No. 21-12160

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOANNA BURKE, JOHN BURKE,
Interested Parties/Putative Plaintiffs-
Intervenors–Appellants,

CONSUMER FINANCIAL PROTECTION BUREAU,
Plaintiff–Appellee,

versus

OCWEN FINANCIAL CORPORATION,
a Florida corporation,
OCWEN LOAN SERVICING LLC,
a Delaware limited liability company,
OCWEN MORTGAGE SERVICING INC.,
a U.S. Virgin Islands corporation,
Defendants – Appellees.

On Appeal from the United States
District Court for the Southern District of Florida
No. 9:17-cv-80495-KAM

BRIEF OF PLAINTIFF-APPELLEE CONSUMER FINANCIAL PROTECTION BUREAU

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, I hereby certify that, to my knowledge, the following is a list of all persons and entities with an interest in the outcome of this particular case or appeal:

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Azuero, Catalina

Baez, Tianna

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Bondi, Pam

Brenowitz, Stephanie

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Burke, John

Butler, Victoria

Cammarata, Anthony

Chiu, Shirley

Clarke, Edwina

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Craven, Laura

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Grenadier, Janice Wolk

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Kraninger, Kathleen

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Matthewman, William

McLeod, Mary

Moody, Ashley

Mulvaney, Mick

Nodler, Gregory

Ocwen Financial Corporation (Ticker symbol OCN)

Ocwen Loan Servicing, LLC

Ocwen Mortgage Servicing, Inc.

Office of Attorney General, State of Florida, Department of Legal Affairs

Office of Financial Regulation, State of Florida, Division of Consumer Finance

O'Malley, Gabriel

Petersen, Cara

PHH Corp.

PHH Mortgage Corp.

Pinder, Jennifer H.

Posner, Michael

Previn, Matthew

Protess, Amanda B.

Rifee, Matthew

Roberson, Amanda

Rose-Smith, Sabrina

Savage, James

Sepulveda, Robert

Sheldon, Matthew

Singelmann, Jan E.

Smith, Tierney

Stoll, Laura

Subramanium, Denise

Sugarman, James

Tayman, W. Kyle

Torres, Susan

Uejio, David

USVI Services, LLC

Van Meter, Stephen

Ward, Thomas

Wein, Andrew

Wells, John C.

Wilkinson, Miriam

Wilson, Jack

Winship, Blaine H.

/s/ Zakery Comer
Zakery Comer

STATEMENT REGARDING ORAL ARGUMENT

The Consumer Financial Protection Bureau respectfully submits that oral argument is not necessary. If the Court determines that oral argument will facilitate its deliberations, however, the Bureau stands ready to present argument.

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JURISDICTIONAL STATEMENT

The Putative Intervenor-Appellants ("the Burkes") filed a timely notice of appeal. This Court has jurisdiction over appeals contesting the jurisdiction of the district court. *See Tamiami Partners, Ltd. ex rel. Tamiami Dev. Corp. v. Miccosukee Tribe of Indians of Fla.*, 177 F.3d 1212, 1221 (11th Cir. 1999) ("[W]e have a special obligation to satisfy ourselves . . . that the district court had jurisdiction."). This Court also has jurisdiction over district court decisions denying motions to intervene. *See Fox v. Tyson Foods, Inc.*, 519 F.3d 1298, 1301 (11th Cir. 2008) ("Although orders denying a motion to intervene are not final orders, under the 'anomalous rule' we have 'provisional jurisdiction to determine whether the district court erroneously concluded that the appellants were not entitled to intervene as of right under [Federal Rule of Civil Procedure 24(a)], or clearly abused its discretion in denying their application for permissive intervention under [Rule 24(b)].'") (quoting *Stallworth v. Monsanto Co.*, 558 F.2d 257, 263 (5th Cir. 1977)).

STATEMENT OF THE ISSUES

1. Whether the district court had jurisdiction to decide the Burkes' Renewed Motion to Intervene which was filed after a notice of appeal to this Court had already been filed.

2. Whether the law-of-the-case doctrine bars the Burkes' appeal given the common factual and legal issues raised in the Burkes' Renewed Motion to Intervene and a prior Motion to Intervene that the Burkes have already litigated in this Court.

3. Whether the Burkes' Renewed Motion to Intervene is timely.

4. Whether the Burkes' Motion for Judge Marra to recuse himself was timely and whether Judge Marra erred in denying that motion.

STATEMENT OF THE CASE

I. The Bureau's Action Against Ocwen

The Consumer Financial Protection Bureau ("Bureau") brought this action on April 20, 2017 against Ocwen Financial Corporation, Ocwen Mortgage Servicing, Inc., and Ocwen Loan Servicing, LLC (collectively, "Ocwen"). Compl., ECF No. 1. The Bureau's Complaint alleges "numerous violations of Federal consumer financial laws" in connection with Ocwen's mortgage servicing in and after January 2014.[1] *See id.* at 1. The Bureau seeks injunctive relief, restitution, refunds, disgorgement, damages, and civil money penalties. Am. Compl. 2, ECF No. 775.

On April 21, 2021, the district court dismissed the Bureau's Second Amended Complaint. Final J., ECF No. 777. The district court found that a prior suit against Ocwen brought by the Bureau in the

[1] The Bureau's Complaint alleges violations of (1) Sections 1031 and 1036 of the Consumer Financial Protection Act, 12 U.S.C. §§ 5531, 5536; (2) Sections 807(2)(a), 807(10), and 808 of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692e(2)(a), 1692e(10), and 1692f; (3) Sections 6 and 19 of the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2605, 2617, and the regulations promulgated thereunder at Regulation X, 12 C.F.R. part 1024; and (4) Section 105(a) of the Truth in Lending Act, 15 U.S.C. § 1604(a), and the regulations promulgated thereunder at Regulation Z, 12 C.F.R. part 1026. Am. Compl. 2, ECF No. 775.

District of Columbia barred the Bureau's present suit on res judicata grounds. *Id*; *see also* Order Granting In Part And Reserving Ruling In Part Defs.' Mot. Summ. J. Counts 1-9, Den. Defs.' Mot. Summ. J. Count 10 Pls.' Am. Compl. [DE 730] And Denying Pls' Mot. Summ. J. Liability 12-27 [DE 728], ECF No. 764. The Bureau appealed the district court's decision that same day. ECF No. 779.

II. The Burkes' First Motion to Intervene

John and Joanna Burke are a Texas couple whose property was allegedly impacted by Ocwen's mortgage servicing. Order 3, ECF No. 375. In connection with their property, the Burkes were involved with several related lawsuits: including: (1) a 2011 foreclosure proceeding, *Deutsche Bank Nat'l Tr. Co. v. Burke*, 902 F.3d 548, 550 (5th Cir. 2018) (per curiam); and (2) a suit against Ocwen for allegedly violating the law in servicing their mortgage, *Burke v. Ocwen Loan Servicing, LLC*, 4:18-cv-04544, (S.D. Tex. 2018).[2]

[2] The Burkes were involved with at least five actions in connection with their property in the Southern District of Texas, three of which reached the Fifth Circuit: (1) *Burke v. Geithner*, No. 4:09-cv-02572 (S.D. Tex. Aug. 12, 2009) (Small Cl. Pet. filed June 15, 2009) (voluntarily dismissed Feb. 22, 2010); (2) *Burke v. IndyMac Mortgage Servs.,* No. 4:11-cv-00341 (S.D. Tex. Jan. 25, 2011) (Pl's. Original Pet. filed Dec. 6, 2010) (dismissed by the Burkes without prejudice, March 4, 2011); (3)

On December 27, 2018, the Burkes filed a Motion to Intervene in the Bureau's case against Ocwen. Mot. Intervene, ECF No. 220. The Burkes sought to intervene "to protect their interests in their homestead . . . and that of similar homeowners nationwide."[3] *Id*. at 3. The Burkes' initial attempt to intervene was denied by the district court. Order at 5, ECF No. 375. The Burkes then filed a motion to reconsider. Mot. Recons. 4, ECF No. 408. That motion was also denied. Order, ECF No. 411.

On August 2, 2019, the Burkes appealed the denial of their first attempt to intervene. ECF No. 414. On November 2, 2020, this Court

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Deutsche Bank Nat'l Trust Co. v. Burke, 902 F.3d 548, 550 (5th Cir. 2018) (per curiam); (4) *Burke v. Hopkins*, No. 4:18-cv-04543 (S.D. Tex. Dec. 3, 2018); and (5) *Burke v. Ocwen Loan Servicing, LLC*, No. 4:18-cv-04544, (S.D. Tex.) (consolidated on appeal with *Burke v. Hopkins* into *Burke v. Ocwen Loan Servicing, LLC*, No. 20-20209, 2021 WL 1208026 (5th Cir. Mar. 30, 2021)). The Fifth Circuit recently held against the Burkes in their most recent cases. *See* Appellant Br. 45. On August 10, 2021, the Burkes filed a new action in the Southern District of Texas. *See id*. at 46.

[3] The Burkes specify for the first time in the present appeal that they seek to intervene only to obtain their mortgage loan file from Ocwen. *See* Appellant Br. 26 ("[T]he Burkes just want their mortgage loan file to prove the lender application fraud."); *see also id*. at 65. There is no indication that their mortgage loan file appears anywhere in the record of this proceeding. The Burkes do not cite or reference it in the record below.

affirmed that denial. *Burke v. Ocwen Fin. Corp.*, 833 F. App'x 288, 295 (11th Cir. 2020). After careful review of the record, this Court determined that the Burkes' arguments did not meet the standards for intervention as a matter of right. *Id*. at 290-93. This Court also determined that the district court acted well within its discretion when it denied the Burkes' request for permissive intervention. *Id*. at 292-96.

III. The Burkes' Renewed Motion to Intervene

In May 2021, four weeks after the Bureau had filed its Notice of Appeal of the district court's dismissal of the Bureau's Second Amended Complaint, the Burkes filed a Renewed Motion to Intervene in this case with the district court. Renewed Mot. Intervene, ECF No. 786. Once again, the district court denied the Burkes' renewed attempt to intervene. Order, ECF No. 788. The district court determined that it lacked jurisdiction to decide the Burkes' Renewed Motion because of the rule that a district court is divested of jurisdiction once a notice of appeal has been filed. *Id*. The district court also determined that none of the exceptions to this rule applied to the Burkes' Motion. *Id*.

The Burkes subsequently filed a Motion for Reconsideration in which they argued for the first time that the district court judge, Judge

Marra, should have recused himself. Mot. Recons. Renewed Mot. Intervene Mem. Recusal Judge Marra 2-6, ECF 790. The Burkes argued that recusal was necessary based on the district court's denial of their motion to intervene. *See id.* at 3. The Burkes' argument for recusal seemed to be partially based on a misunderstanding of a separate action in the Southern District of Texas involving another Texas couple, the Greens. *In re Green*, No. H-19-2690, AP 18-3351, 2019 WL 4016202, at *2 (S.D. Tex. Aug. 26, 2019); *see* Mot. Recons. Renewed Mot. Intervene Mem. Recusal Judge Marra 3, ECF 790. In the Burkes' brief, they repeatedly refer to an order allegedly issued by Judge Marra, which they contend permitted the Greens to obtain discovery in *In re Green*. Appellant Br. 33, 39, 65, 74, 75. *In re Green* was an entirely separate bankruptcy action involving Ocwen, and in that separate matter, the Greens made a discovery request for certain transcripts from Ocwen. *In re Green*, No. 18-3351, 2019 WL 4016202 at *2 (S.D. Tex. Aug. 26, 2019). The Greens relied on portions of the Bureau's Complaint in this case to support their request. *See id.* Relying in part on those statements from the complaint below, the court in *In re Green* granted the Greens the discovery they sought. *Id.*

Contrary to the Burkes' assertions, the Greens did not intervene in this case, and the order they repeatedly reference was entered by the Southern District of Texas bankruptcy court, not by Judge Marra.

The Burkes' Motion for Reconsideration and Recusal was denied. Order Dismissing John Joanna Burke's Pro Se Mot. Recons. Renewed Mot. Intervene Lack Jurisdiction Order Denying Mot. Recusal 1, ECF 791. On June 25, 2021, the Burkes appealed the denial of their Renewed Motion to Intervene. ECF 792.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 24(a)(2) provides that, "[o]n timely motion," a district court must permit intervention by anyone who:

> claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

This Court reviews the denial of a motion to intervene of right de novo. *Tech. Training Assocs., Inc. v. Bucaneers Ltd. P'ship*, 874 F.3d 692, 695 (11th Cir. 2017).

Federal Rule of Civil Procedure 24(b) provides that, on "timely motion," a district court "may" permit intervention by anyone who "has a claim or defense that shares with the main action a common question of law or fact." A district court's denial of a motion for permissive intervention is reviewed for a "clear abuse of discretion." *Fox*, 519 F.3d at 1301.

"An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review." *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934). Questions concerning a district court's jurisdiction are reviewed *de novo*. *United*

States v. Oliver, 148 F.3d 1274, 1275 (11th Cir. 1998) (citing *United States v. Perez*, 956 F.2d 1098, 1101 (11th Cir. 1992)).

Law-of-the-case "bars relitigation of issues that were decided either explicitly or by necessary implication." *United States v. Jordan*, 429 F.3d 1032, 1035 (11th Cir. 2005). "Under the law-of-the-case doctrine, the district court and [the Circuit] court are bound by findings of fact and conclusions of law made by [the Circuit] court in an earlier appeal of the same case." *Kelly v. Dun & Bradstreet, Inc.*, 641 F. App'x 922, 924 (11th Cir. 2016) (citing *Ash v. Tyson Foods, Inc.*, 664 F.3d 883, 891 (11th Cir. 2011)).

28 U.S.C. § 455 provides that:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
> (b) He shall also disqualify himself in the following circumstances:
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

A "district court's refusal to recuse" is reviewed "for abuse of discretion." *Christo v. Padgett*, 223 F.3d 1324, 1333 (11th Cir. 2000).

SUMMARY OF THE ARGUMENT

The district court properly denied the Burkes' Renewed Motion to Intervene and Motion to Reconsider and Recuse. The district court was correct that it lacked jurisdiction to decide the Burkes' Renewed Motion. The district court was divested of jurisdiction after the Bureau's appeal was filed, and the Burkes did not file their motion until well after the Bureau's appeal was initiated. The Burkes' motion was also not a collateral matter over which the district court could have retained jurisdiction.

Even if the district court had jurisdiction, the Burkes' Renewed Motion to Intervene is functionally identical to their first attempt to intervene. As such, the law-of-the-case doctrine bars relitigation of an issue that this Court has already decided.

Regardless, the Burkes' Motion is untimely as it was filed late and granting it would prejudice existing parties. The Motion was also properly denied because its denial only causes minimal prejudice to the Burkes and there are no unusual circumstances that would justify intervention.

Nor did the district court abuse its discretion in denying the Burkes' Motion to Recuse.

For all of these reasons, this Court should affirm the district court's denial of the Burkes' motions below.

ARGUMENT

I. The District Court Lacked Jurisdiction to Decide the Burkes' Renewed Motion to Intervene

"[W]ith limited exceptions . . . , the filing of a notice of appeal divests the district court of jurisdiction over the aspects of the case involved in the appeal." *United States v. Tovar-Rico*, 61 F.3d 1529, 1532 (11th Cir. 1995). The Burkes' Motion to Intervene does not fall within any of those exceptions. After a notice of appeal has been filed, "[t]he district court retains only the authority to act in aid of the appeal, to correct clerical mistakes or to aid in the execution of a judgment that has not been superseded." *Showtime/The Movie Channel, Inc. v. Covered Bridge Condo. Ass'n, Inc.*, 895 F.2d 711, 713 (11th Cir. 1990).

A district court also retains jurisdiction after an appeal is filed over "collateral matters" that do not affect "the questions presented on appeal." *Weaver v. Fla. Power & Light Co.,* 172 F.3d 771, 773 (11th Cir. 1999). A collateral matter is "not a judgment on the merits of an

action." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990). Instead, a collateral matter is an issue that is "separate and distinct from the issues raised in [the] notice of appeal." *United States v. Reed*, 404 F. App'x 464, 465 (11th Cir. 2010). Examples of collateral matters include: (1) Rule 11 Motions for sanctions, *Cooter & Gell*, 496 U.S. at 395-96; (2) motions for attorney fees, *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-03 (1988); and (3) cost disputes, *Zinni v. ER Sols., Inc.*, 692 F.3d 1162, 1168 n. 10 (11th Cir. 2012). Ultimately, "[a] district court does not have the power to alter the status of the case as it rests before the Court of Appeals." *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1309 (11th Cir. 2003) (citing *Dayton Indep. Sch. Dist. v. U.S. Mineral Prods. Co.*, 906 F.2d 1059, 1063 (5th Cir. 1990)).

Here, the Bureau filed its Notice of Appeal on April 21, 2021. The Burkes did not file their Renewed Motion to Intervene until four weeks later on May 19, 2021. The district court was thus divested of jurisdiction when the Burkes filed their motion. The general rule is that a district court is divested of jurisdiction once an appeal is initiated. None of the exceptions to that rule apply here. The Burkes'

Renewed Motion to Intervene did not aid the appeal, did not arise from a clerical error, and did not relate to the enforcement of a judgment.

Nor is the Burkes' Renewed Motion a collateral matter. The Burkes seem to offer two justifications for their intervention. First, to assist them in a completely separate case against Ocwen, the Burkes want access to a "mortgage loan file." *See* Mem. Supp. Renewed Mot. Intervene 18-20, ECF No. 787; *see also* Appellant Br. 26 ("[T]he Burkes just want their mortgage loan file to prove the lender application fraud."). This is hardly the sort of collateral matter that would justify intervention at this stage. Moreover, even assuming that the mortgage loan file is in the record before the district court, the Burkes do not explain why they could not have accessed that file elsewhere, such as during discovery in their now concluded, separate litigation against Ocwen.[4]

[4] The information the Burkes seek is also likely outside the timeframe of the events and conduct at issue in this court proceeding. The Bureau's case is expressly limited to conduct occurring in and after January 2014. Order Partial Summ. J. 1, ECF 764. The Burkes appear to be concerned with conduct occurring before 2014 given the timing of the 2011 foreclosure proceedings. *See Deutsche Bank Nat'l Trust Co.*, 902 F.3d at 550 (noting that the Burkes last payment on their mortgage was in 2009).

Second, the Burkes also note that "if this case were to proceed with the Burkes as Intervenors . . ., then monetary relief and other claims could be raised by the Burkes as part of their Intervention." Appellant Br. 66. The Burkes thus also apparently wish to intervene to litigate the merits of the Bureau's case against Ocwen and thereby seek compensation or other relief for their alleged injuries. *See also* Renewed Mot. Intervene 36, ECF 786 (expressing a desire to intervene "to ensure, as plaintiffs, they could be compensated financially in full for their injuries"). But the Bureau is already seeking to obtain monetary relief for consumers injured by the practices alleged in the Bureau's complaint. *See* Am. Compl. 2, ECF No. 775. Thus, the Burkes' alternative justification is hardly "separate and distinct" from the Bureau's appeal. *Reed*, 404 F. App'x at 645; *see also Burke v. Ocwen*, 833 F. App'x at 293 (noting that the Bureau presumptively represents the Burkes' interest as homeowners). As such, this is not a collateral matter. *See Cooter & Gell*, 496 U.S. at 396 (noting that an attempt to obtain judgment on the merits is not a collateral matter).

II. Even Assuming the District Court Had Jurisdiction, the Law-of-the-Case Doctrine Precludes the Burkes' Second Attempt to Relitigate Their Initial Motion to Intervene

The law-of-the-case doctrine also bars the Burkes' attempt to relitigate their prior intervention attempt. "Courts have a compelling interest in continuity, finality, and efficiency . . . and the law-of-the-case doctrine is an important feature in realizing this goal." *United States v. Anderson*, 772 F.3d 662, 669 (11th Cir. 2014). Law-of-the-case requires a Circuit Court to "follow legal conclusions reached in a prior appellate decision in the same case." *Pope v. Sec'y, Fla. Dep't of Corr.*, 752 F.3d 1254, 1264 n.3 (11th Cir 2014). The doctrine functions to bar "relitigation of issues that were decided either explicitly or by necessary implication." *This That & The Other Gift & Tobacco, Inc. v. Cobb County, GA*, 439 F.3d 1275, 1283 (11th Cir. 2006). A court may only reconsider an issue already decided in the same case if (1) "since the prior decision, new and substantially different evidence is produced," (2) "the prior decision was clearly erroneous and would result in a manifest injustice" or (3) "there has been a change in controlling authority." *Oladeinde v. City of Birmingham*, 230 F.3d 1275, 1288 (11th Cir. 2000).

Here, this Court has already held that the Burkes failed to make a sufficient showing to intervene both as of right or permissively. *Burke v. Ocwen Fin. Corp.,* 833 F. App'x at 290-96. The Burkes' legal and factual arguments in their Renewed Motion to Intervene are functionally identical to the legal and factual arguments in their initial Motion to Intervene. *See, e.g.*, Renewed Mot. Intervene 33, ECF No. 786 ("This renewed motion now cites to the Burkes briefing on appeal [of the Burkes' prior Motion to Intervene] to reiterate why the Burkes ['] homestead being in foreclosure adequately meets the standard for intervention."). This Court has therefore already passed on the Burkes' arguments.

There is also nothing about this second appeal and renewed intervention attempt that would allow the Burkes to circumvent the law-of-the-case doctrine and this Court's prior decision denying their original Motion to Intervene. The Burkes have not produced any new or different relevant evidence.[5] There was no manifest injustice in this

[5] Appellants point to *In re Green* as a newly discovered matter since their initial Motion to Intervene. *See* Mem. Supp. Renewed Mot. Intervene 18-20, ECF No. 787. However, as explained in the Statement of the Case, the discovery request in the Greens' separate case has no legal or factual bearing on the Burkes' attempt to intervene here.

Court's prior decision affirming the district court's denial of the Burkes' original Motion to Intervene. There has also been no change in controlling authority. In short, there are no changed circumstances justifying the Burkes' Renewed Motion and no ability nor reason to relitigate this Court's prior decision.

Accordingly, even if the Burkes could demonstrate that the district court had jurisdiction over their appeal (which it did not), it would nonetheless be foreclosed by the law-of-the-case doctrine.

III. In Any Event, the Burkes' Renewed Motion is Untimely

Federal Rules of Civil Procedure 24(a)(2) and 24(b) require a "timely motion" for a motion to intervene as of right and permissively.

> "In determining whether a motion to intervene was timely, [this Court will] consider (1) the length of time during which the proposed intervenor knew or reasonably should have known of the interest in the case before moving to intervene; (2) the extent of prejudice to the existing parties as a result of the proposed intervenor's failure to move for intervention as soon as it knew or reasonably should have known of its interest; (3) the extent of prejudice to the proposed intervenor if the motion is denied; and (4) the existence of unusual circumstances militating either for or against a determination that their motion was timely."

Georgia v. U.S. Army Corps of Eng'rs, 302 F.3d 1242, 1259 (11th Cir. 2002). "This analysis applies whether intervention of right or

permissive intervention . . . is claimed." *United States v. Jefferson County*, 720 F.2d 1511, 1516 (11th Cir. 1983).

Here, the Burkes have known or reasonably should have known of their general interest in this case since at least 2018 when they filed their own suit against Ocwen. *Burke v. Ocwen Loan Servicing, LLC*, No. 4:18-cv-04544. The Burkes assert a renewed interest based on their misunderstanding of a decision regarding a discovery request in *In re Green*. *See* Renewed Mot. Intervene 19, ECF 787.[6] That decision was issued in August 2019. *In re Green*, 2019 WL 4016202. As such, regardless of the Burkes' misunderstanding of that decision's relationship to this case, the Burkes' Renewed Motion to Intervene was untimely filed.

[6] As explained in the statement of the case, in *In re Green*, the Greens made a discovery request for certain transcripts from Ocwen. *In re Green*, 2019 WL 4016202 at *2. In support of that request, the Greens pointed to public portions of the Bureau's Complaint in its case against Ocwen. *See id*. Relying in part on those statements from the complaint below, the court in *In re Green* granted the Greens' discovery request in their bankruptcy action involving Ocwen. *Id*. Contrary to the Burkes' assertions, the Greens did not intervene in this case, and the order they repeatedly reference was entered by the Southern District of Texas bankruptcy court in the Greens' case, not by Judge Marra. *See* Appellant Br. 33, 39, 65, 74, 75.

Allowing the Burkes to intervene now would also prejudice both the Bureau and Ocwen. Permitting the Burkes to intervene on the merits or even to seek their loan file would inevitably entail "expanded discovery," as well as require "existing parties . . . to litigate new issues." *Burke v. Ocwen Financial Corp.*, 833 F. App'x at 294.

The district court's denial of the Burkes' motion resulted in minimal prejudice to them. As to the Burkes' loan file, there is no indication that file appears anywhere in the record of this proceeding. Nor is there any clear reason why the Burkes could not obtain that file from a more convenient, alternative source, such as through discovery in their newly filed case in the Fifth Circuit. *See* Appellant Br. 46. Further, denying the Burkes' attempt to intervene to litigate the merits of this case would not prejudice them because, as this Court has already held, the Bureau presumptively represents the Burkes' interest as homeowners in this case. *See Burke v. Ocwen*, 833 Fed App'x at 293 ("[T]he Burkes have failed to establish . . . that their interest would not be adequately protected [by the Bureau] absent intervention.").

Finally, there are no unusual circumstances weighing in favor of the Burkes' intervention. The Burkes' Renewed Motion is untimely.

IV. The District Court Did Not Abuse Its Discretion in Denying the Burkes' Motion to Recuse

The district court did not abuse its discretion when it denied the Burkes' motion to recuse, which was filed as part of their motion to reconsider. "[W]hen employing an abuse-of-discretion standard, we must affirm unless we find that the district court has made a clear error of judgment, or has applied the wrong legal standard." *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004). The Burkes argue that Judge Marra is not impartial and should be recused. Mot. Recons. Renewed Mot. Intervene Mem. Recusal Judge Marra 3, ECF 790. (citing 28 U.S.C. § 455(a)). A § 455 recusal motion is evaluated based on "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1524 (11th Cir. 1988). "Bias" or "prejudice" entails an opinion that is "wrongful or inappropriate, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess . . . , or because it is excessive in degree." *Liteky v. United States*, 510 U.S. 540, 550 (1994). "[J]udicial rulings

alone almost never constitute a valid basis for a bias or partiality motion." *Id*. at 555.

Here, Appellants filed a Motion to Recuse as part of a Motion to Reconsider. Motions to Reconsider "should not be used to raise arguments which could, and should, have been made before the judgment was issued." *O'Neal v. Kennamer*, 958 F.2d 1044, 1047 (11th Cir. 1992). There is no reason why their Motion to Recuse could not have been raised earlier, especially given that the Recusal Motion seems to have been primarily premised on an order allegedly issued by Judge Marra in July 2019. *See* Order Dismissing John Joanna Burke's Pro Se Mot. Recons. Renewed Mot. Intervene Lack Jurisdiction Order Denying Mot. Recusal 1, ECF 791. Accordingly, the Burkes' Recusal Motion is untimely.

Even if it were timely though, the Burkes do not articulate a valid basis for recusal. The Burkes claim that Judge Marra was biased because he allegedly permitted another couple, the Greens, "to obtain court documents he would deny the Burkes." Appellant Br. 65. Judge Marra did no such thing. As explained in the Statement of the Case, the Greens filed a separate bankruptcy action in the Southern District

of Texas against Ocwen, and the discovery order that troubles the Burkes was entered in that case, not this one. *See In re Green*, 2019 WL 4016202 at *2. The Greens never intervened in this case. Thus, the Burkes' Motion for Recusal is based upon a misunderstanding of the facts.

Judge Marra did not abuse his discretion in denying the Burkes' Motion to Recuse. Judge Marra applied the proper legal standard, *see* Order Dismissing John Joanna Burke's Pro Se Mot. Recons. Renewed Mot. Intervene Lack Jurisdiction Order Denying Mot. Recusal 1, ECF 791 ("In addressing a motion to recuse pursuant to 28 U.S.C. §455(a), the Court is tasked with determining 'whether an objective, disinterested lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality.'") (internal citations omitted), and there was also no clear error of judgment. Thus, the only basis for the Burkes' Motion for Recusal is that they were unhappy that Judge Marra denied their motion to intervene. *See id.* § 2 (the Burkes' "rely solely on the [District] Court's unfavorable rulings on intervention

requests."). But "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky,* 510 U.S. at 555.

CONCLUSION

For all the foregoing reasons, this Court should uphold the judgment of the district court denying the Burkes' Renewed Motion to Intervene and Motion to Reconsider and Recuse.

Date: October 4, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) this document contains 4,732 words.

This brief has been prepared in a proportionally spaced typeface using Microsoft Word from the Office 365 Suite in 14 point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I hereby certify that today, October 4, 2021, I an electronically filing this Brief of Plaintiff–Appellee Consumer Financial Protection Bureau with the Clerk of the Court using the ECF system. I also certify that the foregoing document is being served this day via transmission of Notices of Electronic Filing generated by ECF to all counsel of record and to the pro se putative Intervenors-Appellants who are registered for the ECF system for this matter.

I further certify that today, October 4, 2021, I am causing the required number of bound copies of this Brief of Appellee Consumer Financial Protection Bureau to be filed with the Clerk of this Court.

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