IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HARRIET NICHOLSON,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**C.A. NO. 3:21-cv-1779-G-BK**
	§	
BANK OF AMERICA and COUNTRYWIDE HOME LOANS, INC.	§	
	§	
Defendants.	§	

REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Defendants Bank of America N.A. ("BANA"), improperly named as "Bank of America," and Countrywide Home Loans, Inc. ("CHLI") respectfully submit this Brief in further support of their Motion to Dismiss Plaintiff Harriet Nicholson's First Amended Complaint (the "Motion to Dismiss," Doc. 17) and in response to Plaintiff's opposition, first amended opposition, and second amended opposition to the Motion to Dismiss (collectively, the "Oppositions," Docs. 20-24). As explained herein, nothing in Plaintiff's multiple Oppositions undermines or overcomes the legal arguments set forth in the Motion to Dismiss and Defendants' Memorandum of Law in Support of the Motion to Dismiss (Doc. 18), which show that a dismissal of the Amended Complaint (Doc. 15) is warranted for lack of subject matter jurisdiction. Thus, the Court should grant the Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1).

I. ARGUMENT

A. Plaintiff's Original Opposition (Doc. 20 & 21)[1] does not overcome the reasons for dismissal set forth in the Motion to Dismiss.

Plaintiff argues in her original opposition to the Motion to Dismiss (Doc. 20 & 21) that "BANA and CHLI [sic] invocation of the Rooker-Feldman doctrine is ultimately inapt" and that "even where the Rooker-Feldman doctrine would bar federal review of a state court decision on the merits, federal courts are obligated to ensure that the state court's decision was rendered with proper jurisdiction." Doc. 20 at 2. But there is nothing in the First Amended Complaint or the Second Court of Appeals' decision to show, or even suggest, that the Court of Appeals lacked jurisdiction over Plaintiff's appeal in Case No. 02-19-00085 CV or lacked jurisdiction to issue the Judgment against Plaintiff.

To the contrary, Texas law is clear that Plaintiff herself invoked the Court of Appeals' jurisdiction by filing a notice of appeal, as Tex. R. App. P. 25.1(b) states that "[t]he filing of a notice of appeal by any party invokes the appellate court's jurisdiction over all parties to the trial court's judgment or order appealed from." Thus, because Plaintiff and Defendants were parties to the Judgment, Plaintiff cannot plausibly challenge the Court of Appeals' jurisdiction over her own appeal in Case No. 02-19-00085 CV.

Moreover, the Court of Appeals confirmed in its Memorandum Opinion that it had appellate jurisdiction—a fact Plaintiff concedes in the Amended Complaint. *See* Doc. 15 ¶ 43. Specifically, the Court of Appeals stated that "We have jurisdiction over both of Nicholson's issues," referring to her challenges to the Severance Order and the summary judgment orders in favor of BANA and CHLI. *See Nicholson v. Bank of Am., N.A.*, No. 02-19-00085-CV, 2019 WL 7407739, at *2 (Tex. App.-Fort Worth, Dec. 31, 2019), *reh'g denied* (Jan. 9, 2020), *review denied* (July 10, 2020). **(App. 3.)** The Court of Appeals made this determination after BANA

and CHLI sought a dismissal of Plaintiff's first issue on appeal, relating to her challenge to the summary judgment orders, because Plaintiff did not identify those orders in her notice of appeal. The Court of Appeals disagreed with BANA and CHLI's argument and confirmed it had jurisdiction over both of Plaintiff's issues, stating:

> We begin by considering Appellees' argument that we do not have jurisdiction over Nicholson's first issue…. **They argue that this court should dismiss Nicholson's first issue "in which she attempts to challenge the [summary judgment orders]," because in the section of her notice of appeal listing the date of the orders from which she appealed, she listed only the dates of the severance order—which rendered the summary judgments final—and the order denying her motion for new trial. We disagree.**
>
> Under the Texas Rules of Appellate Procedure, a notice of appeal must "state the date of the judgment or order appealed from." Tex. R. App. P. 25.1(d)(2). However, "[t]he requirement in Rule 25.1(d) that the notice of appeal must state the date of the judgment or order appealed from does not ... limit what trial court rulings may be challenged on appeal," but rather "is used to determine whether the appeal is timely." *Anderson v. Long*, 118 S.W.3d 806, 810 (Tex. App.-Fort Worth 2003, no pet.). **Nicholson's notice of appeal invoked this court's jurisdiction over Appellees, and Rule 25.1 does not limit the issues that Nicholson may bring on appeal.** *See id.* at 809 (stating that "Anderson's timely filing of her notice of appeal invoked our jurisdiction over the Longs, who were parties to the order sustaining the plea to the jurisdiction" and that "[n]othing in [Texas Rule of Appellate Procedure] 25.1 limits the issues that Anderson, having properly invoked our jurisdiction, may raise on appeal"). **We have jurisdiction over both of Nicholson's issues.**

Id. (emphasis added). The Fifth Circuit has made clear that a state court's determination of its own jurisdiction is binding on federal courts and "absolutely immune from collateral attack." *See Steph v. Scott*, 840 F.2d 267, 270 (5th Cir. 1988).

In contrast, there is no authority—and Plaintiff does not provide any—for the proposition that this Court has jurisdiction to sit in appellate review of the Second Court of Appeals' ***own***

[1] Doc. 20 & Doc. 21 appear to be identical, duplicate filings by Plaintiff.

determination that it had jurisdiction over Plaintiff's appeal in Case No. 02-19-00085 CV. And as previously discussed by BANA and CHLI, the Texas Supreme Court—the appropriate court to review the Court of Appeals' decision—denied Plaintiff's petition for review on July 10, 2020. Thus, the Court should conclude that the *Rooker-Feldman* doctrine applies, and it should dismiss the Amended Complaint pursuant to Rule 12(b)(1).

B. Plaintiff's First Amended Opposition (Doc. 22) does not overcome the reasons for dismissal set forth in the Motion to Dismiss.

Plaintiff's first amended opposition to the Motion to Dismiss fares no better than her original opposition. The first amended opposition supplements the original opposition with several paragraphs regarding the Court of Appeals' jurisdiction over final judgments. Plaintiff then argues that "the face of the state court's record demonstrates that the Second Court of Appeals was acting without jurisdiction in case 02-19-00085-CV on December 31, 2019, affirming non-appealable interlocutory summary judgment and severance orders in case 048-286132-16." Doc. 22 at 3. But as discussed above, Tex. R. App. P. 25.1(b) leaves no doubt that Plaintiff herself invoked the Court of Appeals' jurisdiction by filing a notice of appeal, and in its own decision, the Second Court of Appeals confirmed that it had jurisdiction over both issues raised by Plaintiff's appeal in Case No. 02-19-00085 CV.

As discussed in detail in BANA and CHLI's Memorandum of Law, the Court of Appeals concluded that the lower court did not abuse its discretion in entering the Severance Order. *See* Doc. 18 (Memo of Law) at 7-8 (citing *Nicholson v. Bank of Am.,* 2019 WL 7407739, at *2, *4). As the Court of Appeals held:

> A trial court does not abuse its discretion in severing a claim if "(1) the controversy involves more than one cause of action, (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted, and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues." *Aviation Composite Techs., Inc. v. CLB Corp.*, 131 S.W.3d 181, 188 (Tex. App.-Fort Worth 2004, no pet.) (citing

> *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 658 (Tex. 1990) (op. on reh'g)).

Nicholson v. Bank of Am., 2019 WL 7407739, at *4. The Court of Appeals then applied this law to Plaintiff's arguments on appeal and concluded that Plaintiff: (i) did not "address whether the severed claims, if asserted independently, were the proper subject of a lawsuit;" (ii) did not "explain how the severed claims [were] so interwoven with the remaining action that they involve[d] the same facts and issues;" (iii) did not "explain why the trial court abused its discretion by severing her claims in order to render its interlocutory summary judgment orders final and appealable;" and (iv) "failed to explain how severing her claims against Countrywide and BoA harmed her in any way." *Nicholson v. Bank of Am.*, 2019 WL 7407739, at *4. Thus, the Court of Appeals properly overruled Plaintiff's second issue on appeal, i.e., her challenge to the Severance Order, and properly affirmed. Accordingly, contrary to Plaintiff's argument, the "face of the state court's record" does not demonstrate that the Court of Appeals was acting without jurisdiction, Plaintiff's protestation notwithstanding.

Lastly, the Court of Appeals has twice declined to revisit its decision regarding the Severance Order in two related cases, namely *Nicholson v. Stockman*, No. 02-19-00103-CV, 2020 WL 241420, at *2 (Tex. App.-Fort Worth Jan. 16, 2020), *reconsideration en banc denied* (Jan. 30, 2020), *reh'g denied* (Jan. 30, 2020), *reconsideration en banc denied* (Feb. 13, 2020), *review denied* (July 10, 2020) **(App. 10)**—which involved Plaintiff's claims against a second group of severed defendants referred to as the "Stockman Defendants"—and *Nicholson v. Harvey Law Group*, No. 02-20-00180-cv, 2021 WL 1134455, at *4 (Tex. App.-Fort Worth Mar. 25, 2021), *reh'g denied* (May 7, 2021),), *mandamus denied* (June 25, 2021), *reh'g of motion for mandamus overruled* (Aug. 6, 2021), *review denied* (Oct. 8, 2021) **(App. 17)**—which involved Plaintiff's claims against the non-severed defendants. In *Nicholson v. Harvey Law Group*, 2021

WL 1134455, at *4 (emphasis added), the Court of Appeals addressed the Severance Order and held:

> Nicholson contends that the severance orders regarding the Countrywide and Stockman Defendants were abuses of discretion because they occurred after the case had been submitted to the fact-finder—after summary judgment had been granted in favor of those defendants. **In our prior decisions regarding the Countrywide and Stockman Defendants, we specifically held that the severance orders were not abuses of the trial court's discretion. *Nicholson*, 2020 WL 241420, at *2;[2] *Nicholson*, 2019 WL 7407739, at *4. We decline to revisit these holdings.**

On October 8, 2021, the Texas Supreme Court denied Plaintiff's petition for review, just as it did in regard to Plaintiff's appeal from Case No. 02-19-00085 CV and Case No. 02-19-00103-CV.

Thus, Plaintiff cannot ignore the fact that there are now three Court of Appeals decisions rejecting her argument that the BANA/CHLI Severance Order and a separate severance order regarding the Stockman Defendants were improper. Plaintiff also cannot ignore the fact that in all three instances, the Texas Supreme Court denied her petitions for review. Those state court decisions are final and binding on Plaintiff, and they are not "void" for lack of jurisdiction. This Court should dismiss the Amended Complaint pursuant to Rule 12(b)(1), as the *Rooker-Feldman* doctrine clearly applies.

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[2] In *Nicholson v. Stockman*, 2020 WL 241420, at *2, the Court of Appeals affirmed a second severance order regarding the "Stockman Defendants," concluding:

> "Any claim against a party may be severed and proceeded with separately." Tex. R. Civ. P. 41. In a case with multiple defendants, if summary judgment is properly granted in favor of one defendant, it is generally proper to sever the claim against that defendant for purposes of appeal. *Aviation Composite Techs., Inc. v. CLB Corp.*, 131 S.W.3d 181, 187 n.5 (Tex. App.-Fort Worth 2004, no pet.); *Arredondo v. City of Dall.*, 79 S.W.3d 657, 665 (Tex. App.-Dallas 2002, pet. denied).

C. Plaintiff's Second Amended Opposition (Doc. 23) does not overcome the reasons for dismissal set forth in the Motion to Dismiss.

In her second amended opposition to the Motion to Dismiss, Plaintiff argues that judicial estoppel "bars BANA, CHLI, and Ms. Jones's argument" and takes certain arguments made in BANA and CHLI's appellees' brief in Case No. 02-19-00085-CV out of context. Doc. 23 at 2-3. To be clear, BANA and CHLI did not argue that the Court of Appeals lacked jurisdiction over Plaintiff's appeal because the summary judgment orders were interlocutory, as Plaintiff suggests. Rather, BANA and CHLI argued that the Court of Appeals should dismiss Plaintiff's challenge from the summary judgment orders for lack of jurisdiction because Plaintiff did not list those orders in her notice of appeal and twice represented that she was only appealing the Severance Order and the Order Denying Motion for New Trial. *See* Doc. 24-1 at App. 27-30. Thus, BANA and CHLI argued in Case No. 02-19-00085-CV that:

> In view of Plaintiff's affirmative representation in both the Notice of Appeal and the February 27, 2019 letter to the District Court that the Severance Order and the Order Denying Motion for New Trial were the only orders she was appealing, the Court should find that Plaintiff is bound by the Notice of Appeal and it should conclude that the interlocutory BANA MSJ Order and CHLI MSJ Order are not within this Court's appellate jurisdiction. Thus, the Court should dismiss Plaintiff's appeal from those interlocutory orders for lack of jurisdiction.

Doc. 24-1 at App. at 29-30. But as discussed above in Section I.A, the Court of Appeals rejected BANA and CHLI's argument, concluding that Plaintiff's notice of appeal invoked the Court of Appeals' jurisdiction and Tex. R. App. P. 25.1 did not "limit the issues that Nicholson may bring on appeal." *Nicholson v. Bank of Am.,* 2019 WL 7407739, at *2.

Moreover, the doctrine of judicial estoppel is inapplicable here. For judicial estoppel to apply, "(1) the party's position must be clearly inconsistent with its previous one, and (2) the previous court must have accepted the party's earlier position." *Prideaux v. Tyson Foods, Inc.*, 387 F. App'x 474, 478 (5th Cir. 2010). Here, BANA and CHLI's arguments regarding the

application of the *Rooker-Feldman* doctrine following the Court of Appeals' Judgment are not "clearly inconsistent" with their prior argument, and the Court of Appeals did not accept BANA and CHLI's argument regarding the scope of Plaintiff's appeal, concluding instead that Tex. R. App. P. 25.1(d)(2) did not require Plaintiff to list the summary judgment orders in her notice of appeal. Thus, neither judicial estoppel element is satisfied here.

Plaintiff's remaining arguments in the second amended opposition repeat the arguments made in her original and first amended opposition, which are addressed, *supra*, and fail for the reasons previously discussed. Thus, the Court should dismiss the Amended Complaint pursuant to Rule 12(b)(1).

D. Plaintiff did not oppose Defendants' Alternative Rule 12(b)(1) argument Regarding the Declaratory Judgment Act.

Plaintiff has not opposed, responded to, or otherwise acknowledged Defendants' alternative argument that there is no existing "substantial and continuing controversy" between Plaintiff and Defendants, and thus, the Court should decline to exercise the discretionary jurisdiction conferred by the Declaratory Judgment Act. As discussed in Defendants' Memorandum of Law and above, as recently as October 8, 2021, the Texas state courts—including the district court, the Court of Appeals, and the Texas Supreme Court—have fully adjudicated Plaintiff's claims against BANA and CHLI to finality and thrice rejected Plaintiff's attacks on the state court's Severance Order and a separate severance order regarding the Stockman Defendants. In view of the record of proceedings before the State court system, this Court should decline to exercise the discretionary jurisdiction conferred by the DJA and dismiss the Amended Complaint pursuant to Rule 12(b)(1).

E. The Court should reject Plaintiff's argument that the Motion to Dismiss is "frivolous" or otherwise warrants "sanctions."

Lastly, BANA and CHLI address Plaintiff's baseless argument that the Motion to Dismiss is frivolous, as well as her threats of seeking Rule 11 sanctions against Defendants and their counsel. Plaintiff has used the "sanctions" tactic in the prior State court litigations, and the Court of Appeals has soundly rejected her requests for sanctions as baseless. *See*, *e.g.*, *Nicholson v. Harvey Law Group,* 2021 WL 1134455, at *4 (rejecting Plaintiff's requests for sanctions and concluding (i) appellee ReconTrust's arguments "were based on the record evidence and supported by applicable case law" and (ii) there was "nothing in the record to support Nicholson's fabrication argument" in relation to her motion to sanction HLG's trial and appellate counsel).

Similarly here, there is no basis for sanctions against Defendants and their counsel because BANA and CHLI's Motion to Dismiss is not frivolous, nor was it filed for an improper purpose. The Motion to Dismiss is grounded in well-established law and properly supported by case law and other authorities—including the litany of decisions previously rendered against Plaintiff. As discussed in the Motion to Dismiss, this action represents what amounts to Plaintiff's seventh bite at the proverbial apple, and there is no authority for the proposition that this Court has jurisdiction to review and reject (i) the Court of Appeals' own determination that it had appellate jurisdiction over Plaintiff's appeal in Case No. 02-19-00085 CV or (ii) the Supreme Court's decision denying her petition for review. *See* Doc. 18 at 8-9. In contrast, Rule 12(b) of the Federal Rules of Civil Procedure allows BANA and CHLI to present a "defense to a claim for relief in any pleading" by motion, including a motion to dismiss for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The Motion to Dismiss was properly filed.

Moreover, contrary to Plaintiff's unsupported contentions, BANA and CHLI are not seeking to "extend," "modify," or "reverse" existing law, and nothing about the Motion to

Dismiss makes it "frivolous" or sanctionable under Rule 11. Indeed, Plaintiff has not identified a single instance in her multiple Oppositions where Defendants are improperly seeking an extension, modification or reversal of existing law, and her conclusory, self-serving and inflammatory statements are simply improper and a waste of judicial resources. As the Fifth Circuit has made clear, pro se litigants have "no license to harass others, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets." *Farguson v. MBank Houston, N.A.*, 808 F.2d 358, 359 (5th Cir. 1986). Should Plaintiff choose to proceed with her "plan to pursue sanctions pursuant to Fed. R. Civ. P. 11(c)" against Defendants and their counsel in relation to the Motion to Dismiss, as she has threatened in her second amended opposition, *see* Doc. 23 at 10, BANA and CHLI reserve the right to seek an award of their attorney's fees incurred in defending against any such motion and all other appropriate relief available from the Court in accordance with federal and state law.

II. CONCLUSION

For the reasons stated herein and in Defendants' Motion to Dismiss and supporting Memorandum of Law, BANA and CHLI respectfully request that the Court grant their motion and dismiss the Amended Complaint, in its entirety, pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction.

Dated: October 12, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of October 2021, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system and caused a copy of same to be delivered to pro se Plaintiff Harriet Nicholson via regular U.S. mail and email at the following:

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