No. _____

In The Supreme Court of the United States

DEBORAH WALTON,

Petitioner,

v.

FIRST MERCHANTS BANK,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

APPENDIX

DEBORAH WALTON
P.O. Box 292
Carmel, Indiana 46082
(317) 565-6477
Petitioner pro se

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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

September 20, 2021

Before

Diane S. Sykes, *Chief Judge*
Michael B. Brennan, *Circuit Judge*
Michael Y. Scudder, *Circuit Judge*

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

No. 1:17-cv-01888-SEB-MPB
Sarah Evans Barker, Judge.

DEBORAH WALTON,
Plaintiff-Appellant,

No. 21-2021 v.

FIRST MERCHANTS BANK,
Defendant-Appellee.

ORDER

On consideration of the papers filed in this appeal and review of the short record,

IT IS ORDERED that this appeal is DISMISSED for lack of jurisdiction.

Generally, an appeal may not be taken in a civil case until a final judgment disposing of all claims

against all parties is entered on the district court's civil docket pursuant to Fed. R. Civ. P. 58. *See Alonzi v. Budget Construction Co.*, 55 F.3d 331, 333 (7th Cir. 1995); *see Cleaver v. Elias*, 852 F.2d 266 (7th Cir. 1988).

Plaintiff-appellant Deborah Walton's case is not at an end in the district court. Her case is scheduled to proceed to a jury trial. There is no jurisdictional basis for appellate review at this time.

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with
Fed. R. App. P. 32.1

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

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.*

DEBORAH WALTON,
Plaintiff-Appellant,

v.

FIRST MERCHANT'S BANK,
Defendant-Appellee.

* 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).

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 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

FEES AND COSTS ORDER

November 5, 2021

By the Court:

No. 21-2021

DEBORAH WALTON,
Plaintiff – Appellant

v.

FIRST MERCHANTS BANK,
Defendant – Appellee

Originating Case Information: District Court No: 1:17-cv-01888-SEB-MPB Southern District of Indiana, Indianapolis Division District Judge Sarah Evans Barker

The following are before the court:

1. **APPELLEE'S MOTION FOR DAMAGES AND COSTS,** filed on October 4, 2021, by counsel for the appellee.

2. **APPELLEE'S SUPPLEMENT TO MOTION FOR DAMAGES AND COSTS,** filed on October 18, 2021, by counsel for the appellee.

3. **APPELLANT'S RESPONSE TO APPELLEE'S MOTION FOR SANCTIONS AND OBJECTION**

TO FEES AND COSTS, filed on October 26, 2021, by the pro se appellant.

On September 20, 2021, this court dismissed this appeal for lack of jurisdiction because the district court had not yet reached a final judgment. Appellee has moved for sanctions against appellant for this frivolous appeal. It seeks $22,328.00 in fees and $840.00 in costs. Appellant has filed a response, but the response offers no justification for her persistence in pursuing this frivolous appeal after having previously been sanctioned for her frivolous litigation. *See Walton v. First Merchant's Bank*, 820 F. App'x 450 (7th Cir. 2020); *Walton v. Claybridge Homeowners Ass'n, Inc.*, 433 F. App'x 477 (7th Cir. 2011). Nevertheless, the requested fees and costs are excessive for defending this appeal. *Cf. Budget Rent-A-Car Sys., Inc. v. Consol. Equity LLC*, 428 F.3d 717 (7th Cir. 2005). Accordingly,

IT IS ORDERED that appellee's motion for sanctions is **GRANTED** only to the extent that appellee is awarded $5,000 in damages for this appeal.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ORDER

October 6, 2021

By the Court:

No. 21-2021

DEBORAH WALTON,
Plaintiff – Appellant

v.

FIRST MERCHANTS BANK,
Defendant – Appellee

Originating Case Information: District Court No: 1:17-cv-01888-SEB-MPB Southern District of Indiana, Indianapolis Division District Judge Sarah Evans Barker

Upon consideration of the **APPELLEE FIRST MERCHANTS BANK'S MOTION FOR DAMAGES AND COSTS**, filed on October 4, 2021, by counsel for the appellee,

IT IS ORDERED that appellee shall file, on or before October 18, 2021, a supplement to its motion for sanctions stating the attorneys' fees and costs it reasonably incurred in this appeal. Appellant shall file, jointly, any response to the motion for sanctions and any objections to the statement of fees and costs by November 1, 2021.

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

June 2, 2021

By the Court:

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

No. 1:17-cv-01888-SEB-MPB
Sarah Evans Barker, Judge.

DEBORAH WALTON,
Plaintiff-Appellant,

No. 21-2021 v.

FIRST MERCHANTS BANK,
Defendant-Appellee.

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.

Generally, an appeal may not be taken in a civil case until a final judgment disposing of all claims against all parties is entered on the district court's civil docket pursuant to Fed. R. Civ. P. 58. *See Alonzi v. Budget Construction Co.*, 55 F.3d 331, 333 (7th Cir. 1995); *see Cleaver v. Elias*, 852 F.2d 266 (7th Cir. 1988).

A jury trial in this case is scheduled for July 12, 2021. Therefore, it appears that plaintiff Deborah Walton's case is not at an end in the district court. And, there appears no jurisdictional basis for appellate review at this time. Accordingly,

IT IS ORDERED that plaintiff-appellant Deborah Walton shall file, on or before June 16, 2021, a brief memorandum stating why this appeal should not be dismissed for lack of jurisdiction. A motion for voluntary dismissal 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

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

DEBORAH WALTON,
Plaintiff,

v.

FIRST MERCHANTS BANK,
Defendant.

ORDER DENYING MOTION FOR RELIEF

On January 24, 2020, following a two-day bench trial conducted by the Honorable Jane Magnus-Stinson,[1] final judgment was entered against Plaintiff Deborah Walton ("Ms. Walton") and in favor of Defendant First Merchants Bank ("FMB") on all claims, including Ms. Walton's allegations that FMB had committed a breach of contract (Count I); that FMB had violated Regulation E of the Electronic Funds Transfer Act, 12 C.F.R. § 205.7 ("Regulation E") (Count II); that FMB had violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA") (Count III); and that FMB had violated Indiana's "Autodialer Law," Ind. Code § 24-5-14-1 (Count IV). The Court further ruled that Ms. Walton had proceeded in bad faith given the seriously distorted facts on which she relied that allowed her claim to survive summary judgment. Accordingly, Ms.

[1] This matter was reassigned to the undersigned judge on September 16, 2020. [Dkt. 320].

Walton was ordered to pay FMB's attorneys' fees in the sum of $57,751.00 as a sanction.

Ms. Walton sought appellate review of the Court's determinations and ruling related to the Regulation E and TCPA claims as well the award of attorneys' fees. The Seventh Circuit vacated the Judgment with respect to Ms. Walton's TCPA claim but affirmed the Judgment in all other respects and later denied her request for a rehearing. The Supreme Court denied Ms. Walton's petition for writ of certiorari and also her request for a rehearing.

Now before the Court is Ms. Walton's Motion for Relief from Judgment, filed pursuant to Federal Rules of Civil Procedure 60(b)(2) and 60(b)(3), in which she seeks to vacate the Judgment entered against her with respect to her Regulation E claim. For the reasons set forth herein, this motion is **denied.**

Background

Ms. Walton *pro se* initiated this lawsuit on June 8, 2017, alleging a host of claims arising from her banking relationship with FMB, where she maintained several personal and corporate bank accounts. [*See* Dkt. 1]. In relevant part, Ms. Walton alleged that FMB violated Regulation E by charging her unauthorized overdraft fees.[2]

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[2] Regulation E 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)

While the case was pending before Judge Magnus-Stinson, Ms. Walton filed partial motions for summary judgment seeking summary judgment on each of her four claims; FMB cross-moved for summary judgment on each of the claims against it. On November 28, 2018, Judge Magnus-Stinson denied Ms. Walton's motions in their entirety and granted FMB's motion in part and denied it in part. Specifically, Judge Magnus-Stinson granted FMB's motion as it related to Counts I (breach of contract) and IV (Indiana's "Autodialer law"). She denied FMB's request for summary judgment on Ms. Walton's TCPA and Regulation E claims.

With respect to Ms. Walton's Regulation E claim, FMB argued that summary judgment was warranted, in part, because Ms. Walton had opted in to overdraft protection, so the fees of which she complained were therefore not unauthorized under Regulation E. FMB buttressed this argument with several documents, including a 2010 account maintenance form showing that Ms. Walton had, indeed, opted in to overdraft protection pursuant to Regulation E. Ms. Walton respondedthat she did not recognize the social security number ending in 3888 that was listed on FMB's opt-in form. Because Ms. Walton's social security number apparently does not end in 3888, Judge Magnus-Stinson determined that a question of fact existed as to whether Ms. Walton had opted in to overdraft protection:

> While Ms. Walton does not cite to any record evidence indicating that she did not opt in to overdraft protection and, notably, her Affidavit does not discuss whether or not she opted in, Ms. Walton testified that

> Exhibit N, relied upon by FMB, lists a social security number that is not hers. The Court finds that a genuine issue of fact exists regarding whether Ms. Walton opted into overdraft protection for the FMB Personal Accounts. [Dkt. No. 188 at 19-20 (internal citations omitted)].
>
> However, Judge Magnus-Stinson also noted that:
>
> The denial of summary judgment for FMB on this claim is perhaps more a function of the nature of the briefing rather than the strength of Ms. Walton's case. This may well be an issue that can be cleared up through testimony at trial regarding the social security number discrepancy. But, at the summary judgment stage, an issue of fact remains. [Dkt. 188 at 20 n.9.]

At trial, Ms. Walton admitted knowing that the social security number on the account maintenance form was the one that FMB had on file for her and that the form pertained to her account. [Trial Transcript, Volume 2, pp. 313:13-314:5.] Ms. Walton also admitted at trial that that she had previously lied to another financial institution about her social security number, which lie had been identified by Magistrate Judge McVicker Lynch in a separate proceeding before our court. (Trial Transcript, Volume 2, pp. 632:10-363:16); *Walton v. EOS CCA*, 1:15-cv-00822, 2017 WL 9531997, at *7 (S.D. Ind. July 24, 2017), *report and recommendation adopted*, 2017 WL 4324739 (S.D. Ind. Sept. 29, 2017), *aff'd*,

885 F.3d 1024 (7th Cir. 2018). In addition, FMB's trial evidence established that Ms. Walton had signed numerous documents over the span of nearly a decade, at least once time under the penalties of perjury, affirming that the final four digits of her social security number were 3888. (Trial Transcript, Volume 2, pp. 218:4-223:6; Trial Exhibit 68; Trial Exhibit 78A; Trial Exhibit 24; Trial Exhibit 29; Trial Exhibit 31.)

In her post-trial Findings of Fact and Conclusions of Law, Judge Magnus-Stinson determined that the discrepancy regarding Ms. Walton's social security number, which had saved her at summary judgment was "inconsequential, as the evidence establishes that Ms. Walton used two different social security numbers, including the one that appears on the opt-in documents." [Dkt. 286 at 18]. Judge Magnus-Stinson further concluded that Ms. Walton had litigated her Regulation E claim in bad faith, explaining that Ms. Walton, who has initiated at least twenty different *pro se* suits in the district court, "frequently challenges Court rulings multiple times, through numerous layers of filings. [*Id.* at 19-21]. She has been sanctioned in this case and other cases for frivolous filings." [Id. at 19]. Judge Magnus-Stinson also determined that Ms. Walton should have known that her Regulation E claim was frivolous, at the latest, following the issuance of summary judgment order, in which the Court expressly stated that the sole reason that the Regulation E claim survived summary judgment was because of the confusion over Ms. Walton's social security number. [Id. at 20.]. Because Ms. Walton pursued her claim to trial only to admit that she had known all along that FMB's account maintenance

form concerned her account and featured an inaccurate social security, Judge Magnus-Stinson awarded FMB its fees incurred in having to defend the frivolous Regulation E claim. [*Id.* at 19-21]. The Seventh Circuit affirmed this judgment on appeal. *Walton v. First Merch.'s Bank*, 820 F. App'x 450, 456 (7th Cir.), *reh'g and suggestion for reh'g en banc denied* (July 31, 2020), *cert. denied*, 141 S. Ct. 626 (2020), *reh'g denied*, 141 S. Ct. 949 (2020).

Ms. Walton currently seeks relief from Judge Magnus-Stinson's entry of judgment in favor of FMB on the Regulation E claim, contending that, after the conclusion of trial, "Federal Agencies" "informed First Merchants Bank that their Corporate Representative (Expert Witness), Christopher Horton lied under oath at trial." [Dkt. 341, at 4]. She further contends that Mr. David Tittle, FMB's former counsel, facilitated this perjury by directing Mr. Horton to lie. According to Ms. Walton, Mr. Horton was fired from FMB for having committed perjury at trial. She also asserts that Brian Hunt, FMB's General Counsel, was also terminated because of his involvement with Mr. Horton's alleged perjury.

Analysis

Though Ms. Walton states that she is bringing her motion for relief pursuant to Federal Rules of Civil Procedure 60(b)(2), which permits relief from a judgment or order because of "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial[,]"as well as pursuant to Rule 60(b)(3), which allows for such relief because of fraud or misconduct

by an opposing party, her analysis is limited to accusations of fraud against representatives of FMB. She does not identify any "newly discovered evidence" or craft any arguments to this effect. Accordingly, we shall focus our review here on whether the requested relief is appropriate under Rule 60(b)(3), which requires Ms. Walton to demonstrate by clear and convincing evidence that: "(1) [she] maintained a meritorious claim at trial; (2) but because of the fraud, misrepresentation, or misconduct; (3) [she] was prevented from fully and fairly presenting [her] case at trial. *Fields v. City of Chicago*, 981 F.3d 534 (7th Cir. 2020). For the reasons outlined below, we conclude that relief under Rule 60(b)(3) is unavailable to her.

First, as FMB correctly explains, Ms. Walton's motion is obviously untimely. The order being challenged, that is, the final judgment entered against Ms. Walton, was issued on November 25, 2019. The plain language of Rule 60 dictates that any motion brought pursuant to subsection (b)(3) must be brought "no more than a year after the entry of the judgment or order[.]" Here, Ms. Walton filed her pending motion on April 12, 2021—well beyond the one-year deadline.[3]

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[3] Ms. Walston asserts that instances of "fraud on the court" are not bound by this one-year limitation. Though this is true, Ms. Walton has not alleged (let alone shown) that FMB committed fraud on the court, which includes acts that "defile the court." "[S]imple perjury by a witness" is not such an act. *In re Golf 255*, Inc., 652 F.3d 806, 809 (7th Cir. 2011). To the extent an attorney's involvement in such perjury could be considered fraud on the court, *see id.*, Ms. Walton's allegation that Attorney Tittle directed Mr. Horton to commit perjury is entirely unsubstantiated, as discussed herein.

Moreover, assuming *arguendo* that her motion was timely and that she possesses a meritorious Regulation E claim, Ms. Walton fails to identify any fraud or misconduct that would have prevented her from "fully and fairly presenting [her] case at trial." A vague assertion that the opposing party has committed "perjury" without any identification as to what testimony was untrue or misleading or how it prevented a fair trial is insufficient to justify the extraordinary remedy prescribed in Rule 60.[4]

Of even greater concern to us is the fact that Ms. Walton's motion contains several "factual" assertions which appear to be complete falsehoods. As previously stated, she contends, for example, that "federal agencies" reported to FMB that Mr. Horton had committed perjury at trial in support of which she has submitted no documentary evidence, nor does she explain how she acquired such information. Conversely, FMB has submitted affidavits from Mr. Horton and Mr. Hunt attesting to the fact that no such communication was ever transmitted. Ms. Walton also adduces no evidence in support of her allegation that Mr. Horton and Mr. Hunt were terminated from FMB and that FMB directed Mr. Tittle to withdraw as counsel for FMB in this litigation because of the aforementioned perjury. Again, FMB has provided sworn affidavits attesting that this is not true; in fact, Mr. Horton and Mr.

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[4] Ms. Walton also makes several assertions which appear irrelevant to the question of Mr. Horton's alleged perjury, for example, whether FMB's counsel submitted "bogus Invoices" to the court. We understand this to be an attack on the fee award, which has been affirmed by the Seventh Circuit. In addition, she offers arguments relevant to FMB's Motion for Proceeding Supplement, which is pending before the Magistrate Judge. We need not review those here.

Hunt remain employed with FMB, and Mr. Tittle withdrew from this litigation because he no longer desired to be involved with Ms. Walton's cases. As to the alleged (yet unsubstantiated) perjury, Mr. Horton maintains that he was entirely truthful in his testimony to the Court, and FMB categorically denies Ms. Walton's unsubstantiated claim that it has ever possessed any knowledge of Mr. Horton providing false testimony at trial.

For these reasons, Ms. Walton's request for relief under Rule 60(b)(3) is denied.

We conclude by addressing FMB's Motion for Sanctions against Ms. Walton, in which it seeks to recover its fees incurred in litigating Ms. Walton's Motion for Relief as well as her "Motion to Strike FMB's Motion for Proceedings Supplemental," which remains pending before the Magistrate Judge. Ms. Walton has not responded to FMB's Motion for Sanctions, and the deadline to do so has passed. We therefore **order Ms. Walton to show cause, no later than seven (7) days from the date of this Order,** why FMB should not be awarded, for the reasons stated in its pending Motion for Sanctions, its reasonable attorneys' fees incurred in responding to her Motion for Relief. Failure to respond will result in an order granting the requested fees. She is further ordered to respond to FMB's additional arguments set out in its Motion for Sanctions that relate to her pending Motion to Strike. Again, failure to respond will result in a waiver of any defenses she may possess with respect to FMB's allegations that her Motion to Strike is frivolous.

CONCLUSION

Ms. Walton's Motion for Relief [Dkt. 341] is **denied.** She is ordered to respond to FMB's Motion for Sanctions, [Dkt. 346], no later than **seven (7) days** from the date of this Order, and to show cause why sanctions should not be entered against her for the reasons stated in therein.

IT IS SO ORDERED.

Date: 5/27/2021

/s/ Sarah Evans Barker, Judge
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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

DEBORAH WALTON,
Plaintiff,

v.

FIRST MERCHANTS BANK,
Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO CONFIRM

On January 24, 2020, following a two-day bench trial conducted by the Honorable Jane Magnus-Stinson,[1] final judgment was entered against Plaintiff Deborah Walton ("Ms. Walton") and in favor of Defendant First Merchants Bank ("FMB") on all claims, including Ms. Walton's allegations that FMB had committed a breach of contract (Count I); that FMB had violated Regulation E of the Electronic Funds Transfer Act, 12 C.F.R. § 205.7 ("Regulation E") (Count II); that FMB had violated the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA") (Count III); and that FMB had violated Indiana's "Autodialer Law," Ind. Code § 24-5-14-1 (Count IV). The Court further found that Ms. Walton had proceeded in bad faith by pursuing her Regulation E claim after her distorted facts allowed her claim to survive summary judgment. Accordingly, Ms.

[1] This matter was reassigned to the undersigned judge on September 16, 2020. [Dkt. 320].

Walton was ordered to reimburse FMB's attorneys' fees in the sum of $57,751.00.

Ms. Walton sought appellate review of the Court's findings related to the Regulation E and TCPA claims as well the award of attorneys' fees. The Seventh Circuit vacated the judgment with respect to Ms. Walton's TCPA claim but affirmed it all other respects.

Now before the Court is FMB's Motion to Confirm Scope of Claim for Trial. FMB requests an order confirming that the trial Ms. Walton's TCPA claim will be limited in scope to include only the narrow issues expressly remanded by the Seventh Circuit. For the reasons set forth herein, this motion is **granted**.

Background

I. Overview of Ms. Walton's Lawsuit

Ms. Walton *pro se* initiated this lawsuit on June 8, 2017, alleging a host of claims arising from her banking relationship with FMB, where she maintained several personal and corporate bank accounts. [*See* Dkt. 1].[2] On August 9, 2017, Ms. Walton filed her amended, operative complaint, in which she alleges violations of the TCPA, Regulation E, and Indiana's Autodialer Law as well as a claim for breach of contract. [Dkt. 15]. With respect to her TCPA claim, which is her surviving claim, Ms. Walton alleges that "[a]t all times mentioned

[2] Ms. Walton also banked with Ameriana Bank, where she maintained a personal loan and a business loan. In 2016, when Ameriana and FMB merged, FMB began servicing the loans that Ms. Walton maintained at Ameriana. [Dkt. 188, at 8-9].

Defendant called Plaintiff's cellular telephone number using an [automatic telephone dialing system ("ATDS")] or predictive dialer, in direct violation according to the Telephone Consumer Protection Act[.]" She further alleges that "[t]he telephone number called by Defendant was assigned to cellular telephone service for which Plaintiff incurs charges[.]" [*Id.* at 4-5].

II. Judge Magnus-Stinson Denies Ms. Walton's Partial Motions for Summary Judgment and Grants in Part and Denies in Part FMB's Motion for Summary Judgment

While the case was pending before Judge Magnus-Stinson, Ms. Walton filed partial motions for summary judgment, which sought summary judgment on each of her four claims; FMB cross-moved for summary judgment on each of these claims against it. On November 28, 2018, Judge Magnus-Stinson denied Ms. Walton's motions in their entirety; she granted FMB's motion in part and denied it in part. Specifically, Judge Magnus-Stinson granted FMB's motion as it related to Counts I (breach of contract) and IV (Indiana's Autodialer Law). She denied FMB's request for summary judgment on Ms. Walton's TCPA and Regulation E claims. [*See generally* Dkt. 188].

With respect to Ms. Walton's TCPA claim,[3] FMB asserted that it was entitled to summary judgment

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[3] As Judge Magnus-Stinson explained her summary judgment order, in order for Ms. Walton to prevail, she is required to prove that (1) FMB placed a call to her residential telephone or cell phone; (2) FMB used an ATDS or an artificial or

because, among other reasons, Ms. Walton consented to receiving the calls and because Ms. Walton lacked any evidence that FMB had used an ATDS or an artificial or prerecorded voice to transmit the calls. Ms. Walton countered that she was entitled to summary judgment because she had not consented to the calls and also that FMB had admitted that it has "auto dialed" her. [*Id.*, at 21-23].

Judge Magnus-Stinson denied both parties' motions with respect to the TCPA claim on the grounds that there were disputed material facts surrounding the questions of whether Ms. Walton consented to the calls and whether FMB had used an ATDS in transmitting calls to Ms. Walton's telephone. She also determined that there were disputed material facts regarding the number of calls Ms. Walton allegedly had received from FMB. [*Id.* at 22-24].

Though she denied FMB's request for summary judgment on the TCPA claim, Judge Magnus-Stinson nonetheless issued several rulings in her summary judgment order which clarified the scope of this claim and narrowed the remaining factual questions set for trial. In response to FMB's argument that Ms. Walton lacked any evidence that FMB made calls to Ms. Walton's residential landline, Judge Magnus-Stinson determined that the allegations in the Amended Complaint, consistent with Ms. Walton's Statement of Claims, related only to calls made to her cell phone. Judge Magnus-Stinson thus stated unequivocally that "Ms. Walton is foreclosed from asserting a TCPA claim, or making

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prerecorded voice; and (3) the call was made without her consent. 47 U.S.C. § 227(b)(1)(A)(iii), (b)(1)(B); *Blow v. Bijora, Inc.*, 855 F.3d 793, 798 (7th Cir. 2017);

arguments, based on calls to her residential landline going forward in this matter." [Dkt. 188, at 22].

FMB also argued, and Judge Magnus-Stinson agreed, that because several of Ms. Walton's corporate entities maintained accounts with FMB, it was entitled to summary judgment on Ms. Walton's claims to the extent they were brought on behalf of any of those entities instead by Ms. Walton personally. [Dkt. 188, at 12]. To that end, Judge Magnus-Stinson ruled that Ms. Walton's TCPA claim could only proceed as it related to calls made regarding a personal loan originating with Ameriana (the "American Personal Loan"); she could not proceed with a theory under the TCPA relating to calls made regarding any business loans with Ameriana or FMB. [*Id.* at 12-13, 26].

Consistent with these rulings, Judge Magnus-Stinson clearly defined the scope of Ms. Walton's surviving claims that would proceed to trial:

> (1) the Regulation E claim (Count II) as it relates to the legality of overdraft charges for the FMB Personal Accounts (i.e., whether Ms. Walton opted into overdraft protection); and (2) the claim for violation of the TCPA (Count III) for calls made to Ms. Walton's cell phone regarding the Ameriana Personal Loan.
>
> [*Id.* at 26].

After an unsuccessful settlement conference two months later in January 2019, a jury trial was scheduled for October 2019.

III. Judge Magnus-Stinson's Determination That Ms. Walton Waived Her Right to Jury Trial

On July 17, 2019, despite having never challenged Ms. Walton's request for a jury trial in the preceding two years of litigation, FMB moved to strike Ms. Walton's jury demand. [Dkt. 225]. For the first time, FMB invoked a jury-trial-waiver clause contained within its consumer disclosure booklet, which had been distributed to Ms. Walton following FMB's merger with Ameriana. The waiver clause specifically stated that any disputes relating to the services provided by FMB to its clients "shall be decided in the court of Delaware County, Indiana, without a jury." [Dkt. 225, Exh. A, at 8]. Ms. Walton argued that this motion was untimely, insisting that FMB had waived its right to enforce the jury-trial-waiver clause.

Judge Magnus-Stinson held that she had discretion to rule on the belated Motion to Strike and agreed with FMB that Ms. Walton had waived her right to a jury trial. She concluded the FMB's conduct did not reflect an intentional relinquishment of its right to a bench trial. Moreover, as Judge Magnus-Stinson concluded, a bench trial would conserve judicial resources and would not prejudice Ms. Walton. Accordingly, the October jury trial was scheduled for a bench trial. [Dkt. 239].

IV. Trial Proceedings Before Judge Magnus-Stinson

Judge Magnus-Stinson conducted a two-day bench trial on October 7 and 8, 2019. At trial,

evidence presented included testimony from Ms. Walton and Chris Horton, the vice president of FMB's Credit Control Department, who testified about FMB's internal telephone collection policies. Ms. Walton, who had retained counsel assisting her at trial,[4] also proffered Ms. Carmelo Carabello, an AT&T employee, as a witness to testify as to Ms. Walton's telephone records.

A. Ms. Carabello's Testimony

On direct examination, Ms. Walton's counsel questioned Ms. Carabello regarding the lengthy AT&T records that Ms. Walton had relied upon to support her TCPA claim. During this exchange, Ms. Carabello testified that one of Ms. Walton's phone numbers, ending in 7706, was a cell phone number and *not* a residential landline as Ms. Walton had previously indicated. Counsel for FMB swiftly objected to the testimony:

> Your Honor, we are going to object. That is not a cell phone number, and we are going to object on the grounds of relevance. This is Ms. Walton's home phone number, and it has – last time I checked, this case was about calls to her cell phone.

[Tr. Vol. 1, at 66:23-67:2]. Following Ms. Carabello's confirmation that the 7706 number was, in fact, a cell phone number, FMB's objection was overruled. [*Id.* at 67:3-11].

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[4] Ms. Walton's counsel has since withdrawn from representing her in this litigation.

Troubled by Ms. Carabello's testimony that the 7706 number was something other than a residential landline, which contradicted Ms. Walton's representations throughout the two years of litigation, FMB promptly filed a motion to confirm the limits on the scope of trial. [Dkt. 272]. FMB specifically requested confirmation that Ms. Walton's TCPA claim related only to calls to Ms. Walton's cell phone number ending in 9633 regarding the Ameriana Personal Loan. In its motion, FMB identified the many documents and instances of testimony in which Ms. Walton had confirmed that the 7706 number was a home phone number. FMB further explained that it had spent ten months since summary judgment was denied preparing for trial on Ms. Walton's TCPA claim based on calls made to Ms. Walton's cell phone ending in 9633 about the Ameriana personal loan. [*See generally id.*].

On the morning of the second day of trial, after providing Ms. Walton's counsel an opportunity to review FMB's motion and hearing arguments related thereto, Judge Magnus-Stinson granted the motion to confirm, stating:

> When a party asks every question that it can to find out what its exposure is and is given a limited piece of information, they have a right to rely on that. That is all I can conclude. We will be limiting the TCPA claim to the 9633 cell number[.]
>
> [Tr. Trans. Vol. 2, p. 212:14-17].

B. Mr. Horton's Testimony

Mr. Horton was proffered as a witness to testify regarding FMB's collection practices. He explained that FMB uses a core-banking platform called Horizon to transmit collection calls to its customers, which relies on an outside vendor, Ontario Systems, to provide the software needed for these calls. FMB's collection-call records, including Ms. Walton's records in this case, include a column labeled, "USER ID." Within the AT&T records, the USER ID column included several references to the word, "AUTODIALER." This reference in the USER ID column of FMB's records comes from Ontario Systems. [Tr. Vol. 1, at 106:11-107:9; Tr. Exh. 74].

When asked to explain Ontario Systems's use of the term "AUTODIALER" in the USER ID column of the records, Mr. Horton testified that, based on his understanding, the term meant that the call was assisted by Ontario Systems' software, which had both manual and automatic functions. He was unable to determine from these records, however, whether a particular call had been made using the automatic or manual function. Mr. Horton was also unaware whether this software satisfied the statutory definition of an ATDS. [Tr. Vol. 1, at 138:9-15, 163:9-164:9; Tr. Vol. 2, at 215:16-217:15].

Ms. Walton called no witnesses from FMB or Ontario Systems.

C. Judge Magnus-Stinson Entered Final Judgment in Favor of FMB and Against Ms. Walton

On November 25, 2019, Judge Magnus-Stinson entered her post-trial findings of fact and conclusions of law. [Dkt. 286]. With respect to Ms. Walton's TCPA claim, she ruled that Ms. Walton had presented evidence reflecting five calls from FMB's Credit Control Department to her 9633 cell phone number[5] regarding her Ameriana Personal Loan.[6] However, Ms. Walton had failed to prove that any of these calls had been made using an ATSD. [*Id.* at 9]. Accordingly, Ms. Walton could prevail on her TCPA

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[5] This includes the following calls identified by Judge Magnus-Stinson:

- Call 1: 02/09/17 at 3:46 EST[;]
- Call 2: 02/16/17 at 9:50 EST[;]
- Call 3: 02/16/17 at 4:19 EST[;]
- Call 4: 02/17/17 at 9:32 EST[;] and
- Call 5: 02/17/17 at 3:07 EST.

[Dkt. 286, at 6].

[6] Ms. Walton argued in her post-trial briefing "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 [corporate account at FMB] because her 'personal account was typically paid during the grace period.'" [Dkt 286, at 10 (quoting Dkt. No. 279-1 at 16.]. Judge Magnus-Stinson rejected this argument: "To find that calls regarding the [corporate] 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." Accordingly, Judge Magnus-Stinson determined that Ms. Walton TCPA claim was limited to the five telephone calls to her 9633 cell phone number that originated from FMB's Credit Control Department. [Dkt. 286, at 6, 10].

claim only by showing that the calls were made using a prerecorded or artificial voice. [*Id.* at 9-10]. Ms. Walton had testified that she heard prerecorded or artificial voices on the telephone calls from FMB's Credit Control Department, but Judge Magnus-Stinson refused to credit this testimony, noting that Ms. Walton had "demonstrated a lack of candor and honesty throughout this litigation." [Dkt. 286, at 12-13].

Judge Magnus-Stinson further found that Ms. Walton had pursued her Regulation E claim in bad faith, which had survived summary judgment only because Ms. Walton had provided misleading testimony regarding material facts. Judge Magnus-Stinson awarded FMB its attorneys' fees as sanction for this misconduct. [*Id.* at 19].

Consistent with these findings as well as her summary judgment order, Judge Magnus-Stinson entered final judgment in favor of FMB and against Ms. Walton on January 14, 2020. [Dkt. 306].

V. Ms. Walton's Appeal to the Seventh Circuit

Ms. Walton timely appealed Judge Magnus-Stinson's rulings to the Seventh Circuit, contending that she was entitled to a jury trial on her TCPA claim and challenging the award of attorneys' fees relating to her bad faith litigation of the Regulation E claim. She also challenged a discovery sanction imposed against her in the sum of $13,108.00. Finally, she sought reversal of the judgment on the grounds that Judge Magnus-Stinson was biased against her.

The Seventh Circuit agreed that Ms. Walton was entitled to a jury trial on the TCPA claim, holding

that "FMB implicitly waived its contractual right a bench trial" when it failed to invoked this right until two years into the litigation and after an adverse summary judgment ruling on the TCPA claim. *Walton v. First Merch.'s Bank*, 820 Fed. Appx. 450, 454, 2020 WL 3791946 (7th Cir.), *reh'g and suggestion for reh'g en banc denied* (July 31, 2020), *cert. denied*, 141 S. Ct. 626 (2020), *reh'g denied*, 141 S. Ct. 949 (2020)

The Seventh Circuit further found that denying Ms. Walton a right to a jury trial was not harmless error. To prove her TCPA claim, as previously stated, Ms. Walton was required 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." *Id.* at 455. Judge Magnus-Stinson concluded that the first two elements were satisfied, but the proof on the third element failed. The Seventh Circuit, however, held that reasonable jurors could disagree as to whether Ms. Walton had proven this element. It explained:

> Because Ms. Walton failed to introduce any evidence that the bank used an automatic 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 . . . and we cannot say that no reasonable jury could believe Ms. Walton's account of what she heard over the phone.

[*Id.*]. The Seventh Circuit rejected Ms. Walton's remaining arguments, to wit, that Judge Magnus-Stinson was biased and that FMB was not entitled to recover attorneys' fees related to Ms. Walton's instances of misconduct. Accordingly, the Court of Appeals vacated the judgment with respect to Ms. Walton's TCPA claim but affirmed it all other respects. [*Id.* at 455-57].

This case was remanded to our court,[7] and a jury trial on Ms. Walton's TCPA claim is scheduled to commence on July 12, 2021. FMB has filed the pending Motion to Confirm the Scope of Claim for Trial, specifically requesting an order confirming that the only remaining triable issue is whether the five calls from FMB's Credit Control Department to Ms. Walton's cell phone ending in 9633 (that is, those calls identified by Judge Magnus-Stinson in her post-trial findings) regarding the Ameriana Personal Loan were made with an artificial or prerecorded voice.

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[7] Following the receipt of the Seventh Circuit's mandate, Judge Magnus-Stinson granted Ms. Walton's "Motion for a New Judge." Though Judge Magnus-Stinson determined the motion to be "fatally defective," she nonetheless exercised her discretion to recuse. She explained, "The undersigned has made multiple adverse credibility findings during the prior conduct of the proceedings, and the protracted history of this case cautions in favor of minimizing (as opposed to perpetuating) issues that are unrelated to the merits." [Dkt. 319, at 9]. The case was thereafter reassigned to the undersigned judge.

Analysis

I. Standard of Review

"According to the law of the case doctrine, after an appellate court either expressly or by necessary implication decides an issue, the decision is binding upon all subsequent proceedings in the same case." *Surprise v. Saul*, 968 F.3d 658, 663 (7th Cir. 2020) (citation and quotation omitted). "The law of the case doctrine thus requires a lower court to conform any further proceeding on remand to the principles set forth in the appellate opinion unless there is a compelling reason to depart." *Id.* (citation and quotation omitted). In addition, if the appellate court's decision "identifies a discrete, particular error that can be corrected on remand without the need for redetermination of other issues, the district court is limited to correcting that error." *United States v. Husband*, 312 F.3d 247, 251 (7th Cir. 2002). In such instances where an argument is raised on appeal but not considered by the court of appeals, such "silence on the argument implies that it is not available for consideration on remand" because the court "thought so little of the point that [it] did not see a need to discuss it[.]" *Id.* Finally, "[t]he doctrine of the law of the case creates a presumption against a court's reexamining *its own* rulings in the court of a litigation[,]" except in extraordinary circumstances where a decision was "manifestly erroneous." *Marseilles Hydro Power LLC v. Marseilles Land & Water Co.*, 481 F.3d 1002, 1004 (7th Cir. 2007) (emphasis in original).

Accordingly, in moving forward with a jury trial, we will adhere to the holdings of the Seventh Circuit as well as the rulings of Judge Magnus-Stinson that were not expressly reversed on appeal.

II. Discussion

Invoking the law of the case doctrine, FMB contends that Ms. Walton's TCPA claim should proceed to trial on the narrow basis reflected in the Seventh Circuit's opinion, which, as FMB correctly explains, affirmed all of Judge Magnus-Stinson's rulings with the exception of her decision to strike Ms. Walton's request for a jury trial on her TCPA claim, which decision it ruled was not harmless error. Accordingly, says FMB, "this case should proceed to trial (1) on phone calls to Ms. Walton's (single) cell phone ending in 9633, (2) regarding the Ameriana Personal Loan, and that (3) used an artificial or prerecorded voice." [Dkt. 335, at 13]. She should not, therefore, be permitted to present to the jury any theories or evidence related to "(1) any calls to her phone number ending in 7706[;] (2) any calls related to [her] business loans[;] and (3) any calls purportedly made by an ATDS[.]" [Dkt. 337, at 2]. FMB also seeks an order to preclude Ms. Walton from advancing theories or presenting evidence to the jury that Judge Magnus-Stinson previously determined to be "purely speculative," namely, any evidence or theories related to calls beyond the five identified by Judge Magnus-Stinson in her post-trial findings of fact and conclusions of law. We agree with FMB's description of the proper scope of Ms. Walton's TCPA claim and will limit the evidence at trial accordingly.

The parties' sole remaining dispute is whether, based on the law of the case doctrine, Ms. Walton's TCPA claim at trial must be limited to calls made to her cell phone ending in 9633 or whether she may expand this claim to encompass calls to other telephone lines, including her residential landline. FMB argues for such a limitation; Ms. Walton disagrees. We conclude that FMB is correct.

As previously stated, Judge Magnus-Stinson determined in her summary judgment ruling that Ms. Walton's TCPA claim could proceed to trial only with regard to calls made to her personal cell phone, not to her residential landline. Ms. Walton, however, insists that the Seventh Circuit's opinion, properly read, allows her to broaden her TCPA claim, citing the appellate court's reliance on 47 U.S.C. § 227(b)(1)(B), which is the statutory subsection of the TCPA governing calls made to residential landlines. This provision, Ms. Walton argues, "make[s] clear that [she] can use both her Cell and Home phone numbers; to show pre-recorded messages were left on both phones . . . the fact that, the District Judge excluded the home phone calls, is one of the reasons the TCPA judgment was vacated." [Dkt. 336, at 1-2].

Ms. Walton's interpretation of the Seventh Circuit's opinion is incorrect. Though Ms. Walton challenged Judge Magnus-Stinson's decision to limit the TCPA claim to include only calls made to her cell phone ending in 9963, the Seventh Circuit's opinion is silent on this issue. [Case No. 19-3370, at 13].[8] The

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[8] Ms. Walton specifically challenged on the exclusion of calls to her phone number ending in 7706. To the extent Ms. Walton is now challenging Judge Magnus-Stinson's ruling that the TCPA claim did not encompass calls made to any residential landlines, that argument does not appear to have been raised

Seventh Circuit affirmed the trial court judgment against Ms. Walton in *all* respects, with the exception only for Judge Magnus-Stinson's ruling that Ms. Walton had waived her right to a jury trial. The Seventh Circuit's silence as to all other issues renders them "not available for consideration on remand." *Husband*, 312 F.3d at 251. We thus conclude that the Seventh Circuit preserved, rather than reversed, Judge Magnus-Stinson's ruling in this regard.

Though it is true, as Ms. Walton has noted, that the Seventh Circuit cited both the statutory subsection governing calls to cell phones as well as the subsection governing calls to residential landlines, the citation to the latter statute appears to have been an inadvertent inclusion. Given that the Seventh Circuit's analysis of Ms. Walton's TCPA claim has nothing to do with Judge Magnus-Stinson's order excluding the calls made to Ms. Walton's residential landline (indeed, the Seventh Circuit's limited its analysis to whether a reasonable fact finder could conclude that FMB "called her cell phone" without her consent using a pre-recorded message to initiate the call) or to her phone number ending in 7706, we find no basis on which to conclude that the Seventh Circuit intended to permit an expansion of Ms. Walton's TCPA claim at the trial to include calls beyond those made to her cell phone ending in 9633.

Ms. Walton has not challenged FMB's remaining arguments presented in its Motion to Confirm: that

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on appeal and has therefore been waived. *Husband*, 312 F.3d at 251. To the extent Ms. Walton believes that she did raise this argument on appeal, the Seventh Circuit's silence on the argument reflects its rejection thereof. *Id.*

her TCPA claim is limited to calls regarding her Ameriana Personal Loan, and that these calls were made using a prerecorded or artificial voice. She also does not specifically dispute that her claim is limited to a consideration of the five calls specifically identified by Judge Magnus-Stinson. Accordingly, stated otherwise, the retrial of Ms. Walton's TCPA claim shall exclude any theories, arguments, or evidence related to: FMB's use of an ATDS, calls related to Ms. Walton's business loans, and calls for which she failed to produce any evidence at the first trial (that is, any calls beyond the five identified by Judge Magnus-Stinson). These limitations reflect both Judge Magnus- Stinson's prior rulings and the opinion of the Seventh Circuit.[9]

CONCLUSION

FMB's Motion to Confirm Scope of Claim for Trial [Dkt. 335] is **granted.** The TCPA claim Ms. Walton will be permitted to present to the jury is whether the five previously identified calls made by

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[9] Ms. Walton accuses FMB of misrepresenting the Seventh Circuit's opinion, though she offers no elaboration as to this contention. We find FMB's motion and accompanying briefing to accurately and thoroughly summarize the Seventh Circuit's opinion as well as the factual and procedural history of this case. It is apparent that Ms. Walton believes she is entitled to retry her TCPA claim with a clean slate; however, as explained herein, that is not accurate. Judge Magnus-Stinson issued several evidentiary rulings in this case that were not vacated by the Seventh Circuit. We shall adhere to these rulings and only revisit the narrow, remanded issue. Finally, Ms. Walton asserts that she is permitted "to testify to the pre-recorded messages she heard." There is no dispute on this point; FMB agrees that the Seventh Circuit's analysis holds as much, and that is how we interpret that opinion as well.

FMB's Credit Control Department to Ms. Walton's cell phone ending in 9633 regarding her Ameriana Personal Loan were made with an artificial or prerecorded voice.[10]

IT IS SO ORDERED.

Date: 5/27/2021

/s/ Sarah Evans Barker, Judge
United States District Court
Southern District of Indiana

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[10] We note that Ms. Walton's Amended Complaint asserts that she is seeking to recover her actual, statutory, and treble damages for the alleged TCPA violations. The TCPA provides that a successful plaintiff may recover her "actual monetary loss" or "receive up to $500 in damages for each [] violation, whichever is greater[.]" 47 U.S.C. § 227(a)(2)(F)(3). If the jury finds for Ms. Walton on the merits of her TCPA claim, the jury will also determine whether and to what extent she has suffered actual damages; however, she is not entitled recover both actual *and* statutory damages. *Reliable Money Order, Inc. v. Mcknight Sales Co.*, Inc., 2013 WL 12180512, at *4 (E.D. Wis. Sept. 11, 2013). Rather, she will recover the greater of the two sums, as stated in the statute. Alternatively, if she chooses to forgo her pursuit of actual damages, there is no need to submit the question of damages to the jury given that the court "will simply multiply the number of TCPA violations found by the jury by $500 to arrive at the amount of statutory damages." *Id.* The court may, in its discretion, award treble damages if it finds that FMB acted willfully or knowingly in violating the TCPA. 47 U.S.C. § 227(a)(2)(F)(3).

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

October 8, 2021

Before

Diane S. Sykes, *Chief Judge*
Michael B. Brennan, *Circuit Judge*
Michael Y. Scudder, *Circuit Judge*

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

No. 1:17-cv-01888-SEB-MPB
Sarah Evans Barker, Judge.

DEBORAH WALTON,
Plaintiff-Appellant,

No. 21-2021 v.

FIRST MERCHANTS BANK,
Defendant-Appellee.

ORDER

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service requested a vote on the petition for rehearing en

banc,* and all judges on the original panel voted to deny rehearing. It is therefore ordered that the petition for rehearing and for rehearing en banc is DENIED.

*Circuit Judge Candace Jackson-Akiwumi did not participate in the consideration
of this matter.