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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Civil Action No. 4:11-cv-04543

Joanna Burke and John Burke Plaintiffs, vs. Hopkins Law, PLLC, Mark Daniel Hopkins and Shelley Luan Hopkins, Defendants.	PLAINTIFF'S MEMORANDUM & JOINT AFFIDAVIT TO ALTER OR AMEND THE JUDGMENT

PLAINTIFF'S MEMORANDUM & JOINT AFFIDAVIT TO ALTER OR AMEND THE JUDGMENT PURSUANT TO FED. R. CIV. P. 59(e)

Pursuant to Federal Rule of Civil Procedure 59(e) to alter or amend its judgment entered on March 19, 2020 (Doc. 69). The Court's judgment was (1) issued despite a proclamation of Gov. Abbott, declaring the State of Texas a disaster (pandemic) but not before cancelling a scheduled pretrial hearing the evening before

the judgment was issued. This was after a continuance was requested by all parties, thus not providing due notice and a fair opportunity to be heard and for justice to be served; (2) the memorandum includes new evidence not previously available and; (3) the judgment was based on a clear error of law, and correcting the decision is necessary to prevent manifest injustice.

DISTRICT JUDGE'S CLEAR ERROR(S) AND MANIFEST INJUSTICE(S)

No "De Novo" Review of Magistrate's M&R

United States District Judge David Hittner ("DJ") affirmed Magistrate Judge Peter Joseph Bray's ("MJ") Memorandum and Recommendation ("M&R") which stated that the case was to be dismissed with prejudice and while the court was fully aware the *Burke v. Ocwen*[1] ("*Ocwens' Note*") case[2] is still pending appeal at the Fifth Circuit. As such, dismissal is premature and should be reconsidered.

> "Furthermore, the statute requires the district court to make a "de novo determination" of the enumerated dispositive matters which are referred to the magistrate under § 636(b). A civil trial on the merits is certainly a dispositive matter. Accordingly, we infer that any power to refer dispositive matters under § 636(b)(3) carries with it a requirement of "de novo determination" by the district judge of the portions of the magistrate's findings to which a party objects." - *Calderon v. Waco Lighthouse for the Blind*, 630 F.2d 352, 355 (5th Cir. 1980).

[1] *Burke, et al. v. Ocwen Loan Servicing, LLC*, No. 4:l8-cv-4544 (S.D. Tex. 2018)
[2] Which, like here, (Docs. 55-58) includes constitutional challenges.

Here, reviewing DJ's Order of Adoption (Doc. 68, 18 Mar., 2020), there is no mention of "de novo" review, nor in the final judgment (Doc. 69). A clear error and manifest injustice.

Cancellation of the Conference before the DJ was Innately Prejudicial

After several years litigating against Hopkins, the Burkes can categorically state that they would not have emailed the Burkes to reschedule the conference on 19th March, 2020 if they thought they could have cancelled. Hopkins are experienced trial attorneys with decades of federal and appellate court experience in Texas. Hopkins should know the relevant federal law(s) and they confirm what the Burkes surmise. The fact the court cancelled the conference despite a pandemic and disaster proclamation (an intervening and controlling change in the law) by the Gov. of Texas is innately prejudicial to the Burkes. A clear error and manifest injustice. *See* ;

> "When a state deprives a person of liberty or property through a hearing held under statutes and circumstances which necessarily interfere with the course of justice, it deprives him of liberty and property without due process of law." *Moore v. Dempsey*, 261 U.S. 86; *Frank v. Mangum*, 237 US 309. - *Tumey v. Ohio*, 273 US 510, 511 (1927).

Dismissal With Prejudice is Error

The Burkes reject the entire dismissal and entry of judgment, but analyzing the judgment in law, to dismiss with prejudice is clear error ("DJ"). The Burkes have never filed a previous court action based on the same claim or attorney-defendants.

The Burkes have litigated this case fervently at all times, so dismissal for delay is not even a consideration in this case. The fact the MJ did not familiarize himself with the case, despite his assurances to the contrary, should not penalize the Burkes in this matter. *See;*

> "This circuit has consistently held that Rule 41(b) dismissals with prejudice will be affirmed only upon a showing of "`a clear record of delay or contumacious conduct by the plaintiff," *Rogers v. Kroger Co.*, 669 F.2d 317, 320 (5th Cir. 1982).

This criteria certainly does not apply to the Burkes, and warrants amendment as stated by the appellate court in *Rogers* above which reversed the district court's dismissal with prejudice under Rule 41(b) for failure to prosecute; noting that dismissal with prejudice is "reserved for the most egregious of cases".

In the *Ocwens' Note* case, the signed Order by the DJ (Hittner) dismissed the case 'without prejudice' (Dismissed for want of prosecution ("DWOP")), *see;* Doc. 29, March 20, 2019). That case was appealed and is pending a decision from the 5th Circuit. Here and as stated, the case is dismissed with prejudice;

> "A court may also enter judgment with prejudice, however. This signifies that the court has made an adjudication on the merits of the case and a final disposition, barring the plaintiff from bringing a new lawsuit based on the same subject…Often a court will enter a judgment

> with prejudice ***if the plaintiff has shown bad faith, misled the court, or persisted in filing frivolous lawsuits***.[3]

None of these reasons apply in this case. They do, however, apply to Hopkins. Dismissal with prejudice is prejudicial to the Burkes. A clear error and manifest injustice. As the docket visibly decrees, while the judges may harbor their own animosity towards the Burkes, this should not interfere with justice.[4]

THE MAGISTRATE'S CLEAR ERROR(S) & MANIFEST INJUSTICE(S)

Which were adopted by the DJ

The DJ issued a one-liner adoption of the M&R. Based on a new opinion by the Fifth Circuit, this is disfavored. *See*;

> "In a one-sentence judgment, the district court agreed and dismissed the case with prejudice. In so holding, however, the district court failed to follow controlling Supreme Court authority permitting the enforcement action. We publish this opinion to clarify the reach of our previous precedent, and REVERSE and REMAND for further proceedings." - *Equal Emp't Opportunity Comm'n v. Vantage Energy Servs.*, No. 19-20541, at *1 (5th Cir. Apr. 3, 2020).

As a result, without the benefit of a DJ Adoption Order that has any substance and to aid this motion, the Burkes revert to the M&R for review and argument(s).

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[3] See https://legal-dictionary.thefreedictionary.com/without+prejudice

[4] See https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf

The MJ's Background & Procedural Posture is Factually Incorrect

The MJ's timeline and statements on the first paragraph of p.3 are incorrect. Shelley Hopkins was only appointed co-counsel AFTER remand and commencement of *Deutsche II*.[5] She was not co-counsel of record for the whole of *Deutsche I* at the lower court. (#15-20201 appeal). While the record appears to show some activity in *Deutsche I* by Shelley Hopkins, this was not as co-counsel. She was only appointed as co-counsel at S.D. Tex. for *Deutsche II* (#18-20026 appeal) and AFTER the Burkes attended a conference with Judge Smith to discuss the remand of the case by the Fifth Circuit. To clarify, the 5th erred in the original Opinion (9th June, 2016) by stating that Deutsche Bank was the mortgage servicer and Judge Smith had to write to the 5th Circuit to get that reviewed. The corrected opinion was issued on 19th July, 2016. This is a clear error as the Burkes have maintained that Shelley Hopkins was 'kept in the dark' intentionally after the arrival of Hopkins in 2015. They didn't want the Burkes to discover, or at least delay discovery as long as possible that Shelley Hopkins was in fact Shelley Douglass, a former BDF key management staffer and in overall charge of the Burkes original

[5] Reference to *Deutsche I* and *Deutsche II* have been applied in the docket to make it easier to distinguish between the first appeal (#15-20201) period and the second appeal period (#18-20026) in the *Deutsche Bank Fraud* case; *Deutsche Bank Nat'l Trust Co. v. Burke,* et al., No. 4:l l-cv-1658 (S.D. Tex. 2011).

proceedings from inception in 2011 until BDF handed the case to Mark Hopkins of Hopkins & Williams, PLLC. This is deception. The Burkes have argued extensively why discovery is required to ascertain Shelley Hopkins' work history and employment status for the period 2011-2018. She relies upon attorney immunity which is disputed by the Burkes. The Burkes pleadings were sufficient to warrant discovery.[6] Indeed, the Burkes had already commenced discovery and addressing the Request for Admissions ("RFAs"). This was terminated by the MJ during the scheduling order at the 10 September 2019 status hearing, which had transversed into a motion hearing - without due notice to the parties. This is important when taken in light of the next objection, the MJ's lack of preparedness at the status hearing and the bizarre events and rulings that were decided that day and thereafter.

The Magistrate's Statements as Evidence

When the MJ stated on the record that he had ***familiarized***[7] himself with the case, including the *Deutsche Bank Fraud* case and was fully prepared for the 'status conference', that was untrue, based on the MJ's own statements. *See* Doc. 52, p. 5;

[6] See Doc. 32, starting at p. 17 the Burkes go in-depth about attorney immunity with law/case examples.

[7] See https://www.merriam-webster.com/dictionary/familiarize - Familiarize **:** to make well acquainted.

> THE COURT: "So the first thing I wanted to know is -- so I've ***familiarized*** myself with your complaint. I have ***familiarized*** myself with the prior case that was in here in front of Judge Smith…"

He went on to say (questioning Mark Hopkins who again refused to tell the court that the Burkes had answered his second motion to dismiss);

> "THE COURT: All right. Well, you should try to get it done before then, then. He filed the Motion to Dismiss back in April. And the rules say that you have 21 days to respond to that, and I could have, if I wanted to be, you know, a real stickler for the rules, I could have just ruled on this and said you-all didn't respond and therefore, you're unopposed. MR. BURKE: Okay, Your Honor. THE COURT: Right? I could have done that? MR. HOPKINS: Yes, Your Honor.

It was evident the MJ was totally unprepared for the hearing. He would also lose control during these proceedings; (i) He refused to 'mic up' (ii) He wasn't familiar with the case and had to rely on the Case Manager, Mr. Marchand, who confirmed his clear errors, including advising the MJ he had not vacated the scheduling order (stayed discovery, including the RFAs which the Burkes had started to submit) and then issued that order during the hearing (Doc. 52, p. 29) (iii) changing the hearing from a status hearing to a motion hearing without due notice (iv) Advising the Burkes incorrectly that they had not replied to Hopkins second motion to dismiss, when they had (Doc. 32) (v) Admonishing the Burkes for not answering the motion (which they were confused about) as they had come to court

prepared to discuss discovery, namely the Experts (Docs. 36, 36-1)[8] and RFAs (Doc. 46) as you would expect at a status conference and based on the current scheduling order (vi) by further shouting and gesticulating at them based on false statements from opposing counsel without confirming first any evidence that Hopkins had for such a serious allegation - claiming not once, but twice during the hearing that the Burkes wanted certain judges to be shot. (Doc. 52, p. 30)

The Change from a 'Status Conference' to a 'Motion Hearing' without Notice

The Burkes were expecting a conference to discuss the Burkes discovery requests, including Experts and RFAs. They were sideswiped by the change to a motion hearing and so it would appear, was Hopkins (Doc. 52, p. 29/30).

After the chaotic and fear-inducing conference the Burkes paid for an expedited transcript and audio of the hearing.[9] They also filed a motion to clarify (Doc. 54) which queried the inexplicable hearing, including the new order (Doc. 50) commanding the Burkes answer Hopkins motion to dismiss, Doc. 28 (The Burkes had answered that motion[10]).

[8] Which Hopkins sought to 'Strike'; Docs. 38, 38-1.
[9] This audio and transcript have been 'doctored' (edited) as documented in Doc. 66.
[10] See Doc. 32 (12 **April**, 2019) and Hopkins immediate Reply, Doc.34 (17 **April**, 2019).

The Burkes also inquired as to reimbursement of expenses incurred obtaining the transcript/audio, which was incurred due to the Magistrates error-laden hearing, which totally confused the Burkes. As they are both over 80 years old, the memory is slower and so they decided it was essential to obtain a transcript (Doc. 51) of the hearing as quickly as possible due to the time constraints imposed to prepare a response and comply with the MJ's order.

Unfortunately, this would be at a cost of hundreds of dollars and a lot of frustration as the court delayed the process substantively with numerous excuses. The Burkes were keen to ensure they complied with the erroneous orders by the MJ and prevent dismissal of the case for want of prosecution.

All this was happening while Joanna Burke was in the middle of eye surgery and they had other court proceedings in Florida/Georgia with looming deadlines. They had requested more time at the hearing, but the MJ was cold and unsympathetic. He denied the request (Doc. 52, p. 24/25).

When the MJ issued his unexpected and premature M&R, he did reference the Burkes motion to clarify, merely to deny as moot. No refund was discussed, no apology was given, nor did he address or authorize repayment of the Burkes costs for the transcripts. This is plain and clear error and a manifest injustice.

This Unfamiliarity with the Burkes Complaint shows the Burkes have Not received a Fair Hearing before the MJ

It also provides further evidence that Hopkins knowingly deceived the court by not intervening to correct the judge regarding the fact the Burkes answered the motion and he knew it but answered the judge without mention of this important fact. In conclusion, these facts reviewed individually and/or holistically are sufficient to have the case reopened. *See;*

> "We find that Judge Fitzwater adequately familiarized himself with the case prior to sentencing Defendant Crowe. Compare *United States v. Larios,* 640 F.2d 938 (9th Cir. 1981)." *U.S. v. Bourgeois,* 950 F.2d 980, 988 (5th Cir. 1992). In *Larios;* the appeal panel stated; "We find that under the circumstances, Judge Tanner abused his discretion by not becoming properly familiar with the case." *United States v. Larios*, at 943 and "Under the circumstances of this case, we find that a different judge should do the resentencing." (at 943).

The Burkes case being dismissed is "an abuse of discretion", but it's also a clear error and manifest injustice when reviewing the case in totality. As with *Larios*, this case should be reassigned upon any reinstatement order.

The Magistrate Errors and Substantial Omissions

The MJ's M&R condensed the Burkes complaint into the following areas (i) Attorney Immunity; and (ii) FDCPA & TDCA. The MJ was completely blinkered

in his analysis of the Burkes complaint and cherry-picked what he wanted to review. That is plain and clear error and a manifest injustice. A review of the Burkes filings in comparison with the M&R review shows the MJ ignored 2/3rds of the Burkes first amended complaint (Doc. 27) and based on the citations and cross-referencing in the 24th of February, 2020 M&R (Doc. 65) *See*; Exhibit A.

The Burkes original reply to Hopkins Second Motion to Dismiss, which the MJ claimed had not been filed, but clearly it was, fared even worse in the forensic review. The M&R only referenced 7 pages, or put another way, it ignored 83 percent of the Burkes responses. *See*; Exhibit B.

By discounting practically all of the Burkes responses, this negated the vast majority of the Burkes written arguments and pleadings. The MJ tries to excuse his complete disregard and dismissal of the Burkes filings as being those which the court 'scoured or ferreted out' from the *pro se* pleadings and which were 'facts'. This is condescending, as well as factually incorrect. It is plain and clear error and a manifest injustice. The Burkes would cite from the following recent S.D. Tex. case (The M&R here is by fellow Magistrate Judge Andrew M Edison);

> "[Attorney] Willey alleges that as a result of engaging in protected speech, Judge Ewing removed him from cases to which he was assigned and refused to assign him to new cases in his court. Judge Ewing argues that those factual allegations are insufficient because "Willey fails to indicate whether or not he was receiving appointments from other

> judges during this time period and fails to allege he was available to receive appointments during the time period in question." Dkt. 14 at 13. And, thus, "Willey **merely speculates** that it is unlikely random selection would have caused the lack of appointments." The Court is not persuaded by Judge Ewing's argument**. At this stage, the Court must accept all of Willey's factual allegations as true and make all reasonable inferences in Willey's favor.**" See *Allen v. Walmart Stores, L.L.C.*, 907 F.3d 170, 177 (5th Cir. 2018) ("we will accept all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff) (internal quotation marks and citation omitted).- *Willey v. Ewing*, CIVIL ACTION No. 3:18-CV-00081, at *11 (S.D. Tex. Dec. 17, 2018).

In *Willey*, the MJ is applying the correct legal standard(s) at the motion to dismiss stage. This materially conflicts with the MJ's findings here. The Burkes suggest the MJ in *Willey* would find the Burkes complaint and pleadings more than sufficient to continue to a jury trial. Secondly;

> "When a federal court reviews the sufficiency of a complaint . . . its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed, it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." - *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 267 (5th Cir. 2009).

Returning to the Burkes complaint, they now break down the M&R into what was discussed in the M&R and what was intentionally ignored. Note: this is not to 'rehash', it is required to prove the Burkes reconsideration arguments.

First, Attorney Immunity. The MJ focused on; (a) The Conference Hearing in the *Deutsche Bank Fraud* case wherein Mark Hopkins admitted to withholding the mortgage (closing) file from the Burkes (Doc. 65, p.7) and; (b) Attorney-client relationship 'outside the litigtion' (Doc. 65, p. 7-9) and the 'show authority' demand by the Burkes. (Doc. 65, p. 9).

Re Hopkins Withholding Evidence: Even the areas the MJ focused on, he has misinterpreted the statements of fact and applied the incorrect law. *See*; status conference, Doc. 126, p. 13 of the *Deutsche Bank* docket. For example, Hopkins admitted to withholding the evidence. His statement is clear;

> "I've had the benefit of reviewing that closing file, **which wasn't put in evidence** before the Court **because the allegations were raised by the Burkes**."

The common [wo]man could determine that is withholding evidence. And to correct the MJ again; Hopkins did **not** wish to admit the closing file into evidence, he wanted to admit the **wet-ink note** into evidence (Doc. 27, p.29/30), which was rejected by former MJ Smith;

> "There remains one additional matter. In the last sentence on the last page of its last brief to this court, Deutsche Bank asks to reopen the trial record to provide "the wet ink original of the Note or testimony affirming Deutsche Bank's status as holder of the Note." (Dkt. 90,

> at 7). No authority or excuse is offered for this breathtakingly late request." (Denied, Doc. 93-1, p.15).

The Burkes contentions that this materially affected their case is ratified in the following case;

> "The Court finds from clear and convincing evidence that several of the audiotapes that were not produced before the trial contain conversations that would have been extremely helpful to Defendants, and highly relevant, in defending against MMAR's allegation that it had been libeled by Jereski's statement" *MMAR Group, Inc. v. Dow Jones & Co., Inc.*, 187 F.R.D. 282, 287 (S.D. Tex. 1999).

Re Hopkins Attorney Immunity: The MJ incorrectly applied sweeping attorney immunity ("AI"), relying on the fact that as the complaint, in his opinion, focused on Hopkins acts in the *Deutsche Bank Fraud* case, it was protected by AI. This was not the Burkes argument. The Burkes recognized the shield of AI and they provided the court with sufficient pleadings to show this could be pierced and discovery could continue to prove their case before a Judge and Jury of their peers.

AI, The Shelley Hopkins Resume & Ignored Pleadings: Taking one example, Shelley Hopkins is ex-BDF. At some point in-between marrying Mark Hopkins she left BDF offices and joined Hopkins & Williams, PLLC and/or Hopkins Law, PLLC. The Burkes went into great depth about the fact that AI can be pierced based on Hopkins work history and role(s). The Burkes have also corrected the MJ

about the fact that Shelley Hopkins was **not** co-counsel during *Deutsche I*. She registered at the start of *Deutsche II*. Now refer to Doc. 32, Exhibit # Attorney-Immunity p.13-24 and compare to Exhibit B. This section was completely ignored in the M&R and none of the legal arguments addressed *e.g.* a displaced manager[11] is not protected by AI, the engagement letter(s) and loan file is not covered under AI protection (Attorney-client relationship or privilege).[12]

The MJ goes on to say that even if Hopkins conduct is 'wrongful' it is protected by AI (Doc. 65, p. 9). The Burkes claim 'bad faith', fraud and similar, but the M&R completely ignored the Burkes complaint in relation to the system of fraud, fraud, and malicious conduct claims including the PNC fraud case mirroring the Deutsche Bank case. Again, cherry-picking small areas of the Burkes complaint and ignoring the majority of the Burkes pleadings. This is a clear error and manifest injustice. In summary, Hopkins treacherous acts are not shielded by AI.

A Fraudulent System or Scheme is Actionable

[11] See Doc. 65, p. 6; "First, if an attorney's actions are not "the kind of conduct in which an attorney engages when discharging duties to a client," then attorney immunity does not apply." *Kelly,* 868 F.3d at 374.

[12] "In summary, the court concludes that AP may successfully assert the fiduciary exception against Cigna; or, stated differently, Cigna "cannot assert the attorney-client privilege against [AP] about legal advice dealing with plan administration." See *Wildbur*, 974 F.2d at 645." *Advanced Physicians, S.C. v. Conn. Gen. Life Ins. Co*., CIVIL ACTION No. 3:16-CV-2355-G, at *19 (N.D. Tex. Jan. 3, 2020)

Hopkins lied in another foreclosure case, *PNC v Howard*, mirroring the unlawful acts in the Burkes *Deutsche Bank Fraud* case. See Doc. 45, p. 3; "After trial, PNC discovered a piece of evidence (a proof of mailing of the Notice of Acceleration to Mr. Howard) which had previously been unable to be located. PNC therefore moved for the admission of the additional evidence (CR 818 – 894). The Trial Court denied the motion on September 18, 2017. (RR. Vol. 3, page 40, line 8)." Hopkins also lied about the "accidental use" of a pre-merger name (p.2.). Note; The actual motion is found at Doc 45-2.

Hopkins uses deflection, distraction and wickedness as a premeditated trial tactic. It is another known system of fraud. In *Deutsche I*, he used the 'new evidence' route which was dismissed by Smith. In *Deutsche II* he elected to go down the path of formally criticizing Magistrate Judge Smith in a letter to the Fifth Circuit, which resulted in the removal of Smith from the bench.[13] In this case, the *Hopkins Conspiracy* he's elected to go even further with calculated, evil acts against two elderly citizens which are absolutely outrageous and repugnant.

Hopkins Lies Constantly and With Criminal Intent

[13] See Doc 59, p. 13.

(i) Hopkins lied on at least two repeat occasions to this court at the Sept. 10, 2019 hearing with the MJ. Hopkins lies were extreme, claiming the Burkes '*wanted certain judges to be shot*'. Hopkins would later admit to his horrific and evil lies targeting two innocent victims, who are elderly citizens and one who is disabled.

(ii) Hopkins failed to enter into communication with the Burkes regarding the joint discovery plan (Doc. 15).

(iii) Hopkins is a repeat-offender. He was also untruthful in his response at the hearing when he stated he could have "consolidated" the cases. Doc. 52, p. 18;

> MR. HOPKINS: "We've kept our law firm lawsuit separate.
> ***We could have consolidated***…".

The Burkes preempted by filing a motion to ensure the cases were not being consolidated (Doc. 15) as the status hearing was held for both cases on the same date, in front of the same judge(s), thus concerning the Burkes that their two new civil cases were being consolidated. Later, DJ issued an order confirming they were separate. Hopkins statement months later is another blatant and calculated lie.

(iv) Hopkins was caught in yet another lie as per Doc 59, p. 3, (c). And lied again when he claimed the appeal at the 5th Circuit was *fully* briefed. See Doc 59, p.3, (b).

Hopkins Merciless Deception

Hopkins did not correct the MJ to confirm the Burkes had answered (Doc. 32) Hopkins Second Motion to Dismiss (Doc. 28), which Hopkins then replied to (Doc. 34) … *See* Doc. 52, p. 20;

> THE COURT: "You did not respond to it, although you did something about asking for permission to file supplemental authority. Is that your response to the Motion to Dismiss?" MR. BURKE: "No."

Review of the docket shows Hopkins, at the same time, objected (Doc. 35) to the Burkes motion for leave to file an amended complaint with supporting affidavits (Docs 29-31 and 33) - explaining known errors due to Joanna Burkes hospitalization, a misbehaving printer and for due process and justice to be served [denied (Doc. 37)].

Hopkins Warrants Disbarment

The recent egregious lies by Mark Hopkins at the Sept. 10, 2019 conference (trying to get 2 elderly citizens imprisoned with false claims) confirms the Burkes complaint and accusations therein unequivocally. Hopkins has lied in filings before this court. Hopkins actions are malicious, premeditated and executed in bad faith. Together with his attorney-defendant wife, a known co-conspirator and with the support of BDF, they have no moral compass and will go to any lengths and more

recently, have implemented a system of fraud as documented to illegally steal homes from citizens. It's another known system is to deflect the case onto another party, be it a magistrate or two elderly citizens, Hopkins actions are in complete violation of attorney ethics and codes of conduct and as such are clearly foreign to the duties of an attorney in this case. Hopkins despicable acts should be reconsidered and reviewed in conjunction with the fact that Hopkins invokes systems of fraud, who intentionally withholds evidence and is a proven and admitted serial liar.

That said, in a sweeping and legally erroneous dismissal, the MJ asserted the following; "Because all of Defendants' conduct was within the scope of representation and was "not foreign to the duties of an attorney," attorney immunity applies to all of the Burkes' common law claims. *See*: *Cantey Hanger*, *LLP*, 467 S.W.3d at 485. Thus, the court recommends that the Burkes' claims of **fraud, civil conspiracy, and unjust enrichment** be dismissed." This is also clear error and a manifest injustice as the Burkes have clearly proven this statement by the MJ to be false. The Burkes wish to add the following details for reconsideration.

The Hopkins parties have engaged in a visible pattern of contemptuous conduct since 2015. That pattern includes a known system of fraud[14], perjury, obstruction of justice, deception, lies and overall gamesmanship as summarized in

[14] See Doc 59, p. 11, footnote 24.

Doc. 66. Their pattern of contemptuous conduct has escalated over the years and Hopkins confidence and lawlessness has grown incessantly as they believe they are 'untouchable'. For example, this court has so far refused to take any action against this unlicensed debt collecting law firm and its rogue attorneys, but on the other hand, has been willing to let an honest magistrate judge depart under questionable circumstances (and taking into account the timeline of preceding events).

Although litigation is adversarial and zealous advocacy is deemed appropriate, it is also a search for the truth which requires the participants to tell the truth. Based upon the facts below, it is obvious that Hopkins are incapable of being truthful. The court has already discounted the Burkes cited cases in prior filings, including Doc. 66. The Burkes disagree with that assessment. However, to aid this court, the Burkes now share 3 cases. The first is the BDF case from 2008; *In re Parsley*, 384 B.R. 138 (Bankr. S.D. Tex. 2008). Next is the *In re Cochener*, 382 B.R. 311 (S.D. Tex. 2007) and which needs some extra discussion. This was a bankruptcy case where the judge issued sanctions against a lawyer and the lawyer appealed to the district court and Judge Sim Lake reversed the Bankruptcy Judge. It was appealed to the Fifth Circuit and Judge Edith Jones for the panel found the Bankruptcy ruling to be sound and reversed Judge Sim Lake.

This is important in the light of the next case the Burkes cite, which was only recently issued (Jan. 31, 2020). The Burkes cite this case due to its' intricate detail and this was also an appeal assigned to Senior Judge Sim Lake. Once again, Judge Lake has materially reduced the Bankruptcy Judge's decision. Based on the *Cochener* ruling, Judge Lake's reduced order of a reprimand would most likely be reversed on appeal, if an appeal had been filed. Assessing the historical data and facts presented in conjunction with the known facts pertaining to *Berleth e.g.* his known past business associates, which include a former attorney sentenced and jailed for theft of client funds ($200k) and other criminal charges.[15] In light of all this information, the Burkes do rely upon the detailed opinion, including the legal standards, drilled down to the courts local rules and related laws, *e.g.*

> "III. Charge of Misconduct A. Governing Authority" *In re Berleth*, MISCELLANEOUS No. H-19-2011, at *41 (S.D. Tex. Jan. 31, 2020).

It highlights all the relevant standards, rules and any violations which Hopkins is guilty of in this case.

> "This burden of proof applies even where the alleged disciplinary violation could also be charged criminally." *In re Berleth*, at *42-43 and "Based on the record developed in the bankruptcy court, Judge Isgur determined in a thorough, 19-page opinion that the court

[15] See https://law.justia.com/cases/texas/first-court-of-appeals/2012/01-09-00679-cv.html and https://www.law.uh.edu/libraries/ethics/attydiscipline/2006/04da2006.pdf

> was required to refer Berleth to the United States Attorney pursuant to 18 U.S.C. § 3057(a)" *In re Berleth*, at *43.

In summary, there is no doubt, Hopkins violations are egregious and reach the criminal and referral level which Judge Isgur recommended in *In re Berleth.* Hopkins misconduct warrants disciplinary action, referral and disbarment.

FDCPA and TDCA Claims

The MJ is back to cherry-picking on the Burkes pleadings.

(1) The Burkes have not set forth sufficient facts to show that Defendants are "debt collectors" under the FDCPA. **Response:** The Burkes have provided proof from a United States District Judge in this court, who contradicts the MJ's stance. *See*; *Jackson v. U.S. Bank* , Civil Action No. 4:17-CV-2516, at *17-18 (S.D. Tex. Aug. 14, 2018). Furthermore, Hopkins claims to represent Deutsche Bank (Trustee) and also the Mortgage Servicer, *Ocwen*. See; *Perry v. Stewart Title Co*, 756 F.2d 1197 (5th Cir. 1985). Holding a mortgage servicer is a debt collector as long as the debt was in default at the time it was assigned. The Burkes alleged debt was in default when it was assigned and have previously confirmed that all communications to *Ocwen* are redirected automatically to Hopkins. As such, Hopkins is a debt collector.

(2) Plaintiffs have not set forth sufficient facts to show that Defendants would qualify as "third-party debt collectors" under the TDCA. **Response**: *See*; Doc. 66 and - Shelley Hopkins was not appointed as co-counsel until *Deutsche II*. In the disregarded pleadings, Doc. 32, p. 42 , the Burkes discussed/cited the law relative to determining when lawyers are regarded as non-lawyers. This pleading is/was sufficient to repel a motion to dismiss and move to discovery in order for the Burkes to prove that there were non-lawyer activities being performed at Hopkins Law, PLLC, thus confirming they are 'third-party debt collectors'. As highlighted, to demand a higher level of pleading is clear error.

(3) Even if the Burkes had shown that Defendants are "debt collectors," they have not alleged sufficient facts to show that Defendants engaged in prohibited conduct under either statute. **Response:** *See*; Doc. 66. Clear error in law.

(4) Three of the Burkes' allegations merit specific attention.

(i) The Burkes allege that Mark Hopkins offered a falsified loan application into evidence. (D.E. 27 at 30.) The Burkes do not set forth any facts to show that Hopkins knew the loan application was false. **Response**: *See*; Doc. 66. Clear error in law.

(ii) The Burkes also claim that the original principal of their loan was $615,000, but Defendants, in response to an inquiry from Plaintiffs, said they owed $1.1 million. (D.E. 32 at 26, 34.) While Plaintiffs seem to say Defendants were being deceptive, it is more plausible that they were reporting the amount of principal plus interest that their client, Deutsche Bank, reported the Burkes then owed. **Response**: *See*; Doc. 66. Clear error in law.

(iii) Surety Bond; The Burkes have not provided facts to show that Defendants are "third-party debt collectors" engaged in debt collection…and have failed to show how Defendants' failure to have a surety bond on file caused them any injury. **Response**: *See*; Doc. 66. Clear error in law.

SUMMARY

The MJ's first hearing with the parties (excluding the 3-minute scheduling conference for the two civil actions in early 2019) was complete chaos. He was unfamiliar with the Burkes case, despite his claims. He could not control Hopkins and pre-judged the Burkes as guilty of a falsified crime at the behest of a rogue lawyer. The MJ failed to report or discipline Hopkins as required in law. Then the M&R is issued prematurely and it is based on 28% of the Burkes key filings. A clear error and manifest injustice.

CONCLUSION & PRAYER

For these reasons, the Burkes request this motion be granted and that the Court's order and judgment signed on March 18, 2020 be amended accordingly.

RESPECTFULLY submitted this 14th day of April 2020.

Affidavit: I declare under penalty of perjury that the foregoing is true and correct and the certificates that follow are also correct.
(28 U.S.C. § 1746 - U.S. Code.)

/s/ Joana Burke

_____
Joanna Burke / State of Texas
Pro Se

Affidavit: I declare under penalty of perjury that the foregoing is true and correct and the certificates that follow are also correct.
(28 U.S.C. § 1746 - U.S. Code.)

/s/ John Burke

_____
John Burke / State of Texas
Pro Se

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Email: kajongwe@gmail.com

CERTIFICATE OF CONFERENCE

The Burkes' have not conferenced with any of the parties. Any opposition to the MOTION is hereby classified as UNKOWN.

CERTIFICATE OF SERVICE

We, Joanna Burke and John Burke hereby certify that on April 14th, 2020, we emailed the attached document to the named court personnel who have taken responsibility to answer the Burkes in prior court correspondence.

Heather Carr <Heather_Carr@txs.uscourts.gov>;
Jason Marchand <Jason_Marchand@txs.uscourts.gov>;
Darlene Hansen <Darlene_Hansen@txs.uscourts.gov>;
TXSDdb_Houston_Operation <houston_operation@txs.uscourts.gov>

And also served copies to the following parties, by email:

Mark Hopkins, <mark@hopkinslawtexas.com>;
Shelley Hopkins <shelley@hopkinslawtexas.com>;
Kate Barry <kate@hopkinslawtexas.com>

EXHIBIT A

Doc. 27, Burkes First Amended Complaint

1	2	3	4	5	6	7	8	9	10
						II	II		I
11	12	13	14	15	16	17	18	19	20
21	22	23	24	25	26	27	28	29	30
							II		II
31	32	33	34	35	36	37	38	39	40
I	II						I		I
41	42	43	44	45	46	47	48	49	50
II				I			I	I	I
51	52	53	54	55	56	57	58	59	60
			I						
61	62	63	64	65	66	67	68	69	70
	III	I	I				I		
71	72	73	74	75	76	77	78	79	80
	I	I							
81	82	83	84	85	86	87	88	89	90
		III	I		I		I	I	I
91	92	93	94	95	96	97	98	99	100
		II	I	I	I	I			I

*67/100 – PAGES IGNORED 33/100 – PAGES CITED IN M&R
(of which many are merely cursory references).

EXHIBIT B

Doc. 32 Response to Second Motion to Dismiss

1	2	3	4	5	6	7	8	9	10
11	12	13	14	15	16	17	18	19	20
21	22	23	24	25	26	27	28	29	30
					I	I			
31	32	33	34	35	36	37	38	39	40
		I	III	I	II	II			
41	42	43	44	45	46	47	48	49	50
51	52	53	54	55	56	57	58		

*34/41 – PAGES IGNORED 7/41 – PAGES CITED IN M&R
(black pages are not counted, incl. screenshot exhibits).