United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

July 31, 2020

Before

JOEL M. FLAUM, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

AMY C. BARRETT, *Circuit Judge*

Nos. 19-3370 & 20-1206

DEBORAH WALTON,
Plaintiff-Appellant,

v.

FIRST MERCHANT'S BANK,
Defendant-Appellee.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division

No. 1:17-cv-01888

Jane Magnus-Stinson,
Judge.

ORDER

Plaintiff-Appellant filed on July 15, 2020 a petition for rehearing and suggestion for rehearing en banc and on July 17, 2020 filed an Appellant Motion to Supplement Exhibit A of Petition for Rehearing. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing.

Accordingly, **IT IS ORDERED** that the petition for rehearing is **DENIED**.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted June 30, 2020*
Decided July 7, 2020

Before

JOEL M. FLAUM, Circuit *Judge*

MICHAEL S. KANNE, *Circuit Judge*

AMY C. BARRETT, *Circuit Judge*

Nos. 19-3370 and 20-1206

DEBORAH WALTON,
Plaintiff-Appellant,

v.

FIRST MERCHANT'S BANK,
Defendant-Appellee.

Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:17-cv-01888-JMS-MPB

Jane Magnus-Stinson,
Chief Judge.

ORDER

Deborah Walton sued her bank for violating the Telephone Consumer Protection Act, 47 U.S.C. § 227, and the implementing regulation of the Electronic Funds Transfer Act (Regulation E, 12 C.F.R. § 205.7). She alleged that the bank robocalled her hundreds of times and charged overdraft fees without her consent. Walton demanded a jury trial, but after some claims survived summary judgment, the district court accepted the

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

bank's argument that Walton had contractually waived the right to a jury trial. After a bench trial, the court found for the bank and awarded it attorney's fees because, the court found, Walton pursued a Regulation E claim in bad faith. *See* 15 U.S.C. § 1693m(f). Walton appeals, contending that she was entitled to a jury trial and challenging the fee award. Because the bank waived its right to invoke the contractual waiver, we vacate the judgment as to the TCPA claim, but we affirm in all other respects.

Walton held several accounts at First Merchant's Bank in Indiana. Though she was a longtime customer, the bank had the wrong social security number on file for her. (The reasons for this have been litigated in other cases but are not pertinent here.) Walton signed an account maintenance form with that number on it; the form authorized overdraft protection for a personal checking account. Besides her accounts at FMB, Walton had personal and business loans from Ameriana Bank. On those loan applications, she provided two phone numbers, one of which she said was a residential line. In 2016, FMB merged with Ameriana and took over Walton's loans.

After the merger, FMB sent all customers, including Walton, a "Consumer Disclosure Booklet" explaining its overdraft policies. The booklet also contained a provision for the mandatory arbitration of any disputes about its services, with the qualification that any claim that was not arbitrated would be "decided in the courts of Delaware County, Indiana, without a jury."

In the following months FMB sent several notices to Walton about delinquencies on her loan payments and, after a service fee emptied her personal checking account, it also began charging daily overdraft fees. The bank tried to reach her by phone at her various numbers about these issues, but, when she answered, Walton was hostile and told it to stop calling. Eventually, in May 2017, the bank closed all her accounts.

Walton then sued the bank in federal court and demanded a jury trial. She asserted that the bank violated Regulation E by charging overdraft fees without her advance notice or consent, and that it violated the TCPA by robocalling her cell phone without her consent. In an amended complaint, she attached the disclosure booklet, reiterated her demand for a jury trial, and asserted that her claim was exempt from the arbitration clause. FMB denied her factual allegations in its answer but did not challenge the jury demand or invoke its arbitration clause. Instead, it filed a case management plan in which it anticipated a three-to-four-day jury trial.

Discovery was contentious. Walton moved to compel production of a "TCPA consent form," even though the bank attested that no such document exists. The bank,

meanwhile, asked her to return a handwritten attorney's note it had produced inadvertently, but she refused and attached it to several court filings. After FMB obtained a protective order for the note, the district court determined that Walton's conduct and motion to compel were not substantially justified. It awarded the bank $13,108.00 in attorneys' fees as a discovery sanction. *See* FED. R. CIV. P. 37(a)(5)(A)–(B). Observing that Walton had been sanctioned for similar conduct in other cases, it warned her not to persist.

Eventually, the parties cross-moved for summary judgment. Walton argued that she should prevail because the bank could not produce a signed form showing that she consented to be contacted by phone. She attested that she received over 900 robocalls about her loans on her home and cell phones, even though she repeatedly asked the bank to stop calling her. As for her claim under Regulation E, she attested that she never received notice of or opted into overdraft protection. FMB countered that Walton consented to being called about her loans by providing her phone numbers on the loan applications with Ameriana and by updating her contact information to include a cell phone number (different from the one on her loan applications) after the merger. The bank also argued that Walton could bring claims only for calls related to her personal loan, not her business loans, because she did not (and as a pro se litigant, could not) sue on behalf of any business. To show that Walton opted into overdraft protection for her personal checking account, the bank submitted her signed account maintenance form.

After a hearing, the district court granted in part and denied in part the cross-motions for summary judgment. For purposes of the Regulation E claim, the court determined that there was a genuine issue of material fact about whether Walton had affirmatively opted into overdraft protection because she testified that the social security number on the account maintenance form was not hers and that she did not recognize it. As to her TCPA claim, fact issues existed about whether Walton gave prior express consent to be contacted about her accounts and at what phone numbers, and also whether FMB used an autodialer to place the calls. The court determined, however, that these issues existed only as to calls to Walton's cell phone about her personal loan. Two months later, in January 2019, after an unsuccessful settlement conference, the court scheduled a jury trial for October 2019.

In July 2019, after Walton retained counsel in preparation for trial, FMB moved under Federal Rule of Civil Procedure 12(f) to strike her jury demand. For the first time, it invoked the jury-trial-waiver clause in its disclosure booklet. Walton responded that the motion was untimely, FMB had waived its right to enforce that clause by acting

inconsistently with it for over two years of litigation, and the clause was intertwined with the mandatory arbitration clause that was inapplicable to her claims. The district court reasoned that it had discretion to consider the untimely Rule 12(f) motion and granted it. It concluded that FMB's conduct did not show intentional relinquishment of its right to a bench trial and rejected Walton's argument that the bench-trial clause was intertwined with the arbitration clause. Moreover, a bench trial would conserve judicial resources and would not prejudice Walton because it required less preparation.

At trial, the court heard primarily from Walton and a bank manager. When Walton revealed that the "home" number listed on her loan applications was another cell phone number, the court refused the late attempt to broaden the scope of her TCPA claim to include calls to that number. The manager admitted that the bank called Walton several times using software maintained by an outside vendor, and that she was agitated by those calls. He did not know if the software was an autodialer under the TCPA—only that it interfaced with FMB's core banking software and had both manual and automatic modes. Walton submitted records of hundreds of phone calls and recounted her efforts to get the bank to stop calling. She believed FMB used an autodialer because she heard pre-recorded messages whether she answered the calls or let them go to voicemail. She also admitted that she had known for years that FMB had the wrong social security number on file for her and that she signed the account maintenance form with the opt-in provision.

After post-trial briefing, the district court entered findings of fact and conclusions of law. Though Walton may have initially agreed to be contacted on her cell phone, the court found, she had revoked her consent by March 2016. The evidence showed that she received at least five calls to her cell phone about her personal loan after that. The bank manager's testimony was inconclusive about whether the bank used an autodialer to place those calls, however, and the district court did not credit Walton's testimony that she heard pre-recorded messages when she picked up the phone because of her "dishonesty and lack of candor" throughout the case. The court further found that Walton pursued her Regulation E claim to trial in bad faith. Walton knew that the claim survived summary judgment only because of confusion about the social security number on the opt-in form—which Walton had created with misleading testimony. Because she continued to litigate the claim, the court awarded attorneys' fees to FMB under 15 U.S.C. § 1693m(f).

The bank requested $57,751.00 in fees. It submitted time logs detailing the trial preparation of three attorneys to defend against the Regulation E claim and information

about their billing rates, which they attested were heavily discounted. Walton objected that the amount was grossly disproportionate to her potential recovery for that claim and that the bank used too many lawyers, but the court awarded FMB the full amount.

On appeal, Walton proceeds pro se again, and she first contends that the district court erred in striking her jury demand. She maintains that, through its conduct, FMB waived its right to enforce the jury waiver clause.

Parties may impliedly waive their contractual rights by acting inconsistently with them. *Kawasaki Heavy Industries, Ltd.*, 660 F.3d 988, 994 (7th Cir. 2011). Courts evaluate the totality of the circumstances to determine if such a waiver occurred. *Sharif v. Wellness Intern. Network, Ltd.*, 376 F.3d 720, 726 (7th Cir. 2004). A party's diligence, or lack thereof, in asserting its rights under a contract weighs heavily in that consideration. *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995).

Considering this standard, FMB implicitly waived its contractual right to a bench trial. Through her pleadings, Walton put the bank on notice that she believed she was entitled to a jury trial and that the contractual waivers did not apply to her claims. FMB did not raise the jury waiver in its answer to either of her complaints, however, either as an affirmative defense in its answer or in a motion to strike. Nor did it seek to arbitrate her claims or move them to a Delaware County court. Indeed, in its case management plan, the bank anticipated a jury trial in a federal court.

What's more, the bank did not change position until over two years later, after Walton's claims survived summary judgment and she retained counsel. Even after it failed to secure a complete victory at summary judgment, and the prospect of a trial was certain, the bank waited nine more months to invoke the clause—six of which came after the court scheduled the case for a jury trial in the wake of the failed settlement conference. Conceivably, Walton's position on settlement would have been different had she known the factfinder would be the district judge, not a jury, but FMB left her and the court in the dark. In any event, FMB's engagement in protracted litigation in federal court, its express references to an impending jury trial, and its eleventh-hour invocation of the jury-trial waiver constituted an implied waiver of its contractual right to avoid a jury trial.

FMB's arguments to the contrary are unpersuasive. It simply repeats the contractual language and observes that courts have granted motions to strike jury demands even "on the eve of trial." But in the single case it cites from this circuit, the relief sought was equitable, so the litigants had no right to a jury to begin with.

See Kramer v. Banc of Am. Secs., L.L.C, 355 F.3d 961, 968 (7th Cir. 2004). Walton, by contrast, sought statutory damages under § 227(b)(3) of the TCPA, the type of legal remedy for which a jury trial is ordinarily available. *See, e.g., Lucas v. U.S. Bank, N.A.*, 953 N.E.2d 457, 460 (Ind. 2011); *Kobs v. Arrow Serv. Bureau, Inc.*, 134 F.3d 893, 896 (7th Cir. 1998). FMB also points to *Tracinda Corp. v. DaimlerChrystler AG*, in which the Third Circuit determined that a jury trial waiver clause in the contract that was the subject of the parties' dispute was valid. 502 F.3d 212, 227 (3d Cir. 2007). The *Tracinda* court, however, did not consider whether any party implicitly waived reliance on that clause. That is the only issue here; the validity of the contractual waiver is not disputed.

Our inquiry does not end there; we must also determine whether, as FMB asserts, denying Walton a jury trial was harmless. *Partee v. Burch*, 28 F.3d 636, 639 (7th Cir. 1994). As to the TCPA claim, it was not. Walton had to prove that (1) the bank called her cell phone (2) without her prior express consent (3) using an "automatic telephone dialing system" or a pre-recorded message to initiate the call. 47 U.S.C. § 227(b)(1)(A)(iii), 227(b)(1)(B); *see Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 373 (2012). Based on the trial testimony and phone records, the district court found that she proved the first two elements for at least five phone calls. Her proof on the third element failed. Because Walton failed to introduce any evidence that the bank used an automatic telephone dialing system to place the calls, she could succeed only by showing that she received prerecorded messages from the bank. Her only evidence on that score was her own testimony, which the court refused to credit. That was a reasonable choice given Walton's deceptive behavior throughout the litigation; at the same time, however, a different factfinder might draw a different conclusion. Denying Walton a jury trial is harmless only if the bank would have been entitled to a directed verdict, *Partee*, 28 F.3d at 639, and we cannot say that no reasonable jury could believe Walton's account of what she heard over the phone.

Walton's Regulation E claim fares differently. That claim went to trial only because, at the summary judgment stage, Walton's testimony that she did not recognize the social security number on the account maintenance form created an apparent factual issue about whether she had expressly authorized overdraft protection. At trial, though, Walton admitted that she knew the social security number on the account maintenance form she signed was the one FMB had on file for her and that the form pertained to her account. No reasonable jury could have found, therefore, that she did not opt into coverage. The error was therefore harmless as to this claim. *See Partee*, 28 F.3d at 639.

Walton next challenges the post-trial award of attorneys' fees to FMB under 15 U.S.C. § 1693m(f), which requires a court to award fees "reasonable in relation to the work expended" if it finds that a plaintiff brought a meritless action under the EFTA in bad faith. Walton first argues that the district court's bad-faith finding is logically flawed because her claim made it to trial and so could not have been "brought" in bad faith. However, bad faith can arise after the filing of a complaint. *See Mach v. Will Cty. Sheriff*, 580 F.3d 495, 501 (7th Cir. 2009). Here, the court's summary judgment order put her on notice that, except for the ambiguity about the social security number on the account maintenance form, her claim failed as a matter of law because FMB had her written consent to charge overdraft fees. Walton still pressed her claim to trial, inflicting unnecessary costs on the bank, only to admit that she had known all along that the form, though inaccurate, concerned her account. The district court therefore did not clearly err in its finding. *See In re Golant*, 239 F.3d 931, 936 (7th Cir. 2001).

Walton also renews her challenges to the reasonableness of the fees, which we review for abuse of discretion. *Pickett v. Sheridan Health Care Ctr.*, 664 F.3d 632, 639 (7th Cir. 2011). District courts typically calculate fee awards using the lodestar method, multiplying the "number of hours reasonably expended on the litigation ... by a reasonably hourly rate" and then making whatever adjustments the facts call for. *Id.* (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). First, Walton maintains that FMB used too many lawyers on its trial team. But its three attorneys provided detailed time logs, and she does not identify a single entry as unnecessary or redundant. *See Gautreaux v. Chicago Housing Auth.*, 491 F.3d 649, 661 (7th Cir. 2007). FMB's lawyers further attested to the basis of their respective billing rates, which were discounted in this case. Walton provides no reasons to question the reasonableness of those rates. *Pickett*, 664 F.3d at 640. Next, Walton objects that the award of $57,751.00 grossly exceeds her maximum potential recovery under Regulation E, which was $2,000 by statute. But she cites no authority requiring proportionality in the context of a bad-faith sanction. The purpose of bad faith sanctions is to reimburse a party for losses caused by the other side's abuse of judicial process. *See Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017). Walton does not contend that the fee award goes beyond the bills FMB incurred because of her misconduct. *See id.* She therefore has not met her burden of showing that the fees were unreasonable.

We briefly address two of Walton's remaining arguments. First, she contends that the judge was biased against her and cites several adverse rulings as evidence. But adverse rulings alone show neither bias nor a need for recusal. *Liteky v. United States*, 510 U.S. 540, 555 (1994). Walton also asserts that she was not given an opportunity to be

heard before the district court awarded FMB $13,108.00 in attorneys' fees as a discovery sanction. The record shows otherwise: Walton may have had more to say, but the court held a hearing and entertained several rounds of briefing before imposing that sanction.

Accordingly, we VACATE the judgment with respect to Walton's TCPA claim and REMAND for further proceedings. We AFFIRM in all other respects.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

FINAL JUDGMENT

July 8, 2020

Before:

JOEL M. FLAUM, Circuit Judge

MICHAEL S. KANNE, Circuit Judge

AMY C. BARRETT, Circuit Judge

Nos. 19-3370 & 20-1206	DEBORAH WALTON, Plaintiff - Appellant v. FIRST MERCHANT'S BANK, Defendant - Appellee
Originating Case Information:	
District Court No: 1:17-cv-01888-JMS-MPB Southern District of Indiana, Indianapolis Division District Judge Jane Magnus-Stinson	

We VACATE the judgment with respect to Walton's TCPA claim and REMAND for further proceedings. We AFFIRM in all other respects, in accordance with the decision of this court entered on July 7, 2020. Each side to bear their own costs.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
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ORDER

August 3, 2020

By the Court:

Nos. 19-3370 & 20-1206	DEBORAH WALTON, Plaintiff - Appellant v. FIRST MERCHANT'S BANK, Defendant - Appellee
Originating Case Information:	
District Court No: 1:17-cv-01888-JMS-MPB Southern District of Indiana, Indianapolis Division District Judge Jane Magnus-Stinson	

Upon consideration of the **APPELLANT MOTION TO SUPPLEMENT EXHIBIT A OF PETITION FOR REHEARING**, filed on July 17, 2020, by the pro se appellant,

IT IS ORDERED that the motion is **DENIED** as unnecessary. This court already has access to the document in the record.

form name: **c7_Order_BTC**(form ID: **178**)

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

April 2, 2019

By the Court:

DEBORAH WALTON, Plaintiff-Appellant, No. 19-1338 v. FIRST MERCHANT'S BANK, et al., Defendants-Appellees.	] Appeal from the United] States District Court] for the Southern District] of Indiana, Indianapolis] Division.]] No. 1:18-cv-01784]] James R. Sweeney, II,] Judge.

ORDER

On consideration of the jurisdictional papers filed by the parties,

IT IS ORDERED that this appeal shall proceed to briefing on the merits of the case. *See Otis v. City of Chicago*, 29 F.3d 1159, 1165-67 (7th Cir. 1994) (en banc). The remainder of the briefing schedule is as follows:

1. The appellees shall file their joint brief on or before May 3, 2019.

2. The appellant shall file her reply brief, if any, on or before May 24, 2019.

Appellant Walton is reminded that if she intends to seek review of the district court's disposition of the show cause order, she must file a new notice of appeal. *See Cooke v. Jackson National Life Ins. Co.*, 882 F.3d 630 (7th Cir. 2018) (a judgment on the merits and an award of attorney's fees are separately appealable).

NOTE: **Counsel should note that the digital copy of the brief required by Circuit Rule 31(e) must contain the entire brief from cover to cover. The language in the rule that "[t]he disk contain nothing more than the text of the brief..." means that the disk must not contain other files, not that tabular matter or other sections of the brief not included in the word count should be omitted. The parties are advised that Federal Rule of Appellate Procedure 26(c), which allows for three additional days after service by mail, does not apply when the due dates of briefs are** set by order of this court. All briefs are due by the dates ordered.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

February 7, 2020

By the Court:

DEBORAH WALTON,
Plaintiff-Appellant,

Nos. 19-3370 and 20-1206 v.

FIRST MERCHANT'S BANK,
Defendant-Appellee.

] Appeals from the United
] States District Court
] for the Southern District
] of Indiana, Indianapolis
] Division.
]
] No. 1:17-cv-01888-JMS-MPB
]
] Jane Magnus-Stinson,
] Chief Judge.

ORDER

The court, on its own motion, orders that these appeals are CONSOLIDATED for purposes of briefing and disposition.

The remainder of the briefing schedule is as follows:

1. The plaintiff-appellant shall file her brief and required short appendix in Appeal No. 20-1206 on or before March 18, 2020.

2. The defendant-appellee shall file its consolidated brief on or before April 17, 2020.

3. The plaintiff-appellant shall file her consolidated reply brief, if any, on or before May 8, 2020.

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Important Scheduling Notice!

Notices of hearing for particular appeals are mailed shortly before the date of oral argument. Criminal appeals are scheduled shortly after the filing of the appellant's main brief; civil appeals after the filing of the appellee's brief. If you foresee that you will be unavailable during a period in which your particular appeal might be scheduled, please write the clerk advising him of the time period and the reason for such unavailability. Session data is located at http//www.ca7.uscourts.gov/cal/calendar.pdf. Once an appeal is formally scheduled for a certain date, it is very difficult to have the setting changed. See Circuit Rule 34(e).

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

INSTANTER ORDER

January 24, 2020

Before:
AMY C. BARRETT, *Circuit Judge*

No. 19-3370	DEBORAH WALTON, Plaintiff - Appellant v. FIRST MERCHANT'S BANK, Defendant - Appellee
Originating Case Information:	
District Court No: 1:17-cv-01888-JMS-MPB Southern District of Indiana, Indianapolis Division District Judge Jane Magnus-Stinson	

On January 21, 2020, this court received a brief with an oversized short appendix and lengthy separate appendix. This court construes the submission as a request to file an oversized appendix.

IT IS ORDERED that the motion is **GRANTED**. The clerk of this court shall file **INSTANTER** the submitted brief and appendices.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 17, 2020

By the Court:

DEBORAH WALTON, Plaintiff-Appellant, No. 19-3370 v. FIRST MERCHANT'S BANK, Defendant-Appellee.	] Appeal from the United] States District Court] for the Southern District] of Indiana, Indianapolis] Division.]] No. 1:17-cv-01888-JMS-MPB]] Jane Magnus-Stinson,] Chief Judge.

ORDER

On consideration of the Appellee's Report on Disposition of Attorneys' Fee Matter filed on January 14, 2020, and the paper captioned "Appellant Statement" filed by appellant on January 16, 2020,

IT IS ORDERED that this appeal shall proceed to briefing. The briefing schedule is as follows:

1. The appellant shall file her brief and required short appendix on or before February 26, 2020.

2. The appellee shall file its brief on or before March 27, 2020.

3. The appellant shall file her reply brief, if any, on or before April 17, 2020.

-over-

NOTE: **Counsel should note that the digital copy of the brief required by Circuit Rule 31(e) must contain the entire brief from cover to cover. The language in the rule that "[t]he disk contain nothing more than the text of the brief..." means that the disk must not contain other files, not that tabular matter or other sections of the brief not included in the word count should be omitted. The parties are advised that Federal Rule of Appellate Procedure 26(c), which allows for three additional days after service by mail, does not apply when the due dates of briefs are set by order of this court. All briefs are due by the dates ordered.**

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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 15, 2020

By the Court:

DEBORAH WALTON, Plaintiff-Appellant, No. 19-3370 v. FIRST MERCHANT'S BANK, Defendant-Appellee.	] Appeal from the United] States District Court] for the Southern District] of Indiana, Indianapolis] Division.]] No. 1:17-cv-01888-JMS-MPB]] Jane Magnus-Stinson,] Chief Judge.

ORDER

On consideration of Appellee's Report on Disposition of Attorneys' Fee Matter filed on January 14, 2020,

IT IS ORDERED that plaintiff-appellant Deborah Walton file, on or before January 31, 2020, a statement advising this court whether she plans to file an appeal seeking review of the district court's attorney fee award in favor of defendant First Merchant's Bank.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

January 14, 2020

By the Court:

DEBORAH WALTON, Plaintiff-Appellant,	] Appeal from the United] States District Court] for the Southern District
No. 19-3370 v.	] of Indiana, Indianapolis] Division.
FIRST MERCHANT'S BANK, Defendant-Appellee.	]] No. 1:17-cv-01888-JMS-MPB]
	] Jane Magnus-Stinson,] Chief Judge.

ORDER

On consideration of Appellee's Report on Disposition of Attorneys' Fee Matter filed by on January 10, 2020,

IT IS ORDERED that appellee First Merchant's Bank file, on or before January 31, 2020, a further Status Report regarding the disposition of the attorneys' fee matter.

Briefing shall be SUSPENDED pending further court order.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
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ORDER

January 6, 2020

By the Court:

No. 19-3370	DEBORAH WALTON, Plaintiff - Appellant v. FIRST MERCHANT'S BANK, Defendant - Appellee

Originating Case Information:

District Court No: 1:17-cv-01888-JMS-MPB
Southern District of Indiana, Indianapolis Division
District Judge Jane Magnus-Stinson

The following is before the court: **MOTION FOR CLARIFICATION**, filed on January 3, 2020, by the pro se appellant.

A review of the court's docket indicates that briefing in this appeal has been suspended pending resolution of the jurisdictional issue raised in the order dated December 3, 2019. The jurisdictional issue remains pending and nothing is due from the appellant at this time. The clerk shall send the appellant a copy of the court's public docket.

form name: **c7_Order_BTC**(form ID: **178**)

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

December 27, 2019

By the Court:

DEBORAH WALTON, Plaintiff-Appellant,	] Appeal from the United] States District Court] for the Southern District
No. 19-3370 v.	] of Indiana, Indianapolis] Division.
FIRST MERCHANT'S BANK, Defendant-Appellee.	]] No. 1:17-cv-01888]
	] Jane Magnus-Stinson,] Chief Judge.

ORDER

On consideration of Appellee First Merchants Bank's Jurisdictional Memorandum filed on December 17, 2019,

IT IS ORDERED that appellee First Merchants Bank file, on or before January 10, 2020, a status report regarding the disposition of the attorneys' fee matter.

Briefing shall continue to be **SUSPENDED** pending further court order.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

December 5, 2019

By the Court:

No. 19-3370	DEBORAH WALTON, Plaintiff - Appellant v. FIRST MERCHANT'S BANK, Defendant - Appellee
Originating Case Information:	
District Court No: 1:17-cv-01888-JMS-MPB Southern District of Indiana, Indianapolis Division District Judge Jane Magnus-Stinson	

The following is before the court: **NOTICE**, filed on December 4, 2019, by the pro se appellant.

The clerk has corrected the court's docket to reflect that the appellant paid the $505.00 appellate filing fees in the district court when she filed her notice of appeal. Further, the appellant is reminded of her obligation to file a Circuit Rule 3(c) docketing statement. Accordingly,

IT IS ORDERED that the appellant file the overdue docketing statement by December 20, 2019.

form name: **c7_Order_BTC**(form ID: **178**)

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

December 3, 2019

By the Court:

DEBORAH WALTON, Plaintiff-Appellant,	] Appeal from the United] States District Court] for the Southern District
No. 19-3370 v.	] of Indiana, Indianapolis] Division.
FIRST MERCHANT'S BANK, Defendant-Appellee.	]] No. 1:17-cv-01888-JMS-MPB]
	] Jane Magnus-Stinson,] Chief Judge.

ORDER

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 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,

-over-

IT IS ORDERED that both appellant and appellee 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 appellant pursuant to Fed. R. App. P. 42(b) will satisfy this requirement. Briefing shall be **SUSPENDED** pending further court order.

NOTE: Caption document "JURISDICTIONAL MEMORANDUM." The filing of a Circuit Rule 3(c) Docketing Statement does not satisfy your obligation under this order.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DEBORA WALTON, *Plaintiff,*	)	
vs.	)	1:17-cv-01888-JMS-MPB
FIRST MERCHANTS BANK, *Defendant.*	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff Debora Walton held several loans and bank accounts at First Merchants Bank ("FMB"). After FMB charged certain fees, contacted Ms. Walton numerous times, and closed her accounts, Ms. Walton initiated this litigation. The Court held a two-day bench trial on October 7 and 8, 2019, and the parties submitted post-trial briefs which the Court has reviewed. Accordingly, the Court now issues its Findings of Fact and Conclusions of Law.

I.
SCOPE OF MS. WALTON'S CLAIMS AT TRIAL

At the outset, the Court finds it necessary to set forth the scope of Ms. Walton's claims – particularly in light of Ms. Walton's attempts to broaden that scope during the trial.

Ms. Walton initiated this litigation on June 8, 2017,[1] [Filing No. 1], and filed the operative Amended Complaint on August 9, 2017, [Filing No. 15]. After the parties filed cross-motions for summary judgment, the Court limited Ms. Walton's TCPA claim to calls made to Ms. Walton's cell phone regarding a personal loan[2] Ms. Walton had opened with Ameriana Bank ("Ameriana"),

[1] Ms. Walton litigated this case *pro se* from the filing of her Complaint on June 8, 2017 until April 26, 2019, when her counsel entered an appearance.

[2] Summary judgment briefing and testimony at trial exhibit some confusion regarding the account number for this personal loan. The parties appear to agree, however, and the Court concludes, that calls regarding the personal loan would reflect account number xxxx4736. [*See* Filing No. 278 at 1; Filing No. 279-1 at 1-2.]

which later merged with FMB (the "Ameriana Personal Loan").[3] The Court also found on summary judgment that Ms. Walton's TCPA claim related only to calls to her cell phone. [Filing No. 188 at 22.] Throughout the litigation, the parties and the Court operated under the assumption that the cell phone number relevant to Ms. Walton's TCPA claim ended in 9633. At trial, Ms. Walton presented evidence that the number she listed as her "home phone" on various documents was actually a cell phone, and argued that calls to this "home phone" (ending in 7706) should also form the basis for her TCPA claim along with calls to the 9633 cell phone. During trial, FMB filed a Motion to Confirm Limits on Scope of Trial, [Filing No. 272], and the Court granted the motion to the extent that it found that Ms. Walton's TCPA claim relates only to her cell phone ending in 9633. In granting FMB's motion, the Court noted that at Ms. Walton's deposition, FMB's counsel asked Ms. Walton "What cell phone numbers have you had that you have been contacted by [FMB]?," and Ms. Walton responded "[j]ust the [9633] cell phone number." [Filing No. 276 at 8.] Because of the information she provided in her deposition, and her failure to correct or supplement it in advance of trial, Ms. Walton is estopped from making any assertions regarding the 7706 cell phone. Fed. R. Civ. Proc. 37(c). Further, the Court finds that she has not met her burden of proof regarding calls to that cell phone in any event, based on the reasons discussed

[3] On summary judgment, the Court found that "[a]ny claims Ms. Walton brings [on behalf of corporations with which she is affiliated] belong to the corporations that own those accounts or loans, and Ms. Walton may not assert them on the corporation's behalf." [Filing No. 188 at 13.] At trial, Ms. Walton's counsel made an offer of proof that Ms. Walton meets the constitutional requirements for standing to assert TCPA claims related to calls about an account at FMB held by Foxtrot Corporation ("Foxtrot") because she suffered an injury in fact. The Court took the offer of proof under advisement. As discussed below, Ms. Walton's TCPA claim fails as a matter of law because she did meet her burden of proof regarding FMB's use of an automatic telephone dialing system ("ATDS") or a prerecorded or artificial voice. Accordingly, even if Ms. Walton had standing to assert the Foxtrot-related claims, the absence of evidence showing that FMB used an ATDS or a prerecorded or artificial voice would doom those claims in any event. For that reason, the Court declines to reconsider its ruling on summary judgment regarding calls related to the Foxtrot account based on Ms. Walton's offer of proof.

below in connection with the 9633 cell phone. Ms. Walton's TCPA claim is limited to phone calls she received from FMB to the 9633 cell phone related to the Ameriana Personal Loan.

Ms. Walton's claim under Regulation E, 12 C.F.R. § 1005.7(b), also survived summary judgment, but the Court limited that claim to the legality of overdraft charges for three personal bank accounts Ms. Walton held with FMB (the "FMB Personal Accounts"). [*See* Filing No. 188.]

It is within these parameters that the Court issues its findings of fact and conclusions of law below.

II.
FINDINGS OF FACT[4]

A. Ms. Walton's Accounts

In late 2007, Ms. Walton opened the FMB Personal Accounts. Additionally, several business entities with which Ms. Walton was affiliated maintained business accounts at FMB. On October 2, 2008, Ms. Walton signed a "DDA/SAV Maintenance Form" in which she gave "new authorization" to automatically transfer money from one account to one of her personal accounts as "overdraft protection." [Tr. Ex. 68.] On August 9, 2010, Ms. Walton "opted in" to Regulation E protection for all of her accounts. [Tr. Ex. 32.]

In March 2016, FMB merged with Ameriana and FMB took over Ameriana's accounts including two loans which Ms. Walton had applied for and obtained prior to the merger – the Ameriana Personal Loan and a business loan. Ms. Walton executed credit applications for the Ameriana Personal Loan and the business loan. On the credit applications, the word "overdraft" appears in response to "proceeds of loan to be used for...." [Tr. Exs. 61 and 62.]

[4] Any finding of fact should be deemed a conclusion of law to the extent necessary, and vice versa.

B. The Consumer Disclosure Booklet

In March 2016, at the time of FMB's merger with Ameriana, Ms. Walton received FMB's Consumer Disclosure Booklet (the "Consumer Disclosures"), which included the following language:

> To provide you with the best possible service in our ongoing business relationship for your account we may need to contact you about your account from time to time by telephone, text messaging or email. However, we must first obtain your consent to contact you about your account because we must comply with the consumer protection provisions in the federal Telephone Consumer Protection Act of 1991 (TCPA), CAN-SPAM Act and their related federal regulations and orders issued by the Federal Communications Commission (FCC).
>
> - Your consent is limited to this account, and as authorized by applicable law and regulations.
>
> - Your consent does not authorize us to contact you for telemarketing purposes (unless you otherwise agreed elsewhere).
>
> With the above understandings, you authorize us to contact you regarding this account throughout its existence using any telephone numbers or email addresses that you have previously provided to us or that you may subsequently provide to us.
>
> This consent is regardless of whether the number we use to contact you is assigned to a landline, a paging service, [or] a cellular wireless service.... You further authorize us to contact you through the use of voice, voice mail and text messaging, including the use of pre-recorded or artificial voice messages and an automated dialing device.
>
> If necessary, you may change or remove any of the telephone numbers or email addresses at any time using any reasonable means to notify us.

[Tr. Ex. 30 at 48.]

C. Ms. Walton's Social Security Number

Numerous FMB and Ameriana documents reflect that Ms. Walton used two different social security numbers – one ending in xx88 and one ending in xx38. For example, on an October 2, 2008 "DDA/SAV Maintenance Form," Ms. Walton listed the xx88 social security number. [Tr.

Ex. 68.] She also used the xx88 social security number on: (1) a December 18, 2015 "Account Agreement" with FMB, [Tr. Ex. 24]; and (2) an August 18, 2016 "Account Agreement" with FMB, [Tr. Ex. 29]. Ms. Walton used the xx38 social security number on: (1) an October 21, 2009 Ameriana "Credit Application," [Tr. Ex. 61]; (2) an October 26, 2009 "Account Agreement" with Ameriana, [Tr. Ex. 78C]; and (3) a March 29, 2010 "Account Agreement" with Ameriana, [Tr. Ex. 78B].

D. FMB's Practices Regarding Calls on Delinquent Accounts

FMB uses a core banking platform called Horizon, which provides a file to an outside vendor, Ontario Guaranteed Contact Systems ("Ontario"). At the end of each day, Ontario provides a file to FMB through Horizon and FMB's collection software. The Vice President of FMB's Credit Control Department, Chris Horton, testified that he did not know whether Ontario operated as an ATDS. Ms. Walton did not present any evidence indicating that Ontario operates as an ATDS.

FMB's Credit Control Department, and not FMB's day-to-day call center, made calls regarding delinquent loans or collections. The originating number for calls from FMB's Credit Control Department ended in 8028.

E. FMB's Phone Calls to Ms. Walton

FMB began contacting Ms. Walton regarding delinquencies in her accounts in March 2016.[5] On March 16, 2016, Ms. Walton received a telephone call from FMB's Credit Control Department on the number she had listed as her home phone. The representative asked Ms. Walton for her date of birth, and Ms. Walton refused to provide that information. Ms. Walton asked the

[5] The parties dispute the reason that – and, perhaps, whether – Ms. Walton's accounts were delinquent. Whether or not and why the accounts were delinquent is irrelevant to the issues before the Court.

FMB representative not to call her again and ask for personal information, and also went to her local branch and told a representative that she did not want FMB representatives to call her on her cell phone. Ms. Walton also told the branch employee that she had a four-digit security code, and that she would talk to FMB representatives if they used her code to identify her during telephone calls. Ms. Walton consistently told FMB representatives not to contact her on her cell phone when they called her, but FMB continued to call her.

Ms. Walton continued to receive calls from FMB as late as June 2017, after she initiated this litigation. While Ms. Walton presented evidence reflecting hundreds of phone calls that FMB made to her from various departments to multiple phones, her evidence reflects only five telephone calls to the 9633 cell phone that originated from FMB's Credit Control Department (which has a phone number ending in 8028) and related to the Ameriana Personal Loan:

- Call 1: 02/09/17 at 3:46 EST, [Tr. Ex. 75A-1 at Entry 25855];
- Call 2: 02/16/17 at 9:50 EST, [Tr. Ex. 75A-1 at Entry 26430];
- Call 3: 02/16/17 at 4:19 EST, [Tr. Ex. 75A-1 at Entry 26506];
- Call 4: 02/17/17 at 9:32 EST, [Tr. Ex. 75A-1 at Entry 26546]; and
- Call 5: 02/17/17 at 3:07 EST, [Tr. Ex. 75A-1 at Entry 26635].[6]

[6] The parties' presentation of the relevant phone calls is not a model of clarity. For example, Ms. Walton submitted multiple exhibits at trial that appear to be sub-sets of other exhibits. The Court has focused on Trial Exhibit 54, on which Ms. Walton highlighted phone calls that were from FMB's Credit Control Department to the cell phone ending in 9633. The Court compared those highlighted calls with the calls made regarding the Ameriana Person Loan, which are reflected in Trial Exhibit 74 at FMB000633 to FMB000672. This comparison yielded the five phone calls identified by FBM – *i.e.*, those were the only calls identified by Ms. Walton on Trial Exhibit 54 which also matched up with calls made regarding the Ameriana Personal Loan as reflected in Trial Exhibit 74. To the extent the voluminous record reflects other phone calls from FMB's Credit Control Department to the 9633 cell phone regarding the Ameriana Personal Loan, Ms. Walton has not specifically identified those calls and, consequently, has not met her burden of proving that she is entitled to recover for those calls under the TCPA.

From April 13, 2017 to June 19, 2017, Ms. Walton received prerecorded voicemail messages stating "This is an important message from First Merchants Bank in its Division Lafayette Bank & Trust. We are sorry we missed you and would like to speak with you about an important matter. Please return our call at 877-565-8721 from 8 a.m. to 5 p.m. Monday, Wednesday and Friday, and 8 a.m. to 7 p.m. Tuesday and Thursday. Thank you." [Tr. Ex. 77.][7]

F. FMB Closes Ms. Walton's Accounts

On May 25, 2017, FMB sent Ms. Walton a letter informing her that it was closing all of her accounts. The letter, from FMB's Vice President Robert Holland, stated:

> We are also writing to inform you that First Merchants Bank is closing your accounts effective June 30, 2017. Additionally, any related debit/ATM cards will be cancelled effective June 10, 2017. The First Merchants Bank Terms and Conditions booklet has been included for your reference.
>
> On June 30, 2017, we will close all related personal and business deposit accounts and tender any remaining account balances to you....

[Tr. Ex. 73-A.]

III.
CONCLUSIONS OF LAW

A. TCPA Claim

As relevant to Ms. Walton's claim, the TCPA prohibits any person from making a non-emergency call, or a call without the prior consent of the called party, "using any automatic telephone dialing system or an artificial or prerecorded voice...to any telephone number assigned to...cellular telephone service...or any service for which the called party is charged for the call...." 47 U.S.C. § 227(b)(1)(A)(iii). To prove her TCPA claim, Ms. Walton must establish that: (1) FMB placed a call to her cell phone; (2) FMB used an autodialer or an artificial or prerecorded

[7] Trial Exhibit 77 purports to be prepared by Linda Bour, a Notary Public, but is accompanied by a certification that is unsigned.

voice; and (3) the call was made without Ms. Walton's consent. *Blow v. Bijora, Inc.*, 855 F.3d 793, 798 (7th Cir. 2017) (quoting 47 U.S.C. § 227(b)(1)(A)(iii)). The Court discusses each requirement, in its own order.

1. Calls to Ms. Walton's Cell Phone

As to the first requirement, the Court finds – as discussed above – that FMB placed five calls to Ms. Walton's 9633 cell phone.

2. Calls Made Without Ms. Walton's Consent

The Court also finds that Ms. Walton meets the third requirement, and that the calls were made without Ms. Walton's consent. Ms. Walton received the Consumer Disclosures before FMB began calling her, which provided that:

> [Y]ou authorize us to contact you regarding this account throughout its existence using any telephone numbers or email addresses that you have previously provided to us or that you may subsequently provide to us. This consent is regardless of whether the number we use to contact you is assigned to a landline, a paging service, [or] a cellular wireless service.... You further authorize us to contact you through the use of voice, voice mail and text messaging, including the use of pre-recorded or artificial voice messages and an automated dialing device. If necessary, you may change or remove any of the telephone numbers or email addresses at any time using any reasonable means to notify us.

While Ms. Walton may have initially agreed to be contacted on her cell phone, as provided in the Consumer Disclosures, she presented sufficient evidence to show that she revoked that consent beginning in March 2016, when she started receiving calls from FMB regarding her accounts. When she received calls, she instructed FMB representatives not to call her and also went into her local branch to request that the calls cease. Calls subsequent to these requests were made without her consent.

3. Calls Made Using an ATDS or Artificial or Prerecorded Voice

Ms. Walton must also show that the calls from FMB were made using an ATDS or artificial or prerecorded voice.

a. Use of an ATDS

An ATDS is "equipment which has the capacity – (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). While disputes regarding the definition of an ATDS are currently swirling in numerous courts, the Court need not delve deeply into the nuances litigated in those cases – *e.g.*, whether phone numbers must be randomly or sequentially generated, or whether they can be dialed automatically from pre-existing lists. Ms. Walton provided no evidence whatsoever regarding how Ontario generated or dialed the numbers it called. Indeed, the only witness Ms. Walton questioned regarding Ontario, Chris Horton, who is the Vice President of the Credit Control Department at FMB, testified that he does not know if Ontario is an ATDS as defined by the TCPA and that Ontario's use of the word "autodialer" simply meant that the call was assisted by software. Mr. Horton also testified that the software has a manual and automatic component to it, and that he could not tell from the records whether a particular call was an "auto call" or a manual call. Ms. Walton did not present any evidence showing that the five calls she received on the 9633 cell phone from FMB's Credit Control Department related to the Ameriana Personal Loan were made using an ATDS.

b. Use of an Artificial or Prerecorded Voice

Ms. Walton may also succeed on her TCPA claim if she proves that FMB used an artificial or prerecorded voice on the five calls it made from the Credit Control Department to the 9633 cell

phone related to the Ameriana Personal Loan.[8] *See Ananthapadmanabhan v. BSI Fin. Servs., Inc.*, 2015 WL 8780579, at *4 (N.D. Ill. 2015) (a plaintiff may show that a prerecorded or artificial voice was used by describing "the robotic sound of the voice on the other line, the lack of human response when [she] attempted to have a conversation with the 'person' calling [her], the generic content of the message [she] received, or anything else about the circumstances of a call or message contributing to [her] belief it was prerecorded or delivered via an ATDS"); *Martin v. Direct Wines, Inc.*, 2015 WL 4148704, at *2 (N.D. Ill. 2015) (hearing distinctive "click and pause" after answering a call could support claim that call was made with an ATDS).

Ms. Walton testified that when FMB's "collections department" called her, she would hear "please hold for an important message," then there would be silence, then she would hear a click, and then someone would come on the line. Sometimes she would answer the phone and hang up when she heard "please hold for an important message," and sometimes she would not answer and the call would go into her voicemail. Ms. Walton testified that from April 13, 2017 to June 19, 2017, she received voicemails containing a prerecorded message that said "This is an important message from First Merchants Bank in its Division Lafayette Bank & Trust. We are sorry we missed you and would like to speak with you about an important matter. Please return our call at 877-565-8721 from 8 a.m. to 5 p.m. Monday, Wednesday and Friday, and 8 a.m. to 7 p.m. Tuesday and Thursday. Thank you." [Tr. Ex. 77.]

[8] Ms. Walton argues in her post-trial brief that since FMB's Credit Control Department would sometimes use a single phone call to address issues with multiple accounts, she can recover under the TCPA for 47 calls regarding her Foxtrot account because her "personal account was typically paid during the grace period." [Filing No. 279-1 at 16.] To find that calls regarding the Foxtrot account also related to the Ameriana Personal Loan would be pure speculation, and Ms. Walton has not sustained her burden of proving that these 47 calls fall within the parameters of her TCPA claim.

In order to determine whether FMB used a prerecorded message or artificial voice when it called the 9633 cell phone regarding the Ameriana Personal Loan, the Court considers each of the five phone calls in turn.

i. Call 1: 02/09/17 at 3:46 EST, [Tr. Ex. 75A-1 at Entry 25855]

Call 1 lasted for 34 seconds. FMB argues that Ms. Walton did not present evidence that FMB used a prerecorded or artificial voice. Indeed, the only evidence that FMB used a prerecorded or artificial voice is Ms. Walton's own testimony. Specifically, she testified as follows:

> Q: Okay. Ma'am, let me ask it this way. Did you get calls from the credit department at First Merchants Bank?
>
> A: Yes.
>
> Q: When you get a call from them, would you describe for them what you would hear when you would answer the phone?
>
> A: Okay. When I would answer the phone, I would hear, "Please hold for an important message." I would hold for the important message, and then it would come with a series of silence, click, and someone would come on the line.
>
> Q: Did that always happen when you got calls from the collection department and you spoke with them?
>
> A: Okay. Every time I got a call from First Merchants Bank that said "please hold for an important message," that would happen.
>
> Q: Okay.
>
> A: I had received other calls from the bank that were live people that didn't say "please hold for an important message."
>
> Q: Were those from the collections department or the service department?
>
> A: That was from their customer service department.
>
> Q: And my question is limited to their collections department. When their collections department would call you, would you describe what you would hear?

> A: I would hear, "please hold for an important message," and then I would hear – there would be silence, then I would hear a click, and then someone would come on the phone. Someone would come on the line.

[Filing No. 276 at 100-101.]

The Court does not credit Ms. Walton's testimony that every time she received a call from the Credit Control Department a prerecorded or artificial voice was used. First, Ms. Walton submitted as evidence recordings of thirteen phone calls she received from FMB. Based on the evidence Ms. Walton provided, the Court is unable to determine from which FMB phone number (and, consequently, which FMB department) the calls originated. But at least two of the calls appear to have come from the Credit Control Department – or the "collections department" as Ms. Walton referred to it in her testimony at trial. [*See* Tr. Exs. 72-A and 72-I.] In both calls, the representative requested that she call "credit control." While the call at Trial Exhibit 72-A begins with the FMB representative's voice (*i.e.*, it does not include ringing or Ms. Walton saying "hello"), the call at Trial Exhibit 72-I includes ringing, followed by Ms. Walton saying "hello" and the FMB representative immediately speaking. The recording at Trial Exhibit 72-I directly contradicts Ms. Walton's testimony that when the "collections department" would call her, she "would hear, 'please hold for an important message,' and then [she] would hear – there would be silence, then [she] would hear a click, and then someone would come on the phone. Someone would come on the line."

The Court also notes Ms. Walton's Proposed Findings of Fact 18 and 19, in which she states that she submitted a recording of thirteen calls from FMB's Credit Control Department and that "[a]fter a short pause and silence, Walton received a prerecorded message telling her to hold for an important message." [Filing No. 279-1 at 6.] Again, Trial Exhibit 72-I contradicts that

proposed finding of fact and no prerecorded message is heard on any of the recordings Ms. Walton submitted. [Tr. Exs. 72-A-72-M.]

In addition to the fact that Ms. Walton's testimony regarding calls from the "collections department" contradicts the recordings she submitted, the Court also notes that Ms. Walton has demonstrated a lack of candor and honesty throughout this litigation. Some examples of this include:

- Ms. Walton's violation of a Court order by refusing to cease using, and return copies to FMB of, a privileged document that FMB inadvertently produced. This necessitated FMB filing numerous motions, the Court expending significant judicial resources regarding the privileged document, and the Court ultimately ordering Ms. Walton to pay FMB's attorneys' fees in connection with its efforts.

- Ms. Walton's frequent mischaracterization of her filings and the Court's orders. [*See* Filing No. 216 at 5 (Court stating in its April 26, 2019 Order that it "cannot discern whether these frequent mischaracterizations are inadvertent, or are meant to obfuscate the issues and impede the progress of this litigation").]

- Ms. Walton's efforts at trial to expand her TCPA claim to calls made to the phone she listed as her "home phone" on some bank documents, but which was actually a cell phone. This was contrary to her deposition testimony that the only cell phone numbers she has had on which FMB has contacted her was the 9633 number.

- Ms. Walton's use of two different social security numbers in her transactions with FMB and Ameriana – only one of which is actually her social security number.

Based on the contradictory nature of Ms. Walton's testimony at trial, and on her conduct during this litigation, the Court does not credit Ms. Walton's testimony that every time the Credit Control Department at FMB contacted her, she heard a prerecorded or artificial voice.

Accordingly, the Court finds that Ms. Walton has not sustained her burden of proving that FMB used a prerecorded or artificial voice on Call 1.[9]

ii. Call 2: 02/16/17 at 9:50 EST, [Tr. Ex. 75A-1 at Entry 26430]

Records submitted by Ms. Walton show that Call 2 lasted 0 seconds. [Tr. Ex. 75A-1 at Entry 26430; *see also* Tr. Ex. 74 at FMB 000637-38 (FMB records showing "WE Weak Line" and Filing No. 275 at 142 (Mr. Horton testifying that "weak line" meant "there is a line that is not conducive to making a connection. So there is no, really no call there. I mean, there is nothing that is going to show up").] Since the call did not go through, FMB cannot have used a prerecorded or artificial voice. Ms. Walton cannot recover on her TCPA claim in connection with Call 2.

iii. Call 3: 02/16/17 at 4:19 EST, [Tr. Ex. 75A-1 at Entry 26506]

Call 3 was a voicemail message that lasted 50 seconds. [Tr. Ex. 75A-1 at Entry 26506.] Ms. Walton testified that all of the voicemails she received from FMB were "prerecorded calls, and they would say, 'This is First Merchants Bank. We have an important message for you. Could you please call us at 800' – I don't remember the rest of the number." [Filing No. 276 at 102.] She testified that the calls "had a set duration of 28 seconds...." [Filing No. 276 at 102.] Ms. Walton also submitted a transcription of voicemails she received from FMB from April 13, 2017 through June 19, 2017. [Tr. Ex. 77.]

The Court finds that Ms. Walton has not met her burden of showing that the voicemail left in Call 3 was a prerecorded message or used an artificial voice. In fact, its 50-second duration

[9] This conclusion applies to any additional calls from FMB's Credit Control Department to the 9633 cell phone number regarding the Ameriana Personal Loan, which may be reflected in the voluminous AT&T records, and which did not result in immediate disconnections or voicemail messages.

indicates that it was not. It was nearly twice as long as the 28-second prerecorded message Ms. Walton testified she repeatedly received, and also did not take place within the timeframe applicable to voicemails

that Ms. Walton had transcribed. Call 3 does not form the basis of a TCPA claim.[10]

iv. Call 4: 02/17/17 at 9:32 EST, [Tr. Ex. 75A-1 at Entry 26546]

Call 4 lasted 5 seconds. [Tr. Ex. 75A-1 at Entry 26546.] FMB records indicate "AD Answering Machine Disconnected." [Tr. Ex. 74 at FMB 000637.] The Court finds that Call 4 did not involve the use of a prerecorded or artificial voice. The call was disconnected before a voicemail was left. Ms. Walton cannot recover under the TCPA for Call 4.

v. Call 5: 02/17/17 at 3:07 EST, [Tr. Ex. 75A-1 at Entry 26635]

Call 5 lasted 32 seconds. Again, because this call did not last for the same amount of time as the prerecorded voicemail messages Ms. Walton testified she received, and was outside of the time period for which Ms. Walton had the voicemail message transcribed, the Court finds that Ms. Walton has not met her burden of proving that a prerecorded or artificial voicemail message was left. Call 5 cannot form the basis of Ms. Walton's TCPA claim.

In sum, of the hundreds of calls Ms. Walton submitted in support of her TCPA claim, only five of those calls were identified as made to her 9633 cell phone, from FMB's Credit Control Department, and regarding the Ameriana Personal Loan. Of those five calls:

- Calls 2 and 4 either did not connect or were quickly disconnected; and

[10] To the extent that the voluminous AT&T records reflect additional calls from FMB's Credit Control Department to the 9633 cell phone regarding the Ameriana Personal Loan and which resulted in a voicemail message, Ms. Walton similarly has not met her burden of proof for such calls. Ms. Walton has not pointed to any such calls lasting 28 seconds and taking place between April 13, 2017 and June 19, 2017.

- Ms. Walton did not sustain her burden of proof that FMB used a prerecorded or artificial voice for Call 1 or for the voicemails left during Calls 3 and 5.

The Court finds in favor of FMB on Ms. Walton's TCPA claim.

B. Regulation E Claim

Regulation E of the Electronic Funds Transfer Act ("EFTA") provides, in relevant part, that "a financial institution holding a consumer's account shall not assess a fee or charge on a consumer's account for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service, unless the institution:...(iii) Obtains the consumer's affirmative consent, or opt-in, to the institution's payment of ATM or one-time debit card transactions...." 12 C.F.R. § 1005.17(b)(iii).

1. Whether Regulation E Applies to Ms. Walton's Overdraft Charges

Ms. Walton's Regulation E claim only applies to the FMB Personal Accounts, and Ms. Walton claims that FMB "accessed unauthorized charges to [her] checking account which threw the account into a negative balance in the amount of -$1.08. FMB then began charging this account $8.00 per day because of the negative balance." [Filing No. 188 at 18; Filing No. 257-1 at 2.] Specifically, Ms. Walton bases her Regulation E claim not on overdraft fees for ATM or one-time debit transactions, but for "daily, sustained, or continuous overdraft fees, negative balance fees, and similar fees and charges" that are unrelated to ATM or one-time debit transactions. [Filing No. 257-1 at 14.]

Regulation E only applies to overdraft charges for ATM or one-time debit transactions – which are indisputably not the types of charges upon which Ms. Walton bases her Regulation E claim. *See* https://www.consumerfinance.gov/policy-compliance/rulemaking/regulations/1005

/17/#17-b-Interp-7 (last visited November 22, 2019) (Commentary to Regulation E stating that "where a consumer's negative balance is solely attributable to an ATM or one-time debit card transaction, the rule prohibits the assessment of such fees unless the consumer has opted in. However, the rule does not prohibit an institution from assessing daily or sustained overdraft, negative balance, or similar fees or charges if a negative balance is attributable in whole or in part to a check, ACH, or other type of transaction not subject to the fee prohibition"); *see also* https://www.fdic.gov/regulations/compliance/manual/6/vi-2.1.pdf (last visited November 22, 2019) (Federal Deposit Insurance Corporation stating "[f]or a consumer who has not opted in, if a fee or charge is based on the amount of the outstanding negative balance, an institution may not charge a fee for a negative balance that is solely attributable to an ATM or one-time debit card transaction. However, an institution may assess a fee if the negative balance is attributable in whole or in part to a check, ACH transaction or other type of transaction not subject to the prohibition on assessing overdraft fees").

Because the overdraft fees upon which Ms. Walton bases her Regulation E claim were not for ATM or one-time debit transactions, Regulation E does not apply to those overdraft fees and her Regulation E claim fails as a matter of law.

2. Whether Ms. Walton Opted In To Overdraft Protection

FMB seeks its attorneys' fees in connection with Ms. Walton's Regulation E claim, so the Court finds it prudent to fully consider the strength of that claim. Accordingly, the Court will consider whether, even if Regulation E applied to Ms. Walton's overdraft charges, her claim fails because she opted in to overdraft protection.

On October 3, 2008, Ms. Walton signed a form titled "DDA/SAV MAINTENANCE FORM," which indicated her authorization to transfer funds from account xxxxxx7379 to account

xxxxxx7387 for overdraft protection. [Tr. Ex. 68.] Ms. Walton's social security number is listed as ending in xx88. She testified that she signed the form, despite the fact that it contained an incorrect social security number. [Filing No. 276 at 110-11 (Ms. Walton stating that she signed the form and "never looked to see if that was my Social Security number").] On August 9, 2010, Carolyn Rankin sent an email to Account Services reflecting that "Deborah M. Loy" completed her "Reg E Opt in/Opt Out" and that she opted in to overdraft protection for all of her accounts. [Tr. Ex. 32.] Her social security number on the Reg E Opt In/Opt Out is listed as ending in xx88. As the Court found above, Ms. Walton used two different social security numbers in her business dealings with FMB and Ameriana. Notably, Ms. Walton admitted to lying about her social security number at trial, testifying as follows:

> Q: Have you ever lied and it was determined that you lied about your Social Security number?
>
> * * *
>
> A: Yes.
>
> Q: You did do that?
>
> A: Yes.
>
> Q: And it was determined in a – so determined in a case that was pending at the time in this courthouse?
>
> A: Yes.

[Filing No. 276 at 159-60.]

The Court finds that Ms. Walton opted in to overdraft protection. The social security number discrepancy is inconsequential, as the evidence establishes that Ms. Walton used two different social security numbers, including the one that appears on the opt-in documents. Ms. Walton's Regulation E claim fails for the additional reason that she opted in to overdraft protection.

3. Whether the Award of Attorneys' Fees to FMB Is Appropriate

FMB seeks its attorneys' fees in connection with Ms. Walton's Regulation E claim, arguing that Ms. Walton acted in bad faith by pursuing that claim. 15 U.S.C. § 1693m(f) provides that "[o]n a finding by the court that an unsuccessful action under this section was brought in bad faith or for purposes of harassment, the court shall award to the defendant attorney's fees reasonable in relation to the work expended and costs."

Ms. Walton proceeded *pro se* in this litigation up until April 2019, but it is important to note that Ms. Walton is not a typical *pro se* litigant. She has filed at least twenty lawsuits in this district alone and is a vigorous litigator. As the Court has noted in this case, Ms. Walton frequently challenges Court rulings multiple times, through numerous layers of filings. She has been sanctioned in this case and other cases for frivolous filings. *See, e.g.*, Filing No. 199; *Walton v. Hyatt & Rosenbaum, P.A.*, 1:08-cv-1275-SEB-TAB; *Walton v. Springmill Streams Homeowners Assoc.*, 1:09-cv-1136-TWP-DML. She has even been reprimanded by the Seventh Circuit Court of Appeals. *Walton v. Claybridge Homeowners Assoc.*, 433 F. App'x 477, 478 (7th Cir. 2011) (noting that Ms. Walton could be assessed "monetary sanctions and restrictions on future suits" if she continued to file frivolous lawsuits). In short, Ms. Walton "is no ordinary *pro se* litigant," and "is surely aware of the potential consequences for abuse of the judicial process." *Walton v. First Merchants Bank*, 2019 WL 826769 (2019); *see also Walton v. First Merchants Bank*, 1:18-cv-01784-JRS-DLP at Dkt. 127 (ultimately declining to impose sanctions, but noting that "[Ms.] Walton is advised that she cannot continue to abuse the district court as her arena to air out petty, factually unsupported grievances. She is warned to refrain from filing further baseless claims in this district").

All this to say that Ms. Walton, despite her *pro se* status at the time, should have known that her Regulation E claim was meritless, at the latest, after the Court's ruling on summary judgment. In that ruling, the Court clearly and unequivocally stated that "Regulation E only applies to overdraft charges for ATM or one-time debit card transactions...." [Filing No. 188 at 18.] Ms. Walton knew that the overdraft charges at issue were not for ATM or one-time debit card transactions. That she may have disagreed with that ruling did not give her license to continue pursuing her claim. *See Glass v. Berryhill*, 734 Fed. App'x 372, 374 (7th Cir. 2018) ("even *pro se* litigants must follow court rules"); *Members v. Paige*, 140 F.3d 699, 702 (7th Cir. 1998) ("[R]ules apply to uncounseled litigants and must be enforced").

Additionally, it was clear from the Court's ruling that it denied summary judgment on the Regulation E claim solely because it found that there was a genuine issue of fact regarding whether Ms. Walton opted in to overdraft protection because the opt-in documents reflected a social security number that was not hers. [Filing No. 188 at 19-20.] Again, Ms. Walton knew that the opt-in documents applied to her account and reflected a social security number that appeared on several of her other bank documents. In sum, she knew that the social security number discrepancy did not save her Regulation E claim. Yet, she continued to pursue it.

Accordingly, the Court finds that the award of attorneys' fees incurred by FMB in connection with Ms. Walton's Regulation E claim from November 28, 2018 – the date of the

Court's summary judgment ruling – forward is warranted.[11] *See Bonarrigo v. Prosperity Bank*, 2012 WL 2864496 (N.D. Tex. 2012) (awarding fees under § 1693m(f) where defendant sent plaintiff a letter explaining defendant's compliance with the EFTA, and plaintiff "failed to conduct an appropriate investigation into the facts surrounding his claims prior to filing [the] lawsuit"); *Uchacz v. Gov. Employees Insur. Co.*, 2003 WL 21018653, at *3 (2003) (finding award of fees under § 1693m(f) appropriate where "[p]laintiff continued to litigate the allegations against the Bank after the Bank set forth its argument including...responding to the Motion to Dismiss without properly addressing [the Bank's argument], litigating a Motion to Obtain Discovery and to Extend the Time to Respond to the converted Motion for Summary Judgment, and then failing to respond to the Motion for Summary Judgment").

FMB must submit a Report outlining the attorneys' fees incurred after November 28, 2018 solely in connection with Ms. Walton's Regulation E claim by **December 20, 2019**. Ms. Walton must file any response to FMB's Report, which addresses only whether the attorneys' fees set forth by FMB are "reasonable in relation to the work expended," by **January 8, 2020**. FMB must file any reply by **January 15, 2020**.

[11] Although the Court struck Ms. Walton's second Trial Brief, [Filing No. 281; Filing No. 284], it notes that the arguments she set forth in the brief regarding FMB's request for attorneys' fees are unavailing. Ms. Walton raises issues with difficulty obtaining documents from FMB during discovery, but the time for raising such issues has long passed. Additionally, while the Court acknowledges that Fed. R. Civ. P. 11(c)(2) requires that a party seeking sanctions under that rule not file its motion for sanctions until 21 days after serving the motion on the opposing party, § 1693m(f) does not have a similar "safe harbor" provision. Finally, while it is true that FMB did not explicitly raise the inapplicability of Regulation E in its summary judgment briefing, the fact remains that the Court found on summary judgment that Regulation E only applies to overdraft charges for ATM and one-time debit transactions.

IV.
CONCLUSION

Ms. Walton only established that five phone calls were made from FMB's Credit Control Department to her cell phone ending in 9633 regarding the Ameriana Personal Loan. She did not sustain her burden of proving that FMB used an ATDS or a prerecorded or artificial voice in connection with any of those calls. Accordingly, the Court finds in favor of FMB on Ms. Walton's TCPA claim.

As to Ms. Walton's Regulation E claim, the Court reiterates its finding on summary judgment that Regulation E only applies to overdraft charges for ATM or one-time debit transactions, finds that the overdraft charges that are the subject of the Regulation E claim do not fall within those parameters, and finds that, in any event, Ms. Walton opted in to overdraft protection. The Court finds in favor of FMB on Ms. Walton's Regulation E claim and also finds that Ms. Walton continued to litigate her Regulation E claim after the Court's summary judgment ruling on November 28, 2018 "in bad faith or for purposes of harassment." 15 U.S.C. § 1693m(f). The Court will award FMB its attorneys' fees that are "reasonable in relation to the work expended." *Id.*

The Court **ORDERS**: (1) FMB to submit a Report outlining the attorneys' fees incurred after November 28, 2018 solely in connection with Ms. Walton's Regulation E claim by **December 20, 2019**; (2) Ms. Walton to file any response to FMB's Report, which addresses only whether the attorneys' fees set forth by FMB are "reasonable in relation to the work expended," by **January 8, 2020**; and (3) FMB to file any reply by **January 15, 2020**. The Court also requests that the Magistrate Judge confer with the parties regarding a possible agreed resolution of the attorneys' fee issue. Final judgment shall issue after the attorneys' fee issue is resolved.

Date: 11/25/2019

Hon. Jane Magnus-Stinson, Chief Judge
United States District Court
Southern District of Indiana

Distribution via ECF only to all counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DEBORA WALTON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:17-cv-01888-JMS-MPB
	)	
FIRST MERCHANTS BANK,	)	
	)	
Defendant.	)	

ORDER

Plaintiff Debora Walton[1] held several loans and bank accounts at Defendant First Merchants Bank ("FMB"), and initiated this litigation in June 2017 alleging various claims. After ruling on the parties' cross-motions for summary judgment, two claims remained for trial – a claim under the Telephone Consumer Protection Act ("TCPA"), and a claim under Regulation E of the Electronic Funds Transfer Act ("EFTA"). After holding a two-day bench trial, the Court found in favor of FMB on both of Ms. Walton's claims and also found that FMB was entitled to attorneys' fees[2] incurred in connection with its Regulation E claim from November 28, 2018 – the date of the Court's summary judgment ruling – forward. [Filing No. 286.] The Court ordered FMB to submit a Report outlining the attorneys' fees incurred after November 28, 2018 solely in connection with Ms. Walton's Regulation E claim by December 20, 2019, Ms. Walton to file any

[1] Ms. Walton litigated this case *pro se* up until shortly before the trial in this matter, proceeded to trial with counsel, and now proceeds *pro se* again after her counsel withdrew his appearance in late November 2019.

[2] FMB requested its attorneys' fees in connection with the Regulation E claim at the close of the bench trial, and stated that it would brief the issue. [Filing No. 276 at 178-79.] It did so in its post-trial brief. [Filing No 278 at 26-33.]

response to FMB's Report by January 8, 2020, and FMB to file any reply by January 15, 2020. The parties have done so, and the issue of the amount of attorneys' fees to which FMB is entitled is now ripe for the Court's decision.

I.
DISCUSSION

FMB submitted a Report and Affidavit of John F. McCauley, Counsel of Record for [FMB], in Support of Fee Request on Defense of Regulation E Claim (the "Report"), in which Mr. McCauley sets forth his experience and the experience of his colleagues who have worked on this case, and summarizes the work that was performed. [Filing No. 301.] Mr. McCauley states that "FMB has tried diligently to determine the exact amount of fees dedicated solely to the Reg. E claim, as opposed to Ms. Walton's claim under the TCPA. It is clear from the time entries and the evidence at trial, that it is not a 50/50 split between the Reg. E and TCPA claims. More time, energy and resources were directed at defeating the TCPA claim.... For those time entries that are not clearly delineated as time spent solely working on Reg. E. related issues, FMB has discounted those entries by 80%, or otherwise billed only 20% of the time for those entries." [Filing No. 301 at 4.] Mr. McCauley sets forth two examples of instances where entries did not clearly delineate between the two claims and the entry was reduced by 80%. [Filing No. 301 at 4-5.] He notes that, after the Court's summary judgment ruling, FMB's counsel did not bill any time related to the Regulation E claim until May 5, 2019. [Filing No. 301 at 3-4.] Mr. McCauley attaches invoices and a chart reflecting $57,751.00 in attorneys' fees incurred by FMB in connection with the Regulation E claim from May 5, 2019 forward. [Filing No. 301 at 5; Filing No. 301-1; Filing No. 301-2.]

In response to FMB's Report, Ms. Walton filed a document titled "The Plaintiff Deborah Walton Objects to Defendant First Merchants Bank[']s Attorney Fees and Responds to the

Defendant[']s Report and Attorney Fee Invoices" (the "Response"). [Filing No. 302.] In her Response, Ms. Walton sets forth some of the same arguments she made in her second Trial Brief regarding FMB's request for attorneys' fees, [Filing No. 281].[3] She also argues that "Plaintiff brought her claim for violation of Regulation E, for which the relevant statute limits an award to [$1,000] for each violation. A claim, by Defendant's Bank, of attorneys' fees in the amount of [$57,751.00] grossly exceeds the potential claim, and does not justify three...attorneys for preparation." [Filing No. 302 at 4.] Ms. Walton contends that "in the face of three counts, each with a total maximum recovery of [$1,000], Defendant seeks attorney fees for three...attorneys in an amount some twenty...times Plaintiff's total possible recovery. This is grossly unreasonable and would have a chilling effect on other plaintiffs who might seek redress in our Courts." [Filing No. 302 at 6.] Ms. Walton requests that the Court "deny the Defendants motion for Attorney Fees...." [Filing No. 302 at 6.]

In its reply, FMB argues that Ms. Walton did not address a single time entry, the reasonableness of the hourly rates charged, or the reasonableness of the 80% discount for Regulation E-related work. [Filing No. 304 at 1-2.] FMB states that Ms. Walton "attempts to reweigh the evidence produced at trial..., takes issue with nearly every finding and conclusion by this Court, and attempts to blame FMB for her current predicament." [Filing No. 304 at 2.] It goes on to address why the award of attorneys' fees was appropriate. [Filing No. 304 at 2-4.] Finally, FMB argues that the amount of attorneys' fees requested is not disproportionate to the

[3] The Court struck Ms. Walton's second Trial Brief, finding that it "provided one deadline for filing post-trial briefs," and "did not provide an opportunity for the parties to file 'response' or 'reply' briefs to each other's trial briefs." [Filing No. 284 at 1.] In any event, the Court addressed Ms. Walton's arguments regarding the award of attorneys' fees to FMB in its Findings of Fact and Conclusions of Law. [Filing No. 286 at 21] (noting that it had stricken Ms. Walton's second Trial Brief, but specifically addressing Ms. Walton's arguments regarding FMB's request for attorneys' fees and finding those arguments "unavailing").

potential value of the Regulation E claim, noting that Ms. Walton sought actual damages, statutory damages, punitive damages, and attorneys' fees in connection with that claim and demanded $250,000, or $50,000 "for each checking and loan account closed, and miscellaneous damages or costs." [Filing No. 304 at 4; *see also* Filing No. 303-1.]

The Court notes at the outset that it already found in its Findings of Fact and Conclusions of Law that "the award of attorneys' fees incurred by FMB in connection with Ms. Walton's Regulation E claim from November 28, 2018 – the date of the Court's summary judgment ruling – forward is warranted." [Filing No. 286 at 20-21.] FMB's Report, Ms. Walton's Response, and FMB's reply were to only address whether the amount of attorneys' fees requested by FMB is "reasonable in relation to the work expended and costs." Indeed, the Court – anticipating, based on the history of this litigation, that Ms. Walton might address issues outside of these parameters – stated in its Findings of Fact and Conclusions of Law that "Ms. Walton must file any response to FMB's Report, *which addresses only whether the attorneys' fees set forth by FMB are 'reasonable in relation to the work expended,'* by January 8, 2020." [Filing No. 286 at 21 (emphasis added).] The majority of Ms. Walton's response is devoted to arguing why she believes the award of attorneys' fees is unwarranted in the first instance, which is beyond the scope of the issues that remain before the Court and which the Court already addressed in its Findings of Fact and Conclusions of Law. [*See* Filing No. 286 at 21 (Court discussing Ms. Walton's arguments that she had difficulty obtaining documents from FMB during discovery, that FMB did not send her a letter as required by Fed. R. Civ. P. 11 before seeking attorneys' fees,[4] and that FMB did not explicitly raise the inapplicability of Regulation E in its summary judgment briefing).]

[4] As the Court noted in its Findings of Fact and Conclusions of Law, FMB was not required to send Ms. Walton a letter before seeking attorneys' fees. [Filing No. 286 at 21 (Court stating that "§ 1693m(f) does not have a similar 'safe harbor' provision" as that of Rule 11).] The Court also

The only arguments Ms. Walton sets forth in her Response that relate to the amount of attorneys' fees FMB requests are that it was excessive for three attorneys to work on the Regulation E claim, and that the amount of attorneys' fees is disproportionate to the amount she could have recovered on the Regulation E claim. These are the only two arguments the Court will address, as they are the only arguments relevant to whether the attorneys' fees that FMB requests are "reasonable in relation to the work expended."

15 U.S.C. § 1693m(f) provides that "[o]n a finding by the court that an unsuccessful action under this section was brought in bad faith or for purposes of harassment, the court shall award to the defendant attorney's fees reasonable in relation to the work expended and costs." The Court finds that the attorneys' fees requested by FMB meet the standard set forth in § 1693m(f). First, Ms. Walton argues that her Regulation E claim "does not justify three…attorneys for preparation," [Filing No. 302 at 4], yet she does not explain why that is the case. Indeed, the records submitted by FMB indicate that five attorneys worked on the Regulation E claim. [*See* Filing No. 301-2.] The Court finds nothing inherently unreasonable with the use of multiple attorneys in this case, and notes that the attorney with the highest hourly rate – David Tittle – spent considerably less time working on the Regulation E claim than the combined time of the other attorneys. [*See* Filing No. 301-2.] Had he been the only attorney working on the case, the total attorneys' fees would have been much higher. The use of three (or five) attorneys does not, in and of itself, warrant a reduction in the amount of attorneys' fees requested, and there is no evidence that any of the work was duplicative.

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notes here that FMB repeatedly warned Ms. Walton (and her counsel at the time), before FMB began to prepare for trial, that Ms. Walton had admitted at her deposition that she had opted in to overdraft protection, provided the opt-in documents, and warned them that the Regulation E claim was frivolous. [Filing No. 301 at 3.]

Second, Ms. Walton argues that she was limited to an award of $1,000 for each Regulation E violation, and the amount of attorneys' fees requested "grossly exceeds the potential claim." [Filing No. 302 at 4.] But Ms. Walton ignores the fact that, along with those statutory damages, she sought actual damages, and attorneys' fees and costs in connection with her Regulation E claim. [Filing No. 15 at 4; Filing No. 15 at 7; Filing No. 303-1 at 2 (Ms. Walton stating in a "Settlement Demand" to FMB that "[f]or violation of Regulation E, [FMB] is liable to Walton for her actual damages, statutory damages, her reasonable attorney fees, and costs").] For "liability under Regulation E, she demanded "[a]s damages for violation of Regulation E,...[$250,000], or [$50,000] for each checking and loan account closed, and miscellaneous damages or costs." [Filing No. 303-1 at 3.] She also stated that she was entitled to "attorney/consultant fees," which totaled $163,785.00 as of the date of her settlement demand. [Filing No. 303-1 at 3.] In light of Ms. Walton's demand in connection with her Regulation E claim, attorneys' fees of $57,751 to defend that claim are not unreasonable in relation to the work expended.

Because Ms. Walton has not contested specific time entries or hourly rates, the Court need not sift through each time entry and determine whether it was reasonable. *See Fox v. Vice*, 563 U.S. 826, 838 (2011) (Courts "need not, and indeed should not, become green-eyeshade accountants. The essential goal in shifting fees (to either party) is to do rough justice, not to achieve auditing perfection"). Having found that it was not unreasonable for FMB to use multiple attorneys, and that the amount of attorneys' fees was not disproportionate to the amount that Ms. Walton sought in connection with her Regulation E claim, the Court finds that $57,751.00 in attorneys' fees is "reasonable in relation to the work expended." 15 U.S.C. § 1693m(f).

II.
CONCLUSION

For the foregoing reasons, the Court finds that FMB is entitled to $57,751.00 in attorneys' fees under 15 U.S.C. § 1693m(f). Final judgment shall enter accordingly.

Date: 1/14/2020

Hon. Jane Magnus-Stinson, Chief Judge
United States District Court
Southern District of Indiana

Distribution via ECF only to all counsel of record

Distribution via United States Mail to:

Debora Walton
P.O. Box 598
Westfield IN 46074

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DEBORA WALTON,	)	
	)	
Plaintiff,	)	CASE NO. 1:17-CV-01888-JMS-MPB
	)	
-v-	)	
	)	
FIRST MERCHANTS BANK,	)	
	)	
	)	
Defendants	)	

DEFENDANT FMB'S MOTION TO EXTEND TIME FOR APPEAL

Defendant First Merchants Bank ("FMB"), by counsel, hereby respectfully requests that the Court extend the time for the parties to file any notice of appeal, and in support of this request, states as follows:

1. On November 25, 2019, this Court issued its Findings of Fact and Conclusions of Law on the two-day bench trial that the Court conducted in October 2019. (Filing No. 286.)

2. As part of its Conclusions, pursuant to 15 U.S.C. § 1693m(f), the Court determined that FMB is entitled to its attorneys' fees (from November 28, 2018 forward) for having to defend against Ms. Walton's meritless Regulation E claim. (*Id.* at 20-21.)

3. The Court then set out a briefing schedule for the attorneys' fees award, beginning with FMB filing its Report on fees by December 20, 2019. (*Id.* at 21.)

4. The Court concluded its Findings of Fact and Conclusions of Law with the following statement: "Final judgment shall issue after the attorneys' fee issue is resolved." (*Id.* at 22.)

5. On November 26, 2019, Ms. Walton filed her notice of appeal of the Trial Court's Findings of Fact and Conclusions of Law. (Filing No. 292.)

6. On December 3, 2019, the United States Court of Appeals for the Seventh Circuit issued an order instructing both Ms. Walton and FMB to "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 true and accurate copy of the Seventh Circuit's order has been attached hereto as Exhibit A.

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

8. The Seventh Circuit also suspended appellate briefing pending further court order. (*Id.*)

9. Federal Rule of Appellate Procedure 4 provides that "[i]f a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered." Fed. R. App. Pro. 4(a)(4)(B)(i).

10. A motion for attorneys' is one of the motions listed in Rule 4(a)(4)(A). Fed. R. App. Pro. 4(a)(4)(B)(i).

11. Federal Rule of Civil Procedure 58(e) provides that when a request for fees has been made, "the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4 (a)(4) as a timely motion under Rule 59."

12. A timely motion under Federal Rule of Civil Procedure 59 is also one of the motions that negates the effectiveness of a notice of appeal until the motion has been ruled upon. Fed. R. App. P. 4(a)(4)(A), (a)(4)(B)(i).

13. While Ms. Walton has filed her notice of appeal, because FMB's request for fees is outstanding, that notice of appeal is ineffective. Fed. R. App. Pro. 4(a)(4)(B)(i).

14. This Court, therefore, has authority under Federal Rule of Civil Procedure 58(e) to extend Ms. Walton's time for appeal to begin from the date of entry of the order disposing of FMB's request for attorneys' fees. Fed. R. Civ. Pro. 58(e); Fed. R. App. Pro. 4(a)(4).

15. FMB respectfully believes it was this Court's intent that the attorneys' fees issue be resolved prior to Ms. Walton taking her appeal in this case.

16. FMB also submits that deciding the attorneys' fees issue prior to a full appeal of this case would prevent piecemeal litigation, promote judicial economy, and help reduce the further unnecessary expenditure of time and fees on this case.

17. FMB, therefore, respectfully requests that the Court issue an order extending the time to appeal in this case, so that the clock for the appellate notice begins

to run after the Court has issued its order on attorneys' fees. Fed. R. Civ. Pro. 58(e); Fed. R. App. Pro. 4(a)(4).

WHEREFORE, Defendant First Merchants Bank respectfully requests that the Court issue an order extending the time to file a notice of appeal in this case so that such time begins after the Court has issued its ruling on attorneys' fees, and for all other appropriate relief.

Respectfully submitted,

Andrew M. Pendexter
David O. Tittle
John F. McCauley
Andrew M. Pendexter
BINGHAM GREENEBAUM DOLL LLP
2700 Market Tower
10 West Market Street
Indianapolis, IN 46204
Telephone: (317) 968-5418
Facsimile: (317) 236-9907
dtittle@bgdlegal.com
jmccauley@bgdlegal.com
apendexter@bgdlegal.com

Attorneys for Defendant, First Merchants Bank

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon Plaintiff by U.S. Mail, postage prepaid on December 5, 2019.

Debora Walton
P.O. Box 598
Westfield, IN 46074

Via Certified Mail Return Receipt Requested
Debora Walton
12878 Mayfair Lane
Carmel, IN 46032

Andrew M. Pendexter

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DEBORA WALTON,	)	
	)	
Plaintiff,	)	CASE NO. 1:17-CV-01888-JMS-MPB
	)	
-v-	)	
	)	
FIRST MERCHANTS BANK,	)	
	)	
	)	
Defendants	)	

ORDER ON DEFENDANT FMB'S MOTION TO EXTEND TIME FOR APPEAL

The matter before the Court is Defendant First Merchants Bank's Motion to Extend Time for Appeal. Being duly advised, the Court **GRANTS** that motion. Pursuant to the Findings of Fact and Conclusions of Law (Docket No. 286 at ECF p. 22) and under Federal Rule of Civil Procedure 58, the time to file a notice of appeal in this case is extended so that such time begins after the Court has issued its ruling on attorneys' fees and final judgment.

SO ORDERED.

Dated: 12/9/2019

Matthew P. Brookman
United States Magistrate Judge
Southern District of Indiana

Distribution:

DEBORA WALTON
P.O. Box 598
Westfield, IN 46074

John F. McCauley
BINGHAM GREENEBAUM DOLL LLP
(Indianapolis)
jmccauley@bgdlegal.com

Andrew M. Pendexter
BINGHAM GREENEBAUM DOLL LLP
(Indianapolis)
apendexter@bgdlegal.com

David O. Tittle
BINGHAM GREENEBAUM DOLL LLP
dtittle@bgdlegal.com

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Deborah Walton	) Case No. 1:17-cv-1888-JMS-MPB
	)
Plaintiff	)
	)
v.	)
	)
First Merchants Bank	)
	)
	)
Defendant.	)
	)

PLAINTIFF DEBORAH WALTON OBJECTS TO DEFENDANT FIRST MERCHANTS BANKS MOTION TO EXTEND TIME FOR APPEAL

Come now, the Plaintiff Deborah Walton, pro se, Objects to First Merchants Banks (FMB) Motion to Extend time for an Appeal to the 7th Circuit for the following reasons:

1. FMB lacks standing as they have a completely favorable ruling, and they do not have standing to file an extension for the Plaintiff by claiming they are doing this "on behalf of the parties." Especially since the Plaintiff made it very clear by filing her Appeal under 28 U.S. Code § 1291, which gives jurisdiction to 7th Circuit Court of Appeals.

2. The Defendants motion is untimely according to Rule **58(e)**, which clearly states that if a timely motion for Attorney's Fees is made under Rule 54(d)(2) the court may act before a Notice of Appeal has been filed however; this was not the case. Neither FMB nor the Court raised the issue under Rule 54(d)(2), therefore their motion is untimely.

Rule 58(e)

COST OR FEE AWARDS. Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under **Rule 54(d)(2)**, the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4 (a)(4) as a timely motion under Rule 59.

3. The Plaintiff's Appeal shall also challenge the District Courts decision on the Attorney Fee's, based on the fact she was not afforded due process.

4. The 7th Circuit Court of Appeals has established that an Order entered on the Merits are Appealable, and they have jurisdiction to address such cases. Buchanan v. United States 82 F. 3d 706, 708 (7th Cir. 1996. They have also established that a sanctions matter is collateral to merits of the case. Barrow v. Falck, 977 F.2d 1100, 1102 (7th Cir. 1992) Lingering dispute about attorney fees does not affect the finality of the judgment on the merits.

5. The 7th Circuit Court of Appeals has also ruled that a judgment on the merits and an award of attorney's fees are separately appealable. See Cooke v. Jackson National Life Ins. Co., 882 F.3d 630 (7th Cir. 2018).

6. The Supreme Court has also weight in on the issue of Final Orders and Final Judgments pending Attorney Fees. See Budinich v. Becton Dickinson Co., 486 U.S. 196, 201-2 (1988).

7. The Supreme Court has said elsewhere that "[t]he considerations that determine finality are not abstractions but have reference to very real interests — not merely those of the immediate parties, but, more particularly, those that pertain to the smooth functioning of our judicial system." Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62,69 (1948). Indeed, in the context of the finality provision governing appealability of

matters from state courts to this Court, 28 U.S.C. § 1257, we have been willing in effect to split the "merits," regarding a claim for an accounting to be sufficiently dissociated" from a related claim for delivery of physical property that "[i]n effect, such a controversy is a multiple litigation allowing review of the adjudication which is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled." Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 126 (1945). This practical approach to the matter suggests that what is of importance here is not preservation of conceptual consistency in the status of a particular fee authorization as "merits" or "nonmerits," but rather preservation of operational consistency and predictability in the overall application of § 1291. This requires, we think, a uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final.

Respectfully submitted,

Deborah Walton, pro se

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been deposited in the U.S. mail, first-class postage prepaid, on the 9th day of December 2019 addressed to:

David O. Tittle
Alex S. Rodger
2700 Market Tower
10 West Market Street
Indianapolis, IN 46204

Deborah Walton, pro se

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DEBORA WALTON,	)	
	)	
Plaintiff,	)	CASE NO. 1:17-CV-01888-JMS-MPB
	)	
-v-	)	
	)	
FIRST MERCHANTS BANK,	)	
	)	
	)	
Defendants	)	

DEFENDANT FMB'S MOTION TO STRIKE PLAINTIFF'S POST TRIAL REPLY BRIEF, OR, IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE A RESPONSE

Defendant First Merchants Bank, ("FMB"), by counsel and pursuant to Federal Rule of Civil Procedure 12(f), respectfully requests that this Court strike Plaintiff Debora Walton's ("Walton") unauthorized and untimely Reply In Opposition To FMB's Post-Trial Brief ("Reply Brief"), Filing No. 281, or, in the alternative, grant FMB leave to file a response to the new arguments raised in the Reply Brief. In support of this motion, FMB states as follows:

1. On October 7 and 8, 2019, this Court conducted a bench trial in this matter. After both parties rested, this Court allowed the parties to make closing arguments. Further, pursuant to the Court's Minute Entry - Day Two, Filing No. 274, "[t]he Court took the case **UNDER ADVISEMENT** and **ORDERED** the parties to file any post-trial briefs or Updated Proposed Findings of Fact and/or Conclusions of Law **by October 28, 2019**." (emphasis in original).

2. On October 28, 2019, Plaintiff filed her Trial Brief with accompanying Findings and Conclusions, Filing No. 279, and FMB filed its Post Trial Brief, Filing No. 278, all pursuant to the Court's Order.

3. On November 12, 2019, fifteen days after the October 28, 2019, deadline, Plaintiff filed a purported Reply Brief. Filing No. 281. This Reply Brief is unauthorized, untimely, and improperly raises new arguments for the first time, unfairly prejudicing FMB.

MOTION TO STRIKE

Federal Rule of Civil Procedure 12(f) permits a court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Although Rule 12(f) "does not explicitly authorize a motion to strike documents other than pleadings, courts routinely entertain such motions." "This authority comes from the Court's inherent power to strike impermissible filings." *City of Sterling Heights Gen. Employees' Retirement Sys. v. Hospira, Inc.*, No. 11-c-8332, 2013 WL 566805, at *11 (N.D. Ill. Feb.13, 2013) (citing *Ind. Ins. Co. v. Westfield Ins. Co.*, 10 C 2660, 2010 WL 3404971, at *3 (N.D. Ill. Aug. 26, 2010) (denying motion to strike portions of response to motion to dismiss)); *Unytite, Inc. v. Lohr Structural Fasteners, Inc.*, 91 C 2849, 1992 WL 34143, at *6 (N.D. Ill. Feb.13, 1992) (granting motion to strike affidavit and exhibit in plaintiff's response to motion to dismiss)); *Hanover Ins. Group v. Singles Roofing Co.*, 10 C 611, 2012 WL 2368328, at *9 (N.D. Ill. June 21, 2012) (granting motion to strike unauthorized and untimely supplemental response brief to preliminary injunction motion)); *see also In re Bear Stearns Cos., Inc. Secs., Derivative & ERISA Litig.*,

763 F. Supp .2d 423, 581–82 (S.D.N.Y. 2011) (noting the district court's "inherent authority to strike any filed paper which it determines to be abusive or otherwise improper under the circumstances" in deciding motion to strike exhibits from a motion to dismiss)).

This Reply Brief from Plaintiff is improper and unauthorized. The Court's Order, Filing No. 274, set a hard date of October 28, 2019, to file whatever the parties deemed necessary to support their cases post-trial. The Court provided the parties nearly three weeks after trial to make any arguments, or present any facts or conclusions of law. The Court's Order could have included dates for replies or further responses, but it didn't. There is no provision in the Local Rules or anywhere else allowing a post-trial Reply Brief. Further, to the extent Plaintiff intended to file a Reply Brief after October 28, Plaintiff was required to seek leave to do so and state the grounds for seeking that relief.

Finally, the purported Reply Brief is untimely. Even if Plaintiff was authorized to file a Reply Brief or granted leave to do so, Plaintiff had seven days after the October 28, 2019, due date. S.D. Ind. L.R. 7-1(c)(3)(b). This Reply Brief was filed fifteen days after October 28, 2019. The date to file a Post-Trial Brief was October 28, 2019, and Plaintiff's unauthorized and untimely Reply Brief should be stricken.

ALTERNATIVE MOTION FOR LEAVE TO FILE RESPONSE BRIEF

Plaintiff's Post-Trial Reply Brief is replete with new arguments made for the first time on reply, including arguments that requests for fee-shifting are premature, why Plaintiff should not be assessed attorney's fees, failure to comply with Rule 11, among

others. Filing No. 281, p. 9. To allow Plaintiff to file this Reply Brief fifteen days after briefing closed is highly prejudicial to FMB. To the extent this Court will consider Plaintiff's Reply Brief, FMB respectfully requests that it be granted leave to file a response brief addressing new issues and arguments raised by Plaintiff.

CONCLUSION

For the foregoing reasons, Defendant First Merchants Bank respectfully requests that the Court strike Plaintiff Debora Walton's Reply Brief and/or grant FMB leave to file a responsive brief.

Respectfully submitted,

John F. McCauley
David O. Tittle
John F. McCauley
Andrew M. Pendexter
BINGHAM GREENEBAUM DOLL LLP
2700 Market Tower
10 West Market Street
Indianapolis, IN 46204
Telephone: (317) 968-5418
Facsimile: (317) 236-9907
dtittle@bgdlegal.com
apendexter@bgdlegal.com
jmccauley@bgdlegal.com

Attorneys for Defendant, First Merchants Bank

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served on all counsel of record via the Court's electronic filing system.

John F. McCauley

Additional material from this filing is available in the Clerk's Office.