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

PLAINTIFFS-APPELLANTS REPLY BRIEF

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VI. INTRODUCTION

The [Supreme] Court has held that "liberty" is defined by federal constitutional law and "property" by "existing rules or understandings that stem from an independent source such as state law." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972); cf. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 394 (1798).

A. THE CONSTITUTIONAL QUESTIONS

Appellants submitted Rule 5.1[1] challenging both State and Federal Constitution in *Burke v. Hopkins* (No. 4:18-CV-4543) in the lower court on September 17th, and a Rule 44[2] challenge to this court on September 18th, 2019. They also submitted a joint motion to stay proceedings and motion to hold case in abeyance.

At the time of this filing, the joint motion remains undecided. The Burkes are complying with the docket timeline and deadlines in this appeal including this submission and content, which may have been materially different in content and argument, if the joint motion had been granted.

[1] Fed. R. Civ. P. 5.1

[2] Fed. R. App. P. 44

The Constitutional arguments found in the Appellants initial brief will remain as-is. The Burkes will not address it again herein (with the exception of cross-referencing), at least for the time-being, and based on the above disclaimer.

B. BEING 'TARRED WITH THE SAME BRUSH'

In Texas courts, the Burkes are being tarred with the same brush.* This is erroneous, discriminatory and unconstitutional.[3]

> *The origin is the verb *to tar*, meaning to defile or dirty. The idiom appears in print first in Sir Walter Scott's novel, *Rob Roy* (1818): "They are a' tarr'd wi' the same stick — rank Jacobites and Papists."

However, in *McGillivray*, a 14-year old case, and reading the opinions of the 5th (2010) and WDTX (Doc.8, 2019), the record openly confirms *McGillivray* has filed the complaint and not responded thereafter. That negligent and delaying approach is inapplicable to the Burkes case(s). It is inapposite to the Burkes objection to a fraudulent loan with evidence hidden on appeal for self-gain and financial greed, by corrupt, unbonded, rogue debt collecting lawyers.

[3] See *McGillivray v. Bank of America, N.A.* (1:18-cv-00942-RP) District Court, W.D. Texas (2018) which was previously 'decided', see; *McGillivray v. Countrywide Home Loans*, 360 Fed. Appx. 533 (5th Cir. 2010) and where Mark D. Hopkins was counsel for Appellees.

The Burkes history of compliance with court instructions, including attending court conferences and the bench trial is without question. This notably included defeating plaintiff *Deutsche Bank* and obtaining a favorable judgment not once, but twice.

Combined with the latest Scheduling Conference this year, [ROA.3, Minute Entry Doc. 17] and in case(s) which include submission of detailed filings with supporting evidence, the court(s) (to-date) have a complete and comprehensive set of *pro se* arguments in the first two simultaneous cases, strategically raised by the Burkes at the end of 2018. The truth is, the Burkes are extremely active litigants seeking justice in Texas courts and beyond. They are certainly *not dilatory*[4] nor can the Burkes be accused of being lazy in their style of litigation.

The Burkes goal is not to *delay*[5], it is quite the opposite. They wish to seek recovery of known evidence which will provide further irrefutable evidence and which they wish to present to a jury trial, in order to achieve another victory in the lower court in Texas, in full compliance of the laws. The material difference being,

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[4] "In *McGowan v. Faulkner Concrete Pipe Co.*, 659 F.2D 554 (5th Cir. 1981), we reversed the district court's dismissal of an employment discrimination action that had been pending for about two years. " *Rogers v. Kroger Co.*, 669 F.2d 317, 323 (5th Cir. 1982).

[5] "Further, there is no indication that Raborn or her counsel is guilty of dilatory tactics, deliberate delays, utter inattention to the litigation, or any other form of contumacious conduct." *Raborn v. Inpatient*, 278 Fed. Appx. 402, 405 (5th Cir. 2008).

a permanent and final judgment, which will allow the Burkes to live out the rest of their remaining years, with the security of knowing their retirement home is a safe place and homesteads are still sacrosanct in Texas law.

Nonetheless, reading Texas court opinion(s) and opposing counsel briefs and motions, the Burkes "are being tarred with the same brush" as *McGillivray*. This is prejudicial. It is brutal confirmation that 'non-prisoner'[6], *pro se* foreclosure and related cases, which should be the domain of State Courts per the common law and Constitution, are being treated in a similar light to the instructions mandated in *Bonner v. City of Prichard*, 661 F.2d 1206, 1208 (11th Cir. 1981):

"7. The Fifth Circuit has urged district courts to take "imaginative and innovative" steps in dealing with prisoner § 1983[7] cases; ". Relying upon the mature words of warning from US Supreme Court Justice Clarence Thomas;

It is evident Texas Courts are "substituting the law for their own pleasure."

C. MEET THE BURKES

What is missing from all the years of court filings and abuses transmitted against these two elderly citizens of the State, is a short bio of the Burkes character, which has been demonized by written and verbal assaults in Texas court(s).

[6] See warning in; *Mason v. Ocwen Loan Servicing, L.L.C.*, No. 17-10941 (5th Cir. Oct. 25, 2018)

[7] 42 U.S.C. § 1983

This chapter has been inspired by Justice Neil Gorsuch of the US Supreme Court and his recent visit to Austin for the investiture of Texas Supreme Court Justice Brett Busby. Justice Gorsuch talked about restoring civility. Judge Elrod sang the national anthem. It is not a blood-thirsty, militaristic song, but a narrative of military triumph allowing for the continued moral victory of democracy. Her version softened the lyrics, unlike the opinions that often grace her pen. Maybe change is possible and there is some flicker of hope that perhaps one day, the robe-wearing penholders in Texas Courts will write with the same patriotic passion, while issuing court orders and opinions when *pro se* litigants are before them.

It was interesting to read that Justice Gorsuch is married to Louise, a British woman who became a US Citizen. The Burkes birthplace is also Great Britain. For the record, they too, are US Citizens.

1. JOHN BURKE

John, born in 1937 in Scotland, UK, is a retired consultant engineer who has traveled the world with his job, wife and family, including Zimbabwe, Nigeria, Liberia, Qatar, UAE, and Europe, ended their lengthy travels and residences by deciding to settle permanently in Texas.

In his early years, John proudly served his country and during his time in service, he was deployed to NATO in Norway, where his ‘red beret’ was revered by

Norwegian citizens, recognized as the visual symbol of the British Paratroopers who were, in large part, responsible for the successful fight against German troops and the liberation of Norway. John was honorably discharged from his elite Brigade, now renamed as the 16 AIR ASSAULT BRIGADE.

John Burke, 16th Independent Parachute Brigade Group (RMP)

Born under the zodiac of cancer, John provides the following as representative of his beliefs, based on his experiences and concurrence with the Norwegian stance in relation to 'liberty';

> "Norwegians would rather die tomorrow on their feet than live a thousand years on their knees."
>
> - Wilhelm Morgenstierne, Norwegian Ambassador to the United States.

> The above statement, in conjunction with the meaning of the 16th's emblem, the Pegasus, mirrors John's commitment to ensuring liberty is never taken away from citizens by dictatorships;
>
> "Pegasus is the defining symbol of British airborne forces and is internationally recognized as the classical image of an armed man being delivered into battle by air. The Pegasus holds an iconic status."

2. JOANNA BURKE

Joanna, born 1938 in Scotland, UK, is a retired business entrepreneur who started her career as a former model, TV host, published author, cosmetic and health business owner, who kept active playing tennis, running and setting aside quality family time. Joanna was also a prolific fundraiser and advocate for disabled children, the under-privileged and related causes. Joanna is a free-thinker, an avid bridge player and enjoys reading and crosswords in her leisure-time.

While in Dubai, combining her love of bridge and her charity work, she approached the Royal Family and was subsequently introduced to the Emir of Dubai's brother, Sheikh Hamdan. Hamdan listened intently and immediately became one of her largest donors, not only providing financial support, but also an avid stakeholder, aiding in delivery of school housing (mobile units) and other logistics to assist Joanna's work raising funds for Down Syndrome children and

providing them with all the facilities they needed to improve their education and the quality of their lives.

Joanna Burke, Advocate & Fundraiser
for UAE (Dubai) Down Syndrome Charity

Born under the zodiac of Sagittarius, Joanna's style has always been concise, direct, and honest. In Joanna's logical and common-sense driven approach, if you want something accomplished correctly and efficiently, you have to reach out to the highest source possible. This proven method has been successful in every country she has held residence, with the exception of the USA; the executive, legislative and judicial branches in particular. That is telling.

"Each generation has to stand up for democracy.
It can't take anything for granted and may have to fight fundamental battles anew."
~ Margaret Thatcher

VII. SUMMARY OF THE ARGUMENT

Appellees have intentionally *narrowed* their response. They have resorted to gauche remarks and a contemptuous writing style, to try and mask the fact that both Ocwen and their counsel are responsible for, at minimum, a decade-long assault on homeowners since the financial crisis. They are responsible for perpetrating inexcusable financial crimes against unwitting, vulnerable and legally unsophisticated homeowners, including perjury, fake documents, [a system of] fraud, forgery, conspiracy, and related charges, with the ultimate goal of purloining their homesteads, resulting in gross unjust enrichment, as documented in detail in this reply brief.

A. Res Judicata:

The lower Courts restrictive interpretation in law related to *res judicata* is in error.[8] This is true when the case includes new facts and parties not in privity, despite a close relationship, due to a precedent opinion from the 5th Circuit.

[8] "we decline to take the drastic step of invoking res judicata for the first time on appeal" *United Home Rentals v. Texas Real Estate Com'n*, 716 F.2d 324, 330 (5th Cir. 1983)

B. Involuntary Dismissal is an Abuse of Discretion:

The lower Court denied the Burkes constitutional rights to a jury trial by taking advantage of the Burkes *pro se* status to stimulate[9] an involuntary dismissal (Rule 41(b)) of the case, an *abuse of discretion*. This, despite the Burkes many documented requests for clarification of the Courts ambiguous Order.[10]

C. The Judicial Oath and the Constitution:

Silence and ignorance is not part of the Constitution and should not be allowed as an excuse. A judge agrees to serve and follow the Constitution, per their signed judicial oath. As stated, the Burkes were blatantly ignored, yet the lower court could be very time sensitive and attentive when dismissing the case less than 24hrs after the Burkes last motion to reconsider.

D. A Summary List of Abuses and Errors:

To aid the appellate court and for the purposes of this reply, the Burkes now summarize the lower Courts' clear abuses and errors, which are discussed and replied to herein:

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[9] " the district court failed to employ lesser sanctions before dismissing the case. *See Brown v. Thompson*, 430 F.2D AT 1216." *Burden v. Yates*, 644 F.2d 503, 504 (5th Cir. 1981).

[10] "the Court held a hearing in this matter with regard to these motions [to clarify which were granted]" *Issaquena & Warren Counties Land Co. v. Warren Cnty.*, CIVIL ACTION NO. 5:07-cv-106(DCB)(JMR), at *1 (S.D. Miss. Oct. 26, 2012)

a) Failure to remand [ROA.191-235] the Burkes civil action to State Court. (*See* initial brief).
b) Failure to keep timely control of the docket while critical motions lay pending.
c) Failure to allow the Burkes to submit evidence at the scheduling hearing, nor scheduling any future 'motion hearings' on the pending motions and then 16 days later issue a 'roman candle' Order.
d) Failure to allow the Burkes to amend their pleadings before the first Order in c).
e) Failure to answer the Burkes omnibus motion responses to c) and failure of Judge Hittners' case manager and staff to respond to requests for clarification as detailed in letters and emails.[11]
f) Failure to allow a hearing on the Burkes motion to reinstate and request for a hearing [ROA.1075-1094].
g) Failure to grant an interlocutory appeal.[12]
h) Failure to interpret the Burkes notices and requests for an extension of time in relation to the letters to the Texas Attorney General as being a Rule 5.1 'constitutional question(s)' and directing the Burkes to file a notice.[13]
i) Failure in humanity by denying [ROA.1072] the Burkes motion for an extension of time [ROA.1039-1047] for a life-threatening medical illness to Joanna Burke and when 60 day extensions were signed by Judge Hittner for lesser reasons [ROA.1046, footnote 7 (citations)]

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[11]"It is clear to the Court from the memoranda submitted that Plaintiff's counsel in this case has failed to comply with many of the Court's scheduling deadlines. Such a drastic remedy is not appropriate…" *Solomon Iberville Rentals, LLC v. State Farm Fire*, CIVIL ACTION NO: 07-7523, SECTION: "J"(1), at *1 (E.D.La., 2008).

[12]*Ashcroft v. Iqbal*, 556 U.S. 662 (2009) Holding that court of appeals had jurisdiction to consider the sufficiency of a complaint on interlocutory appeal.

[13] "Any supposed respect the Court seeks in not reaching the constitutional question is out weighed by the intrusive and erroneous exercise of its own powers." *Zadvydas v. Davis*, 533 U.S. 678, 705 (2001)[Dissent].

VIII. THE ARUGMENT

A. THE RESPONSE BY APPELLEES LACKS SUBSTANCE

The Burkes compliance with the Fifth Circuits unambiguous instructions[14] obviates the necessity to address the many repetitive and mis-directed arguments found in the Appellees Brief. What stands out reading the Appellees brief is the fact most of the Burkes arguments have *not* been answered.

1. A State Complaint Moved to Federal Court

The two parties to this case are the homeowners, the Burkes, and on the opposite side of the case, the alleged 'mortgage servicer', and 'debt collector'[15] Ocwen Loan Servicing, LLC ("Ocwen"). The Trustee, Deutsche Bank National Trust Company ("Deutsche") is not a party here.

2. The Fifth Circuit's *Riddle* Opinion Supersedes a QWR

The Fifth Circuit's published opinion in *Riddle* confirmed the Burkes actions, namely, if the homeowner has an issue with the core functions of a mortgage servicer, the homeowner has no alternative but to raise a civil action against the

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[14]*Burciaga v. Deutsche Bank Nat'l Trust Co*., 871 F.3d 380, 390 (5th Cir. 2017).

[15]Holding; "as long as the [mortgage] was *not* in default at the time it was assigned by the originator." *Perry v. Stewart Title Co.,*756F.2D 1197, 1208 (5th Cir.1985).

In the Burkes case, Ocwen allegedly became the mortgage servicer around the year 2013. Appellees have not disputed the fact that the claimed [mortgage] home equity loan by Appellees was 'in default at the time it was assigned'. It is irrefutable; Ocwen is a debt collector.

mortgage servicer.[16] *Riddle*, as applied here, would mean Deutsche could not be held liable for items such as accounting.[17]

Hence the Burkes raised their complaint against the new party, Ocwen, for the first time. Any claims for 'privity' between the parties should fail.

3. Common Sense Realism; Res judicata cannot apply if Deutsche Bank is not responsible for mortgage servicing per *Riddle*

Ocwen's reliance on 'res judicata' is flawed in law.[18] Ocwen believe the Burkes cannot even refer to the underlying case *Deutsche Bank Nat'l Tr. Co. v. Burke*, 902 F.3d 548 (5th Cir., 2018) as that would be 'res judicata'. Clearly, that is error.[19] The Burkes were correct to commence a new civil action against Ocwen per *Riddle*.

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[16]*Christiana Trust, A Division v. Mary Riddle*, 17-11429 (5th Cir. 2018) (pub.) "The Court concluded that "[b]ecause only 'servicers' can 'fail to comply' with 12 U.S.C. §2605(k)(1)(E), only servicers can be "liable to the borrower' for those failures."

[17]12 U.S.C. §2605(i)(3) Servicing; The term "servicing" means receiving any scheduled periodic payments from a borrower…and making the payments of principal and interest…pursuant to the terms of the loan." And ROA.22, ROA47-49.

[18] *Turner v. Pleasant*, No. 11-30129 (5th Cir. Nov. 23, 2011) Reversing res judicata dismissal.

[19]*Saint Paul Commodities, LLC v. Crystal Creek Cattle Co.*, CIVIL ACTION NO. 3:11-CV-0037-G (N.D. Tex. Aug. 1, 2012).

4. The Underlying Timeline and Events post September 2018's Opinion in the *Deutsche Bank v. Burke* case 18-20026, (5th Cir., 2018)

As admitted by attorneys for Deutsche, Ocwen and themselves [BDF Hopkins], they also attempted to modify the above case after the entry of judgment, (5th September 2018), from $615,000.00[20] to $1,146,557.32.[21] The Burkes objected and this Court denied the motion as BDF Hopkins was attempting to alter the judgment based on facts presented *for the first time*, which this Court has stated many times, is not allowed. See Exhibit #CRUM, ROA.544-545 and also Deutsche, Doc. 00514734347 p. 11 (with footnote citations).

5. The Burkes Complaint Should Not have Been Dismissed for Res Judicata or DWOP'd

As aggrieved consumers, the Burkes filed a legal civil action, as plaintiffs for the first time in State Court, in compliance with this Courts instructions, against a new party, Ocwen, for a new claim, the $1,146,557.32 million dollar statement which is nearly double the amount of the judgment. The Burkes are rightfully upset

[20]EXHIBIT #FIFTHII, ROA.546-557

[21]ROA.28

consumers who are entitled to litigate when Ocwen refuses to correct the material accounting error.[22]

6. The Federal Court Abuse of Discretion

The Burkes have noted the lower court enjoys broad discretion[23]. That said, it should not be allowed to 'abuse' that discretion.[24] In this case, the lower court failed to provide due process to the Burkes when every possible attempt had been made to reach the court prior to the deadline, seeking a *good faith* clarification of the Courts Order. [ROA.489-497] Indeed, even in the 5th Circuit, common sense has been applied when it is clear there was 'reasonable excuse' for any perceived delay or neglect.[25] Observe below, an expanded description of the docket, which provides the Court with a clear overview of the events and timelines for consideration of the Burkes arguments.

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[22]Ocwen claim in their brief the Burkes QWR is non-compliant. But the details and law prove otherwise; ROA.29-36.

[23]*Willis v. Barron*, 604 S.W.2d 447 (Tex. Civ. App. 1980).

[24]"Betzel concedes that he offered no explanation to the district court for his failure to timely designate" *Betzel v. State Farm Lloyds*, 480 F.3d 704, 707 (5th Cir. 2007) "We reverse, nevertheless…"

[25]*Marcaida v. Rascoe*, 569 F.2d 828 (5th Cir. 1978)

B. EXPANDING THE DOCKET

Ocwen dismissed the docket in the majority as being irrelevant, with the exception of res judicata, attorney immunity and support of the lower courts' decision to dismiss the Burkes complaint. This section addresses Appellees misleading and malevolent notion. It provides a detailed and expanded summary of the docket, *e.g.* the record on appeal, which should be reviewed and considered on appeal.

The *pro se* Appellants recognize this courts statements in *United States v. Flores*, 887 F.2D 543, 546 (5th Cir. 1989). Furthermore, in; *Crear v. Select Portfolio Servicing Inc.*, No. 18-10860, at *7 n.2 (5th Cir. Jan. 22, 2019). And finally; "A reply brief may not be used to raise new issues." *Penley v. Westbrook*, 146 S.W.3D 220, 227 (Tex.App.-Fort Worth 2004 pet. filed).

The Burkes wish to comply. What follows provides a detailed, cross reference summary of the key documents and their purpose, with reference to the record on appeal. This will ensure the appellate court can review easily, respecting this courts time.

1. THE DEUTSCHE BANK CASE (TRUSTEE)

The Burkes filed suit against Ocwen as a result of the judgment of this court in *Deutsche Bank National Trust Company v. Burke*, 5th Cir., 2018. As well

documented in the initial brief, the judgment of foreclosure was issued and then counsel for Deutsche Bank attempted to amend the sum of the judgment from $615,000.00[26] to $1,146,557.32[27] and also sought a 3-day eviction notice.

2. THE CASE AGAINST OCWEN IN STATE COURT

On advisement by this court and by following the case law and precedents provided, the Burkes sued Ocwen. As such, this civil action is a new complaint in a new civil action and where privity is not applicable. One of the main arguments surrounds Ocwen, who continue to mail the Burkes statements wherein they claim the Burkes owe $1,146,557.32[28] (this is a variable, increasing sum, which of course, increases the Burkes injury and damages claim(s)). This contradicted the judgment, which is for the fixed sum of $615,000.00.[29]

The lower court docket [ROA.1-5] sheds a summary timeline of events and filings by the parties. The Burkes now take this opportunity to narrate the facts pertaining to the key docket filings.

[26]EXHIBIT #FIFTHII, ROA.546-557

[27]ROA.28

[28]ROA.83-84.

[29]EXHIBIT #FIFTHII, ROA.546-557

3. REMOVAL TO FEDERAL COURT BY OCWEN (SDTX)

After the Burkes filed the Ocwen case in *State* Court, it was removed by the Appellees. Seven short days later, they filed their first *premature*[30] motion to dismiss[31]. Ocwen conveniently ignored substantial areas of the Burkes original complaint, or chose to incorrectly label it as *attacks* on Ocwen, Deutsche Bank, BDF Hopkins and the Courts. In other words, the Burkes case was only filed to *harass* and delay, an act of *bad faith*. Appellees focused on the '*res judicata*' claims, citing cases which are indifferent to the Burkes preparation, arguments and exhibits.

In closing, Appellees counsel *condemned* the lower court Judge in the *Deutsche* case before this Court as documented. That tactic proved successful and this Court joined in, ridiculing the judge[32] and the homeowners[33] in the 3-panel Opinion. As a result, there is one less honest judge on the bench. Once again, Appellees, via counsel, rely upon the same '*system*' of verbal and written *attacks* on the Appellants, on the basis that bullying, lies, abusive language and repetitive retaliation is a known *precedent* to winning the case in the 5th Circuit. It is shameful.

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[30]ROA.162-173 and ROA.440, including footnote 3.

[31]ROA.162-183.

[32]"The conduct here is extraordinary conduct that would lead to chaos if routinely done." ***Burke***, 902 F.3d. 548, 551.

[33]"Given nearly a decade of free living by the Burkes, there is no injustice in allowing that foreclosure to proceed." *Burke*, 902 F.3d 548, 552.

4. EARLY MOTIONS TO REMAND AND STAY

The Burkes filed simultaneously, motions to remand [ROA.191-235] and stay, [ROA.190-193] a request to suspend the case until the court ruled on the motion to remand. This would also negate the necessity to reply to the disfavored motion to dismiss.[34] The remand motion provides background details pertaining to the case, what transpired after Indymac Bank collapsed and discusses how Ocwen have paid billions of dollars in fines and settlements[35] in order to maintain a lucrative and ever-increasing stake in the foreclosure and eviction business by pretending to be a customer-focused non-bank servicer.

(1) Show Authority

The Appellants presented strong arguments why a 'show authority' request is necessary in law, why BDF Hopkins dual role with Ocwen is clouded and due to the many roles, contracts and transfers, it would be prudent, for the court to intervene in order to satisfy itself, prior to the anticipated return of the case to its rightful place, the State Court. This is also detailed extensively in EXHIBIT #RULE12 [ROA.558-

[34]ROA.162-173 and ROA.440, including footnote 3.

[35]E.g., ROA.20-22; CFPB, $127M, 49 State settlement, $2.1B ROA.49-50 and then lists cases, settlements thereafter.

571] and would highlight the TRCP/FRCP defense offered by BDF Hopkins as 'absurd', per ROA.586.

The Burkes leave this section relating to debt collectors' BDF Hopkins as-is, relying upon the arguments presented in their initial brief, lower court filings, *e.g.* ROA.215-220, and per the disclaimer in relation to the Constitutional Challenge.

(2) OneWest Bank Sells MSR Business to Ocwen

Moreover, as stated in the remand motion, [ROA.191-235] OneWest Bank[36] sold all their mortgage servicing rights to Ocwen in 2013[37] and no *proof of transfer* provided to the Burkes or in court filings. The Burkes furnished the lower court with the *CFPB v. Ocwen* case, ROA.646-740. The Burkes intervened as judicially noticed, and who are now on appeal for denial of that right to the Eleventh Circuit, who follow 5th Circuit precedent[38].

Reading this CFPB complaint, which includes pages and pages dedicated to the fiasco as regards the onboarding of loans, the complete failure of the RealServicing platform, to the absence of invoicing to match charges applied to

[36]OneWest Consent Order, Trump Cabinet and Financial Crisis History ROA.263-271

[37]ROA.49

[38]*Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).

accounts (implied fraud), the Burkes focus on this complaint section for the purposes of guiding this court as to why it is critical; see ROA.655-659.

In summary, the onboarding of purchase MSR loans was/is a complete debacle and which includes the year 2013, the purported year that the alleged Burkes loan was transferred. This, despite the fact these loans were "sold" to Ocwen by OneWest Bank in 2013, and if that is the case, then Deutsche's 2015 appeal should never have been allowed, and Hopkins knew it (fraud), as argued by the Burkes and ignored by the lower court when he arrived for the first time after the bench trial to appeal the judgment.

(3) Hopkins Pierced His Own Legal Immunity

Additionally, in the remand motion, [ROA.191-235] the Burkes expand on how attorney-client immunity fails and how Hopkins own actions pierces his own claims for legal immunity - it has been waived.[39]

[39]"Ordinary waiver principles resolve the present dispute. By definition, the attorney-client privilege protects only *confidential* communications. MISS. R. EVID. 502(B). By disclosing such communications to third parties—such as by revealing them in open court—the client waives the privilege. *Hewes v. Langston* , 853 SO.2D 1237, 1264 (Miss. 2003)" *In re Itron, Inc.*, 883 F.3d 553, 558 (5th Cir., 2018).

(4) No Surety Bond for Hopkins Law, PLLC (Constitutional Challenge)

The remand motion [ROA.191-235] discusses the failure by BDF Hopkins to obtain and maintain a valid surety bond with the State of Texas.

5. THE SANCTIONABLE MOTIONS RESUME IN 2019

In early 2019 there was a 'flurry' of court sanctionable Ocwen motions, repeating the same claims as in 2018, with the goal to label the Burkes as '*vexatious'* [40] litigants who had brought the *'baseless'*[41] law suit in '*bad faith*'[42] and the case should be dismissed immediately '*with prejudice'*[43] and no doubt, based on the premeditated wording, sought to obtain attorney fees and court restrictions on the Burkes in relation to any future civil actions. That's how the Appellees act in litigation, without civility, but continually play the victim.

(1) The Stacked Docket

The first motion filed was Ocwens', the *premature* motion to dismiss.[44] The docket records any and all subsequent filings [ROA.1-5]. However, by the time of

[40]E.g., ROA.165, #7 and 241, #10.

[41]E.g., ROA.245, #8.

[42]E.g., ROA.254, #4.

[43] E.g., ROA.172, #II DISMISSAL WITH PREJUDICE, #20.

[44]ROA.162-173 and ROA.440, including footnote 3.

the Scheduling Conference, (Transcript; ROA.1121-1124) the court had remained silent on all pending motions. Prior to the conference, the Burkes submitted their own Case Management Plan and Answers [ROA.435-456]. This highlighted the 'stacked docket'; the pending Motion to Remand [ROA.191-235] – with emphasis on *fraud* [ROA.441] and highlighting the Meeting of the Supreme Court of Texas Foreclosure Task Force Transcript [ROA.274, ROA.276, ROA.292, ROA.295, ROA.300, ROA.302-303, ROA.329, ROA.337, ROA.339, ROA.354, ROA.367-368, ROA.390], and the 'Constitutional Challenge' [ROA.442], Stay, [ROA.443-444] Process of Service, [ROA.442-443], Separate Trials/Reschedule Conference [ROA.444, and Motion ROA.447-487[45]; never answered by the Court] and Ocwens' 'premature' Motion to Dismiss[46] (citing *Gray v. 1 Texas Adjusters, LLC* [ROA.440].

At the 3-minute Scheduling Conference, attended by all parties in *Burke v Hopkins,* 4:18-cv-04543, S.D. Tex. (2019) and *Burke v Ocwen,* 4:18-cv-04544, S.D. Tex. (2019) cases, were held in front of Magistrate Judge Peter Bray, the Burkes approached the court and asked if they could submit evidence, Exhibit #BINDEROCWEN [ROA.586-618] for their case relevant to the pending motions.

[45]This motion detailed concerns about the stacked docket, the time it would take to prepare for both Burke cases which is complex law. The Burkes would most likely be human and make mistakes, citing *Maty v Grasselli* [ROA.483], and also referencing their intervention in Florida.

[46]ROA.162-173 and ROA.440, including footnote 3.

This was politely denied by Mr. Jason Marchand (for Judge Bray) who advised the court would only schedule the case(s), nothing else.

6. THE ROMAN CANDLE ORDER

Nonetheless, only sixteen days later, and while the Burkes were studying all about Federal Rules of Evidence, in eager anticipation of a Jury Trial in early 2020, the court issued its first Order, [ROA.489-497] dismissing the majority of the Burkes claims (in error) under the 'res judicata' doctrine and leaving the ambiguous "Collection Claims" related to the Burkes RESPA complaint - with the 'opportunity to amend'.[47]

7. CATALOGING THE BURKES' OMNIBUS RESPONSE

As the Appellees would have the court believe, the Burkes then filed a 'flurry' of "aggrandized filings attacking the court and opposing counsel"[48]. Once again, the Appellees are being deceptive.

What was actually filed is based on facts and true statements. The motions filed by the Burkes were relevant to the unexpected events which had just transpired. Namely, after attendance at the 'Scheduling Conference' which was a signal that the

[47] *Hays v. State*, 936 F. Supp. 360 (W.D. La. 1996)

[48] Document: 00515095608, Page: 20

case was going to trial, the court, without warning or any 'motion hearings', sixteen days later, sideswiped the Burkes with a 'Roman Candle' Order [ROA.489-497].

In order to preserve the record, it requires any answers and submissions to be in written, memorialized form, a standard requirement, especially for any interlocutory or final appeal(s) to this court. In order to rectify this gross injustice, the Burkes spent a great deal of time and detail responding to the Courts Order via an omnibus of compelling legal motions, seeking review, rectification and clarification, as listed herein;

(1) Motion to substitute service and motion for an extension of time to execute service

See ROA.498-529. As Ocwen denied service. The Burkes had retained the State court to issue service directly on their behalf.[49] Appellees counsel also ignored Appellants letter[50] and direct email(s)[51] asking if they would waive service or in the alternative, confirm the correct address to ensure service was received.

[49]ROA.514-529

[50]ROA.517-519

[51]ROA.509-512

(3) Master Motion with Exhibits

See proof of claim(s); ROA.530-980. The index breaks down the motion, which can be found specifically at ROA.531 with an expanded index description for each main index item following, ROA.532-538.

(4) Motion to Clarify

Based on the Order EXHIBIT #ORDER19, ROA.971-980 (a copy), the Motion to Clarify is found at ROA.981-990. The main index breaks down the motion at ROA.982 with an expanded index description following, ROA.983-988.

The summary of the Burkes argument is critical. As this Court will note after reading the motion, there are so many issues which are vague and questionable from the Courts Order. The lower courts failure hold any 'motion hearings', telephonic hearings or allowing the Burkes *leave to amend*[52] as per their request in the original *State* filed complaint and *before* deciding on the majority of the case, including the pending remand motion[53], all together and without notice of any kind - after the Burkes attended the 1.5 minute Scheduling Conference where it could have been at

[52]"It is well settled that amendments must be liberally granted …" *In re Jones*, 490 F.2d 452, 457 (5th Cir. 1974).

[53] ROA.191-235

least scheduled for a hearing in a matter of such critical importance - is an abuse of discretion.

(5) Motion for Reconsideration of 'Res Judicata'

ROA.991-1012. The index breaks down the motion at ROA.995 with an expanded index description (before and after) at ROA.991-1012. The summary of the Burkes argument in this motion is very detailed with arguments and relevant citations, *e.g.*; *Lawlor v. National Screen Service*, 349 U.S. 322 (1955), ROA.1002-1003.

(6) Motion for Reconsideration of 'Abuse of Discretion'

ROA.1013-1034. The index breaks down the motion, which can be found specifically at ROA.1016 with an expanded index description for each main index item before and after, ROA.1013-1034. The Burkes timely request for the lower court to certify an Interlocutory Appeal is located at ROA.1032.

(7) Motion to Strike

Unauthorized Supplement by Ocwen, filed without leave of the Court (ROA.1035-1038), which Judge Hittner would later deny.

(8) Motion for 'Extension of Time'

See [ROA.1039-1067] which was requested due to; (i) A very ill Joanna Burke, an 80 year old woman; (ii) who relies upon John Burke as her caregiver and

he is disabled himself; (iii) Requests for information from TXSML & Texas OAG were pending; (iv) the Burkes busy legal diary.

C. THE ROCKET-DOCKET DISMISSAL

When the USPS Driver left the court building after delivering the Burkes' final legal documents [ROA.1075-1094] in an attempt to at least have ***one*** 'motion hearing' on their case in front of a judge, these efforts would be denied in rocket time, less than 24hrs later [ROA.1095]. The Burkes timely appealed [ROA.1096-1120].

a. THE APPELLEES CITATIONS ARE IRRELEVANT

Not surprisingly, Appellees concur with the lower court's dismissal per Fed. R.Civ.P.41(b) of the Burkes remaining complaint and cites *Link v. Wabash.* However, that Supreme courts' narrow decision is inapposite. It discussed failure to attend the court hearing in a case which was pending for 6 YEARS. In this case, the Burkes attended the 1.5 minute Scheduling Conference.

The Burkes suggest a more accurate and similar complaint (*e.g.* fraud) *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 367 (1966). The higher court reversed the appellate courts' decision to affirm the lower court decision to dismiss the case by invoking the involuntary dismissal rule:

> "The Court of Appeals reached its conclusion that the case must be dismissed under Rule 23(b) and Rule 41(b) despite the fact that the charges made against the defendants were viewed as very serious and grave charges of fraud and that "many of the material allegations of the complaint are obviously true and cannot be refuted." 342 F.2d, at 607."

IX. CONCLUSION

The true facts cannot be refuted nor hidden by Appellees and which forms a substantial part of the evidence preserved, documented and submitted to this court as the formal, authenticated record on appeal.

This record confirms, Ocwen has been publicly censured, State Attorney Generals' have joined together and fined, sanctioned and issued cease and desist letters[54] to Ocwen for its significant and systematic misconduct which occurs at every stage of the mortgage servicing process *e.g.* Ocwens continual failure to do its job.

The Burkes, consumers, private businesses and shareholders have sued Ocwen across the country and in the majority, they've settled with monetary

[54]As recently as April 2017 in Texas, EXHIBIT #2018-OCWEN-TEXS-CEASE-DESIST-LETTER, "Ocwen and OLS the .Respondent have engaged in, are engaging in, or are about to engage in, acts or practices which warrant the belief that such entities are not operating honestly, fairly, soundly, and efficiently in the public interest..." [at ROA.148], ROA.142-150 and "Respondent was also issued a *prior* Order to Cease and Desist…" [at 146] and nationwide, ROA.51-66.

payments and agreements to clean up their act. Yet they continue to maliciously ignore these binding agreements and contractual legal settlements.

Ocwen has endured one of the longest and highest activity levels in courts nationwide since the financial crisis of any non-bank , defending their scandalous acts.[55]

In closing, Appellants would draw this courts' attention to one of those many cases, a civil action in Florida, Exhibit #OCWENDER, ROA.742-970. It is a "must read" complaint by shareholders against Ocwen which provides a comprehensive index particularizing the corrupt business enterprise. The case was settled by Ocwen.

The only remaining question in this private civil action and appeal is – Will this Courts selected 3-panel reverse the erroneous and unconstitutional lower court decision in order that the Burkes may proceed with a jury trial and for justice to be served? Appellants think they should.

[55]E.g., ROA.51-66, ROA.742-970, and HTTPS://VIOLATIONTRACKER.GOODJOBSFIRST.ORG/PARENT/OCWEN-FINANCIAL

DATED: September 25, 2019 JOANNA BURKE

By *s/ Joanna Burke*
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CERTIFICATE OF SERVICE

I hereby certify that, on September 25, 2019, a true and correct copy of the foregoing Brief of Appellees was served via the Court's EM/ECF system on the following counsel of record for Appellees:

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CERTIFICATE OF COMPLIANCE

This motion complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts exempted by Fed. R. App. P. 32(f), it contains **5,999** words.

This motion 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 it has been prepared in proportionally-spaced typeface, including serifs, using Microsoft Word 2010, in Times New Roman 14-point font, except for the footnotes, which are in proportionally-spaced typeface, including serifs, using Microsoft Word 2010 in Times New Roman 12-point font.

s/ Joanna Burke
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