No. 19-20267

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOANNA BURKE; JOHN BURKE,

Plaintiffs-Appellants,

v.

OCWEN LOAN SERVICING, L.L.C.,

Defendant-Appellee.

On Appeal from the United States District Court
For the Southern District of Texas, Houston Division;
USDC No. 4:18-CV-4544

BRIEF OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants

Joanna Burke, et al

Pro Se Appellants

John Burke
Joanna Burke

Defendant-Appellee

Ocwen Loan Servicing, L.L.C.

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STATEMENT REGARDING ORAL ARGUMENT

This is an appeal from a trial court order dismissing the Burkes' case 'for want of prosecution' [ROA.1073]. Plaintiffs-Appellants submit that oral argument is not necessary to restore the civil action to its correct place - on the docket at the State court - and ensure it proceeds without further interruption or delay to a jury trial. *Middlesex County Ethics Comm. v. Bar Assn.,* 457 U.S. 423 (1982);

"A proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."

The reason; As Justice Clarence opined in *Gramble v US* 587 US ___ (2019), the Texas Constitution and United States Constitution both[1] command superiority. As the lower court clearly erred in its decision(s) which is usurped by both state and federal Constitution(s), no oral argument is necessary to correct these superior written word(s).

[1] For example, see: THE HERITAGE GUIDE TO THE DUE PROCESS CLAUSE; "From the 1940s onward, however, the view that the Fourteenth Amendment's Due Process Clause literally "incorporates" the text of various provisions of the Bill of Rights rapidly gained steam; by the 1960s, what we know today as the "incorporation doctrine" was complete. Under current law, most provisions of the Bill of Rights are deemed applicable to the states in precisely the same manner that they are applicable to the federal government.

This assumes the Court of Appeals judicial panel will adhere to the Constitution and refrains from substituting the law for their own pleasure.

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III. INTRODUCTION

Joanna and John Burke come before this Court of Appeals for the Fifth Circuit in a civil action as Appellants. Let the record show, this is the *first time* that the Burkes' have arrived on appeal after *pursuing* a civil action to prevent a miscarriage of justice. It provides an opportunity for this court not to repeat *Priester*[2], a published opinion which also negatively impacted many related cases.

The Priester case was recently overturned by the highest *state* court, the Supreme Court of Texas, relying on the correct interpretation of the *Texas Constitution, home equity loans and property law,* and presented legal arguments of attorney Connie Pfeiffer of Beck Redden, who also represented the Burkes' at the lower court for '*Deutsche II*.' (18-20026, 5th Cir. (2018)).

As documented in an oral transcript from the lower court, [in *Deutsche II*, 4:11-cv-01658, Doc. 126, Status Conference] Ms. Pfeiffer agreed with the lower court magistrate judge that this Courts' reverse and remand decision in '*Deutsche I*' (15-20201, 5th Cir. (2016)) was in error. Florida's 4th District Court of Appeals has

[2] *Priester v JPMorgan Chase*, 18-40127, 5th Cir., 2019

reversed many foreclosure judgments [which this Court would affirm for the financial institutions].[3]

In order to discuss this and the reason why the Burkes' are before this Court requires a detailed synopsis of prior legal events.

1. Former Hon. Judge Stephen Wm. Smith

As this Court is aware, the Burkes' were successful in defending a fraudulent foreclosure by *Deutsche Bank National Trust Co*., a straw man, not once, but twice at the lower court. The Appellants had the benefit of an honest judge in that case, former Magistrate Judge Steven Wm. Smith, [now Director of the Fourth Amendment and Open Courts, at the CIS (STANFORD LAW SCHOOL)].

Smith was slain by his own and ridiculed by this Court for standing up for the Burkes' and other Texas homeowners in a similar situation, who applied the correct

[3] See THJF.ORG article by Lynn Szymoniak, an attorney and government whistleblower who defeated the likes of *Deutsche Bank* and the known *system* of fake evidence and affidavits. She was awarded $18 million and is still advocating for homeowners like the Burkes.

interpretation of nearly two centuries old property law[4] and in full ethical compliance with the judicial oath.[5]

As now fatefully recorded, this Court reversed the judgments of the lower court in defiance of over 170+ years of good standing property and contract law, which even Connie Pfeiffer, Partner at Beck Redden, denounced[6] and in favor of erroneous precedent and *erie guess*[7].

Former Judge Smith, in his Opinion on Remand, separated his findings into three categories; (i) "...compel the conclusion that the panel's *Erie guess* about the validity of the assignment is clearly erroneous and, if followed, would work a manifest injustice. (ii) "The difficulty with the dual capacity theory as an *Erie guess* is that no Texas court at any level has ever adopted it." (iii) See *Harris County v.*

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[4] *See* Tex. R. Civ. P. 736.1(d)(3)(B); Texas Property Code § 51.0001(4); *Leavings v. Mills*, 175 S.W.3d 301, 308-10 (Tex. App. 2004).

[5] 28 U.S. Code § 453 & TEXAS OATHS OF JUSTICES AND JUDGES.

[6] Ms. Pfeiffer: " . . . And I do want to make an important clarification, which is we don't necessarily agree that the Fifth Circuit was correct in reversing this Court's judgment. . . . And I will add – and Ms. Hassan Ali might want to comment on this as well – I do think the Court's hypothetical and understanding of centuries of common law is correct, and it may just be that MERS is unique." – *Deutsche Bank v. Burke*, Transcript, Doc. 126, p. 34/35. Case 4:11-cv-01658, Filed in TXSD on 02/06/17.

[7] See *Priester v JPMorgan Chase*, 18-40127, 5th Cir., 2019 – "Erie guesses are just that—guesses. Hopefully we get them right, but sometimes we get them wrong...John and Bettie Priester were on the losing end of what turned out to be an incorrect Erie guess." (This error is applicable to a precedent case e.g. a published opinion, 12-40032).

MERSCORP Inc.,[8] No. 14-10392, 2015 WL 3937927 (5th Cir. June 26, 2015) (making an *"Erie guess"* that the Texas Supreme Court would interpret Texas Local Government Code § 192.007 as imposing no duty to record assignments of deeds of trust when the interests in related promissory notes are transferred).

2. The Constitution is the Superior Law

US Supreme Court Justice Clarence Thomas opined in a separate and concurring opinion very recently in *Gramble v US* 587 US ___ (2019).

> "When faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it. This view of *stare decisis* follows directly from the Constitution's supremacy over other sources of law—including our own precedents. That the Constitution outranks other sources of law is inherent in its nature…. Notably, the Constitution does not mandate that judicial officers swear to uphold judicial precedents. And the Court has long recognized the supremacy of the Constitution with respect to executive action and "legislative act[s] repugnant to" it…. The same goes for judicial precedent. The "Judicial Power" must be understood in light of "the Constitution's status as the supreme legal document" over "lesser sources of law."… The same principle applies when interpreting statutes and other sources of law: If a prior decision

[8] Note: Fifth Circuit Judge James Ho's spouse, Allyson N. Ho of Morgan Lewis & Bockius LLP, represented Merscorp, said that argument failed as a matter of law. "The deeds of trust themselves could not be clearer," Ho said in *Dallas County, Texas, et al v. MERSCORP, Incorporated*, 14-10392 (5th Cir., 2015). She has also represented *Deutsche Bank National Trust Company* for abandoning properties in Illinois after they gutted the homeowners and then the title/government insurance payouts; *Cleveland v. Deutsche Bank Natl. Trust Co*., 2014 Ohio 1948, Ohio Court of Appeals.

> demonstrably erred in interpreting such a law, federal judges should exercise the judicial power—not perpetuate a usurpation of the legislative power—and correct the error. A contrary rule would permit judges to "substitute their own pleasure" for the law."

3. The Absence of Integrity and Humanity at the Fifth Circuit

Despite a central location in the heart of the South [Louisiana], this court is part of the Union[9], a judiciary ultimately reporting to the US Government and organized under the United States Constitution and laws of the federal government.

As history recorded, William Tecumseh Sherman was a Union General during the American Civil War, a banker and he was later allowed to be admitted to the bar as an Attorney without formal qualification based on his 'experience and connections', *e.g.* his adopted father was Charles Robert Sherman, a lawyer who sat on the Ohio Supreme Court.

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[9] "Texas draws its authority not from the federal government, but from its status as a dual sovereign within the Union. That being the case, the Supreme Court has recognized that preserving comity between the dual sovereigns that make up our union is a core value of our Constitution.

This comity demands "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.""

– Jeffrey C. Mateer, First Asst AG, Texas OFFICE OF THE ATTORNEY GENERAL'S LETTER TO WAYS & MEANS COMMITTEE, MAY 15TH, 2019

Sherman was also a professor, who, for a short period, taught at what is now called Louisiana State University ("LSU"). When he resigned to take up his Union soldier role to 'uphold' the Constitution of the US Government, shortly thereafter the Union went on to invade Louisiana, it is recorded he personally asked that the main LSU building be spared.

William Tecumseh Sherman, however, was not that type of character by nature. He was most remembered for his "scorched earth" policy of decimating Georgia from Atlanta to Savannah, killing the fathers and sons [the confederate soldiers], evicting families and children from their homes and burning them, confiscating their livestock and cutting off their supplies.

The unemotional General believed that the intentional eradication of the buffalo should be encouraged as a means of weakening Indian resistance to assimilation. He voiced this view in remarks to a joint session of the Texas legislature in 1875.

Since the Great Recession of 2008, this Court and the US Government has invoked their own “scorched earth” and “buffalo” policies by ordering homeowners and their families illegally out of their homesteads and communities. Let it be known, this grave decision based on corporate greed has failed and has turned the economy into recession for a second time. A more damning legacy is that once proud

citizens are now displaced and financially ruined. They have witnessed the illegal takings of their property and liberties. They are now antagonists.

Like Sherman in battle, it shall be etched into history that this judiciary and much of the circuit[10] has the blood of the South and Texas on its' hands. Those responsible, who claim the South and Texas as their home, yet inflict such wretchedness against their own citizens, are correctly labeled as turncoats and shall be remembered as such.

In the Burkes' case, this Court not only incorrectly mandated an order of foreclosure with an Order Authored by a first-panel Judge, Catharina Haynes, who presided on the second panel and criticized former Judge Smith[11], but without justification or provocation, personally decided to make unfounded, abhorrent and salacious criticisms on two elderly citizens of the State of Texas in the 'per curiam' order. They abused Senior Citizens who are in declining health due to the ongoing

[10] For example, if you look at the recent events of Ditech Financial, a troubled non-bank mortgage servicer in bankruptcy. Current foreclosure cases were stayed until the proceedings were finalized or a resolution found. In this case, a PRESS RELEASE of their sale was issued **June 18th, 2019** and yet Judge Sim Lake, in the case of *Henry v. Ditech Financial LLC* (4:18-cv-04414) District Court, S.D. Texas found for Ditech against the homeowner in an Order and Judgment on **June 14th, 2019.** As former British Ambassador Kim Darroch would most likely note, that was an unfortunate and premature action by Judge Sim Lake, on a *leaked cable*. Citizens would call it perversion.

[11] See Order in 18-20026, p.4 "The conduct here is extraordinary conduct that would lead to chaos if routinely done."

stress and mental anguish over the civil action and who were merely protecting and defending their homestead[12] interests via counsel. A shameful act.

In Justice Clarence's words, this 3-panel "substituted their own pleasure for the law".

IV. STATEMENT OF JURISDICTION

This is an appeal of a final judgment from a district court exercising jurisdiction pursuant to 28 U.S.C. § 1332. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

[12] "The lack of protection from wrongful foreclosure is especially troubling because of what is at stake. The home is at the center of the American dream and is the subject of much of American jurisprudence...

These questions are especially salient in light of the behavior of national banks in the last two decades. During that time, banks participated in, or, in many cases caused, the subprime crisis (the worldwide market collapse due to mortgage securitization), the creation of shell recording companies to avoid the cost of public recording of property ownership, robo-signing (an automated signature process that is simply perjury in relation to foreclosures), widespread servicing abuse and rampant questionable foreclosures.

However, despite growing concerns, banks have initiated in excess of ten million foreclosures since 2008." - JOHN CAMPBELL, CAN WE TRUST TRUSTEES? PROPOSALS FOR REDUCING WRONGFUL FORECLOSURES, 63 CATH. U. L. REV. 103 (2014).

V. STATEMENT OF THE ISSUES

The Appellants, aware of the obvious prejudgment and bias[13] of this Court, but with no possible alternative venue, now focus on the case at hand, and would summarize the complaint into four stated errors.

Notice; If this Court decides it has appellate jurisdiction to consider this case and then moves to either directly remand the case to the State court or remands to the lower court to remand to the State court, then b., c., and d., are moot:

a. STATE v FEDERAL:

The Appellee removed the civil action against *Ocwen Loan Servicing LLC* ("*Ocwen*"). The Appellants argue this should have been remanded back to State Court.

However, the Appellants first address this Courts standing and jurisdiction to review this appeal based on Appellee claims of non-service.

[13] See *Deutsche II*, 18-20026, Doc. 00514734347, p.7

b. OCWEN IS A SEPARATE LEGAL ENTITY:

This Court has previously ruled, [new] civil action against *Ocwen* is required, if homeowners are to obtain relief from a Mortgage Servicer. As such, the lower court erred in asserting 'res judicata'.

c. ABUSE OF DISCRETION:

The lower court is guilty of a series of questionable administrative ministerial errors. As such, and for the sake of justice, this case should be remanded directly to the State Court, or in the alternative, the District Court, with instructions for remand. In the case of last resort, reinstatement on the lower court docket, continuance to a jury trial without any further delay, in compliance with the laws, ministerial acts and judicial oath.

(1) Motion Stacking and an Unresponsive Court

Ocwen removed the case to the lower court on 3rd December 2018. The first activity from the Court was to set the Scheduling Conference on 4th December [to see if the parties attended].

By the time of the Conference, there was a stack of pending motions, including a Motion to Dismiss by *Ocwen* filed 7 days after removal [ROA.162], a Motion to Remand [ROA.196] and Motion to Stay [ROA.190] by the Burkes' along with objections to both by *Ocwen*, ROA.238 and ROA.243.

Then *Ocwen* filed an unauthorized Motion to Supplement which was without leave of the lower court [ROA.253]. In that period there was also activity and motions pertaining to the scheduling order and conference.

(2) The Conference was a Ruse

Both sides appeared on February 6th, 2019 and were advised the only activity would be to Schedule. The stacked motions would not be discussed and not even a future hearing was set on the pending motions. A minute entry was recorded [ROA.488]. The Conference lasted 3 minutes for two cases (*Burke v Ocwen* and *Burke v Hopkins*) [ROA.1121].

(3) The Court Side-Swiped the Burkes' Due Process with a Roman Candle Order

Believing the lower court that the Schedule was set, the Burkes' left the conference anticipating a Jury Trial in 2020 and would be preparing for the same based on the schedule order. That turned out to be fake.

The Court had merely hoped that the Burkes' would not show, in order to dismiss the case. But the Burkes' did show, for the 3 minute hearing [ROA.1121].

This meant the lower court would have to steer the Burkes' into what would be a dismissal for want of prosecution ("DWOP").

The Court issued a 'Roman Candle'[14] Order two weeks later and the writing was clearly on the wall thereafter as the Court rebuffed any and all attempts by the Appellants to be heard.

Due process was denied repeatedly.

[14] Airborne term when your Paratrooper colleagues' parachute fails to open during a jump.

(4) Motion to Substitute Service and Motion for Extension of Time to Effect Service

Recognizing the fact *Ocwen* denied receiving service from the State court and aware the 90-day limit to effect service was fast approaching, the Burkes' diligently filed the above motions [ROA.498]. The lower court slept on.

(5) The Burkes Killed a Forest to Wake Up the Court but to No Avail

On 5th of March, 2019, the Burkes filed a 'Master Motion' [ROA.530] with a list of separate motions and exhibits in response to the Roman Candle Order. This required a lot of time, preparation, paper, ink and in the end resulted in a large box of legal motions and exhibits being delivered to the Court and opposing counsel.

The Court slept on.

(6) If You're Extremely Ill and Elderly, Forget About any Compassion from a Judge Who's Wife is a Doctor

On 14th March, 2019, the Burkes' filed a Motion for Extension of Time [ROA.1039] and to Stay Proceedings

[ROA.1068] as Joanna Burke was extremely ill and the Burkes' legal diary timeline was overloaded. A short recess of 60 days would help Joanna Burke recover.

This woke up the Court – to deny the motion for extension of time [ROA.1072] and as precontrived, DWOP the case on the same day, 19th March, 2019 [ROA.1073].

Note: A week later, on 27th March, Joanna Burke was rushed to hospital via Ambulance and the Doctor said she most likely would have died without urgent care and treatment. (See Affidavit Doc. 29, *Burke v Hopkins*, 4:18-cv-04543, SDTX).

(7) The Alarm Finally Went Off, But the Radio was Playing Johnny Cash; 'Bad News'

The Burkes filed their Motion to Reinstate and Notice of Hearing [ROA.1075] (as Judge Hittner had been especially shy, never appearing, nor allowing any hearings) but on the very next day, April 16th, 2019, the music lyrics the Burkes' woke up to from the radio started out; "Well bad news travels like wildfire, good news travels slow…"

Judge Hittner denied the motion in record time, in less than 24 hrs [ROA.1095]. The Burkes' timely appealed to this Court [ROA.1096].

d. DWOP WAS IN ERROR & CITIZENS ARE JUDICIOUS

The lower court erred in dismissing the case 'for want of prosecution' ("DWOP") [ROA.1073].

There is no benefit in skirting the obvious and being diplomatic in Texas Courts as highlighted by the recent opinions of this Court.

That stated, the shenanigans of the lower court in this case is a dishonor to the judiciary and to common sense. The people are smarter than the court give them credit and this case was a 'Hit-n-Run' ruse the moment it was redirected to the Federal court. There was never going to be a jury trial.

VI. STATEMENT OF THE CASE

After the Mandate of this Court was issued on November 28, 2018 in case *Deutsche Bank National Trust Co., v Burke,* 18-20026, Doc. 00514740251, (*"Deutsche II"*) it was entered by Senior District Judge David Hittner precipitously in the lower court records without comment nor discussion.

1. The State Court Civil Actions

The Burkes' filed two new law suits in State Court, one against *Ocwen Loan Servicing, LLC ("Ocwen")* (which is the subject of this appeal) and a separate civil action against Mark Daniel Hopkins, Shelley Luan Hopkins and Hopkins Law[15], PLLC, a shell company of the BDF Law Group, otherwise known as Barrett, Daffin, Frappin, Turner & Engel, LLP ("BDF Hopkins"). See *Deutsche II,* 18-20026, Doc. 00514734347 p. 3-4.

These civil actions were both removed from the State on 'federal question' jurisdiction by BDF Hopkins and they both parachuted into Judge Hittners' courtroom. [ROA.6]

2. The Parties

The parties over the history of the cases which are raised in this matter are (a) *Deutsche Bank National Trust Co.*, a straw man (b) *IndyMac Bank*, Texas largest failed and now defunct original lender and mortgage servicer who committed lender fraud and forgery as documented by the Burkes' and also in many court records in

[15]Also well known to the Fifth Circuit and in conflict with legal ethics, where Shelley Hopkins uploaded a picture to her twitter profile, of her and Mark Hopkins on the steps of the John Minor Wisdom Courthouse and announced;

"Who has the sample appellee briefs in the Fifth Circuit website? Yep...we do :)" – See; *Deutsche II*, 18-20026, Doc. 00514734347 p. 12-13.

circuits and reports across the country[16] (c) *BDF*[17], a foreclosure mill and Supreme Court lobbyist firm who regularly present to legislators[18] with suggestions on how to expedite foreclosures and allow them to maintain a control over trustee duties in foreclosures over independent auctioneers ('who are not lawyers and inexperienced in such matters')[19] until loss at the bench trial in 2015 (d) *BDF Hopkins* thereafter, and (e) *OneWest Bank*, mortgage servicer, after FDIC sold the unsecured debt to Steve Mnuchin's (now US Treasury Secretary in Trumps Cabinet) investors for 24c on the dollar,

[16] See *Deutsche II*, 18-20026, Doc. 00514734347 p. 8-10.

[17] Which included the head of the BDF foreclosure litigation department, Shelley 'Hopkins' [nee Douglass] until she left BDF and married Hopkins and joined Mark Hopkins at his 'firm'.

[18]See Tommy G. Bastian of BDF as one example of a lobbyist always promoting new House Bills and successfully so, to expedite foreclosures with less documentation and protection for homeowners (more recently Brian Engel and Robert Forster); HTTPS://DSNEWS.COM/UNCATEGORIZED/03-17-2016/THE-BDF-LAW-GROUP-TEXAS-LEGISLATIVE-UPDATE

[19] See Brian S. Engel of BDF; "I do not point this out to disparage or impugn auctioneers. But it is demonstrably true that foreclosure process, in light of complex new servicing requirements and the dynamic litigation environment that prevails, requires the involvement of qualified trustees and specialized law firms more than ever."; HTTPS://CAPITOL.TEXAS.GOV/TLODOCS/83R/HANDOUTS/C0402014052710001/8A48CE5A-A4D0-4959-92E4-CA80F2A5A955.PDF

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Mortgage Servicing Asset Sales

Mortgage Servicing Assets, A/K/A Mortgage Servicing Rights, are sales of those rights and obligations arising out of the retained obligations of a failed Insured Depository Institution. MSA assets shown below are sold and transferred to the servicer of the winning bidder shortly after Bank Failure and can be sold with or without a variety of representations and warranties. If possible, the Rep and Warrants exposure may be mitigated as part of the sale negotiations. It is usually the case that pricing and structure of these transactions can utilize the assets of the private sector for sale expertise in this asset class.

Sale ID	Site Name	Date Sold	No. of Loans	Book Value	Sales Price (Gross)	Winning Bidder	Address
2008-10007-MSA	Washington, DC	2/28/2009	682,097	$2,435,283,223	$596,086,229	One West Bank	One West Bank, PO Bx 7056, Pasadena, CA 91109

and (f) somewhere in between, around the end of 2013, *Ocwen* appears and claims an interest as mortgage servicer, replacing *OneWest Bank* servicing, but they have never shown any authority in this case, to this date.

However, as a 'party', they are hence subject to litigation as they have claimed legal interest.

49. Ocwen's own senior leadership has repeatedly recognized and acknowledged REALServicing's failures.

50. For example, in an internal communication in 2014 with Ocwen's Chief Executive Officer, Ocwen's Head of Servicing described Ocwen's technology as:

> **An absolute train wreck. I know there's no shot in hell, but if I could change systems tomorrow I would**. I can't tell you the number of hours I and others spend on basic servicing technology blocking and tackling. I'm not talking about differentiators here. I'm talking about getting system to stay online, escrow analysis to work, letters to print, etc. It's ridiculous. (Emphasis added.)

[ROA.660 *Ocwens*' Own Admission]

3. The Burke's Strategy to 'Flush Out' the 'Real Parties'

The stratagem of the Burkes' is evident for any person with basic legal knowledge to deduce. If you sue the mortgage servicer (Ocwen) and the debt collector (BDF Hopkins) simultaneously but separately, you should be able to 'flush out' the 'real parties'. Here, until the civil action was crudely dismissed in error, it flushed out BDF Hopkins. In other words, the Burkes' allegations and arguments remain pure. This is not, and never has been, a debt owned by *Deutsche Bank National Trust Co*., a straw man.

a. Hopkins are Unlicensed and Unbonded Debt Collectors and Ocwen is a Registered Debt Collector

BDF must be red-faced right now. Imagine their star attorneys, with combined experience of nearly half a century in Texas law and who are foreclosure and debt collection lawyers at Hopkins Law, PLLC, skipping out on $50 for a license to legally trade in Texas.

You see, BDF is a debt collector which *does* hold a Surety Bond with the State of Texas. Inexplicably, Hopkins is a debt collector *without* a surety bond [ROA.12, ROA.26, ROA.30, ROA.121, ROA.304] representing BDF Hopkins for a debt they own <u>*or*</u> they represent *Ocwen*, who purchased 'the debt' and are not members of MERS, did <u>*not*</u> record [in the land registry] and declare their interest legally to ensure

the case did not end after the bench trial and before appeal. If legally recorded, they could not have appealed in *Deutsche I* (15-20201) [ROA.937].

Despite several months seeking answers from the Office of the Attorney General[20] pertaining to clarification of the legislation surrounding the surety bond, to this date they have refused to even directly acknowledge nor answer the citizens of the State's questions, in breach of their RESPONSIBILITIES and Constitution.

BDF Hopkins also committed fraud and forgery in order to appeal the *Deutsche Bank* case, by withholding evidence, which was judicially noted in a response motion by the Burkes' after Hopkins tried to modify the Fifth Circuit Judgment[21] and subsequently is documented in the *Ocwen* case and argued in the *Burke v Hopkins,* 4-18-cv-0543, SDTX.

Otherwise, you would expect *Deutsche Bank* to object to BDF Hopkins dual role, in conflict with the Pooling & Servicing Agreement ("PSA")[22], which they failed to do as straw parties. *Deutsche Bank* has remained conspicuously silent.

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[20] *Burke v. Hopkins* (4:18-cv-04543) District Court, S.D. Texas, Doc. 27, p. 90

[21] *Deutsche II*, 18-20026, Doc. 00514734347, p.8; which also questioned how Hopkins can represent Deutsche Bank and which the Burkes' question again in this filing, e.g. How can Hopkins represent *Ocwen* in this case?

[22]DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE OF THE RESIDENTIAL ASSET SECURITIZATION TRUST 2007-A8, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-H **UNDER THE POOLING AND SERVICING AGREEMENT DATED JUNE 1, 2007.**

Implementing smoke and mirrors, gaming the system with shell companies and hidden facts, these foreclosure mills are working the legal system to its fullest potential for illicit gains.

It is well known and admitted in court records across the State and country that BDF Hopkins has many alter-egos and registered companies, similar to *Ocwen*, which the NY Superintendent derided; [ROA.938].

See HTTPS://SEC.EDGAR-ONLINE.COM/RESIDENTIAL-ASSET-SECURITIZATION-TRUST-2007-A8/8-K-CURRENT-REPORT-FILING/2007/06/29/SECTION5.ASPX

The underwriting agreement dated June 29, 2007 between the Depositor and Bear, Stearns & Co. Inc. (the "Underwriting Agreement") – Bear Stearns & Co. was a historic investment bank which collapsed due to over-exposure in the MBS marketplace, with the much-publicized sale to JPMorgan Chase.

Note; This agreement is updated on the sale of Indymac Bank to Steve Mnuchin's consortium, including Michael Dell, George Soros and Co., yet never referenced in any filings by BDF Hopkins. Nor, in the intervening decade, where banking, non-banking, mortgage servicing and legislative acts been introduced, have any addendums nor any new agreements been referenced.

This is despite their false and unproven reliance on the fact the Burkes' loan was part of the unsecured debt sale to Mnuchin which was shortly followed by the Indymac known strategy of returning homeowners rent payments to spark confusion and throw homeowners into debt *e.g.*

Fifth Circuit Judge Priscilla Owen acknowledged this scheme as a common and recurring complaint by homeowners; "I've seen at least 50 of these claims . . . " (quote begins at 19.52 mins + of oral hearing recording) *Diaz v. Deutsche Bank Nat'l Trust Co.*, Case No. 15-41372 (5th Cir. 2016) (pet. denied)

during the greatest recession in Texas, in order to allow these new owners to steal homes via [foreclosure] using fabricated documents and untruthful mortgage servicer and debt collecting attorney affidavits in this circuit.

The new agreements were called; SERVICING AGREEMENT BY AND BETWEEN INDYMAC VENTURE, LLC AND ONEWEST BANK, FSB, DATED AS OF MARCH 19, 2009 AND; LOAN SALE AGREEMENT BY AND BETWEEN THE FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR INDYMAC FEDERAL BANK, FSB AND ONEWEST BANK, FSB DATED AS OF MARCH 19, 2009.

It is true, a lawyer, like any other professional, may very well be an employee of a private corporation. It is not unusual for a big corporation to hire a staff of lawyers as its in-house counsel, pay them regular salaries, rank them in its table of organization, and otherwise treat them like its other officers and employees. At the same time, it may also contract with a law firm to act as outside counsel on a retainer basis. The two classes of lawyers often work closely together but one group is made up of employees while the other is not.

This fits BDF Hopkins profile, wherein BDF Law Group / Barrett Daffin Frappier Turner & Engel, LLP, also has many alter-egos *e.g.* National Default Exchange L.P., aka "NDEX" / NDEX West LLC[23], a title company offering trustee[24] services [owned by BDF Hopkins per SOS company registration records and also a Wells Fargo Bank N.A. shareholder] retained Hopkins & Williams P.L.L.C.[25] / Hopkins Law, PLLC / et al as 'outside counsel'.

[23]See E*dstrom v. NDEX West*, *Wells Fargo Bank, et.al.*, Case No. 20100314. Superior Court of California, Eldorado County.

[24] See footnote in Court of Appeals for the Third District, Austin, Texas Opinion, in *Trevarthen v New Century Mortgage Corp., et al*, 03-12-00790-CV, wherein it names Mark Hopkins as the substitute trustee.

[25] See Court of Appeals for the Fifth Circuit, Dallas, Texas Opinion, in *Hornsby and all Occupants v Secretary of Veteran Affairs*, 05-11-01075-CV, where BDF represented the Secretary at trial and where Hopkins & Williams P.L.L.C. and Mark Hopkins presented the appeal.

However, this Court agreed with the IRS in *Donald G. Cave v Commissioner of Internal Revenue*, 11-60390 (2012), that Caves legal firm, describing its employees as 'independent contractors', was to evade employment taxes and benefits payable if they were deemed employees. To the clients and outside world, the 'staff' appeared to be on 'the payroll', but they were not. However, these staff were employees who were using their skills in a set profession for one company, which meant they should be on the payroll and paying the correct taxes.

Here, Hopkins resume identifies his skill as an attorney in the foreclosure vertical and there is no disputing that is the core business of BDF. A cursory review of the court records in Texas and even reciting the Oral transcript from *Deutsche Bank v Burke*, Hopkins proudly states his resume and experiences, as also identified on HOPKINSLAWTEXAS.COM website.

In summary, Hopkins obtains, if not all, the majority of his referrals from BDF and as such the IRS would view the Hopkins firm Partners and staff as 'employee[s]' *e.g.* it is not a separate legal entity, which is a sham company setup to *evade* taxation (illegal) and also create more smoke and mirrors in legal cases (unethical).

Indeed, recently, at least two of BDF partners now work in an office suite beside Hopkins Law, PLLC at 3809 Juniper Trace, Austin. This is further confirmation of the smoke and mirrors, shell-game and alter-egos.

> On or about February 26, 2014, Benjamin M. Lawsky, Superintendent of the NYDFS, addressed a letter (the "February 26th Letter") to the Company's General Counsel, Timothy Hayes, seeking documents and information concerning transactions with the Company's affiliates stating, in relevant part, that:
>
> > The Department's ongoing review of Ocwen's mortgage servicing practices has uncovered a number of potential conflicts of interest between Ocwen and other public companies with which Ocwen is closely affiliated. Indeed, ***the facts our review has uncovered to date cast serious doubts on recent public statements made by the company that Ocwen has a "strictly arms-length business relationship" with those companies.*** We are also concerned that this tangled web of conflicts could create incentives that harm borrowers and push homeowners unduly into foreclosure. As such, we are demanding additional information on these issues as part of our review.

[ROA.357-358]

(1) Howard v PNC

In recent times, the BDF Hopkins illicit enterprise has once again shown the Burkes' the depths of illegal and unlawful acts of their star attorney, Mark Daniel Hopkins. In the case of *Howard v PNC*[26], Hopkins literally mirrors his counterfeit acts in *Deutsche Bank National Trust Co. v Burke et al*. Specifically, BDF Hopkins states;

"The basis of the Howards' claim for wrongful foreclosure **stems from PNC's accidental use** of its pre-merger name within its Notice of Acceleration and the resulting Substitute Trustee's Deed.", and; "**After trial, PNC discovered a piece of**

[26] PNC MORTGAGE, A DIVISION OF PNC BANK, N.A. SUCCESSOR TO NATIONAL CITY BANK, AND NATIONAL CITY MORTGAGE, A DIVISION OF NATIONAL CITY BANK OF INDIANA V. JOHN HOWARD AND AMY HOWARD, 05-17-01484-CV, Court of Appeals, Fifth District of Dallas, Texas, Opinion and Judgment entered on June 24, 2019.

evidence (a proof of mailing of the Notice of Acceleration to Mr. Howard) that had previously been unable to be located. PNC therefore moved for the admission of the additional evidence (CR 818 – 894)."

On reflection of the *Deutsche Bank v Burke* case, (*Deutsche I*), and immediately **after a bench trial** with no evidence or witnesses, Hopkins appeared insistently (and without proper notice) for the appeal and he conveniently and miraculously **"found a piece of evidence"** [which was not presented as evidence during the 4 years prior[27] to the bench trial] and moved the lower court to open up the record **so Mark Hopkins could file the "original wet ink note"** [ROA.18-20026.908]. And as admitted and well documented, he also withheld evidence from the Burkes and the Court.

In conclusion, in the two known, current and high-profile, high revenue and highly contested Texas foreclosure cases which were judged in favor of the homeowners at the lower court, and where Mark Hopkins was the attorney-of-record for the appeal, in both cases, he came to the lower court(s) and immediately presented fake documents and demanded they be allowed into evidence. In both cases the honest judges refused.

[27] MR. BARRETT: "Barrett Burke, for example, is an entirely paperless outfit. We don't keep paper." - Barrett of BDFTE, Foreclosure Mill, Addison, Texas. ROA.277

This regular *system* of BDF Hopkins fabricating false documents is a criminal offence. This has been submitted as a supplemental motion (with leave of the lower court requested) in the *Burke v Hopkins* case by USPS Priority Mail on 13 July, 2019 (as ECF Filing was denied). The Burkes' wish to judicially notice this court of the same.

Mark Hopkins is a classic Rambo-Lawyer[28], implementing a *system*[29] which duplicates Stern, who was *disbarred* for exactly the same acts detailed herein. He is a liar and a thief who commits fraud and forgery in civil actions in this circuit. It should be fully investigated by the relevant authorities. See *Oakwood Mobile Homes, Inc. v. Cabler*, 73 S.W.3d 363 (Tex. App. 2002), Court of Appeals of Texas;

> "This Court noted the exception to the doctrine of res inter alios acta in *Durbin v. Dal-Briar Corp*. stating, "prior acts or transactions with other persons are admissible to show a party's intent where material, if they are so connected with the transaction at issue that they may all be parts of a *system*, scheme or plan." *Durbin v. Dal-Briar Corp*., 871 S.W.2d 263, 268 (Tex.App.-El Paso 1994, writ denied)

[28] "When this abusive practice—sometimes referred to by lawyers and judges as "Rambo-Lawyering"—occurs during litigation, parties are equipped with several tools under the rules of civil procedure to thwart improper behavior and move the proceeding into civil territory. However, when attorney misconduct or abusive discovery tactics result in favorable judgments to the offending parties, the available remedies under the rules diminish substantially, and the party against whom the judgment was entered is now faced with a challenging legal hurdle." - FRAUD ON THE COURT AND ABUSIVE DISCOVERY, DAVID R. HAGUE, 16 NEV. L. J. 707, ASSISTANT PROFESSOR OF LAW, SOUTH TEXAS COLLEGE OF LAW.

[29] "The corrected assignment was respondents [Stern's] attempt to conceal and correct the prior fraudulent assignment…" ROA.318-319

> (citing *Underwriters Life Ins. Co. v. Cobb*, 746 S.W.2d 810, 815 (Tex.App.-Corpus Christi 1988, no writ)). Moreover, the rules of civil evidence allow the admission of evidence of the habit of a person, or of the routine practice of an organization, if the evidence is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. See Tex.R. Evid. 406; see also *Durbin*, 871 S.W.2d at 268."

Hopkins has no ethical boundaries and his attorney wife and ex-BDF foreclosure manager is complicit in these ignoble schemes and *systems* which, for example, have been seen before during her tenure at BDF, e.g. the *Givens*[30] case.

(2) NDEX, a BDF Hopkins Entity and Alter Ego

BDF Hopkins[31] operate a lucrative and conflicting shell company [NDEX] to act as foreclosure trustees.[32] "In many states, trustees ["housejackers"] are deeply imbedded in every step of the foreclosure process. While the law requires the trustee

[30] See footnote 61, p.37 of the original complaint in *Burke v Hopkins* case, SDTX.

[31] FOR EXAMPLE, SEE; MAY 27, 2014, PUBLIC HEARING OF THE BUSINESS AND INDUSTRY COMMITTEE OF THE TEXAS HOUSE OF REPRESENTATIVES, TESTIMONY AND REMARKS OF BRIAN S. ENGEL, BDF HOPKINS.

[32] Example cases; *Wells Fargo Bank, N.A. v Campbell, et al*, 11-1742-CC4, In the County Court at Law 4, Williamson County (2011), *Acevedo v Federal National Mortgage Association*, 03-15-00215-CV, Court of Appeals for the Third District, Austin (2015), and *Rodriguez et al v Citimortgage Inc.*, 03-10-00093-CV, Court of Appeals for the Third District, Austin (2011)

to act as a neutral, the trustee typically takes on multiple roles, many of which are contradictory."[33]

b. Pro Se Homeowner Foreclosure Cases Rarely Reach Trial in Federal District Courts in Texas

The judiciary is complicit, as they are refusing to allow discovery and trial to homeowners pursuing justice in Texas Courts as evidenced in this case and the many hundreds of cases before it.

As confirmed in this case, if the parties show up to the 'Scheduling Conference', shortly after the judges will rule on pending Motions to Dismiss by the lawyers for the lender/servicer is the norm in Texas District Courts.

The Appellants have reviewed the public records. The visual data presents stark and depressing evidence which confirms an embattled homeowners' foreclosure case is very unlikely ever to reach trial, especially if you are *pro se*.[34]

[33] JOHN CAMPBELL, CAN WE TRUST TRUSTEES? PROPOSALS FOR REDUCING WRONGFUL FORECLOSURES, 63 CATH. U. L. REV. 103 (2014).

[34] See Oral Transcript in *Deutsche II*, 4:11-cv-01658, Doc. 126, re fmr Judge Smith; "It's unusual to go to trial where one side is represented by counsel and the other side is not.".

It will be dismissed as soon as possible after the scheduling hearing. This case is proof of that statement. There is absolutely no justification in law that this case was even remotely a DWOP case, as discussed herein.

c. The Warrilow Case Confirms BDF Hopkins are not just Unethical, they are Corrupt

Hopkins should not be representing himself in the BDF Hopkins case[35], yet he is, despite the conflict of interest[36] which is evident. Hopkins, his wife and firm claim to represent the mortgage servicer, *Ocwen*, and the Bank/Trustee, *Deutsche Bank*. Representing the Bank and the Mortgage Servicer per the Pooling and Servicing Agreement ('PSA') when there is contentious litigation is unrealistic if *Deutsche Bank National Trust Company* was a real party of interest in the civil action.

[35] "The practice of attorneys furnishing from their own lips and on their own oaths the controlling testimony for their client is one not to be condoned by judicial silence; **nothing short of actual corruption can more surely discredit the profession.**" *Warrilow v. Norrell*, 791 S.W.2d 515 (Tex. App. 1990)

[36] "Because Schwager is a witness to what promises to be a hotly contested issue of fact, she obligated to withdraw, and does so now before anyone raises it as a complete sign of respect for this Judge, and the United States District Court." Case assigned to the Hon. Judge David Hittner, *James v. Calkins*, 4:16-cv-01910, Doc. 33, (2016).

d. The Document BDF Hopkins Relies Upon Confirms they are Perjurers.

The PSA clearly states, which Hopkins relies upon, that the attorney hired is 'responsible to the Bank/Trustee' first and foremost. Where there is contentious litigation, the attorney should not represent both, as in the scenario outlined herein, e.g. the Bank may have a malpractice, errors or omissions, professional indemnity insurance claim against the mortgage servicer and/or the attorney(s), hence the conflict of interest. For example, the trustee attorneys generally are contracted to maintain a malpractice insurance[37] and the same is required in the PSA and related agreement(s) for law firms representing the trustee and law firms representing mortgage servicer(s).

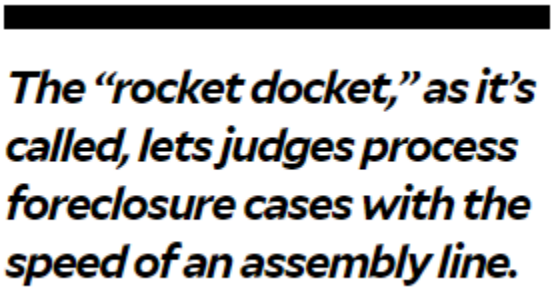
Despite the fact engagement letters are not protected by attorney immunity[38] nor work product doctrines, [ROA.387-389] no Texas foreclosure lawyer or firm, to-date, has had to lay down an engagement/retention agreement letter in Texas due to the sweeping and unconstitutional interpretations of the "attorney immunity[39] and

[37] See HTTPS://WWW.SECINFO.COM/DSVRM.S1MQ.8.HTM with reference to HTTPS://AGREEMENTS.REALDEALDOCS.COM/CONTRIBUTION-AGREEMENT/AMENDED-AND-RESTATED-SERVICES-AGREEMENT-2139587/ citing; 4.6 Maintenance of Malpractice Insurance

[38] See *Burke v. Hopkins* (4:18-cv-04543) District Court, S.D. Texas, Doc. 27, p. 94-97 (Attorney Immunity)

[39] This Court refusing to Certify a question to the Supreme Court of Texas (think *Priester*) and applying questionable sweeping attorney immunity; "Greenberg's winning argument in the district

work product doctrines", the Burkes went to Florida, where David Stern, who operated a corrupt foreclosure mill mirroring BDF Hopkins, was caught red-handed for his illegal ways, despite his lies [ROA.318-319]. His firm was shuttered and he was subsequently disbarred by the State Bar in Florida. The evidence of fake documents and forgery in that case only became public thanks to the journalistic efforts of MOTHER JONES who have refused to yield to government pressure to suppress the damning evidence and to help citizens who were being evicted in what became infamously known as the "ROCKET DOCKET" court system for foreclosures in Florida.



On review of the STERN RETENTION AGREEMENT WITH FREDDIE MAC, the following sections should be emphasized; (i) **3** Freddie Mac / Servicer /

court was that *attorney immunity* under Texas law precluded the plaintiffs' claims…The issues here are primarily about Texas law. We first discuss why we will not certify and then move to our analysis of Texas law…" *Official Stanford Invstr Com, et al v. Greenberg Traurig, LLP*, 17-11464 (2019).

Attorney Client / Designated Counsel Relationship (ii) **4** Litigated Matters (iii) **5** Contacts (iv) **9** Obtain Powers of Attorney from Servicers (v) **10** Malpractice Insurance Coverage and (vi) **12** Conflicts of Interest.

Despite all of these facts being disclosed and presented at the lower court, Hopkins has consistently maintained in both civil actions that BDF Hopkins represents **all** parties. That holding is untenable **if** *Deutsche Bank* was a real party, as BDF Hopkins are known as legal defenders of mortgage servicers in this State and act as trustees at foreclosure sales. One just needs to peruse the hundreds of cases in this circuit identifying BDF and BDF Hopkins representing the mortgage servicer for confirmation.

Quizzically, there are times when the circuit and this Court have meshed the servicer and the bank, two distinct and different functioning entities, into one name, or referenced *Deutsche Bank* as the Mortgage Servicer *e.g.* Smith questioned this courts' opinion in *Deutsche I* and it had to be reissued for that reason, as the courts opinion became nonsensical (*Deutsche II*, 4:11-cv-01658, Doc. 110, Order to Supplement the Record) ;

"At several points in its opinion, the panel asserted that MERS granted foreclosure authority to *Deutsche Bank* as the "mortgage servicer.""

It is clear from the documentation and information publicly available, Banks/Trustees legal staff would not be involved in such matters - they delegate.

For BDF Hopkins to claim representation of both the bank/trustee and mortgage servicer/non-bank is perjury and as the Burkes' pleaded with sufficiency in law, the lower court to compel, to dismiss the case is an abuse of discretion.

VII. STANDARD OF REVIEW

Remand to State Court; See *ii Statement Regarding Oral Argument and ix Argument*. Res Judicata; "The res judicata effect of a prior judgment is a question of law that this court reviews de novo." *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 571 (5th Cir. 2005) and *Ambre Bodle v. TXL Mortgage Corporation, et,* 14-20224 (5th Cir. 2015). Abuse of Discretion for DWOP; is under a clear abuse of discretion standard. *MacGregor v. Rich*, 941 S.W.2d 74, 75 (Tex. 1997). See also *Veterans' Land Bd. v. Williams*, 543 S.W.2d 89, 90 (Tex. 1976).

See Standard of Review generally; W. Wendell Hall, Standards of Appellate Review in Civil Appeals, 21 St. Mary's L.J. 865, 893 (1990); *Tex. Ass'n of Business v. Air Control Bd.*, 852 S.W.2d 440 (Tex. 1993).

VIII. SUMMARY OF THE ARGUMENT

The controlling issue is the Constitution is the superior law and as such the order of the lower court is usurped. As property is a State protected matter, removal to federal court by BDF Hopkins on the basis of 'federal question' should have been denied.

Additionally, a *res judicata* fueled Motion to Dismiss[40] seven short days later by Appellee should never have been considered, and in any event the Judges' ruling was wrong in law.

Plus, *Ocwen* is a separate entity and privity is not relevant to the new facts of the new civil action.

Moreover, the Abuse of Discretion is continuous as it started from the date it parachuted into Judge Hittners court. More detail is provided in the following argument and further reference may be taken from the record on appeal.

The lower courts' Dismissal for Want of Prosecution was a ruse, it was a premeditated act and an abuse of discretion.

[40] "[G]enerally a res judicata contention cannot be brought in a motion to dismiss; it must be pleaded as an affirmative defense." *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 570 n.2 (5th Cir. 2005); see also *Webb v. Town of St. Joseph*, 560 Fed. Appx. 362, 366 n.4 (5th Cir. 2014) (per curiam) ("[I]t is not clear that the district court was even correct to consider Defendants' res judicata defense in the motion to dismiss.").

IX. ARGUMENT

A. The removed civil action against Ocwen Loan Servicing LLC ("Ocwen") should have been remanded back to State Court.

1. Service of Process & Jurisdiction

As discussed in the opening of this brief, BDF Hopkins, claim [disputed] authority to act as *Ocwen's* counsel, crudely removed the original State court filed civil action to the Federal District Court for SDTX using what is known as a 'SNAP REMOVAL', alleging *Ocwen* was not served. The Burkes' disputed this vigorously and continually, but their motions fell upon a silent court.

A review of ROA.498-532 should provide this Court an accurate and detailed synopsis of the Burkes' many failed attempts to get any type of response regarding the disputed service of process from either the lower court or BDF Hopkins, counsel for Appellee.

The Appellants refer to the lower courts' own actions as acceptance of jurisdiction. For whatever reason, Judge Hittner did not address the service of process dispute. However, opposing counsel attended the Scheduling Conference [ROA.488] and Judge Hittner signed the first of three Roman Candle Orders' [ROA.489] on 22nd Feb., 2019. This, in effect, confirms the lower court asserted jurisdiction and between the time of this Order and that of the final Judgment [ROA.1073], and the final Dismissal Order [ROA.1095, 16th April, 2019] the

Appellee did not continue to, or, object to the jurisdiction, and waived it by appearance at the Scheduling Conference. Thus, this Court has jurisdiction to hear an appeal from a final Order and Judgment.[41]

2. The Constitution Usurps Denial of Remand

Next; a state court action may be removed to federal court only if the action could have been brought in federal court originally and the case of *Snook et al v Deutsche Bank AG*, et al, SDTX, Case No. H-05-2694 (2005), which was remanded to State Court is a good example of refusing to invoke 'federal question' jurisdiction.

> "The ***Deutsche*** Defendants removed the suit to this Court pursuant to 28 U.S.C. § 1441, asserting that Plaintiffs' state law claims raise a federal question under 28 U.S.C. § 1331. Federal question jurisdiction is normally invoked when the plaintiff pleads a cause of action created by federal law.
>
> However, the Supreme Court has recognized that "in certain cases federal question jurisdiction will lie over state-law claims that implicate significant federal issues." *Grable*, 125 S. Ct. at 2367. The mere presence of a federal issue "does not automatically confer federal-question jurisdiction." *Merrell Dow Pharms. Inc. v.Thompson*, 106 S. Ct. 3229, 3234 (1986). Rather, "[i]t has become a constant refrain . . . that federal jurisdiction demands not only a contested federal issue, but a *substantial one*, indicating a serious federal interest in claiming the

[41] See 28 U.S.C. § 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States.").

> advantages thought to be inherent in a federal forum." *Grable*, 125 S. Ct. at 2367.
>
> Thus, in order to support federal question jurisdiction, the federal issue effecting removal must necessarily raise an "actually disputed and substantial" federal question. Id. Moreover, even if a disputed and substantial federal issue is present, a court may exercise federal question jurisdiction over state law claims only if the claims are of a type that "a federal court may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." Id. at 2368. In other words, federal question jurisdiction exists when "a state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." Id."

In the Burkes' case, Snr. Judge Hittner was silent on the reasons he denied remand, but any answer provided would fail to disturb the facts that remand should have been granted, similar to the *Snook* case. He also did not allow the Burkes' to amend their pleadings *before* his first opinion and Order, ROA.489. The Burkes' had asked for that due process in ROA.24.

The federal questions identified by Appellee in ROA.238 are not substantial but merely in compliance to obtain accounting from the alleged mortgage servicer, in the form of a Qualified Written Request ("QWR"), the terms and response times are controlled by the said Acts. See 12 U.S. Code § 2616. State laws unaffected;

> "The Bureau may not determine that any State law is inconsistent with any provision of this chapter if the Bureau determines that such law gives greater protection to the consumer."

This clearly reads that this Code is equivalent in State law and it is not intended to usurp it so to rely on it is the same as relying on the State law.

Also, in the Burkes' Prayer section, they ask for judgement and rulings in Texas law (State law), not Federal law.

The Burkes' also interpret the Constitution of both the State and Federal law for 'citizen rights' as; If state law affords more rights to residents, the state law is presumed to prevail *and* for issues under jurisdiction regarding real estate and property matters, the state laws also prevail.

If this is misinterpreted by the Appellants, then ROA.24 footnote should apply to *pro se*, or the law is not providing citizens due process and breaching their constitutional rights.

The facts presented are irrefutable. Property law is defined by the State, and the Supreme Court of Texas has made it abundantly evident that the '*Erie Guesses*' emanating from this Court regarding the States' property laws in recent times are found to be bad guesses and costly errors.

Thus, to prevent further bad guesswork, the correct forum for such matters should be State courts.

Besides, reliance is not just on the *Snook* case. Judge Jennifer Walker Elrod[42] of the Court of Appeals for the Fifth Circuits' address to Harvard, which was subsequently converted to a short book, has been cited by fellow Judges in Opinions[43] in this Court and throughout the circuit, titled "***Don't Mess with Texas Judges***". Judge Elrod also advocates the Appellants arguments in this case; that the State Court is the right forum for cases concerning the homestead laws of Texas;

> "One might argue that Hamilton's toast to the state judiciaries was merely a calculated response to the Anti-Federalists, but it is quite revealing of popular sentiment that such a staunch defender of national power felt the need to defend state courts as "the immediate and visible guardian of life and property."

Then, there's the case of *Leggette v Washington Mutual Bank*, *FA, et al.,* (2005), 3:03-CV-2909-D[44] in NDTX Court;

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[42] However, Judge Elrod, who was part of the following 3-Panel, did not follow her resounding affirmation of the State Courts in her Harvard speech and book of words;

The Fifth Circuit has chosen not to follow this *test* of materiality when a federal question is the basis for removal in one of its most recent rulings, *Susan Sissom v. Countrywide Home Loans, Inc*., et al, 18-50343. Judges Elrod, Ho and Barksdale, per curiam.

[43] Judge Don Willett; "For a fascinating discussion of the importance of state courts, I commend my colleague's superb article on the subject. JENNIFER W. ELROD, DON'T MESS WITH TEXAS JUDGES: IN PRAISE OF THE STATE JUDICIARY, 37 HARV. J.L. & PUB. POL'Y 629 (2013)." *Thompson v Dallas City Attorney's Office*, 17-10952 (2019) – "She sued in both state court (raising only state claims) and federal court (raising only federal claims). Both suits arose from the same operative facts."

[44] Memorandum Opinion and Order granted. Motion to Remand filed by Joyce A Leggette. In this removed action asserting a state-law claim for wrongful foreclosure, plaintiff's motion to remand presents the question whether exercising *federal question jurisdiction* would disturb a

> "Invoking "foreclosure by private power [is] a traditional creditor's remedy under state law." *Roberts v. Cameron-Brown Co*., 556 F.2d 356, 359 (5th Cir. 1977)."
>
> "Regulating the foreclosure of real property has traditionally been the province of states, despite federal regulation of some sectors of the lending industry, and "there are state law remedies available to protect mortgagors from unconscionable mortgages." Id. at 361." and the Judge continues; "It is improbable that Congress, having opted not to create a private right of action for violations of the NHA or regulations promulgated thereunder, would have intended to shift from state to federal courts potentially massive numbers of foreclosure-related lawsuits."

In *Watson v. City of Allen, et al.*, 821 F.3d 634 (5th Cir. 2016) this Court held that the exercise of jurisdiction over the remaining state law claims was an abuse of discretion because the claims "substantially predominated" over the federal claims."

Here, the Burkes' claims substantially predominated over the federal claims based on the Constitution, which is superior to all laws. Property laws are driven by the State of Texas and failure to remand is a breach of the Burkes' Constitutional rights. See the *Watson* Opinion;

> "Texas courts have a strong interest in deciding whether Texas legislation comports with the Texas Constitution (and in defining the

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congressionally approved balance of federal and state judicial responsibilities. Concluding that it would, the court holds that it lacks subject matter jurisdiction and remands the case to state court. (see order, Doc. 43, for specifics) (Signed by Judge Sidney A Fitzwater on 10/19/05).

> contours of state law standing). On matters of Texas law, they speak with an authority rightly denied federal courts. *R.R. Comm'n of Tex. v. Pullman Co.,* 312 U.S. 496, 500, 61 S. Ct. 643, 645 (1941)."

In the Burkes' case, it revolves around foreclosure of a homestead, which this Court in the past has claimed is sacrosanct in Texas. See *McDaniel*[45], a federal court opinion ratifying the States own property laws.

Listening to Fifth Circuit Judge Catharina Haynes discussion with Connie Pfeiffer of Beck Redden during Oral Hearing; *Zepeda v Federal Home Loan Mortgage Corp*., 18-20336 (Oral Hearing on May 1, 2019, Opinion Pending). she confirms that Home Equity Loans (protected by the Texas Constitution), like the Burkes', are especially protected in Texas law, in part stating;

> "…I think Texas has a right to do that, it's how you even have a home equity loan industry in Texas is because of all these technical rules…"

The facts are clear, there are many laws specific to Texas for the purpose of protecting homeowners in Texas.

In other words, it involves matters of extreme importance to the State, Texas legislation and the Texas Constitution. This case should be remanded to the State court.

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[45] "In Texas, homestead rights are sacrosanct": *In the Matter of Fred W. McDaniel*, 70 F.3d 841 (5th Cir. 1995).

B. Ocwen is a Separate Legal Entity

The Burkes', compelled to cite federal/appellate law in this Court, refer to this Courts' ruling in *Christiana Trust, A Division v. Mary Riddle, 17-11429 (5th Cir. 2018)* (pub.) wherein it states in part;

> "The Court concluded that "[b]ecause only 'servicers' can 'fail to comply' with 12 U.S.C. §2605(k)(1)(E)[46], only servicers can be "liable to the borrower' for those failures." Id. at *8."

In the Burkes' case, they filed *for the first time*, an action in State Court against the criminally admonished enterprise known as *Ocwen Loan Servicing, LLC*. They are the named party, not *Deutsche Bank* and privity is not relevant to the disputed elements of this case - as discussed herein. Res Judicata does not apply as per Snr. Judge Hittners' Order when applying the Fifth's precedent rulings.[47]

Also, in the Order, he kept referring to the words *bar* and *could have* and *claim preclusion.* This works in tandem with *extinguish* when referencing res judicata. His application, however, is legally flawed. This would only apply if the prior case had been extinguished, but as the ruling was for the plaintiffs it was *merged*;

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[46] "fail to comply with any other obligation found by the BUREAU of CONSUMER Financial Protection, by regulation, to be appropriate to carry out the consumer protection purposes of this chapter."

[47] J*esse Burciaga, et al v. Deutsche Bank Natl Trust*, 16-40826 (pub.)

"If a judgment is rendered for the plaintiff, the cause of action is considered to *merge* in the judgment leaving only the judgment.

If a judgment is rendered for the defendant, the judgment operates as a *bar* to relitigation of the cause of action which is again considered *extinguished*.

Since the cause of action is extinguished by the lawsuit, res judicata precludes litigation of not only that which was pleaded but also any issue which might have been pleaded with regard to that cause of action.' In this way res judicata effects a true claim preclusion."

At common law, the doctrine is based on a concept of extinguishment of the cause of action. The Burkes' were defendants and *Deutsche Bank* were the plaintiffs and so his Order is wrong in this regard.

The main distinction in the Burkes' case is obvious. The difference is the Burkes' obtained judgment against *Deutsche Bank National Trust Co.*, in the underlying suit in the lower court and it is unknown where the Burkes' loan is to this day, and no verifiable evidence of any successor was ever identified. This was not proven by *Deutsche Bank National Trust Co*., in evidence before, or during the bench trial. As such, a judgment in favor of the Burkes in 2015 was rendered.

After reversal of *'Deutsche I'* by this Court based on an incorrect interpretation of the law, an *erie guess* and not based on the evidence, including

lender application forgery, the remand rules demanded specific restrictions on what *could* be discussed. In *Deutsche II* it excluded the mortgage servicer.

In summary, the Burkes' did not need to argue about *Ocwen* in that case which they were awarded judgment on other grounds against *Deutsche Bank National Trust Co*. In the Burkes' *pro se* experiences, you'll see that as being referenced as 'moot' in Orders issued by the Courts. The lower court judge ruled *Deutsche Banks'* claims were *void ab initio*.

As a result of the Fifths' remand, in *Deutsche II*, the Burkes' were legally restrained from discussing *Ocwen* / mortgage servicing violations, and so it required a new case.

Again, following the Fifth Circuit suggestion and while BDF Hopkins was attempting to obtain a State Order post judgment, relying on Tex. R. Civ. Proc. §309 and for a writ of possession §310, in *Deutsche II*, 18-20026, Doc. 00514684582, the Burkes prepared to file this new case.

As admitted by BDF Hopkins, they also attempted to modify *Deutsche II,* after the entry of judgment, from $615k to $1.1+m. The Burkes objected and this Court denied the motion as BDF Hopkins was attempting to alter the judgment based on facts presented for the *first time*, which this Court has stated many times, is not

allowed. See *Crum* ROA.544 and also *Deutsche II,* Doc. 00514734347 p. 11 (with footnote citations).

The Burkes then raised a civil action against *Ocwen* as they continue to claim $1.1m (as the mortgage servicer and in statements sent to the Burkes) when the judgment issued in favor of *Deutsche Bank National Trust Co* was for the sum of $615k. [ROA.24 and ROA.546-557]

Hence, this new claim cannot be barred by *res judicata*. See *Ambre Bodle, et al v. TXL Mortgage Corporation, et al*, "...the two cases do not involve the same subject matter, [nor party] and the second suit is therefore not barred by *res judicata*.".

See this Courts' Opinion in the published precedent case, J*esse Burciaga, et al v. Deutsche Bank Natl Trust*, 16-40826 (pub.);

> "A Rule 736 order "is without prejudice and has no res judicata, collateral estoppel, estoppel by judgment, or other effect in any other judicial proceeding." …and "Texas law provided the Burciagas an adequate procedure to challenge the Foreclosure Order by filing an independent suit in a court of competent jurisdiction. See Tex. R. Civ. P. 736.8."

Note: It should be remembered, the original complaint by *Deutsche Bank National Trust Co.*, sought a similar judgment.

The Burkes' complaint is directed at *Ocwen*, as discussed herein. In particular they have failed to show authority [ROA.196] for the Burkes' loan, it is all merely 'implied' and have continued to furnish loan statements to the Burkes' with a balance in excess of $1.1m US Dollars when the Order of this Court, at the request of BDF Hopkins, was for the sum of $615,000.00. [ROA.24]

The Burkes' dispute (i) the authority of *Ocwen* and (ii) The sum and accounting in its totality and the mortgage servicer is responsible for the accounting and day-to-day management of mortgage loans it oversees or controls, not the Bank, lender or Trustee[48]. [ROA.24] (iii) The letterhead of Hopkins Law which does not identify them as a PLLC [ROA.125-126 and ROA.83-84 and ROA.78 and ROA.181-182] in breach of TEX. DISCIPLINARY R. PROF. CONDUCT SECTION 7.01 FIRM NAMES AND LETTERHEAD VIOLATION(S).

The Burkes' civil action against *Ocwen Loan Servicing, LLC*, is in total compliance with the Opinion of this Court – "only servicers can be liable to the borrowers for those failures." As a result, Snr. Judge Hittners' *res judicata* Order fails in law and is in conflict with this Courts published precedents.

[48]See *Miller v BAC Home Loans Servicing L.P.*, et al, 12-41273. 5th Cir. (2013), reversing lower courts denial of accounting from a BDF Hopkins' *alter ego*, namely National Default Exchange ("NDE"), as substitute trustee - The *trustee* did not provide Miller requested accounting.

C. Abuse of Discretion.

The difficulty and scope of the abuse of discretion is voluminous based on the fact it started immediately after *Ocwen* moved the Burkes' case from the State Court and it parachuted into Judge Hittners' domain:

1. Master Motion

The Burkes' refer to the comprehensive "Master Motion" with Control Document and Index starts at ROA.530 and which outlines in great detail the Abuse of Discretion.

> The Burkes would advise that the Master Motion is the control document which references all the other enclosures listed above. Respectfully, the Burkes would request that the Motion to Clarify is reviewed first, followed by the Motion(s) for Reconsideration, then the Motion to Strike and finally, if necessary a request to certify for Interlocutory Appeal to the Court of Appeals to the Fifth Circuit.

ROA.542 above extract details the enclosures and in which sequence the Court should review. A couple of major issues are discussed before addressing the above control list;

a. Motion to Show Authority

Considering this is a new civil action against *Ocwen*, defended by a firm of lawyers who also claim to represent the Bank/Trustee, this is in direct conflict with the PSA as identified in the Burkes' filings.

Moreover, contract law and 'consideration' is integral to the core questions one would look to ask in most legal matters. Without consideration, there is no contract. To deny the Burkes' motion to show or compel authority just because *Ocwen* and their Counsel refuse, is in error.

The lower court is acting as a personal gatekeeper for the Appellee and preventing access to records which should be readily available to the Burkes' - and the Court - to prove authority and consideration.

In other words, *COMMON SENSE REALISM* should be applied. This formed the basis of the Founding Fathers Constitution, which was derived from a Scotsman named Thomas Reid;

> "If there are certain principles, as I think there are, which the constitution of our nature leads us to believe, and which we are under a necessity to take for granted in the common concerns of life, without being able to give a reason for them — these are what we call the principles of common sense; and what is manifestly contrary to them, is what we call absurd."

BDF Hopkins relies upon *Cervantes v. Ocwen Loan Servicing, LLC, 2016 WL 10951818 (S.D. Tex. 2016)* claiming the Burkes' cited TRCP and not FRCP. Certainly, this proves four points; (i) Pro Se's should be held to less stringent demands [ROA.483 – citing *Maty v Grasselli Chemical Co.*, 303 U.S. 197 (1938) and *Jenkins v McKeithen*, 395 U.S. 411, 421 (1959)] on knowing all the laws[49] and in order for due process and justice to be served,[50] and; (ii) it would appear that while preparing this brief, FRCP 17 covers the same question, and; (iii) BDF Hopkins cited TRCP[51] in their own motions to this Court, and; (iv) Federal Courts can review State Court actions and if they [incorrectly in this case] decide not to remand, they are competent in State law and thus can rule on any TRCP question:

[49] The court has sufficient discretion to take account of the special circumstances that often arise in *pro se* situations. See *Haines v. Kerner* 404 U.S. 519 (1972).

[50] "While Mr. Jemison may have limited knowledge of the law, this is true of nearly every person who files a pro se lawsuit. For this reason, pro se pleadings are held to less stringent standards than formal pleadings drafted by a lawyer and courts are liberal in reviewing pro se pleadings and motions, giving pro se individuals ample opportunity to amend if necessary, and granting generous extensions of time to comply with court orders." [Currently Chief] US District Lee H. Rosenthal, *Jemison v. CitiMortgage, Inc.,* 4:13-cv-02475 (2013), Doc. 15, SDTX.

This discretion was not applied by Judge Hittner in this case, who denied every single motion, including those submitting hospital records as proof of serious illness of an elderly party, namely Joanna Burke, or remained silent on them, denying the Burkes' their Constitutional rights to a fair hearing and jury trial. (This is even more disturbing when you read HITTNERS' SPOUSE IS A DOCTOR at the medical center in Houston).

[51] See Motion to Modify Judgment, 18-20026 [8898552-2], Oct. 2018, 5th Cir.

(a) Chief Judge Rosenthal of SDTX released an opinion on June 10th, 2019 allowing pendent[52] jurisdiction;

""Although the Fifth Circuit has not yet addressed pendent personal jurisdiction, this district and every circuit to decide the issue have approved the doctrine. *Sadagopan*, 2017 WL 2957908, at *6 (quotation omitted). Pendent personal jurisdiction exists when a court possesses personal jurisdiction over a defendant for one claim, lacks an independent basis for personal jurisdiction over the defendant for another claim that arises out of the same nucleus of operative fact, and then, because it possesses personal jurisdiction over the first claim, asserts personal jurisdiction over the second claim." Id. (quoting *Rolls-Royce Corp. v. Heros, Inc*., 576 F. Supp. 2d 765, 783 (N.D. Tex. 2008))."

And; (b) In *GEO-CHEVRON Ortiz Ranch 2, A Texas Joint Venture v. T.C. Woodworth* (2005), 5:04-cv-00138, Doc. 68, SDTX. Judge George P. Kazen remanded the case to the Texas State Court;

""The [US Supreme] Court further stated that "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the **pendent jurisdiction doctrine** – judicial economy, convenience, fairness, and comity – will point toward **declining to exercise jurisdiction** over the remaining state-law claims." Id. at 350 n.7."

[52] As state courts are concerned with federal law, so federal courts are often concerned with state law and with what happens in state courts. Federal courts will consider state-law-based claims when a case involves claims using both state and federal law. Claims based on federal laws will permit the federal court to take jurisdiction over the whole case, including any state issues raised. See 3.1 THE RELATIONSHIP BETWEEN STATE AND FEDERAL COURT SYSTEMS IN THE UNITED STATES

Hence in this case, where the Appellants cited TRCP Rule 12 (Show Authority), the federal court can either allow and rule on that motion, *or* rather than dismiss or deny, refuse jurisdiction and remand to the State Court.

Furthermore, Tommy Bastian[53] of BDF Hopkins presided at the Office of the Attorney General in 2009, discussing securitization and the role of the servicer which clearly shows (i) the Servicer can be a *Master Servicer* [who has restricted information] or, as Bastian refers to them; "the Entity" Servicer, or a *Special Servicer* or '*Scratch and Dent*' *Servicer*.

It is unknown in what capacity *Ocwen* or it's assumed counsel [who claim to represent *Deutsche Bank*, the Trustee, the Mortgage Servicer and anyone else related to the Appellee] are in Court as it remains unidentified in *Ocwen's* filings. Also, the Burkes' have been unable to obtain a complete accounting history, including the 'loan closing file' (which Hopkins withheld from the Burkes and the Court) and any notes which are available to the authorized Servicer.

The Burkes' have been denied due process by the lower courts refusal to allow or compel discovery pertaining to authority, accounting and the withholding of evidence by Mark Hopkins, as admitted on the record.

[53] See ROA.337, ROA.367, ROA.275, ROA.295, ROA.300, ROA.390 Supreme Court of Texas Task Force on Judicial Foreclosure Rules.

Tommy Bastian of BDF ratifies the Burkes' original complaint at ROA.37 and indeed expands on the Burkes' understanding as follows:

> "MORTGAGE FRAUD SEMINAR SECURITIZATION: THE BIG PICTURE TEXAS OFFICE OF THE ATTORNEY GENERAL JUNE 15, 2009 AUSTIN, TEXAS
>
> IV. SERVICER
>
> If a loan has been securitized, there is only one entity that has any loan level information about a particular loan and that is the servicer to whom the borrower makes loan payments.
>
> A person investigating a loan file is wasting time and energy trying to get information from anyone other than the servicer who collects the borrower's loan payments.
>
> In a typical securitization, there is a **master servicer** who is usually affiliated with the originator or sponsor of the securitization, *but the master servicer role is more like a general contractor* who hires all the entities that manage the myriad functions related to a securitization.
>
> In general, the only information a master servicer will have about a particular borrower's loan is a spreadsheet identifying the loan by a number and maybe some of the financial variables related to the loan like loan balance, principal and interest payment, and maturity date.
>
> *The closest the master servicer comes to the borrower's loan is the master servicer distributes to the investors the principle and interest received from the borrower's loan payment that was remitted by the "direct" servicer or "sub-servicer" who collected the payment from the borrower.*
>
> **The entity that receives the borrower's regular loan payment is the entity that holds the original note, the loan origination and**

collateral file with loan application and closing documents, and the borrower's loan history.

In some cases, if the loan goes into default, a "*special servicer*" or "*scratch and dent" servicer* may be retained by the master servicer to handle the default.

Almost without exception, all records related to the borrower's loan payment history or "loan history"; taxes and insurance – if the loan is escrowed; and a log of all communications between the borrower and the servicer or "comments" are kept by the servicer who collects the loan payments.

Effective January 1, 2006, the offering documents of all asset-backed security transaction must contain a clear description of the roles, responsibilities and oversight requirements of all persons involved in the servicing process to include each master servicer, each affiliate servicer, and each unaffiliated servicer that services at least ten percent (10%) or more of the pool assets. This includes any servicer responsible for calculating or making distributions to investors, persons performing workouts or foreclosures, or other activities related to servicing of the pool of assets.

The offering documents must also provide basic information about the servicer's experience and its servicing practices, the agreement between the various parties controlling the securitization, and, if a servicer defaults, the backup for servicing."

b. Scheduling Conference & Pending Motions

The Burkes' [who traveled from Kingwood, Texas to Houston] and Opposing Counsel [Austin to Houston] to attend the Scheduling Conference, with the Hon. Magistrate Judge Peter Bray presiding. At this 3 minute conference, he stated that only scheduling would be addressed and no motion hearing(s) discussed, held or

even scheduled for hearing, as he was merely sitting in for Judge Hittner who would 'preside over the trial'. (Despite the fact the case was initially assigned to Judge Bray).

There was never an intention to hold a motion hearing and it was a calculated act. If the Burkes' had not attended, then the case could be DWOP'd. Unfortunately for the Court, the Burkes' did attend and so shortly thereafter and over the objections and motions of the Burkes' a candle order was crafted to steer the *pro se* Burkes' into DWOP (discussed herein). Due process was denied.

From the *pro se's* view of court records and review of Federal Rule of Civil Procedure 16(b), it is standard that motions can be heard or at least scheduled for hearing at a scheduling conference *e.g.* See *Cunningham v. Offshore Specialty Fabricators, Inc*., (2006) 5:04-cv-00282, Doc. 218, EDTX. TRANSCRIPT of Proceedings (Scheduling Conference **and** Motion Hearing) held on November 8, 2006 before Judge David Folsom and *Salinas v. City of Harlingen* (1:98-cv-00162), Doc. 18, Minute Entry dealing with several outstanding items, SDTX (1999).

Additionally, from the pro se's own experience in the Southern District Court in the matter of *Deutsche I*, the court conducted conferences for pending motions and Hittner was the Senior Judge for the duration of that case as well. History has recorded the disparity in the proceedings when comparing both cases.

In summary, the Burkes' were in attendance for a one minute and thirty second conference e.g. the amount of actual time assigned to each of the two cases *Burke v Ocwen* and *Burke v Hopkins*.

Additionally, the Court refused the Burkes' case evidence for submission in anticipation of motion(s) hearing [ROA.572 and ROA.582].

Also, the Burkes' had written to the Court about the Conference and pending motions, but the Court was silent [ROA.1039 with Exhibits].

In short summary, the Burkes' and opposing counsel needlessly attended Court fully prepared and expecting to litigate the pending motions, when it could have been handled by a telephonic conference and minute entry. See *Deutsche I*, 4:11-cv-01658, Doc. 20 Minute Entry of Telephonic Scheduling Conference with pending motions discussed.

The evidence, the court records from the circuit and the relative access which citizens and members of the public can harvest current and historic data and analytics, means that conjecture and hearsay arguments can be easily repelled, if raised.

The datasets and reporting tools available today point to only one conclusion: this *Ocwen* case was patently marked as a Texas "rocket docket" case. One minute thirty seconds in Court is abuse of discretion when there were so many pending

motions, the Court 'was on notice' (care of a battery of Case Management Plan motions) and considering the travel times for all parties; that type of discrimination is unconstitutional and arrogant.

2. Interlocutory Appeal

Despite the Burkes' request, no Certified Interlocutory Appeal was granted [ROA.1081, #2], which would have prevented *delay* and for justice to be served. See *In re Masonite Corp*., 997 S.W.2d 194, 197(Tex. 1999). Time will tell.

3. Motion to Clarify

The Burkes' management of this case cannot be called tardy or dilatory, which is one of the main reasons a DWOP is normally issued. The reverse is true. The lower court's administration of the case was extremely lethargic. The lower court was silent for long periods as the motions from both sides stacked up on their desk(s) and when they did respond, they deprived the Burkes' of their Constitutional rights to be heard.

The Burkes' filed the Motion to Clarify [ROA.981] but also attempted to reach out for clarification by contacting the Case Manager as instructed to do on the Scheduling Order, but who was also silent.

This is in stark contrast to when the Burkes' reached out to the Court Reporter via email regarding filing the DKT13 again with the Fifth Circuit. The Court Reporter had Heather Carr, Assistant Deputy-in-Charge, SDTX emailing Joanna Burke by return, after 5pm, May 8th, 2019 (cc: Ebonee Mathis, SDTX).

The Burkes' have articulated the reasons the lower court erred in the motion to Reinstate and for a Hearing, see ROA.1075-1094.

4. Motion for Reconsideration

The Burkes' have articulated the reasons the lower court erred in dismissing the case for want of prosecution from ROA.1013-1067.

5. Motion to Strike

Based on the law cited in the Burkes' motion, the motion to strike should have been granted [ROA.1035].

D. Dismissal for Want of Prosecution was Clear Error

In Snr. Judge Hittners' final Order, his reliance and interpretation on 'the Burkes' *failure* to amend the motion for DWOP' was clear error.

The Burkes' did reply, with a request (Motion) for clarification [ROA.981], which was denied along with an omnibus of related motions per the Master Motion [ROA.530] as identified herein and the Docket Sheet [ROA1-5].

The Burkes' final attempt to rectify the error was to file a Motion to Reinstate on the Docket and Notice of Hearing. [ROA.1075-1094] The Burkes' have articulated the reasons the lower court erred in denying the motion therein.

X. CONCLUSION

This was not a civil action where any justice could be found at the lower court, this was a ruse. For the foregoing reasons, and the fact the Constitution is the superior law, the Burkes request that the lower court judgment be reversed and remanded to the State Court so that due process and the right to a fair jury trial may be taken.

DATED: July 23, 2019

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CERTIFICATE OF SERVICE

I hereby certify that, on July 23, 2019, a true and correct copy of the foregoing Brief of Appellees was served via the Court's EM/ECF system on the following counsel of record for Appellees:

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font, with the exception of footnotes, which are in proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 12-point font.

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,000 words, excluding the parts exempted under Fed. R. App. P. 32(f).

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