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

APPELLANTS MOTION FOR RECONSIDERATION

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Pro Se Appellants

Appellants, Joanna Burke and John Burke ("Burkes"), now file a Motion for reconsideration [FED. R. APP. P. 27.2] of single Circuit Judge Patrick Higginbothams' Order dated Monday, 28th October, 2019. In support thereof:

1. The **Second Circuit** has stayed *CFPB v RD Legal Funding* pending a decision in the *Selia Law* case #19-7 at the US Supreme Court.
2. The **Ninth Circuit** has stayed *CFPB v CashCall* pending a decision in the *Selia Law* case #19-7 at the US Supreme Court.
3. The **District Court for the Eastern District of New York** has also agreed to stay in the case of Bureau of *Consumer Financial Protection v. Forster & Garbus* pending a decision in the *Selia Law* case #19-7 at the US Supreme Court.

Questionably, this Court, the **Fifth Circuit** and sister, the **Eleventh Circuit**, both denied the Burkes recent request to stay the case(s) pending the *Selia Law* decision *e.g.* "The Fifth Circuit has urged district courts to take "imaginative and innovative" steps in dealing with § 1983 [constitutional] cases." - *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981). Furthermore, and which is discussed below, the Order was signed by single Judge Patrick Higginbotham, who should have automatically recused himself from this case.

The Second Circuit Stay: In *CFPB and People of the State of New York v. RD Legal, the CFPB and NYAG* appealed to the Second Circuit from the district court's decision holding; (i) the *CFPB's* structure is unconstitutional and (ii) striking all of Title 10 of Dodd-Frank. On Nov. 5th, 2019, the Second Circuit entered an

order adjourning the oral argument which was set for November 21, 2019. The order states that oral argument will be rescheduled at a later date. The *CFPB*, which announced after it filed the appeal that it will no longer defend its constitutionality in the appellate courts or the Supreme Court, asked the Second Circuit to adjourn the oral argument until the Supreme Court decides *Seila Law*. *RD Legal* opposed the motion, arguing that unless the Supreme Court finds that the Dodd-Frank for-cause removal provision is unconstitutional and cannot be severed, the Supreme Court's decision will not resolve the issues in *RD Legal*, specifically whether *RD Legal* is a "covered person" under the Consumer Financial Protection Act.[1]

The Ninth Circuit Stay: In *CFPB v. CashCall*, *CashCall* appealed to the Ninth Circuit from the district court's decision ordering *CashCall* to pay a $10M statutory fine based on its finding that it was the "true lender" of loans issued to borrowers in 16 states. *CashCall's* grounds for appeal include the district court's rejection of its constitutional challenge to the *CFPB*. The Ninth Circuit recently heard oral argument. The Ninth Circuit issued an order withdrawing submission of the appeal and staying all further proceedings pending the Supreme Court's decision in *Seila Law*.[2]

[1] See JDSUPRA.COM ARTICLE and LINK TO STAY ORDER (2nd Cir.)

[2] See JDSUPRA.COM ARTICLE and LINK TO STAY ORDER (9th Cir.)

District Court for the Eastern District of New York Stay: Judge Sandra Jeanne Feuerstein has also agreed to stay in the case of Bureau of *Consumer Financial Protection v. Forster & Garbus*[3] and again, is related to the Supreme Court's decision to hear arguments in the case of *Seila Law v. CFPB* over the constitutionality of the agency's leadership structure. The defendants had requested the stay, pending the Supreme Court's decision to hear arguments in the case.

The Circuit's Denial[s] of Stay[s]: Firstly, as recorded in prior motion(s) *All American* snubbed this court and went directly to the US Supreme Court.[4] That case is currently pending before the Supreme Court but the question they raised about the Dodd Frank Act was added to the *Selia* case. Secondly, the Burkes stay in the Eleventh Circuit, which was also denied by a single Judge, is simultaneously on notice of a reconsideration motion.[5]

[3] See ARTICLE and LINK TO COURT ORDER (NY District Court)

[4] See JDSupra.com Article and comment; "It appears likely that the CFPB will also seek to adjourn the December 4 Fifth Circuit oral argument in *All American* pending the outcome in *Seila Law*. I would expect the Fifth Circuit to adjourn the oral argument at least until the Supreme Court rules on *All American's* Petition for a Writ of Certiorari Before Judgment. If the petition is granted, I would expect the Fifth Circuit to continue the adjournment pending a decision from the Supreme Court. If the petition is denied, I would still expect the Fifth Circuit to continue the adjournment but, in that scenario, pending a Supreme Court decision in *Seila Law."*

[5] See[Intervenor] *Burke v. Ocwen Loan Servicing, LLC, et al* #19-13015. (11th Cir.)

Judge Patrick Higginbotham:

> "An impartial judiciary, while a protean term, translates here as the state's interest in achieving a courtroom that at least on entry of its robed judge becomes a neutral and disinterested temple, in appearance and fact - an institution of integrity, the essential and cementing force of the rule of law. That this interest is compelling cannot be gainsaid."
>
> - Before HIGGINBOTHAM, WIENER and CLEMENT, Circuit Judges. PATRICK E. HIGGINBOTHAM, Circuit Judge for the panel in *Jenevein v. Willing*, 493 F.3d 551 (5th Cir., 2007)

First, the Burkes address the fact ***biased*** Judge Higginbotham signed the Order. While this court may claim random assignment, there is a duty of judges to recuse themselves, even without an inkling of bias in the eyes of the judge and as SCOTUS has recently reaffirmed in *Rippo*[6];

> "Under our precedents, the Due Process Clause may sometimes demand recusal even when a judge "'ha[s] no actual bias.'" *Aetna Life Ins. Co. v. Lavoie*, 475 U. S. 813, 825 (1986). Recusal is required when, objectively speaking, "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U. S. 35, 47 (1975); see *Williams v. Pennsylvania*, 579 U. S. ___, ___ [, 136 S. Ct. 1899] (2016) (slip op., at 6) ("The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias" (internal quotation marks omitted)).

[6] *Rippo v. Baker*, 137 S. Ct. 905 (2017).

It certainly cannot be claimed by Judge Higginbotham that he falls outside this ***'bias'*** standard.

> **"Ain't no free lunch and there sure ain't no free house" (laughing)…** (Oral Audio recording: quote begins at 36.25 mins +)[7]

In reaching this conclusion, the Burkes first remind this court of their personal interest in; (i) *Deutsche Bank Nat'l Tr. Co. v. Burke*, 902 F.3d 548 (5th Cir. Sep. 5, 2018) and *Deutsche Bank Nat'l Tr. Co. v. Burke*, No. 15-20201 (5th Cir. 2016) and; (ii) *Reinagel v. Deutsche Bank Nat'l Trust Co.*, 735 F.3d 220 (5th Cir. 2013), the En Banc Order authored by Judge Higginbotham; and (iii) the Burkes' judicial council COMPLAINTS about the 3-panel in *Deutsche Bank Nat'l Tr. Co. v. Burke*, 902 F.3d 548 (5th Cir. Sep. 5, 2018) and the subsequent Order of denial of reconsideration by the Appellate Review panel, as signed on March 29, 2019 by newly appointed Chief Judge R. Priscilla Owen[8]. In this order the Burkes' stated;

[7] See *Reinagel v. Deutsche Bank Nat'l Trust Co.*, 12-50569 and listen to the Oral Argument Audio found at the Library HERE.

[8] See Burkes judicial complaint "Or the Priscilla Owen question in *Diaz v Deutsche Bank*, where she stated she'd seen at least 50 complaints by homeowners who had mortgage payments returned without explanation, yet *Deutsche Bank* prevailed in this case she reviewed."

> "For example, ***Judge Higginbothams'*** oral statements ['no free house(s)'] in *Reinagel v Deutsche Bank*, which Graves sat on and agreed with the Opinion, rendering foreclosure in favor of the Bank."

Conclusion: The Burkes requests this Court grants a timely Motion to Stay Proceedings until the matter of the *CFPB's* Constitutionality is answered by the US SUPREME COURT, and to prevent a noticeably biased Circuit split.[9] The Burkes would dutifully remind this court this is an extremely important **civil rights** case[10] with far reaching possibilities in consumer and property law. It is directly related to the **Constitution** and a potentially unlawful and void Act (Dodd- Frank). Just as importantly, with $3 BILLION dollars in fines[11] since the great recession, *Ocwen*

[9] "…a right newly recognized by the Supreme Court is held to be retroactively applicable by an appellate court. In light of the circuit split and the absence of controlling authority in this Circuit, prudent petitioners will treat the earlier date — the date on which the right is newly recognized by the Supreme Court — as the date on which the one-year limitation period begins to run." - *Dodd v. United States*, 365 F.3d 1273, 1279 n.3 (11th Cir. 2004).

[10] Those concerns were apparently well-placed; the *Consumer Financial Protection Board* filed a civil action against *Ocwen* in 2012 for "violating consumer financial laws at every stage of the mortgage servicing process." Other federal and state entities followed suit. Ocwen signed a consent order with 49 state attorneys general in 2013 that "required *Ocwen* to provide over $2 billion in relief to wronged homeowners and subject itself to a monitor . . . and a monitoring committee"; a consent order with the New York Department of Financial Services in 2014 that required *Ocwen* to adopt a "system of robust internal controls and oversight" and pay $150 million in fines and restitution; and a consent order with the California Department of Business Oversight in 2015 that required *Ocwen* to pay a $2.5 million fine and stop acquiring new mortgage-servicing rights in California until it could satisfactorily comply with the Department's requests for information. *Carvelli v. Ocwen Fin. Corp.*, No. 18-12250, at *5 (11th Cir. Aug. 15, 2019).

[11] See VIOLATION TRACKER (It's in excess of $3 billion when you add Altisource).

[Altisource][12] is the worst offender of citizens **human rights** of any private and "offshore" tax evading business in recent history, by the continued abuses against homeowners for financial greed. The public outrage against *Ocwen* along with the importance of this case and this reconsideration motion should not be undermined. **This court is inferior to the US Supreme Court**[13] **and *they* should not be defied**.[14] Ocwen's abuses have been well documented since the Great Recession, the people and the press will no doubt be highly concerned that their citizens are not being afforded access to courts, justice, liberty and due process per the Constitution of the

[12] *Fed. Trade Comm'n v. Lanier Law, LLC*, 194 F. Supp. 3d 1238 (M.D. Fla. 2016) - Finding a common enterprise where the owners shared ownership and control over several entities and discussing the Dodd-Frank Act.

[13] Article III, Section 1, of the Constitution requires that "[t]he judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Judges of Article III courts "shall hold their Offices during good Behaviour" and "receive for their Services ... a Compensation[ ] [that] shall not be diminished." U.S. Const. Art. III, § 1. The Supreme Court has identified two purposes served by this constitutional provision: first, Article III acts "to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government," *Commodity Futures Trading Comm'n v. Schor*,478 U.S. 833, 848, 106 S.Ct. 3245, 3255, 92 L.Ed.2d 675 (1986) (citations and internal quotation marks omitted); and, second, Article III "serves ... to protect the role of the independent judiciary within the constitutional scheme of tripartite government," *Id.* (citations and internal quotation marks omitted). - *Day v. Persels & Associates, LLC*, 729 F.3d 1309, 1322-23 (11th Cir. 2013).

[14] "A contrary rule would permit judges to "substitute their own pleasure" for the law." –*Gamble v. United States*, 139 S. Ct. 1960 (2019).

United States - should this Court refuse to grant the Stay upon reconsideration of a single judge's Order.

Respectfully submitted,

DATED: Nov. 7th, 2019

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CERTIFICATE OF CONFERENCE

We hereby certify that on November 7th, 2019, we did not confer with Appellants Mark D. Hopkins and Shelley L. Hopkins of Hopkins Law, PLLC. We assume the joint MOTION is OPPOSED.

CERTIFICATE OF SERVICE

We hereby certify that, on November 7th, 2019, a true and correct copy of the foregoing Motion for Leave to Supplement the Record and Pleading was served via the Court's EM/ECF system on the following counsel of record for Appellees:

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s/ Joanna Burke
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s/ John Burke
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CERTIFICATE OF COMPLIANCE

The undersigned counsel certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this motion contains **2,004** words according to Microsoft Word's word count, excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

s/ Joanna Burke
JOANNA BURKE

s/ John Burke
JOHN BURKE