No. 21-12160

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOHN BURKE, JOANNA BURKE,

Interested Parties-Appellants,

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff-Appellee,

v.

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, PHH MORTGAGE CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Florida,
No. 9:17-cv-80495, Judge Kenneth A. Marra

ANSWERING BRIEF OF DEFENDANTS-APPELLEES

Sabrina M. Rose-Smith
Benjamin Hayes
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
(202) 346-4000

Counsel for Defendants-Appellees

Burke v. Ocwen Financial Corp.

CERTIFICATE OF INTERESTED PERSONS

In compliance with Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1–26.1-3, Defendants-Appellees Ocwen Financial Corporation, Ocwen Mortgage Servicing Inc., Ocwen Loan Servicing LLC, and PHH Mortgage Corporation identify all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case:

Alexis, Anthony

Altisource Portfolio Solutions, S.A. (Ticker symbol ASPS)

Alvarez, Joaquin

Azuero, Catalina E.

Baez, Tianna E.

Barrett, Bernard J.

Berry, Bridget A.

Bondi, Pam

Brenowitz, Stephanie C.

Bressler, Steven Y.

Buckley LLP

Burke, Joanna

Burke, John

Butler, Victoria

Cammarata, Anthony

Chiu, Shirley T.

Clarke, Edwina

Cohen, Adam H.

Coleman, John, R.

Comer, Zakery

Consumer Financial Protection Bureau

Cordray, Richard

Craven, Laura S.

DeMille-Wagman, Lawrence

Desai, Atur R.

Farrell, Patrick

Fauley, Robynne

Fransen, Scott R.

Goodwin Procter LLP

Granai, Sasha F.

Greenburg Traurig, LLP

Grenadier, Janice Wolk

Hayes, Benjamin

Healey, Jean M.

Hefferon, Thomas M.

Jay, William

Jovanov, Predrag Patrick

Kelly, Erin M.

Kraninger, Kathleen

Lichter, David H.

Marra, Kenneth A.

Matthewman, William

McLeod, Mary

Moody, Ashley

Mulvaney, Mick

Nodler, Gregory R.

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 P.

Protess, Amanda B.

Riffee, Matthew L.

Roberson, Amanda C.

Rose-Smith, Sabrina M.

Savage, James J.

Sepulveda, Robert

Sheldon, Matthew S.

Singelmann, Jan E.

Smith, Tierney E.

Stoll, Laura

Subramanium, Denise

Sugarman, James

Tayman, W. Kyle

Torres, Susan

Uejio, David

USVI Services, LLC

Van Meter, Stephen

Ward, Thomas

Wein, Andrew S.

Wells, John C.

Wilkinson, Miriam

Wilson, Jack Douglas

Winship, Blaine H.

/s/ Sabrina M. Rose-Smith

Sabrina M. Rose-Smith

Burke v. Ocwen Financial Corp.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, Defendants-Appellees Ocwen Financial Corporation, Ocwen Mortgage Servicing Inc., Ocwen Loan Servicing LLC, and PHH Mortgage Corp., identify any parent corporation and any publicly held corporation that owns 10% or more of their stock or state that there is no such corporation:

1. Ocwen Financial Corporation is a publicly held corporation whose shares are traded on the New York Stock Exchange, under ticker symbol "OCN," with no publicly traded company owning 10% or more of its stock.

2. Ocwen Loan Servicing, LLC merged into PHH Mortgage Corporation on June 1, 2019. PHH Mortgage Corporation is successor by merger to Ocwen Loan Servicing, LLC. PHH Mortgage Corporation is a wholly-owned subsidiary of PHH Corporation. Ocwen Financial Corporation owns 100% of the common stock of PHH Corporation.

3. Ocwen Mortgage Servicing, Inc. merged into USVI Services, LLC on November 17, 2019. USVI Services, LLC is a wholly owned subsidiary of Ocwen Financial Corporation, its sole member.

/s/ Sabrina M. Rose-Smith

Sabrina M. Rose-Smith

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary because the issues are straightforward and adequately presented in the parties' briefs.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Regulations:

Other Authorities:

INTRODUCTION

This is the second time Appellants John and Joanna Burke have sought to intervene in the same enforcement action brought by the Consumer Financial Protection Bureau ("CFPB") against Ocwen.[1] The district court denied the Burkes' first motion to intervene, as well as their motion to reconsider that denial, in May 2019. This Court affirmed that denial in full. *Burke v. Ocwen Fin. Corp.*, 833 F. App'x 288, 295 (11th Cir. 2020). The litigation between the CFPB and Ocwen proceeded to final judgment, and the CFPB appealed.

Almost a month after the CFPB noticed its appeal from that final judgment, the Burkes filed a renewed motion to intervene in the district court. The district court denied that motion, because it lacked jurisdiction: settled law establishes that a timely notice of appeal divests the district court of jurisdiction to entertain a motion to intervene. Unhappy with that result, the Burkes filed a motion for reconsideration and, for the first time, requested that the district court judge recuse himself from ruling on their motion, alleging that the court had become a "witness" in this case and had acted fraudulently in denying intervention. The district court denied the recusal motion, too.

The Court should affirm. The Burkes do not even address, much less dispute, the longstanding case law establishing that the district court no longer had

[1] Defendants-Appellees are collectively referred to as "Ocwen."

jurisdiction to grant their request to intervene by the time they filed it, nearly a month after the CFPB's timely notice of appeal. And although the recusal argument is meritless, this Court need not even reach it: if the district court lacked jurisdiction, *any* judge would have been required to deny the Burkes' motion.

But even if the district court had jurisdiction, the Court still should affirm. First, the Burkes' renewed motion to intervene is barred by basic law-of-the-case principles: this Court has already held that the Burkes failed to satisfy any of the requirements for intervention, and the Burkes' renewed intervention motion made essentially the same arguments as their unsuccessful first motion. Second, the motion to recuse was plainly untimely, because the Burkes only requested recusal *after* the district court denied their renewed motion—even though they knew all the alleged grounds for recusal many months before. And third, the Burkes have utterly failed to identify any plausible basis to question the district court's impartiality toward the Burkes. In reality, the Burkes are simply displeased that the district court denied their motions to intervene, but that would not be a ground for recusal even if their motions had merit—which they do not.

JURISDICTIONAL STATEMENT

The district court denied the Burkes' renewed motion to intervene on May 24, 2021, holding that it lacked jurisdiction to consider their motion. Appx I, Doc.

788; *see* Part I.A, *infra*.[2] On June 7, 2021, the Burkes filed a combined motion for reconsideration and for recusal. Appx I, Doc. 790. The district court denied both motions on June 10, 2021. Appx I, Doc. 791. The Burkes filed their notice of appeal, specifying that they were appealing only the June 10 order, on June 25, 2021. Appx I, Doc. 792. Because no further proceedings remain before the district court, this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. The dispositive issue before the Court is as follows:

Whether the district court correctly held that it lacked jurisdiction to decide the Burkes' renewed motion to intervene and motion for reconsideration because those motions were filed after final judgment and after the losing party, the CFPB, noticed its appeal.

2. If this Court were to hold that the district court had jurisdiction, the following issues would then be presented:

a. Whether the Burkes' renewed motion to intervene and motion for reconsideration are barred by the law of the case, and specifically by this Court's holding that the Burkes satisfy none of the prerequisites for intervention.

[2] Citations to Appellants' Appendix are in the form: Appx [Vol. #], [document number], at [page(s)]. Citations to the Supplemental Appendix are in the form: SAppx, [document number], at [page(s)].

b. Whether the district court abused its discretion by denying an untimely motion to recuse filed only after the court had already denied the Burkes' renewed motion to intervene.

STATEMENT OF THE CASE

I. The Burkes File Their First Motion To Intervene.

The CFPB initiated the underlying enforcement action against Ocwen on April 20, 2017, alleging that Ocwen, in servicing borrowers' loans, engaged in various acts and practices in violation of federal consumer financial laws.[3] All of the CFPB's claims—including those related to allegedly wrongful foreclosure—were limited to conduct that allegedly occurred after January 2014. *See* SAppx, Doc. 1, at 64-91; *see also* SAppx, Doc. 775, at 1, 63-82.

On January 4, 2019, more than twenty months after that action began, the Burkes filed their first motion to intervene under Federal Rule of Civil Procedure 24. Appx II, Doc. 220. The Burkes stated that they are homeowners, that their house is under an order of foreclosure, and that their house is subject to a loan that is serviced by Ocwen. *Id*. at 3. They stated that they sought to intervene in the

[3] The Complaint alleges violations of the Consumer Financial Protection Act (CFPA), 12 U.S.C. §§ 5531, 5536; the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692e(2)(a), 1692e(10), and 1692f; the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2605, 2617, and Regulation X, 12 C.F.R. § 1024; the Truth in Lending Act, 15 U.S.C. § 1604(a), and Regulation Z, 12 C.F.R. § 1026; and the Homeowners Protection Act of 1998, 12 U.S.C. § 4902(b).

CFPB's suit to "protect their interests in their homestead … and that of similar homeowners nationwide." *Id.* They also argued that the CFPB would not protect their interests because the agency is "conflict[ed]" and "disorganized." Appx II, Doc. 220-1, at 21-23.

The Burkes stated in their motion that they were parties to two lawsuits involving their home. Appx II, Doc. 220, at 3-4. First, Deutsche Bank, the holder of their deed of trust, initiated an action to foreclose on their property in April 2011—before the timeframe covered by the CFPB's complaint. *See Deutsche Bank Nat'l Trust Co. v. Burke*, 4:11-cv-01658 (S.D. Tex.). That action ended in September 2018 when the Fifth Circuit held that the foreclosure should proceed. *See Deutsche Bank Nat'l Trust Co. v. Burke*, 902 F.3d 548, 552 (5th Cir. 2018) (per curiam). Second, the Burkes sued Ocwen, alleging that it had violated state and federal law in servicing their loan. *See Burke v. Ocwen Loan Servicing, LLC*, No. 4:18-cv-4544, Doc. 19 (S.D. Tex.). That case was dismissed for want of prosecution, and the Fifth Circuit affirmed. *See Burke v. Ocwen Loan Servicing, L.L.C.*, 855 F. App'x 180, 182-83, 185 (5th Cir. 2021).

II. The District Court Denies The Burkes' Motion To Intervene And Motion For Reconsideration, And This Court Affirms.

On May 30, 2019, the district court (Marra, J.) denied the Burkes' motion to intervene. Appx II, Doc. 375. The court held that the Burkes did not meet the requirements for intervention as of right under Rule 24(a) "because they have

failed to establish that their interests, if any, would be impaired by the disposition of th[e] action, particularly since [they] could raise or could have raised their concerns either in their individual foreclosure lawsuit or the recent litigation they initiated in Texas federal court." *Id*. at 4. The district court added that any interest the Burkes did have in the litigation "would be adequately represented by CFPB, who seeks to hold Ocwen accountable for allegedly wrongfully foreclosing upon property based upon inadequate information." *Id*. The district court also denied the Burkes' request for permissive intervention under Rule 24(b). *Id.* The court held that the Burkes "fail[ed] to identify a common question of fact or law in support of permissive intervention," and that "the present parties in this action would suffer prejudice and undue delay if the [Burkes] were permitted to intervene in this case." *Id.* at 4-5.

The Burkes moved for reconsideration. Appx II, Doc. 408. In their motion, the Burkes argued for the first time that they should be permitted to intervene to obtain information from Ocwen that might help them in their action against Ocwen in Texas. *Id.* at 3-4. The district court denied the motion for reconsideration because "intervention is not permitted to allow a party to seek or obtain evidence for other litigation as asserted by the [Burkes]." Appx II, Doc. 411, at 2-3.

This Court affirmed the denial of the Burkes' motion to intervene and motion for reconsideration. *See Burke v. Ocwen Fin. Corp.*, 833 F. App'x 288,

295 (11th Cir. 2020). The Court held that the Burkes failed to satisfy any of the requirements for intervention as of right, *id*. at 291-93, and that the district court did not abuse its discretion in denying permissive intervention, *id*. at 293-95. The Court also concluded that the Burkes had failed to preserve several arguments. First, the Court rejected the Burkes' asserted interest in "gaining access to sealed files and protected documents" for use in their lawsuit against Ocwen, because they had "raised this argument for the first time in their motion to reconsider." *Id*. at 294. The Court also declined to consider another of the Burkes' asserted reasons for intervening—to take over the litigation in the event Ocwen's then-pending challenge to the CFPB's constitutionality was successful[4]—because the Burkes "first raised this argument in their reply brief." *Id*. at 293 n.3.

III. The District Court Enters Final Judgment For Ocwen And The CFPB Appeals.

On March 4, 2021, the district court granted summary judgment in Ocwen's favor on all but one of the ten counts in the CFPB's amended complaint. *See* SAppx, Doc. 764, at 29-31. The CFPB then amended its complaint to omit the remaining count, and the district court entered final judgment in Ocwen's favor on

[4] The district court did not grant Ocwen relief on the constitutional challenge. *See generally Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020) (severing unconstitutional provision of CFPA); *see also* SAppx, Docs. 660, 660-1 (CFPB notice of the then-CFPB Director's ratification of the underlying enforcement action).

April 21, 2021. SAppx, Doc. 777. The CFPB noticed its appeal from the final judgment. SAppx, Doc. 779. That appeal is currently pending before this Court (No. 21-11314).

IV. The District Court Denies The Burkes' Renewed Motion To Intervene And Motion To Recuse.

On May 19, 2021, almost a month after final judgment was entered and the CFPB appealed, the Burkes filed a renewed motion to intervene. Appx I, Docs. 786, 787. In that motion, the Burkes reasserted many of the same arguments they raised in support of their prior effort to intervene. *See, e.g.*, Appx I, Doc. 787, at 33-36 (arguing that their home was an "interest relating to the property or transaction" in this case, and that the CFPB does not "adequately represent" the Burkes' purported interests in the case). The Burkes also claimed that some purported new developments had occurred since the denial of their first set of motions. In particular, the Burkes asserted that when their first appeal was pending, they learned that plaintiffs in unrelated litigation against Ocwen in a Texas bankruptcy court had been granted access to documents from this litigation. *Id*. at 18-20; *see Green v. Ocwen Loan Servicing, LLC*, No. 18-03351 (Bankr. S.D. Tex.) ("the *Green* litigation").[5] The Burkes argued that this showed that Judge

[5] The plaintiffs in that case, Larry and Edris Green, brought an adversary action against Ocwen for alleged violations of court orders in their bankruptcy case. *See* No. 18-03351, Doc. 1 (Bankr. S.D. Tex. Nov. 25, 2018). As part of discovery, the

Marra willfully erred in concluding that "intervention is not permitted to allow a party to seek or obtain evidence for other litigation." *See* Appx I, Doc. 787, at 18-20, 24-28; p. 6, *supra* (quoting Appx II, Doc. 411, at 3). The Burkes also argued that the Supreme Court's decision in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), supports their intervention because it puts at risk the CFPB's ability to continue this litigation. *See* Appx I, Doc. 787, at 20-24, 28-31.

The district court denied the Burkes' renewed motion to intervene for lack of jurisdiction. Appx I, Doc. 788. The court explained that the CFPB had filed a notice of appeal from the final judgment, and that "[t]he filing of a notice of appeal divests the district court of jurisdiction to decide matters related to the appeal." *Id.* at 1. The court noted that there are "certain exceptions" to this rule, but concluded that "they do not apply here." *Id.*

The Burkes filed a motion for reconsideration of the denial of their renewed motion to intervene, which they combined with a motion that Judge Marra recuse himself from ruling on their intervention motion under 28 U.S.C. § 455. Appx I,

---

Greens requested copies of "all transcripts … that were specifically referenced in the complaint filed" in this case. *Id.*, Doc. 9, at 5. The Greens stated that "[a] copy of the CFPB Complaint, Docket sheet, and contact information for Ocwen's counsel [in this case]"—all of which are on the public docket—"ha[d] been provided" to them. *Id.* Ocwen opposed the Greens' request on confidentiality grounds. *Id.*, Docs. 19, 35. The bankruptcy court ordered Ocwen to produce the transcripts. *Id.*, Docs. 32, 39.

Doc. 790, at 2-5. The Burkes argued that Judge Marra was not impartial because he had rejected the Burkes' request to intervene to obtain documents for use in other litigation, even though the Greens had received such documents (by other means, not by taking any action in the Southern District of Florida). *Id*. at 3; *see* pp. 8-9, *supra*.

The district court denied both motions. Appx I, Doc. 791. In denying the motion for reconsideration, the court reaffirmed its prior decision that it lacked jurisdiction because the final judgment had already been appealed to this Court. *Id*. at 2. The court also concluded that the Burkes' motion to recuse was based "solely on the Court's unfavorable rulings on intervention requests in this case," which is insufficient to show "pervasive bias [or] prejudice" and cannot be a "premise for a recusal motion." *Id*. at 1-2.

The Burkes appealed the denial of their motions for reconsideration and recusal. Appx I, Doc. 792.[6]

SUMMARY OF ARGUMENT

I. The Court should affirm the denial of the Burkes' renewed motion to

[6] The Burkes specified only those two orders in their notice of appeal (*see* Appx I, Doc. 792)—not the order denying their renewed motion to intervene (Appx I, Doc. 788). To the extent their appeal seeks to challenge that order as well, that does not change the outcome: the jurisdictional and law-of-the-case arguments in this brief apply equally to the renewed motion itself.

intervene and motion for reconsideration. The district court correctly held that it lacked jurisdiction to review those motions in light of the CFPB's timely notice of appeal. Because that conclusion is correct, there is no need to consider the recusal issue: any substitute judge would have lacked jurisdiction, too.

This Court, and other courts of appeals, have long held that the timely filing of a notice of appeal deprives the district court of jurisdiction to decide a pending motion to intervene. *See Beavers v. Am. Cast Iron Pipe Co.*, 852 F.2d 527, 530-31 (11th Cir. 1988). In this case, the CFPB filed a notice of appeal of the district court's final judgment on April 21, 2021, but the Burkes did not file their renewed motion to intervene until nearly a month later. Therefore, the district court correctly denied the Burkes' renewed motion to intervene and motion for reconsideration for lack of jurisdiction.

II. Alternatively, this Court can affirm the denial of the renewed motion to intervene and motion for reconsideration based on law-of-the-case principles. The law-of-the-case doctrine "bars relitigation of issues that were decided, either explicitly or by necessary implication, in an earlier appeal of the same case." *United States v. Jordan*, 429 F.3d 1032, 1035 (11th Cir. 2005). The district court denied the Burkes' first motion to intervene, and this Court affirmed in full. The Burkes' renewed motion to intervene raises arguments that are materially identical to those raised in the first motion to intervene, and none of the "new

developments" the Burkes identify justify departing from law-of-the-case principles.

III. If the Court reaches the Burkes' motion to recuse, the Court should affirm that decision.

A. As a threshold matter, the Burkes' motion to recuse was untimely. The Burkes did precisely what this Court's cases forbid: they filed their motion without suggesting that the district judge could not resolve it, waited until they received an adverse decision, and only then requested recusal—based on facts that they had known for *months* before they filed their motion. That is far too late. *See, e.g.*, *Summers v. Singletary*, 119 F.3d 917, 921 (11th Cir. 1997).

B. In any event, the Burkes have identified no reasonable ground for questioning Judge Marra's impartiality toward them. The Burkes' real dispute is with the merits of the district court's rulings, and it is well-established that disagreement with a judge's decisions is almost never a basis for recusal. *See Liteky v. United States*, 510 U.S. 540, 555 (1994). The Burkes have identified no reason to depart from that rule.

STANDARD OF REVIEW

This Court reviews a district court's denial of a motion for lack of subject-matter jurisdiction *de novo*. *Miccosukee Tribe of Indians v. United States*, 619 F.3d 1286, 1288 (11th Cir. 2010). The Court "review[s] a district court judge's

denial of a motion to recuse for an abuse of discretion." *Smith v. Phillips Winters Apartments*, 599 F. App'x 365, 366 (11th Cir. 2015) (citing *In re Walker*, 532 F.3d 1304, 1308 (11th Cir. 2008)). A district court abuses its discretion when it "[makes] a clear error of judgment, or has applied the wrong legal standard." *United States v. Frazier*, 387 F.3d 1244, 1259 (11th Cir. 2004) (en banc).

ARGUMENT

I. The District Court Lacked Jurisdiction To Entertain The Burkes' Motions.

Under well-established law, the filing of a notice of appeal divests a district court of jurisdiction over a motion to intervene. The Burkes' motions fall squarely under that rule, and the district court was correct to deny them on that basis. Because the district court lacked jurisdiction over the motions—no matter which judge heard them—this Court need not address the recusal motion.

A. The CFPB's Notice Of Appeal Deprived The District Court Of Jurisdiction To Decide The Renewed Motion To Intervene And The Motion For Reconsideration.

This Court squarely addressed this precise jurisdictional issue in *Beavers v. Am. Cast Iron Pipe Co.*, 852 F.2d 527 (11th Cir. 1988). There, the district court dismissed the plaintiffs' complaint with prejudice and "the plaintiffs … filed a notice of appeal." *Id.* at 530. Several weeks later, three putative class members moved to intervene, but "the district court denied these motions, citing lack of jurisdiction," and the would-be intervenors appealed. *Id.* This Court concluded

that "[t]he district court acted properly in refusing to entertain the would-be intervenors' motions on jurisdictional grounds." *Id*. at 531.[7] Those are the same "jurisdictional grounds" that the district court correctly invoked here.

Numerous other circuits follow the same rule and, indeed, have gone further—holding that filing a notice of appeal cuts off jurisdiction to entertain a motion to intervene *even if that motion has already been filed*. For example, in *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 298 (5th Cir. 1984), final judgment was entered for defendants, the motion to intervene was filed several weeks later, but the plaintiff noticed his appeal before the district court ruled on the pending motion to intervene. *Id*. at 298-99. The Fifth Circuit explained that once "an appeal is taken from a judgment which determines the entire action, the district court loses power to take any further action in the proceeding upon the filing of a timely and effective notice of appeal." *Id*. at 299. The court thus "affirm[ed] the denial of intervention because the district court was without jurisdiction to rule upon the … motion [to intervene] once [plaintiff] filed his notice of appeal." *Id*. (citing *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 928-29 (5th Cir. 1983)). Similarly, in *Taylor v. KeyCorp*, 680 F.3d 609 (6th Cir. 2012), the

[7] The Court ultimately held that dismissal of the plaintiffs' complaint was erroneous, so it vacated the denial of the motions to intervene and remanded for the district court to "re-examine the various motions to intervene" in light of "the removal of the jurisdictional impediment." 852 F.2d at 531.

district court entered final judgment against the plaintiff, the would-be intervenor filed his motion to intervene several weeks after final judgment, and the plaintiff filed its notice of appeal three days later. *Id*. at 612. The Sixth Circuit held that the denial of the motion to intervene was proper because once the notice of appeal was filed, "the district court was without jurisdiction to address the [intervention] motion." *Id*. at 617; *see also Doe v. Pub. Citizen*, 749 F.3d 246, 258 (4th Cir. 2014) ("hold[ing] that [the] notice of appeal deprived the district court of authority to rule on [the] motion to intervene" and noting that "[t]he majority of our sister circuits that have confronted this issue" have held that "an effective notice of appeal deprives a district court of authority to entertain a motion to intervene"); *Drywall Tapers & Pointers of Greater New York, Loc. Union 1974 of I.U.P.A.T., AFL-CIO v. Nastasi & Assocs. Inc.*, 488 F.3d 88, 94 (2d Cir. 2007) ("The District Court did not err in denying [the] intervention motion once the notice of appeal of the Court's injunction Order divested the Court of jurisdiction to affect that Order.").

This Court's precedent in *Beavers* establishes that "[t]he district court acted properly in refusing to entertain the would-be intervenors' motions on jurisdictional grounds." 852 F.2d at 531. The district court entered final judgment on April 21, 2021, and the CFPB noticed its appeal the same day. SAppx, Docs. 777, 779. The Burkes filed their renewed motion to intervene almost a month

later. Appx I, Docs. 786, 787. Therefore, the district court lacked jurisdiction over the Burkes' motions and properly denied them on that basis. The Court does not need to reach the question that other circuits have answered—whether the outcome would be different if the Burkes had filed their motion before, not after, the notice of appeal.

The Burkes do not raise any meaningful argument that the district court's jurisdictional ruling was incorrect. Instead, they argue (at 64-66) that the district court had jurisdiction because the denial of a motion to intervene is appealable under the collateral-order doctrine. But the collateral-order doctrine is an interpretation of *appellate* jurisdiction, *see Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545 (1949); it does not determine the scope of the *district court's* jurisdiction. None of the Burkes' cases addresses the district court's jurisdiction over a motion to intervene after a notice of appeal has been timely filed. *See* Opening Br. 64-66.[8]

Accordingly, the district court correctly held that the filing of the CFPB's notice of appeal deprived it of jurisdiction to decide the Burkes' renewed motion to

[8] The Burkes also discuss (at 59-63) this Court's appellate jurisdiction under the so-called "anomalous rule" to provisionally review denials of interlocutory motions to intervene. That doctrine of appellate jurisdiction, likewise, is not relevant to whether the district court had jurisdiction over the Burkes' motions, and the Burkes do not appear to argue that it is.

intervene and motion for reconsideration. The Court should therefore affirm the denial of those motions.

B. Because The District Court Lacked Jurisdiction, This Court Need Not Reach The Merits Of The Recusal Motion.

If the Court agrees with the district court's no-jurisdiction ruling, it can affirm the denial of the motion to recuse. If Judge Marra lacked jurisdiction—a question that is already answered by this Court's precedent and that requires no deference to Judge Marra's ruling—then any other judge would lack jurisdiction as well. Put another way, any error would necessarily be harmless. *See Parker v. Connors Steel Co.*, 855 F.2d 1510, 1526, 1528 (11th Cir. 1988) (harmless error analysis applies to violations of § 455(a) and (b)); *accord* 28 U.S.C. § 2111.[9]

As discussed, the filing of the CFPB's notice of appeal deprived the district court of jurisdiction to decide the Burkes' motions. *See* pp. 13-16, *supra*. Judge Marra's recusal could not have resulted in a different decision on the Burkes' motions, because *any* district judge would have been compelled to deny the Burkes' motions for lack of jurisdiction, and even if the judge did not, this Court would have been obliged to point out the lack of jurisdiction before reaching any question of recusal. Article III does not permit this Court to decide what the district court should have done *if* it had jurisdiction. *See Steel Co. v. Citizens for a*

[9] The recusal motion lacks merit in any event. *See* Part III, *infra*.

Better Env't, 523 U.S. 83, 94, 101 (1998) (rejecting the exercise of "hypothetical jurisdiction").

Put another way, the lack of jurisdiction establishes that the Burkes cannot obtain reversal by arguing that the jurisdiction-less Judge Marra should have recused. This Court considers the following factors to determine whether a § 455 violation warrants reversal: "[1] the risk of injustice to the parties in the particular case; [2] the risk that the denial of relief will produce injustice in other cases; and [3] the risk of undermining the public's confidence in the judicial process." *Parker*, 855 F.2d at 1526 (citing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988)). None of these factors supports reversal here. Judge Marra's decision not to recuse, even if it were beyond his discretion, would pose no "risk of injustice to the parties" or "risk of undermining the public's confidence in the judicial process." *Id*. 1526-27 (concluding that there would be no injustice to the parties when the Court "concluded that [the district court's ruling] was proper" and that "the public will lose faith in our system of justice" if the court reversed a decision it "already determined to be proper"). Nor have the Burkes identified any way in which Judge Marra's refusal to recuse would "produce injustice in other cases." *Id*. at 1526.

If the district court lacked jurisdiction, there is no basis for reversing its decision and remanding for another judge to confirm that the court still lacks

jurisdiction. The Court need say nothing else on the recusal issue. It can simply affirm.

II. This Court's Prior Decision Is Law Of The Case And Establishes That The Burkes Are Not Proper Intervenors.

Even if the Court concludes that the district court had jurisdiction to decide the Burkes' renewed motion to intervene, the Court should still affirm the denial of intervention. The law of this case has already established that the Burkes are not proper intervenors. *See Tang v. U.S. Atty. Gen.*, 578 F.3d 1270, 1275 n.3 (11th Cir. 2009) (court of appeals "can affirm on any grounds supported by the record").

"The law of the case doctrine bars relitigation of issues that were decided, either explicitly or by necessary implication, in an earlier appeal of the same case." *United States v. Jordan*, 429 F.3d 1032, 1035 (11th Cir. 2005) (collecting cases). The doctrine does not apply "where there is new evidence, an intervening change in controlling law dictates a different result, or the appellate decision, if implemented, would cause manifest injustice because it is clearly erroneous." *United States v. Anderson*, 772 F.3d 662, 668-69 (11th Cir. 2014) (alterations omitted).

Here, the district court denied the Burkes' first motion to intervene, and this Court affirmed. The Court held that the Burkes failed to satisfy *any* of the requirements to intervene as of right, and it also affirmed the district court's conclusion that the Burkes' failed to identify a "common question of fact or law"

necessary for permissive intervention. *See* 833 F. App'x at 292-94. The Burkes' renewed motion to intervene relies on the same bases for intervention as their first round of motions. *See, e.g.*, Appx I, Doc. 787, at 33-36 (asserting that their homestead is a "necessary interest per Rule 24").[10] That is reason enough to reject their arguments.

The Burkes purport to identify "new developments," but none satisfies any of the exceptions to the law-of-the-case doctrine. The Burkes first rely on the *Green* litigation as reason to intervene. *See* note 5, *supra*. According to the Burkes, the district court willfully erred in refusing to allow the Burkes to intervene to obtain discovery from this case for use in separate litigation, because the plaintiffs in the *Green* litigation were granted access to documents related to this case. *See* Opening Br. 74-78; Appx I, Doc. 787, at 24-26. But the Greens did not obtain documents from this litigation *by intervening* in this case (or any other);

[10] In their renewed motion to intervene, the Burkes asserted an interest in obtaining documents from this litigation, as well as an interest in "prevent[ing] the case from being dismissed" in the event the CFPB no longer can continue the litigation. *See, e.g.*, Appx I, Doc. 787, at 20, 37. In the prior appeal, this Court held that the Burkes forfeited both arguments. *See* 833 F. App'x at 293 n.3, 294-95. The Burkes cannot revive those forfeited arguments by filing a new motion to intervene and a new appeal. *See Furcron v. Mail Crts. Plus, LLC*, 849 F. App'x 781, 785 (11th Cir. 2021) (holding "under the 'law of the case' doctrine" that "when a party waives a legal argument in an earlier appeal, it waives the right to raise that argument in a later appeal"); *United States v. Fiallo-Jacome*, 874 F.2d 1479, 1480, 1482-83 (11th Cir. 1989) (prohibiting a party that failed to raise an argument in the first appeal from asserting the same argument in a second appeal).

instead, they obtained transcripts referenced in the CFPB's complaint in this case pursuant to a discovery order entered by a bankruptcy court in Texas in a proceeding the Greens initiated against Ocwen. *See* pp. 8-9 & note 5, *supra*. Thus, the *Green* litigation offers no reason to question the district court's conclusion "*that intervention* is not permitted to allow a party to seek or obtain evidence for other litigation," Appx II, Doc. 411, at 3 (emphasis added), and the Burkes' renewed motion to intervene did not otherwise challenge the district court's decision on this point.

Further, the Burkes argue that the Supreme Court's decision in *Seila Law* supports intervention. That makes no sense. As this Court previously concluded, the CFPB is adequately representing any purported interest the Burkes might have in this litigation, 833 F. App'x at 293, and *Seila Law* has undermined, not bolstered, the Burkes' argument that the CFPB might no longer be able to pursue it. *See* note 4, *supra*.

Accordingly, even if the Court were to conclude that the district court had jurisdiction to entertain the Burkes' renewed motion, it can affirm the denial of the renewed motion to intervene and the motion for reconsideration on this alternative basis.[11]

[11] The Burkes allude (at 66-67) to the principle that a court can treat an intervenor's pleading as a separate action. To the extent the Burkes argue that the

III. The Motion To Recuse Was Both Untimely And Meritless.

If it concludes that the district court had jurisdiction, the Court should also affirm the order denying the Burkes' motion to recuse. The Burkes' motion was untimely, and the district court's denial of the motion to recuse was not an abuse of discretion.

A. The Motion To Recuse Was Untimely.

The district court's order can be affirmed because the Burkes' motion to recuse was untimely. *See United States v. Siegelman*, 640 F.3d 1159, 1188 (11th Cir. 2011) ("The untimeliness of … a motion [for recusal] is itself a basis upon which to deny it."); *Summers v. Singletary*, 119 F.3d 917, 920-21 (11th Cir. 1997) (recognizing that motions under both 28 U.S.C. § 455(a) and (b) must be timely). To be timely, a motion to recuse "must be filed within a reasonable time after the grounds for the motion are ascertained," and a motion is not timely "where the facts are known before a legal proceeding is held," but the party "wait[s] to file such a motion until the court has ruled against [it]." *Summers*, 119 F.3d at 921; *see Siegelman*, 640 F.3d at 1188 ("A motion for recusal based upon the appearance of

---

district court should have done so, this argument is not properly before the Court because the Burkes raised it for the first time in their motion for reconsideration. *See* Appx I, Doc. 790, at 6-7; *Burke*, 833 F. App'x at 294-95 (refusing to consider argument made for the first time in a motion for reconsideration). In any event, the Burkes' renewed motion to intervene did not assert any cause of action against Ocwen that could have been pursued as an independent action.

partiality must be timely made when the facts upon which it relies are known."). That is exactly what the Burkes did here.

The Burkes claimed that Judge Marra was required to recuse because his order denying the Burkes' first motion for reconsideration wrongly asserted that "intervention is not permitted to allow a party to seek or obtain evidence for other litigation." Appx II, Doc. 411, at 3. The Burkes asserted that this was "clearly untruthful" because other "parties similarly situated"—*i.e.*, the Greens—obtained documents from this litigation. Appx I, Doc. 790, at 3. But the Burkes knew of this asserted basis for recusal by November 2020 at the very latest—six months before they filed their renewed motion to intervene—as they raised the same argument in their petition for rehearing in the prior appeal. *See* Petition for Rehearing *En Banc* at 9-12, No. 19-13015 (11th Cir. filed Nov. 23, 2020).

Rather than request recusal before (or even at the same time as) filing their renewed motion to intervene, the Burkes waited until *after* Judge Marra denied that motion and then raised recusal for the first time in their motion for reconsideration. That is exactly the kind of wait-and-see approach that this Court has disapproved. *See Summers*, 119 F.3d at 921; *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1472 (11th Cir. 1986) (motion to recuse untimely when party "knew about" the asserted basis for recusal "six to seven months before moving for recusal"); *United States v. Slay*, 714 F.2d 1093, 1094 (11th Cir. 1983) (motion to recuse untimely "and need

not be considered" when movant "was aware prior to the hearing on the motion to suppress of the facts which he now contends support a § 455(a) motion"); *see also Jallali v. U.S. Funds*, 573 F. App'x 915, 916 (11th Cir. 2014) (holding that recusal motion filed eight months "after the first order she argues evinced bias or prejudice" was untimely). The Burkes filed their renewed motion before Judge Marra and asked him to rule on it. It is now too late to complain that he did so.

B. The District Court Did Not Abuse Its Discretion In Concluding That The Burkes Failed To Identify Any Legitimate Basis For Recusal.

If the Court reaches the merits of the recusal issue, it should affirm because the Burkes have utterly failed to show that Judge Marra abused his discretion in declining recusal. A judge must recuse when "his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). This is a high bar and is met only when 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." *Jenkins v. Anton*, 922 F.3d 1257, 1271 (11th Cir. 2019). Further, a judge must recuse if he "has a personal bias or prejudice concerning a party." 28 U.S.C. § 455(b)(1). "[B]ias sufficient to disqualify a judge must stem from extrajudicial sources," or the judge's "remarks in a judicial context demonstrat[ing] such pervasive bias and prejudice that it constitutes bias against a party.'" *In re Walker*, 532 F.3d 1304, 1310-11 (11th Cir. 2008).

The Burkes have not come close to satisfying these demanding standards. In their brief in this Court, as in their motion to recuse, the Burkes argue (at 74, 78) that Judge Marra demonstrated "pervasive bias and prejudice" because he concluded "that intervention is not permitted to allow a party to seek or obtain evidence for other litigation." As already explained, the Greens obtained transcripts referenced in the CFPB's complaint in this case pursuant to orders entered in the Texas bankruptcy proceeding to which they were parties—*not* by intervening in this case (or any other). *See* pp. 20-21, *supra*. No "objective, disinterested, lay observer" could possibly question Judge Marra's impartiality on this basis, much less conclude that events *in another case, in another court, in another circuit* demonstrate pervasive bias on the part of Judge Marra. *See United States v. Patti*, 337 F.3d 1317, 1321 (11th Cir. 2003). In fact, the Eleventh Circuit Judicial Council has already rejected an ethics complaint the Burkes filed against Judge Marra, which asserted the same accusations of bias raised in the motion to recuse. *See In re: Complaint of Judicial Misconduct or Disability*, No. 11-20-90113, at 1 (11th Cir. Judicial Council Apr. 30, 2021).[12] That order affirmed Chief Judge Pryor's conclusion that "[the Burkes] provide[d] no credible facts or evidence in support of their claim that [Judge Marra] … was biased against them."

[12] https://www.ca11.uscourts.gov/sites/default/files/judicial_complaints/11-20-90113%20%28Public%29.pdf.

In re: Complaint of Judicial Misconduct or Disability, No. 11-20-90113, at 2 (11th Cir. Chief Judge Jan. 27, 2021).[13]

In reality, the Burkes' motion to recuse is based on nothing more than their disagreement with Judge Marra's decisions. *Id.* (determining that the Burkes made allegations "directly related to the merits of [Judge Marra's] decisions or procedural rulings"). But it is settled that mere disagreement with a judge's decisions "almost never constitute[s] a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994); *see also Walker*, 532 F.3d at 1311 ("Adverse rulings are grounds for appeal but rarely are grounds for recusal…."). The Burkes have not identified any reason to depart from this near-categorical rule.[14]

[13] The Burkes appear to argue (at 76-78, 80) that Judge Marra was required to recuse himself because his denial of the Burkes' first motion for reconsideration somehow made him a witness in this case. That is plainly wrong. The Burkes rely on *Tyler v. Swenson*, 427 F.2d 412 (8th Cir. 1970), in which a state judge spoke with a defendant regarding entering a guilty plea, and then when presiding over a subsequent proceeding in which the defendant sought to set aside his guilty plea as involuntarily made, the judge interjected his own recollection of what had been said. *Id*. at 413-14. That is nothing like this case.

[14] The remaining discussion in the Burkes' opening brief (at 79-96) has no relevance to the merits of the recusal motion.

CONCLUSION

The Court should affirm the district court's orders denying the renewed motion to intervene, the motion for reconsideration, and the motion to recuse.

Respectfully Submitted,

/s/ Sabrina M. Rose-Smith
Sabrina M. Rose-Smith
Benjamin Hayes
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
(202) 346-4000

Counsel for Defendants-Appellees

October 4, 2021

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,565 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify 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 a proportionally spaced 14-point Times New Roman typeface using Microsoft Word.

/s/ Sabrina M. Rose-Smith
Sabrina M. Rose-Smith

CERTIFICATE OF SERVICE

I certify that on October 4, 2021, I filed the foregoing brief with the Clerk of Court using the CM/ECF System. I also certify that the foregoing brief is being served this day via transmission of Notices of Electronic Filing generated by ECF, and that I caused the foregoing document to be served via U.S. Mail on the following:

Joanna Burke
46 Kingwood Greens Dr.
Kingwood, TX 77339

Interested Party-Appellant

/s/ Sabrina M. Rose-Smith

Sabrina M. Rose-Smith