UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In re: Fifth Third Early Access Cash Advance Litigation	Case No. 1:12-cv-00851-MRB Judge Michael R. Barrett

FIFTH THIRD'S REPLY IN SUPPORT OF ITS RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW AS TO BREACH OF CONTRACT

Fifth Third filed for preservation purposes a Rule 50(b) motion challenging the jury's finding that Fifth Third breached the Early Access contract. Plaintiffs' response confirms Fifth Third's motion should be granted.

As Plaintiffs note, the "crux of the issue" regarding breach of contract at trial was whether the loan cost was "a fixed cost of 120% APR" or a flat 10% fee. Opp., ECF No. 288, PAGEID#9550. That is, the dispute was about "the amount of money that Fifth Third charged [P]laintiffs." *In re Fifth Third Early Access Cash Advance Litig.*, 925 F.3d 265, 274 (6th Cir. 2019). Contract interpretation is intended to "give effect to the intent of the parties." *Eastham v. Chesapeake Appalachia, LLC*, 754 F.3d 356, 361 (6th Cir. 2014) (cleaned up). Here, the evidence supported one reasonable result: All parties intended this product to cost $1 for every $10 borrowed. Because customers were charged that amount, there was no breach.

A. Plaintiffs' Attempt to Revisit This Court's Summary Judgment Ruling Is Incorrect.

Plaintiffs recognize that the trial evidence was devastating to their claim, so their first argument in response to Fifth Third's motion does not pertain to the trial evidence at all, but attempts to reargue summary judgment. At summary judgment, the Court properly held

(i) extrinsic evidence can inform the meaning of form contracts, Op. & Order Denying Summ. J., ECF No. 209, PAGEID#6046; (ii) *contra proferentem* is a rule of last resort, *id.*; and (iii) the testimony of the Named Plaintiffs could inform the meaning of the contract, *id.* at PAGEID##6047–49. It correctly denied Plaintiffs' summary judgment motion, and the evidence at trial demonstrated why: The only reasonable interpretation of the contract was Fifth Third's.

B. Neither the Expert Testimony, the Testimony of Fifth Third's Witnesses, nor the Plain Language of the Contract Supports Plaintiffs' Interpretation.

Once Plaintiffs actually begin to discuss the *trial evidence*, it becomes apparent that no reasonable juror, even taking the evidence in the light most favorable to the class, could have concluded Fifth Third breached the contract.

1. Plaintiffs' lead argument—that the expert testimony (particularly that offered by M. Patricia Oliver) supports their reading of the contract—is meritless. Opp., ECF No. 288, PAGEID##9554–55. *First*, Ms. Oliver's testimony was inadmissible and highly prejudicial. *See* Mot. to Strike, ECF No. 257, PAGEID##7857–62. The law is clear that experts may not testify as to what a contract means. *See, e.g.*, *Innes v. Howell Corp.*, 76 F.3d 702, 712 (6th Cir. 1996) ("A jury does not need an expert to tell it whether there has been mutual assent for a contract."); *Drips Holdings, LLC v. Teledrip LLC*, No. 5:19-cv-02789, 2022 WL 17718291, at *5 (N.D. Ohio Aug. 30, 2022) (excluding "impermissible legal opinions" from an expert who attempted to "testify as to the legal effect of a contract"); *Allied Erecting & Dismantling Co. v. U.S. Steel Corp.*, No. 4:12-CV-1390, 2015 WL 1530648, at *2 (N.D. Ohio Apr. 6, 2015) ("[A] district court will not permit an expert to offer legal opinions or conclusions, or interpret the parties' contracts."); *Michigan First Credit Union v. CUMIS Ins. Soc., Inc.*, No. 05-CV-74423, 2009 WL 43479, at *2 (E.D. Mich. Jan. 5, 2009) ("Expert testimony interpreting the contractual intent of the Bond would amount to a legal conclusion . . . ."). Plaintiffs attempt to overcome the mountain of evidence supporting Fifth Third's interpretation by relying on precisely such inadmissible testimony, including Ms. Oliver's legal conclusion that the

APR was "fixed" because "[w]e don't see any other percentage relating to the APR" in the contract. Opp., ECF No. 288, PAGEID#9555 (quoting Ms. Oliver's testimony). Because Ms. Oliver's testimony was erroneously admitted, it has no bearing on the sufficiency-of-the-evidence calculus. *See Weisgram v. Marley Co.*, 528 U.S. 440, 457 (2000) (courts may enter judgment as a matter of law when, "on excision of testimony erroneously admitted, there remains insufficient evidence to support the jury's verdict").

Second, regardless of its admissibility, Ms. Oliver's testimony could not support a reasonable jury's conclusion that Fifth Third breached the contract. The operative question at trial was one of contractual intent, not whether the APR carried a standard or idiosyncratic definition or whether an APR could theoretically be viewed as a "cost term." *See Eastham*, 754 F.3d at 361. This case was a dispute about whether the parties *to this contract* intended *this product* to cost $1 for $10, or whether they intended *this product* to cost a fixed APR of 120%. *See In re Fifth Third Early Access*, 925 F.3d at 274. The evidence at trial conclusively proved that both the bank and its customers understood the product to cost $1 for $10.

Each Fifth Third witness and each Named Plaintiff testified that they understood the cost was $1 for every $10 borrowed. *See* Trial Tr. (4/20/23 PM) at 40:20-22, ECF No. 259, PAGEID#7918 (Erhardt); Trial Tr. (4/21/23) at 171:25-172:6, ECF No. 262, PAGEID##8243–44 (Carpenter); Trial Tr. (4/24/23) at 92:8-12, ECF No. 289, PAGEID#9656 (Mendelsohn); Trial Tr. (4/18/23 PM) at 140:8-10, 145:1-24, ECF No. 253, PAGEID##7472, 7477 (McKinney); Trial Tr. (4/19/23) at 34:10-16, ECF No. 255, PAGEID#7527 (Harrison); *id.* at 100:16-18, PAGEID#7593 (L. Laskaris); *id.* at 141:4-10, PAGEID#7634 (D. Laskaris); Trial Tr. (4/20/23 AM) at 34:7-11, ECF No. 263, PAGEID#8339 (Fyock). No reasonable fact-finder could have concluded that Fifth Third and its customers entered into a contract for a fixed APR of 120% based on Ms. Oliver's expert testimony alone. *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993)

("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict.").

2. Plaintiffs are likewise incorrect to suggest that testimony from Fifth Third's witnesses supports their reading. Opp., ECF No. 288, PAGEID##9553, 9555. Here too, Plaintiffs misinterpret each witness's testimony. At best, the testimony demonstrates that if one were to calculate the APR for this product based on an assumed loan length other than 30 days, the APR would no longer equate to 120%. *See, e.g.*, Opp., ECF No. 288, PAGEID#9555 (citing *inter alia* testimony from T. Carpenter that, "[a]t an average loan length of 10 days, [the] APR would be 356 percent"). But that basic math is undisputed. This testimony cannot be read to suggest that either Fifth Third or its customers *understood that this product cost a fixed rate of 120% annually*. Indeed, the testimony of each Fifth Third witness could not have been clearer on this point: each understood this product to cost $1 for every $10 borrowed. *See* Trial Tr. (4/20/23 PM) at 40:20-22, ECF No. 259, PAGEID#7918 (Erhardt); Trial Tr. (4/21/23) at 171:25-172:6, ECF No. 262, PAGEID##8243–44 (Carpenter); Trial Tr. (4/24/23) at 92:8-12, ECF No. 289, PAGEID#9656 (Mendelsohn).

3. Finally, Plaintiffs suggest that the mere fact that the 120% APR term was in the contract is itself a sufficient evidentiary basis for the jury to decide for them on breach. That too is incorrect. The contract makes clear no less than ten times that the product cost $1 for $10, *see* JX 2009 (FAQs (2011)), ECF No. 137-2; JX 2006 (T&Cs (2011)), ECF No. 137-1, which is why every contracting party understood that was the cost until Plaintiffs' counsel suggested an alternative as a basis for a lawsuit, *see* Trial Tr. (4/18/23 PM) at 145:1-24, ECF No. 253, PAGEID#7477 (McKinney); Trial Tr. (4/19/23) at 36:12-25, ECF No. 255, PAGEID#7529 (Harrison); *id.* at 106:23-25, PAGEID#7599 (L. Laskaris); *id.* at 141:4-6, PAGEID#7634 (D. Laskaris); Trial Tr.

(4/20/23 AM) at 43:2-21, ECF No. 263, PAGEID#8348 (Fyock). The dispute at trial was about the meaning of the contract language as informed by extrinsic evidence. If the mere presence of the disputed language in the contract were itself enough to survive a motion for judgment as a matter of law, no plaintiff or defendant could ever be entitled to judgment as a matter of law in cases like this one. That is plainly not the law. *See, e.g.*, *Penford Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 662 F.3d 497, 506 (8th Cir. 2011) (insurer entitled to judgment as a matter of law where "the extrinsic evidence presented at trial removed any ambiguity regarding the meaning of the sublimits provision"); *Shepley v. New Coleman Holdings Inc.*, 174 F.3d 65, 72 n.5 (2d Cir. 1999) (summary judgment is appropriate "when the language is ambiguous and there is relevant extrinsic evidence, but the extrinsic evidence creates no genuine issue of material fact and permits interpretation of the agreement as a matter of law" (citation omitted)).

C. Plaintiffs' Course of Performance Arguments Are Meritless.

Plaintiffs also have no answer to the course of performance evidence Fifth Third cited in support of its Rule 50(b) motion, which demonstrates that customers agreed to pay a flat fee of $1 for every $10 advanced. Had customers understood their agreement differently, they would not have reaffirmed their agreement to pay exactly 10% each time they took an advance, and they would not have returned dozens of times (more than 67 times on average) to take new advances after they were charged 10% for their prior advances.

1. Plaintiffs contend that even if the course of performance evidence supports Fifth Third's interpretation, that does not mean Fifth Third is entitled to judgment as a matter of law. Opp., ECF No. 288, PAGEID#9556. But Plaintiffs miss the point. The course of performance evidence is just a portion of the evidence that supports Fifth Third's interpretation. The plain language of the contract, the testimony of each class representative, the testimony of each Fifth Third witness, and the documentary evidence also support Fifth Third's interpretation. *See* Mot.,

ECF No. 282, PAGEID##9117–18. The evidence taken as a whole conclusively shows customers received the benefit of their bargain.

2. Plaintiffs' argument that course of performance evidence cannot be used to interpret form contracts is incorrect. Opp., ECF No. 288, PAGEID##9556–57. The law is clear that "the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence." *Old Colony Tr. Co. v. City of Omaha*, 230 U.S. 100, 118 (1913). Form contracts are no different. *See William C. Roney & Co. v. Fed. Ins. Co.*, 674 F.2d 587, 590 (6th Cir. 1982) ("Where a course of conduct removes an ambiguity in the written terms of an agreement, the rule of practical construction should take precedence over the rule that a contract of insurance is construed against its drafter."); *Emps. Reinsurance Co. v. Superior Ct.*, 161 Cal. App. 4th 906, 921 (Cal. Ct. App. 2008) ("Since insurance policies are still contracts to which the ordinary rules of contractual interpretation apply, it is apparent that the rules relating to course of performance as extrinsic evidence are equally applicable to insurance policy interpretation.").

The out-of-circuit cases Plaintiffs cite do not suggest otherwise. They merely hold that an *individual customer's* course of performance may not be used to resolve ambiguities in standard form contracts, because those agreements should be interpreted uniformly. *Cf. Gillis v. Respond Power, LLC*, 677 F. App'x 752, 756 (3d Cir. 2017) ("[S]tandard form contracts should be interpreted uniformly as to all similarly situated signatories whenever it is reasonable to do so, rendering *individual, transaction-specific interpretations inapposite*." (emphasis added)); *Kolbe v. BAC Home Loans Servicing, LP*, 738 F.3d 432, 436 (1st Cir. 2013) ("Extrinsic evidence of the parties' *unique intentions* regarding a uniform clause is generally uninformative because unlike individually tailored contracts, uniform clauses do not derive from the negotiations of the specific parties to a contract." (emphasis added)); *In re TD Bank, N.A. Debit Card Overdraft Fee Litig.*, 325 F.R.D. 136, 157 (D.S.C. 2018)

("*[I]ndividual customers'* 'intent' and 'course of performance' is largely irrelevant to resolving any ambiguity." (emphasis added)). These cases do not suggest that a uniform course of performance applicable to a class cannot resolve ambiguities in standard form contracts. Indeed, they counsel for a uniform interpretation of standard form agreements. Relying on them to omit huge swaths of evidence that speak directly to how *the class* uniformly used this product ignores entirely the rationale for each decision.

3. Plaintiffs argue that the course of performance evidence does not suggest that the APR language was understood to be a regulatory disclosure, but that is beside the point. Opp., ECF No. 288, PAGEID#9557. This dispute was about what the parties agreed the product would cost. *In re Fifth Third Early Access*, 925 F.3d at 274. That class members used the product again and again after being charged a flat fee of $1 for every $10 borrowed demonstrates that they understood the cost to be $1 for $10. Because customers were charged $1 for $10, there was no breach. For similar reasons, the fact that the APR disclosure appeared in the contract, on the banking screens, and in the monthly statements in no way undermines the course of performance evidence. *Contra* Opp., ECF No. 288, PAGEID#9558. The class's actions demonstrate that they understood the fee to be $1 for $10 and did not view the APR disclosure as the cost of this product.

D. Black Letter Law Supports Fifth Third's Entitlement to Judgment as a Matter of Law.

Plaintiffs next challenge Fifth Third's invocation of the black letter proposition that where "one party attached a meaning to the [disputed] language and . . . the other attached none," the first party's interpretation controls "if the other party had reason to know this." 2 E. Farnsworth, Contracts § 7.9, at 285 n.30 (4th ed. 2023). That hornbook principle squarely applies here. Fifth Third viewed the APR disclosure as a regulatory disclosure, the meaning of which was apparent from the face of the contract. *See* JX 2006 (T&Cs (2011)), ECF No. 137-1, PAGEID#1641; JX 2009 (FAQs (2011)), ECF No. 137-2, PAGEID#1649. Plaintiffs, in contrast, attached no meaning

to the APR disclosure at all until speaking with counsel. *See* Trial Tr. (4/18/23 PM) at 145:1-3, ECF No. 253, PAGEID#7477 (McKinney); Trial Tr. (4/19/23) at 36:12-15, ECF No. 255, PAGEID#7529 (Harrison); *id.* at 106:23-25, PAGEID#7599 (L. Laskaris); *id.* at 141:4-6, PAGEID#7634 (D. Laskaris); Trial Tr. (4/20/23 AM) at 43:2-21, ECF No. 263, PAGEID#8348 (Fyock). In these circumstances, Fifth Third's interpretation controls.

Plaintiffs' arguments to the contrary are meritless. *First*, Plaintiffs argue that customers did not have "reason to know" of Fifth Third's interpretation. But Fifth Third charged customers 10% for each advance and customers were never charged a fee based on the APR. Customers confirmed the exact amount of the fee when they took each advance at the point of sale. They saw the fee for each advance on their bank statements. Most customers then returned over and over again to take more advances. The contract itself also made it abundantly clear that this product cost $1 for $10. It separately made clear that Fifth Third included the APR disclosure so that customers could compare products and explained to customers the basis for the APR's calculation. *See* JX 2006 (T&Cs (2011)), ECF No. 137-1, PAGEID#1641; JX 2009 (FAQs (2011)), ECF No. 137-2, PAGEID#1649. Customers thus had ample "reason to know" that the APR disclosure did not dictate the cost of this product.

Second, Plaintiffs suggest that Farnsworth's rule may not reflect Ohio law, Opp., ECF No. 288, PAGEID#9560, even though they relied on the same treatise previously in this litigation, *see* Mot. to Exclude Testimony of R. Wilcox, ECF No. 196, PAGEID#4978. But Plaintiffs cite nothing to suggest the rule does not apply in Ohio, and there is ample reason to believe it would. After all, the rule is but a corollary of the general rule that "[w]here the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made . . . that party had no reason to know of any different meaning attached by the other, and the other had reason to know

the meaning attached by the first party." Restatement (Second) of Contracts § 201 (1981); *see* 2 E. Farnsworth, Contracts § 7.9, at 285 n.30 (4th ed. 2023) (citing Restatement (Second) of Contracts § 201). Ohio courts ascribe to the general rule, *see, e.g.*, *Ragen v. Hancor, Inc.*, 920 F. Supp. 2d 810, 831 (N.D. Ohio 2013); *LaConte Ent. v. Cuyahoga Cty.*, 764 N.E.2d 1051, 1054–55 (Ohio Ct. App. 2001), and there is no basis to suggest they would not apply the corollary outlined in Farnsworth on the facts presented here.

Finally, Plaintiffs are wrong that application of the rule hinges entirely on Mr. Mendelsohn's testimony that the APR was a regulatory disclosure. Documentary evidence showed that the APR term was included because "Federal law require[d] that [the bank] disclose the finance charge as an Annual Percentage Rate (APR)." DX 1063.0015. Other Fifth Third witnesses also testified that the APR was a regulatory disclosure. Mr. Erhardt, for example, testified extensively about the APR language in the contract.[1] He explained how the APR was "defined in our documents" using a formula "based on . . . 12 statement cycles." Trial Tr. (4/20/23 PM) at 124:15-22, ECF No. 253, PAGEID#8002. And he made plain that the APR provision was a regulatory disclosure. *See id.* at 57:25-58:3, PAGEID##7935–36 (APR was a "regulatory disclosure"); *id.* at 121:8-11, PAGEID#7999 ("APR term is a disclosure term").

Plaintiffs also are wrong that Mr. Mendelsohn was not competent to speak to Fifth Third's intent. As a senior Fifth Third employee with practical experience selling this product, Mr. Mendelsohn was surely qualified to testify as to how he and the bank understood the product to work. As a banker, he was also more than capable of providing insight into how he understood APRs were used in the industry. *See* Trial Tr. (4/24/23) at 121:13-20, ECF No. 289,

[1] Mr. Erhardt gave this testimony mostly during cross examination, after the Court erroneously restricted Fifth Third's direct examination, and even though the Court erroneously corrected him in the presence of the jury. *See* Mot. for Curative Instruction, ECF No. 252, PAGEID##7325–30.

PAGEID#9685 ("[An] APR is a disclosure that happens before you take an advance, in fact before you even open the loan."). The jury was thus presented with ample evidence demonstrating why Fifth Third included the APR language in the contract.[2]

E. *Contra Proferentem* Does Not Apply.

Lastly, Plaintiffs contend that the jury's breach finding should stand because the jury may have concluded that the extrinsic evidence could not resolve the ambiguity and that the contract should instead be construed against its drafter. Opp., ECF No. 288, PAGEID##9561–62. But this argument ignores that Plaintiffs offered precisely zero evidence that any contracting party understood this product was capped at an annual percentage of 120%, while Fifth Third offered substantial evidence that the parties intended the charge to be 10%. *See supra* pp. 3–4. Thus, if the jury relied on *contra proferentem* to resolve the alleged ambiguity in Plaintiffs' favor, it did so in error. *See* Op. & Order Denying Summ. J., ECF No. 209, PAGEID#6046 (*contra proferentem* is a maxim of last resort).

Plaintiffs' opposition also cannot overcome that *contra proferentem* "does not allow a court to adopt an unreasonable interpretation of the contract." *Savedoff v. Access Grp., Inc.*, 524 F.3d 754, 764 (6th Cir. 2008). In its motion, Fifth Third argued that Plaintiffs' interpretation was unreasonable because (among other reasons) it reads an interest rate into an agreement that expressly stated there was no interest rate. Plaintiffs responded with two points—that APRs and interest rates are different things, and that it is possible to calculate an APR for both fee-based products and interest-

[2] Plaintiffs contend that the jury may have concluded that Fifth Third's interpretation was "unreasonable" or that Fifth Third "did not in fact hold the interpretation about the APR term that it claimed to hold." Opp., ECF No. 288, PAGEID#9561. But there has never been any meaningful dispute in this litigation as to how Fifth Third interpreted the contract and certainly no evidence at trial that would have suggested Fifth Third viewed the APR as anything other than a regulatory disclosure. Plaintiffs' suggestion that the jury may have simply disregarded this undisputed evidence only serves to demonstrate just how erroneous the jury's breach finding was.

based products. Opp., ECF No. 288, PAGEID#9562.[3] But neither point is responsive to Fifth Third's argument. As Fifth Third has made clear, Plaintiffs' interpretation is unreasonable as a matter of law because it takes this fixed-fee product whose price did not vary based on the length of the loan and transforms it into a product where the price varies based on the length of the loan. *See* JX 2006 (T&Cs (2011)), ECF No. 137-1, PAGEID#1641 (noting that the fee is $1 for $10 "without regard to how long the Advance remains outstanding"). That interpretation was shared by no contracting party at the time they entered into the contract and is unreasonable as a matter of law.

CONCLUSION

The jury in this case heard days upon days of evidence that supported but one conclusion: Both contracting parties understood the Early Access product to cost $1 for every $10 borrowed. Because "there can be but one reasonable conclusion as to the proper verdict," the Court should enter judgment as a matter of law in Fifth Third's favor on the issue of breach. *Kusens v. Pascal Co., Inc.*, 448 F.3d 349, 360 (6th Cir. 2006).

Dated: July 13, 2023

Respectfully submitted,

/s/Enu A. Mainigi

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[3] Plaintiffs persist in contending, inaccurately, that the Sixth Circuit already concluded that their interpretation of the contract was "reasonable." Opp., ECF No. 288, PAGEID#9553. As Fifth Third has made clear, *see* Fifth Third's Opp. to Plfs' Mot. for Summ. J., ECF No. 188, PAGEID#4095, the Sixth Circuit merely accepted all well-pleaded allegations in the complaint as true for purposes of a motion to dismiss, *see In re Fifth Third Early Access*, 925 F.3d at 276. The court did not hold that Plaintiffs' interpretation of the contract as a whole was reasonable for purposes of trial—that would depend on the extrinsic evidence which had not yet been developed at the time of the Sixth Circuit decision.

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CERTIFICATE OF SERVICE

On July 13, 2023, a copy of the foregoing was filed via the Court's Electronic Filing System. Copies will be served upon counsel of record by, and may be obtained through, the Court's CM/ECF Systems.

Respectfully submitted,

/s/*Enu A. Mainigi*
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