

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

In re: Fifth Third Early Access Cash Advance  
Litigation

Case No. 1:12-cv-00851-MRB

Judge Michael R. Barrett

**FIFTH THIRD'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW  
AS TO BREACH OF CONTRACT**

Before the jury's verdict in this case, at the close of Plaintiffs' case-in-chief and again at the close of all the evidence, Fifth Third moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a) on the issues of (1) breach, (2) voluntary payment doctrine, (3) damages, and (4) notice. *See* Trial Tr. (4/20/2023 PM) at 4:1–11:23, ECF No. 259, PAGEID##7882–89; Trial Tr. (4/25/2023 AM) at 173:19–176:7, ECF No. 275, PAGEID##8820–23. The Court denied the motions. Trial Tr. (4/20/2023 PM) at 17:1, ECF No. 259, PAGEID#7895; Trial Tr. (4/25/2023 AM) at 177:2, ECF No. 275, PAGEID#8824.

The jury unanimously returned a verdict for Fifth Third. It concluded that the voluntary payment doctrine barred Plaintiffs' claim. ECF No. 272. That same day, the Court entered a judgment in Fifth Third's favor. ECF No. 273.

Pursuant to Federal Rule of Civil Procedure 50(b), Fifth Third renews its motion for judgment as a matter of law on the issue of breach only, having prevailed on the remaining issues raised orally in its Rule 50(a) motions when the jury found that the voluntary payment doctrine bars the claim and awarded no damages. As the prevailing party at trial, Fifth Third does not need to renew its motion for judgment as a matter of law to preserve all arguments, *see Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513, 519 n.3 (7th Cir. 2012) (“It would waste time and resources to require a party to

move for judgment as a matter of law under Rule 50(b), formerly denominated ‘judgment notwithstanding the verdict,’ if that party has obtained a jury verdict in its favor.”), but an outlier, out-of-circuit case to the contrary leads Fifth Third to file this motion for avoidance of any doubt, *see Babin v. Plaquemines Parish*, No. 21-30417, 2022 WL 3097852, at \*2 (5th Cir. Aug. 3, 2022) (“Although the [prevailing party] raised this argument in a Rule 50(a) motion for judgment as a matter of law, it did not renew this motion after trial under Rule 50(b). Without a Rule 50(b) motion, we cannot review the [prevailing party’s] argument [on appeal].”).

### ARGUMENT

Fifth Third is entitled to judgment as a matter of law on the issue of breach because, viewing the evidence in the light most favorable to Plaintiffs, “there can be but one reasonable conclusion as to the proper verdict”: Fifth Third did not breach the contract. *Kusens v. Pascal Co.*, 448 F.3d 349, 360 (6th Cir. 2006).

Plaintiffs’ “breach-of-contract claim focuse[d] on the amount of money that Fifth Third charged plaintiffs.” *In re Fifth Third Early Access Cash Advance Litig.*, 925 F.3d 265, 274 (6th Cir. 2019). Relying on an alleged ambiguity in the Early Access contract’s APR disclosure, Plaintiffs contended they should not have been charged more than an annualized interest rate of 120%. That interpretation contradicts the plain language of the agreement, which makes clear the product cost \$1 for \$10. Regardless, the extrinsic evidence conclusively resolved any claimed ambiguity in Fifth Third’s favor. Not a single fact witness testified they understood the APR language to dictate the cost of credit when they entered into the contract, and all five class representatives testified they were unaware of or did not understand the APR language until speaking with counsel. *See* Trial Tr. (4/18/23 AM) at 145:1-24, ECF No. 253, PAGEID#7477 (McKinney); Trial Tr. (4/19/23 AM) at 36:12-25, ECF No. 255, PAGEID#7529 (Harrison); *id.* at 106:23-25, PAGEID#7599 (L. Laskaris);

*id.* at 141:4-6, PAGEID#7634 (D. Laskaris); Trial Tr. (4/20/23 AM) at 43:2-21, ECF No. 263, PAGEID#8348 (Fyock).

The parties' contractual intent could not have been clearer: They intended Early Access to cost \$1 for each \$10 borrowed. *See* Trial Tr. (4/18/23 AM) at 140:1-21, ECF No. 253, PAGEID#7472 (McKinney); Trial Tr. (4/19/23 AM) 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. (4/20/23 AM) at 39:13-24, ECF No. 263, PAGEID#8344 (Fyock). Plaintiffs' repeated use of the product further supports this unambiguous testimony. Plaintiffs' expert Arthur 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; *see Wears Kahn McMenamy & Co. v. JPMorgan Chase Bank, N.A.*, No. 12-cv-812, 2013 WL 1689030, at \*3 (S.D. Ohio Apr. 18, 2013) ("When the contract contains ambiguous terms, the court may use the parties' course of performance to determine their intent."). Defense expert Tim Hart also testified 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. (4/24/2023) (testimony of T. Hart).<sup>1</sup> Customers further affirmatively demonstrated their intent each time they took out an advance and confirmed the exact amount they were agreeing to pay. *See, e.g.*, JX 2001 (Online Account Screenshots), ECF 186-1, PAGEID#3922. "[U]nder Ohio law, when confronted with an issue of contract interpretation, a court's role is to give effect to the intent of the parties." *Eastham v. Chesapeake Appalachia, LLC*, 754 F.3d 356, 361 (6th Cir. 2014) (cleaned up). Because customers were charged what they agreed to be charged, there was no breach.

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<sup>1</sup> The transcript for this testimony is not yet available.

Black letter law reinforces that conclusion. Where “one party attached a meaning to the [disputed] language and . . . the other attached none,” the first party’s interpretation controls “if the other party had reason to know this.” 2 E. Farnsworth, *Contracts* § 7.9, at 285 n.30 (4th ed. 2023). The evidence adduced at trial showed unequivocally that this principle applied to the APR language in the contract. Fifth Third’s understanding of that language, supported by the contract language and the testimony at trial, is undisputed: It was a regulatory disclosure, calculated based on an assumed 30-day repayment period. JX 2009 (FAQs (2011)), ECF No. 137-2, PAGEID#1649; *see* Trial Tr. (4/24/2023) (testimony of B. Mendelsohn).<sup>2</sup> Plaintiffs, in contrast, attached no meaning to the APR disclosure whatsoever until speaking with counsel, because they were unaware of it or did not understand it. *See supra* pp. 2–3. Because Plaintiffs “had reason to know” of the meaning Fifth Third attached to the contract, 2 E. Farnsworth, *Contracts* § 7.9, at 285 n.30, the contract must be interpreted as Fifth Third proposes, meaning there was no breach.

*Contra proferentem* does not change that result. At summary judgment, this Court correctly rejected Plaintiffs’ argument that extrinsic evidence is irrelevant, holding that “construing a contract against the drafter is a secondary rule of contract construction, and is applicable when the primary rules of contract construction, *i.e.* plain language of the document and extrinsic evidence, in that order, fail to clarify the meaning of the contract.” Order Denying Summ. J., ECF No. 209, PAGEID#6046 (quoting *Cadle v. D’Amico*, 66 N.E.3d 1184, 1189 (Ohio Ct. App. 2016)) (cleaned up); *see also* 4218868 *Canada, Inc., dba Pivotal Holdings, Ltd. v. Kwasny*, 654 F. App’x 727, 730 (6th Cir. 2016) (*contra proferentem* “comes into play only if the extrinsic evidence fails to show the parties’ intent”); 1 Corbin on Ohio *Contracts* § 24.14 (2019) (doctrine is a “tie breaker”). Here, the extrinsic evidence conclusively resolves any ambiguity in Fifth Third’s favor, so the maxim does not apply.

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<sup>2</sup> The transcript for this testimony is not yet available.

*Data Based Sys. Int'l, Inc. v. Hewlett-Packard Co.*, No. CIV. 00-CV-4425, 2001 WL 1251212, at \*7 (E.D. Pa. Sept. 26, 2001) (*contra proferentem* “is a general rule that does not operate to the exclusion of all other rules of contract interpretation; it is used only when none of the canons of construction succeed in dispelling the uncertainty” (cleaned up)).

*Contra proferentem* also is inapplicable because Plaintiffs’ interpretation of the contract is unreasonable. See *Savedoff v. Access Grp., Inc.*, 524 F.3d 754, 764 (6th Cir. 2008) (“this *contra proferentem* rule does not allow a court to adopt an unreasonable interpretation of the contract”). Among other issues, Plaintiffs’ interpretation requires ignoring the ten separate times the contract recites the 10% fee and requires reading an interest rate into an agreement that states, “there is no interest charge associated with an Advance.” JX 2009 (FAQs (2011)), ECF No. 137-2, PAGEID#1649. That is not a sound or reasonable interpretation. Thus, even taking the evidence in the light most favorable to Plaintiffs, there can be but one reasonable conclusion: The contract provided for a fee of \$1 for every \$10, and the APR language did not cap or alter that fee. That is what customers paid. There was no breach.

## CONCLUSION

For the foregoing reasons, Fifth Third is entitled to judgment as a matter of law on the issue of breach of contract as well as the judgment in its favor pursuant to the jury’s verdict.

Dated: May 25, 2023

Respectfully submitted,

/s/ Enu A. Mainigi

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**CERTIFICATE OF SERVICE**

On May 25, 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  
Enu A. Mainigi

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**[PROPOSED] ORDER**

Upon consideration of Fifth Third's Renewed Motion for Judgment as a Matter of Law as to Breach of Contract, the Court hereby GRANTS the motion.

Judgment has been entered in favor of Fifth Third upon the jury's verdict. The Court further finds that the judgment is supported by the additional reason that the evidence at trial was insufficient to support a finding that Fifth Third breached the Early Access contract.

IT IS SO ORDERED.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Judge Michael R. Barrett  
United States District Judge