D-1-GN-23-006883

BENJAMIN BRODY, *Plaintiff*	§ § §	IN DISTRICT COURT OF
VS.	§ §	TRAVIS COUNTY, TEXAS
ELON MUSK, *Defendant*	§ §	459th DISTRICT COURT

PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION FOR *PRO HAC VICE* ADMISSION OF ALEX SPIRO

The question of the reputability of nonresident attorneys is addressed to the discretion of the trial court. *Keller Indus., Inc.*, 804 S.W.2d at 186. Under the Texas Rules Governing Bar Admission, Rule 19(d) provides that a court may deny a nonresident attorney's motion for admission pro hac vice if the court determines one of the following: (1) The nonresident attorney is not a reputable attorney who will observe the ethical standards required of Texas attorneys; (2) The nonresident attorney has been appearing in courts in Texas on a frequent basis; (3) The nonresident attorney has been engaging in the unauthorized practice of law in the state of Texas; or (4) Other good cause exists to deny the motion. Tex. Rules Govern. Bar Adm'n R. XIX(d).

Plaintiff has concurrently filed a motion for sanctions regarding conduct by applicant Alex Spiro. Here, the application should be denied due to the conduct set forth in the motion, namely that (1) Spiro has repeatedly and willfully engaged in unauthorized practice of law, (2) While engaged in unauthorized practice, Spiro also engaged in disruptive and unprofessional conduct, (3) While engaged in unauthorized practice, Spiro repeatedly gave improper instructions to the witness not to answer, (4) While engaged in unauthorized

practice, Spiro continually interrupted a deposition with improper speaking objections, commentary, witness coaching, and obstructionist tactics.

Plaintiff's Motion for Sanctions is attached as Exhibit 1. Based on the evidence set forth therein, this Court should deny the privilege of pro hac vice admission to Spiro on these multiple grounds.

Respectfully submitted,
FARRAR & BALL, LLP

MARK D. BANKSTON
State Bar No. 24071066
KYLE W. FARRAR
State Bar No. 24034828
WILLIAM R. OGDEN
State Bar No. 24073531
1117 Herkimer
Houston, TX 77008
(713) 221-8300
mark@fbtrial.com

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2024, the forgoing brief was served upon all counsel of record via electronic service.

MARK D. BANKSTON

Exhibit 1

Plaintiff's Motion for Sanctions

D-1-GN-23-006883

BENJAMIN BRODY, *Plaintiff*	§ § §	IN DISTRICT COURT OF
VS.	§ §	TRAVIS COUNTY, TEXAS
ELON MUSK, *Defendant*	§ §	459th DISTRICT COURT

PLAINTIFF'S MOTION FOR SANCTIONS

Out-of-state attorney Alex Spiro brazenly engaged in unauthorized practice of law by signing and preparing Musk's pleadings, showing up unannounced to defend Musk's deposition with no authority to practice law in Texas, and drafting and serving subsequent legal demands to Plaintiff. Even worse, Spiro's behavior in deposition was astonishingly unprofessional, as he continually interrupted the deposition with commentary, gave numerous improper instructions not to answer, berated opposing counsel, insulted Plaintiff's claims, mocked counsel's questions, and generally acted in the most obnoxious manner one could contemplate without crossing into parody. In doing so, he irreparably disrupted the deposition, prevented relevant questioning relating to Plaintiff's TCPA response, and demonstrated his disrespect for the sanctity of these proceedings.

Spiro, a Madison Avenue celebrity lawyer, does not feel compelled to obey our rules. As shown below, he has seriously overstepped his bounds, and sanctions should issue.[1]

[1] Trial courts possess the "inherent power to sanction for violations of the Disciplinary Rules." *Greene v. Young*, 174 S.W.3d 291, 300 (Tex.App.-Houston [1st Dist.] 2005, pet. denied). Where "an attorney's alleged misconduct properly can be made the subject of a grievance," the trial court is not "limited to referring the matter to disciplinary authorities," but may "use its inherent power to sanction the same conduct." *Westview Drive Investments, LLC v. Landmark Am. Ins. Co.*, 522 S.W.3d 583, 616 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

LEGAL STANDARD

Plaintiff seeks sanctions under the Court's inherent powers and under Rule 215. "Texas courts have inherent judicial power that they may call upon to aid in the preservation of their independence and integrity." *Public Util. Comm 'n of Texas v. Coffer*, 754 S.W.2d 121, 124 (Tex. 1988). Inherent power "exists to the extent necessary to deter, alleviate, and counteract bad faith abuse of the judicial process." *Brewer v. Lennox Hearth Prods.*, LLC, 601 S.W.3d 704, 718 (Tex. 2020). Further, Rule 215 authorizes sanctions when a party "fails to comply with proper discovery requests or to obey an order to provide or permit discovery," and such sanctions can include "an order that the matters regarding which the order was made or any other designated facts shall be taken to be established." Tex. R. Civ. P. 215.2(b).

FACTUAL BACKGROUND

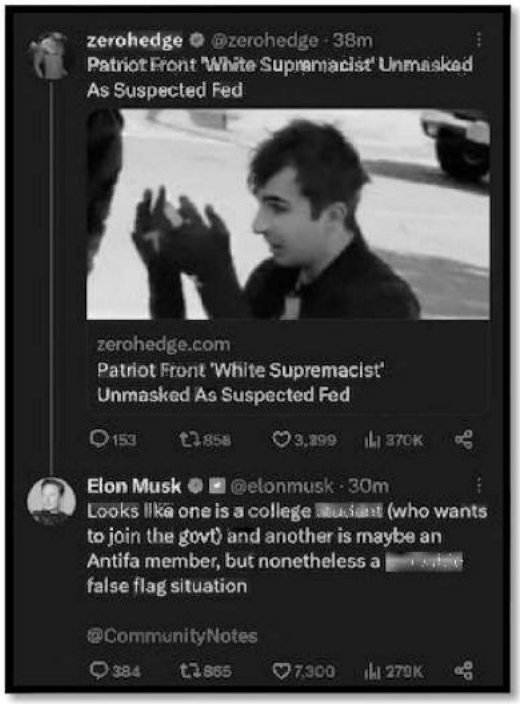
I. Brody's Lawsuit.

Brody alleges that Musk posted remarks on Twitter which conveyed the defamatory impression that Brody participated in a street brawl on behalf of a neo-Nazi group. (*See* Petition, p. 19-38). On June 24, 2023, two far-right extremist groups were involved in a melee during Portland's Pride festival. During the brawl, two of members of the Rose City Nationalists, a neo-Nazi group, had their masks removed. (*Id.*, p. 19-21). The following day, an anonymous social media user posted a photo of one of the unmasked brawlers alongside a photo of innocent California resident Ben Brody. This user also included a screenshot of a social media post from Brody's fraternity stating, "After graduation, Ben plans to work for the government." The user claimed Brody was engaged in a "false flag" operation. (*Id.*, p. 21-22).

By the evening of June 25th, the rumor had started to spread, and over the next two days, significant portions of the internet were debating over the potential involvement of this

college student who wanted to join the government. (*Id.*, p. 22-34). On June 25th-26th, two Twitter users showed Elon Musk the screenshots of Ben Brody along with his fraternity's social media message about Brody wanting to join the government, and Musk replied with interest to their messages about Brody. (*Id.*).

The following morning, on June 27th, Musk tweeted a reply in which he tried to correct a @zerohedge tweet that accused the brawler of being a member of law enforcement. Instead of a member of law enforcement, Musk posted his conclusion that it looked like the brawler was "a college student (who wants to join the govt)" who was engaged in "a probable false flag situation":



Many readers of Musk's tweet, both in the general public and among Brody's personal acquaintances, immediately understood that Musk's reference about "a college student (who wants to join the govt)" was aimed at Brody. Further, there was nothing in the @zerohedge tweet or the linked article that discussed Ben Brody wanting to work for the government, so

readers understood Musk must have acquired that information elsewhere. To readers of Musk's June 27th tweet, the statement conveyed the impression that Musk had seen information which caused him to believe that the "college student (who wants to join the govt)," *i.e.,* Ben Brody, was one of the unmasked neo-Nazis, but readers could not judge the quality or nature of his information. Thus, because Musk did not disclose the factual basis for his opinion, his remarks were defamatory. Brody requested a retraction, Musk refused, and Brody brought this suit for defamation per se.

II. The Court's Discovery Order.

Musk filed a Motion to Dismiss under the Texas Citizen's Participation Act (TCPA) on January 5, 2024. Brody responded with a Motion for Discovery. The Court granted Brody's Motion for Discovery on February 21, 2024. The Court ordered Musk to answer written discovery by March 15th and to appear for deposition by April 1st on four topics, all relating to Musk's level of fault. The Court also reset the TCPA hearing for April 22nd.

III. Musk's Deposition.

Musk appeared for deposition on March 27th. Musk's testimony was devastating to his defense, which was almost certainly one of the causes of the misconduct discussed in this motion. During his deposition, Musk:

- Admitted he intended to refer to Ben Brody.[2]
- Admitted that he intended to communicate the idea that he had seen information supporting the allegation that Ben Brody was one of the neo-Nazi brawlers.[3]

[2] Exhibit 1, Musk Deposition, 33:11-23; 35:23-36:3. A video of the deposition will be provided to the Court.
[3] *Id.* at 34:4-10.

- Admitted that he did not disclose the source or nature of his information, and that readers of his tweet would have no idea what information he was relying on for his conclusion.[4]

- Admitted that he relied solely on a pair of highly dubious tweets, and that he acquired no other information about Brody or the neo-Nazi brawler.[5]

- Admitted that his source of information showed indications of unreliability.[6]

- Admitted that he performed no investigation into the facts whatsoever.[7]

- Admitted that he made the statement with substantial doubts about whether it was true.[8]

In sum, Musk admitted to all the material allegations in Brody's Petition. Yet as damaging as it was, Musk's deposition could have gone even worse but for the obstructionist conduct of the attorney defending the deposition. In this case, Musk has been represented by two Texas attorneys -- Emiliano Delgado and John Bash. Both of these attorneys appeared on Musk's behalf at the discovery hearing. However, neither of these attorneys were present at Musk's deposition. Instead, and unbeknownst to Plaintiff's counsel, out-of-state attorney Alex Spiro showed up to the deposition with no notice. Spiro is not licensed in Texas, nor is he admitted pro hac vice. As shown below, Spiro continually interrupted the testimony,

---

[4] *Id.* at 36:20-37:13.

As the Court is likely aware, these facts render the statement defamatory. *See, e.g.,* Restatement (Second) of Torts § 566 (1977) ("If the defendant expresses a derogatory opinion without disclosing the facts on which it is based, he is subject to liability if the comment creates the reasonable inference that the opinion is justified by the existence of unexpressed defamatory facts."). Thus, Musk's tweet was "issued upon a concealed set of facts which the speaker implies would confirm his opinion." *DeLuca v. New York News Inc.*, 109 Misc. 2d 341, 352, 438 N.Y.S.2d 199, 206 (Sup. Ct. 1981).

[5] *Id.* at 20:13-21:6.
[6] *Id.* at 79:7-11.
[7] *Id.* at 20:5-12; 20:25-21:2.
[8] *Id.* at 33:24-34:3.

injected his commentary in front of the witness, berated opposing counsel, gave numerous instructions not to answer relevant questions, and generally attempted to derail an obviously damaging deposition, all while Spiro was engaged in flagrant unauthorized practice of law. As a result, the Court's rules have been flouted, and Brody was prevented from a full inquiry on the issue of actual malice.[9]

ARGUMENT

I. Alex Spiro Repeatedly and Willfully Engaged in Unauthorized Practice of Law.

Under the Texas Disciplinary Rules, "a lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction." *See* Tex. Disciplinary R. Prof'l Conduct 5.05. Under the Government Code, a person may not practice law in Texas unless they are a member of the State Bar of Texas or meets the requirements of Supreme Court rules allowing for limited practice by attorneys licensed in another jurisdiction. *See* Tex. Gov't Code § 81.102. The Texas *pro hac vice* rule requires an application to the State Bar as well as a sworn motion for admission to the trial court which must be granted before the nonresident attorney can practice law in Texas. *See* Rule XV of the Rules Governing Admission to the Bar of Texas. In Texas, the "practice of law" is defined as "the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court, as well as a service rendered out of court." Tex. Gov't Code § 81.101(a).

Out-of-state attorneys can enter a "valid retainer agreement" before they have "been admitted pro hac vice," *see Shapiro, Lifschitz & Schram, P.C. v. R.E. Hazard, Jr. Ltd. Pshp.*, 24 F.

[9] Musk alleges Brody is a public figure and must prove malice. While this is a frivolous argument, Brody must still respond to the TCPA Motion as though it were genuine.

Supp. 2d 66, 81 (D.D.C. 1998), and "[a]ctivities in contemplation of such admission are also authorized, such as investigating facts or consulting with the client within the jurisdiction prior to drafting a complaint and filing the action." *Dorsey v. Home Depot U.S.A., Inc.*, 271 F. Supp. 2d 726, 729 (D. Md. 2003). But out-of-state attorneys can do nothing more unless they are admitted pro hac vice. Here, Spiro committed unauthorized practice in three ways: (1) He prepared and signed pleadings, (2) he showed up unannounced to defend (and disrupt) Musk's deposition, and (3) he drafted and served subsequent legal demands on the Plaintiff.

A. Alex Spiro first committed unauthorized practice of law by preparing and signing his name on a Texas pleading.

Despite not being authorized to practice in Texas, Alex Spiro prepared and personally signed Musk's TCPA Motion to Dismiss, and he made his first appearance before the Court in that document. Spiro obviously prepared the document, as he also signed the affidavit attesting to the exhibits in the motion. These actions were unauthorized practice of law, and this fact alone supports sanctions and denial of future pro hac vice admission in this case.

This set of facts is similar, though more egregious, than the facts of *In re Autozoners,* where in the Relator's answer, "[f]ollowing [local counsel's] signature block, the pleading included like information for Relator's nonresident attorneys." *In re Autozoners, LLC*, 649 S.W.3d 774, 776 (Tex. App.—El Paso 2022, no pet. h.). The signature blocks for the non-resident attorneys indicated they were licensed in another state and indicated that an "application for pro hac vice admission would be forthcoming." *Id.* When that application was later heard by the trial court, it was denied due to unauthorized practice. *Id.*

The facts in *Autozoners* were less incriminating than this case. The attorney in *Autozoners* "disagreed that she had engaged in the unauthorized practice of law merely because her name appeared in the signature block below [local counsel's] name and

signature." *Id* at 777. Unlike Spiro, who personally signed the motion, the attorney in *Autozoners* "stated that [local counsel] had prepared and signed the answer" with her name listed underneath. *Id.* Nonetheless, the El Paso court rejected this argument.

The El Paso court ruled that the trial court properly found that "by appearing in the signature block of information, the two nonresident attorneys had prematurely identified themselves as representing Relator in the cause even before the court had actually granted admission pro hac vice, regardless of their additional assertion of a forthcoming motion." *Id.* at 780. Thus, the trial court was held to have properly denied the pro hac vice application based on their unauthorized practice. *Id.*

In reaching this ruling, the El Paso court noted that that the Dallas court of appeals likewise found unauthorized practice "where a nonresident attorney's information was prematurely included on a party's initial pleading before the attorneys had been properly admitted by the courts." *Id.*, citing *In Re Pine Tree Capital, LLC*, No. 05-22-00105-CV, 2022 WL 500035, at *1 (Tex. App.-Dallas Feb. 19, 2022, orig. proceeding) (mem. op.) (denying pro hac vice due admission due to unauthorized practice, where nonresident attorney placed his signature block on a pleading along with those of a member of the Texas Bar before gaining pro hac vice admission).

The El Paso court noted that other jurisdictions with the same pro hac vice rules have reached the same conclusion. *See id.* at n. 1, citing *Isom v. Valley Forge Ins. Co.*, 716 Fed.Appx. 280, 288 (5th Cir. 2017) (finding unauthorized practice where nonresident attorney's name appeared on the complaint before being granted pro hac vice admission, noting that the denial of application was mandatory if an applicant made an appearance before securing approval); *In re Nevins*, 60 V.I. 800, 803-04 (V.I. 2014) (inclusion of nonresident attorney's

name on signature page of brief before pro hac vice petition was unauthorized practice of law, and the fact that the words "pro hac vice application pending" appeared after the nonresident attorney's name did not "render his conduct any less improper"); *In re Williamson*, 838 So.2d 226, 235 (Miss. 2002) (finding unauthorized practice where nonresident attorney's name appeared on the complaint before his pro hac vice application was granted and warning that "attorneys are hereby noticed and cautioned that a foreign attorney will be deemed to have made an appearance in a Mississippi lawsuit if the foreign attorney signs the pleadings or allows his or her name to be listed on the pleadings."). These decisions involved cases in which the attorneys' names appeared below local counsel, and in which they disclaimed any involvement in drafting, but their actions were still held to constitute unauthorized practice. In this case, Spiro personally signed the TCPA motion and gave an attestation to the exhibits.

B. Alex Spiro next committed unauthorized practice of law by defending a deposition in a Texas proceeding.

Unlike *Autozoners*, which was limited to a signature block on a pleading, Spiro's unauthorized practice is much worse. Spiro decided to show up unannounced to Musk's deposition, make an appearance as his attorney, and represent Musk during his testimony. Plaintiff's counsel were not informed Spiro would appear at the deposition, and none of Musk's Texas attorneys even attended the deposition.

As the Delaware Supreme Court observed, "one of the principal purposes of the pro hac vice rules is to assure that" either a local lawyer or a "lawyer admitted pro hac vice" will "be present at a deposition," as "an officer of the [ ] Court, subject to control of the Court to ensure the integrity of the proceeding." *Paramount Commc'ns v. Qvc Network*, 637 A.2d 34, 56 (Del. 1994). Importantly, pro hac vice requirements also ensure the attorney is familiar with

the state's rules, procedures, and ethical standards. As such, Musk "should have been represented at the deposition by a [Texas] lawyer or a lawyer admitted pro hac vice." *Id.* at 55. Here, Plaintiff's counsel noted that he was "very concerned" that Spiro "came to this deposition to practice law in violation of Texas law with no pro hac admission."[10] As shown below, Spiro mocked these concerns.

In doing so, Spiro broke his ethical duties. "Without admission pro hac vice, out-of-state attorneys ... actively participating in pretrial proceedings such as depositions ... would be engaged in the unauthorized practice of law in this state." *In re Roswold*, 249 P.3d 1199, 1208 (Kan. 2011); *see also Forbes v. Hixson*, 145 So. 3d 1124, 1136 (Miss. 2014) ("[P]hysically appearing at ... a deposition ... or any other proceeding in which the attorney announces that he or she represents a party to the lawsuit ... require[s] a foreign attorney to be admitted pro hac vice."); *see also In re Hughes*, 833 N.E.2d 459, 460 (Ind. 2005) (violation of professional conduct rule for Indiana lawyer to permit Michigan attorney to handle depositions and mediation in Indiana case); *In re York*, 2010 MP 11, ¶ 2 n.3, 8 N. Mar. I. 476, 477 ("After the Court learned of Murray's participation in the deposition [before his pro hac vice admission], it made a finding of unauthorized practice of law and revoked Murray's recently-granted pro hac vice status."); *Smith v. Hastings Fiber Glass Prods.*, No. 11-0894, 2014 U.S. Dist. LEXIS 81125, at *11-12 (W.D. La. 2014) (Noting that attorney "could not have participated in out of court proceedings such as depositions" without "admission pro hac vice in this case ... unless he was engaged in the unauthorized practice of law."); *In re Cortigene*, 13-2022 (La. 02/14/14), 144 So. 3d 915, 918-20 (Holding that non-resident attorney "engaged in the practice of law in this state by appearing at and participating in a deposition" and that the

[10] Exhibit 1, Musk Depo., 104:1-4.

"appropriate sanction for such misconduct would be a three-year suspension" when attorney "participated in the deposition of [client] taken in New Orleans by another party," and "advised [client] 'once or twice' to either answer or not answer a particular question," even though another attorney "predominantly did the questioning and the objecting.").

Yet as later discussed in Section II, below, Spiro's unauthorized practice of law was greatly exacerbated by his outrageous conduct throughout the deposition.

C. Alex Spiro next committed unauthorized practice of law by drafting and serving legal demands on counsel of record in a Texas proceeding.

On March 27, 2024, following his improper appearance at Musk's deposition and his unprofessional conduct therein, Spiro sent a letter to Brody's counsel. (Ex. 3, Spiro letter). This letter informed Brody's counsel that an emergency motion was being prepared, and the letter made legal demands of confidentiality on Brody, his attorneys, and consulting expert. Thus, even after being confronted during the deposition about his lack of authority to practice law in Texas, Spiro continues to engage in unauthorized practice.

II. While Committing Unauthorized Practice, Alex Spiro Engaged in Abusive Litigation Conduct.

A. Spiro's conduct in Musk's deposition was unacceptable.

Plaintiff began the deposition with a simple question that inquired into Musk's subjective state of mind about his fault: "Do you think you did anything wrong to Ben Brody?" In a bizarre and combative outburst, Spiro interrupted this first question, chastised Brody's counsel, instructed his client not to answer, insisted that Brody's counsel "just showed your cards that this case is DOA."[11] Following these derisive and unnecessary remarks, Plaintiff's counsel requested Spiro abide by Tex. R. Civ. P. 199.5. Yet Spiro refused, and almost

[11] *Id.* at 6:25.

immediately thereafter, Spiro decided he would interrupt questions and **answer them himself**, and then berate Plaintiff's counsel when again asked to follow the rules:

> Q. Mr. Musk, I'm referring to the fact that on June 24th, 2023, as described in the plaintiff Ben Brody's lawsuit, there was a brawl in Oregon between right wing extremists. Were you aware that that was the subject matter of the lawsuit?
>
> MR. SPIRO: I don't know that that's the subject matter of the lawsuit. I think the subject matter of the –
>
> MR. BANKSTON: A subject matter of the lawsuit. And, Mr. Spiro, again, your objections to questions in an oral deposition under Rule 199.5 are limited to objection; leading and objection; form, or objection; nonresponsive. Those objections are waived if not stated as phrased. All other objections need not be made or recorded during the oral deposition to be raised to the court. You must not give any suggestive or argumentative or any explanations during the deposition.
>
> MR. SPIRO: Well, then don't say things that are misleading.
>
> MR. BANKSTON: No. That's not -- that's why you should object to the form of the question.
>
> MR. SPIRO: No, no, it's not –
>
> MR. BANKSTON: That's misleading. Mr. Spiro, you know -- Mr. Spiro --
>
> MR. SPIRO: Listen, if you want to go back and forth with me and waste your time, you can. Go on to your next question.
>
> MR. BANKSTON: Oh, we're going to get more time if you keep doing this.
>
> MR. SPIRO: No, you're not. No, you're not. Go to the judge --
>
> MR. BANKSTON: You're violating Rule 199, you're not even *pro hac* admitted.
>
> MR. SPIRO: Okay. Okay. You're just giving speeches that nobody's listening to but you. You're just doing them for yourself.
>
> MR. BANKSTON: Oh, they're for the record, Mr. Spiro, they're for the court to listen to.

> MR. SPIRO: Okay. So keep --
>
> MR. BANKSTON: And I would appreciate it -- I'm going to give you an instruction. I would appreciate it if you would abide by Rule 199.5 of the Texas Rules --
>
> MR. SPIRO: I heard you the first three times.
>
> MR. BANKSTON: Mr. Spiro, please do not interrupt me.
>
> MR. SPIRO: I heard you the first three times.
>
> MR. BANKSTON: Mr. Spiro, please do not interrupt me. I'm asking you on the record to obey Rule 199.5. If you continue to violate Rule 199.5, I will move for sanctions against you. So I please ask you to obey the rules in the remainder of this deposition.[12]

Regrettably, Spiro continued to act in a ridiculously unprofessional manner for the entirety of the deposition. In fact, during his next interruption moments later, Spiro indicated that he didn't care about following deposition rules:

> MR. SPIRO: I am going to interrupt again, and I don't really care that rule you keep reading because it has nothing to do with –
>
> MR. BANKSTON: I know you don't.
>
> MR. SPIRO: Good.[13]

Spiro's outrageous conduct continued to grow more unprofessional as he grew angrier, and the deposition was continually interrupted by his snide and ridiculous commentary:

> MR. SPIRO: **This isn't like a real case. This is just some stupid --**
>
> MR. BANKSTON: Mr. Spiro.
>
> MR. SPIRO: Yeah, so --

---

[12] *Id.* at 10:3 – 12:7.
[13] *Id.* at 12:21-25.

> MR. BANKSTON: Lawyers do not -- It is not in accordance with the Lawyer's Creed to just start making random statements about the alleged frivolity of a case to a lawyer in a deposition. You know that's not proper. You know that.
>
> MR. SPIRO: Do you give these lectures in all of your depositions?[14]

Spiro continued to express his indifference to the rules, and throughout the deposition, Spiro continued to interrupt with sarcasm and mocking remarks:

- "I'm surprised you don't know they're not proper questions."[15]
- "Maybe just ask proper questions."[16]
- "There's nothing about me saying that that changes what he's going to answer. That's not how witness coaching works. I'm surprised you don't know that."[17]
- "Any judge reviewing this will tell you it's not a proper question."[18]

During yet another interruption, when Plaintiff's counsel again expressed his alarm that the deposition wasn't being defended by a Texas lawyer, Spiro stated, "**You keep filing these silly frivolous shakedown cases, I'll -- I'll keep trying to think of Texas lawyers to bring to your deposition.**"[19] Plaintiff's counsel is not sure what the second part of this comment meant exactly, but it was clear Spiro was engaged in scorn, as well as accusing Plaintiff's counsel of a fraudulent and potentially illegal "shakedown." Spiro continued these attempts at ridicule throughout the deposition, stating, for example:

- "You're running out of time. I know this is your big day in the sun. You're running out of time."[20]

---

[14] *Id.* at 14:5-15.
[15] *Id.* at 38:15.
[16] *Id.* at 38:22.
[17] *Id.* at 38:23-39:1.
[18] *Id.* at 39:3-5.
[19] *Id.* at 43:12-15.
[20] *Id.* at 43:23-44:2.

- "I think this is nonsense and you know it."[21]
- "This isn't – this isn't productive."[22]
- "I don't understand why you're doing this. You're just wasting everybody's time."[23]

At the end of Musk's extraordinarily damning testimony, Spiro demanded the testimony be treated as confidential despite the absence of any protective order. When informed that there was no protective order in place and that parties must seek protection under Rule 192.6 **before** discovery is produced, Spiro repeated his baseless confidentiality demand and angrily abandoned the Zoom call before the parties concluded the record and before the court reporter could ask if Musk would choose to read and sign the transcript.[24] Following the deposition, Spiro wrote declarations in support of multiple "emergency motions" attempting to keep the deposition confidential, despite the lack of a protective order or any confidential information in the deposition. These motions were frivolous. Spiro simply did not want damaging testimony to become public knowledge.

B. Spiro's conduct merits sanctions under Texas law.

An identical situation was discussed by the San Antonio court in *Harvest Communities.* In that case, an attorney engaged in almost identical deposition misconduct. First, the offending attorney was "not shy to put on the record what he thought about the ability of [opposing] counsel to ask questions." *In re Harvest Communities of Houston, Inc.*, 88 S.W.3d 343, 346 (Tex. App.—San Antonio 2002). That attorney characterized deposition questions as "incredible," "nonsense," "an incredible waste of time," "preposterous," and "absurd," as

[21] *Id.* at 104:15.
[22] *Id.* at 7:18-19.
[23] *Id.* at 106:4-5.
[24] *Id.* at 107:13-108:20.

well as stating that "counsel had asked 'the most preposterous questions I've seen in nearly—in 39 years of practicing law, I've never seen anybody like you.'" *Id.* As the court rightly noted, "[s]uch comments clearly are not in keeping with a lawyer's responsibilities under the Texas Disciplinary Rules of Professional Conduct." *Id.* Further, the questioning attorney in *Harvest Communities* was "repeatedly interrupted by long, argumentative objections." *Id.* Also, just like here, "[r]eminders by [opposing] counsel to [the offending attorney] regarding the applicable Rules of Civil Procedure and efforts to ensure that [the offending attorney] complied with the rules were given short shrift." *Id.* Like in this case, "[i]n a typical exchange during the deposition, [opposing] counsel complained of [the offending attorney's] speech-making and reminded [him], 'You're entitled to make the objection as to form — and then you are to stop.' Counsel's reminder was a fair restatement of Rule 199.5(e), but [the offending attorney's] response was: 'You're not going to tell me a thing. You just keep your mouth shut. We're through.'" *Id.*

Every attorney, whether authorized to practice in Texas or not, should be aware of how to behave at a deposition. "[I]t is to be conducted in a manner that simulates the dignified and serious atmosphere of the courtroom." *Soule v. RSC Equip. Rental, Inc.*, No. 11-2022, 2012 WL 5060059, *2 (E.D. La. Oct. 18, 2012). Emotions may run high, voices might be raised, but reputable attorneys do not ridicule, demean, and disrupt, all while mocking the rules. Deviating from these standards cannot be allowed, as the D.C. federal court explained:

> Behavior of the type this record reveals demeans the participants, demeans the witnesses and demeans the very system and essence of justice itself. It simply cannot be tolerated. A deposition is an extension of a judicial proceeding. It should be attended and conducted with the same sense of solemnity and the same rules of etiquette that would be required were the parties in the courtroom itself.

Alexander v. F.B.I., 186 F.R.D. 21, 52 (D.D.C. 1998).

As noted by the San Antonio court when faced with identical misconduct, "[t]he trial court was well within his discretion to assess sanctions in this case, including harsh sanctions. Such attorney misbehavior demeans the entire profession, and should be punished." *In re Harvest Communities*, 88 S.W.3d at 347; *see also Paramount Commc'ns*, 637 A.2d at 52 (Chastising the "lack of professionalism" and "misconduct during a deposition" involving celebrity attorney Joe Jamail, who appeared at deposition though "not admitted pro hac vice" while "improperly direct[ing] the witness not to answer certain questions" and acting in a "rude, uncivil, and vulgar" manner, which the Delaware Supreme Court called "a lesson of conduct not to be tolerated" which "cries out for relief under the trial court's rules.").

III. While Engaged in Unauthorized Practice, Alex Spiro Improperly Instructed Musk Not to Answer Relevant, Non-Privileged Questions.

A. Spiro prevented relevant questioning about Musk's prior denial of neo-Nazi violence and any warnings he received.

To show actual malice, Plaintiff would need to show that when Musk made the accusation that the neo-Nazi street brawl was a false flag psy-op, Musk consciously disregarded a substantial risk. Plaintiff alleges that Musk was consciously aware of the risk his conduct posed because one month prior, Musk received significant attention for another a reckless series of statements in which he wrongly claimed that an act of neo-Nazi violence was actually a false flag psy-op, just like this case.

On May 6, 2023, a neo-Nazi mass shooter murdered shoppers at an outlet mall in Allen, Texas. The shooter had multiple Nazi tattoos and engaged with neo-Nazi materials online. Just like in this case, Musk spent the days after the shooting bantering with rightwing extremists while claiming that the event was a false flag psy-op and denying that the shooter was actually a neo-Nazi. And just like in this case, Musk relied on baseless information from

unverified social media accounts to make an absurd accusation. Plaintiff's counsel tried to question Musk about this experience and its impact on his state of mind a month later when denying another act of neo-Nazi violence as a psy-op based on ridiculous rumors from rightwing extremists. Unfortunately, Spiro shut down any inquiry before it could even begin:

> Q. Do you remember just a couple of weeks before this meme in the -- when the Allen, Texas, neo-Nazi shooting happened, about you using the term psyop for that event?
>
> MR. SPIRO: I think this is outside the court order, so I'm not going to allow you to answer this question. You can keep going.
>
> MR. BANKSTON: So you're going to instruct him not to answer it?
>
> MR. SPIRO: You heard me the first time.[25]

Later in the deposition, Plaintiff's counsel revisited the topic, hoping its relevance had become apparent over the course of the deposition. Plaintiff's counsel told Musk:

> I want to talk about if in your mind you were aware or considering any warnings you had been given say in the past few months about the level of care you were showing in your tweets ... And during that time, I want to ask you about some situations if people have ever voiced concern about the level of care you were showing when tweeting about factual events.[26]

During this questioning, Plaintiff's counsel again asked about the neo-Nazi mass shooting on which Musk commented in the month prior to defaming Plaintiff. However, Spiro again cut off any questioning before it could even begin:

> Q. A month before the events of this case was the neo-Nazi mass shooting in Allen, Texas?
>
> MR. SPIRO: Look, I'm going to object again. I was going to let you do a couple of these because it's not worth necessarily arguing about each and every one even though I don't think it's relevant, but you're not backdooring all this stuff in through the fourth category that the judge

[25] *Id.* at 17:20-18:4.
[26] *Id.* at 69:6-19.

> proposed when in the judge's instructions they very much limit the tweets in question in this case. And so we're not going to do any more on it. So I'm instructing Mr. Musk not to answer any more questions about any other tweets in this case for the rest of this deposition. You can go to the judge if you don't like that instruction.
>
> MR. BANKSTON: Let's put it on the record that your statement is just incorrect. The order does not limit me to the tweets in this case --
>
> MR. SPIRO: We disagree. We disagree whether -- whether the judge is sitting here -- we would disagree whether if the judge was sitting here would allow you to go through each and every tweet so.
>
> MR. BANKSTON: Okay. I'm going to start over before you interrupted me and I am going to go ahead and state what I said I need to put on the record. Again, this is not for you; this is for the judge, right? I am now being told that there are events that I want to talk to him about about whether he's been given warnings about his level of care. These are not about tweets in the case. These are about the topic of his state of mind at the time the alleged defamatory statement was allegedly published, and warnings he may have received in advance of that tweet about the level of care that he was habitually showing are clearly relevant. I've now been told I'm not going to be allowed to ask any more questions about that.[27]

When questioning Musk about his state of mind on the day he falsely denied a violent neo-Nazi event based on flimsy social rumors, Plaintiff should have been able to question Musk about the impact of his experience one month prior in which he was widely chastised for falsely denying the reality of a violent neo-Nazi event based on flimsy social rumors. Yet this was hardly the only subject in which Plaintiff's counsel was prevented from inquiring.

B. Spiro prevented relevant questioning about Musk's use of Twitter posts as a news source.

On the same day as Musk's defamatory tweet, Musk also made a comment about the difference between consuming news on Twitter versus the traditional media. Musk stated,

---

[27] *Id.* at 75:16-77:3.

"The thing about traditional news is by the time they actually publish anything, it's not news anymore."[28] Plaintiff's counsel initiated a line of inquiry about this statement:

> Q. Traditional news takes time to publish things whereas on Twitter, you're reading about events before the news can even cover it. Is that right?
>
> MR. SPIRO: What's the relevance of this question to the fourth --
>
> MR. BANKSTON: His state of mind upon the information he relied on it and why he relied on it.
>
> MR. SPIRO: No, I don't see that. I don't see the relevancy of that question. Don't answer that.[29]

Plaintiff's counsel would have questioned Musk about the difference between traditional news and Twitter, including that Musk was aware of the substantial risk of false information from real-time anonymous sources on Twitter, and that Musk consciously disregarded that risk in favor of "pro-free speech" views he maintains about the Twitter platform. In sum, an exploration of Musk's remarks about traditional news versus Twitter would have revealed his conscious choice to value speed over accuracy despite his subjective awareness of the risk. Musk's tweet, which occurred on the same day as the defamatory tweet, was a subject reasonably calculated to lead to admissible evidence about Musk's state of mind at the time of the defamation. Spiro's improper instruction foreclosed any possible inquiry in this area.

C. Spiro prevented relevant questioning about Musk's sources for the defamatory statement.

"[R]ecklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *Warner Bros. Entm't, Inc. v. Jones*, 538 S.W.3d

---

[28] *Id.* at 62:9-11.
[29] *Id.* at 63:6-15.

781, 809 (Tex. App.—Austin 2017), aff'd, 611 S.W.3d 1 (Tex. 2020). It does not matter if the publisher claims to be ignorant of the source's unreliability at the time of the statement. For instance, in *Warner Bros,* the court found evidence of malice when the defendants did not "dispute that no one investigated Watson to determine whether he was a credible source," though information suggesting his potential unreliability was publicly available. *Id.* at 807. The combination of an objectively unreliable source and a subjective failure to assess credibility creates circumstantial evidence that the truth was avoided. *See id.*

Here, Plaintiff sought to question Musk about his two sources, a pair of Twitter accounts named "DrFrensor" and "MattWallace888." As noted above, Musk acknowledged these two Twitter accounts were his only source of information about Ben Brody. Plaintiff's counsel asked Musk if he had looked at the profiles of DrFrensor or MattWallace888 or seen any of their tweets in the prior days. Musk testified that he did not know if he did or not.[30] Plaintiff's counsel began questioning Musk about the tweets present on DrFrensor's profile page on the day of the incident and whether he had seen them or found them to indicate unreliability. Yet Musk's attorney shut down this questioning.

Spiro instructed Musk not to answer even though Spiro understood the relevance of the questioning, stating, "I understand your point that if he had checked he could have seen these things."[31] Nonetheless, Spiro stated, "We're not going to do any more hypothetical, if you had seen these tweets," and wouldn't allow any more questions about these users' profiles.[32] Spiro insisted that, "The point has been made," and he instructed Musk, "We're not

---

[30] *Id.* at 25:24-26:14.
[31] *Id.* at 81:3.
[32] *Id.* at 80:25.

doing any more questions on this."[33] Following Spiro's instruction, Plaintiff's counsel made a record of why he was asking these questions:

> I'm going to go ahead and make this record again for the Court because once again I've been shut down in the relevance area. I am facing a situation where I must prove certain facts which may have triggered different duties in this case. One of those is not a subjective analysis of whether the source is reliable, but an objective analysis of the source is reliable. And if that source is unreliable, there is arguable basis that a defendant will have to exercise greater care and that that could reflect more actual malice if the person purposefully avoided any investigation into the credibility of an unreliable person. I would like to establish (a) whether he has seen these tweets as though he has already said he does not know and cannot tell me what tweets from these people he has seen. And (2) I would like to establish these people are unreliable. I understand that you're instructing the witness not to answer it and so I will have to add that to whatever relief we're going to seek from the court.[34]

Questions about the reliability of Musk's sources, and whether information about those sources would have triggered reliability concerns, were appropriate inquiries relating to malice as described by the Austin court in *Warner Bros.*

D. Spiro prevented relevant questioning about the circumstances of Musk's refusal to retract his statement.

Plaintiff's counsel raised the issue of Musk's refusal to issue a retraction. Plaintiff's counsel asked Musk, "Knowing right now Ben is really upset that this tweet is still up and that he wanted there to be a retraction, how do you feel about that?"[35] Spiro would not allow Musk to answer:

> MR. SPIRO: Now to the four deposition topics, we're on I guess topic four. We've addressed one through three. How is that relevant to four?
>
> MR. BANKSTON: Because in *Gonzalez vs. Hearst Corp.*, 930 S.W.2nd 275, "a refusal to print a retraction is evidence of an action after the

[33] *Id.* at 81:4-6.
[34] *Id.* at 81:25-82:22.
[35] *Id.* at 42:6-8.

> publication but it can lend support to a claim that reckless disregard or knowledge existed at the time of publication." Similarly, in *New Times vs. Issacks*, Texas Supreme Court, 2004, 146 S.W.3rd 144, "refusal to retract an exposed error tends to support a finding of actual malice and conversely a readiness to retract, tends to negate actual malice." So again I'm pose my question --
>
> MR. SPIRO: Yeah, I'll look at those cases but he's not answering that right now. I don't see the relevance. I don't think those cases -- I'm pretty confident those cases are not directly on point so I'll review the cases so we can respond further.[36]

Contrary to Spiro's remarks, the cases are on-point, and they are consistent with other authority regarding a defendant's refusal to retract. "Refusal to retract an exposed error tends to support a finding of actual malice." *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1071 (5th Cir. 1987); *MMAR Grp. v. Dow Jones & Co.*, 987 F. Supp. 535, 548 (S.D. Tex. 1997) ("Under certain circumstances, however, evidence of a refusal by a publisher to retract a statement after it has been demonstrated to him to be both false and defamatory might be relevant in showing recklessness at the time the statement was published."). This line of cases originates from the Restatement of Torts on actual malice. *See* Restat 2d of Torts, § 580A, cmt. d (noting that "the defendant's refusal to retract a statement after it has been demonstrated to him to be both false and defamatory ... might be relevant in showing recklessness at the time the statement was published."). However, not all refusals to retract are equally probative of actual malice. As the Restatement and Texas cases emphasize, it is only "under certain circumstances" that a refusal to retract can suggest actual malice. Some refusals to retract are driven by ill will, spite, or disregard. Other refusals to retract are driven by a genuine

---

[36] *Id.* at 42:13-43:7.

belief in the truth of the statement. Plaintiff was denied the opportunity to fully question Musk about those circumstances.[37]

IV. Spiro Continually Disrupted the Deposition with Interruptions and Speaking Objections.

In Texas, an attorney must limit "objections to questions during [an] oral deposition to 'Objection, leading' and 'Objection, form.'" *In re Harvest Communities*, 88 S.W.3d at 346. An attorney who consistently makes "long, argumentative objections" is not only in violation of Rule 199.5 but also the Texas Disciplinary Rules of Professional conduct. *Id.* at 346-47.

Here, Spiro's obstructionist tactics, speaking objections, and interruptions all disrupted the free flow of the deposition and influenced the answers given by the deponent. This kind of conduct was examined in the oft-cited *Abbott Labs* opinion, which exhaustively discussed the problem of deposition interruptions and speaking objections, noting they "are an independent reason to impose sanctions." *Sec. Nat'l Bank of Sioux City, Iowa v. Abbott Labs*, 299 F.R.D. 595, 609 (N.D. Iowa 2014). In *Abbott Labs*, "Counsel's interruptions while defending depositions were grossly excessive," given than "[c]ounsel's name appears at least 92 times in the transcript of the Barrett–Reis deposition (about once per page)." *Id.* In *Phillips v. Manuf. Hanover Trust*, 1994 WL 116078 (S.D.N.Y. Mar. 29, 1994), a lawyer was sanctioned

---

[37] Another troubling issue should be noted for context. During his deposition, Musk was asked about a Twitter account called @ermnmusk that he was rumored to use. (*Id.* at 44:11-12; *see also* Ex. 2, @ermnmusk account). Musk testified that he used the account during the summer of 2023, which means he viewed and interacted with tweets on this account around the time when Brody was defamed. (*Id.* at 45:17). Thus, information Musk interacted with on this account near the time of the defamation could be relevant to Brody's claims. However, when Plaintiff's counsel checked the account after the deposition, they discovered it had been deleted. According to @BigTechAlert, an automated bot that tracks Twitter activity, it appears the @ermnmusk account was deleted on or about February 21, 2024: https://twitter.com/BigTechAlert/status/1762064280961110198

This deletion is alarming because February 21, 2024 is the date of the Court's discovery order. In other words, after almost a year of inactivity on the account and with no recent public discussion about it, it appears Musk chose to delete the account on the day the Court ordered discovery to go forward, which is either intentional spoliation or an extraordinary longshot coincidence.

when he "objected or otherwise interjected during [the examiner's] questioning of the deponent at least 49 times though the deposition lasted only an hour and a half" in which "approximately 60 percent of the pages of the transcript contain such interruptions." In *Bordelon Marine, Inc. v. F/V Kenny Boy*, 2011 WL 164636, 14, 999 (E.D. La. Jan. 19, 2011), sanctioned counsel "objected or provided commentary...on 170 pages of the 360–page transcript."

Here, Spiro's name appears on the transcript 170 times in a 110-page deposition, and his numerous interruptions frequently contained commentary that coached the witness. Through his constant interruptions and commentary, Spiro "completely shut down many segments of the deposition, issued several instructions not to answer that were wholly inappropriate, completely interrupted, and made objections outside of Rule 199.5."[38] This strategy "frustrated the free flow of the deposition[ ] Counsel defended," and it likewise amounts to sanctionable discovery abuse. *Abbott Labs*, 299 F.R.D. at 606.

CONCLUSION

Due to his sense of entitlement, Spiro brazenly engaged in unauthorized practice of law. That same sense of entitlement led to Spiro's unprofessional behavior in deposition, as he continually interrupted the deposition with commentary, gave numerous improper instructions not to answer, berated opposing counsel, insulted plaintiff's claims, mocked counsel's questions, and attempted to derail damaging testimony. In doing so, he disrupted the deposition, prevented relevant questioning relating to Plaintiff's TCPA response, and demonstrated his disrespect for these proceedings. As such, Plaintiff asks the Court to enter remedial sanctions under its inherent powers and Rule 215.

---

[38] *Id.* at 109:9-13.

Respectfully submitted,
FARRAR & BALL, LLP

MARK D. BANKSTON
State Bar No. 24071066
KYLE W. FARRAR
State Bar No. 24034828
WILLIAM R. OGDEN
State Bar No. 24073531
1117 Herkimer
Houston, TX 77008
(713) 221-8300
mark@fbtrial.com

CERTIFICATE OF CONFERENCE

I hereby certify that before filing this motion, I conferred with counsel of record, but Defendant is opposed to the relief sought.

MARK D. BANKSTON

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2024, the forgoing brief was served upon all counsel of record via electronic service.

MARK D. BANKSTON