



**1.**  
**SUMMARY**

1. Undeterred after being declared a vexatious litigant<sup>2</sup> the State District Com1 after over a decade of frivolous litigation, Nicholson now attempts to circumvent the vexatious order and obtain relief from the Federal Court in her continued attempted to delay the foreclosure of the Property.<sup>3</sup> Since 2012, Nicholson has filed lawsuit after lawsuit against all mortgagees mortgage servicers, attorneys, and/or substitute trustees related to the foreclosure of the Property ,<sup>4</sup> all of which have been resolved against her. The current suit is the most recent filing in Nicholson's vexatious history and, as with all other lawsuits, is frivolous and without merit.

2. It is undisputed that Plaintiff acquired the subject property by borrowing the funds necessary to purchase the property on January 18, 2001. [Doc. 1J]. In connection with the purchase of the Property, Plaintiff executed a Promissory Note ( "Note") that is secured by a Deed of Trust ("Deed of Trust") encumbering the Property. *Id.* Plaintiff failed to make the required payments under the Note and Plaintiffs loan was referred to Attorney Defendant to represent the beneficiary of the Deed of Trust in a nonjudicial foreclosure.

3. Attorney Defendant Barrett Daffin' is the law firm that was retained by ationstar Mortgage, LLC d/b/a Mr. Cooper (" ationstar") the successor by assignment to Bank of New York Mellon FKA the Bank of New York as Trustee for the Certificateholders of CWMBS, INC.,

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<sup>2</sup> See Exhibit A - Order declaring Nicholson as a vexatious litigant. 1:3arrett Daffin requests the Court take judicial notice of all of the filings, claims, pleadings and orders in Nicholson's prior lawsuits as they are all public record. Fed. R. Evict. 201; See *Krystal One Acquisitions, LLC v. Bank o\_Am., NA.*, 805 F. Appx. 283,287 (5th Cir. 2020) (permitting district court to take judicial notice of filings from prior lawsuits because such documents were public records); *Funk v. StJlker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011). A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id.*

<sup>3</sup> 2951 Santa Sabina Drive, Grand Prairie, Texas 75052 (the "Property").

<sup>4</sup> See Exhibit [3 - Motion to Declare Plaintiff a Vexatious Litigant detailing Nicholson's frivolous suits.

CWMBS Reforming Loan Remic Trust Certificates, Series 2005-R2 ("BONYM") as counsel to assist in the foreclosure of Property. Barrett Daffin's only relationship to this matter is as counsel for Plaintiffs mortgagee.

4. Attorney Immunity. While hard to decipher at times, Plaintiffs Complaint does not assert any claims against Attorney Defendant that arise of any conduct *other than* the Attorney Defendant's legal representation of their mortgagee client. Plaintiff's Complaint is devoid of any allegations that would subject Attorney Defendant, or the law firm's attorneys or employees, to liability for conduct outside of Attorney Defendant's scope of representation of the mortgage servicer and/or the mortgagee, or its predecessors or successors in interest, in regard to efforts to foreclose the mortgagee's deed of trust lien against the Property. To the extent that Plaintiff makes any claims that may be outside the scope of attorney immunity, Plaintiff's Complaint is subject to dismissal for failure as a matter of law.

5. No Claim for FDCPA. Plaintiff's Complaint alleges violation of the Fair Debt Collection Practices Act ("FDCPA"), yet any conduct encompassed therein would be solely in connection with Attorney Defendant's representation of their client with respect to the foreclosure of the Property. Federal Rule of Civil Procedure 12(b)(6) authorizes the dismissal of a complaint that fails to state a claim upon which relief can be granted and conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss. *Taylor v. Books A Million, inc.*, 296 F.3d 376, 378 (5th Cir. 2002). Plaintiffs claims fail and should be dismissed with prejudice.

6. To the extent that Plaintiff makes any claims that may be outside the scope of attorney immunity, Plaintiffs Complaint is subject to dismissal for failure to state a claim as a matter of law.

111.

**ARGUMENT AND AUTHORITIES**

7. Attorney Defendant incorporates the preceding paragraphs as if fully stated herein. Attorney Defendant moves the Court to dismiss Plaintiffs Complaint as it fails to state a claim for which they are entitled to relief. [Doc. 1].

**A. The Applicable Standard for a 12(8)(6) Motion.**

8. To survive a Rule 12(b)(6) motion to dismiss, a complaint must include facts that "raise a right to relief above the speculative level," and into the "realm of plausible liability." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965 and 1966 n.5 (2007). Even though the complaint is to be construed liberally and in the light most favorable to the nonmoving party, a plaintiff must plead enough facts to state a claim that is at least plausible on its face. *Id.* at 1973-74. Although detailed factual allegations are not necessary, a "plaintiff's obligation to provide the 'grounds' of his 'entitlement' to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964-65 (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932 (1986)). A complaint must allege enough facts to move past possibility and on to plausibility of "entitlement to relief." *Id.* at 1966. This standard is referred to as the "flexible plausibility standard." *See Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937 (2009).

**B. Attorney Defendant is Immune from Suit.**

9. Attorney Defendant was retained as legal counsel to assist Atonstar (as successor to BONYM) in the foreclosure of the Property. Attorney Defendant is immune from suit because attorneys are immune from suit by their client's adversaries for conduct undertaken in their capacity as attorneys. *Troice v. Proskauer Rose, L.L.P.*, 816 F.3d 341, 348 (5th Cir. 2016). Every Federal District Court in Texas has dismissed foreclosure law firms based upon attorney immunity,

When the only connection with the complaining party was as legal counsel for the party's adversary, like the mortgagee herein.<sup>5</sup>

10. Dismissal based on the attorney immunity defense is proper when "the scope of the attorney's representation-and thus entitlement to the immunity-[i]s apparent on the face of the complaint." *Burke v. Ocwen Loan Servicing, LLC*, 855 Fed. App'x 180, 186 (5th Cir. 2021) (citing *Kelly v. Nichamof*); 868 F.3d 371, 374 (5th Cir. 2017)) (affirming dismissal with prejudice of suit against mortgage servicer's attorneys based upon attorney immunity). The doctrine of attorney immunity provides attorneys an opportunity to practice their profession, without a conflict between advocating zealously for their clients' best interests as deemed necessary and proper and their own personal exposure to liability from non-parties in the discharge of their duties within the scope of their client's representation. / *Jaynes and Boone, LLP*, 631 S.W.3d 65 (Tex. 2021) (affirming the defense of attorney immunity applies to adversarial context in litigation and non-litigation activities).<sup>6</sup>

11. The Texas Supreme Court's opinions in *Haynes and Boone, LLP v. NFTD, LLC* and *Cantey Hanger, LLP v. Byrd* confirm a long line of well-reasoned cases that stand for the proposition that regardless of whether an attorney's work is merit-filled or defective (or performed in litigation or transactional work), if the work constitutes the performance of legal services on behalf of a client then the lawyer is immune to liability from third parties in connection with such

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<sup>5</sup> See also *Vallez v. Harding*, 2023 WL 2583929 (W.D. Tex. Mar. 2023)(granting motion to dismiss foreclosure law firm based upon attorney immunity); *Jackson v. PHH Mortgage*, 2023 WL 2541993 (S.D. Tex. Feb. 22, 2023)(finding diversity jurisdiction as there was no reasonable basis for recovery against attorney based upon attorney immunity); *Hullett v. Deutsche Ja11k Nat 'I Trnst Co.*, 2023 WL 2520764 (E. D. Tex. Feb. 6, 2023)(dismissing foreclosure law firm from suit based upon attorney immunity).

<sup>6</sup> See also *Campbell v Mortgage Electronic Registration Systems Inc.*, 2012 WL 1839357, at \*5-6 (Tex. App. - Austin, May 18, 2012, pct. denied.) (mcm. op.) (Attorneys hired to assist a mortgage beneficiary in the non-judicial foreclosure of real property were immune from the borrower's suit for wrongful foreclosure.).

work. *Haynes and Boone, LLP*, 631 S.W.3d 65; *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d at 483 (Tex. 2015).

12. The Fifth Circuit has repeatedly echoed the Texas Supreme Court's holding on attorney immunity as reflected by the Fifth Circuit's repeated affirmance of 12(b)(6) dismissals of counsel from cases similar to this matter.<sup>7</sup> See, *Troice v. Proskauer Rose, LLP*, 816 F.3d at 346. In *Troice*, the Fifth Circuit focused on the concept that the conduct being complained of was, "[T]he kind of conduct in which an attorney engages when discharging his duties to his client." *Troice v. Proskauer Rose, LLP*, 816 F.3d 341,346 (5th Cir. 2016). The Fifth Circuit went on to provide, "The immunity focuses on the type of conduct, not on whether the conduct was meritorious in the context of the underlying lawsuit." *Id.* at 349 (quoting *Alpert v. Crain, Caton & James, PC*, 178 S.W.3d 398 (Tex. App. - Houston, [15<sup>1</sup> Dist. 2005, pet. denied). In its analysis, the Fifth Circuit focused on whether the conduct complained of was legal in nature. If the work performed by an attorney is legal in nature then the attorney who performed the work is immune from suit by third parties as a result of the work. *Troice v. Proskauer Rose, LLP*, 816 F.3d at 346.

13. Attorney Defendant's work in connection with the foreclosure of the deed of trust against the Property does not expose it to liability asserted by third parties such as Plaintiff. As such, Plaintiff has failed to assert any cause of action against Attorney Defendant upon which Plaintiff could conceptually obtain relief. This Court should dismiss Plaintiff's claims against Attorney Defendant with prejudice based upon attorney immunity.

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<sup>7</sup> *Johnson v. Ashmore*, 681 Fed. Appx. 345 (5th Cir. 2017) (finding attorney immunity applies to actions of attorney in representing her client in non-litigation context); *Rojas v. Wells Fargo Bank, NA*, 571 Fed. Appx. 274 (5th Cir. 2014) (Hansett Daffin dismissed as improperly joined because attorneys are immune from suits brought under Texas law against them by their adversaries if the action arises out of the duties involved in representing a client); *L'Amoreaux v. Wells Fargo Bank, NA*, 755 F.3d 748 (5th Cir. 2014); *!qhal v. Banko/America, N.A.*, 559 Fed. Appx. 363 (5th Cir. 2014); see also *See Daniels v. Saucedo*, 2022 WL 6943343 (5th Cir. 2022); *Raymond v. Flagstar Bank*, 2022 WL 1553173 (W.D. Tex. Mar. 14, 2022); *Bruning v. At1111ore*, 2022 WL 885123 (5th Cir. Mar. 25, 2022).

**C. Plaintiff Fails to Assert a Claim under the FDCPA.**

14. Plaintiff attempts to conjure up new causes of action by asserting claims against Attorney Defendant for violation of the FDCPA, based upon the allegation that Attorney Defendant made a false misrepresentation in the course of collecting a debt. See Plaintiffs Complaint at ¶¶ I [Doc. I]. Plaintiffs claims against Attorney Defendant for violation of the FDCPA are misplaced. Black letter law from the Supreme Court of the United States provides that law firms (like Attorney Defendant) "who engage in only nonjudicial foreclosure proceedings are not debt collectors within the meaning of the Act." *Obduskey v. McCarthy & Holthus LLP*, 139 S.Ct. 1029, 1038; 203 L.Ed. 2d 390 (2019). In short, *Ohduskey* stands for the proposition that attorneys assisting a mortgagee or mortgage servicer with the foreclose of real property pursuant to a deed of trust, are not considered debt collectors within the main scope of the FDCPA.

15. In *Obduskey*, a lender retained a law firm to assist with the nonjudicial foreclosure process. See generally, *Ohduskey*. Therein, the law firm sent correspondence to the borrower about the foreclosure of the loan due to nonpayment of the debt. *Id.* The borrower disputed the debt and the law firm continued with nonjudicial foreclosure. The borrower then brought claims against the law firm for violation of the FDCPA. *Obduskey* is on all fours with this lawsuit. *Id.* Herein, Attorney Defendant was retained by a mortgagee to proceed with the nonjudicial foreclosure sale of the Property. Attorney Defendant informed Plaintiff through written correspondence that it was "retained our firm to pursue nonjudicial foreclosure under a deed of trust against the real property that secures a debt owed by you...". See, Plaintiffs Complaint, ¶ 53 [Doc. 1]. Plaintiff disputed owing the debt *Id.* at ¶ 54. Attorney Defendant sent Plaintiff a response referencing Plaintiffs note and deed of trust. Attorney Defendant subsequently sent a Notice of Substitute Trustee's Sale. *Id.* at ¶ 78.

16. Plaintiff's complaint alleges that Attorney Defendant violated 15 U.S.C. §1692(e)(4)<sup>8</sup> and (e)5<sup>9</sup> in threatening foreclosure despite Plaintiffs dispute of the debt and lien. However, per *Obduskey*, attorneys like Attorney Defendant who provide legal work in connection with nonjudicial foreclosures are not governed by the restrictions of § 1692(e). This is because the definition of a 'debt collector' under the Act creates two categories of debt collectors. *See*, 15 U.S.C. 1692a(6).

17. As explained by the Supreme Court in *Obduskey* regarding the two categories,

"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 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."

*Obduskey*, 139 S.Ct. at 1032 (emp. added). The Supreme Court reasoned that by the definition above, the Act creates two categories 'debt collectors' those being two categories being the general category of 'anyone who regularly collects or attempts to collect a debt' and the second category being a limited category of those 'whose principal purpose is the enforcement of security interests.'

18. As explained by the Supreme Court, by creating the limited definition, Congress must have intended to exclude those businesses who enforce security interests from the primary definition, otherwise "the limited purpose definition would be superfluous." *Id*. Likewise, as concluded by the Supreme Court, Congress must have intended to limit the liability of those

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<sup>8</sup> *See* 15 U.S.C. § 1692(e)(4): The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

<sup>9</sup> *See* 15 U.S.C. § 1692(e)(5): The threat to take any action that cannot legally be taken or that is not intended to be taken.



businesses whose primary business is to enforce security instruments to only a discrete section of the Act, that being Section 1692f(6). *Id.*; also see 15 U.S.C. §1692(a)(f).

19. Plaintiffs Complaint only alleges § 1692(e) violations against Attorney Defendant. As the Supreme Court has explained, security-interest enforcers pursuing nonjudicial foreclosure (like Attorney Defendant) are not "debt collectors" who must comply with all FDCPA protections. *See Obduskey*, 139 S. Ct. at 1038.<sup>10</sup> Plaintiff fails to allege that Attorney Defendant committed any acts that would constitute violations of 15 U.S.C. § 1692(e). Plaintiffs claim fails as a matter of law and should be dismissed.<sup>11</sup>

#### **D. Dismissal With Prejudice.**

20. The Court should deny Plaintiff an opportunity to amend because any amendment to his pleadings would be futile as to Attorney Defendant. *See SB. Intern., v. Jindal*, 2007 WL 2410007, \* at 3 (N.D. Tex. Aug. 23, 2007)(citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)); *see also Abruzzo v. PNC Bank, N.A.*, 2012 WL 3200871, at \*3 (N.D. Tex. July 30, 2012) (denying leave to amend with respect to claims that fail as a matter of law). Attorney Defendant's Motion to Dismiss should be granted because the Plaintiff has failed to state a claim against Attorney Defendant upon which relief can be granted. Further, even if allowed the opportunity to amend, Plaintiff cannot assert a viable claim against Attorney Defendant due to attorney immunity. As

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<sup>10</sup> Also see *Anderson v. CitiMortgage, Inc.*, 2011 WL 1113494 (E.D. Tex. March 23, 2011) (citing *Williams v. Collinville Home Loans, inc.*, 504 F. Supp. 2d 176, 190 (S.D. Tex. 2007)); Tex. Fin. Code Ann. § 392.301(b)(3) (Vernon 2006). The court in *Anderson* stated that "foreclosing on a property pursuant to a deed of trust does not constitute the collection of a debt within the meaning of the FDCPA". *See Anderson*, 2011 WL 1113494 at \*13. *Prophet v. Joan Ivers, Iveyers & Assoc's., P.C.*, 645 F. Supp. 2d 614 (S.D. Tex. 2008) (enforcement of a security instrument is not debt collection for purposes of the FDCPA); *Bergs v Ilover, Bax, Slovacek. L.L.P.*, No. 3:01-CV-1572-L, 2003 WL 22255679 (N.D. Tex. 2003) (granting summary judgment on claim for violation of the federal fair Debt Collection Practices Act (FDCPA), arising out of a foreclosure sale because the foreclosure proceeding did not constitute the collection of a debt) (overruled on other grounds, *Kaltenbach v. Richards*, 464 F.3d 524 (5<sup>th</sup> Cir. 2006)).

<sup>11</sup> To the extent Plaintiff can be heard to assert claims against Attorney Defendant for quiet title and/or trespass to title, these claims also fail as Attorney Defendant has no title interest in the property.

such, Plaintiffs claims against Attorney Defendant should be dismissed with prejudice pursuant to Rule 12(b)(6).

**V.  
CONCLUSION**

Plaintiff fails to state a claim upon which relief can be granted. Accordingly, Barrett Daffin Frappier Turner & Engel, LLP respectfully requests that its Motion to Dismiss be granted and Plaintiff's claims be dismissed with prejudice. Defendant Barrett Daffin Frappier Turner & Engel, LLP further requests all relief, at law or in equity, to which it is entitled.

Respectfully submitted,

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**ATTORNEY FOR DEFENDANT BARRETT  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 24th day of May 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF filing system, and will send a true and correct copy to the following:

**VIA EMAIL AND  
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