

Honorable David G. Estudillo

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

NATHEN BARTON,

Plaintiff  
v.

JOE DELFGAUW, XANADU  
MARKETING INC., STARTER HOME  
INVESTING INC, &  
JOHN DOE 1-10

Defendant(s).

CASE NO. **3:21-cv-05610-DGE**

MOTION FOR SANCTIONS UNDER  
28 U.S.C. §1927 AND THE COURT’S  
INHERENT POWER FOR  
UNREASONABLE AND  
VEXATIOUS LITIGATION  
PURSUED FOR AN IMPROPER  
PURPOSE

NOTED FOR 12/2/2024

On 9/23/2021 Barton sued the Defendants for unwanted phone calls. The Defendants retained Donna Gibson and countersued for fraud and fraud by non-disclosure. Dkt. 20. After a lengthy court battle spanning three years, over 416 docket entries, and something like six in-person court hearings, on 11/1/2024 the Court disposed of both, finding that “fraud by nondisclosure” . . . “involves failure to disclose defects in real property” and their fraud claim failed 55.6% of the 9 elements – the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup> – with whiffs on the 8<sup>th</sup> and 9<sup>th</sup>.

Gibson knew the counterclaims were frivolous in 2021, and she unreasonably and vexatiously multiplied the proceedings in the case pursuing them. This motion asks her and her

1 clients to compensate Barton and the Court for the resulting excess costs and expenses incurred  
2 as allowed under 28 U.S.C. §1927 and the Court’s inherent power.

3 **The standard for awarding sanctions under 28 U.S.C. §1927**

4 A 2024 Ninth Circuit case [Caputo v. Tungsten Heavy Powder, Inc.](#), 96 F.4th 1111, 1155  
5 (9th Cir. 2024) sets the standard for awarding sanctions under §1927.

6 . . . it is plainly clear that "a finding that the attorneys recklessly raised a  
7 frivolous argument which resulted in the multiplication of the  
8 proceedings" justifies § 1927 sanctions . . . Bad faith is present when an  
9 attorney knowingly or recklessly raises a frivolous argument . . . We  
10 have characterized frivolous arguments for the purposes of § 1927  
11 sanctions as ones that are "baseless and made without reasonable and  
12 competent inquiry" or made up of "legal or factual contentions so weak  
13 as to constitute objective evidence of improper purpose." . . . an  
14 argument is patently lacking in any basis in either law or fact, it can be  
15 fairly characterized as "frivolous" for the purpose of a § 1927 sanction  
16 award . . . As Hagans himself acknowledged, as an attorney for THP, it  
17 was his responsibility to ensure the veracity of the arguments he was  
18 approving on the company's behalf.

19 Recklessly raising a frivolous argument or meritorious claim for a harassing purpose  
20 opens the door to §1927 sanctions. [Hilliard v. Twin Falls Cnty. Sheriff's Office](#), 1:18-cv-00550-  
21 CWD, 5 (D. Idaho Mar. 29, 2024).

22 **The standard for awarding sanctions under the Court’s inherent power**

23 The §1927 threshold is lower than the Court’s inherent power requirements:

24 The Court may utilize its inherent authority to assess attorney fees when  
a party has “acted in bad faith, vexatiously, wantonly, or for oppressive  
reasons.” Id. at 766 (internal marks and citation omitted). Unlike Section  
1927 sanctions, inherent power sanctions require more than just mere  
recklessness. See, e.g., Fink, 239 F.3d at 993-94. However, recklessness  
“combined with an additional factor such as frivolousness, harassment,  
or an improper purpose” allows a court to exercise its inherent  
sanctioning power. [Hilliard v. Twin Falls Cnty. Sheriff's Office](#), 1:18-cv-  
00550-CWD, 7 (D. Idaho Mar. 29, 2024)

1 **Argument**

2 Both standards are met here. The Court dismissed their fraud counterclaim over five  
 3 missing elements and two whiffs. How could an attorney in good conscience file a two-count  
 4 counterclaim – and litigate it to the eve of trial – when one is missing more than half the required  
 5 elements and the other one is premised on a Minnesota law? While an attorney is not required to  
 6 fully substantiate or develop all vital facts before filing, *[w]hat is required of lawyers, however,*  
 7 *is that they inform themselves about the facts of their clients' cases and the applicable law and*  
 8 *determine that they can make good faith arguments in support of their clients' positions.* [In re](#)  
 9 [Girardi](#), 611 F.3d 1027, 1036 (9th Cir. 2010). Perhaps Gibson performed a sufficiently  
 10 reasonable inquiry at the onset, but somewhere in the discovery process she should have  
 11 abandoned the counterclaims. Instead, she recklessly or intentionally misled the court that they  
 12 were meritorious sufficient to impose sanctions under §1927 and the Court's inherent powers.

13 **In 2021 Gibson knew or should have known the 1<sup>st</sup> element of fraud couldn't be met**

14 The first element of fraud is a representation of existing fact and to succeed the  
 15 Defendants had to show Barton consented to the calls they initiated. Barton sued under 47 CFR  
 16 § 64.1200(c)(2) and the defense under 64.1200(c)(2)(ii) requires a signed, written agreement  
 17 between the consumer and *seller*. Because they initiated the solicitations without a signed,  
 18 written agreement between the consumer and *seller*, the Court rightly held: “Defendants /  
 19 Counterclaimants cannot claim they had a representation of consent to send text messages from  
 20 the non-partner entities to begin with.” Dkt. 416, 7:18-20.

21 Gibson had a duty to know this because express consent is not an element of a plaintiff's  
 22 prima facie case but is an affirmative defense for which the defendant bears the burden of proof  
 23 – [Van Patten v. Vertical Fitness Grp., LLC](#), 847 F.3d 1037, 1044 (9th Cir. 2017). Once Gibson  
 24 knew or should have known her clients did not have a *signed, written agreement between the*  
*consumer and seller* everything she did to prosecute the counterclaims was frivolous.

1 And Gibson certainly knew they didn't because the Defendants admitted that every single  
2 entity they solicited for wasn't on the list of partners. This is one example of over 91:<sup>1</sup>

3 4 5 6 7 8 9	<p>7 <b><u>ADMISSION NO. 120:</u></b> Admit or deny that Honest Loans was not on the list of partners 8 who might contact someone who "opts in" by providing a telephone number to website 9 <i>educationschoolmatching.com</i> during the times you allege Barton "opted in" and caused you 10 injury.</p> <p>11 <b><u>ANSWER:</u></b></p> <p>12 Admitted that Honest Loans, who is not a party to this lawsuit, does not appear to be 13 on the list of partners, but points out that it would have clearly been covered by the privacy policy agreed to when opting-in.</p>
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10 Then Barton followed up about their privacy policy exception (NB189):

11 12 13 14 15 16 17 18 19 20 21 22 23	<p>12 <b><u>Introduction to Interrogatory No. 3:</u></b></p> <p>13 In your answer to Admission No 120, propounded in Counter-Defendant's Fourth Request for 14 Admission to Counter Plaintiff Xanadu Marketing Inc., you said "Admitted that Honest Loans, 15 who is not a party to this lawsuit, does not appear to be on the list of partners, but points out that 16 it would have clearly been covered by the privacy policy agreed to when opting-in".</p> <p>17 <b><u>INTERROGATORY NO. 3:</u></b></p> <p>18 Please quote the privacy policy text that supports your assertion "it would have clearly been 19 covered by the privacy policy agreed to when opting-in". Only quote the portion of the privacy 20 policy that supports your answer.</p> <p>21 <b><u>ANSWER:</u></b></p> <p>22 See attached.</p>
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22 <sup>1</sup> Dkt. 407-9 page 7. These eventually migrated to Dkt. 362 ¶88, ¶89, ¶90, ¶91, ¶92, ¶93, ¶94, ¶157, ¶158, ¶159,  
23 ¶160, ¶161, ¶162, ¶163, ¶167, ¶168, ¶190, ¶191, ¶192, ¶193, ¶194, ¶195, ¶196, ¶197, ¶198, ¶199, ¶200, ¶201, ¶202,  
24 ¶203, ¶204, ¶206, ¶206, ¶207, ¶208, ¶209, ¶210, ¶211, ¶212, ¶213, ¶214, ¶215, ¶216, ¶217, ¶218, ¶219, ¶220, ¶221,  
¶222, ¶223, ¶224, ¶225, ¶226. ¶263, ¶264, ¶265, ¶266, ¶267, ¶300, ¶301, ¶302, ¶303, ¶304, ¶305, ¶306, ¶307, ¶308,  
¶309, ¶310, ¶311, ¶312, ¶313, ¶314, ¶315, ¶316, ¶317, ¶318, ¶319, ¶320, ¶321, ¶322, ¶323, ¶324, ¶325, ¶326, ¶327,  
¶328, ¶329, ¶330, ¶331, and ¶332. See Barton's declaration on the last page.

1 The following image is a complete and accurate copy of the “See attached.”:

2 USE OF COLLECTED INFORMATION: We may use your Personal Information for all  
3 legal purposes including but not limited to; (i) to verify your identity; (ii) to send  
4 you commercial or marketing messages; (iii) to provide you with content specific  
5 to your interests; (iv) to follow up with specific transactions initiated on the  
6 Website; (v) to conduct internal research and reporting; (vi) to monitor and  
7 improve use of the Website; (vii) to improve Our products and services; (viii) to  
8 deliver targeted advertisements; (ix) to respond to your comment questions, or  
9 inquiries; or (x) to thank you for feedback.

10 In addition, We may use your Personal Information in the following ways:

11 Significant Announcements. We may use your name and e-mail address  
12 information to inform you via e-mail message of any significant changes to the  
13 Website or services or other significant information that may affect your use of  
14 the Website or services.

15 Product Information and Sales Promotions. We may use your e-mail address  
16 information that you have provided to contact you about product and service  
17 offers by Us or Our affiliates.

18 Special Sales Promotions from Third Parties. From time to time, We may use the  
19 information you have provided to alert you of special sales promotions from Our  
20 business partners and/or other companies.

21 And in Interrogatory #4 below they explained why, in their opinion, their privacy policy  
22 (immediately above) allowed them to solicit for entities not on the partner list: Delfgaww thought  
23 their privacy policy language allowed them to solicit for unnamed “*business partners and/or*  
24 *other companies*”. Of course this is contrary to § 64.1200(c)(2)(ii) and [Williams v. PillPack](#)  
[LLC](#), 644 F. Supp. 3d 845, 849 (W.D. Wash. 2021-2022). “In *Pillpack*, the court held that

1 failure to list the name of the seller of product on the relied upon opt-in registry site did not  
 2 comply with the TCPA's consent requirement, thus alleging a TCPA violation.” Moore v. Club  
 3 Exploria, LLC, 19 C 2504, 11 (N.D. Ill. Aug. 17, 2023).

4	<b>Introduction to Interrogatory No. 4:</b>
5	In your answer to Admission No 120, propounded in Counter-Defendant’s Fourth Request for
6	Admission to Counter Plaintiff Xanadu Marketing Inc., you said “Admitted that Honest Loans,
7	who is not a party to this lawsuit, does not appear to be on the list of partners, but points out that
8	it would have clearly been covered by the privacy policy agreed to when opting-in”.
9	<b><u>INTERROGATORY NO. 4:</u></b>
10	Please explain how the privacy policy text you quoted in Interrogatory No. 3 above entitles
11	Honest Loans to initiate a phone call to someone who “opted in” on
12	<i>educationschoolmatching.com</i> .
13	<b><u>ANSWER:</u></b>
14	When a person giving their consent to be contacted checks the box they are stating that
15	they have read and agree to the Terms of Service and Privacy Policy of of the website.
16	The Privacy Policy explains how the information provided is used and states that it may be used, "From time to time, We may use the information you have provided to alert you of special sales promotions from Our business partners and/or other companies. "

16 Barton sued under 47 CFR § 64.1200(c)(2) and the consent defense 64.1200(c)(2)(ii)  
 17 requires a signed, written agreement between the consumer and *seller*. Gibson knew her clients  
 18 didn’t have that long before the closure of discovery on September 23, 2022 (Dkt. 194).

19 **Likewise, she quickly knew the 3<sup>rd</sup> element of fraud couldn’t be met**

20 If the Defendants have been consistent with one thing, it is that they could not *prove or*  
 21 *disprove the identity of an opt-in; rather they “simply assumed all the information submitted*  
 22 *during the “opt in” process was correct” and took “no steps” to verify the identity of the opt-in.*  
 23 Dkt. 416, 8:8-10. Delfgaww testified to that on 1/4/2022 (NB183 Interrogatory #14) and

1 admitted it on 1/11/2024.(Dkt407-8 page 17 #93), and Dkt. 416 quoted more recent testimony  
2 “there is currently no way for us [t]o confirm[] that information,” *Id* at 8:15.

3 **Factors four, five, and six failed for the same as the first**

4 Moving on to the other elements of fraud, factors four and five fail for  
5 the same reasons—if Defendants/Counterclaimants cannot prove the  
6 falsity of the statement, they cannot prove Barton’s knowledge of the  
7 falsity, nor his intent for them to act on it. Factor six likewise assumes  
8 the falsity of the representation. Dkt 416, 10:17-20.

9 Gibson knew that her clients didn’t have consent to text solicitations from non-partner  
10 entities and she, like her clients, had no idea who asked for the calls.

11 **The Defendants’ countersuit was retaliatory, and Gibson maliciously prosecuted it**

12 Delfgauw was asked if his countersuit was based on evidence or retaliation. Viewed in  
13 isolation his answer *I countersued you because your suit caused me damages* isn’t solely  
14 indicative of bad faith but under the totality of the circumstances it fits their bringing and  
15 pursuing a frivolous counterclaim. See his Dkt. 398-1 deposition testimony starting at 54:4:

16 Q: I want to focus on what evidence you have that I opted in.

17 A: Again, I wasn't sitting next to you. I'm not an omnipotent God, where I can exist and see  
18 that you did this. I don't really know -- I feel like that's kind of a setup trick question. Of  
19 course I wasn't sitting next to you. I wasn't anywhere -- the first time I ever met you was  
20 today. Q. Well, you sued me, so if you sued me, you would have done a reasonable  
21 investigation before filing --

22 A: I countersued you based off of your suit towards me, just to be accurate. Correct? I mean  
23 am I wrong on that?

24 Q: Well, I don't know why you did it, if you're telling me why you did it, but when you  
countersued me, what information do you have that I opted in?

A: The information -- I mean I guess I feel like -- do I have -- was I sitting next to you? No.  
So I can't say that I physically saw you do it. The  
information that I have was based on the information provided through TCPA University and  
the patterns that we saw regarding, "Oh, this is most likely a serial litigator."

Q: So you countersued me just because I have sued other people not because you had  
evidence that I actually opted in?

⋮

1 A: THE WITNESS: Okay. I countersued you because your suit caused me damages. That's  
2 why I countersued you.

3 By 6/6/2024 Gibson certainly knew the counterclaim had no basis in law or fact, but she  
4 maliciously prosecuted it anyway with falsity. For example, in her Dkt. 369 SUMMERY OF  
5 FACTS she represented to the Court:

6 After collecting 18 communications, **for which he consented to be contacted,**  
7 and determining what parties it was he wished to sue and Plaintiff filed this  
8 lawsuit.

9 But 17 days earlier she signed her name to admitted facts #170, #171, #172, #173, #174,  
10 #175, #176, and #177 in Dkt. 362 page 11, saying the opposite. And she had known for years  
11 her clients were unable to know the identity of anyone opting in on the website. *Their own*  
12 *declaration in opposition to summary judgement confirms that “there is currently no way for us*  
*[t]o confirm[] that information,” referring to opt-in identity.* Dkt 416, 8:14-16.

13 She also said: *[n]ot only has Plaintiff committed fraud, but he has also blatantly and*  
14 *obviously abused and manipulated the legal process and federal statutes* although she knew her  
15 clients didn't have consent to solicit Barton for the non-partner entities.

16 **Gibson frivolously alleged Barton gave her clients**  
17 **consent for the calls they initiated to support the counterclaims**

18 At some point in 2021 Gibson knew or should have known her clients didn't have written  
19 consent to initiate calls for the non-partner entities and she knew her clients actively disavowed  
20 any knowledge of the identity of who asked for the calls. Yet she still vexatiously pursued the  
21 frivolous counterclaims. *An action becomes frivolous when the result appears obvious, or the*  
22 *arguments are wholly without merit.* [Galen v. Los Angeles](#), 477 F.3d 652, 666 (9th Cir. 2007)  
23 and a party can be sanctioned if it continued to litigate after it clearly became so. [Christiansburg](#)  
[Garment Co. v. Equal Emp't Opportunity Comm'n](#), 434 U.S. 412, 422 (1978)

1 The counterclaims directly drove many docket entries, but worse, the frivolous  
2 counterclaim tactic multiplied the effort required to address nearly every subsequent proceeding.  
3 The Court’s inherent powers and §1927 also apply to *tactics once a lawsuit has begun*. [\*In re\*](#)  
4 [\*Keegan Management, Securities Litigation\*](#), 78 F.3d 431, 435 (9th Cir. 1996).

### 5 **The relief sought**

6 Somewhere in 2021 their counterclaims became frivolous and pursued in bad faith. Once  
7 they knew they initiated the calls for entities not on their partners list, it was game over for the  
8 counterclaims but they doggedly ploughed ahead. It is difficult to apportion the time and costs  
9 Barton and the Court spent between the claims and counterclaims but they greatly complicated  
10 resolving the claims. Absent the counterclaims the docket count would be far less than 416,  
11 there would have been less than six in-person court hearings (with more to come along with  
12 redoing all the pretrial prep and paperwork), and Barton would have spent far less on mileage  
13 expenses, depositions, trial exhibits, and time. Barton is not an attorney but §1927’s  
14 compensations are expansive – it includes “costs” and “expenses”, and the Court can award  
15 Barton and itself financial sanctions under its inherent powers as it has done numerous times  
16 already.

### 17 **Conclusion**

18 At some point in 2021 Gibson knew or should have known the Defendants had solicited  
19 for non-partner entities for which they didn’t have consent, and the other claim wasn’t grounded  
20 in Washington State law. Litigating the counterclaims beyond that point in 2021 could only be  
21 unreasonable, vexatious, and in bad faith. This meets the threshold for the Court to compensate  
22 Barton for the costs and expenses incurred in defending it under §1927 and for the Court to  
23 sanction both Gibson and her clients under the Court’s inherent powers to dissuade this wild  
24 goose chase from happening again.

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s/ Nathen Barton  
(signed)

November 10, 2024  
(Dated)

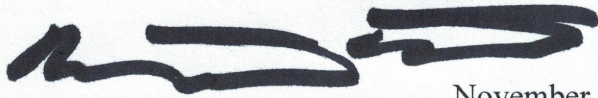
Nathen Barton  
(469) 347 2139  
4618 NW 11<sup>th</sup> Cir  
Camas WA 98607  
FarmersBranch2014@gmail.com

**Declaration of Nathen Barton**

My name is Nathen Barton and I live at 4618 NW 11<sup>th</sup> Cir, Camas WA 98607. I am over the age of eighteen, and otherwise competent to be a witness in this matter. Except as expressly set forth herein, I make this declaration in my personal capacity and based on my personal knowledge.

1. All of the interrogatory questions and response snapshots are true and accurate copies of the originals, including the “see attached” document.
2. The request for admissions and response snapshot is a true and accurate copy of the original.
3. Although only one admission is shown, in over 91 different requests for admission they admitted that each entity advertised for was not on the partner list.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing statements are true and correct.



Signed by Nathen Barton

November 10, 2024  
Date

Signed in Camas Washington  
Clark County

**I. CERTIFICATE OF SERVICE**

I hereby certify that on November 10, 2024, I electronically filed the foregoing with the Clerk of the Court using the Court’s CM/ECF System, which will automatically generate a Notice of Electronic Filing to all parties in the case who are registered users of the CM/ECF System, which includes the Defendant. The said Notice of Electronic Filing specifically identifies recipients of electronic notice.

/s/ Nathen Barton

Nathen Barton