. Lutterodt is also a member of the Association's board of directors. Under the Association's Bylaws, owners are permitted to examine the Association's hooks and records "at any reasonable time."

8. Envision is the duly elected manager of the Association. Envision has control of books and records of account and minutes of proceedings of Association.

Potter is the sole member of Envision, which, based on information and belief, forfeited its corporation status.

9. On or about November 17, 2009, August 18, 2010, and December 16, 2011, Lutterodt, as a member of the Association and a member of the board of director, made a written demand on the Association, Envision and Potter requesting that he be permitted to examine, in person or through Raymond Abbey, CPA and Ivette Rivera, CPA, his duly authorized agent, the books and records of the Association and to make extracts for the purpose of looking at the financial condition of the Association. The requests were made on business days and provided a reasonable time for responses. The Association, Envision, and Potter refused and continue to refuse to allow Lutterodt to examine the records.

II. Cause of Action No. 1: Issuance of Writ of Mandamus

10. Lutterodt is an owner of the Association. Under the Association's bylaws, the Property Code, and the Business Organization Code, the Association, Envision, and Potter had a duty to permit Lutterodt to inspect the Association's books and records. It is within the Association, Envision, and Potter's power to perform this duty.

11. Lutterodt requested in writing that he be allowed to examine the Association's books and records. The Association, Envision, and Potter refused, breaching their duty under the Association's bylaws, the Property Code, and the Business Organization Code.

12. By that refusal, Lutterodt has been deprived of the right under the Association's bylaws, the Property

Code, and the Business Organization Code to inspect the Association's corporate records,

13. Issuance of a writ of mandamus is necessary to obtain performance, as the Association, Envision, and Potter have refused to perform their duties. There is no other adequate and sufficient remedy other than a writ of mandamus.

III. Cause of Action No. 2; Attorney's Fees

14. Under the Property Code and the Association's bylaw, the Association, Envision, and Potter had a duty to permit Lutterodt to inspect the Association's books and records. The prevailing party in an action to enforce the bylaws or the Property Code provisions is entitled to recover reasonable attorney's fees and costs of litigation. Lutterodt sues to recover such sums.

Plaintiff requests that defendants be cited to appear and answer this petition for a writ of mandamus, at a time and place designated by this Court, and on final hearing a writ of mandamus be issued by this court commanding, ordering, and directing Envision Realty Group, LLP, Jackson Potter and Emily Lane Owners Association, Inc. and their officers, employees, agents, and servants to allow plaintiff to inspect the books and records of the corporation and to make extracts and for general relief, attorney's fees and all costs.

Respectfully submitted,

Bennett Weston LaJone & Turner PC

By: /s/ Bruce E. Turner
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VERIFICATION

State of Texas
County of Denton

BEFORE ME, the undersigned Notary Public, on this day personally appeared Albert Lutterodt, who being by me duly sworn on this oath, deposed and said he has read the above and foregoing document; and that every statement contained in them is within his knowledge and is true and correct.

/s/ Albert Lutterodt
Affiant

SUBSCRIBED AND SWORN TO BEFORE ME on this the 24th day of October, 2012.

/s/ Rosemary Rodriguez Hall
Notary Public in and for the
State of Texas
My Commission Expires
November 10, 2013