No. 20-311

In The
Supreme Court of the United States

DEBORAH WALTON

Petitioner

v.

FIRST MERCHANTS BANK.

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Deborah Walton
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QUESTIONS PRESENTED

Whether the Appellants 14th Amendment rights, were violated when she was not afforded the right to respond to the Appellee's motion for Attorney fees.

Whether the Appellants 14th Amendment rights, were violated after she filed a timely Appeal with the 7th Circuit. Subsequently when an order was entered challenging jurisdiction, than the Appellee, filed a motion with the District Court under Fed. T.R. 58 to delay the Appeal.

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

RULE 29.6 STATEMENT

The Respondent First Merchants Bank, is a publicly traded Corporation.

STATEMENT OF RELATED CASES

Deborah Walton v. First Merchants Bank, Southern District of Indiana Docket No. 1:17-cv-1888-JMS-MPB Ended November 25, 2019.

Deborah Walton v. First Merchants Bank, Southern District of Indiana Docket No. 1:17-cv-1888-JMS-MPB Ended January 14, 2020.

Deborah Walton v. First Merchants Bank, Seventh Circuit Court of Appeals Docket No. 19-3370 and No. 20-1206 Ended July 7, 2020.

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RULE:

Deborah Walton respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, and Remand the case back to the Southern District of Indianan.

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OPINIONS BELOW

The Denied Re-hearing en banc at United States Court of Appeals is dated July 31, 2020 (7th Cir. 2020) is found at Appendix, **App 1.**

The Opinion of the United States Court of Appeals is dated July 7, 2020 (7th Cir. 2019) is found at Appendix, **App 2.**

The Seventh Circuit, Order on motion to supplement Exhibit A, August 3, 2020, is found at Appendix, **App 11.**

The Seventh Circuit, Order on Appellee Statement to Stay Appeal, April 2, 2020, is found at Appendix, **App. 12**

The Seventh Circuit, Order on Appellee Statement to Stay Appeal, March 5, 2020, is found at Appendix, **App. 14**

The Seventh Circuit, Order on Consolidate 19-3370 and 20-1206, February 7, 2020, is found at Appendix, **App. 15**

The Seventh Circuit, Order on Granting the Petitioners oversized appendix January 24, 2020, is found at Appendix **App. 17**

The Seventh Circuit, Order on briefing schedule, January 17, 2020, is found at Appendix **App. 18**

The Seventh Circuit, Order on instructing Plaintiff to inform the Court if she plans to Appeal the Attorney Fees, January 15, 2020, is found at Appendix **App. 20**

The Seventh Circuit, Order on request for Statues Report, January 14, 2020, is found at Appendix **App. 21**

The Seventh Circuit, Order on motion for clarification, January 6, 2020, is found at Appendix **App. 22**

The Seventh Circuit, Order on Suspending Briefing, December 27, 2019, is found at Appendix **App. 23**

The Seventh Circuit, Order on instructions to Clerk to reflect Appellant's payment, December 5, 2019, is found at Appendix **App. 24**

The Seventh Circuit, Order on Preliminary Review and Suspending Appeal December 3, 2019, is found at Appendix, **App. 25**

The Southern District of Indiana Order on Findings of Fact and Conclusions of Law, November 25, 2019 is found at Appendix, **App. 26**

The Southern District of Indiana Order on Attorney Fees, January 14, 2020 is found at Appendix, **App. 49**

JURISDICTION

Petitioner seeks review of the decision of the United States Court of Appeals for the Seventh Circuit entered on July 7, 2020. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Frank Dodds Act Regulation E

The **Frank Dodds Consumer Financial Protection Bureau Act, Regulation E - Electronic Fund Transfers 12 CFR § 1005 et seq.** prohibits financial institution from assesses a fee or charge on a consumer's account held by the institution for paying any transaction (including a check or other item) when the consumer has insufficient or unavailable funds in the account, without the Consumers affirmative consent. Regulation E, known as Opt-In / Opt-Out.

STATEMENT OF THE CASE

This case derives from the Southern District of Indiana, with two surviving calms scheduled for Trial by Jury. The Telephone Consumer Protect Act (TCPA), 47 U.S.C. § 227, and Electronic Funds Transfer Act (Regulation E, 12 C.F.R §205.7). The Petitioner proceeded to litigate her claims pro se, and when all dispositive motions had been filed, the Petitioner survived summary judgment, hence her case was set for a Jury Trial.

After the collapse of two settlement conferences, the Petitioner was faced with litigating her claims at trial. As a pro se litigant, with no trial experience, and no legal education, the Petitioner retained legal counsel to represent her at trial. However, months before the Jury Trial was scheduled to take place, the Respondent motioned the court to waive the Jury Trial and a Bench Trial was granted.

For the first time, during the course of over two years of pleadings, the Respondent raised a frivolous claim argument, during their closing arguments at trial, accusing the Petitioner of filing a frivolous Regulation E claim. Yet, when the Respondent submitted their Facts Findings and Conclusion of Law brief, it contained a motion for attorney fees. The Petitioner's counsel responded to the motion for attorney fees, however, the Respondent filed a motion to strike the response brief, **App. 66**, and the District Court granted the motion to strike. **App. 71**

A judgment was entered against the Petitioner on all claims, so the Petitioner terminated her Attorney Client relationship, and filed an Appeal on November 26, 2019, under cause number 19-3370, with the Seventh Circuit Court of Appeals.

The Petitioner argued that her right to a Jury Trial and right to Due Process was violated under the under the 5th, 7th and 14th Amendments. On July 7, 2020, the Seventh Circuit Affirmed the Due Process Claim, and Remanded the TCPA claim for further proceedings. The Petitioner then, filed a petition for rehearing en banc, however, she lacked the votes for a rehearing, and the denial was entered on July 31, 2020.

ARGUMENT

THIS COURT SHOULD GRANT REVIEW OF THE 7TH CIRCUIT COURT OF APPEALS DECISION AFFIRMING THE DISTRICT COURTS ORDER SANCTIONING THE PETITIONER FOR THE FOLLOWING REASON: THE 7TH CIRCUIT FAILED TO APPLY PROCEDURAL DUE PROCESS.

A. This Court Should Grant Certiorari Since the 7th Circuit Court of Appeals Affirmed The District Courts Sanction For Not Proving That The Petitioner Did Not Opt-In To Overdraft Protection.

The Petitioner was not afford due process on four different occasions: Stating with at the District Court ***1)*** Petitioner was not allowed to respond to the Respondent's motion for Attorney Fees, after the Respondent filed a motion to Strike the Petitioner response. **App. 66**, and the District Courts entered an Order **App. 71** striking Petitions response. ***2)*** The District court never scheduled a hearing for the Petitioner to be heard concerning the Attorney Fees awarded. ***3)*** The Petitioner was not allowed to Oral Argument **App. 2** at the 7th Circuit Court of Appeals, ***4)*** The Petition for Re-Hearing En Banc, was denied. If the Petitioner had, had the opportunity to point out to both the Southern District of Indiana, and the Seventh Circuit Court of Appeals, she would have prevailed on the sanction waged against her. *See Snyder v. Masachusetts, 291 U.S. 97, 105 (1934)*

The Seventh Circuit failed to follow procedural due process, because they had already formed their opinion: ***"No reasonable jury could have found, therefore, that she did not opt into coverage."*** **App. 2** However, the 7th Cir. Opinion is incorrect, the Petitioner testified that the Maintenance Form she signed, was for

overdraft protection, from her Saving to her Checking account, and that she never signed an Opt-In Consent Form for Regulation E, because It was not Enacted until January 19, 2010. The Petitioner's Maintenance Form was signed October 2, 2008, prior to January 2010, when Regulation E ***(Opt-In, Opt-Out)*** was enacted. **App. 73** Therefore; a jury of fact finders, would have heard the Petitioners testimony, and seen the Regulation E guidelines, along with the Maintenance Form, submitted as Evidence, would have immediately recognized the discrepancy, therefore; the documents speak for themselves. If the 7th Circuit would have examined the Maintenance Form, they would have realized that the Respondent did not submit as Evidence a Regulation E form to Opt-In to overdraft protection. The 7th Circuit Judges and the District Court Judge all based their ruling of a frivolous claim, on a maintenance savings and checking account overdraft form that was signed more than a year prior to Regulation E, and didn't even met the Regulation E requirements. Therefore, the Petitioner did not file a frivolous Regulation E claim. The Opt-In, Opt-Out effective dates are as follows:

The guidelines for Opt-In / Opt-Out overdraft protection became effective on *January 19, 2010.* However, compliance did not become mandatory until *July 1, 2010.* The Rule applies to new and existing accounts. For accounts opened before *July 1, 2010,* financial institutions may not assess any overdraft fee on or after *August 15, 2010,* if the consumer has not opted in. For accounts opened on or after *July 1, 2010,* financial institutions may not assess any overdraft fee unless and until the consumer has opted in.

When the Petitioner signed the Maintenance Form on October 2, 2008, more than a year prior to the enactment of Regulation E, Overdraft Opt-In / Opt-Out protection, there was no possible way she could have Opted-In to First Merchants Banks overdraft protection. Because it wasn't even heard of in 2008, nor is there any Opt-In / Opt-Out Language on the Maintenance Form, and the document speaks for itself. (First Merchants Bank Maintenance Form), **App. 73** and (Petitioners testimony at trial) **App. 74** . Nowhere in the record shows the Petitioner Opted-In to Overdraft protection, therefore; she, did not file a frivolous complaint under Regulation E. The Judges lack of attention to the details of the Banks Maintenance Form, has turn out to be a $57,751.00 misstep. *emphasis added.*

The Petitioner gleaned from the 7th Circuit Court of Appeals final judgment order, that they felt it was irrelevant that the Petitioner's Due Process was violated, because their ruling virtually weighed on the fact that an overdraft form was signed, while ignoring the fact that the Maintenance Form was for the sole purpose of transferring funds from the Petitioners Savings to her Checking account. In no way was the Maintenance Form an Opt In to overdraft protection form, under Regulation E. If the Petitioner had, had the opportunity to challenge the attorney fees, by answering the moving parties allegation, before the attorney fees were taxed against the Petitioner, it would have been obvious to the District Court Judge that the Maintenance Form failed to qualify as an Opt In Regulation E form. (First Merchants Bank Maintenance Form) **App. 73** *emphasis added.*

The Supreme Court has made it very clear, that under the 14th Amendment they will continue to uphold the rights of the people, and that their right to be heard is a vital part of their due process. Procedural due process is essentially based on the concept of "fundamental fairness". For example, in 1934, the United States Supreme Court held that due process is violated "if a practice or rule offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental". *See Snyder v. Masachusetts, 291 U.S. 97, 105 (1934)*

When the Petitioner first heard the phrase Justice Is Blind, in a very naïve way, she believed it, however; what she is experiencing, is Justice took a Blind eye to the truth. As a cradle Catholic, the most profound homily she ever heard at Mass, was, "Being unfair with the powers one is blessed with, means that Just, is to be Powerless". The profound meaning: Is without the ability to behave according to what is morally right and fair. *emphasis added*

B. **This Court Should Grant Certiorari Since The 7th Circuit Allowed The Respondent to Delay the Petitioners Appeal To Be Timely Heard**

The Seventh Circuit Conducted A Preliminary Review Of The Petitioners Case On December 3, 2019, Questioning Jurisdiction by entering the following Order with instructions:

The Petitioner filed her notice of Appeal on December 2, 2019, and December 3, 2019 an Order from the 7th Circuit was entered citing the following:

A preliminary review of the short record indicates that the order appealed from may not be a final appealable judgment within the meaning of 28 U.S.C § 1291.

A notice of appeal filed before the district court issues its ruling on an attorneys' fees matter is ineffective until the order disposing of the attorneys' fees motion is entered on the district court's civil docket "if the district court extends the time to appeal under Rule 58.' Fed. R. App. P. 4(a)(4)(iii).

In the present case, the district court resolved the merits of plaintiff's case, but stated that 'Final judgment shall issue after the attorneys' fee issue is resolved." As such this appeal may be premature, because it appears that the district court has not resolved the attorneys' fees matter and entered its order on the district court's civil docket.

Accordingly,

IT IS ORDERED that both Petitioner and Respondent file, on or before December 17, 2019, a brief memorandum stating why this appeal should not be **STAYED** pending the entry of the order disposing of the attorneys' fee matter. A motion for voluntary dismissal by Petitioner pursuant to Fed. R. App. P. 42(b) will satisfy this requirement. Briefing shall be **SUSPENDED** pending further court order. **App. 25**

The Respondent filed a motion with the District Court under rule 58, requesting an extension of time to file an Appeal, on December 5, 2019, **App. 56**, and on December 9, 2019, **App. 60**, the motion was Granted. When the Petitioner checked the docket she saw the motion, and the Order by the district court, so she immediately filed an objection, at **App. 62**, and also submitted her objection to the 7th Circuit, and her response to the courts December 3, 2019 Order.

The Respondent was without standings to file an extension of time on the Petitioner's Appeal, and even if they had standings, the motion was untimely, according to the U.S. Supreme Court. *See* Bankers Trust Co. v. Mallis, 435 U.S. 381 (1978) (per curiam); United States v. Indrelunas, 411 U.S. 216 (1973) (per curiam);

C. This Court Should Grant Certiorari Because the Petitioners Right To Due Process Was Denied When The District Court Judge Struck The Petitioner's Response To Respondent's Motion For Attorney Fees

When the Respondent filed their Finding and Conclusions of Law brief, they requested Attorney fees, which was premature, however the Petitioner should have been allowed the opportunity to respond to the Finding and Conclusion of Law brief, of which the Petitioner did do. The traditional way of dealing with motions to recover Attorney Fee's, are usually made after you have prevailed on the case. No written motion or pleading was filed by the Respondent in advance of the Court's deadline for each party to simultaneously submit proposed findings of fact and conclusions of law. It would be impossible for the Petitioner to address the merits of the Respondent's petition since it had not been filed. When the Petitioner attempted to file a response to the Respondent's motion for Attorney Fee's consistent with the Local Rules, the Respondent moved to strike the Petitioners response. The Court again did not allow the Petitioner an opportunity to respond to the Respondent's motion to strike, when the Petitioner had 21 days to respond in accordance to Fed T.R. 12(f). Yet again the Court prematurely granted the Respondent's motion, without allowing the Petitioner her right to be heard, which is denying the Petitioner's right to due process. Therefore; the Federal Rules, also

allows any party that objects to attorney fees, the opportunity to argue against them, and the Southern District of Indiana Local Rule - L.R. 7-1(g), states that when attorney fees are sought under Rule 11, that the Rule 11 argument would have to be raised prior to a motion for attorney fees. However, this was not the case, and the Conclusion of Law Order awarded attorney fees to the Respondent, after striking the Petitioner's brief objecting to the attorney fees, and without allowing the Petitioner a hearing to object to the amount of Attorney fees. How the Petitioner was harmed, is without saying, her rights were taken away from her, and she was not afforded due process.

In the Seventh Circuit, attorney fees taxed to a plaintiff generally are limited to where the "Plaintiff's conduct was abusive, or merely a disguised effort to harass or embarrass the Defendant" *Badillo v. Central Steel & Wire Co.,* 717 F.2d at 1164. The tests are: (1) where the plaintiff proceeds in the face of an unambiguous adverse previous ruling and (2) where the plaintiff is aware with some degree of certainty of the factual or legal infirmity of his claim. ID. At 1163-64. The record will show that the Petitioner did not file her complaint to harass the Respondent, yet her complaint, and the record, will show that the Petitioner's Regulation E is with merit. When the Board that oversee Regulation E, published a proposed rule amending Regulation E and the official staff commentary to clarify certain aspects of the Rule *See 75 Fed. Reg. 9,120 (Mar.1 2010).* "Among other things, the proposed rule would clarify that the fee prohibition encompasses not only overdraft fees assessed on a per-transaction basis, but also any daily, sustained, or continuous

overdraft fees, negative balance fees, and similar fees and charges." *emphasis added*

The Respondent filed their Post Trial Brief, raising the argument that the Petitioner filed a baseless Regulation E Claim, however; they failed to raise their baseless argument on several occasions. ***1)*** When Respondent Responded to the Petitioners Complaint, ***2)*** Before the time expired for the Respondent to file a motion to Dismiss, **3)** When Respondent filed their dispositive motions, ***4)*** When Respondent's counsel Cross Examined the Petitioner at Trial, and when ***5)*** Respondent Cross Examined FMB Witness. The only time the Respondent brought up the issue of the Petitioner filing a frivolous Regulation E Claim, is in their closing argument. Therefore, the Respondent's allegations that the Petitioner filed a frivolous claim is untimely, and fails to apply with the Southern District of Indiana's Local Rules concerning Sanctions for a Bad Faith Claims. The Local Rules are very clear and unambiguous. *See* **IN SD-LR 7-1(g)** The Respondent failed to file a Rule 11 in accordance with LR-71(g). *emphasis added.*

The District Court wrote in the Summary Judgment Order the following:

> *"The following claims will proceed to trial: (1) the Regulation E claim (Count II) as it relates to the legality of overdraft charges for the FMB Personal Accounts (i.e., whether Ms. Walton opted into overdraft protection)....."*

Petitioner proved at Trial that she never opted in to overdraft protection, and the Respondent was unsuccessful in proving that Petitioner did. **App. 74.** The record

will show that the Respondent submitted a Maintenance Form as the Regulation E Opt-In / Opt-Out form, **App. 73** and the Petitioner testified to the contrary.

When the Petitioner followed the instructions of the Summary Judgment Order, she did by proving her claims at trial. Therefore, the Petitioner should not be assessed Attorney fees, because no attorney fees are allowed as sanctions for Regulation E, since no Rule 11 letter was sent under LR 7-1(g). *emphasis added.* Not only did FMB not follow the Local Rules, they have also failed to raise any legitimate argument as to how the Petitioner's Regulation E Claim was frivolous, yet the Respondent did allege its actions were unintentional and simply a mistake. However; the Respondent's request for Attorney Fees claiming the Petitioner has pursued her Regulation E claim in bad faith and for purposes to harassment under 15 U.S.C. § 1693m(f). Yet there is not much in the way of useful precedent to guide the Court in assessing attorney fees as requested under 15 U.S.C. § 1693m(f). However, the standard incorporated into this statute has been utilized in other settings.

In the Seventh Circuit, attorney fees taxed to a plaintiff generally are limited to where the "Plaintiff's conduct was abusive, or merely a disguised effort to harass or embarrass the Defendant" *Badillo v. Central Steel & Wire Co.,* 717 F.2d at 1164. The tests are: (1) where the plaintiff proceeds in the face of an unambiguous adverse previous ruling and (2) where the plaintiff is aware with some degree of certainty of the factual or legal infirmity of his claim. ID. At 1163-64. Given the course of proceedings in this matter and the breadth of the factual and legal issues

in this case, Petitioner has not pursued an action under the TCPA or Regulation E in the face of unambiguous rulings by the District Court, Further, Petitioner's claims did not merit Summary Judgment in favor of the Respondent.

Had Petitioner's claims truly been frivolous, this issue would have been disposed of by a Motion to Dismiss or at a minimum, a Motion for Summary Judgment. Petitioner's reliance on legal authority, which she believed was controlling, even if mistaken, is no grounds for the imposition of attorney fees. Every case has winners and losers. Petitioner's position in this litigation does not justify the imposition of attorney fees, when the record clearly show, the Petitioners, Regulation E Claim is with merit, and the record also shows that. *emphasis added.*

Petitioner brought her claim for violation of Regulation E, for which the relevant statute limits an award to One Thousand Dollars ($1,000.00) for each violation. A claim, by Respondent's Bank, of attorneys' fees in the amount of Fifty-Seven Thousand Seven Hundred Fifty One Dollars ($57,751.00) grossly exceeds the potential claim, and does not justify three (3) attorneys for preparation.

A plaintiff in an individual suit who proves a violation of the Act is entitled to his actual damages, if any, or to statutory damages of at least $100 but not more than $1000. 15 U.S.C. §§ 1693m(a)(1), (a)(2)(A). If a class action is filed instead, and is successful, the class is entitled to "such amount [of damages] as the court may allow," but only up to the lesser of $500,000 or 1 percent of the defendant's net worth. § 1693m(a)(2)(B)(ii). No minimum amount of damages to which a class member is entitled is specified, in contrast to the $100 minimum award to the

plaintiff in a successful individual suit. § 1693m(a)(2)(B)(i). In both types of case (individual and class action) the court is to award "a reasonable attorney's fee" if the suit is successful, paid of course by the defendant. § 1693m(a)(3). Hughes v. Kore of Ind. Enter., Inc., 731 F.3d 672, 674 (7th Cir. 2013).

In other contexts, a defendant who seeks fees for the costs of defense "has a tough row to hoe." Redwood v. Dobson, 476 F.3d 462, 470 (7th Cir. 2007) (discussing award of fees under 42 U.S.C. § 1988). The Seventh Circuit Court of Appeals has cautioned that "[t]here is a significant difference between making a weak argument with little chance of success . . . and making a frivolous argument with no chance of success." Khan v. Gallitano, 180 F.3d 829, 837 (7th Cir. 1999). In the event a plaintiff has asserted both frivolous and non-frivolous claims, "a court may grant reasonable fees to the defendant . . . , but only for costs that the defendant would not have incurred but for the frivolous claims." Fox v. Vice, 131 S. Ct. 2205, 2211 (2011).

The district court must be careful not to allow the litigation expenditure tail to wag the remedy dog. In re Baby Products Antitrust Litigation,708 F.3d 163, 179 (3d Cir.2013). In Kore, the Seventh Circuit cautioned against the threat of an award of huge fees that could induce a small defendant to "throw in the towel", agreeing to a settlement favorable to the class even if the defendant has an excellent defense. 731 F.3d at 678. "When the potential liability created by a lawsuit is very great, even though the probability that the plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather

than to bet the company, even if the betting odds are good." Id., citing to Kohen v. Pacific Investment Mgmt., Co., 571 F.3d 672, 678 (7th Cir.2009). The converse is no less true. Under Regulation E the "maximum statutory damages [are] $100 to $1000 per individual plaintiff. " 731 F.3d at 678. Here, in the face of three counts, each with a total maximum recovery of One Thousand Dollars ($1,000.00), Defendant seeks attorney fees for three (3) attorneys in an amount some twenty (20) times Petitioner's total possible recovery. This is grossly unreasonable and would have a chilling effect on other plaintiffs who might seek redress in our Courts.

This court should really that a close look at how the Respondents legal counsels were able to bill $57,751.00 amongst the three Attorney's for research on **Regulation E - Electronic Fund Transfers 12 CFR § 1005 et seq.**, and not one of them noticed that the Maintenance Form was dated October 2, 2008, which did not contain any Opt-In / Opt-Out language, and was dated prior to the enactment of January 19, 2010. *emphasis added*

The Supreme Court has formulated a balancing test to determine the rigor with which the requirements of procedural due process should be applied to a particular deprivation, for the obvious reason that mandating such requirements in the most expansive way for even the most minor deprivations would bring the machinery of government to a halt. The Court set out the test as follows: "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected

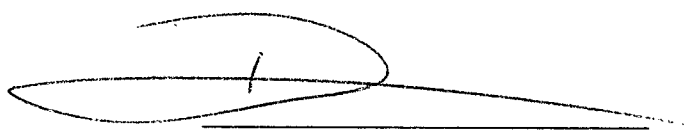
by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." See *Mathews v. Eldridge, 424 U.S. 319, 335 (1976).*

CONCLUSION

Petitioners respectfully request that this Court remand the case back to the district court to be included, in the upcoming Jury Trial that will held on the pending TCPA claim in 2021.

Dated: September 2, 2020

Respectfully submitted,



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