No. 22-295

In The Supreme Court of the United States

IN RE DEBORAH WALTON,

Petitioner,

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANAPOLIS
Hon. Judge Sara Evans Barker,
Hon. Judge James R. Sweeney II,
and Hon. Judge James P. Hanlon

SUPPLEMENTAL PETITION FOR A WRIT OF MANDAMUS

The Petitioner Deborah Walton, Pro Se, respectfully supplements her petition for a writ of mandamus to the United States Supreme Court. In the alternative, the Petitioner respectfully request that the Court treat this petition as a petition for a writ of mandamus.

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ISSUES PRESENTED

Whether the District Court erred by misinterpreting the Order from the Seventh Circuit Court of Appeals.

Whether the District Court is denying the Petitioner her First Amendment Rights.

Whether the District Court is denying the Petitioner her Fourteenth Amendment Rights.

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

RULE 29.6 STATEMENT

None of the petitioners is a nongovernmental Corporation. None of the petitioners has a parent Corporation or shares held Publicly traded company

STATEMENT OF RELATED CASES

Deborah Walton v. First Merchants Bank
Southern District of Indiana
Docket No. **1:17-cv-01888-SEB-MPB**.
Ended September 28, 2022

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TABLE OF AUTHORITIES

CASES

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1651. The judgment of the Seventh Circuit Court, was entered September 1, 2022, and the Southern District Court of Indianapolis Orders were entered on September 28, 2022.

RELIEF REQUESTED

The Petitioner Deborah Walton, petitions this Court for a Writ of Mandamus reversing the District Court orders, that barred her from filing motions, pleadings and complaints, and canceled her upcoming jury trial.

ISSUES PRESENTED

Whether the District Court erred by misinterpreting the Order from the Seventh Circuit Court of Appeals.

Whether the District Court is denying the Petitioner her First Amendment Rights.

Whether the District Court is denying the Petitioner her Fourteenth Amendment Rights.

FACTUAL BACKGROUND

The Petitioner, Deborah Walton ("Petitioners"), filed a Petition for Writ of Mandamus, with the U.S. Supreme Court under the cause number **22-295**, on September 23, 2022. The Respondents received their briefs on September 26th 2022. The Hon. Judge Sarah Evans Barker, entered an Order on September 28th 2022, disposing of the

pending case that has been Docket since June 2017, under cause number 1:17-1888-cv-SEB-MAB

Therefore, after Hon. Judge Sarah Evans Barker, reviewed the opinion of the Seventh Circuit, she concluded, she had a right to dispose of the Petitioners pending case, and she did. App. 1

REASONS FOR GRANTING THE WRIT

THIS COURT MUST ISSUE A WRIT OF MANDAMUS REVERSING THE RULING OF THE DISTRICT COURT JUDGE THAT DENIED THE PETITIONER HER FIRST AMENDMENT RIGHT TO A JURY TRIAL

The Petitioner is seeking the writ because she has no other adequate means, such as a direct appeal, to attain the relief she desires. Hence the Seventh Circuit Court of Appeals made it very clear that the Petitioner is not to file anything further with their court for two years. These factors are only guidelines and raise questions of degree, including how clearly erroneous the district court's order is as a matter of law and how severe the damage to the petitioner will be without relief. *Bauman v. United States Dist. Court*, 557 F.2d 650, 654-55 (9th Cir. 1977) (citations omitted). Furthermore, these factors need not all point the same way or even all be applicable in cases where relief is warranted. Id. The existence of clear error as a matter of law, however, is dispositive. *Calderon v. United States Dist. Court (Nicolaus)*, 98 F.3d 1102, 1105 (9th Cir. 1996). The *Bauman* factors favor issuance of the writ in this case.

I. Hon. Judge Sarah Evans Barker Ignored The Seventh Circuit Courts Order Remanding The Case Back To The District Court For Trial In Her Most Recent Order

Hon. Judge Sarah Evans Barker's Order, Dated September 28, 2022, shows the District Court was determined to throw the Petitioners case out, after the Seventh Circuit Court of Appeals REMANDED the case back to the District Court for a Jury Trial. **App. 30.** The dismissal order made it very clear that Judge Barkers decision was derived from the Seventh Circuit Order, dated September 1, 2022, **App. 1**, which Judge Barker's interpretation is as follows:

> ***The Seventh Circuit "direct[ed] the clerks of all federal courts in this circuit to return unfiled any papers that Walton tries to file for two years, other than in cases concerning a criminal prosecution against her or a habeas corpus proceeding." Id. at 3-4. That order applies to the case before us, given that the Seventh Circuit did not include filings in pending civil cases in its enumerated exceptions to its filings bar. See id.*** **App. 17.**

However, the Seventh Circuits Order reads as follows:

> The 7th Circuit Court of Appeals Order clearly states: This appeal is **DISMISSED** as

> frivolous. The clerks of all federal courts in this circuit are hereby **ORDERED** to return unfiled any papers submitted to this court by or on behalf of Deborah Walton, with the exceptions previously noted. **App. 1 – App. 5**

Ironically the order on September 28, 2022, came just two days after Judge Sarah Evans Baker received a copy of the Petition for Writ of Mandamus on September 26, 2022. *emphasis added*

Therefore, when First Merchants Bank took the Petitioners signature that was intended for a product the Bank was offering, then used it to convince the District Court that the Petitioner **had** agreed to Reg E, when she had not, **and** it was Appealed several times. **Hence**, the Seventh Circuit, entered an Order, that instructed the Petitioner to raise the issue at the upcoming trial, scheduled for **July**. However, Judge Barker canceled the trial and never put it back on her schedule. After the case **was** set on the docket for months, **however;** Judge Barker Dismissed the case with prejudice, ignoring the Seventh Circuits Order, and **prohibiting** the Petitioner **the opportunity** to show cause **App. 17,** However; if the Petitioner were permitted to show cause, she would have submitted the cashiers check that was tendered to First Merchants Bank, to the District Court. **App. 42**

The U. S. Supreme Court has made it very clear that Due Process Clause of the Fourteenth Amendment, is the fundamental right of all citizens in the United States. *See Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1692 (1961).

II. The District Court Violated The Petitioners First Amendment Rights.

The Judicial Branch of government performs the essential role of ensuring that all persons, should be able to enforce their legal rights, and the First Amendment recognizes the right to access the courts as the principal means by which the Judicial Branch performs this role. *See Marbury v. Madison.* In *Marbury v. Madison*, Chief Justice Marshall stated: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Through civil litigation, persons can seek enforcement of their legal rights against entities and persons who violate them. They can also seek to invoke the law-making authority of judges to define the common law. Finally, they can seek to enforce provisions of the Constitution against entities or persons who transgress them. It is imperative that all persons have access to the Judicial Branch of government to enforce their rights under law. The First Amendment to the Constitution of the United States of America is the legal basis of the right to access the courts. It provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

One of the prior Seventh Circuit Judges, Posner recognized years ago "[b]revity may be the sole of wit, but seismic constitutional change is not a laughing matter." *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986).

III. The District Court Violated The Petitions Fourteenth Amendment Rights

The U. S. Supreme Court has made it very clear that Due Process Clause of the Fourteenth Amendment, is the fundamental right of all citizens in the United States. *See Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1692 (1961). The Seventh Circuit has also weight in on due process, and this court has explicitly held, there can be no claim of a denial of due process, either substantive or procedural, absent deprivation of either a liberty or property right." *Eichman v. Indiana State University Board of Trustees*, 597 F.2d 1104 (7th Cir., 1979).

Therefore, the Seventh Circuit has made it very clear that procedural due process applies equally to any alleged substantive due process claims. *Jeffries v. Turkey Run Consolidated School Dist.*, 492 F.2d 1 (7th Cir. 1974)

CONCLUSION

It is very apparent, that Hon. Judge Sarah Evans Barker has not properly interpreted the Order from the Seventh Circuit Court of Appeals. Therefore, the Petitioner **respectfully** request this court reverse the Order entered on September 28, 2022

Respectfully submitted this 24th day of October, 2022.

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No. 22-295

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ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANAPOLIS
Hon. Judge Sara Evans Barker,
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APPENDIX

The Petitioner Deborah Walton, Pro Se, respectfully supplements her petition for a writ of mandamus to the United States Supreme Court. In the alternative, the Petitioner respectfully request that the Court treat this petition as a petition for a writ of mandamus.

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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 OF DISMISSAL

Plaintiff, Deborah Walton, who proceeds here *pro se*, filed this case in June 2017 alleging violations of Regulation E of the Electronic Funds Transfer Act and of the Telephone Consumer Protection Act ("TCPA"), among other claims, against Defendant First Merchants Bank ("FMB"). (Dkt. 1; Dkt. 15). After a protracted litigation history, including six separate appeals by Ms. Walton, and a $57,751.00 Final Judgment entered against Ms. Walton for misconduct relating to her pursuit of the Regulation E claim, the only remaining substantive issue is Ms. Walton's TCPA claim, more specifically, "whether the five previously identified calls made by 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." (Dkt. 350 at 16).

FMB has filed two motions seeking sanctions against Ms. Walton for her various transgressions, including a monetary award and dismissal of her

complaint. On September 1, 2022, the Seventh Circuit entered sanctions against Ms. Walton in connection with an appeal of another, but related case, for "persist[ing] in pursuing frivolous litigation." *Walton v. First Merchants Bank*, No. 22-1240, Dkt. 14 at 3 (7th Cir. Sept. 1, 2022) (citing *Support Sys. Intern., Inc. v. Mack*, 45 F.3d 185 (7th Cir. 1995)). The Seventh Circuit "direct[ed] the clerks of all federal courts in this circuit to return unfiled any papers that Walton tries to file for two years, other than in cases concerning a criminal prosecution against her or a habeas corpus proceeding." *Id.* at 3-4. That order applies to the case before us, given that the Seventh Circuit did not include filings in pending civil cases in its enumerated exceptions to its filings bar. *See id.*

Background

The Court conducted a two-day bench trial on October 7 and 8, 2019, and in its Findings of Fact and Conclusions of Law the Court[1] stated that Ms. Walton "should have known that her Regulation E claim was meritless, at the latest, after the Court's ruling on summary judgment." (Dkt. 286 at 20). The Court explained its denial of summary judgment on the Regulation E claim on the grounds that "there was a genuine issue of fact regarding whether Ms. Walton opted in to overdraft protection because the opt-in documents reflected a social security number that was not hers." (Dkt. 188 at 19-20). Even so, Ms. Walton knew that the opt-in documents applied to her account and reflected a social security number

[1] The Honorable Jane Magnus-Stinson presided over the trial. (Docket No. 286).

that appeared on several of her other bank documents. (*Id.*). Ms. Walton also "knew that the social security number discrepancy did not save her Regulation E claim. Yet, she continued to pursue it." (Dkt. 286 at 20). On this basis, the Court awarded a reimbursement of attorney's fees to FMB incurred in connection with Ms. Walton's Regulation E claim from November 28, 2018—the date of the Court's summary judgment ruling—forward. (*Id.*). The Court subsequently determined that the amount FMB was entitled to as attorney's fees was the sum of $57,751.00 and final judgment was entered accordingly. (Dkt. 306).

Thereafter, the Seventh Circuit vacated this judgment with respect to Ms. Walton's TCPA claim and remanded the case for further proceedings, while affirming the judgment in all other respects. *Walton v. First Merchant's Bank*, 820 F.3d App'x 450 (7th Cir. 2020).

More than a year after the District Court imposed the Regulation E-related sanction against her and entered final judgment in the case, Ms. Walton filed a motion for relief from that judgment pursuant to Rule 60(b)(2) and (3) (Dkt. 341) and a motion to strike FMB's motion initiating proceedings supplemental to collect on that judgment (Dkt. 340). On April 26, 2021, FMB filed a motion for sanctions (Dkt. 346), arguing that both of these filings are frivolous and that, based on the Court's inherent authority, FMB should be awarded its attorney's fees for having to respond to Ms. Walton's frivolous motions. FMB also requested that the Court admonish Ms. Walton by informing her that additional frivolous filings may result in the imposition of additional sanctions, including the

dismissal of her suit and restrictions placed on her ability to file new lawsuits in this Court. FMB contends that these frivolous motions must be analyzed against the backdrop of Ms. Walton's protracted history of vexatious litigation.

On May 27, 2021, the Court denied Ms. Walton's motion for relief from judgment, agreeing with FMB that the motion was "obviously untimely." (Dkt. 351 at 6). Moreover, the Court held that "Ms. Walton fail[ed] to identify any fraud or misconduct that would have prevented her from 'fully and fairly presenting [her] case at trial.'" (*Id.* at 7). The Court emphasized that "[o]f even greater concern to us is the fact that Ms. Walton's motion contains several 'factual' assertions which appear to be complete falsehoods." (*Id.*). For example, Ms. Walton had represented that "federal agencies" had reported to FMB that Mr. Horton had committed perjury at trial, in support of which allegation Ms. Walton "has submitted no documentary evidence, nor does she explain how she acquired such information." (*Id.*). Ms. Walton also provided no evidentiary support for 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." (Dkt. No. 351 at 7-8). In denying the motion for relief of judgment, the Court noted that Ms. Walton had filed no response to FMB's motion for sanctions and that the deadline to do so had passed. (*Id.* at p. 8). The Court then ordered Ms. Walton to show cause, no later than seven days from the date of the order, why FMB should not be awarded sanctions. (*Id.*). The Court also warned Ms. Walton that a "[f]ailure to respond will result in an order granting the

requested fees." (Dkt. 351 at 8). On June 1, 2021, Ms. Walton responded stating that she "disagrees to the Defendants motion for Sanctions, in its entirety." (Dkt. 361). No further rationale for her disagreement was submitted. She further responded to the Order to Show Cause stating that she requests "the court schedule a hearing on the attorney fees that the Court will be awarding to the Defendant, and allow the Plaintiff to call witness (sic)." (Dkt. 360).

On May 28, 2021, the Court scheduled an evidentiary hearing to occur on June 18, 2021, for the purpose of hearing evidence in support of Ms. Walton's Motion to Disqualify Counsel. (Dkt. 328; Dkt. 352). However, on that same day, Ms. Walton again appealed the case to the Seventh Circuit (Dkt. 354; Dkt. 355), causing further delay in resolving the issues in this case. The second Court of Appeals' mandate based on the two notices of appeal was received on October 18, 2021. Thereafter the Court again scheduled an evidentiary hearing for December 2, 2021, for the purpose of taking evidence on Ms. Walton's Motion to Disqualify Counsel. (Dkt No. 382). On December 2, 2021, following a hearing on Ms. Walton's Motion to Disqualify Counsel, the Magistrate Judge also resolved several pending motions, including, of relevance, by denying Ms. Walton's Motion to Strike FMB's Motion for Proceedings Supplemental. (Dkt. 340). The Magistrate Judge found Ms. Walton's request to be procedurally inappropriate because a motion to strike under Fed. R. Civ. P. 12(f) applied only to pleadings, not to motions or other papers. Second, the Magistrate Judge concluded that, even when construed as a response in opposition to FMB's

proceeding supplemental motion, Ms. Walton's motion lacked absolutely any merit. (Dkt. 394 at 14).

On December 17, 2021, FMB renewed its Motion for Sanctions, pointing out that Ms. Walton has filed a Petition for Certiorari to the United States Supreme Court repeating the same falsehoods and inaccuracies she had included in her Motion for Relief from Judgment. (Dkt. 397- 1). In its renewed motion, FMB sought additional sanctions, specifically, dismissal. (Dkt. 397). Instead of filing a meaningful response to that motion, Ms. Walton filed a *Motion to Strike* pursuant to Fed. R. Civ. P. 12(f), arguing that because she was seeking Certiorari to the United States Supreme Court, FMB's motion would have to be resolved there. (Dkt. 399).

Analysis

The Court has the inherent authority to "impose appropriate sanctions to penalize and discourage misconduct," *Ramirez v. T&H Lemont, Inc.*, 845 F.3d 772, 776 (7th Cir. 2016). "Dismissal [under the court's inherent authority] can be appropriate when the plaintiff has abused the judicial process by seeking relief based on information that the plaintiff knows is false." *Id.* (quoting *Secrease v. Western & Southern Life Ins. Co.*, 800 F.3d 397, 401 (7th Cir. 2015)). To authorize sanctions pursuant to its inherent authority, the Court must find "that the culpable party willfully abused the judicial process or otherwise conducted the litigation in bad faith." *Ramirez*, 845 F.3d at 776.

Despite being given several opportunities to respond to the sanctions motions, Ms. Walton has

rejoined with nothing more than conclusory statements. Thus, any meaningful, substantive argument she could have made to attempt to justify her conduct has been waived. *See M.G. Skinner & Assocs. Ins. Agency v. Norman-Spencer Agency, Inc.*, 845 F.3d 313, 321 (7th Cir. 2017) ("Perfunctory and undeveloped arguments are waived, as are arguments unsupported by legal authority."). The record clearly reflects that Ms. Walton has opted not to defend herself, in any effective sense, against the sanctions.

Ms. Walton's Rule 60(b) motion (Dkt. 341) and her motion to strike (Dkt. 340) were determined to be plainly frivolous. Our colleague, Judge Magnus-Stinson, had previously reasoned that, despite Ms. Walton's *pro se* status, her pursuit of her Regulation E claim following entry of the Court's summary judgment ruling on November 28, 2018, was conducted "in bad faith or for purposes of harassment," thus warranting an award of attorney's fees. (Dkt. 286 at 22). The Seventh Circuit affirmed that ruling, reasoning that "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." *Walton v. First Merchant's Bank*, 820 F.3d App'x 450 (7th Cir. 2020).

A reasonable litigant would have returned to the trial court ready to seek a resolution of the remaining substantive issue. Instead, Ms. Walton focused her efforts on an attempt to evade the proceedings supplemental process relating to the sanctions award (Dkt. 340), including the submission of a distorted, disingenuous rewrite of the events leading up to the imposition of the sanctions award.

(Dkt. 341). Undeterred by the denial of her Motion for Relief of Judgment, Ms. Walton doubled-down on her pattern of advancing unsubstantiated "truths" in her Petition for Certiorari to the United States Supreme Court. In repeating that Mr. Hunt and Mr. Horton of FMB committed perjury at the trial and were terminated by FMB based on that alleged conduct, plainly put, she lied. (Dkt. 397-1). Ms. Walton twice advanced this same false assertion to the Court in another of her lawsuits against FMB. (*See* 1:21-cv-00419-JRS-TAB; Dkt. 70 at 2; Dkt. 81 at 2-3).

As referenced in the Magistrate Judge's entry detailing events related to the proceedings supplemental (Dkt. 341), Ms. Walton's efforts to evade service, ignore Court orders, and, demonstrate a disregard for the legal process continue unabated. Clearly, her purpose is simply to harass FMB and generate excessive, unjustified litigation costs on FMB. These actions have already saddled FMB with needless expense and diverted the Court's resources and attention from far more urgent cases. Ms. Walton continues to willfully abuse the judicial process through her bad faith tactics and disingenuous intentions.

For these reasons, the Court, in exercise of its inherent authority, rules that monetary sanctions against Ms. Walton are warranted. FMB's motion for sanctions as well as its renewed motion for sanctions are **granted**. Ms. Walton is thus ordered to reimburse FMB reasonable expenses, including attorney's fees, which it incurred in having to respond to her Motion for Relief from Judgment (Dkt. 341) and Motion to Strike (Dkt. 340). FMB

shall file an itemized statement of attorney's fees by **October 18, 2022**.

We turn next to address Ms. Walton's failure to respond to the show cause order directing her to explain why she should not be sanctioned for her reliance on demonstrably false assertions of fact, and further to explain why sanctions for such conduct would be inappropriate. Indeed, Ms. Walton has continued to advance the same false assertions in proceedings before the undersigned judge (Dkt. 369), as well as before the Honorable James R. Sweeney and before the United States Supreme Court. (Dkt. 397-1). Prior to the Seventh Circuit's imposition of the *Mack* bar, Ms. Walton had been forewarned on numerous occasions by various judges to cease her false and defamatory assertions. *See Walton v. Claybridge Homeowners Ass'n, Inc.*, 433 F. App'x 477, 480 (7th Cir. 2011) ("[W]e warn Walton that, in addition to attorneys' fees, she may subject herself to monetary sanctions and restrictions on future suits if she continues to abuse the judicial process."). In this litigation, Judge Magnus-Stinson observed that Ms. Walton's "*modus operandi*" "is to challenge the Court's decisions multiple times, through layers upon layers of filings. She often mischaracterizes her filings and the Court's orders, stating that they apply to certain orders or filings when they really apply to others." (Dkt. 216 at 4-5).

These warnings and monetary sanctions have not deterred her misconduct. As a result, the Magistrate Judge has recommended an award of attorney's fees in FMB's favor, pursuant to Federal Rule of Civil Procedure 37, and that this lawsuit be dismissed with prejudice. (Dkt. 341). We agree with both of these recommendations.

Besides the previously detailed grounds warranting sanctions, including dismissal of the lawsuit with prejudice, a few other matters warrant attention here. In August 2018, the Court found that Ms. Walton had failed to fulfill her obligation to return all copies of a document that FMB had inadvertently disclosed to her. (Dkt. 138 12:16-24). Despite the Court's direction to her to return the copies of the document, Ms. Walton attached it as an exhibit to her motion for summary judgment, requiring the Court to strike it from the public record. (Dkt. 188 at 4). Moreover, Ms. Walton has continued to utilize this privileged document in several other filings, both in this and other cases. Ms. Walton has been admonished that her continuing disregard of the Court's order can prompt further sanctions against her. (Dkt. 199). Ms. Walton has also been ordered to pay $13,108.00 in attorney's fees, pursuant to Rule 37 (Dkt. 209) and, in November 2021, the Seventh Circuit sanctioned Ms. Walton by imposing an additional $5,000, based on her refusal to "offer[] [any] justification for her persistence in pursuing this frivolous appeal after having previously been sanctioned for her frivolous litigation." (Dkt. 385 at 1) (citing *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)).

The *Mack* bar, imposed by the Seventh Circuit, forecloses any effort by Ms. Walton to prosecute this case until at least September 1, 2024. Consistent with our colleague Judge Hanlon's recent decision in another of Ms. Walton's cases pending in this district, dismissal of the case at bar for failure to prosecute pursuant to Federal Rule of Civil

Procedure 41(b) is appropriate here as well. *See Walton v. Equifax, Inc.*, 1:21-cv-00365-JPH-TAB (Dkt. 83). Ms. Walton's sanctionable misconduct led to her suspension for a period of at least two years due to her persistent, frivolous litigation tactics. *Walton*, No. 22-1240, Dkt. 14 at 3-4. "A plaintiff's failure to respond that delays the litigation can be a basis for a dismissal for lack of prosecution." *Bolt v. Loy*, 227 F.3d 854, 856 (7th Cir. 2000). The power to dismiss a case, *sua sponte*, for failure to prosecute, "is necessary in order to prevent undue delays in the disposition of pending cases." *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630 (1962).

We hold, for all of these reasons, that dismissal of this suit is the required outcome of Ms. Walton's litigiousness marked by the many abusive tactics we have detailed above. Anything less than a dismissal would be patently unfair to FMB. The numerous forewarnings of a possible dismissal of this lawsuit have now become reality. No further notice under Rule 41(b) is required here, especially in light of the Seventh Circuit's order preventing Ms. Walton from responding to any show cause order and from resuming timely prosecution of this case. *Walton*, No. 22-1245, Dkt. 14 at 3-4.

Conclusion

As explained, the Court **grants** FMB's Motion for Sanctions (Dkt. 346) and Renewed Motion for Sanctions (Dkt. 397). Ms. Walton's remaining single claim against FMB is **dismissed with prejudice** pursuant to Federal Rule of Civil Procedure 41(b). On January 14, 2020, the Court entered Final Judgment against Ms. Walton and in favor of FMB

as to all claims and awarded FMB $57,751.00 in attorney's fees. (Dkt. 306). The Seventh Circuit later vacated the judgment with respect to the TCPA claim, but affirmed the judgment in all other respects. (Dkt. 311). With the exception of the TCPA claim, the Court's January 14, 2020, judgment remains of record as a partial judgment under Federal Rule of Civil Procedure 54(b). All claims have now been resolved. Final judgment shall now issue.

IT IS SO ORDERED.

Date: 9/28/22

/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.

FINAL JUDGMENT

The Court, having this day issued its Order directing the dismissal of this cause with prejudice, FINAL JUDGMENT is hereby entered accordingly.

Date: 9/28/2022

/s/ SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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

DEBORAH WALTON,
Plaintiff-Appellant,
v.

FIRST MERCHANT'S BANK,
Defendant-Appellee.

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

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

Jane Magnus-Stinson,
Chief Judge.

* 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

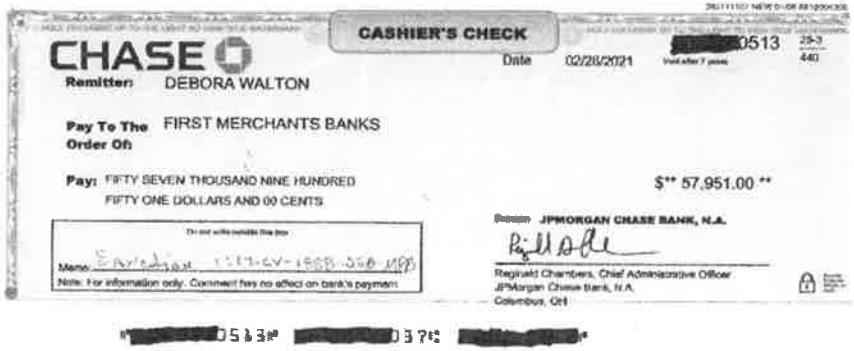
in bad faith. Walton first argues that the district court's bad-faith finding is logically flawed because her claim made it to trial and so could not have been "brought" in bad faith. However, bad faith can arise after the filing of a complaint. *See Mach v. Will Cty. Sheriff*, 580 F.3d 495, 501 (7th 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.



CASHIER'S CHECK

CHASE

[redacted]0513 25-3 440

Date 02/26/2021

Void after 7 years

Remitter: DEBORA WALTON

Pay To The Order Of: FIRST MERCHANTS BANKS

Pay: FIFTY SEVEN THOUSAND NINE HUNDRED FIFTY ONE DOLLARS AND 00 CENTS

$** 57,951.00 **

Do not write outside this box

Memo: Eviction 1:17-CV-1668-JPB MP

Note: For information only. Comment has no effect on bank's payment.

JPMORGAN CHASE BANK, N.A.

Reginald Chambers, Chief Administrative Officer
JPMorgan Chase Bank, N.A.
Columbus, OH

[redacted]0513" [redacted]0378 [redacted]"