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 BANK'S RESPONSE TO PLAINTIFFS' MOTION FOR RENEWED JUDGMENT AS A MATTER OF LAW OR, IN THE ALTERNATIVE, FOR A PARTIAL NEW TRIAL

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After more than ten years of litigation, Plaintiffs had their day in court, and the jury returned a verdict for Fifth Third Bank ("Fifth Third"). The evidence in the two-week trial fully supported the jury's verdict. The uncontested evidence established: that customers knew they would pay $1 for every $10 borrowed; that customers affirmatively agreed at the point of sale to pay the precise amount they paid; and that customers used Early Access over and over again, with over 95% of advances taken by customers who used the product more than 10 times. The verdict was thus entirely consistent with settled Ohio law, and with the Court's instructions that followed that law and provided that the voluntary payment doctrine bars a claim for breach of contract when the plaintiff paid with a full understanding of the facts.

Unhappy with the verdict, Plaintiffs now seek judgment as a matter of law or a new trial, but many of their arguments are waived, the others have already been rejected, and none has any merit.

I. Plaintiffs are not entitled to judgment as a matter of law, as they cannot show, with the evidence "construed most strongly" against them, that "a reasonable jury would not have a legally sufficient evidentiary basis" to find for Fifth Third. *Matus v. Lorain Cnty. Gen. Health Dist.*, 707 F. App'x 304, 312 (6th Cir. 2017) (citing Fed. R. Civ. P. 50(a)(1)). This jury's verdict, supported by "substantial evidence," *id.*, was more than reasonable: It was correct.

I.A.1. Plaintiffs' lead argument—that Fifth Third cannot invoke Ohio's "equitable" voluntary payment doctrine because Fifth Third acted with unclean hands—is waived as a matter of law because they did not make this argument in their Rule 50(a) motion. The law could not be clearer that this amounts to a waiver. *See, e.g.*, *Hanover Am. Ins. Co. v. Tattooed Millionaire Ent., LLC*, 974 F.3d 767, 780 (6th Cir. 2020); *Maxwell v. Dodd*, 662 F.3d 418, 420–21 (6th Cir. 2011).

In any event, the argument is meritless. Plaintiffs cite no case from Ohio holding that the voluntary payment doctrine is "equitable," and they ignore others suggesting the opposite. *See, e.g.*,

Nationwide Life Ins. Co. v. Myers, 425 N.E.2d 952, 956 (Ohio Ct. App. 1980). They also cite no case anywhere holding that a party's "unclean hands" bars the voluntary payment defense.

Plaintiffs also have not come close to showing, as Rule 50 requires, that Fifth Third has unclean hands *as a matter of law*. Reasonable minds obviously could disagree with Plaintiffs' contention that Fifth Third engaged in "reprehensible, grossly inequitable, or unconscionable conduct," the high standard for unclean hands. *See Deutsche Bank Natl. Tr. Co. v. Pevarski*, 932 N.E.2d 887, 894 (Ohio Ct. App. 2010). Fifth Third witnesses testified they understood in good faith that the cost of Early Access was always $1 for $10 and that the APR was not a cap.

I.A.2. Plaintiffs' back-up position—that Early Access customers did not have a full understanding of the facts as a matter of law—also fails. Under Ohio law, the operative question is not whether customers knew Fifth Third was (allegedly) charging more than 120% APR, but whether customers had full knowledge of "what [was] being paid for." *Indus. Fabricators, Inc. v. Nat'l Cash Reg. Corp.*, No. 83AP-13, 1984 WL 4669, at *3 (Ohio Ct. App. Mar. 8, 1984). Here, the evidence showed that customers knew what they were paying ($1 for every $10) and what they were paying for (use of the funds for the earlier of 35 days or their next qualifying direct deposit). Thus, at worst, payments were based on a wrong construction of the contract—a mistake of law that does not bar application of the voluntary payment doctrine. *See id.*; *Scott v. Fairbanks Cap. Corp.*, 284 F. Supp. 2d 880, 894 (S.D. Ohio 2003). The evidence strongly favored Fifth Third, but more to the point for this motion, a reasonable jury could and did agree with Fifth Third's view of the evidence.

Even assuming arguendo that Plaintiffs were correct that the voluntary payment doctrine applied only if they knew they were paying more than 120% annualized interest, there was ample evidence from which the jury could have ruled for Fifth Third. As Plaintiffs argued to the jury, an APR is an *annualized figure* that varies *based on the length of time a loan is outstanding*. The evidence showed that Early Access customers knew the 10% fee they paid was the same regardless of the

length of the loan and that there was no interest rate. That evidence was more than enough to allow a reasonable jury to conclude customers knew the APR did not dictate what they were paying.

I.B. Plaintiffs' arguments about "notice" are moot because the voluntary payment doctrine applies. In any event, Plaintiffs are wrong that as a matter of law, damages continued to accrue through August 2021. Plaintiffs waived these arguments by not raising them in their Rule 50(a) motion. On the merits, a reasonable juror could easily conclude the contract was modified in May 2013 when the APR was removed from the Terms and Conditions or, at the latest, in January 2015 when the Early Access program was revamped. The Court denied Plaintiffs' virtually identical summary judgment motion on this basis, and the evidence at trial only reinforced this conclusion.

II. Plaintiffs' alternative motion for a partial retrial also should be denied. Far from a "seriously erroneous" result, *Caudill Seed & Warehouse Co. v. Jarrow Formulas, Inc.*, 53 F.4th 368, 379 (6th Cir. 2022), the verdict for Fifth Third was based on substantial evidence after a lengthy trial.

II.A. The verdict was not against the weight of the evidence. "[G]ranting a new trial on this ground is a rare occurrence," *Armisted v. State Farm Mut. Auto. Ins. Co.*, 675 F.3d 989, 995 (6th Cir. 2012), and is appropriate only if the verdict was "unreasonable," *id.* That standard is not satisfied here, where there was more than a sufficient evidentiary basis for the jury to conclude customers knew exactly what they were paying for.

II.B.1. Plaintiffs fault this Court for not instructing the jury that the voluntary payment doctrine applies only if customers knew the effective APR exceeded 120% at the time of payment. But this Court's instructions informed the jury that the voluntary payment doctrine requires "*full knowledge of all relevant facts*," which "adequately inform[ed] the jury of the relevant considerations and provide[d] the jury with a sound basis in law with which to reach a conclusion." *Pivnick v. White, Getgey & Meyer Co., LPA*, 552 F.3d 479, 488 (6th Cir. 2009). (If anything, the instructions were too favorable *to Plaintiffs* because they did not specify that a payment made by reason of a wrong

construction of a contract does not defeat the voluntary payment doctrine.) "[A] more factually specific instruction," along the lines of Plaintiffs' request, "would only [have] create[d] an error" by placing the Court's thumb on the scale in Plaintiffs' favor. *Blues To You, Inc. v. Auto-Owners Ins. Co.*, No. 1:21-CV-00165, 2022 WL 9753916, at *9 (N.D. Ohio Oct. 17, 2022). Nor is there merit to Plaintiffs' *post hoc* contention that the Court mishandled its response to the jury's question about the voluntary payment doctrine; at the time, Plaintiffs *endorsed* the Court's entirely permissible decision to direct the jury back to the original instructions. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000).

II.B.2. Plaintiffs are wrong to fault the Court for admitting evidence that the named Plaintiffs continued to use Early Access after filing suit and for instructing the jury that it could consider that conduct. Plaintiffs' evidentiary challenge is waived because they did not object at trial, and in fact *Plaintiffs* were the first to elicit this evidence. *See, e.g.*, *Ohler v. United States*, 529 U.S. 753, 758 (2000); *Ludwig v. Norfolk S. Ry. Co.*, 50 F. App'x 743, 751 (6th Cir. 2002). Regardless, the evidence was relevant to both breach and the voluntary payment doctrine and therefore admissible. And, assuming for argument's sake the evidence were inadmissible, its admission would be harmless.

This Court's instruction concerning named Plaintiffs' post-lawsuit advances also was proper. Indeed, it was necessary because Plaintiffs' counsel implied that the named Plaintiffs' conduct did not speak for the class where the named Plaintiffs were not personally seeking damages for their post-suit advances. That flouts the entire premise of a class action, which proceeds "on a representative basis." *Cummings v. Connell*, 402 F.3d 936, 944 (9th Cir. 2005); *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) ("as go[] the claim[s] of the named plaintiff[s], so go the claims of the class"). The Court's instructions did nothing more than set the record straight on this issue. And again, assuming arguendo the instruction was erroneous, it did not prejudice Plaintiffs.

II.B.3. The Court did not err in refusing to instruct the jury that it could consider whether the contract's APR language was accurate when evaluating the voluntary payment doctrine, because

that instruction was plainly argument. *See Simmons v. Napier*, 626 F. App'x 129, 138 (6th Cir. 2015). Nor did the Court err in refusing to tell the jury that Fifth Third violated the Truth in Lending Act ("TILA"), a strict-liability federal statute that does not establish any element of a breach of contract claim or the voluntary payment defense. Courts routinely refuse to allow parties to reference claims disposed of at summary judgment. *See Holloway v. Kings Dodge, Inc.*, No. 1:16-cv-1075, 2019 WL 13093580, at *2 (S.D. Ohio Aug. 23, 2019) (Barrett, J.).

II.C. Plaintiffs affirmatively agreed to the jury interrogatories and did not complain until after the jury answered them. Their post-hoc arguments are waived. *See Peak v. Kubota Tractor Corp.*, 559 F. App'x 517, 526 (6th Cir. 2014). The interrogatories also were entirely proper. Both parties argued the voluntary payment doctrine could be resolved on a class-wide basis, and the jury was not "inconsistent" in concluding that one side breached a contract but the other side paid voluntarily. *See Salling v. Budget Rent-A-Car Sys., Inc.*, 672 F.3d 442, 443 (6th Cir. 2012).

II.D. Plaintiffs did not object to Fifth Third's comments at closing argument and thus did not preserve their post-trial objections. The complained-of statements at closing were entirely consistent with the Court's instructions and, even if they had not been, they were not the "outrageous" or "egregious" conduct that could require a new trial. *Appalachian Reg'l Healthcare, Inc. v. U.S. Nursing Corp.*, 68 F.4th 324, 335 (6th Cir. 2023).

II.E. No new trial should be granted, but under no circumstances are Plaintiffs entitled to a *partial* retrial limited to only certain issues. The voluntary payment doctrine and damages are not "so distinct and separable from" the issue of breach of contract that a separate trial limited to the former issues could "be had without injustice." *Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp.*, No. 3:10-cv-83, 2015 WL 853193, at *8 (S.D. Ohio Feb. 26, 2015); *see Gasoline Prods. Co. v. Champlin Refin. Co.*, 283 U.S. 494, 500 (1931).

INTRODUCTION

Over two weeks of trial, the jury heard evidence that proved each of the named Plaintiffs knew they were entering an agreement with Fifth Third to advance funds from their next direct deposit in exchange for a 10% transaction fee. At the time of their enrollment in Early Access, and again at the point of sale, each and every customer affirmatively authorized Fifth Third to charge a 10% transaction fee before receiving each and every advance. No one believed they had made a different agreement. All customers were, in fact, charged a 10% transaction fee. In other words, the Plaintiffs got the benefit of their bargain. Consistent with these facts, at the end of the trial, the jury unanimously returned a verdict in favor of Fifth Third. ECF No. 272, PAGEID#8643.

This Court charged the jury to consider the voluntary payment doctrine, "a legal principle that provides that when a plaintiff pays money with full knowledge of all the relevant facts, plaintiff has made that payment voluntarily and is not entitled to any recovery." Jury Instructions, ECF No. 270, PAGEID#8629. The Court also instructed that the parties' disagreement concerned whether Plaintiffs "had a full understanding of all relevant facts." *Id.* Plaintiffs had every opportunity to present their evidence and theories that they lacked this understanding. The jury rejected Plaintiffs' arguments. In view of the facts and law, the jury's verdict was reasonable—indeed, it was the *only* reasonable result. Plaintiffs now ask the Court to disregard the jury's conclusion, throw out the verdict, and grant them either judgment as a matter of law or a partial new trial.

Plaintiffs' lengthy and scattershot motion is a mixture of rehashed arguments, which this Court has rejected multiple times, and brand-new arguments raised now for the *very first time*. These new arguments are obviously waived, and they are in any event meritless, which presumably explains why Plaintiffs did not raise them sooner.

First, Plaintiffs' lead argument, that the voluntary payment doctrine is "equitable" and does not apply because Fifth Third did not act "with clean hands," is raised here for the first time, so it

has been waived. It is also wrong: Plaintiffs cite nothing to suggest the voluntary payment doctrine is an equitable defense under Ohio law or that it is barred by a showing of unclean hands. Even if it were, it would not entitle Plaintiffs to judgment because the evidence did not come close to establishing that Fifth Third acted with unclean hands as a matter of law.

Second, a reasonable jury could (and this reasonable jury did) conclude that the voluntary payment doctrine applied on the evidence presented. Ohio law is clear that the voluntary payment doctrine is a defense to a breach of contract claim when the payor misunderstood a term in the contract but still made the payment with full knowledge of "what is being paid for." *Indus. Fabricators, Inc. v. Nat'l Cash Reg. Corp.*, No. 83AP-13, 1984 WL 4669, at *3 (Ohio Ct. App. Mar. 8, 1984). The jury reasonably concluded that Plaintiffs knew exactly what they were paying for—$1 for every $10 borrowed for early access to their next direct deposits. It heard ample evidence to justify that conclusion.

Third, Plaintiffs are not entitled to judgment as a matter of law on whether Fifth Third effectively removed the APR disclosure in May 2013. This argument is moot because of the jury's verdict as to voluntary payment, but it also fails on its own terms. Plaintiffs waived this argument by not raising it in their Rule 50(a) motion. Even if they had preserved the argument, judgment as a matter of law would be inappropriate because a reasonable jury could conclude that Fifth Third modified the contract in May 2013 when the APR was removed from the contract or, at the latest, in January 2015 when Fifth Third notified customers of fundamental changes in Early Access's payment terms.

Fourth, Plaintiffs are not entitled to a new trial on the voluntary payment defense. The trial record lends no support to Plaintiffs' claim that the verdict was against the weight of the evidence. The instructions were, if anything, favorable to Plaintiffs over Defendant's objection: They instructed that the defense applied only if the Plaintiffs had "full and actual knowledge of the facts,"

Jury Instructions, ECF No. 270, PAGEID#8629, and the Court did not give Fifth Third's proposed instruction that a misunderstanding of a contract does not defeat the defense.

Finally, Plaintiffs' arguments pertaining to the verdict form and Fifth Third's closing argument were also not preserved: Plaintiffs affirmatively waived any challenge to the relevant interrogatory on the verdict form, and they never objected to the statements in closing argument they now challenge. In all events, the verdict form and counsel's comments were entirely consistent with relevant law.

None of Plaintiffs' scattershot arguments can "overcome the substantial deference owed a jury verdict," *Hernandez v. Boles*, 949 F.3d 251, 256 (6th Cir. 2020) (citation omitted), and the motion should be denied in full.

BACKGROUND

The Court is familiar with the facts and procedural history of this case, which "focuses on the amount of money that Fifth Third charged [P]laintiffs" through its Early Access program. *In re Fifth Third Early Access Cash Advance Litig.*, 925 F.3d 265, 274 (6th Cir. 2019). Beginning in 2008, Fifth Third permitted customers to receive an advance on their next qualifying direct deposit in exchange for a flat 10% fee collected at the earlier of when the customers received their next qualifying direct deposit or 35 days. Early Access's 10% fee was spelled out no fewer than ten times in Early Access's Frequently Asked Questions, *see* JX 2009 (FAQs (2011)), ECF No. 137-2, and Terms and Conditions, *see* JX 2006 (T&Cs (2011)), ECF No. 137-1. Customers were required to agree to the terms of the contract when enrolling in the program. *See* Trial Tr. (4/20/23 PM) at 60:4-7, ECF No. 259, PAGEID#7938 (M. Erhardt discussing online enrollment). Then, when taking out each advance, customers had to affirmatively confirm their agreement to be charged a 10% fee before they could receive the advance. *See, e.g.*, JX 2000 (ATM Screenshots), ECF No. 186-2, PAGEID#3934; JX 2001 (Online Screenshots), ECF No. 186-1, PAGEID#3922.

The five named Plaintiffs in this case—Janet Fyock, Brian Harrison, Daniel Laskaris, Lori Laskaris, and Adam McKinney—each used Early Access multiple times, and knowingly paid the 10% fee. They did so without complaint until their counsel suggested a novel interpretation, inconsistent with all prior customer understandings, leading Plaintiffs to contend for the first time that they had been overcharged. *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). Relying on an alleged ambiguity in Early Access's APR disclosure, Plaintiffs' lawsuit alleged they should have been charged no more than an annualized interest rate of 120%. They alleged eighteen causes of action, including breach of contract, fraud, and Truth in Lending Act (TILA) claims.

This Court dismissed all but Plaintiffs' TILA claim on Fifth Third's Rule 12(b)(6) motion. Op. & Order on Mot. to Dismiss, ECF No. 89, PAGEID#1195. As to breach of contract, after highlighting the $1 for $10 fee language, the Court held that "the Terms & Conditions are unambiguous in their explanation as to the method for calculating the APR." *Id.* at PAGEID#1192. The Sixth Circuit, however, reversed the judgment in a divided opinion. Taking all Plaintiffs' allegations as true, the panel majority concluded that the APR language in the contract was "reasonably susceptible of more than one interpretation." *In re Fifth Third Early Access*, 925 F.3d at 280. Importantly, the Sixth Circuit did *not* decide the meaning of the APR disclosure, or decide how to interpret the APR language in light of the $1 for $10 term; it did not determine whether the APR language impacted the cost of the Early Access product; and it did not make any finding that Fifth Third acted with bad intent.

Following remand, the Court certified a breach of contract class.[1] After full fact and expert discovery, both parties then moved for summary judgment. Regarding Fifth Third's voluntary payment defense, Plaintiffs' motion contended that the defense failed because customers did not have a full understanding of the relevant facts. Fifth Third's motion argued that it was entitled to summary judgment on the voluntary payment doctrine because customers had a full understanding of the facts. The Court denied both motions on that issue, finding that factual disputes precluded entry of judgment for either party. Op. & Order on Summ. J., ECF No. 209, PAGEID##6040–57.

During the two-week trial, the jury heard multiple days of evidence from both parties. The evidence included the contract documents and the information customers received at the point of sale, *see* JX 2000 (ATM Screenshots), ECF No. 186-2, PAGEID#3934; JX 2001 (Online Screenshots), ECF No. 186-1, PAGEID#3922, as well as testimony from all five class representatives and four current and former Fifth Third employees.

Not a single fact witness testified they understood the APR language dictated the cost of credit when they entered into the contract. All five class representatives testified they were unaware of or did not understand the APR language until they met with Plaintiffs' attorneys. *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). Instead, each class member understood the cost of the product to be $1 for every $10 borrowed at the time of contract. *See* Trial Tr. (4/18/23 PM) at 140:1-21, ECF No. 253, PAGEID#7472 (McKinney); Trial Tr. (4/19/23) at 34:10-13, ECF No. 255, PAGEID#7527

[1] The Court also certified a separate TILA class and granted Plaintiffs summary judgment on their TILA claim—a strict liability claim—on the basis that Fifth Third did not state that the APR was an estimate. *See* Op. & Order on Summ. J., ECF No. 209, PAGEID##6057–60.

(Harrison); *id.* at 100:16-18, PAGEID#7593 (L. Laskaris); *id.* at 140:4-9, PAGEID#7633 (D. Laskaris); Trial Tr. (4/20/23 AM) at 39:13-24, ECF No. 263, PAGEID#8344 (Fyock).

The jury also heard evidence that customers understood the Early Access fee was the same (10%) regardless of the length of the loan, *see* Trial Tr. (4/19/23) at 50:5-7, ECF No. 255, PAGEID#7543 (Harrison); *id.* at 94:3-9, PAGEID#7587 (L. Laskaris); *id.* at 140:10-13, PAGEID#7633 (D. Laskaris); Trial Tr. (4/20/23 AM) at 39:13-24, ECF No. 263, PAGEID#8344 (Fyock), and knew there was no interest charge associated with advances, *see* Trial Tr. (4/19/23) at 97:4-6, ECF No. 255, PAGEID#7590 (L. Laskaris). Both of these features of Early Access were clearly stated in the contract. *See* JX 2006 (T&Cs (2011)), ECF No. 137-1, PAGEID#1641; JX 2009 (FAQs (2011)), ECF No. 137-2, PAGEID#1649.

The jury also heard testimony from both sides' expert witnesses. Relevant here, Fifth Third's data expert, Timothy Hart, and Plaintiffs' damages calculations expert, Arthur Olsen, testified about the frequency with which customers used the Early Access product. Mr. Hart explained, without contradiction, that 95.7% of all Early Access advances in the class period were taken by customers who used the product more than 10 times, and 99.7% were taken by customers who had used the product more than once. Trial Tr. (4/24/23) (testimony of T. Hart).[2] Mr. Olsen testified that the average class member used the product more than 67 times. Trial Tr. (4/20/23 AM) at 107:1-4, ECF No. 263, PAGEID#8412. In short, the jury heard ample evidence that customers understood and were satisfied with the 10% fixed fee they paid.

At the close of evidence, Plaintiffs moved for judgment as a matter of law solely as to Fifth Third's voluntary payment doctrine defense, contending that Fifth Third presented insufficient evidence that customers made payment with a full understanding of the facts. Plaintiffs did not

[2] The transcript for this testimony is not yet available.

argue (either orally or in their written submission) that Fifth Third was categorically barred from asserting this "equitable" defense because it acted with unclean hands. Nor did Plaintiffs move for judgment as a matter of law as to whether Fifth Third was liable for damages after the APR disclosure was removed from the contract in May 2013. *See* Plfs.' Bench Brief (Voluntary Payment Doctrine), ECF No. 268-1; Trial Tr. (4/25/23) at 177:15-182:7, ECF No. 275, PAGEID##8824–29. The Court denied Plaintiffs' motion from the bench. *See* Trial Tr. (4/25/23) at 182:8, ECF No. 275, PAGEID#8829.

The jury returned a verdict in favor of Fifth Third on April 27, 2023. That same day, this Court entered judgment in accordance with the verdict. ECF No. 273.

ARGUMENT

During more than a decade of litigation, Plaintiffs have had every opportunity to develop evidence and argue to the Court why they are entitled to judgment as a matter of law on their breach of contract claim, including on Fifth Third's voluntary payment defense. This Court, however, repeatedly concluded that these arguments were issues of fact for the jury to resolve. Op. & Order on Summ. J., ECF No. 209, PAGEID#6060. At a nearly two-week trial, both sides presented their arguments to the jury. The jury sided with Fifth Third.

Plaintiffs now ask this Court to vacate the jury's verdict and either enter judgment as a matter of law against Fifth Third or grant them a partial new trial on the basis of arguments that have either been considered and rejected by this Court, or are raised for the *very first time* in this motion. Plaintiffs' meritless and waived arguments cannot "overcome the substantial deference owed a jury verdict." *Radvansky v. City of Olmsted Falls*, 496 F.3d 609, 614 (6th Cir. 2007).

I. Plaintiffs Are Not Entitled to Judgment as a Matter of Law as to the Voluntary Payment Doctrine or the Notice Issue.

Federal Rule of Civil Procedure 50(a) provides that "[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient

evidentiary basis to find for the party on that issue, the court may . . . resolve the issue against the party," and Rule 50(b) permits parties to renew that motion after entry of judgment. When evaluating sufficiency of the evidence in diversity cases, courts are to apply "the standard of review used by the courts of the state whose substantive law governs the action." *Caudill Seed & Warehouse Co. v. Jarrow Formulas, Inc.*, 53 F.4th 368, 379 (6th Cir. 2022) (citation omitted). Ohio law therefore supplies the standard here.

Under Ohio law, "[t]he evidence adduced at trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party against whom the motion [for judgment notwithstanding the verdict] is made." *Matus v. Lorain Cnty. Gen. Health Dist.*, 707 F. App'x 304, 312 (6th Cir. 2017) (citation omitted). "[W]here there is substantial evidence to support [the non-movant's] side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied. Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination." *Id.* (citation omitted); *Young v. Gannett Satellite Info. Network, Inc.*, No. 1:10CV483, 2012 WL 3072147, at *2 (S.D. Ohio July 30, 2012) (Barrett, J.) (citations omitted), *aff'd*, 734 F.3d 544 (6th Cir. 2013).

A. The Court Should Deny Plaintiffs' Renewed Motion for Judgment as a Matter of Law as to the Voluntary Payment Doctrine.

1. Plaintiffs' argument that Fifth Third's "unclean hands" preclude application of the voluntary payment doctrine is waived and incorrect as a matter of law.

For the very first time in this ten-year litigation, Plaintiffs contend Fifth Third cannot invoke the "equitable" voluntary payor defense because Fifth Third did not act "with clean hands." This argument is waived and, in any event, meritless.

a. Plaintiffs waived any argument that Fifth Third's voluntary payment defense is barred by unclean hands.

The Federal Rules of Civil Procedure "tell parties to speak up at two times if they want the court to resolve the claim as a matter of law. They *must* move for judgment as a matter of law before the claim goes to the jury, and they *must* renew the motion (or seek a new trial) after the jury issues its verdict." *Maxwell v. Dodd*, 662 F.3d 418, 420–21 (6th Cir. 2011) (emphases added) (citations omitted). That is, "[a] Rule 50(b) motion is only a renewal of the preverdict motion, and it can be granted only on grounds advanced in the preverdict motion." *Hanover Am. Ins. Co. v. Tattooed Millionaire Ent., LLC*, 974 F.3d 767, 780 (6th Cir. 2020) (cleaned up); *see also Kay v. United of Omaha Life Ins. Co.*, 709 F. App'x 320, 328 (6th Cir. 2017).

Plaintiffs did not argue in their Rule 50(a) motion that Fifth Third cannot avail itself of Ohio's robust voluntary payment doctrine because it has unclean hands. Instead they focused their directed verdict argument on whether there was an evidentiary basis to conclude customers made payments with a full understanding of the facts. *See* Plfs.' Bench Brief (Voluntary Payment Doctrine), ECF No. 268-1; Trial Tr. (4/25/23) at 177:15-182:7, ECF No. 275, PAGEID##8824–29. Plaintiffs' argument that Fifth Third cannot avail itself of the voluntary payment doctrine because it has unclean hands is thus waived. *See, e.g.*, *Kay*, 709 F. App'x at 328–29 (party waived argument by not asserting it in Rule 50(a) motion); *Blues To You, Inc. v. Auto-Owners Ins. Co.*, No. 1:21-CV-00165, 2022 WL 9753916, at *17 (N.D. Ohio Oct. 17, 2022) (same); *Nekkanti v. V-Soft Consulting Grp., Inc.*, No. 3:18-CV-784-BJB-RSE, 2022 WL 1504832, at *1 (W.D. Ky. May 12, 2022) (same); *Campbell v. Gause*, No. 10-11371, 2019 WL 1434302, at *2 (E.D. Mich. Mar. 31, 2019) (same).

Although the absence of a Rule 50(a) motion is sufficient to find the issue waived, we note that Plaintiffs did not raise this issue in any other way either—for example, they did not move for

summary judgment,[3] or request a jury instruction to the effect that the jury could find in their favor on voluntary payment if it concluded that Fifth Third had unclean hands. In short, this issue is waived many times over.

b. Plaintiffs are wrong that Ohio's voluntary payment doctrine is equitable or susceptible to an unclean hands exception.

Even if Plaintiffs had not waived, their argument that Fifth Third cannot avail itself of this "equitable" defense is incorrect.

There is no question that the voluntary payment defense is "an 'ancient' doctrine adopted by many states" with "common-law roots derived from English law." *Hazelwood v. Bayview Loan Servicing, LLC*, No. 1:20-cv-726, 2021 WL 664059, at *2 (S.D. Ohio Feb. 19, 2021) (citation omitted), *R. & R. adopted*, No. 1:20cv726, 2021 WL 1019936 (S.D. Ohio Mar. 17, 2021). But it nevertheless is "not uniformly applied." *Wells Fargo Bank v. Deerbrook Mall, LLC*, No. H-21-1519, 2021 WL 5054644, at *4 (S.D. Tex. Nov. 1, 2021). For instance, "[t]he doctrine is a common law defense in some states and codified by statute in others." *Id.* There are also variations in the types of claims to which it operates as a defense, *see id.* ("In some states, the voluntary payment doctrine does not apply to breach of contract actions, and in others, it does."), as well as the test that must be satisfied for it to bar a claim, *compare*, *e.g.*, *Hyper Bicycles, Inc. v. Acctel, Ltd.*, 22cv1601 (DLC), 22cv3308 (DLC), 2023 WL 2267041, at *5 (S.D.N.Y. Feb. 28, 2023) ("The doctrine does not apply, however, when a plaintiff made payments under a mistake of fact *or law* . . . ." (emphasis added)), *with Pittsfield Dev., LLC v. Travelers Indem. Co.*, 542 F. Supp. 3d 791, 800 (N.D. Ill. 2021) ("The doctrine, stated

[3] In fact, their summary judgment arguments were flatly inconsistent with their current argument, because they conceded that the voluntary payment doctrine may apply to the named Plaintiffs' post-lawsuit advances after they had consulted with counsel. *See* Plfs.' Mot. for Summ. J., ECF No. 172, PAGEID#2693. Plaintiffs did not mention "unclean hands."

succinctly, maintains that 'absent fraud, coercion, or mistake of fact, monies paid under a claim of right to payment but *under a mistake of law* are not recoverable." (emphasis added) (cleaned up)).

Ohio applies a particularly robust—even "harsh"—version of the voluntary payment doctrine. *Nationwide Life Ins. Co. v. Myers*, 425 N.E.2d 952, 956 (Ohio Ct. App. 1980) ("The Ohio rule may be a harsh doctrine, but we have lived with it for a long time."). In Ohio, "[i]n the absence of fraud, duress, compulsion or mistake of fact, money, voluntarily paid by one person to another on a claim of right to such payment, cannot be recovered merely because the person who made the payment mistook the law as to his liability to pay." *State ex rel. Dickman v. Defenbacher*, 86 N.E.2d 5, 7 (Ohio 1949). It has been applied consistently in this state for over a century. *See*, *e.g.*, *Salling v. Budget Rent-A-Car Sys., Inc.*, 672 F.3d 442, 443 (6th Cir. 2012); *Porterfield v. Zeve (In re Est. of Kangesser)*, 247 N.E.2d 724, 725–26 (Ohio 1969); *City of Cincinnati v. Cincinnati Gaslight & Coke Co.*, 41 N.E. 239, 242 (Ohio 1895); *Consol. Mgmt., Inc. v. Handee Marts, Inc.*, 671 N.E.2d 1304, 1307 (Ohio Ct. App. 1996); *Luebke v. Moser*, 598 N.E.2d 760, 762 (Ohio Ct. App. 1991); *Clawson v. Prop. Sys. Co.*, No. 87AP-503, 1987 WL 18763, at *3 (Ohio Ct. App. Oct. 22, 1987); *In re Barnett's Est.*, 186 N.E.2d 879, 880 (Ohio Prob. Ct. 1962). And unlike in some states, the Ohio rule applies in breach of contract cases. *E.g.*, *Salling*, 672 F.3d at 445; *Hazelwood*, 2021 WL 664059, at *2–4.

Plaintiffs do not cite a single case holding that *under Ohio law* the voluntary payment doctrine is an equitable defense or that "unclean hands" abrogates the voluntary payment defense. In Ohio, the voluntary payment doctrine is a "common law rule"—"*not* a claim of equity." *Nationwide Life Ins.*, 425 N.E.2d at 956 (emphasis added); *see also Newport & Cincinnati Bridge Co. v. Hamilton Cnty. Comm'rs*, 1883 WL 6723, at *2 (Ohio Dist. Jan. 1, 1883) ("It is well settled that where a party makes a voluntary payment, no *process of the law* can be had to recover it back, unless the payment was made through a mistake of fact; for where a party with a full knowledge of the facts . . . voluntarily parts with his money, the court will not give relief, because *courts of law* are not organized for the purpose

of correcting mistakes of people who have full opportunity of knowing their rights." (emphases added)). Plaintiffs' out-of-jurisdiction cases are thus inapposite.[4] In Ohio, there is no legal basis to suggest that unclean hands precludes a litigant from invoking the doctrine.

In fact, Plaintiffs have not cited a single case from *any* jurisdiction which concluded a litigant could not avail themselves of the voluntary payment doctrine because they had "unclean hands." Many of Plaintiffs' cases involve different affirmative defenses entirely. *See, e.g.*, *Osborn v. Griffin*, 865 F.3d 417, 450–52 (6th Cir. 2017) (laches); *Ohio State Bd. of Pharmacy v. Frantz*, 555 N.E.2d 630, 633 (Ohio 1990) (estoppel). That unclean hands applies to one equitable defense does not mean it applies to all other equitable defenses, even if the voluntary payment doctrine were an equitable defense (which it is not). Plaintiffs also cite caselaw from around the country that merely demonstrates a litigant cannot prevail on the voluntary payment doctrine if their opponent did not have a full understanding of the facts, not that litigants with "unclean hands" cannot invoke the doctrine. *See, e.g.*, *McCracken v. Verisma Sys., Inc.,* 131 F. Supp. 3d 38, 50 (W.D.N.Y. 2015); *Spiro v. Healthport Technologies, LLC*, 73 F. Supp. 3d 259, 276 (S.D.N.Y. 2014). These are entirely different propositions.

c. In any event, Plaintiffs are wrong to suggest that Fifth Third has unclean hands, much less as a matter of law.

Finally, even assuming the voluntary payment doctrine were barred by a party's unclean hands, Plaintiffs cannot obtain judgment as a matter of law unless they show that Fifth Third acted with unclean hands *as a matter of law*, such that no reasonable jury could find otherwise. *See supra* pp. 7–8. Any such suggestion is frivolous. "For the doctrine of unclean hands to apply, the offending conduct must constitute *reprehensible, grossly inequitable, or unconscionable conduct*, rather than mere

[4] *Cf. Best Buy Stores, L.P. v. Benderson-Wainberg Assocs., L.P.*, 668 F.3d 1019, 1029 (8th Cir. 2012) (Minnesota law); *Russ v. Apollo Grp., Inc.*, No. CV 09-904-VBF(FMOx), 2010 WL 11515297, at *4 (C.D. Cal. Mar. 19, 2010) (California law).

negligence, ignorance, or inappropriateness." *Deutsche Bank Natl. Tr. Co. v. Pevarski*, 932 N.E.2d 887, 894 (Ohio Ct. App. 2010) (emphasis added) (cleaned up). "Fraud or unclean hands are not to be lightly inferred [and] must be established by clear, unequivocal and convincing evidence." *Hoover Transp. Servs., Inc. v. Frye*, 77 F. App'x 776, 784 (6th Cir. 2003) (citation omitted).

Here, particularly construing the evidence "most strongly" in Fifth Third's favor, *see Matus*, 707 F. App'x at 312, reasonable minds could easily disagree with Plaintiffs' contentions that Fifth Third engaged in reprehensible, grossly inequitable, or unconscionable conduct. Indeed, Plaintiffs' claim of unclean hands is unsupported by any evidence beyond speculation and innuendo. Plaintiffs' fraud claims were dismissed on the pleadings, *see* Op. & Order on Mot. to Dismiss, ECF No. 89, PAGEID##1194–95; and they offered no actual evidence suggesting Fifth Third acted in bad faith or that Fifth Third intentionally misstated the APR to gain market share. Although Plaintiffs seek to draw an inference of bad faith from the allegedly misleading contract documents, the suggestion that no reasonable jury could disagree with them ignores that *this Court, as well as one of three judges on the Sixth Circuit panel*, thought the contract was sufficiently clear to dismiss the breach of contract claim at the pleading stage. *See In re Fifth Third Early Access*, 925 F.3d at 281 (Larsen, J., dissenting in part) (APR definition was "idiosyncratic but abundantly clear"); Op. & Order on Mot. to Dismiss, ECF No. 89, PAGEID#1192. In short, the evidence at issue here is far afield from the sort of conduct that would suggest Fifth Third had unclean hands, as Plaintiffs' own case law demonstrates. *Cf., e.g.*, *Osborn*, 865 F.3d at 451 (discussing "intentional wrongful conduct"); *Transp. Ins. Co. v. Busy Beaver Bldg. Ctrs., Inc.*, 969 F. Supp. 2d 875, 890 n.28 (S.D. Ohio 2013) (discussing litigant who "violated conscience or good faith or has acted fraudulently" (citation omitted)); *State ex rel. Mallory v. Pub. Emp. Ret. Bd.*, 694 N.E.2d 1356, 1363 (Ohio 1998) (discussing a "knowing violation of applicable law").

Neither this Court's TILA ruling nor the Sixth Circuit's decision suggests otherwise. As to the former, a technical departure from a strict liability statute falls far short of what is required to establish unclean hands. *See Deutsche Bank Nat'l. Tr. Co.*, 932 N.E.2d at 894 ("negligence, ignorance, or inappropriateness" insufficient to establish unclean hands (citation omitted)). And as to the latter, no part of the Sixth Circuit's decision suggests that Fifth Third acted with malicious intent. For one thing, the Sixth Circuit decided whether the case should be dismissed on the pleadings—it made no factual findings about anything, much less about Fifth Third's subjective intent, as to which no evidence was before the Court. For another, the Court's ruling says nothing about unclean hands. Plaintiffs quote Sixth Circuit language that the APR formula was the "most misleading of all." *See, e.g.*, Mot., ECF No. 284, PAGEID##9424, 9427, 9436, 9439. But that was a reference to the face of the contract, which made the APR language ambiguous in the panel's view. The panel majority in no way suggested Fifth Third acted intentionally or fraudulently.

The trial evidence demonstrates there would have been no basis for such a conclusion in any event. Fifth Third launched a product with a 10% flat fee. It disclosed an APR of 120% in the absence of any obvious or settled way to accurately calculate the APR for this variable loan product that lacked an interest rate or pre-determined loan duration. *See* Trial Tr. (4/21/23) at 50:2-51:6, ECF No. 262, PAGEID##8122–23 (testimony of C. Grice). Plaintiffs did not provide "clear, unequivocal and convincing evidence" that Fifth Third acted with unclean hands, *Hoover Transp. Servs.*, 77 F. App'x at 784 (citations omitted), and certainly did not establish that proposition as a matter of law.

2. Plaintiffs are not entitled to judgment as a matter of law as to the voluntary payment doctrine because a reasonable jury could and did conclude that the doctrine applied.

As a back-up position, Plaintiffs renew their argument from their Rule 50(a) motion that no reasonable jury could conclude that Plaintiffs had full knowledge of the facts. Mot., ECF No. 284,

PAGEID##9441–48. The Court already denied this argument once, and for good reason: "Whether a person made a payment voluntarily, with full knowledge of the facts at issue, is primarily an issue of fact," *Fox v. TransUnion, LLC*, No. 1:17-cv-362, 2018 WL 11433351, at *3 (S.D. Ohio Aug. 1, 2018), and the evidence adduced during trial demonstrated that Plaintiffs' payments were made voluntarily. At a minimum, when the evidence at trial is viewed "most strongly" in Fifth Third's favor, a reasonable juror could so find. *Matus*, 707 F. App'x at 312 (citations omitted).

First, each and every advance was preceded by the customer's confirmation of *exactly* what they would pay for that advance: the principal plus a 10% transaction fee, set forth to the dollar and penny. To have the funds transferred to their account, the customer had to *affirmatively authorize* the bank to charge them that fee. *See* JX 2001 (Online Account Screenshots), ECF No. 186-1, PAGEID#3922 ("I agree to pay to the order of Fifth Third Bank the amount of $x.xx on or before 35 days from today's date."); *see also* Trial Tr. (4/20/23 PM) at 89:1-8, ECF No. 259, PAGEID#7967 (M. Erhardt confirming the same language appeared on advances taken by ATM, phones, or in person). As Mr. Mendelsohn testified, this language—also found on checks—is commonly used by banks when their customers agree to pay a specific amount of money. Trial Tr. (4/24/23) (testimony of B. Mendelsohn).[5] It was also undisputed that customers actually did pay the exact amount they authorized to be charged ($1 for every $10, or a 10% fee). *E.g.*, Trial Tr. (4/18/23) at 140:1-7, ECF No. 253, PAGEID#7472.

Second, the class representatives all testified that they *knew* at the time they took out advances that they were agreeing to pay $1 for each $10 borrowed. *See id.* at 140:1-21, PAGEID#7472 (McKinney); Trial Tr. (4/19/23) at 34:10-13, ECF No. 255, PAGEID#7527 (Harrison); *id.* at 100:16-18, PAGEID#7593 (L. Laskaris); *id.* at 140:4-9, PAGEID#7633 (D. Laskaris); Trial Tr.

[5] The transcript for this testimony is not yet available.

(4/20/23 AM) at 39:13-24, ECF No. 263, PAGEID#8344 (Fyock). They also knew that the cost of using the program did not turn on the length of the advance, meaning they *knew* the cost of the advance would be the same over any period of time up to 35 days. Trial Tr. (4/19/23) at 50:5-7, ECF No. 255, PAGEID#7543 (Harrison); *id.* at 94:3-9, PAGEID#7587 (L. Laskaris); *id.* at 140:10-13, PAGEID#7633 (D. Laskaris); Trial Tr. (4/20/23 AM) at 39:13-24, ECF No. 263, PAGEID#8344 (Fyock). Thus, they knew they were not paying an APR or interest rate. In fact, there was no evidence to suggest that even a single customer considered or relied upon the APR disclosure at the point of sale or at any other point. The argument that customers were "mistaken" or "misled" about what they would pay is false. Plaintiffs understood what they would be charged and what they were paying for.

Third, all of the named Plaintiffs, as well as the overwhelming majority of class members, used Early Access over and over again. A total of 95.7% of all Early Access advances in the class period were taken by customers who used the product more than 10 times, and 99.7% were taken by customers who had used the product more than once. Trial Tr. (4/24/23) (testimony of T. Hart).[6] The average class member used the product more than 67 times. Trial Tr. (4/20/23 AM) at 107:1-4, ECF No. 263, PAGEID#8412. The Laskarises, in fact, used it more than 150 times. Trial Tr. (4/19/23) at 123:11-16, ECF No. 255, PAGEID#7616. In other words, these customers, after using the program once and seeing on their bank statements what they were charged, went back and used the program again and again.

In light of all this compelling evidence, the jury determined that the voluntary payment doctrine barred Plaintiffs' claims. Plaintiffs' primary response is that they did not apprehend that the amount they were agreeing to pay exceeded 120% APR calculated on an annualized basis. Mot.,

[6] The transcript for this testimony is not yet available.

ECF No. 284, PAGEID##9436, 9441. Even assuming that were true—and, as explained below, the jurors may well have found otherwise—it would not matter. Customers understood they would be charged $1 for every $10 for early access to their direct deposit, and that is what they voluntarily paid. In any event,"[a] payment made by reason of a wrong construction of the terms of a contract is not made under a mistake of fact, but under a mistake of law." *Scott v. Fairbanks Cap. Corp.*, 284 F. Supp. 2d 880, 894 (S.D. Ohio 2003) (citations omitted); *see Salling*, 672 F.3d at 445 (same). In Ohio, a mistake of law includes *a misunderstanding of the contract price*. *Indus. Fabricators*, 1984 WL 4669, at *3–4.[7]

Indus. Fabricators is instructive. The sale contract for metal parts for a cash register contained an ambiguity as to whether the contract's price was calculated on a per-unit or per-part basis—a "unit" being made up of one or more "parts." *Id.* at *2, *6. The jury found that the contract's price was calculated on a per-unit basis, not a per-part basis, meaning the claimant had overpaid. *Id.* at *6. But the purchase orders made clear that "the billing was made upon a per-part basis." *Id.* at *2. The trial court denied relief and the appellate court determined that the voluntary payment doctrine barred the claimant's demand for reimbursement for an alleged overpayment as a matter of law. The appellate court held that "there was overpayment, not by a mistake as to what is being paid for but, rather, by a mistake as to the terms of the contract, namely, the contract price"; that "mistake is one of law, not of fact." *Id.* at *3. Thus, similar to the purchase orders in that case, even if the Plaintiffs here had been overcharged under the contract, they got exactly what they agreed to at the point of sale: the use of borrowed funds for up to 35 days at a 10% fee. This case is thus

[7] Plaintiffs spend three pages in their motion attacking a strawman, arguing that the voluntary payment doctrine does not apply if Plaintiffs do not have the relevant knowledge *at the time of payment*. Mot., ECF No. 284, PAGEID##9445–48. But Fifth Third has never argued otherwise. At the time of payment, Plaintiffs knew the relevant facts: they knew they were paying $1 for every $10 borrowed. It does not matter that they allegedly did not have a full understanding of the *law*—their rights under the contract—until they later spoke to lawyers.

distinguishable from those cited by Plaintiffs, where customers were charged fees without prior notice or explanation of what they were paying. *See Arlington Video Prods., Inc. v. Fifth Third Bancorp*, 569 F. App'x 379, 389–90 (6th Cir. 2014); *Carter v. CIOX Health, LLC*, 260 F. Supp. 3d 277, 289–90 (W.D.N.Y. 2017).[8]

Wears Kahn McMenamy & Co. v. JPMorgan Chase Bank, N.A., is also on point. No. 2:12-cv-812, 2013 WL 1689030, at *9 (S.D. Ohio Apr. 18, 2013). There, the plaintiff entered into a variable interest rate commercial loan from the defendant bank, which sent the plaintiff monthly invoices detailing the calculation of the total interest accruing during that month's billing cycle. *Id.* at *1. The plaintiff later brought a breach of contract action alleging that the bank overcharged it by mishandling the interest charges, and the bank moved to dismiss under the voluntary payment doctrine. *Id.* at *2–3. The "central issue" was whether the plaintiff had full knowledge of the pertinent facts, with the plaintiff asserting that the monthly invoices were "misleading" because they did not expressly detail how the bank was applying the excess interest charges. *Id.* at *4, *6 (citation omitted). The court rejected this argument, holding that even though the invoices did not expressly state the way that the excess interest was calculated, "[a]ll pertinent information was in Plaintiff's possession" to make this calculation from the face of the invoices. *Id.* at *6. That was dispositive because, "[w]hen a party with knowledge of the facts, but without legal liability to do so, pays money

[8] Even if *Carter* were not inapposite on its facts, it would be improper to rely on New York case law for this issue. By statute in New York, "the voluntary payment doctrine does not preclude recovery when a payment is made under *a mistake of law* or under a mistake of fact," which is not the law in Ohio. *Caro Cap., LLC v. Koch*, 20-cv-6153(LJL), 2023 WL 1103668, at *14 (S.D.N.Y. Jan. 30, 2023) (emphasis added) (citing N.Y. C.P.L.R. 3005)). Plaintiffs' reliance on *Cox v. Porsche Fin. Servs., Inc.*, 337 F.R.D. 426, 430 (S.D. Fla. 2020), is improper because the Florida legislature has prohibited the application of the voluntary payment doctrine in contract actions, *see* Fla. Stat. § 725.04, a limitation that does not exist in Ohio. In addition, the defendant in that case claimed the voluntary payment doctrine precluded recovery under Florida's Deceptive and Unfair Trade Practices Act, circumstances that required the defendant to make a heightened showing as to the plaintiffs' knowledge of the facts.

voluntarily, that person has no claim to recovery for the monies so paid." *Id.* at *4 (citations omitted).

The facts in this case are even more stark: Plaintiffs did not just passively acquiesce to what they were charged after the fact when they received their monthly statements; they affirmatively acknowledged and authorized each charge. *See supra* p. 15. Their voluntary payments were thus (at most) the result of a wrong construction of the terms of the contract, not a mistake of fact. *See Scott*, 284 F. Supp. 2d at 894. To repeat: There was no mistake about the bargain they believed they were getting: a short-term loan at a fee of $1 for every $10 borrowed. Thus, the jury reasonably concluded that the voluntary payment doctrine barred their claim. *See Salling v. Budget Rent-A-Car*, No. 1:09-CV-2160, 2010 WL 2803081, at *8 (N.D. Ohio July 14, 2010) ("In this case, the facts most favorable to Salling show he proceeded under a mistake in the construction of the contract's terms [which] . . . is not made under a mistake of fact, but under a *mistake of law*, and if voluntary cannot be recovered back . . . . Thus, because Salling's claim for fraud has failed, and because there is no additional evidence of duress or coercion, this court must apply the voluntary payment doctrine.").

Finally, even if Plaintiffs were correct that a misunderstanding about the meaning of the APR in the contract is a mistake of fact, not law (and they are not), a reasonable jury still could have found in Fifth Third's favor. As Plaintiffs' own expert testified, an APR is an annualized number, meaning that it varies based on the length of time a loan is outstanding. Trial Tr. (4/18/23 AM) at 38:5-9, ECF No. 253, PAGEID#7370. But as explained above, Plaintiffs testified that they knew that the cost of using the program *did not turn on the length of the advance*, meaning they knew that they were not always paying an annualized interest rate of 120%. Trial Tr. (4/19/23) at 50:5-7, ECF No. 255, PAGEID#7543 (Harrison); *id.* at 94:3-9, PAGEID#7587 (L. Laskaris); *id.* at 140:10-13, PAGEID#7633 (D. Laskaris); Trial Tr. (4/20/23 AM) at 39:13-24, ECF No. 263, PAGEID#8344 (Fyock). Plaintiffs also testified that they knew exactly how much they paid in relation to how much

they borrowed (10%). The contract was also clear that "*there is no interest charge associated with an advance*." JX 2009 (FAQs (2011)), ECF No. 137-2, PAGEID#1649 (emphasis added); *see* Trial Tr. (4/19/23) at 97:4-6, ECF No. 255, PAGEID#7590 (L. Laskaris) (acknowledging the same). For this reason as well, Plaintiffs' motion for judgment as a matter of law as to the voluntary payment doctrine should be denied.

B. The Court Should Deny Plaintiffs' "Renewed" Motion for Judgment as a Matter of Law on the Notice Issue.

Plaintiffs separately contend they are entitled to judgment as a matter of law on the issue of notice of the APR's removal from the contract because Fifth Third "failed to carry its burden to prove that it properly modified the Early Access Loan Agreement" in May 2013. Mot., ECF No. 284, PAGEID#9448. Because Plaintiffs are not entitled to judgment as a matter of law or a new trial as to the voluntary payment doctrine, which disposes of their entire case, their arguments pertaining to the notice issue are moot. But even if the Court were to consider Plaintiffs' motion as to notice, the motion should be denied.

First, Plaintiffs waived this issue by failing to raise it in their Rule 50(a) motion. *See Maxwell*, 662 F.3d at 420–21. As discussed above, "[a] Rule 50(b) motion is only a *renewal* of the preverdict motion, and it can be granted only on grounds advanced in the preverdict motion." *Hanover Am. Ins. Co.*, 974 F.3d at 780 (emphasis added) (cleaned up); *see also Kay*, 709 F. App'x at 328. Plaintiffs did not move for judgment as a matter of law on the notice issue during trial. Their Rule 50(a) motion was devoted exclusively to the evidence concerning Fifth Third's voluntary payment doctrine defense. *See* Plfs.' Bench Brief (Voluntary Payment Doctrine), ECF No. 268-1, PAGEID##8595–8603; Trial Tr. (4/25/23) at 177:15-182:7, ECF No. 275, PAGEID##8824–29. Their arguments pertaining to the notice issue are thus waived. *See Blues To You*, 2022 WL 9753916, at *17.

Second, Plaintiffs are wrong on the merits. A reasonable jury could easily conclude that the APR language was no longer part of the contract after Fifth Third deleted that language from the

Terms and Conditions in May 2013 or (at the latest) in January 2015 when Fifth Third substantially revamped the Early Access program after sending formal notification to its customers.[9] For example, the jury heard from Thomas Carpenter, who oversaw the Early Access program from 2011 through 2016. *See* Trial Tr. (4/21/23) at 157:3-7, ECF No. 262, PAGEID#8229. He testified that the Terms and Conditions and Frequently Asked Questions were made available to customers on Fifth Third's website at all times. *Id.* at 185:23-186:12, PAGEID##8257–58. He also explained that, prior to January 2015, customers received a formal, mailed notice that the cost of the Early Access program was changing along with an updated version of the Early Access Terms and Conditions. *See id.* 186:16-189:6, PAGEID##8258–61; *see* DX 1152, ECF No. 186-5, PAGEID#3958. Mr. Carpenter also responded affirmatively to a juror's question that he "believe[d] Fifth Third upheld all terms of the contract, including notices of changes to customers." Trial Tr. (4/21/23) at 224:9-13, ECF No. 262, PAGEID#8296. Ms. Fyock also confirmed that she received an email (DX 1089) in December 2014 advising her that the cost of Early Access would be changing from $1 for every $10 to $3 for every $100. *See* Trial Tr. (4/20/23 AM) at 50:2-52:5, ECF No. 263, PAGEID##8355–57. Collectively, this evidence would easily allow a reasonable jury to conclude that Fifth Third complied with the notice provision of the contract in May 2013 or, at the latest, in January 2015.

This Court reached a similar conclusion when it rejected Plaintiffs' motion for summary judgment on the same issue of notice. *See* Op. & Order on Summ. J., ECF No. 209, PAGEID##6054–56. Then, as now, Plaintiffs moved for entry of judgment as to the notice issue

[9] That is so regardless of which party bore the burden of proof, but in fact Plaintiffs also are incorrect to assert that it was *Fifth Third's* burden to prove the contract was "modified." Mot., ECF No. 284, PAGEID#9451. The operative question is not contract modification but whether Fifth Third *breached* the contract with its customers each time they took out an advance after May 2013. The elements of breach of contract are Plaintiffs' burden to prove, including the meaning of the contract at the time of the breach.

without citing a single case from any jurisdiction dealing with the removal of an APR provision and the effect that action had on each contracting party's obligations. Then, as now, Plaintiffs cited a series of insurance contract cases, *see, e.g.*, *MDC Acquisition Co. v. Traveler's Prop. Cas. Co. of Am.*, 545 F. App'x. 398, 400 (6th Cir. 2013); *J.R. Roberts & Son v. Nat'l Ins. Co.*, 25 Ohio C.D. 212, 217 (Ct. App. 1914), and travel ticket cases, *see Barbachym v. Costa Line, Inc.*, 713 F.2d 216, 218 (6th Cir. 1983); *Silvestri v. Italia Societa Per Azioni Di Navigazione*, 388 F.2d 11, 17 (2d Cir. 1968), and argued that the Early Access contract required "direct notice" of any changes, Mot., ECF No. 284, PAGEID##9451–53. (The term "direct notice" does not appear anywhere in the contract.) This Court denied summary judgment: "Even if the Court were to adopt the [insurance] analogy proposed by Plaintiffs," Plaintiffs failed to "demonstrate the absence of any genuine issue of material fact concerning such notice." Op. & Order on Summ. J., ECF No. 209, PAGEID#6055. Similarly here, on materially identical evidence and a more favorable standard for Fifth Third, the Court should deny Plaintiffs' request to resolve the notice issue in their favor as a matter of law. *See Matus*, 707 F. App'x at 312.

II. Plaintiffs' Motion for a Partial New Trial Should Be Denied.

In the alternative to judgment as a matter of law, Plaintiffs seek a partial new trial addressing the voluntary payment doctrine and damages. Under Rule 59(a) a new trial is warranted only when the "jury has reached a 'seriously erroneous result' as evidenced by: (1) the verdict being against the weight of the evidence; (2) the damages being excessive; or (3) the trial being unfair to the moving party in some fashion, *i.e.*, the proceedings being influenced by prejudice or bias." *Caudill Seed & Warehouse Co.*, 53 F.4th at 379. "[N]ew trials are not to be granted on the grounds that the verdict was against the weight of the evidence 'unless that verdict was unreasonable.'" *Barnes v. Owens-Corning Fiberglas Corp.*, 201 F.3d 815, 820–21 (6th Cir. 2000) (citation omitted). "[C]ourts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn

different inferences or conclusions or because judges feel that other results are more reasonable." *Id.* (citation omitted). For that reason, "granting a new trial on this ground is a rare occurrence." *Armisted v. State Farm Mut. Auto. Ins. Co.*, 675 F.3d 989, 995 (6th Cir. 2012). Here, the trial record requires no such extraordinary relief.

A. The Jury's Verdict as to the Voluntary Payment Doctrine Was Not Against the Weight of the Evidence.

For the same reasons stated in section I.A.2 above, Plaintiffs are wrong that the jury's verdict on the voluntary payment doctrine was against the weight of the evidence. To the contrary, it was the *only* reasonable conclusion. Plaintiffs uniformly testified that they believed that they were agreeing to pay a fee of $1 for $10 for early access to their next direct deposit and did, in fact, pay $1 for $10. *See supra* pp. 15–16. They did not believe that the fee would vary based on the length of the advance, which means they knew they were not being charged based on an annualized percentage rate. *See supra* pp 19–20. And each and every time customers took an advance, they affirmatively reconfirmed their agreement to pay $1 for every $10 advanced. *See supra* p. 15. In short, there was ample evidence to support the jury's verdict, and there is certainly no basis to conclude that the jury reached "a seriously erroneous result." *Caudill Seed & Warehouse Co.*, 53 F.4th at 379.

B. Plaintiffs' Challenge to the Jury Instructions Is Meritless.

Plaintiffs next demand a partial new trial based on their assertion that the Court's voluntary payment doctrine jury instructions were "deficient, confusing, and prejudicial." Mot., ECF No. 284, PAGEID#9455. This argument also fails.

A court's inquiry into jury instructions "is limited to whether, taken as a whole, the instructions adequately inform the jury of the relevant considerations and provide the jury with a sound basis in law with which to reach a conclusion." *Pivnick v. White, Getgey & Meyer Co., LPA*, 552 F.3d 479, 488 (6th Cir. 2009) (citation omitted). Even if an instruction was erroneous, no reversal is required unless the instructions are "confusing, misleading, and prejudicial." *Id.* Courts will "not

reverse a decision on the basis of an erroneous jury instruction where the error is harmless"—that is, if the "jury would [not] have been so misled or confused . . . that a different outcome would have ensued." *Id.*; *see Roberts ex rel. Johnson v. Galen of Virginia, Inc.*, 325 F.3d 776, 787 n.3 (6th Cir. 2003). "[T]he party that seeks to have a judgment set aside because of an erroneous ruling carr[ies] the burden of showing that prejudice resulted." *A.K. by & through Kocher v. Durham Sch. Servs., L.P.*, 969 F.3d 625, 629 (6th Cir. 2020) (cleaned up).

The Court's final instruction concerning the voluntary payment doctrine stated, in relevant part:

> The voluntary payment doctrine is a legal principle that provides that when a plaintiff pays money with full knowledge of all the relevant facts, plaintiff has made that payment voluntarily and is not entitled to any recovery. You have heard evidence that the named Plaintiffs are personally not seeking damages for loans after the filing of this lawsuit. You may still consider actions by the named Plaintiffs after they filed suit that have been admitted into evidence. However, a payment is not voluntary when the plaintiff pays without full and actual knowledge of the facts. Defendant contends Plaintiffs cannot recover, as they paid for these loans with the full understanding of all relevant facts. Plaintiffs deny that they had a full understanding of all relevant facts.

Jury Instructions, ECF No. 270, PAGEID#8629. Plaintiffs do not argue that anything in this instruction misstates the elements of the voluntary payment doctrine; rather, they criticize the Court for omitting their slanted proposed instructions on this and other topics. Mot., ECF No. 284, PAGEID#9456.

Courts have considerable discretion when crafting instructions. *See Boyle v. United States*, 556 U.S. 938, 946 (2009); *United States v. Geisen*, 612 F.3d 471, 485 (6th Cir. 2010). "A district court's refusal to give a jury instruction constitutes reversible error if (1) the omitted instruction is a correct statement of the law, (2) the instruction is not substantially covered by other delivered charges, and (3) the failure to give the instruction impairs the requesting party's theory of the case." *Simmons v. Napier*, 626 F. App'x 129, 138 (6th Cir. 2015) (citation omitted). Each of Plaintiffs' arguments concerning the instructions is meritless, as we proceed to explain.

1. The Court correctly declined to instruct the jury as to the particular facts that (in Plaintiffs' view) were relevant to the voluntary payment doctrine.

"Whether a person made a payment voluntarily, with full knowledge of the facts at issue, is primarily an issue of fact," *Fox*, 2018 WL 11433351, at *3, as this Court recognized when it denied summary judgment on the voluntary payment doctrine and left this determination to the jury, *see* Op. & Order on Summ. J., ECF No. 209, PAGEID#6053. Although the Court told the jury—at Plaintiffs' request—that it could apply the voluntary payment doctrine only if Fifth Third had proved their payments were made with "full and actual knowledge of the facts," Plaintiffs now fault the Court for not telling the jury *what* facts to consider. They argue the jury should have been told "that full knowledge of the relevant facts *must* include knowledge of payment of over 120%." Mot., ECF No. 284, PAGEID#9457. More specifically, they asked for an instruction that the jury "must decide whether Plaintiffs voluntarily paid for the Early Access Loans with full and actual knowledge that the loans had APRs that exceeded 120 percent, expressed as a yearly rate." *Id.* at PAGEID#9456 (emphasis omitted).

"It is not error to refuse to give special instructions which merely represent a [party's] view of the facts of the case." *United States v. Frost*, 125 F.3d 346, 372 (6th Cir. 1997). In fact, "a more factually specific instruction," such as the one Plaintiffs urged, "would only [have] create[d] error rather than remed[ied] one." *Blues to You*, 2022 WL 9753916, at *9. It would have been entirely improper to elevate Plaintiffs' view of what facts are most significant while not also mentioning any number of others that supported *Fifth Third's* arguments. *See supra* pp. 14–20. Importantly, the Court's instruction did not foreclose Plaintiffs from arguing anything to the jury, and in fact, Plaintiffs' counsel made this same argument in closing. *E.g.*, Trial Tr. (4/26/23) at 52:2-5, ECF No. 276, PAGEID#8883 ("And the most important relevant fact that they did not have any knowledge of was that they were paying higher than 120 percent APR."). The jury disagreed with Plaintiffs'

argument, presumably because it concluded that customers' affirmative confirmation of the $1 for $10 fee, their own testimony about what they knew, and their repeated use of the product showed they paid with "full and actual knowledge of the facts." *Cf. Balsley v. LFP, Inc.*, No. 1:08 CV 491, 2010 WL 11561844, at *8 (N.D. Ohio Jan. 26, 2010) ("It remains up to a jury to weigh the facts and determine whether or not this defense is available to Defendants.").

Plaintiffs also claim that the Court mishandled its response to the jury's question about the voluntary payment doctrine. Mot., ECF No. 284, PAGEID##9455–58. But Plaintiffs *agreed* with the Court's response during the trial and never suggested the jury needed any additional information. Trial Tr. (4/27/2013) at 11:22-24, ECF No. 277, PAGEID##9011–13 ("I think it's important to let them know that the only thing that exists is the voluntary payment jury instructions. I don't see any harm to telling them that.").[10] And yet now, only after losing, they argue it was prejudicial that "[r]ather than providing any additional information as requested," "the Jury was required to deliberate and return a verdict under the inadequate and confusing instruction." Mot., ECF No. 284, PAGEID#9458. But "[a]n attorney cannot agree in open court with a judge's proposed course of conduct and then charge the court with error in following that course." *Peak v. Kubota Tractor Corp.*, 559 F. App'x 517, 526 (6th Cir. 2014) (quoting *United States v. Sloman*, 909 F.2d 176, 182 (6th Cir. 1990)) (rejecting assignment of error related to trial court's response to a jury question when "Plaintiff agreed with the trial court's instructional response" at the time).

Plaintiffs' "failure to make an objection at trial results in a waiver of the objection," and thus "the jury verdict can be reversed only for plain error." *Scott v. Miller*, 361 F. App'x 650, 653 (6th Cir. 2010) (citations omitted); *see* Fed. R. Civ. P. 51(c), (d). "Plain error requires a finding that, taken as a

[10] In fact, it was *Fifth Third* who objected to the judge's proposed response at the time. Trial Tr. (4/27/2013) at 11:11-14, PAGEID#9010 (renewing its "request for the statement that the voluntary payment doctrine applies even if the plaintiffs made the payments because of an incorrect interpretation of the terms of the contract").

whole, the [supplemental] jury instructions were so clearly erroneous as to likely produce a grave miscarriage of justice." *United States v. Combs*, 33 F.3d 667, 669 (6th Cir. 1994) (citation omitted). It is not plain error—or any other type of error—to answer a juror's question by directing him or her to the jury instructions. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (holding trial judge sufficiently responded to jury's question by referring them back to the original instructions).

Plaintiffs also argue that the jury's question about voluntary payment shows they were confused by the instructions. But, "[w]here a judge responds to the jury's question by directing its attention to the precise paragraph of the constitutionally adequate instruction that answers its inquiry and the jury asks no follow-up question," it is proper to "presume[] that the jury fully understood the judge's answer and appropriately applied the jury instructions." *Waddington v. Sarausad*, 555 U.S. 179, 196 (2009) (cleaned up). "To presume otherwise would require reversal every time a jury inquires about a [key issue in the case], regardless of the judge's answer." *Weeks*, 528 U.S. at 234; *see also State of Ohio v. Ford*, No. 07AP-803, 2008 WL 3970913, *14 (Ohio Ct. App. Aug. 28, 2008) ("[W]e will not speculate as to why the jury asked this question for purposes of its deliberations.").

In sum, the Court's instructions to the jury as to the voluntary payment doctrine were not "confusing, misleading, and prejudicial," *Troyer v. T. John. E. Prods., Inc.*, 526 F. App'x 522, 525 (6th Cir. 2013) (citation omitted), much less plain error. If anything, the instruction was too favorable *to Plaintiffs* by not specifically stating that a payment made by reason of a wrong construction of the terms of a contract is a mistake of law. *See Scott*, 284 F. Supp. 2d at 894.[11] The Court properly rejected Plaintiffs' efforts to inject a one-sided and argumentative additional instruction.

[11] Fifth Third requested this instruction; the Court denied it. *See* Trial Tr. (4/25/23) at 144:12-22, ECF No. 275, PAGEID#8791.

2. The Court correctly admitted evidence and instructed the jury about named Plaintiffs' advances after they filed suit.

Plaintiffs next contend that the Court erred in (1) admitting evidence pertaining to the class representatives' post-lawsuit use of Early Access and (2) instructing the jury that it could consider that evidence, even though the class representatives were not personally seeking damages for the loans taken after they filed suit. Both contentions lack merit.

As to the admissibility of advances after Plaintiffs filed suit, Plaintiffs did not preserve this argument, because they both failed to object to the admissibility of such evidence at trial and *affirmatively elicited such testimony during their case-in-chief*. To be sure, among Plaintiffs twenty-eight motions *in limine* was a motion to exclude evidence of advances taken after the named Plaintiffs filed suit. *See* Plfs.' Mot. *in Limine*, ECF No. 222, PAGEID#6555. But this Court took all of Plaintiffs' motions under advisement and expressly stated the rulings were "advisory and subject to modification based upon the presentation of evidence." Minute Entry (4/13/23). Sixth Circuit law is clear that if a "court's ruling is in any way qualified or conditional, the burden is on counsel to raise objection to preserve error." *Appalachian Reg'l Healthcare, Inc. v. U.S. Nursing Corp.*, 824 F. App'x 360, 373 (6th Cir. 2020) (citations omitted). Here, that did not occur. Indeed, Plaintiffs themselves were the first to elicit testimony pertaining to post-lawsuit loans by the named Plaintiffs. *See, e.g.*, Trial Tr. (4/18/23 AM) at 133:18-134:6, ECF No. 253, PAGEID##7465–66 (McKinney direct examination); Trial Tr. (4/19/23) at 86:3-87:8, ECF No. 255, PAGEID##7579–80 (L. Laskaris direct examination). A litigant cannot offer evidence and then complain that it should not have been admitted. *See, e.g.*, *Ohler v. United States*, 529 U.S. 753, 758–60 (2000); *Ludwig v. Norfolk S. Ry. Co.*, 50 F. App'x 743, 751 (6th Cir. 2002); *see also Clarett v. Roberts*, 657 F.3d 664, 671 (7th Cir. 2011).

Regardless, evidence pertaining to the loans taken by class representatives after they filed suit was plainly relevant and admissible. For one, these loans spoke directly to breach. "[T]he 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). In other words, a party's *pre*-suit conduct that contradicts its litigation position is probative of the contract's meaning. By extension, a party's *post*-suit conduct is at least as probative. Here, four of the five named Plaintiffs continued to voluntarily pay the $1 for $10 fee *even after a dispute arose*, which is unquestionably probative of how they interpreted the contract. *See* Opp. to Plfs.' Mot. *in Limine*, ECF No. 227, PAGEID##6632–33. The Laskarises even took out three advances *within a month of this trial*—and more than 10 years after filing suit. *See* Trial Tr. (14/19/23) at 123:21-126:5, ECF No. 255, PAGEID##7116–19.

The advances were also relevant to the voluntary payment defense. Plaintiffs conceded that the named Plaintiffs' decisions to continue to use Early Access after filing suit meant that *those* post-suit payments were voluntary. Op. & Order on Summ. J., ECF No. 209, PAGEID#6053. The jury could rightly infer from this same evidence that Plaintiffs' earlier payments were equally voluntary. Before and after filing suit, customers knew they would be charged $1 for $10 for this service, knew the fee would not vary based on the length of the loans, and knew there was no interest rate associated with an advance. *See supra* pp. 14–20.

Plaintiffs contend that "there is no legal or logical basis" to impute their experiences to the entire class. Mot., ECF No. 284, PAGEID#9461. They are wrong. A class action proceeds "on a representative basis" and the "class representatives stand in the stead of their fellow class members." *Cummings v. Connell*, 402 F.3d 936, 944 (9th Cir. 2005). In other words, "as go[] the claim[s] of the named plaintiff[s], so go the claims of the class." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998); *see* Plfs.' Mot. for Class Cert., ECF No. 137, PAGEID#1601 (conceding that the "[named] Plaintiffs' claims are *typical of the claims of the Classes*" (emphasis added)). Any other result would mean the class should not have been certified. *See AstraZeneca AB v. United Food & Com.*

Workers Unions & Emps. Midwest Health Benefits Fund (In re Nexium Antitrust Litig.), 777 F.3d 9, 19 (1st Cir. 2015).

Because this evidence was relevant and properly admitted, it was also entirely proper for the Court to instruct the jury that even though "the named Plaintiffs are personally not seeking damages for loans after the filing of this lawsuit," the jury could still "consider actions by the named Plaintiffs after they filed suit that have been admitted into evidence." Jury Instructions, ECF No. 270, PAGEID#8629. Absent that instruction, the jury would have been left with the misimpression that because these Plaintiffs were not seeking damages they did not fully represent the class.

In any event, even if the Court's instruction had been erroneous (it was not), Plaintiffs would not be entitled to a new trial "unless the instructions are 'confusing, misleading, and prejudicial.'" *Troyer*, 526 F. App'x at 525 (citation omitted); *see Barnes*, 201 F.3d at 822 ("We will not reverse a decision on the basis of an erroneous jury instruction where the error is harmless."). Here, Plaintiffs come nowhere close to satisfying that standard. In particular, Plaintiffs have not shown and cannot show that "a different outcome would have ensued" if the instruction had not been given. *Pivnick,* 552 F.3d at 488. Nor have they satisfied their burden to show that "one cannot say, with fair assurance, . . . that the judgment was not substantially swayed" by the alleged error in admitting evidence, *Appalachian Reg'l Healthcare, Inc. v. U.S. Nursing Corp.*, 68 F.4th 324, 332 (6th Cir. 2023) (cleaned up), and thus any error was harmless. *See* Fed. R. Civ. P. 61. The crux of Fifth Third's voluntary payment defense was that customers understood precisely what they were paying for when they authorized payment, not that certain customers continued to take out loans after filing suit. There is thus no basis to conclude that either the admission of such evidence or this Court's instructions materially prejudiced Plaintiffs.

3. The Court did not err in refusing to tell the jury to consider Plaintiffs' preferred view of the evidence or that Fifth Third violated TILA.

Plaintiffs next contend the Court erred in not providing two additional instructions to the jury: (a) an instruction that it "may also consider whether Fifth Third clearly and accurately identified the actual APR in determining whether plaintiffs or class members had knowledge of all relevant facts when they made payments on their Early Access Loans prior to being advised by a lawyer"; and (b) an instruction that Fifth Third violated TILA. Mot., ECF No. 284, PAGEID#9463. The Court did not abuse its discretion in refusing to give either of Plaintiffs' proposed instructions and, regardless, any alleged error was harmless.

a. Plaintiffs' first proposed instruction stated that the jury "may" consider certain evidence Plaintiffs believe supported their view of the case. That statement is not one of law. It is argument intended to place this Court's thumb on the scale in Plaintiffs' favor, as this Court recognized in the charge conference. *See* Trial Tr. (4/25/23) at 143:22, ECF No. 275, PAGEID#8790 (classifying the requested instruction as "argument"); *see Frost*, 125 F.3d at 372 ("It is not error to refuse to give special instructions which merely represent a [litigant's] view of the facts of the case."); *United States v. Downs*, 173 F.3d 430 (6th Cir. 1999), 1999 WL 130786, at *5. The other instructions made it clear that the jury should consider all properly admitted evidence when judging the facts, *see* Trial Tr. (4/26/23) at 7:25-8:2, ECF No. 276, PAGEID#8839; Trial Tr. (4/27/23) at 14:8-12, ECF No. 277, PAGEID#9013, and the Court's decision not to give Plaintiffs' one-sided instruction in no way impaired Plaintiffs' ability to present their case. As with Plaintiffs' other request for a one-sided fact-based instruction, *see supra* pp. 25–27, the Court did not abuse its considerable discretion in declining to give Plaintiffs' proposed instruction as to the evidence the jury "may" consider during deliberations.

b. As for Plaintiffs' request for an instruction that Fifth Third violated TILA, there is absolutely no basis in law to suggest that the jury in this breach of contract case should have been

instructed that the contract violated a strict-liability federal disclosure statute. That presumably explains why Plaintiffs' motion cites no case where a similar instruction was given. A TILA claim has entirely separate elements from a breach of contract claim and the voluntary payment doctrine. Indeed, providing such an instruction would amount to the sort of propensity evidence the federal rules preclude. *Cf.* Fed. R. Evid. 404(a). Thus, courts in this Circuit and elsewhere commonly hold "that at trial, parties may not reference claims that were previously disposed of by the court at the summary judgment stage in the proceedings." *Holloway v. Kings Dodge, Inc.*, No. 1:16-cv-1075, 2019 WL 13093580, at *2 (S.D. Ohio Aug. 23, 2019) (Barrett, J.); *Irvin v. City of Shaker Heights*, No. 1:06 CV 1779, 2012 WL 13028095, at *5 (N.D. Ohio May 17, 2012) (same); *see also Gonzalez Prod. Sys., Inc. v. Martinrea Int'l Inc.*, No. 13-cv-11544, 2015 WL 4934628, at *11 (E.D. Mich. Aug. 18, 2015).

c. Regardless, as to both instructions, a court's refusal to give a requested instruction is not grounds for a new trial unless the instructions provided to the jury were "confusing, misleading, and prejudicial." *Pivnick*, 552 F.3d at 488 (citation omitted). Here, the jury instructions made clear that the jury should find for the Plaintiffs as to the voluntary payment doctrine if it concluded that Plaintiffs paid "without a full and actual knowledge of the facts." Jury Instructions, ECF No. 270, PAGEID#8629. Plaintiffs made their position on this issue abundantly clear to the jury, *e.g.*, Trial Tr. (4/26/23) at 52:2-5, ECF No. 276, PAGEID#8883 ("And the most important relevant fact that they did not have any knowledge of was that they were paying higher than 120 percent APR."), and the jury rejected those arguments, *see Balsley*, 2010 WL 11561844, at *8 ("It remains up to a jury to weigh the facts and determine whether or not this defense is available to Defendants."). This Court's refusal to provide Plaintiffs' one-sided, hand-crafted instructions had no impact on the jury's verdict.

C. There Was No Error in the Verdict Form.

Plaintiffs' belated objections to the verdict form in this case—yet again, raised for the first time only after losing—are also wholly without merit.

Prior to trial, on April 3, 2023, the parties each filed proposed verdict forms. ECF No. 221, PAGEID#6495. Plaintiffs' proposal contained five jury interrogatories, including, "Did Plaintiffs and the Class voluntarily pay for Early Access loans with full and actual knowledge that the Annual Percentage Rate or APR was higher than 120%?" *Id.* at PAGEID#6540. During the charge conference and by email shortly thereafter on April 25, 2023—the day before closing arguments—the Court provided to the parties a more streamlined proposed verdict form and jury interrogatories, including the following two questions:

- "Did Plaintiffs prove by the greater weight of the evidence that Fifth Third breached the Early Access contract?"
- "Did Fifth Third prove by the greater weight of the evidence that the voluntary payment doctrine applies to the class?"

Email from G. Royalty (4/25/23), ECF No. 283-10, PAGEID#9297. The Court then asked for any objections. Trial Tr. (4/25/23) at 170:13-16, ECF No. 275, PAGEID#8817. After reviewing the proposal, counsel for Plaintiffs noted that a question they had previously proposed concerning the meaning of APR (unrelated to the issues presented here) was not included, but they did not object or request its inclusion and did not take issue with the two questions included above. *Id.* at 170:25-171:18, PAGEID##8817–18.

Pursuant to the Court's invitation to provide additional comments by email, Plaintiffs followed up later that evening by email to suggest a third interrogatory related to notice and some edits to the damages interrogatories, but did not provide any substantive comments, objections, or additions to the above two questions. Email from A. Haac (4/25/23), ECF No. 283-12, PAGEID##9346–47. During additional discussions between the parties and the Court about the

verdict form the next morning, Plaintiffs raised no objections to these questions, either.[12] These two questions, with inconsequential stylistic changes, were later read to the jury. At that time, Plaintiffs' counsel confirmed that the parties had agreed to them. *See* Trial Tr. (4/26/23) at 150:14, ECF No. 276, PAGEID#8981. The Court thus adopted these two jury interrogatories without objection. *See* ECF No. 270-1, PAGEID#8640; *see* Trial Tr. (4/27/23) at 34:21-23, ECF No. 277, PAGEID#9033.

After full deliberations, the jury returned its verdict in favor of Fifth Third. The jurors unanimously answered "yes" to the first interrogatory and "yes" to the second, finding that the voluntary payment doctrine bars the breach of contract claim; it thus answered "N/A" to the damages interrogatory. Trial Tr. (4/27/23) at 16:5-21, ECF No. 277, PAGEID#9015. Each juror confirmed individually that this was his or her true verdict. *Id.* at 16:23-17:21, PAGEID##9015–16.

After the verdict in favor of Fifth Third, Plaintiffs' counsel for the first time asked for an *additional* interrogatory concerning *what period of time* there was a voluntary payment. *Id.* at 18:2-19:4, PAGEID##9017–18. Plaintiffs had never previously requested this interrogatory, or even hinted that they might do so—on the contrary, Plaintiffs had consistently affirmed their satisfaction with the existing voluntary payment interrogatory. The Court properly rejected Plaintiffs' extraordinary request, noting that "the interrogatories that were submitted to the jury were consistent with both sides' proposals." *Id.* at 34:21-23, PAGEID#9033. The Court also commented that "it's clear that they've applied the voluntary payment doctrine to the class," holding that the interrogatories are "consistent, especially the one on voluntary payment doctrine." *Id.* at 23:17-18, PAGEID#9022; *id.* at 36:7-8, PAGEID#9035.

[12] The full discussion regarding the verdict form and interrogatories on the morning of April 26, 2023, does not appear to have been transcribed. *See generally* Trial Tr. (4/26/23), ECF No. 276; *Kinder Cap., Inc. v. Unity Cmty.*, 85 F.3d 629 (6th Cir. 1996), 1996 WL 229819, at *1 ("Absent a transcript or a reconstructed version, an appellant waives his objections to jury instructions.").

Plaintiffs' arguments to the contrary are patently wrong. *First*, yet again, Plaintiffs have "waived any such objection" at the threshold due to their failure "to state objections" to the verdict form "by the close of the evidence." *Hall v. State Farm Ins. Co.*, 1 F. App'x 438, 444 (6th Cir. 2001) (citing Fed. R. Civ. P. 51). Plaintiffs complain that the Court did not accept one of the interrogatories in their original submission on April 3, but this argument was waived when they did not raise it at any of the opportunities the Court gave them during or after the charge conference. *See* Fed. R. Civ. P. 51; *United States v. Callahan*, 801 F.3d 606, 626 (6th Cir. 2015) (objection to verdict form not preserved when party raised it at trial but then "agree[d] with the judge's proposed course of conduct" to remedy the concern) .[13] Even after the verdict was rendered—which would have been untimely in any event—they did not raise it; their objections at that stage focused on the "point in time" the jury's finding covered. Trial Tr. (4/27/23) at 19:7-9, ECF No. 277, PAGEID#9018. Not only did Plaintiffs' fail to timely object, however, they *affirmatively agreed* to the interrogatories prior to their submission to the jury. "An attorney cannot agree in open court with a judge's proposed course of conduct and then charge the court with error in following that course." *Peak*, 559 F. App'x at 526 (citation omitted). After agreeing to the interrogatories, Plaintiffs cannot now claim they were objectionable all along.

Second, there was no error in the verdict form. The Court did not abuse its "sound discretion" in crafting the jury interrogatory as it was presented to the jury. *Workman v. Frito-Lay, Inc.*, 165 F.3d 460, 465 (6th Cir. 1999) (discussing Federal Rule of Civil Procedure 49); *see also Jarrett v. Epperly*, 896 F.2d 1013, 1020 (6th Cir. 1990) ("[T]he privilege of calling for a special verdict is not a right to be demanded by the parties but is rather a matter to be determined by judicial discretion."

[13] The only "exception to the principle of non-reviewability [is] in cases of plain error" where a "manifest injustice" would result. *Ford v. Cty. of Grand Traverse*, 535 F.3d 483, 491 (6th Cir. 2008). But here, there is no plain error—or any error at all—so no relief is appropriate.

(quoting Fed. R. Civ. P. 49 Commentaries)). "[T]he proper setting in which to argue that [Fifth Third did not prove its voluntary payment defense] was not on the verdict form; rather, it was during opening and closing arguments." *Barrett v. Detroit Heading, LLC*, 311 F. App'x 779, 797 (6th Cir. 2009). The Court's interrogatory was consistent with the way that *both* parties argued their voluntary payment doctrine case, as the Court recognized. Trial Tr. (4/27/23) at 34:23-35:2, ECF No. 277, PAGEID##9033–34.

Nor is there anything inconsistent about the jury's finding that the voluntary payment doctrine bars Plaintiffs' claim even if Fifth Third breached the contract. "The Supreme Court has stated that where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way," *Barrett*, 311 F. App'x at 795 (citation omitted), but here, no such reconciliation is even necessary. "[F]ederal courts look to state law to determine whether a verdict is inconsistent," *Conte v. Gen. Housewares Corp.*, 215 F.3d 628, 639 (6th Cir. 2000), and as explained *supra*, the voluntary payment doctrine is a recognized defense to breach of contract claims in Ohio, including claims when a party paid a different price than that stated in a contract, *see Salling*, 672 F.3d at 445; *Hazelwood*, 2021 WL 664059, at *2–5; *Wears Kahn McMenamy & Co.*, 2013 WL 1689030, at *6; *City of Cincinnati*, 41 N.E. at 239; *Indus. Fabricators, Inc.*, 1984 WL 4669, at *3–4. It was thus entirely permissible for the jury to find a breach of contract, but also decide that the voluntary payment doctrine bars any recovery. Plaintiffs' dissatisfaction with the outcome is not a proper basis to overturn the game board. The jury's verdict was reasonable and well-supported by the evidence. *See supra* pp. 14–20. There is no basis to order a new trial.

D. Defense Counsel's Closing Argument Pertaining to the Voluntary Payment Doctrine Was Entirely Appropriate.

Plaintiffs' objections to Fifth Third's closing argument are equally meritless. None of Plaintiffs' counsel's complained-of statements was inappropriate, and—in what has become a familiar pattern—counsel did not raise these objections during the closing argument.

A failure to object "raise[s] the degree of prejudice which must be demonstrated in order to get a new trial." *Balsley v. LFP, Inc.*, 691 F.3d 747, 761–62 (6th Cir. 2012) (citation omitted). Ordinarily, a movant seeking a new trial must show "a reasonable probability that the verdict . . . has been influenced by" counsel's allegedly inappropriate statements. *Id.* (citation omitted). When the party failed to object at trial, however, "a new trial will be granted only when counsel's conduct [in closing argument] was 'outrageous' or 'egregious.'" *EEOC v. EMC Corp. of Mass.*, 205 F.3d 1339 (6th Cir. 2000), 2000 WL 191819, at *8 (citation omitted). Examples of "outrageous" or "egregious" conduct include statements "so inappropriate that the Court referred [the attorney] to his state bar association for potential discipline." *Appalachian Reg'l Healthcare*, 68 F.4th at 335.

Nothing Fifth Third argued in closing argument was remotely improper, much less even close to crossing this extremely high threshold. *First*, Plaintiffs once again assert their mistaken understanding of the voluntary payment doctrine, contending that Fifth Third should have focused on the APR rather than the $1 for $10 term. Mot., ECF No. 284, PAGEID##9466–67. Plaintiffs misunderstand the voluntary payment doctrine, as outlined at length above, but in any event Fifth Third was entitled to present its view of the evidence to the jury. "Trial counsel may propose these types of favorable inferences drawn from the evidence, or even a party's failure to introduce certain types of evidence, without improperly influencing the jury." *Farley v. Country Coach Inc.*, 403 F. App'x 973, 983 (6th Cir. 2010). Plaintiffs were then free to emphasize the evidence concerning the 120% APR term in their argument, *see id.*; *Weckbacher v. Mem'l Health Sys. Marietta Mem'l Hosp.*, Nos. 2:16-CV-01187, 2:17-cv-00438, 2:17-cv-00439, 2020 WL 1030896, at *2 (S.D. Ohio Mar. 3, 2020), which they did, *see* Trial Tr. (4/26/23) at 143:18-144:11, ECF No. 276, PAGEID##8974–75.

Second, Plaintiffs take issue with counsel's comment that the jury must find in its favor on the voluntary payment doctrine if the payment was made "voluntarily." Mot., ECF No. 284, PAGEID#9467. They do not disagree with this statement's accuracy, as they clearly cannot, but

only argue that it was incomplete because it did not also add that the doctrine only applies "where an individual pays a claim with full knowledge of all relevant facts." *Id.* (cleaned up). Plaintiffs cite no case to support their extraordinary claim that a party cannot emphasize certain portions of the jury instructions in its closing. But in any event, they entirely ignore other statements Fifth Third's counsel made shortly before: "So for [the voluntary payment doctrine], we put the question of the breach of contract aside and we ask: Did the customer voluntarily pay with *full knowledge of the fact[s]*? That's the question." Trial Tr. (4/26/23) at 115:5-8, ECF No. 276, PAGEID#8946 (emphasis added). Later, counsel read from the jury instructions and even put them on the screen: "The voluntary payment doctrine is a legal principle that provides that when a plaintiff pays money with *full knowledge of all the relevant facts*, plaintiff has made that payment voluntarily and is not entitled to any recovery." *Id.* at 115:15-19, PAGEID#8946 (emphasis added). Plaintiffs' argument that Fifth Third omitted part of the relevant standard is thus not only frivolous, it is factually incorrect.

Third, Plaintiffs' argument that it was "impermissible for Defendant to suggest that Plaintiffs bore the burden of establishing reliance on Defendant's affirmative defense," Mot., ECF No. 284, PAGEID#9468, also misstates Fifth Third's comments. The words "rely" or "burden," or anything to that effect, do not appear in the cited section. Instead, Fifth Third focused on what customers *knew*, which is the critical issue for this defense. And what Plaintiffs knew, as Fifth Third explained, is that they would pay $1 for $10: "It's beyond dispute that they knew they were paying a dollar for ten and did pay a dollar for ten. They didn't think they were being charged an APR." Trial Tr. (4/26/23) at 116:1-4, ECF No. 276, PAGEID#8947. Fifth Third then explained that there was not "any witness [who] came in and said" that they "thought the price was related at the time to the 120 percent APR." *Id.* at 116:5-9, PAGEID#8947. Pointing out the absence of evidence supporting Plaintiffs' response does not improperly shift any burden; it merely points out a glaring deficiency in their argument.

Even if these arguments had merit (and they do not), "[t]he Court clearly instructed the jury that the closing arguments of counsels were not to be considered evidence and that the law would be provided to them by the Court, not counsels." *Hutchinson v. Stride Rite Children's Grp., Inc.*, No. 1:05cv738, 2008 WL 11450729, at *4 (S.D. Ohio Apr. 30, 2008) (Barrett, J.); *see* Trial Tr. (4/26/23), 12:20-13:17, ECF No. 276, PAGEID##8843–44. Thus, "[a]ny of the alleged misstatements by Defense counsel in this matter would clearly be harmless." *Hutchinson*, 2008 WL 11450729, at *4.

E. The Court Should Not Order a New Trial, and in All Events Should Reject the Artificial "Partial" New Trial Plaintiffs Request.

For the reasons set forth above, there is no basis in law or fact to enter judgment for Plaintiffs or to order any retrial. That should be the end of the matter, but in no event should the Court order a "partial" retrial. "[A] partial new trial is appropriate only if it 'clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be [held] without injustice.'" *Miami Valley Fair Hous. Ctr., Inc. v. Connor Grp.*, No. 3:10-cv-83, 2015 WL 853193, at *8 (S.D. Ohio Feb. 26, 2015) (quoting *Gasoline Prods. Co. v. Champlin Refin. Co.*, 283 U.S. 494, 500 (1931)). Here, the issues of voluntary payment and damages are intertwined with the issue of breach, and accordingly if any retrial were ordered (it should not be), it would have to be a full trial on all issues.

Gasoline Products is the seminal case. In that breach of contract action where only the damages award was erroneous, the Court noted that the first jury's overall verdict of liability had not included findings on such subsidiary issues as the dates of contract formation and breach, and thus "the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty." *Gasoline Prods.*, 283 U.S. at 500; *see also Armstrong v. Shirvell*, 596 F. App'x 433, 457 (6th Cir. 2015) (affirming continued applicability of the *Gasoline Products* standard). Similarly here, the same evidence that speaks to the issue of breach speaks to the voluntary payment doctrine. That is, one

cannot understand Fifth Third's voluntary payment doctrine defense without understanding that customers understood the contract at the point of sale to call for a payment term of $1 for every $10 borrowed. Nor could a jury award "expectation damages" without fully understanding what the parties intended the product to cost, something that is not readily apparent from the liability finding. *See* 1 OJI CV 501.33 (damages to be awarded must be the "natural and probable result of the breach of the contract or that were reasonably within the contemplation of the parties").

In short, the sort of piecemeal, follow-on proceeding Plaintiffs request is not possible without immeasurably prejudicing Fifth Third. That conclusion is only reinforced by the fact that the jury did not make any subsidiary findings concerning when the breach ended, *see* Mot., ECF No. 284, PAGEID##9449–51, and the fact that the jury's finding as to breach was plainly erroneous in any event, *see* Fifth Third Rule 50(b) Mot., ECF No. 282, PAGEID##9116–20.[14] Thus, if this Court were to grant any relief at all (and it should not for the reasons we have explained), the only recourse is a full retrial on all issues.

CONCLUSION

The jury verdict in this case was correct and unsurprising. For ten years, Plaintiffs have advanced a lawyer-concocted interpretation of the Early Access contract that *not a single class member* believed at the time. To the contrary, the undisputed evidence at trial showed that Plaintiffs knew exactly what they were agreeing to pay Fifth Third and what exactly they were getting in return: early access to their next direct deposit in exchange for a 10% transaction fee. Plaintiffs had a full

[14] Errors that prejudiced Fifth Third included, among others, the admission of Patricia Oliver's legal opinions, Mot. to Strike Testimony of Patricia Oliver, ECF No. 257, PAGEID##7857–62; the decision to correct Mark Erhardt before the jury, *see* Mot. for Curative Instruction, ECF No. 252, PAGEID##7325–30; erroneous jury instructions that endorsed Plaintiffs' interpretation of the APR language and told the jury that every term of the contract must, under all eventualities, be given meaning; and the Court's refusal to instruct the jury that *contra proferentem* does not permit a fact-finder to adopt an unreasonable interpretation of a contract.

opportunity to present their arguments to the jury, but the jury, after careful deliberation, ultimately agreed with Fifth Third and rejected Plaintiffs' claim. Not only was the verdict not "against the weight of the evidence" or "unreasonable," *Barnes*, 201 F.3d at 820–21, it was the only reasonable conclusion.

For the foregoing reasons, the Court should deny Plaintiffs' motion in full.

Dated: June 15, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

On June 15, 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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