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

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| HARRIET NICHOLSON, | § | |
| PLAINTIFF | § | |
| v. | § | |
| BARRETT DAFFIN FRAPPIER TURNER & ENGLE and THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWMBS, INC., CWMBS REFORMING LOAN REMIC TRUST CERTIFICATES, SERIES 2005-R2, | § | CASE NO. 4:24-cv-389-P-BJ |
| DEFENDANT. | § | |

**PLAINTIFF'S MOTION FOR SANCTIONS AND STRIKE DEFENDANT'S MOTION TO DISMISS (DOCUMENT 22)**

On May 2, 2024, Plaintiff filed Plaintiff's Verified Complaint & Request for Declaratory Judgment and Expedited Hearing Pursuant to FRCP 57 and Temporary Restraining Order on Defendants' 5/7/2024 Foreclosure on Void Extinguished Deed of Trust (the "Complaint"). [Doc. 1]

On May 24, 2024, Mark D. Hopkins filed Defendant's Motion to Dismiss, (Document 22, ¶17) misciting and mischaracterizing authority because in quoting from and citing "*Obduskey v. McCarthy & Holthus LLP, 139 S.Ct. 1029, 1035–36, 586 U.S. 466, 473–74 (U.S., 2019*)", counsel distorted what the opinion stated by leaving out significant portions of the citation *"The subsection to which the limited-purpose definition refers, § 1692f(6), prohibits a "debt collector" from:* ***"Taking or threatening to take any nonjudicial action to effect dispossession or***

***disablement of property if—"(A) there is no present right to possession of the property ..."***[1] *See Jenkins v. Methodist Hosps. of Dallas, Inc., 478 F.3d 255, 265 (5th Cir. 2007)* (quoting *Precision Specialty Metals, Inc. v. United States,* 315 F.3d 1346, 1357 (Fed. Cir.2003) (affirming a sanction for miscitation and mischaracterization of authority "because, in quoting from and citing published opinions, [counsel] distorted what the opinions stated by leaving out significant portions of the citations or cropping one of them, and failed to show that she and not the court had supplied the emphasis in one of them").

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| Defendant's Motion to Dismiss ¶17 | *Obduskey v. McCarthy & Holthus LLP, 139 S.Ct. 1029, 1035–36, 586 U.S. 466, 473–74 (U.S., 2019)* |
| "The Act first sets out the primary definition of the term "debt collector": a" 'debt collector', " it says, is "any person ... in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts." Ibid. The Act then sets forth the limited-purpose | The Act then sets out the definition of the term "debt collector." § 1692a(6). The first sentence of the relevant paragraph, which we shall call the primary definition, says that the term "debt collector":<br>"means any person ... in any business the principal purpose of which is the collection of any debts, or who |



[1] Unlike under Sections 1692c(a)(2), 1692d, and 1692e, the definition of debt collector under Section 1692f(6) includes a person enforcing a security interest. 15 U.S.C. § 1692a(6). Section 1692f(6) regulates more than just the collection of a money debt. It prohibits:

**[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest**; (B) there is no present intention to take possession of the property; or (C) the property is exempt by law from such dispossession or disablement. 15 U.S.C. § 1692f(6).

*Dowers v. Nationstar Mortgage, LLC, 852 F.3d 964, 971 (C.A.9 (Nev.), 2017)*

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| definition, which states that "[f]or the purpose of section 1692f(6)... [the] term [debt collector] also includes any person ... in any business the principal purpose of which is the enforcement of security interests." | regularly collects or attempts to collect, directly or indirectly, debts owed or asserted to be owed or due another." *Ibid.*<br>*The third sentence, however, provides what we shall call the limited-purpose definition*:<br>"For the purpose of section 1692f(6) [the] term [debt collector] also includes any person ... in any business the principal purpose of which is the enforcement of security interests." *Ibid.*<br>**The subsection to which the limited-purpose definition refers, § 1692f(6), prohibits a "debt collector" from: "Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—"(A) there is no present right to possession of the property** ... |



The court should sanction Defendant's counsel strike the motion to dismiss for deliberately and grossly negligent miscitations and mischaraterizations and to disclose counsel's lack of candor and future motions before this court *See Sewell v. Phillips Petroleum Co., 606 F. 2d 274, 276 (10th Cir. Utah August 24, 1979)* (We expect the highest standard of care by attorneys and correctly citing facts and cases. If necessary, when deliberate or grossly negligent miscitations occur, we will strike the briefs and leave the clients who are damaged thereby to malpractice remedies. We intend to apply an equal standard to false accusations of unethical conduct.)

ARGUMENT

## I. The conduct of Defendant's counsel merits sanctions.

Defendant's counsel-no stranger to federal practice- filed a motion to dismiss quoting, misciting, and mischaracterizing binding precedent distorting precedent to attain a favorable ruling. This  sanctionable.

The court may require an attorney "to satisfy personally the access costs, expenses and attorney's fees reasonably incurred because of conduct that multiplies the proceedings in any case unreasonably and vexatiously. 28 USC section 1927; See *Engra, Inc. v. Gabel, 958 F.2d 643, 645 (5th Cir. 1992)*

In addition to "the sanctioning scheme of the statue and the rules," "a court's inherent power" permits the imposition of sanction when a party shows bad faith. See *Chambers v. Nasco, Inc.,* 501 U.S. 32, 44-45 (1991). Defendant's counsel conduct is sanctionable under all these standards.



The inherent powers of the Court give the court wide latitude to impose stations for "bad faith or willful abuse of the judicial process." *Gonzalez v. Trinity Marine Grp.,* 117 F.3d 894, 898 (5th Cir. 1997 (quoting *Woodson v. Surgitek, Inc.,* 57 F.3d 1406, 1417 (5th Cir.1995). Under its power,  the Court has discretion "to fashion an appropriate sanction for a conduct which abuses the judicial process." See *Chambers v. Nasco, Inc.,* 501 U.S. 32, 44-45 (1991).

These deliberate and intentional miscitations and mischaracterizations by the Defendant's counsel are not only misleading but also violate the ethical obligations imposed upon attorneys. The Texas Disciplinary Rules of Professional Conduct specifically Rule 3.03a)(1) clearly state that "a lawyer shall not knowing make a false statement of material fact or law to a tribunal."  This rule emphasizes the duty of candor the counsel owes to the court.  Additionally, the case of *Schlafly v.*

*Schlafly, 33 S.W. 3d 863, 873 (Tex. App.-Houston [14th Dist.] 201, pet. denied*) supports the proposition that misrepresentations to the court are unacceptable and violate professional standards.

Rule 3.3 of the ABA Model Rules of Professional Conduct (1984) provides in part:

"CANDOR TOWARD THE TRIBUNAL

"(a) A lawyer shall not knowingly:

"(1) make a false statement of material fact or law to a tribunal;

……..

"(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

*McCoy v. Court of Appeals of Wisconsin, Dist. 1, 108 S.Ct. 1895, 1903, 486 U.S. 429, 441 (U.S.Wis.,1988)*



Moreover, the Texas Lawyer's Creed provide further guidance regarding the duty of counsel to avoid misrepresentations. The lawyers pledge in Section IV of the Texas Lawyer's Creed explicitly states that, "I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage."

The Court's inherent power to sanction reaches knowing or reckless "abuse[s] [of] the judicial process and the method of prosecution," regardless of the merit of the underline claim. This Court has the "inherent power to assess fees as sanctions when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. See *Moench v. Marquette Transp. Co. Gulf-Inland, LLC, 838 F.3d 586, 595 (5th Cir. 2016)* "Under this test, sanctions are warranted when a party knowingly or recklessly raises an objectively frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent." *Id*. It is also

clear that Defendant's counsel, a seasoned federal litigator, abuse of the judicial process was knowing or reckless.

Thus, although sanctions should include a fee award, money alone is unlikely to deter deep-pocketed law Defendant and law firm. Cf. *Cleveland Hair Clinic Inc. v. Puig, 200 F. 3d 1063, 1067-1068. (7th Cir. 2000*) ([V]iolations of th[e] duty [of candor] can lead to sanctions even more severe than payment of an opponent fees and cost s.) A more effective prophylactic would be to ensure that the court before which Defendant's attorney practice are aware of his proclivity for rule-breaking. The court should therefore order the lawyer to inform every Court before which he is admitted (including pro hac vice) that he was found to have violated his duty of candor. And for the next two years defendant's lawyer should be required to do the same when filing a motion or brief in any court within the Fifth Circuit.



Given the blatant material misrepresentations by the Defendant's counsel *supra*, it is imperative that this honorable Court takes appropriate action to address the issue. To remedy this situation, Plaintiff Nicholson respect requests that the court strike the Defendants Motion to Dismiss (Document 22) from the record and sanctions defendant's counsel.

PRAYER

Plaintiff prays Defendant's Motion to Dismiss, Document 22, be stricken and Mark D. Hopkins be sanctioned.

Respectfully submitted.
/s/ Harriet Nicholson
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Dated: May 25, 2024