In the
United States Court of Appeals
For the Seventh Circuit

NO. 19-1184

NICHOLE L. RICHARDS,

Plaintiff-Appellant,

v.

PAR, INC., and
LAWRENCE TOWING, LLC,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division, No. 1:17-cv-00409-TWP-MPB,
Tanya Walton Pratt, Judge.

ARGUED SEPTEMBER 19, 2019 DECIDED MARCH 25, 2020

Before SYKES, HAMILTON, and BRENNAN, *Circuit Judges.*

SYKES, *Circuit Judge*. When Nichole Richards defaulted on her car loan, her lender hired PAR, Inc., to repossess the vehicle. PAR subcontracted with Lawrence Towing to carry out the repossession. Richards protested when employees of the towing company arrived at her Indianapolis home and tried to take the car. She ordered them off her property. They

summoned the police, and a responding officer handcuffed Richards and threatened her with arrest. The officer removed the handcuffs after the car was towed away.

Richards sued PAR and Lawrence Towing for violating the Fair Debt Collection Practices Act ("FDCPA" or "the Act"). As relevant here, the Act makes it unlawful for a debt collector to take "nonjudicial action" to repossess property if "there is no present right to possession of the property claimed as collateral through an enforceable security interest." 15 U.S.C. § 1692f(6)(A). Richards concedes the validity of the security interest and admits that she defaulted on her loan. Her argument is that the defendants lacked a present right to possess the vehicle because Indiana law authorizes nonjudicial repossession only if the repossession "proceeds without breach of the peace." IND. CODE § 26-1-9.1-609. If a breach of the peace occurs, the repossessor must immediately stop and seek judicial remedies.

The district judge viewed the claim as an improper attempt to repackage a state-law violation as a violation of the FDCPA and entered summary judgment for the defendants.

We reverse. Whether a repossessor had a "present right to possession" for purposes of § 1692f(6)(A) can be determined only by reference to state law. Based on the evidentiary record, a reasonable jury could find that the towing company employees did not have a present right under Indiana law to possess Richards's

vehicle when they seized it. Accordingly, she has a viable FDCPA claim.

I. Background

Richards obtained a loan from Huntington National Bank to finance her purchase of a used Chevrolet Tahoe. The loan agreement gave the bank a security interest in the vehicle and the right to take possession of it if Richards defaulted on her payment obligations. The agreement also specified that any repossession would proceed without a breach of the peace.

When Richards later defaulted on her loan payments, Huntington contracted with PAR, Inc., to repossess the Tahoe. PAR in turn subcontracted with Lawrence Towing to complete the repossession. In the early-morning hours on February 6, 2017, employees of Lawrence Towing arrived at Richards's home in Indianapolis to take possession of the Tahoe. Richards protested and said she would not voluntarily surrender it. They persisted, and one of them told her they could "either do this the hard way or . . . do this the easy way." Richards ordered them to leave her property. They responded by calling the police.

An officer arrived and Richards continued to object to the repossession. When she stepped off her porch, the officer grabbed her arm, handcuffed her, and threatened her with arrest. He removed the handcuffs after the Tahoe was towed away.

Richards sued PAR and Lawrence Towing alleging a violation of the FDCPA—more specifically, a violation of § 1692f(6)(A) of the Act, which prohibits debt collectors from "[t]aking . . . any nonjudicial action to effect dispossession or disablement of property *if there is no present right to possession* of the property claimed as collateral through an enforceable security interest." (Emphasis added.) The basis of her claim is that the Lawrence Towing employees had no "present right to possess" the Tahoe when they seized it because section 26-1-9.1-609 of the Indiana Code permits repossession of collateral without judicial process only if the repossessor "proceeds without breach of the peace." The complaint also raised several state-law claims.

The judge entered summary judgment for the defendants, construing the claim as an impermissible attempt to use the FDCPA to enforce a violation of state law. The judge declined to exercise supplemental jurisdiction over the statelaw claims, dismissing them without prejudice. After an unsuccessful motion for reconsideration, the judge entered final judgment for the defendants, and this appeal followed.

II. Discussion

We review a summary judgment de novo, construing the evidence and drawing all reasonable inferences in favor of the nonmoving party—here, Richards. *Pantoja v. Portfolio Recovery Assocs., LLC*, 852 F.3d 679, 682 (7th Cir. 2017).

The FDCPA broadly proscribes unfair debt-collection practices: "A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. § 1692(f). This language is obviously quite general, but the statute also sets forth some specific prohibited debt-collection methods. Immediately after the main clause we just quoted, the statute says this: "Without limiting the general application of the foregoing, the following conduct is a violation of this section," *id.*, and a list of eight specific prohibited acts follows.

This case involves the sixth: a debt collector may not "[t]ak[e] or threaten[] to take any nonjudicial action to effect dispossession or disablement of property if there is no present right to possession of the property claimed as collateral through an enforceable security interest." *Id.* § 1692f(6)(A). Repossessors qualify as debt collectors under the Act. *Id.* § 1692a(6) (defining "debt collector" to include a person in "any business the principal purpose of which is the enforcement of security interests"). Together, these provisions establish the following rule: a repossession without judicial process violates § 1692f(6)(A) *unless* the property is collateral under an enforceable security interest *and* the repossessor has a "present right to possession" of the property.

Richards admits that she defaulted on her loan and that Huntington's security interest is valid and enforceable. The premise of her claim is that the Lawrence Towing employees lacked a present right to possess the Tahoe when they seized it because Indiana

law permits nonjudicial repossession only if the process doesn't breach the peace. More specifically, section 26-1-9.1-609 of the Indiana Code provides that a secured party may take possession of collateral without judicial process only "if it proceeds without breach of the peace." If a breach of the peace occurs, the repossessor "must desist and pursue his remedy in court." *Allen v. First Nat'l Bank of Monterey*, 845 N.E.2d 1082, 1086 (Ind. Ct. App. 2006) (quotation marks omitted).

It's undisputed that the Lawrence Towing employees were pursuing a self-help remedy by seizing the Tahoe. Drawing inferences in Richards's favor, a reasonable jury could conclude that a breach of the peace occurred during the repossession attempt. At that point the towing company no longer had a present right to possession, but its employees took Richards's Tahoe anyway. The record is factually and legally sufficient to proceed on a claim for violation of § 1692f(6)(A).

The defendants counter with a statutory-interpretation argument. As they read § 1692f(6)(A), the requirement of a "present right to possession" means only that the repossessor must have an enforceable security interest in the property claimed as collateral. On this reading, the statutory phrase "through an enforceable security interest" modifies "present right to possession." But that interpretation skips over language that appears between these two phrases.

Recall the actual text of the statute: debt collectors may not take nonjudicial action to effect dispossession

of property if "there is no present right to possession of the property claimed as collateral through an enforceable security interest." § 1692f(6)(A). Under the last-antecedent canon, "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Lockhart v. United States*, 136 S. Ct. 958, 962 (2016) (quotation marks omitted); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 144–46 (2012). Thus, in § 1692f(6)(A), the phrase "through an enforceable security interest" modifies the phrase directly preceding it: "the property claimed as collateral." That is, the phrase "through an enforceable security interest" identifies the legal mechanism through which the property is "claimed as collateral"; it does not modify "present right to possession."

But the more important and indeed decisive point is that the FDCPA does not define the phrase "present right to possession." Repossession rights are governed by the relevant state's property and contract law, so in the absence of an FDCPA-specific rule, we must look to state law to determine whether a repossessor had a present right to possess the property at the time it was seized.

The defendants respond by invoking our decisions in *Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 480 F.3d 470 (7th Cir. 2007), and *Bentrud v. Bowman, Heintz, Boscia & Vician, P.C.*, 794 F.3d 871 (7th Cir. 2015). A close look at each case shows that neither applies here. In *Beler* the plaintiff sued a law firm that

served her bank with a citation to discover assets in an effort to execute on a state-court judgment for the law firm's client. 480 F.3d at 472. In response to the citation, the bank froze her account. The plaintiff claimed that the funds in her account came from her social-security disability payments, which are exempt from collection under both the Social Security Act and Illinois law. She accused the law firm of engaging in unfair or unconscionable debt-collection practices by trying to collect against exempt assets. *Id.* at 473.

We rejected that argument, explaining that § 1692f "creates its own rules . . . ; it does not so much as hint at being an enforcement mechanism for other rules of state and federal law." *Id.* at 474. We observed that the phrase "unfair or unconscionable" in § 1692f "is as vague as they come." *Id.* But it is not "a piggyback jurisdiction clause" or a means "to enforce existing state and federal laws exempting certain assets from execution." *Id.* We concluded that the FDCPA's broad prohibition of "unfair or unconscionable" debt-collection practices should not be read to displace state legislative or judicial rules about the execution of state-court judgments. *Id.* at 475.

In a similar vein, the plaintiff in *Bentrud* argued that it was unfair or unconscionable in violation of § 1692f for the defendant to deviate from arbitration procedures dictated by contract. 794 F.3d at 875. The plaintiff's claim was premised on a breach of contract governed by state law. Relying on *Beler*, we reaffirmed that § 1692f's "vague" language prohibiting unfair or unconscionable debt-collection practices could not be

read to "transform the FDCPA into an enforcement mechanism for matters governed by state law." *Id.* at 876.

Importantly, both *Beler* and *Bentrud* dealt with § 1692f's general clause prohibiting "unfair or unconscionable" debt-collection methods. We held only that this broad and vague language does not transform every violation of state or federal law into a violation of the FDCPA. Nothing about the general phrase "unfair or unconscionable" requires reference to state law, but elsewhere the FDCPA contains more specific provisions that *do* call for an inquiry into state law. As we've explained, § 1692f(6)(A) is one of them.

Two cases illustrate the point. In *Seeger v. AFNI, Inc.*, 548 F.3d 1107, 1111 (7th Cir. 2008), we consulted Wisconsin law to determine whether methods used by a cell-phone company to collect debts in that state were "expressly authorized by the agreement creating the debt or permitted by law" under § 1692f(1). We could not determine whether the methods were "permitted by law" without reference to Wisconsin law. *Seeger*, 548 F.3d at 1111. A second example is our en banc decision in *Suesz v. Med-1 Sols., Inc.*, 757 F.3d 636 (7th Cir. 2014) (en banc). That case concerned § 1692i, which requires a debt collector to file a suit in the "judicial district or similar legal entity" where the contract was signed or where the debtor resides. We held that identifying the "judicial district or similar legal entity" for purposes of § 1692i requires the identification of the "smallest geographic area that is relevant for determining venue in the court system in which the case is

filed." *Id.* at 638. We looked to Indiana law to identify the smallest "geographic area" for venue purposes because the collection action in question was filed in Indiana. *Id.* at 640.

This case is similar to *Seeger* and *Suesz*. A repossession of property without judicial process violates § 1692f(6)(A) *unless* the property is collateral under an enforceable security interest *and* the repossessor has a "present right to possession." The statute doesn't supply its own rule for determining whether a repossessor had a present right to possess the property when it was seized; that question can be answered only by reference to state law. In Indiana a repossessor has a present right to take possession of collateral without judicial process only if he proceeds without a breach of the peace. Richards has a sound legal theory and enough evidence to present her § 1692f(6)(A) claim to a jury.

REVERSED AND REMANDED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NICHOLE L. RICHARDS, Plaintiff, v. PAR, INC. and LAWRENCE TOWING, LLC, Defendants.	)	Case No. 1:17-cv-00409-TWP-MPB

ENTRY ON PENDING MOTIONS

(Filed Jul. 16, 2018)

This matter is before the Court on a Motion for Summary Judgment (Filing No. 36) filed by Defendants PAR, Inc. ("PAR") and Lawrence Towing, LLC ("Lawrence Towing") (collectively, "Defendants"). Plaintiff Nichole L. Richards ("Richards") filed a Complaint with claims under the Fair Debt Collection Practices Act ("FDCPA"), as well as state law claims. (Filing No. 1.) Richards alleges that Defendants are debt collectors under 15 U.S.C. § 1692a(6), and their repossession of her vehicle was in violation of Indiana Code § 26-1-9.1-609. Thus, she argues the Defendants violated the FDCPA. Richards' state law claims arise out of the alleged wrongful repossession. Also pending before the Court is a Motion to Stay Arbitration filed by the Defendants (Filing No. 43), and a Motion to

Intervene, filed by Huntington Bancshares, Inc. ("Huntington") (Filing No. 47). For the reasons that follow, the Court **grants** the Defendants' Motion for Summary Judgment, and **denies** the Motions to Stay Arbitration and to Intervene.

I. BACKGROUND

The following facts are not necessarily objectively true, but as required by Federal Rule of Civil Procedure 56, the facts are presented in the light most favorable to Richards as the non-moving party. *See Zerante v. DeLuca*, 555 F.3d 582, 584 (7th Cir. 2009); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). On February 26, 2015, Richards purchased a used 2010 Chevrolet Tahoe (the "Tahoe") from Tru Worth Auto for $26,750.00. (Filing No. 1 at 1.) Huntington National Bank financed the purchase and obtained a lien on the vehicle. (Filing No. 44-1 at 2.) Richards missed payments on the Tahoe and defaulted under the terms of the Personal Loan Agreement ("Agreement") with Huntington. *Id.* The Agreement provided that Huntington had the right to repossess the Tahoe in the event that Richards defaulted on her payments. *Id.*

Huntington contracted with PAR to repossess the Tahoe, and PAR subcontracted the job to Lawrence Towing. (Filing No. 1 at 2.) On December 6, 2016, Lawrence Towing went to Richards' home located in Indianapolis, Indiana to repossess the Tahoe. (Filing No. 38-1 at 6.) Because the Tahoe had a trailer attached to

it and was not readily accessible, Lawrence Towing had to make contact with Richards to accomplish the repossession. *Id.* at 3. Richards refused to give Lawrence Towing her vehicle. (Filing No. 38-1 at 8.) The following exchange occurred between Richards and the Lawrence Towing employee:

> And he said, well, we can either do this the hard way or we can do this the easy way. And I said what's the hard way? He said the hard way is I call the police and they make you give me the vehicle. And I said, well, I guess we're going to have to do this the hard way because I'm not giving you my vehicle. I'm going to have to ask you to leave my property. He said that's fine and so him and the younger gentleman walked off my property and they got in their vehicle and they moved up into the front of my driveway and turned off the engine, got out and he got on his cell phone and he was—presumably the police, but he was talking to somebody.

(Filing No. 38-1 at 8-9). Ultimately, the police arrived and Richards continued to verbally refuse the repossession. *Id.* at 10. When the Lawrence Towing employee went to unhook the trailer attached to the Tahoe, Richards stepped off of her porch and was put in handcuffs by the officer. *Id.* at 11. Richards was not taken into custody, however, the Tahoe was towed away and repossessed. (Filing No. 1 at 3.) On February 9, 2017, Richards filed this action against the Defendants in federal court. (Filing No. 1.) Her claims for relief are violation of the FDCPA, Replevin, and violation of the

Indiana Crime Victims Relief Act (in particular Indiana Code § 35- 43-2-2 and § 35-43-4-3, Criminal Trespass). *Id.* at 3-5. Richards intentionally did not include Huntington in this lawsuit because Huntington's contract contained a binding Arbitration Provision that would have allowed Huntington to require Richards' claims to be arbitrated. (Filing No. 52-1 at 1.)

On April 16, 2018, Richards filed an Amended Claim for Arbitration against Huntington with JAMS (formerly known as Judicial Arbitration and Mediation Services, Inc.) premised on factual averments identical to those asserted in this action. (Filing No. 44-3.) An arbitration was convened on May 31, 2018, during which Huntington objected to Richards' efforts to adjudicate this matter in two different forums. (Filing No. 47 at 3.) Ultimately, JAMS cancelled the arbitration following Huntington's assertion that JAMS was ineligible to administer the arbitration as its policies and procedures were materially inconsistent with Huntington's arbitration provision. *Id*. Thereafter, on June 7, 2018, Huntington filed a Motion to Intervene in the instant action, pursuant to Federal Rule of Civil Procedure 24(a) and 24(b) (Filing No. 47).

II. LEGAL STANDARDS

A. Summary Judgment Standard

The purpose of summary judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Electric Industrial Co. v. Zenith Radio Corp*., 475 U.S.

574, 587 106 S.Ct. 1348 (1986). Federal Rule of Civil Procedure 56 provides that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Hemsworth v. Quotesmith. Com, Inc.*, 476 F.3d 487, 489-90 (7th Cir. 2007). In ruling on a motion for summary judgment, the court reviews "the record in the light most favorable to the nonmoving party and draw[s] all reasonable inferences in that party's favor." *Zerante v. DeLuca*, 555 F.3d 582, 584 (7th Cir. 2009) (citation omitted). However, "[a] party who bears the burden of proof on a particular issue may not rest on its pleadings, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact that requires trial." *Hemsworth*, 476 F.3d at 490 (citation omitted). "In much the same way that a court is not required to scour the record in search of evidence to defeat a motion for summary judgment, nor is it permitted to conduct a paper trial on the merits of a claim." *Ritchie v. Glidden Co.*, 242 F.3d 713, 723 (7th Cir. 2001) (citation and internal quotations omitted). Finally, "neither the mere existence of some alleged factual dispute between the parties nor the existence of some metaphysical doubt as to the material facts is sufficient to defeat a motion for summary judgment." *Chiaramonte v. Fashion Bed Grp., Inc.*, 129 F.3d 391, 395 (7th Cir. 1997) (citations and internal quotations omitted).

B. Motion to Intervene Standard

Federal Rule of Civil Procedure 24 governs a party's ability to intervene in a cause of action. Rule 24(a)(2) states that a party may intervene as a matter of right when he "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Rule 24(b)(2) states that a party may be allowed to intervene if he "has a claim or defense that shares with the main action a common question of law or fact."

A party seeking to intervene as a matter of right under Rule 24(a)(2) must show: (1) timeliness of the application, (2) an interest relating to the subject matter of the main action, (3) potential impairment of that interest if the action is resolved without him, and (4) that the interest cannot be adequately protected by the existing parties. *See Reid L. v. Ill. State Bd. of Educ.*, 289 F.3d 1009, 1017 (7th Cir. 2002); *Commodity Futures Trading Comm'n v. Heritage Capital Advisory Servs., Ltd.*, 736 F.2d 384, 386 (7th Cir. 1984). If the applicant does not carry his burden of satisfying each of these requirements, *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985), the court must deny the application. *See United States v. BDO Seidman*, 337 F.3d 802, 808 (7th Cir. 2003); *United States v. 36.96 Acres of Land*, 754 F.2d 855, 858 (7th Cir. 1985).

"When deciding a motion for permissive intervention under Rule 24(b), the 'court must consider three requirements: (1) whether the petition was timely; (2) whether a common question of law or fact exists; and (3) whether granting the petition to intervene will unduly delay or prejudice the adjudication of the rights of the original parties.'" *Dave's Detailing, Inc. v. Catlin Ins. Co.*, No. 1:11-cv-1585-RLY-DKL, 2012 WL 5377880, at *2 (S.D. Ind. Oct. 31, 2012) (quoting *Pac for Middle Am. v. State Bd. of Elections*, No. 95–c–827, 1995 WL 571893, at *3 (N.D. Ill. Sept. 22, 1995)).

III. DISCUSSION

As stated earlier, Richards does not dispute that she was in default on her car loan. She notes however, that Indiana Code § 26-1-9.1-609 provides that a secured creditor may repossess the collateral after default "if it proceeds without a breach of the peace." Richards argues that there is a genuine issue of material fact, at the least, as to whether she objected to the repossession and therefore whether the subsequent repossession was in breach of the peace. The Court will first address the summary judgment motion.

A. Motion for Summary Judgment

Lawrence Towing filed a Motion for Summary Judgment alleging that Richards' FDCPA claim is not an enforcement mechanism for state law disputes, therefore, this Court should grant its Motion for Summary judgment on the FDCPA claim and dismiss any

remaining state law claims pursuant to 28 U.S.C. § 1367(c). (Filing No. 37 at 4, 8.) Richards responds that numerous cases rely upon state law to establish a violation of the FDCPA. (Filing No. 38 at 3.) The material facts are largely not in dispute. (Filing No. 38 at 2.) ("Plaintiff does not take issue with any of Defendants' facts in their Statement of Material Facts Not in Dispute.") Thus, the dispositive question regarding the FDCPA is a legal one.

Richards proposes that a trial in this case is required because the material issue of fact in this case is whether or not the repossession involved a breach of the peace. *Id.* The parties agree that "breach of the peace repossession" in violation of Indiana Code § 26-1-9.1-609, is a state law remedy. However, they disagree on whether courts may look to state law, *i.e.* the definition of breach of the peace, to determine if § 1692f(6)(A) of the FDCPA was also violated. Section 1692f(6)(A) prohibits the "[t]aking or threatening to take any nonjudicial action to effect dispossession or disablement of property if there is no present right to possession of the property claimed as collateral through an enforceable security interest." 15 U.S.C. § 1692f. It is also undisputed that Huntington held a present right to possession based on the fact that Richards defaulted on her payments under the Agreement and Huntington held a security interest in the Tahoe. (Filing No. 44-1 at 2; Filing No. 44-3 at 2.)

"The FDCPA is not an enforcement mechanism for matters governed elsewhere by state and federal law." *Bentrud v. Bowman, Heintz, Boscia & Vician, P.C.*, 794

F.3d 871, 875 (7th Cir. 2015). *Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC* is instructive on the scope of 15 U.S.C. § 1692f. 480 F.3d 470, 473 (7th Cir. 2007). In *Beler*, the plaintiff sued defendants after the defendants served a citation that caused her bank to freeze her checking account for three weeks. In freezing the account, the plaintiff was unable to access her Social Security benefits which are exempt from attachment under both Social Security regulations and Illinois law. Thus, the plaintiff advanced a theory that violation of Social Security regulations and Illinois law regarding the exempted Social Security benefits was also a violation of § 1692f. The Seventh Circuit advised against expanding the scope of the FDCPA through § 1692f. "This is not a piggyback jurisdiction clause. If the Law Firm violated the Social Security Act, that statute's rules should be applied. Likewise if the Law Firm violated Illinois law. Section 1692f does not take a state-law dispute and move it to federal court." *Id.* at 424. More recently, the Seventh Circuit considered another state law, an arbitration provision in a credit card agreement, in the context of § 1692f. Again, the Seventh Circuit held that it would not "transform the FDCPA into an enforcement mechanism for matters governed by state law." *Bentrud*, 794 F.3d at 876.

Richards refers to the Seventh Circuit's holding that the "FDCPA is not an enforcement mechanism for state law" as dicta and points to FDCPA violations that have relied upon state law such as determining the relevant statute of limitations and the charging of additional amounts on top of the debt itself such as

attorney fees. (Filing No. 38 at 4.) Defendants respond that the distinction between the present cases and Richards' citation to other cases that rely on state law in addition to the FDCPA, is that Richards "is attempting to use the FDCPA to enforce independent legal obligations not mandated by the FDCPA." (Filing No. 40 at 3.) Although *Beler* and *Bentrud* did not consider the state law regarding breach of the peace, the relief that Richards seeks is an independent state law regarding legal collection activity under Indiana law that would amount to transforming the FDCPA into an enforcement mechanism for state law. Additionally, Richards' claims concern the very section of the FDCPA at issue in *Beler* and *Bentrud*.

Indiana Code § 26-1-9.1-609 provides that after default, a secured party may take possession of the collateral without judicial process, if it proceeds without breach of the peace. Indiana courts have interpreted breach of the peace to include "all violations of public peace, order, or decorum. A breach of the peace is a violation or disturbance of the public tranquility or order, and the offense includes breaking or disturbing the public peace by any riotous, forceful, or unlawful proceedings." *Census Fed. Credit Union v. Wann*, 403 N.E.2d 348, 350 (Ind. Ct. App. 1980). Unlike the district court cases cited by Richards which analyzed whether defendants had a 'present right' to collateral via valid security interests, there is no dispute that the Defendants in this case did have the 'present right' to the Tahoe, based on the FDCPA's definition. Richards admits that she had defaulted on her car loan payments.

(*See* Filing No. 38 at 6-7; Filing No. 37-1 at 2-3) (citing *Purkett v. Key Bank USA, N.A.*, 2001 U.S. Dist. LEXIS 6126, *5 (N.D. Ill. May 9, 2001); *Clark v. Auto Recovery Bureau, Inc.*, 889 F. Supp. 543, 546 (D.Conn. 1994)). Similar to the state law issues considered in *Beler* and *Bentrud*, any violation for Defendants breaching of the peace when she was handcuffed and threatened with arrest during the repossession, is independently a matter of state law. Richards may not use the FDCPA to enforce a remedy governed under state law. The FDCPA requires an enforceable security interest to effect dispossession, which is present as evidenced by the Agreement. Accordingly, Defendants' Motion for Summary Judgment on Richards' FDCPA claim is **granted**.

Richards also filed state law claims for Replevin and violation of the Indiana Crime Victims Relief Act. If the district court has original jurisdiction over an action, it may also exercise supplemental jurisdiction over "all other claims that are so related to claims in the action . . . that they form part of the same case or controversy . . . ". 28 U.S.C. § 1367(a). If the underlying federal claim that supported supplemental jurisdiction is dismissed, courts have discretion in deciding whether to continue to exercise jurisdiction over the remaining state law claims. 28 U.S.C. § 1367(c). The court may decline to exercise supplemental jurisdiction if the court has dismissed all claims over which it has original jurisdiction. *Id*. The dismissal of federal claims do not require the court to decline to exercise supplemental jurisdiction over state law claims.

However, the court "will normally relinquish [supplemental] jurisdiction over the state-law claims." *Sullivan v. Conway*, 157 F.3d 1092, 1095 (7th Cir. 1998).

The Court's jurisdiction over the state law claims is based on supplemental jurisdiction under 28 U.S.C. § 1367(a). Because the Court has granted summary judgment in favor of Defendants on the FDCPA claim conferring the Court's original jurisdiction, in the interests of judicial economy, convenience, fairness, and comity, the Court declines to exercise supplemental jurisdiction over the remaining state law claims. Accordingly, the state law claims are **dismissed without prejudice**.

B. Motion to Stay

On May 24, 2018, the Defendants filed a Motion to Stay Arbitration, (Filing No. 43), on the basis that Richards waived her right to arbitration when she filed her Complaint in this Court. Richards responds that arbitration was initiated against non-party Huntington pursuant to a binding arbitration provision in the Agreement. (Filing No. 52 at 1; Filing No. 52-1 at 17.) On April 9, 2018, Huntington and Richards agreed to arbitrate their matter. (Filing No. 52-1 at 18.) Because neither Lawrence Towing nor PAR have standing to stay Huntington and Richards' pending agreed upon (and binding) arbitration, the Court **denies** the Defendants' Motion to Stay Arbitration.

C. Motion to Intervene

On June 7, 2018, Huntington filed a Motion to Intervene, (Filing No. 47), in the present action on the issue of "whether Richards is entitled to any recovery for an alleged breach of the peace repossession by Lawrence Towing LLC and PAR, Inc.". *Id.* at 4. Richards asserts that Huntington's motion to intervene would be futile because the arbitration provision in the Agreement is binding, and Huntington's motion is not timely. She argues that Huntington knew of her claims against it in April 2017 and of this lawsuit in September 2017, yet it did not move to intervene until June 2018, two months prior to the August 27, 2018 jury trial. (Filing No. 52 at 8-9.) She further contends that Huntington will not be prejudiced by not allowing it to intervene because it has the arbitration forum that it chose in which to defend its liability. *Id*.

As noted above, this Court has declined to exercise supplemental jurisdiction over the state law claims, and Richards may not pursue breach of the peace—a state law claim—pursuant to the FDCPA. Thus, Richards is correct in that intervention as a right or permissive would be futile given the disposition of the present case and the underlying basis for Huntington's request to intervene. Additionally, the arbitration provision was included in Huntington's contract to apply to any claims between Richards and Huntington. (Filing No. 52-1 at 17.) Richards has elected to arbitrate her claims against Huntington pursuant to the Agreement, and arbitration is already underway. (Filing No. 52-1 at 18.) As Richards noted, Huntington

significantly delayed in requesting intervention, over a year after Richards filed the present complaint against the Defendants, and the request occurred after Huntington received the JAMS ruling that the arbitration provision bound Huntington to arbitration. *Id.* at 20. Accordingly, the Court **denies** Huntington's Motion to Intervene.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment (Filing No. 36) is **GRANTED** on the federal claim asserted by Richards. The Court declines supplemental jurisdiction over the state law claims and those claims are **dismissed without prejudice**. The Defendants' Motion to Stay Arbitration is **DENIED**. (Filing No. 43). Huntington's Motion to Intervene (Filing No. 47) is **DENIED,** and Huntington is **terminated** as an intervenor in this action. **The Clerk is directed to remove Huntington as a defendant in the caption, as they were never a named party.**

The Court will issue Final Judgment under separate order.

SO ORDERED.

Date: 7/16/2018 /s/ Tanya Walton Pratt
TANYA WALTON PRATT,
JUDGE
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NICHOLE L. RICHARDS, Plaintiff, v. PAR, INC., and LAWRENCE TOWING, LLC, Defendants.	))))))))	Case No. 1:17-cv-00409-TWP-MPB

ENTRY ON RICHARDS' MOTION TO RECONSIDER

(Filed Dec. 27, 2018)

This matter is before the Court of a Motion to Reconsider filed pursuant to Federal Rule of Civil Procedure 59(e) by Plaintiff Nichole L. Richards. (Filing No. 55.) On July 16, 2018, the Court granted PAR, Inc.'s and Lawrence Towing, LLC's (collectively, "Defendants") Motion for Summary Judgment, finding Richards did not have a valid claim under the Fair Debt Collection Practices Act ("FDCPA") because the Defendants had a present right to repossess her Chevrolet Tahoe and any claim that they breached the peace while doing so was an independent matter of state law. (Filing No. 53.) The Court declined to exercise supplemental jurisdiction over Richards' state law claims and dismissed those claims without prejudice. *Id.* at 11. The Court entered final judgment pursuant to Fed. R. Civ. Pro. 58. (Filing No. 54.) Richards now asks the

Court to reverse its summary judgment order and enter an order denying Defendants' Motion for Summary Judgment (Filing No. 56 at 15). For the following reasons, the Court **denies** Richards' Motion to Reconsider.

I. LEGAL STANDARD

Although motions to reconsider are not specifically authorized by the Federal Rules of Civil Procedure, courts in the Seventh Circuit apply Rule 59(e) or Rule 60(b) standards to these motions. *Smith v. Utah Valley Univ.*, 2015 U.S. Dist. LEXIS 70271, at *3–4 (S.D. Ind. June 1, 2015). A motion to alter or amend under Rule 59(e) "must be filed no later than 28 days after the entry of the judgment." Fed. R. Civ. P. 59(e). If timely filed, a motion styled as a motion to reconsider should be considered under Rule 59(e). *Kiswani v. Phoenix Sec. Agency, Inc.*, 584 F.3d 741, 742 (7th Cir. 2009). The Court issued its Order on Defendants' Motion for Summary Judgment on July 16, 2018 (Filing No. 53). Richards filed her "Motion to Reconsider" (Filing No. 55) on August 11, 2018, twenty-six days after the Court's Order. Therefore, the Court will analyze the Motion as a motion to alter or amend under Rule 59(e).

The purpose of a motion to alter or amend judgment under Rule 59(e) is to ask the court to reconsider matters "properly encompassed in a decision on the merits." *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 174 (1989). "A Rule 59(e) motion will be successful only where the movant clearly establishes: (1) that the court committed a manifest error of law or fact, or

(2) that newly discovered evidence precluded entry of judgment." *Cincinnati Life Ins. Co. v. Beyrer*, 722 F.3d 939, 954 (7th Cir. 2013) (citation and quotation marks omitted). Relief pursuant to a Rule 59(e) motion to alter or amend is an "extraordinary remed[y] reserved for the exceptional case." *Foster v. DeLuca*, 545 F.3d 582, 584 (7th Cir. 2008). A Rule 59(e) motion may be used "to draw the district court's attention to a manifest error of law or fact or to newly discovered evidence." *United States v. Resnick*, 594 F.3d 562, 568 (7th Cir. 2010). A manifest error "is not demonstrated by the disappointment of the losing party. It is the wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000) (citation and quotation marks omitted). Furthermore, "a Rule 59(e) motion is not an opportunity to relitigate motions or present arguments, issues, or facts that could and should have been presented earlier." *Brownstone Publ'g, LLC v. AT&T, Inc.*, 2009 U.S. Dist. LEXIS 25485, at *7 (S.D. Ind. Mar. 24, 2009).

II. DISCUSSION

Richards' position is that "the court committed a manifest error of law or fact in failing to apply the unanimous interpretation of [15 U.S.C.] § 1692(f)(6) and in overlooking the terms of the parties' agreement." (Filing No. 56 at 4.) Section 1692f(6)(A) makes the following a violation of federal law: "Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if . . . there is no

present right to possession of the property claimed as collateral through an enforceable security interest." In its Order on Defendants' Motion for Summary Judgment, the Court found that Defendants had an enforceable security interest in the Chevrolet Tahoe, and thus they had a present right to possession and did not violate § 1692f(6)(A). Richards disagrees with the Court's reading of the statute.

Her understanding is that Defendants lost their present right to repossession by breaching the peace under Indiana law. (Filing No. 56 at 5.) According to Richards, a § 1692f(6) present right to repossession, even when it is supported by an enforceable security interest, can be extinguished by a violation of a state self-help statute. *Id.* at 6. She cites as authority for this assertion one federal Court of Appeals opinion from the Eighth Circuit and numerous District Court orders from within the Seventh Circuit and elsewhere. *Id.* at 7-11. Richards also argues that the Court of Appeals for the Seventh Circuit has consulted state law in FDCPA cases unrelated to breach of the peace and that other provisions of the FDCPA require courts to examine state law. *Id.* at 11-13. Last, Richards argues that, independent of state law, a provision in her loan agreement in which her creditor agreed not to breach the peace when taking possession of any collateral property also extinguishes Defendants' present right to repossession under § 1692f(6)(A). *Id.* at 13-14.

In response, Defendants argue that when a claim for recovery under the FDCPA is based solely on the premise that the defendant violated state law, the

FDCPA claim is dismissed, allowing the plaintiff to pursue the remedy contemplated by the state law that the defendant violated. (Filing No. 58 at 4.) Defendants cite *Montgomery v. Huntington Bank*, 346 F.3d 693 (6th Cir. 2003), in which the Court of Appeals for the Sixth Circuit declined to use state law as a reference point for interpreting the FDCPA. *Id.* at 3. Defendants disagree that the text of the loan agreement supports a FDCPA claim, arguing that the Seventh Circuit disapproved of using contractual provisions to formulate a § 1692f violation in *Bentrud v. Bowman*, 794 F.3d 871 (7th Cir. 2015).

A. State Law

The Court of Appeals for the Seventh Circuit has not directly ruled on this issue, but it has addressed the issue several times, most directly in *Beler v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 480 F.3d 470 (7th Cir. 2007). In that case, like in this one, a debtor admitted that she violated a security agreement by failing to make payments, but claimed that the defendant violated the FDCPA. Beler argued that defendants, by freezing her checking account, violated the provision of § 1692f that prohibits debt collectors from using "any unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. § 1692f. Beler asked the court for a broad ruling declaring that violation of any other rule of positive law by a debt collector was unfair or unconscionable under the FDCPA. The Court of Appeals declined to issue that broad holding. In doing so, it noted that

> § 1692f creates its own rules (or authorizes the courts and the FTC to do so); it does not so much as hint at being an enforcement mechanism for other rules of state and federal law. This is not a piggyback jurisdiction clause. If the Law Firm violated the Social Security Act, that statute's rules should be applied. Likewise, if the Law Firm violated Illinois law. Section 1692f does not take a state-law dispute and move it to federal court, even though the amount in controversy is well under $75,000 and the parties are not of diverse citizenship.

480 F.3d at 474.

Although not at issue in *Beler*, the Court of Appeals addressed § 1692f(6) *in dicta*:

> Subsection (6) is especially interesting. It says that creditors may not take "nonjudicial" actions that seize property exempt by law. The implication is that state judicial proceedings are outside the scope of § 1692f. State judges may decide how their judgments are to be collected. This does not necessarily mean that the FTC must steer clear of the subject, but it certainly implies that federal judges ought not use this ambulatory language to displace decisions consciously made by state legislatures and courts about how judgment creditors collect judgments entered under state law.

Id. at 475. The Court of Appeals' language suggests that when a state legislature has crafted a self-help repossession statute and prescribed a remedy, federal

courts should not usurp that remedy by resolving self-help repossession disputes through the FDCPA.

Richards cites numerous cases from the Northern District of Illinois and one case from the Eastern District of Wisconsin in which courts looked at state law to determine whether a defendant had extinguished his right to possession by engaging in extrajudicial self-help. *E.g.*, *Bednarz v. Lovald*, 2016 WL 6304705 (E.D. Wis. Oct. 27, 2016); *Barnes v. Nw. Repossession, LLC*, 210 F. Supp. 3d 954 (N.D. Ill. 2016). These courts' choice to consult state law is understandable. The FDCPA does not define "present right to possession," and the courts must derive its meaning from somewhere. But just as the phrase "present right to possession" is vague, so is the phrase "unfair and unconscionable," the subject of *Beler*.[1] Yet the *Beler* court resisted the urge to resort to state law, instead hoping that federal common law or a Federal Trade Commission advisory opinion would provide the answer. *Beler* at 473.

The Indiana Code allows a secured party to "take possession of the collateral" after default "without judicial process, if it proceeds without breach of the

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[1] "The statute provides that '[a] debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt.' What is 'unfair or unconscionable'? The statute does not say. Although the FDCPA does authorize the Federal Trade Commission to issue advisory opinions that bear on the question at hand. Nor has it issued any helpful opinions in enforcement proceedings under 15 U.S.C. § 1692a." 480 F.3d at 473 (brackets original).

peace." Ind. Code § 26-1-9.1-609. If a secured party fails to comply, it "is liable for damages in the amount of any loss caused." Ind. Code § 26-1-9.1-625(b). Additionally, "a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions." *Id.* at § 26-1-9.1-625(a). Indiana has installed a procedure for debt collection or repossession and a remedy for when that procedure is ignored. In accordance with *Beler*, this Court will not use the "ambulatory language" of the FDCPA "to displace decisions consciously made by state legislatures and courts" about how creditors collect debts under state law. 480 F.3d at 475. Thus, the Court **denies** Richards' Motion to Reconsider on these grounds.

B. The Loan Agreement

Richards' second argument fails for the same reason. Richards argues that her loan agreement prohibited her creditor from breaching the peace when it repossessed her collateral, and thus Defendants forfeited their present right to possession under the FDCPA when they breached the peace. But just as the FDCPA will not make a federal claim out of a state claim, it will not make a federal claim out of a breach of contract claim.

The Court of Appeals said as much in *Bentrud v. Bowman, Heintz, Boscia & Vician, P. C.*, 794 F.3d 871 (7th Cir. 2015). Relying on *Beler*, *Bentrud* declared "The FDCPA is not an enforcement mechanism for matters governed elsewhere by state and federal law."

Bentrud at 875. In *Bentrud*, the plaintiff argued that it was "unfair" or "unconscionable" under the FDCPA for defendants to move for summary judgment against him in a state court debt collection action because the contract at issue—his credit card agreement—allowed him to pursue arbitration. The Seventh Circuit reminded Bentrud that if the defendants violated his contract by pursuing litigation after he had elected to proceed in arbitration, "his remedy sounds in breach of contract, not the FDCPA." *Id.*

That is the case for Richards as well. If Defendants disregarded their contractual obligations by breaching the peace, Richards has a state claim for breach of contract, not a federal claim under the FDCPA. For that reason, the Court **denies** her Motion to Reconsider on this second ground.

III. CONCLUSION

For the foregoing reasons, Richards' Motion to Reconsider pursuant to Federal Rule of Civil Procedure 59(e) (Filing No. 55) is **DENIED**.

SO ORDERED.

Date: 12/27/2018

/s/ Tanya Walton Pratt
TANYA WALTON PRATT, JUDGE
United States District Court
Southern District of Indiana

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United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

April 27, 2020

Before

DIANE S. SYKES, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 19-1184

NICHOLE L. RICHARDS,
Plaintiff-Appellant,

v.

PAR, INC., and
LAWRENCE TOWING, LLC,
Defendants-Appellees.

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

No. 1:17-cv-00409-TWP-MPB

Tanya Walton Pratt, *Judge*.

ORDER

(Filed Apr. 27, 2020)

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc, and all judges on the original panel have voted to deny rehearing. It is therefore ordered that the petition for rehearing and for rehearing en banc is DENIED.