IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In re: Fifth Third Early Access Cash Advance Litigation	)	CASE NO. 1:12-CV-00851
	)	HON. MICHAEL R. BARRETT

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

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SUMMARY OF ARGUMENT

I. Under Civil Rule 50(b) and 59(e), the Court should enter judgment as a matter of law against Defendant on its voluntary payment defense and on its contract modification/notice argument.

A. Defendant's voluntary payment defense fails as a matter of law.

1. Voluntary payor is an equitable defense that Defendant should have been barred from asserting at trial.

The voluntary payment doctrine is an equitable defense. As such, Defendant should have been barred from availing itself of this defense given its misleading misrepresentations of the APR on Early Access loans in violation of the Truth in Lending Act. Indeed, the voluntary payment defense requires full disclosure of facts and courts have precluded the application of the defense when the defendant has not complied with that requirement. Given that, as a matter of law, Fifth Third did not present an accurate APR in violation of federal law, it cannot, therefore, rely on the voluntary payment defense.

Principal authorities: *Bilbie v. Lumley*, (1802) 2 East 469 (1802 ER 448); *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806 (1945); *Arlington Video Productions, Inc. v. Fifth Third Bancorp.*, 569 F. App'x. 379 (6th Cir. 2014); ECF No. 209

2. Even setting aside equitable considerations, Defendant did not carry its burden on any element of the voluntary payor defense at trial, as there are no facts upon which a jury could reasonably conclude that Plaintiffs or the Class knowingly paid APRs in excess of 120% on Early Access Loans at the time of such payment.

a. The actual APRs charged on Early Access Loans is a relevant fact for purposes of the voluntary payor doctrine.

Defendant's voluntary payment argument focused exclusively on the $1 for $10 fee. Throughout this case, Defendant argued that, because Plaintiffs and most customers took multiple loans, they understood the fee was $1 for every $10 borrowed, such that the APR was irrelevant. Not so. The voluntary payment doctrine requires that a customer must have knowledge of all relevant facts when paying. The APR is a relevant fact. This Court and the Sixth Circuit have held that the 120% APR is a term of the contract. This Court must make the legal ruling that the 120% APR is a relevant

term for purposes of the voluntary payment doctrine, which necessarily means Defendant did not carry its burden on that defense, as Defendant presented no evidence of knowledge of this fact.

Principal Authorities: *In re Fifth Third Early Access Cash Advance Litigation*, 925 F.3d 265 (6th Cir. 2019); ECF No. 209; *Cox v. Porsche Financial Services, Inc.*, 337 F.R.D. 426 (S.D. Fla. 2020)

b. As to the relevant fact in dispute—the actual APRs on Early Access Loans—there was no evidence at trial that any Plaintiff or Class Member had knowledge of this fact at the time of payment.

The voluntary payment doctrine focuses on the customer's knowledge at the time of payment. In this case, Plaintiffs have testified uniformly that they did not know that the APRs on their Early Access loans exceeded 120% until after they met with their attorney. That is, for the loans on which Plaintiffs are seeking damages, they did not know of the excessive APR at the time of payment. Likewise, there was no evidence presented that any Class Member had any knowledge at any time that their APRs exceeded 120%. Accordingly, the voluntary payment doctrine cannot apply to any of the loans for which Plaintiffs were seeking relief on behalf of themselves and the Class.

Principal Authorities: *City of Cleveland v. Ohio Bureau of Worker's Compensation*, 109 N.E.3d 84 (Ohio App. Ct. 2018); *Arlington Video Productions, Inc. v. Fifth Third Bancorp.*, 569 F. App'x. 379 (6th Cir. 2014)

B. Defendant presented no evidence that it sent a notice for the removal of the 120% APR term, and therefore, it did not properly modify the Early Access Loan Agreement.

1. The Early Access Loan Agreement requires direct notice, which Fifth Third did not provide.

The Early Access Loan contract required Fifth Third to provide its customers with advance notice of changes. It is without dispute that Defendant did not provide such notice. Accordingly, Defendant did not carry its burden of proving a contract modification.

2. Ohio law requires that the drafter of an adhesive contract provide direct notice when amending the contract.

Signatories to adhesive contracts are accorded special protection, including with respect to notice and in the form of the doctrine of *contra proferentem*. The most relevant example of this is in the

context of insurance contracts, which require that the insurer provide a customer direct notice, *i.e.*, a written explanation, of any changes to an insurance policy. Failure to do this means the change is not effective. In this case, Fifth Third did not meet this standard when it removed the APR from the Early Access Loan Agreement. Indeed, its witnesses admitted that Fifth Third did not send an explanation to its customers, notifying them of the change. As a result, the attempted medication was ineffective.

Principal Authorities: *Nottingdale Homeowners' Ass'n. Inc. v. Darby*, 514 N.E.2d 702, 707 n. 7 (Ohio 1987); *J.R. Roberts & Son v. National Ins. Co.*, 25 Ohio C.D. 212, 218 (Ohio Ct. App. 1914); *MDC Acquisition Co. v. Traveler's Property Cas. Co. of America*, 545 Fed. App'x. 398, 400 (6th Cir. 2013)

II. In the Alternative, the Court Should Grant a New Trial on Fifth Third's Affirmative Defense of Voluntary Payment.

A. The Jury's verdict that Plaintiffs and the Class made payments on all of their early access loans "with full knowledge of all the relevant facts" was against the weight of the evidence.

At trial, there was no evidence that any Class member knew, at the time of payment, they were paying over 120% APR on any loan for which the Class was seeking recovery. Rather, the evidence showed that Fifth Third misrepresented the APR. This prevented Plaintiffs and the Class from making any payment with full knowledge of the facts. Accordingly, the Jury's verdict on the voluntary payment doctrine was against the weight of the evidence, which entitles Plaintiff to a new trial on this issue.

Primary Authorities: *Conte v. General Housewares Corp.*, 215 F.3d 628 (6th Cir. 2000); *King v. Exxon Co., U.S.A.*, 618 F.2d 1111 (5th Cir. 1980); *Denhof v. City of Grand Rapids*, 494 F.3d 534 (6th Cir. 2007)

B. The voluntary payment jury instruction was deficient, confusing, and prejudicial.

At trial, the jury was confused by the voluntary payment instructions, which is patent by the fact that the jury asked for additional information on the voluntary payment doctrine during deliberation. When instructions are misleading, as they were here, a new trial is warranted.

Primary Authorities: *Miami Valley Fair Housing Center, Inc. v. Connor Group*, 725 F.3d 571 (6th Cir. 2013); *Reynolds v. Green*, 184 F.3d 589 (6th Cir. 1999)

1. The Court did not instruct the Jury that the APR on Plaintiffs' loans was a relevant fact for voluntary payment, resulting in an inadequate instruction.

The Court submitted a vague instruction on voluntary payment, which allowed Defendant to make the improper argument that knowledge of the $1 for $10 fee was sufficient to carry the defense. Accordingly, the Court failed to instruct the Jury properly, which was evidenced by the Jury's question on the voluntary payment doctrine, reflecting juror confusion.

Primary Authorities: *Pivnick v. White, Getgey & Meyer Co, LPA*, 552 F.3d 479 (6th Cir. 2009); *Pouillon v. City of Owosso*, 206 F.3d 711 (6th Cir. 2000); *Reynolds v. Green*, 184 F.3d 589 (6th Cir. 1999)

2. The Jury was instructed to consider irrelevant evidence with respect to voluntary payment, which was erroneous, confusing, and highly prejudicial.

Not only was the Court's instruction on the voluntary payment doctrine improperly vague, it also highlighted irrelevant information, further prejudicing Plaintiffs. Specifically, the Court instructed the Jury that it could consider Plaintiffs post-lawsuit loans, for which Plaintiffs were not seeking recovery, and impute Plaintiffs' post-facto knowledge of the APR to the Class, notwithstanding that such knowledge was irrelevant to *pre*-lawsuit loans given that the voluntary payor defense is judged at the time of payment and there was no basis to impute such knowledge to the Class. This is improper and prejudiced Plaintiffs. Further, it is contrary to this Court's class certification order, which explained that the post-lawsuit loans that some Plaintiffs took out was an individualized issue.

Primary Authorities: *Hazelwood v. Bayview Loan Servicing, LLC*, No. 1:20-CV-726, 2021 WL 664059 (S.D. Ohio Feb. 19, 2021); *L.I. Head Start Child Dev. Servs., Inc. v. Econ. Opportunity Comm'n of Nassau Cnty., Inc.*, 558 F. Supp. 2d 378 (E.D.N.Y. 2008); ECF No. 150

3. The Court's voluntary payment instruction was further inadequate because the Jury was not instructed that the Early Access Agreement violated the Truth in Lending Act, or that the Jury could (or should) consider whether the contract was misleading in determining whether Plaintiffs and the Class paid with full knowledge of all relevant facts.

In addition, the Court improperly failed to include the language that Plaintiffs proposed that would have cured the improper instruction the Court gave regarding post-lawsuit loans. Plaintiffs

requested that the Court instruct the Jury 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." Such an instruction would have at least (1) identified that knowledge of the actual APR was a relevant fact for purposes of the voluntary payment doctrine and (2) clarified to the Jury that the analysis must focus on what an individual knew at the time it paid for a loan on which it was now seeking recovery. The failure to provide this instruction warrants a new trial.

Primary Authorities: *Pivnick v. White, Getgey & Meyer Co, LPA*, 552 F.3d 479 (6th Cir. 2009)

C. The single interrogatory posed to the Jury on voluntary payment was deficient, prejudicial, and resulted in injustice.

The interrogatory the Court gave the Jury on voluntary payment was, like the instruction, too vague. Plaintiffs requested an interrogatory that specifically asked whether the Class had knowledge that the APR exceeded 120% at the time of payment. And the Court improperly denied Plaintiffs' request for an additional interrogatory under Rule 49(a), which would have clarified the issue.

Primary Authorities: *Davis v. City of Columbus, Ohio*, No. 2:17-CV-0823, 2022 WL 4310852 (S.D. Ohio Sept. 19, 2022); *Rodgers v. Ohio Valley CFM Inc.*, 774 F.2d 1163 (6th Cir. 1985); *Cutlass Productions Inc. v. Bergman*, 682 F.2d 323, 327-28 (2d Cir. 1982)

D. The Court allowed Defendant to present improper legal argument on its voluntary payment defense, resulting in further prejudice to Plaintiffs.

Seizing on the improper instruction and interrogatory, Defendant presented argument that prejudiced Plaintiffs, including making the legally impermissible argument that knowledge of the $1 for $10 fee satisfied the voluntary payment defense. Defendant also argued that the mere act of paying 'voluntarily' was sufficient, which misstates the legal standard for voluntary payment. And Defendant improperly made a reliance argument, when the standard is simply whether a payor has knowledge.

Primary Authorities: *City of Cleveland v. Peter Kiewit Sons' Co.*, 624 F.2d 749 (6th Cir. 1980)

INTRODUCTION

Pursuant to Federal Rules of Civil Procedure 50(b) and 59(e), Plaintiffs move for judgment as a matter of law on Defendant's affirmative defense of voluntary payment and contract modification and to alter the Court's judgment on those issues entered on April 27, 2033 (ECF No. 273). In the alternative, Plaintiffs move for a new trial on the issues of voluntary payment and damages.

The Jury in this case found that Fifth Third breached its contracts with nearly half a million of its customers when it promised to provide loans at fixed APRs of 120% but actually charged APRs that were on average triple that amount and even as high as 3,650%. Prior to trial, the Court also found as a matter of law that this same conduct violated the Truth in Lending Act because the 120% APR was not accurate, nor was it stated as an estimate. ECF No. 209, PAGEID #: 659-60. The Sixth Circuit also previously held that various aspects of Fifth Third's contract as to the 120% APR term were "misleading" on their face, with the "most misleading of all" being the contract's formula for calculating APR because it deceptively "signal[ed] to customers that the APR formula is somehow tied to a yearly rate when it is not." *In re Fifth Third Early Access Cash Advance Litig.*, 925 F.3d 265, 279 (6th Cir. 2019). Against this backdrop, Fifth Third should have been barred from availing itself of the *equitable* defense of voluntary payor.

As a matter of first principles, the equitable voluntary payment defense is not available to a party, like Fifth Third, that engages in misleading misrepresentations as to key facts relevant to the payment in violation of federal law. Indeed, it would defy every sense of equity for the law to allow Fifth Third to mispresent the APR it intended to charge on a loan—in violation of the Truth in Lending Act—and yet nevertheless to then evade all liability and retain its resulting ill-gotten gains merely because unsuspecting consumers ultimately paid the amounts Fifth Third took out of their checking accounts. That is not the law. Put simply, one who seeks equity must act equitably. Having misrepresented the APR to its customers and violated a federal law that requires truthful disclosures,

Fifth Third cannot be said to have acted equitably. Thus, the defense was not available to Fifth Third, and the issue should never have been presented to the Jury.

Not only should Fifth Third have been barred from asserting this equitable defense at trial from the outset, there was no evidentiary basis for the Jury to conclude it applied here given the lack of any evidence presented at trial that consumers knew or understood that Fifth Third was collecting more than 120% APR at the time of payment. The law is clear that to prevail on a voluntary payor defense, a Defendant must show actual knowledge of *all* facts *relevant* to payment *at the time payment is made*. Yet, with respect to the loans for which Plaintiffs were seeking relief in this case, there was zero evidence presented at trial that would have satisfied any of these core elements of a voluntary payor defense, much less all of them. Nor could post-facto knowledge-conferring events in the form of advice and notice by counsel provide a basis for such knowledge given that the application of voluntary payor is tied to the time of payment.

Rather than seeking to satisfy the elements of voluntary payment, Fifth Third's defense has always been predicated on the argument that customers voluntarily paid because they knew that they were paying $1 for every $10 borrowed. But that does not answer the question of whether consumers were also knowingly paying APRs in excess of 120% at the time Fifth Third collected their payments. And all the evidence available at trial showed they did not. Fifth Third did not even bother to argue otherwise. Accordingly, the Court should grant judgment on voluntary payor in Plaintiffs' favor notwithstanding the verdict.

Plaintiffs also move for judgment as a matter of law on whether Defendant modified the Early Access Agreement to remove the 120% APR term. Because Defendant did not present legally sufficient evidence that it modified the contract at issue, the Court should grant judgment in Plaintiffs' favor on this issue as well.

In the alternative, Plaintiffs move for a new trial on Defendant's affirmative defense of voluntary payment and damages. The Jury's determination of the voluntary payment defense was infected with prejudicial error. First, the Court's short instruction provided insufficient guidance—in fact the Jury requested, but was denied, additional guidance before rendering its verdict. Second, the instruction failed to make clear that the defense would not apply if the Class was not aware that it was paying more than 120% APR—the *sine qua non* of the defense. Third, the Court erroneously included, over Plaintiffs' objection, instructions authorizing the Jury to retroactively apply Plaintiffs' knowledge gained following advice of counsel to payments made without such knowledge and then further to apply this irrelevant knowledge to Class Members. This does not comport with the voluntary payor doctrine, which requires a defendant to prove knowledge for all Class Members at the time of payment on a payment-by-payment basis, a burden Fifth Third plainly did not meet at trial. Fourth, the interrogatory posed on voluntary payment was deficient and the Jury's interrogatory responses were contradictory but, despite Plaintiffs' request, the Jury was not afforded the opportunity to cure these issues. And finally, Defendant presented various erroneous and prejudicial legal arguments to the Jury on voluntary payment. The cumulative effect of all of these errors resulted in a trial that was fundamentally unfair to Plaintiffs and the Class on the issue of voluntary payment.

Accordingly, Plaintiffs request that the Court enter judgment as a matter of law on the issue of voluntary payment and modification and to grant a new trial to allow the jury to determine damages. In the alternative, the Court should grant a new trial on the issue of voluntary payment and damages.

FACTUAL AND PROCEDURAL BACKGROUND

Because the Court is familiar with the facts of the case, this Section provides a summary of the key facts and procedural history. This case arises out of a payday loan-type product called "Early Access," offered by Defendant Fifth Third Bank beginning in 2008. The Court appointed five Named

Plaintiffs to represent a class of over 477,000 customers of Fifth Third Bank who took Early Access Loans and who signed up for the program on or before May 1, 2013.

Throughout the long life of this case, Plaintiffs have maintained that Defendant breached the Early Access Agreement by promising 120% APR but charging, on average, three times that amount. Plaintiffs claimed damages from 2008 through 2021, when class notice was delivered to Class Members after the Court certified the Class. Defendant, throughout the litigation, has made various claims about the 120% term in the Early Access Agreement—including that it was not a term at all, that it was an estimate, and that it was a regulatory disclosure that was not indicative of Early Access's cost. In each permutation, Defendant has maintained that the product's 10% finance charge somehow overrides the 120% APR term when it comes to Early Access Loans' cost.

Early in the case, the Court accepted Defendant's argument that the 10% transaction fee governed the cost of loans and that, while the APR formula in the Early Access Agreement was misleading, there was no breach of the Early Access Agreement. And so, the Court dismissed the case.

The Sixth Circuit reversed, holding that the 120% APR Term should not "be assigned any less meaning or importance as a matter of contract interpretation." *In re Fifth Third Early Access Cash Advance Litigation*, 925 F.3d 265, 279 (6th Cir. 2019). The Court explained that the example interest calculations in the complaint "demonstrate that the contract's formula for calculating APR is static, and always the same regardless of the length of the loan." *Id.* at 279. "Hence, any APR produced using the contract's formula cannot be 'expressed as a yearly rate,'" despite the fact that the term "APR" "is inextricably tied to a period of a time." *Id.* Still further, the Court noted that the formula shown in the contract "includes as a factor 'the number of statement cycles within a year.'" *Id.* This, according to the Sixth Circuit, was "perhaps the most misleading of all, signaling to customers that the APR formula is somehow tied to a yearly rate when it is not." *Id.* The Court thus remanded this case solely to determine the meaning of the 120% APR term in the Early Access Agreement. Specifically, the Sixth Circuit held

that, "[b]ecause the term 'APR' as it appears in the contract is reasonably susceptible of more than one interpretation, it is ambiguous as a matter of law." *Id.* at 280.

Prior to trial, Plaintiffs moved for summary judgment on this question because the evidence was undisputed that APR as defined in the contract is based on a yearly rate. ECF No. 185. Shortly before trial, Defendant conceded that "all parties agree that if a loan term other than 30 days were used to calculate APR for this product, the APR would change." ECF No. 220 at PageID #: 6477. At trial, Plaintiffs, through their banking expert, put on evidence of the industry standard APR formula that showed that the length of time a loan was outstanding affected the APR. ECF No. 253 at PageID #: 7359-62 (Oliver Tr. at 27:12-30:25). Defendant's banking expert did not take issue with this formula. ECF No. 262 at PageID #: 8183-84 (Grice Tr. at 111:19-12:2). He also testified that if a customer held an Early Access loan for ten days, the customer would have paid an APR of 365 percent, not 120%. *Id.* at PageID #: 8200 (Grice Tr. at 128:1-7). Although Fifth Third later acknowledged that and never put on any evidence that an APR meant anything but what the industry understood it to be, this Court denied Plaintiffs' motion for directed verdict on all counts. ECF No. 259 at PageID #: 7894-95 (Transcript at 16:24-17:2) (denying parties' motions for directed verdict).

Leading up to the pretrial conference, over the course of trial, and during trial, the Court heard the Parties' arguments regarding the proper jury instructions. Throughout this process, Plaintiffs asked the Court to provide clear guidance to the Jury regarding the legal significance of the 120% APR term and the $1-for-$10 term, both with respect to breach of contract and with respect to Defendant's affirmative defense of voluntary payment. Most critically, Plaintiffs asked the Court to instruct the Jury that in order for the voluntary payment doctrine to apply, Defendant had to prove that the amount of money in dispute was paid "with full and actual knowledge ***that the loans had APRs that exceeded 120 percent, expressed as a yearly rate***." ECF No. 221 at PageID #: 6525 (emphasis added). Plaintiffs' proposed verdict form also would have required the Jury to determine whether

"Plaintiffs and the Class voluntarily pa[id] for Early Access loans with full and actual knowledge ***that the Annual Percentage Rate or APR was higher than 120%***." ECF No. 221-1 at PageID #: 6538. The Court rejected both of these requests, as well as a later request to tie knowledge to the relevant facts pertaining to payment, namely those "relating to Fifth Third's breach ***of the APR term.***" ECF No. 283-8 at PageID # 9250.

Plaintiffs also repeatedly requested that the Court instruct the Jury that the APR disclosure in the Early Access Agreement violated the Truth in Lending Act by not accurately stating the APR it charged on the loans, which the Court had determined on summary judgment. *See, e.g.,* ECF No. 242 at PageID #: 7145-47 (requesting instruction on TILA in both preliminary instructions and closing instructions). Plaintiffs also asked the Court to expressly instruct the Jury that they could consider this misrepresentation of fact when determining whether consumers had full knowledge of all relevant facts when making payments on their Early Access Loans. ECF No. 275 at PageID #: 8790 (Charge Conference at 143:14-21). The Court declined to provide this guidance, instead allowing the Parties to make various arguments regarding the respective legal significance of the terms, apparently with the view that the Jury would sort it all out. Although Fifth Third's voluntary payor defense should have never been presented to the Jury, the failure to advise the Jury that misleading conduct can and should bar application of the voluntary payor defense compounded the prejudice to Plaintiffs.

At the beginning of trial, the Jury was instructed that the case was "a breach of contract case between Plaintiffs and Fifth Third about the cost of the Early Access product." Despite the Sixth Circuit's ruling, the Court allowed Defendant to argue to the Jury that the APR Term in the Early Access Agreement was not related to Early Access's cost. Defendant sought to convince the Jury that the 10% finance charge was the only "cost" term in the Early Access Agreement. On this basis, Defendant argued both that it did not breach the contract and that Plaintiffs' knowledge of the finance charge alone entitled it to a finding of voluntary payment.

After hearing five days of evidence, the Jury sided with Plaintiffs on the sole question that the Sixth Circuit remanded for determination: that is, the Jury found that Defendant breached the Early Access Agreement, thereby adopting Plaintiffs' interpretation that the 120% APR term was "a measure of the cost of credit, expressed as a yearly rate." In finding breach, the Jury necessarily found that the 120% APR term was a material cost term of the Early Access Agreement, rejecting Defendant's position. But at the same time, the Jury also found that "the voluntary payment doctrine applie[d] to the class," and awarded no damages—even though there was no evidence presented at trial that Plaintiffs' were aware of the APR that they were charged at the time they paid on the loans at issue, or that they paid in excess of 120% APR. While the Jury was still empaneled, Plaintiffs requested clarification of this contradictory finding under Rule 49(a), but the Court denied that request. ECF No. 277 at PageID #: 9033-34 (Tr. at 34:20-35:2)

LEGAL STANDARD

I. Motion for Judgment as a Matter of Law under Fed. R. Civ. P. 50(b)

At trial, "if the court finds that a reasonable jury would not have a legally sufficient evidentiary basis" to find in favor of the party with the burden of proof on any particular issue, the district court may "resolve the issue against the party; and grant a motion for judgment as a matter of law" against that party. Fed. R. Civ. P. 50(a)(1). After trial, the movant may renew the motion. Fed. R. Civ. P. 50(b).

A Rule 50(b) motion examines "whether sufficient evidence was presented to raise a question of fact for the jury." *Green v. Francis*, 702 F.2d 846, 849 (6th Cir. 1983). And so, a Rule 50(b) motion is proper "if, when viewing the evidence in a light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences, there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion in favor the moving party." *Barnes v. City of Cincinnati*, 401 F.3d 729, 736 (6th Cir. 2005). The court may not reweigh the evidence or assess the credibility of witnesses. *Radvansky v. City of Olmstead Falls*, 496 F.3d 609, 614 (6th Cir. 2007). The

standard on a motion under Rule 50(b) "is the same as one under Rule 50(a) made during trial." *The Hillman Group, Inc. v. Minute Key Inc.*, 317 F. Supp. 3d 961, 968 (S.D. Ohio 2018).

II. Motion for New Trial under Fed. R. Civ. P. 59

Under Fed. R. Civ. P. 59(a)(1)(A), the Court may grant a new motion "on all or some of the issues . . . for any reason for which a new trial has heretofore been granted in an action at law in federal court." The Sixth Circuit has held that there are at least three scenarios that constitute a seriously erroneous result sufficient to warrant a new trial: "(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." *Holmes v. City of Massillon, Ohio*, 78 F.3d 1041, 1045-46 (6th Cir. 1996) (citation omitted). In the context of jury instructions, a new trial is appropriate when the "instructions, taken as a whole, are misleading or given an inadequate understanding of the law." *Miami Valley Fair Housing Center, inc. v. Connor Group*, 725 F.3d 571, 579 (6th Cir. 2013) (quotation omitted).

In that vein, "the governing principal in the district court's consideration of a motion for a new trial is whether, in the judgment of the trial judge, such course is required in order to prevent an injustice; and where an injustice will otherwise result, the trial judge has the duty as well as the power to order a new trial." *Park West Galleries, Inc. v. Hochman*, 692 F.3d 539, 544 (6th Cir. 2012). Here, Plaintiffs respectfully submit that the application of the voluntary payor doctrine to the facts of this case given the evidence at trial and particularly in light of the Jury's verdict on breach of contract would be the epitome of injustice.

A court need not grant a retrial in full and may decide that a new trial is only appropriate on certain issues. "In deciding on the scope of a retrial, the court must consider whether '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 had without injustice." *Davis v. City of Columbus, Ohio*, No. 2:17-CV-0823, 2022 WL 4310852, at *9

(S.D. Ohio Sept. 19, 2022) (citing *Yehia v. Rouge Steel Corp.*, 898 F.2d 1178, 1184 (6th Cir. 1990); further citation and quotation marks omitted) (ordering new trial only on whether certain of the police conduct at issue in original trial constituted excessive force); *see also Greenwood Ranches, Inc. v. Skie Const. Co., Inc.*, 629 F.2d 518, 522 (8th Cir. 1980) (ordering new trial on limited issue of damages, leaving prior jury finding on liability undisturbed); *DePascale v. Sylvania Elec. Products, Inc.*, 510 F. App'x. 77, 79-80 (2d Cir. 2013) (upholding trial court's decision to limit new trial to affirmative defense, as it was a distinct issue from liability); *Akermanis v. Sea-Land Service, Inc.*, 688 F.2d 898, 906-07 (2d Cir. 1982) (limiting new trial to issue of plaintiff's comparative negligence and declining to retry damages, as two issues were separate). Indeed, the United States Supreme Court has held that the Seventh Amendment right to a jury trial does not "require that an issue once correctly determined … be tried a second time, even though justice demand that another distinct issue, because erroneously determined, must again be passed on by a jury." *Gasoline Products v. Champlin Refining Co.*, 283 U.S. 494, 498 (1931).

ARGUMENT

I. The Court should enter judgment as a matter of law against Defendant under Rules 50(b) and 59(e) on its voluntary payment defense and on its contract modification/notice argument.

Plaintiffs seek judgment as a matter of law on two issues: (1) Defendant's voluntary payment defense and (2) Defendant's contract modification argument. On both issues, Defendant had the burden of proof, and on both issues, Defendant did not meet that burden.

As to the voluntary payment defense, the Court should have prevented Defendant from presenting this defense to the Jury because Defendant misleadingly misrepresented the APR to customers—in violation of the Truth in Lending Act, which requires APRs to be stated accurately or clearly presented as reasonable estimates. Equitable defenses are not available to those defendants, like Fifth Third here, who do not act equitably and with clean hands. For good reason, courts have thus held that a defendant is barred from taking advantage of this equitable defense when it

misrepresents relevant facts, which the Sixth Circuit criticized Fifth Third for in this case. *See In re Fifth Third Early Access*, 925 F.3d at 279 (holding Fifth Third's contract misleading on its face). Furthermore, based on the evidence presented at trial, Defendant failed to carry its burden on this defense, as it did not prove that Plaintiffs or any Class Member knew the APR exceeded 120% at the time of payment.

On the contract modification issue, Defendant did not prove that it ever provided a notice to customers that explained Fifth Third was removing the 120% APR term. The failure to do so violates Ohio law and the terms of the Early Access Loan Agreement.

A. Defendant's voluntary payment defense fails as a matter of law.

Defendant's voluntary payment defense fails on two independent bases. First, Defendant is barred from availing itself of this equitable defense based on having misrepresented the APR in what the Sixth Circuit found to be misleading manner and which this Court held violated TILA. Second, Defendant failed to present any evidence at trial for the Early Access loans at issue that Plaintiffs or Class Members knew at the time of payment that Fifth Third was collecting APRs in excess of 120%.

1. Voluntary payor is an equitable defense that Defendant should have been barred from asserting at trial.

The affirmative defense of voluntary payor is an equitable defense. *See e.g.*, *Bilbie v. Lumley*, (1802) 2 East 469 (1802 ER 448) (establishing voluntary payor doctrine as an equitable defense in England in the 1800s); *Best Buy Stores, L.P. v. Benderson-Wainberg Assocs., L.P.*, 668 F.3d 1019, 1029 (8th Cir. 2012) (recognizing voluntary payor doctrine as an equitable defense); *Russ v. Apollo Grp., Inc.*, No. CV 09-904-VBF(FMOX), 2010 WL 11515297, at *4 (C.D. Cal. Mar. 19, 2010) (same). Equitable defenses may not be used to work an injustice. *Ohio State Bd. of Pharmacy v. Frantz*, 51 Ohio St. 3d 143, 145 (1990) (recognizing equitable estoppel "should not be used to uphold crime, fraud, or injustice") (emphasis added); *In re Cowan*, 273 B.R. 98 (B.A.P. 6th Cir. 2002), *aff'd*, 70 F. App'x 797 (6th Cir. 2003) (recognizing the same and precluding Fifth Third Bank from raising equitable defense).

It is thus well-established as a general matter that in order to seek an equitable defense, a party must act with equity. *See, e.g.*, *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814 (1945) ("[H]e who comes into equity must come with clean hands."); *Osborn v. Griffin*, 865 F.3d 417, 452 (6th Cir. 2017) (disallowing equitable defense of laches based on defendant's intentional wrongful conduct); *Transportation Ins. Co. v. Busy Beaver Bldg. Centers, Inc.*, 969 F. Supp. 2d 875, 890 n. 28 (S.D. Ohio 2013) ("In order to have any standing to successfully assert an equitable defense one must come with clean hands, and if he has violated conscience or good faith or has acted fraudulently, equitable release in defenses are not available to him."). The defense is thus unavailable if a party has acted inequitably or in violation of law. *In re Nelson*, 206 B.R. 869, 881 (Bankr. N.D. Ohio 1997) (holding that party's failure to disclose and misrepresentation barred equitable relief because "to get equity, one must do equity"); *State ex rel. Mallory v. Pub. Emp. Ret. Bd.*, 694 N.E.2d 1356, 1363 (Ohio 1998) ("A knowing violation of applicable law would certainly preclude a party from asserting the affirmative, equitable defense of laches.").

In line with these equitable principles, courts have repeatedly found that the voluntary payor defense is unavailable when a party mispresents or fails to fully disclose relevant facts, as Fifth Third unquestionably did here. In a controlling case that is directly on point, the Sixth Circuit held that where Fifth Third Bank failed to disclose all relevant facts relating to disputed bank fees, the voluntary payment defense could not apply. *Arlington Video Productions, Inc. v. Fifth Third Bancorp.*, 569 F. App'x. 379, 389 (6th Cir. 2014). In *Arlington Video*, the plaintiff brought suit because Fifth Third levied various fees on it without properly disclosing those fees before withdrawing the charges from the checking account. Fifth Third nevertheless claimed that the voluntary payment doctrine applied. In reversing the district court's ruling, the Sixth Circuit held that the voluntary payment defense was inapplicable to the breach of contract cause of action, because Fifth Third "did not disclose to Arlington all of the facts relating to the deposit adjustment fee or the increase in the returned item fee before automatically

withdrawing those fees from Arlington's accounts and listing unexplained 'service charges' on the monthly bank statements." *Id.* That is, the Sixth Circuit found that voluntary payment did not apply, because "the evidence show[ed] that Arlington did not voluntarily pay the Bank fees with full knowledge of the facts." *Id.*

Numerous other courts have refused to apply the defense when there has been a failure to make a full disclosure of the relevant facts. *See, e.g., Rodman v. Safeway, Inc.*, 694 F. App'x. 612, 614 (9th Cir. 2017) ("The [voluntary payment] defense requires full disclosure and the undisputed evidence shows that Safeway did not make a full disclosure.") (collecting cases); *Schwebel Baking Company v. FirstEnergy Solutions Corp.*, 4:17-cv-974, 2018 WL 1419477, at *5 (N.D. Ohio Mar. 21, 2018) (holding that the defendant's misleading representation of the charges it levied on plaintiff undermined its voluntary payment defense.); *Fink v. Time Warner Cable*, 810 F. Supp. 2d 633, 649 (S.D.N.Y. 2011) (finding that an internet service provider, who had provided internet services at a speed much slower than advertised, could not take advantage of the voluntary payment doctrine, reasoning that "the voluntary payment doctrine does not apply when a plaintiff's claim is predicated on a lack of full disclosure by the defendant"); *Patterson v. Dean Morris LLP*, No. 08-5014, 2011 WL 1791235, at *10 (E.D. La. May 6, 2011) ("If there were in fact misrepresentations about the fees and costs, then the voluntary payment doctrine could not have been made with full knowledge of the facts.").

A line of cases involving payment for medical records is also particularly instructive because—as in the case at bar—the defendants claimed the plaintiffs were making voluntary payments because they were aware of the dollar amount of the fees the defendant charged them. In one such case, *Carter v. CIOX Health, LLC*, plaintiffs brought state law class claims for improperly charging 75 cents per page for medical records in excess of the actual cost of producing those records, which violated a New York law requiring healthcare providers to furnish copies of medical records to patients for an amount that does not exceed the cost of producing those documents and cannot exceed 75 cents per page.

260 F. Supp. 3d 277-80 (W.D.N.Y. 2017). Defendants claimed that the voluntary payment doctrine applied, because the plaintiffs knew that the disclosed cost was 75 cents per page. *Id.* at 289. This is equivalent to Fifth Third's only argument for application of the voluntary payment doctrine here—that Class Members knew the $1 for $10 disclosed transaction fee.

As the *Carter* court explained, however, the voluntary payment doctrine did not apply because defendants were mispresenting that the 75 cents per page charge was reflective of their actual costs in reproducing the medical records. *Id.* at 289; *see also McCracken v. Verisma Systems, Inc.*, 131 F. Supp. 3d 38, 50 (W.D.N.Y. 2015) (declining to apply voluntary payment doctrine when plaintiffs alleged that 75 cent per page cost for medical records exceeded actual cost of producing medical records); *Spiro v. Healthport Technologies, LLC*, 73 F. Supp. 3d 259, 275 (S.D.N.Y. 2014) ("That defendants disclosed in advance their intention to charge $0.75 per page, or that plaintiffs 'voluntarily agreed' to pay this figure, does not preclude a claim under Section 349(s), where defendants allegedly failed to disclose that their actual costs were below that figure."). That is, while the plaintiffs knew the charge was 75 cents per page, they did not know what that cost represented, much like in this case, where Plaintiffs knew the dollar amount of $1 for every $10, but did not know this equated to an APR well in excess of 120%.

Because this Court held as a matter of law that Fifth Third failed to accurately provide consumers with the true APRs it was charging on Early Access Loans, in plain violation of the Truth in Lending Act, Fifth Third should have been barred as a matter of equity from asserting the affirmative defense of voluntary payor at trial. ECF No. 209 at PageID #: 6057-60. In other words, Fifth Third's TILA violation is a misrepresentation of fact sufficient to preclude application of the voluntary payor defense under the caselaw discussed above. Nor was this a simple oversight on Defendant's part, as it made numerous improper representations that hid the true APR on Early Access loans from its customers, which the Sixth Circuit characterized as "the most misleading" portion of the contract. *In re Fifth Third Early Access*, 925 F.3d at 279. In granting summary judgment

on Plaintiffs' TILA claims, this Court likewise held that "[a]s the Sixth Circuit acknowledged when this case was on appeal, the contract's formula for calculating APR was misleading because it includes as a factor 'the number of statement cycles within a year' which 'signals to customers that the APR formula is somehow tied to a yearly rate when it is not.'" ECF No. 209 at PageID #: 6059 (quoting *In re Fifth Third Early Access*, 925 F.3d at 279).[1]

Not only did the Court find that Defendant failed to truthfully disclose the actual APRs it was charging on Class Members' loans, which alone should have been sufficient to bar application of the voluntary payor defense, the evidence at trial overwhelmingly demonstrated that Fifth Third knew the APRs systematically understated the average APRs on these loans and nevertheless used the 120% APR in an effort to gain a competitive edge over other payday lenders, when in reality Early Access loans carried APRs that were on average the same, and often far greater than payday loans.

Specifically, the undisputed evidence at trial showed that 97% of customers had Early Access Loans that were charged an APR in excess of 120%, with the average time of repayment being approximately 10 days at over 330% APR. ECF No. 263 at PageID #: 8401 (Olson Tr. at 96:16-97:2); ECF No. 262 at PageID #: 8284-85 (Carpenter Tr. at 212:18-213:8); ECF No. 280-1 at PageID # 9080 (Howard Tr. at 129:18-22). There was further ample evidence presented at trial that Fifth Third has always known that the $1 for $10 transaction fee did not equate to 120% APR and that the actual APRs were typically much higher. *See id.*; ECF No. 259 at PageID #: 8007-08 (Erhardt Tr. at 129:19-25, 130:15-17 (agreeing that 120% APR is not an accurate APR for a loan of 11 days or 14 days, where

[1] Defendant may try to analogize this case to *Wears Kahn McMenamy & Co. v. JPMorgan Chase Bank, N.A.*, as it has done throughout this litigation, but this case is inapposite. No. 2:12-CV-812, 2013 WL 1689030, at *6 (S.D. Ohio Apr. 18, 2013). In that case, while the plaintiff alleged that the defendant was misleading in its invoices, the court disagreed and found that the defendant had not engaged in misleading conduct. *Id.* That is the inverse of this case, where this Court has held as a matter of law that Defendant was misrepresenting the APR and where the Sixth Circuit held that the relevant contract term was misleading.

the APR is 332% or 260%); (Howard Tr. at 69:15-69:24, 103:23-104:3, 138:14-138:18) (testifying that loans paid back in less than 30 days would have an APR in excess of 120% "[b]ased on how APRs are calculated"); PX-24 (email from B. Howard on August 12, 2008 recognizing that Fifth Third was "charging (at least) 120% per transaction" on Early Access loans); PX-27 (email from B. Howard on September 15, 2008 stating "if a customer pays the advance back before 35 days is up the APR would be higher to the customer."); PX-31 (email from B. Howard on November 21, 2008 stating that "someone could argue that people get paid every 14 days, and that translates into a 260% APR."); PX-33 (email from B. Howard on March 20, 2009 expressing concern that Fifth Third "could have some exposure if the Fed begins to dig into the program," which "may shine on our 120% APR disclosure (too low)").

Fifth Third's misleading 120% misrepresentation thus systematically understated the actual APRs charged on Early Access Loans, which typically carried APRs triple that percentage, even as high as 3,650%. See ECF No. 262 at PageID #: 8188 (Grice Tr. at 116:10-24); *see also* ECF No. 283-15 at PageID # 9384 (demonstrative showing APRs on Early Access loans over thirty-day period); ECF No. 262 at PageID #: 8187-89 (Grice Tr. at 115:7-17:12) (validating chart for thirty-day loan). Yet, Fifth Third repeatedly made its misleading 120% APR misrepresentation to consumers—which Fifth Third knew would be false and understate the actual APR paid for nearly every customer—not only at the time of contracting, but also at the time they took out their Early Access loans (via ATM and website loan screens and call scripts), as well as in monthly account statements. *See, e.g.*, JX-2000 at p. 4 (exemplar ATM screenshots showing the 120% APR misrepresentation); JX-2001 at p. 5 (same for exemplar online screenshots); JX-2012 at p. 8 (same for exemplar call flow); JX-2013 at p. 162 (example of monthly account statement for Adam McKinney misrepresenting seven-day loan as having a 120% APR, when the actual APR was 521%).

Fifth Third also used the false and misleading 120% APR in order to make Early Access Loans look more attractive than payday loans. *See, e.g.*, PX-1 at p. 2 ("The EAX APR is 120%, compared to most payday lenders that charge between 391% And 680%); PX-4 at p. 3 (stating that "[t]he cost [for Early Access loans] to the customer will be approximately 70% less than a conventional payday loan (the average payday loan APR is between 391% and 680%."); PX-6 at p. 1 (instructing employees to inform customers that Early Access loans are "[c]heaper," as "Fifth Third Banks's APR on Early Access product is on average, almost 280 percentage points lower than payday lenders within [Fifth Third]'s blueprint."). The fact that Fifth Third's APR misrepresentation was not a mere technical inaccuracy or inadvertent error, but rather a systematic understatement of the actual APRs on Early Access Loans in an effort to gain a competitive advantage further underscores the impropriety of allowing Fifth Third to avail itself of the equitable defense of voluntary payor.

Beyond improperly stating (and marketing) the APR as 120%, Fifth Third even contrived a faulty formula to support its misrepresentation of the $1 for $10 fee as equating to 120% APR, a detail the Sixth Circuit held was the "most misleading of all." *In re Fifth Third Early*, 925 F.3d at 279. The formula provided as follows: $100 Advance with a $10 transaction fee = $10/$100 = 0.1% X 12 cycles = **120% APR**." JX2006 at p. 3 (emphasis in original). No matter how long a loan is outstanding, however, the APR will always equal 120%. *See* Mendelsohn Testimony (testifying that formula provided in Early Access Agreement would always produce an APR of 120%, regardless of length of loan)[2]; ECF No. 253 at PageID #: 7371 (Oliver Tr. at 39:6-15) (testifying that Defendant's formula did not account for time loan was outstanding). In holding Fifth Third violated TILA, this Court agreed with the Sixth Circuit and held as a matter of law that Fifth Third's APR formula was misleading. *See* ECF No. 209 at PageID #: 6059 (citing *In re Fifth Third Early Access*, 925 F.3d at 279).

[2] The transcript of Mr. Mendelsohn's testimony is not available yet. As a result, Plaintiffs cite to his testimony generally based on their recollection.

Nor was there any dispute at trial that the formula resulting in 120% for all loans was inaccurate as the APRs actually charged on an Early Access Loan would be higher the shorter period of time the loan was outstanding. Fifth Third's "lead witness"[3] even admitted that the term was inaccurate. ECF No. 259 at PageID #: 8008 (Erhardt Tr. at 130:15-17) (testifying that formula was not accurate because an APR on a loan less than 31 days would be higher than 120 percent); *see also* Howard Tr. at 69:15-69:24, 103:23-104:3, 129:23-130:06, 138:14-138:18 (testifying that loans paid back in less than 30 days would have an APR in excess of 120% "[b]ased on how APRs are calculated"); ECF No. 262 at PAGEID #: 8180 (Grice Tr. at 108:12-25, 109:10-19) (Fifth Third expert agreeing the APRs on Early Access Loans varied "based on the term of the loan" and would be higher than 120% if paid back before 30 days," which is just "how the math works"); *Id.* at PageID #: 8524-25 (Carpenter Tr. at 210:6-8, 212:18-13:8) (recognizing that the formula in the Early Access contract always produced 120% APR, but that the average term of repayment on Early Access loans was 10 days, which would yield an APR of 365%); PX-24; PX-27; PX-31; PX-33; PX43.[4]

Yet, Fifth Third never disclosed the actual APR to consumers, instead choosing to affirmatively misrepresent the APRs it was collecting on Early Access Loans in various forms through April 30, 2013. ECF No. 262 at PageID #: 8301 (Carpenter Tr. at 229:20-24) (admitting that the "one thing" Fifth Third knew "for sure" and yet "never disclosed" was that the APR would vary based on the length of repayment). Thereafter, Fifth Third surreptitiously removed these references to an APR, but never disclosed to consumers that it had charged APRs far in excess of 120% for over a decade. *See id.* at PageID #: 8288-89 (Carpenter Tr. at 216:24-217:3).

[3] ECF No. 262 at PageID #: 8080-81 (Tr. at 8:25-9:1) (counsel for Fifth Third describing Mr. Erhardt as its "lead witness").

[4] Counsel for Defendant also admitted that it was "pretty basic and [] undisputed" that decreasing the amount of time a customer has to repay a loan increases the APR. ECF No. 256 at PageID #: 7787 (Motion hearing at 16:20-25).

Under these circumstances, to allow Defendant to use a voluntary payment escape hatch to evade liability for breach of contract would work a manifest injustice by *rewarding* Defendant for (1) violating TILA, which requires truth in lending, specifically the accurate disclosure of APRs, and (2) engaging in affirmative misrepresentations that the APR on Early Access Loans was 120% when Fifth Third has always known that it was not. Such a result would be contrary to every notion of equity that the affirmative defense of voluntary payment is supposed to serve.

2. Even setting aside equitable considerations, Defendant did not carry its burden on any element of the voluntary payor defense at trial, as there are no facts upon which a jury could reasonably conclude that Plaintiffs knowingly paid APRs in excess of 120% on Early Access Loans at the time of such payment.

A defendant who is not barred as a matter of equity from availing itself of the voluntary payor defense (as Fifth Third should have been here) has the burden of proving this defense by the greater weight of evidence. Under Ohio law, this requires showing with respect to each payment at issue that such payment was made with "*full knowledge of the relevant facts*." *City of Cleveland v. Ohio Bureau of Worker's Compensation*, 109 N.E.3d 84, 115 (Ohio App. Ct. 2018) *reversed on other grounds by* 152 N.E.3d 172 (Ohio 2020) (denying application of the voluntary payment doctrine because there was no evidence that plaintiff made any payments of annual worker's compensation premiums with full knowledge of the relevant facts (emphasis added)). Knowledge is judged *at the time of the payment*. *Arlington Video*, 569 F. App'x. at 390 (analyzing knowledge prior to bank's automatic withdrawal of payment); *see also Rodman v. Safeway*, 125 F. Supp. 3d 922, 941 (N.D. Cal. 2015) *aff'd.* 694 F. App'x. 612 (9th Cir. 2017) (explaining that the relevant analysis under the voluntary payment doctrine is "[w]hether a plaintiff knew her payment to be excessive at the time of payment"); *Hazelwood v. Bayview Loan Serving, LLC*, 2021 WL 664059, at *4 (S.D. Ohio Feb. 19, 2021) ("The relevant issue is whether plaintiff believed that he did owe the full debt charged by Bayview *at the time of payment*, but chose voluntarily to pay the debt anyway.") *report and recommendation adopted,* 2021 WL 1019936 (Mar. 17, 2021).

At trial, however, Fifth Third did not present any evidence for the Jury to conclude that Plaintiffs or any Class Member knew the highly relevant fact that the APRs on the Early Access loans at issue in this case exceeded 120%. As a result, this issue should not have been given to the Jury to decide. Rather, the Court should have ruled as matter of law that Defendant failed to meet its burden of proving its voluntary payor affirmative defense.

a. The actual APRs charged on Early Access Loans is a relevant fact for purposes of the voluntary payor doctrine.

Throughout the life of this case and at trial, Defendant has hinged its voluntary payor defense entirely on Plaintiffs and the Class knowingly having paid the $1 for $10 transaction fee.[5] The fact that Plaintiffs and most Class Members took out multiple loans and were aware of the $1 for $10 transaction fee was the *only* evidence presented by Defendant on voluntary payor.[6] Defendant wholly failed to elicit any evidence at trial regarding Plaintiffs or Class Members' knowledge of the APRs on Early Access Loans because Defendant's position, as argued to the jury, was that "for purposes of this separate doctrine, this voluntary payment doctrine, it does not matter what the APR means." ECF No. 276 at PageID #: 8908 (Closing at 77:14-16). Rather, Defendant claimed that "if plaintiffs knew

[5] *See e.g.*, ECF No. 250 at PageID #: 7319 (Defendant's opening statement at 82:18-22) ("If you find that the plaintiffs knew that they were paying a dollar for ten and voluntarily paid a dollar for ten and did, in fact, actually pay a dollar for ten, then they can't recover this money."); ECF No. 276 at PageID #: 8907-08 (Defendant's closing argument at 76:24-77:3) ("But if they paid a dollar for ten thinking that was the cost and they agreed to pay that amount, they can't come back years later now and say 'A lawyer told me there was a difference cost' in order to get out of the deal they believed they made at the time."); (77:14-16) ("So for purposes of this separate doctrine, this voluntary payment doctrine, it does not matter what the APR means, whether it means one thing or another.").

[6] Defendant methodically cross-examined Plaintiffs on the fact that they took out multiple loans with knowledge of the $1 for $10 fee. ECF No. 253 at PageID #: 7472, 7482 (McKinney Tr. at 140:1-21, 150:2-10) (cross examination regarding 10% fee); ECF No. 255 at PageID #: 7527-28, 7540-41 (Harrison Tr. at 34:10-35:4, 47:17-48:3); ECF No. 255 at PageID #: 7586-88, 7593, 7594, 7607, 7610 (L. Laskaris Tr. at 93:24-94:12, 95:2-15, 100:16-18, 101:14-19, 114:8-24, 117:17-18:13); ECF No. 255 at PageID #: 7633-34 (D. Laskaris Tr. at 140:4-41:10); ECF No. 263 at PageID #: 8337-42, 8353-55 (Fyock Tr. at 32:8-37:22, 48:16-50:1); *see also* Hart Testimony (testifying in great detail regarding repeat usage of Early Access loans by customers) (the transcript for Mr. Hart's testimony is not yet available).

that they were paying a dollar for ten and voluntarily paid a dollar for ten and did, in fact, actually pay a dollar for ten, then they can't recover this money." ECF No. 250 at PageID #: 7319 at 82:18-22. But this is a misstatement of law. While there was evidence that some of the class representatives took out Early Access Loans after they were aware that the APRs exceeded 120%, this was never the basis for the voluntary payment defense. And, as discussed infra at Section II(B)(2), it could not be a valid defense because Plaintiffs explicitly excluded all such payments—which amount to $675—from this case. *See* ECF No. 263 at PageID #: 8402-03 (Olsen Tr. at 97:8-98:16) (testifying that he did not include loans Plaintiffs took after they filed suit in his damages calculations); ECF No. 253 at PageID #: 7467 (McKinney Tr. at 135:4-14) (testifying that he was not seeking recovery for loans he took after filing his lawsuit); ECF No. 263 at PageID #: 8332 (Fyock Tr. at 27:11-18) (same).

Defendant's $1 for $10 argument cannot establish the basis for the voluntary payment defense because the total dollar amount paid by Plaintiffs and the Class has no bearing on whether Plaintiffs had knowledge of the *other* relevant fact: that this dollar amount did not equate to 120% APR, as Fifth Third misrepresented. The number of times Plaintiffs or Class Members took out Early Access Loans simply cannot cure the fact that Fifth Third *never* disclosed the true APRs it was charging on these loans, which on average, were triple the amount promised and as high as 3,650%. As to *this* fact, the Court should find as a matter of law that the actual APRs Fifth Third charged on Early Access Loans was indeed relevant. "A trial judge has broad discretion to decide whether evidence is *relevant* and admissible." *U.S. v. Allen*, 872 F.2d 1029 (table), 1989 WL 31131, at *2 (6th Cir. Mar. 30, 1989) (emphasis added). This Court should thus hold as a matter of law that knowledge of the $1 for $10 fee alone cannot support application of the voluntary payment doctrine, and that the actual APRs charged on Early Access loans was a relevant fact that Fifth Third had to show knowledge of. *See* ECF No. 175 at PageID #: 2923-26 (Plaintiffs' argument on summary judgment that knowledge of 10% fee is not sufficient for Defendant to carry burden of voluntary payment defense)

Indeed, prior to trial, this Court declined "Defendant's invitation to gloss over the APR term." ECF No. 209 at PageID #: 6050; ECF No. 256 at PageID #: 7763-64 (Motion Hearing at 92:23-93:11) (stating that 120% APR provision was term of the contract and admonishing Defendant that it could not write terms out of contract). This is consistent with the Sixth Circuit's admonition that the APR term should not "be assigned any less meaning or importance" merely because Fifth Third was required to include an APR in the Early Access Loan contract. *In re Fifth Third Early Access*, 925 F.3d at 279. *Ipso facto*, the same holds true with regard to Defendant's voluntary payment defense.

Lest there be any doubt as a matter of law that the actual APRs Fifth Third charged on Early Access loans were a relevant fact a customer must have had knowledge of for payment to be voluntary, the Jury's verdict establishes this as a matter of fact. Specifically, by finding that Fifth Third breached its contract by failing to uphold the promise of a 120% APR, the Jury necessarily must have rejected Defendant's argument, made throughout trial, that the $1 for $10 transaction fee was the sole relevant cost term and the 120% APR term was only a "regulatory disclosure," not "what the product cost." *See* ECF No. 250 at PageID #: 7291:11-92:24 (Opening Statement). There was ample evidence presented at trial supporting the Jury's verdict in this regard.

For example, the Early Access Loan Agreement defines APR as "the cost of credit, expressed as a yearly rate." JX-2006 at p. 4. In fact, Defendant's banking expert even admitted that APR reflected cost. ECF No. 262 at PageID # 8181 (Grice Tr. at 109:8-19) ("They paid a higher, higher cost based on the length of time; so the shorter the time; the higher the APR."). And numerous Fifth Third documents showed that APR was a cost term. *See* ECF No. 253 at PageID #: 7354-55 (Oliver Tr. at 22:24-23:1) (testifying that transaction fee is part of information that goes into APR, which is the cost of the loan); PX-4 at p. 3 (referring to APR as the "cost to the customer"); PX-6 at p. 1 (instructing employees to inform customers that Early Access loans are "[c]heaper," as "Fifth Third Banks's APR on Early Access product is on average, almost 280 percentage points lower than payday lenders within

[Fifth Third]'s blueprint."); PX-1 at p. 1 ("While the interest rate *charged* on EAX advances (120% APR) is approximately one-third that of conventional payday lenders, EAX is considered a higher-cost borrowing source when compared to other types of credit.") (emphasis added).

This case is thus similar to *Cox v. Porsche Financial Services, Inc.*, a Southern District of Florida case. 337 F.R.D. 426 (S.D. Fla. 2020). In *Cox*, Plaintiff leased a car, using the trade-in of another car as part of the financing. *Id.* at. 428. The dealer applied the trade-in-value of the car, $25,000, but failed to credit the trade-in as a capitalized cost reduction, which resulted in plaintiff paying additional interest and taxes. *Id.* Plaintiff thereafter filed a lawsuit claiming the defendant similarly overcharged other customers on a class-wide basis, to which Defendant raised a voluntary payment defense. The *Cox* court rejected this defense on summary judgment, however, reasoning that although plaintiff had knowingly paid the gross monthly lease price, there was no evidence the plaintiff contemporaneously had knowledge that this dollar amount did not account for the $25,000 trade-in credit as a capitalized cost reduction. *Id.* at. 431. Similarly, here, even though Plaintiffs and the Class knew they were paying the $1 for $10 dollar amount, they did not know that this did not equate to the 120% APR promised in the contract. That is, Plaintiffs did not know the implication of the $1 for $10 as it related to APR, just as the *Cox* plaintiff did not know that the $25,000 trade-in value was improperly applied.

b. As to the relevant fact in dispute—the actual APRs on Early Access Loans—there was no evidence at trial that any Plaintiff or Class Member had knowledge of this fact at the time of payment.

For the defense of voluntary payor to apply to any given payment, a Defendant must show full knowledge of all relevant facts *at the time of payment*. In *Arlington Video v. Fifth Third Bankcorp*, for example, the Sixth Circuit held that the voluntary payment doctrine did not apply because Fifth Third had failed to "disclose all of the facts relating to the deposit adjustment fee or the increase in the returned item fee *before automatically withdrawing those fees* from Arlington's account." 569 F. App'x. at 390 (emphasis added); *see also Rodman v. Safeway*, 125 F. Supp. 3d 922, 941 (N.D. Cal. 2015) *aff'd.* 694

F. App'x. 612 (9th Cir. 2017) (explaining that the relevant analysis is "[w]hether a plaintiff knew her payment to be excessive at the time of payment"). The same is true here.

For Plaintiffs' loans at issue in this case for which they were seeking relief at trial, Plaintiffs testimony was that they had no knowledge prior to meeting with their attorneys that the APRs on their Early Access loans exceeded the contractually stated rate of 120%. *See* ECF No. 253 at PageID #: 7448-49 (McKinney Tr. at 116:23-17:5); ECF No. 255 at PageID #: 7523-24 (Harrison Tr. at 30:21-31:4); *Id.* at PageID #: 7593 (L. Laskaris Tr. at 100:12-15); *Id.* at PageID #: 7631 (D. Laskaris Tr. at 138:14-18); ECF No. 263 at PageID #: 8327-28 (Fyock Tr. 22:21-23:8). This testimony was undisputed and credited by Defendant at closing argument as truthful and honest. ECF No. 276 at PageID #: 8907 (Closing argument at 76:17-22) ("But to give them credit, these plaintiffs were honest, and they came in and they testified truthfully about what they thought the product cost when they were using the product."). As to the APRs on loans taken out by other Class Members, there was no evidence whatsoever presented at trial regarding the knowledge of any Class Member.

Thus, there was no evidence presented at trial on which the Jury could have concluded that any of the loans Class Members took or any of the loans Plaintiffs took Plaintiffs prior to consulting with their attorneys were paid with knowledge of all relevant facts *at the time of payment*. Nor has Defendant ever argued that Plaintiffs knew the APRs of pre-lawsuit loans before they met their attorneys or that any Class Member had knowledge of the actual APRs on any of their loans at any time. Judgment as a matter of law should thus be granted to Plaintiffs on voluntary payor with respect to Plaintiffs pre-lawsuit loans and the loans taken out by other Class Members prior to Class Notice.

The case law is clear that a Defendant *cannot* avail itself of the voluntary payment doctrine by demonstrating knowledge gained *following* payment. *See also Cox*, 337 F.R.D. at 431 (granting plaintiff's motion for summary judgment based on testimony by the plaintiff that "he did not know *at the time of his lease transaction* that his $25,000 trade-in credit would not be applied to his CCR and would thus

result in a higher payment") (emphasis added) (citation omitted); *City of Cleveland v. Ohio Bureau of Workers' Compensation*, 109 N.E.2d at 115-16 (rejecting defendant's attempt to apply the voluntary payment defense because the at-issue information regarding overpayment of worker's compensation premiums was not "available to [the city's risk manager] or the city *at the time the city made any of the premium payments at issue*"); *Hazelwood*, 2021 WL 664059, at *4 ("The relevant issue is whether plaintiff believed that he did owe the full debt charged by Bayview *at the time of payment*, but chose voluntarily to pay the debt anyway."). In other words, knowledge cannot be applied retroactively, meaning that a defendant who fails to make a showing of full knowledge at the time of payment does not carry its burden with respect to that payment.

With respect to Plaintiffs' post-lawsuit loans, Plaintiffs conceded prior to trial they were not seeking damages on any such loans. Yet, the *only* evidence at trial showing *any* knowledge regarding the actual APRs charged on Early Access Loans was tied to these post-lawsuit loans taken out by some (but not all) of Plaintiffs. Thus, at most, the voluntary payment defense might have applied to Plaintiffs' post-lawsuit loans, which were a miniscule portion of the over *thirty-two million* loans to Class Members at issue in this case. *See* ECF No. 263 at PageID #: 8410 (Olson Tr. at 105:22-25). With respect to payments on those loans, there at least arguably would have been some evidence upon which a jury could have concluded that those Plaintiffs knew by that time that Fifth Third was collecting greater than 120% APR. But the Court need not address these loans because Plaintiffs expressly excepted them from any claim for relief—meaning there was no need to consider whether Plaintiffs voluntarily paid on these loans because they were not at issue in the lawsuit.[7] And because knowledge for purposes of the voluntary payment doctrine is judged *at the time of payment*, any such

[7] By stipulation of the parties, Plaintiffs also were not seeking any relief on loans taken out by Class Members after the date of Class Notice.

post-facto knowledge was wholly irrelevant to whether Plaintiffs knowingly paid in excess of 120% APR at the time they paid on loans taken out *prior to* a knowledge-conferring event.

In sum, given the relevant inquiry—knowledge at the time of payment—Defendant cannot meet its burden to carry the affirmative defense of voluntary payment for pre-lawsuit loans taken out by Plaintiffs or pre-Notice loans taken out by Class Members, which were the only loans on which Plaintiffs sought damages at trial and were thus at issue for purposes of voluntary payor in this case. Accordingly, the Court must grant judgment in Plaintiffs' favor as to these loans.

B. Defendant presented no evidence that it sent a notice for the removal of the 120% APR term, and therefore, it did not properly modify the Early Access Loan Agreement.

Like with the voluntary payment doctrine, Defendant has failed to carry its burden to prove that it properly modified the Early Access Loan Agreement. Under Ohio law, when a contract has been modified, it is the burden of the party seeking to prove that modification who must carry that burden. *Coldwell Banker Residental Real Estate Services v. Sophista Homes, Inc.*, No. CA-13191, 1992 WL 303073, at *3 (Ohio App. Ct. Oct. 16, 1992); *see also* 1-OJI-CV 501.09 (providing that the party seeking to show modification must prove modification).

Defendant has failed to meet its burden as it did not show that it provided customers notice of the removal of the 120% APR as required by the Early Access contract. Rather, Fifth Third's witnesses testified unequivocally that no notice was sent to customers advising them of any change in their APR, nor was any evidence of such a notice presented at trial. This failure precludes Defendant's attempt to limit the period of damages given the Early Access Loan contract's notice requirement and related course of dealing and trade custom informing the interpretation of the same, as well as the special notice protections that attach to changes to adhesion contracts under Ohio and federal law, all of which make clear that Fifth Third was required to provide direct notice of any change in the APR

terms of the contract, which there is no dispute Fifth Third did not do As a result, the Court should grant judgment as a matter of law on this issue.

1. The Early Access Loan Agreement required notice to amend the contract, which Fifth Third did not provide.

Although the Early Access Loan Agreement allows Fifth Third the right to amend the agreement, it must provide notice to customers in order to do so:

> **CHANGE IN TERMS**
> We reserve the right to change the terms of this Agreement at any time by providing notice to you of such changes. Such changes may apply to any outstanding Advances as well as to future Advances. By continuing to use Fifth Third Early Access or keeping your Associated Checking Account open, you are accepting the change in terms, or you may decline the change in terms by no longer using Fifth Third Early Access prior to the effective date of the change or by requesting that access to the feature be discontinued.

JX-2006 at p. 7. As evidenced by the above, to effect any change in terms, the Early Access contract signed by Plaintiffs and the Class required Fifth Third to provide notice "to you" or the customer. This notice provision also expressly contemplates a period of time between when a consumer will receive said notice from Fifth Third and "the effective date of the change," given that a customer has the option to decline the change by ceasing to use the product prior to the effective date. Accordingly, under the plain language of the contract, in order to change any term therein, Fifth Third was required at a minimum to provide notice directly to a consumer at some point in time prior to the change occurring, which also would have advised them of the effective date of any such change.

Yet, Fifth Third's witnesses testified that no notice was provided. ECF No. 262 at PAGEID #: 8257 (Carpenter Tr. at 185:5-8, 188:15-19, 216:24-217:3, 227:23-228:4); Mendelsohn Testimony (testifying that Defendant did not provide notice when it removed 120% APR term). Rather, the evidence shows that the only way a customer would have known about any change to the APR term was if they had themselves navigated to a hyperlink where the updated Terms and Conditions could be accessed (i.e., following the effective date of any such change). *Id.* at 229:2-228:12. This is plainly not the type of notice contemplated by the contract because (a) it involves self-discovery, not the

required provision of notice by Fifth Third to a customer reflected in the contract's plain language, and (b) it necessarily would have been following the effective date of any such change, which is contrary to the timing of how notice must be effectuated under the contract. Accordingly, judgment as a matter of law should be rendered in Plaintiffs' favor on this issue.

Indeed, Fifth Third's witnesses testified customers were in fact notified of other changes to the terms of the Early Access contract—such as 2009 changes to the automatic repayment process and eligibility restrictions, a 2012 increase in available loan limits, and a 2015 change to the transaction fee, repayment period, and advance eligibility. *Id.* at 184:20-185:4; DX-1152 (example of notice to customers regarding certain changes made to Early Access contract effective January 1, 2015); DX-1089 (email to Janet Fyock showing same); PX-53 (example of notice to customers regarding changes to repayment process effective July 1, 2009). In other words, in addition to and consistent with the plain language of the contract, Fifth Third's course of dealing shows that it understood the contractually required notice to be a direct communication that expressly identified the changes to the Early Access Agreement prior to those notices going into effect.

The Ohio Supreme Court has also held that evidence of a general custom or trade usage may be used to show the meaning of a term with a special meaning within an industry. *Alexander v. Buckeye Pipe Line Co.*, 374 N.E.2d 146, 151 (Ohio 1978) (citation omitted). And in this case, only Plaintiffs presented such evidence. Specifically, Plaintiffs' banking expert testified that "the banking standards for notice would be a direct notice to your customer, written notice. You would be explaining any changes that you're making in the loan contract, including any language changes or any terms that you're deleting." ECF No. 253 at PageID #: 7390 (Oliver Tr. at 58:5-8). Plaintiff's banking expert also testified that a change to the APR term in the Early Access agreement would "absolutely" be a change in a material term of a contract "because it basically tells you what the total cost of credit is." *Id.* at PageID #: 7390 (Oliver Tr. at 58:18-22). Fifth Third presented no contrary expert testimony.

Given the plain language of the contract and the overwhelming weight of the evidence at trial, the Court should render judgment in favor of Plaintiffs on the issue of contract modification/notice.

2. Ohio law requires that the drafter of an adhesive contract provide direct notice when amending the contract.

That Plaintiffs' interpretation must prevail is further supported by the adhesive nature of the contract, to which special protections apply and requires strict construction in Plaintiffs' favor.

First, Ohio law recognizes that adhesive contracts, like the Early Access Agreement, require special protection. For instance, in a decision reversing long-standing Ohio law and allowing for fee-shifting in contracts, the Ohio Supreme Court specifically exempted adhesion contracts from its ruling. *See Nottingdale Homeowners' Ass'n. Inc. v. Darby*, 514 N.E.2d 702, 707 n. 7 (Ohio 1987). As this Court properly instructed the jury, any ambiguity in adhesion contracts is also strictly construed against the drafter. ECF No. 270 at PageID #: 8627-28; *see also Westfield Ins. Co. v. Galatis*, 797 N.E.2d 1256, 1262 (Ohio 2003) ("where the written contract is standardized and between parties of unequal bargaining power, an ambiguity in the writing will be interpreted strictly against the drafter and in favor of the nondrafting party.").

One prototypical adhesion contract is a contract of insurance. In that context, Ohio common law requires that, for changes to terms, simply sending an updated policy to customers without expressly identifying the changes is insufficient. Indeed, Ohio common law has long held that "where there is a renewal of a policy without anything being said by the parties as to a change in its conditions, the agreement is implied that the new policy shall be upon the same terms and conditions as the former one." *J.R. Roberts & Son v. National Ins. Co.*, 25 Ohio C.D. 212, 218 (Ohio Ct. App. 1914). So, if a renewal insurance policy contains changes, the insured must give direct notice of those changes; otherwise, the changes are invalid. *MDC Acquisition Co. v. Traveler's Property Cas. Co. of America*, 545 Fed. App'x. 398, 400 (6th Cir. 2013) citing *Allstate Ins. Co. v. Croom*, 2011-Ohio-1697 (8th Dist. 2011). "[A]n insurance company does not give an insured actual notice of

a change in coverage by merely sending the policy alone, or with Instructions to read the policy carefully." *MDC Acquisition Co. v. North River Ins. Co.*, 898 F. Supp. 2d 942, 952 (N.D. Ohio 2012), citing *Thomas v. Connally*, 43 Ohio Misc. 5, 8 (Ohio Mun. Ct. Jul. 2, 1974); *Allstate Insurance Co. v. Zampedro*, 1983 WL 6040 (11th Dist. Dec. 30, 1983). That is because "it is inequitable to require an insured to search the fine print of each renewal policy." *Government Emp. Ins. Co. v. U.S.*, 400 F.2d 172, 175 (10th Cir. 1968). Yet, that is exactly what a Class Member would have been required to do here, as Fifth Third's own witness testified at trial. *See* ECF No. 262 at PageID #: 8301 (Carpenter Tr. at 229:2-12).

Likewise, in the context of travel tickets, another form of an adhesive agreement, federal law requires that passengers must receive direct notice of contract provisions. *See Barbachym v. Costa Line, Inc.*, 713 F.2d 216, 218 (6th Cir. 1983) citing *The Majestic*, 166 U.S. 375 (1897). Under this body of law "a carrier has not made a reasonable effort to warn passengers of its liability limitations unless the face of the ticket contains conspicuous language directing the passenger's attention to the contractual terms contained in other materials furnished by the carrier." *Id.* at 219-20 (collecting cases). In *Barbachym*, the Sixth Circuit concluded that the ticket did not include conspicuous language because the only language that suggested additional terms was a reference to conditions on a ticket held by a group leader, not each individual ticket. *Id.* at 220. Under this authority, a carrier must do "all it reasonably could to warn the passenger that the terms and conditions were important matters of contract affecting his legal rights." *Silvestri v. Italia Societa Per Azioni Di Navigazione*, 388 F.2d 11, 17 (2d Cir. 1968).[8]

[8] Ohio law on notice in legal matters is similarly exacting. The Ohio Supreme Court has held that "[i]t is fundamental … that in order for notice to be effective, it 'must be granted at a meaningful time and in a meaningful manner.'" *State ex rel. Nicodemus v. Industrial Com'n.*, 448 N.E.2d 1360, 1362 (Ohio 1983) quoting *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). In that vein, Ohio "has long followed the rule . . . which states where a statute requires notice of a proceeding, but is silent concerning its form or manner of service, actual notice will alone satisfy such requirement." *State ex rel. Peake v. Board of Ed. of South Point Local School Dist.*, 339 N.E.2d 249, 251 (1975) (quotation omitted).

Thus, for an adhesive contract, such as this one, notice of any change to a contractual term is not effective unless the notice expressly identifies the changes made to the contract. The drafter of a contract does not effectuate notice by simply sending the new contract with the expectation that the non-drafters will comb through the agreement to find the changes and amendments.

In this case, Defendant did not send any notice of the removal of the APR term in 2013. The most Defendant was able to muster was pointing to a 2015 notice (DX-1152), which did not specifically reference APR. ECF No. 262 at PageID #: 8260 (Carpenter Tr. at 188:15-19). This is not enough for Defendant to carry its burden of proving a valid modification. As a result, the 120% APR promise remains part of the contract.

II. In the Alternative, the Court Should Grant a New Trial on Fifth Third's Affirmative Defense of Voluntary Payment

If the Court does not grant Plaintiffs' renewed motion for judgment as a matter of law on Defendant's voluntary payment affirmative defense (which it should), the Court should grant a new trial on the issue of voluntary payment.[9] Not only was the Jury's voluntary payment verdict against the weight of the evidence, the inadequate and confusing instructions and insufficient interrogatory provided to the Jury on Defendant's voluntary payment defense resulted in unfairness to Plaintiffs and the Class. The Court should therefore exercise its "duty as well as [its] power" to order a new trial because, if it does not, an injustice will result. *Davis by Davis v. Jellico Community Hosp. Inc.*, 912 F.2d 129, 133 (6th Cir. 1990) (quotation marks and citation omitted).

A. The Jury's verdict that Plaintiffs and the Class made payments on all of their early access loans "with full knowledge of all the relevant facts" was against the weight of the evidence.

A new trial is warranted where the verdict is against the weight of the evidence. *Conte v. General Housewares Corp.*, 215 F.3d 628, 637 (6th Cir. 2000). When assessing whether a verdict was against the

[9] A new trial should cover both voluntary payment and damages, as the Jury made no damages finding.

weight of the evidence, "the trial court must compare the opposing proofs" and "weigh the evidence," and must set aside the verdict if it is against the clear weight of the evidence. *Strickland v. Owens Corning*, 142 F.3d 353, 357 (6th Cir. 1998) (quotation marks and citation omitted). Granting a new trial based on the weight of the evidence therefore requires a lower showing by the movant than a request for judgment as a matter of law. *Denhof v. City of Grand Rapids*, 494 F.3d 534, 543 (6th Cir. 2007).

Nevertheless, as discussed at length in Section I(A)(2)(b) above, there was *no evidence* presented at trial that any Class Member knew they were paying more than 120% at any point in time. There was likewise *no evidence* that Plaintiffs knew they were paying more than the promised 120% APR before meeting with counsel and filing this lawsuit, following which voluntary payor was inapplicable and irrelevant because knowledge cannot be applied retroactively and because Plaintiffs were not seeking damages on any loans that post-dated this knowledge-conferring event.

Further, the clear weight of the evidence is that Defendant affirmatively misled Plaintiffs and Class Members by systematically understating the true APR on their loans by using a misleading and inaccurate APR formula in the Early Access Agreement that always equated to 120%, which was repeated on customers' bank statements and when they took loans (by phone, online, or at the ATM). Thus, Defendant's own actions precluded Plaintiffs' and Class Members' from having full knowledge of the APR they were actually paying on their loans and barred Defendant from taking advantage of the equitable voluntary payor defense.

In short, this is not a close case. The evidence is entirely one-sided in Plaintiffs' favor, such that a new trial is required. It's hard to imagine a situation that would demand a new trial more than this one based on the undisputed evidence presented at trial and the Bank's own $1 for $10 arguments to the Jury that had nothing to do with plaintiffs or the Class voluntarily paying more than 120% APR.

B. The voluntary payment jury instruction was deficient, confusing, and prejudicial.

A party is also entitled to a new trial based on deficient jury instructions where those instructions "taken as a whole, are misleading or give an inadequate understanding of the law." *Miami Valley Fair Housing Center, Inc. v. Connor Group*, 725 F.3d 571, 579 (quotation marks omitted; citing *Jones v. Federated Fin. Reserve Corp*, 144 F.3d 961, 966 (6th Cir. 1998)). Instructions must "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). If they do not, and if the instructions are "confusing, misleading, and prejudicial," then a new trial is warranted. *Id.* at 488 (citation omitted).

Here, the Jury was manifestly confused by the Court's voluntary payment instructions, which were comprised of a brief paragraph among 31 pages of additional instructions. Specifically, on the second day of deliberations, the Jury requested additional information on voluntary payment, asking the Court: "can we get more information on the voluntary payment doctrine? i.e. full document." ECF No. 277 at PageID #: 9008 (Transcript at 8:23-25) (juror question).[10] In response, the Court only provided the following: "You have seen and heard all the evidence in this case. The voluntary payment doctrine is a legal principle explained in the jury instructions. Please see page 24 of the jury instructions." ECF No. 277 at PageID #: 9013 (Transcript at 14:9-12) (answer to juror question).[11]

A jury's note or question during deliberation regarding a particular instruction can serve as a strong indicator that the instruction provided was inadequate or confusing. *See, e.g.*, *Reynolds v. Green*, 184 F.3d 589, 592-94 (6th Cir. 1999) (jury notes requesting clarification on verdict form and indicating difficulty in reaching agreement indicate that a confusing "key instruction" constituted plain error); *Encompass Office Solutions, Inc. v. Louisiana Health Serv. & Indem. Co.*, 919 F.3d 266, 276 & n.29 (5th Cir.

[10] The Court has not filed this question on the docket.
[11] The Court's response has also not been filed on the docket.

2019) (jury note asking "Can you clearly define Arbitrary and Capricious in the eyes of the court[?]" indicated jury confusion from instruction provided); *Aero Intern., Inc. v. U.S. Fire Ins. Co.*, 713 F.2d 1106, 113 (5th Cir. 1983) (jury note requesting to review jury instructions was a "telling indication of actual jury confusion").

Importantly, the Jury's question regarding voluntary payor followed a question on the first day of deliberations, which indicated the Jury disagreed as to the amount of damages to award. Specifically, on the first day of deliberations, the Jury asked the Court: "What can we use to determine damage amount if not agreeing to the other numbers given?" ECF No. 276 at PageID #: 8998 (Transcript at 167:15-16) (juror question); *see also* ECF No. 266-1 at PageID# 9040. In response, the Court quoted in writing an excerpt from the final instructions on damages and referred the Jury to those pages of the final instructions. *See* ECF No. 277 at PageID #: 9002-9005 (Transcript at 3:1-6:9) (describing answer to juror question).

Taken together, it is clear the Jury was struggling with how to address damages given the voluntary payor instruction. That is no surprise as the voluntary payor instruction and corresponding jury verdict form suffered from three critical defects: (a) the jury was not instructed that knowledge of the actual APRs charged on Early Access Loans was a necessary relevant fact to establish voluntary payment, (b) the jury was instructed to consider irrelevant evidence regarding conduct that could not have informed the voluntary payor defense, and (c) the jury was not instructed that Defendant violated TILA, which should have barred application of the voluntary payor defense.

1. The Court did not instruct the Jury that the APR on Plaintiffs' loans was a relevant fact for voluntary payment, resulting in an inadequate instruction

Plaintiffs requested that the Court instruct the Jury that "[i]n this case, you 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*." ECF No. 221 at PageID #: 6525 (emphasis

added). In requesting this instruction, Plaintiffs argued that knowledge of the $1-for-$10 term constituted only partial knowledge, and that full knowledge of the relevant facts *must* include knowledge of payment of over 120% APR. *Id.* at PageID #: 6526. The Court, however, declined to provide *any* instruction to the Jury on what facts were relevant to Defendant's defense; instructing instead that that voluntary payment applies "when a plaintiff pays money with full knowledge of all the relevant facts." ECF No. 270 at PageID #: 8629. This instruction, though, necessarily raises the question: what facts are relevant? Instead of providing any guidance the Jury on this issue, the Court essentially asked the Jury to determine the parameters of the voluntary payment doctrine for itself.[12]

The Court further endorsed the idea that Defendant merely had the burden of showing that "Early Access loan customers voluntarily paid the amount of money in dispute." ECF No. 270 at PageID #: 8629 (jury instructions). Defendant, for its part, maintained at trial that whether consumers knew the actual APRs didn't matter because their knowledge of the amount of the transaction fee ($1 for $10) alone was sufficient to find voluntary payment, which for all the reasons discussed in Section I(A)(2) above egregiously misstates the law. *See, e.g.,* ECF No. 250 at PageID #: 7319:18-22 (opening statement); ECF No. 276 at PageID #: 8907-08 (Defendant's closing argument at 76:24-77:21) ("So in this case, the plaintiffs, the plaintiffs knew they were paying a dollar for ten and did pay a dollar for ten. . . . So for purposes of this separate doctrine, this voluntary payment doctrine, it does not matter what the APR means, whether it means one thing or another.").

In submitting this broad instruction to the Jury, without providing *any* guideposts on relevance or tying the doctrine to the facts of the case, the Court did not "adequately inform the jury of the relevant considerations" or provide the Jury with "a sound basis in law with which to reach a conclusion." *Pivnick*, 552 F.3d at 488; *see also United States v. Holley*, 502 F.2d 273, 276 (4th Cir. 1974)

[12] As described below, the Court's instruction in fact highlighted irrelevant evidence, compounding the misleading and confusing nature of the instruction.

(because abstract instructions not adjusted to the facts of a particular case may confuse the jury, it has been held plain error "for a [trial court] to fail to relate the evidence to the law"; internal citations and quotations omitted); *Bollenbach v. U.S.*, 326 U.S. 607 (1946) ("Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria."). Furthermore, the determination of what facts were relevant is a legal question, *Allen*, 872 F.2d 1029, and it was erroneous to submit that issue to the Jury, *see, e.g., Pouillon v. City of Owosso*, 206 F.3d 711, 718-19 (6th Cir. 2000) (court "abused its discretion in submitting to the jury questions of law as well as of fact" even though questions of fact may also have been relevant to the legal determination).

Finally, the Jury specifically requested "more information" on voluntary payment, which was a "telling indication of actual jury confusion" and weighs strongly in favor of a new trial. *Aero Intern.*, 713 F.2d at 113; *see Reynolds*, 184 F.3d at 592-94; *Encompass*, 919 F.3d at 276 & n.29; ECF No. 277 at PageID #: 9008 (Transcript at 8:23-25) (juror question). Rather than providing any additional information as requested, though, the Jury was required to deliberate and return a verdict under the inadequate and confusing instruction. This was highly prejudicial, resulting in an unreliable verdict that merits a new trial. *See Bollenbach,* 326 U.S. at 612-13 ("When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy.").

2. The Jury was instructed to consider irrelevant evidence with respect to voluntary payment, which was erroneous, confusing, and highly prejudicial.

Compounding the inadequate and confusing nature of the voluntary payment instruction, the Court, at Defendant's request, in fact highlighted information that was *irrelevant* to voluntary payment and instructed the Jury that it could consider it.

In this case, some of the Plaintiffs—after meeting with counsel and initiating litigation—nonetheless used the Early Access Program to differing extents. Plaintiffs did not seek relief for any

of those loans, which were taken out after those Plaintiffs were made aware that they were being overcharged. *See* ECF No. 209 at PageID #: 6053, n.4. Similarly, by stipulation of the Parties, Plaintiffs only sought damages on behalf of Class Members through the date that Class Members were apprised of the litigation through court-ordered notice of the class certification ruling. Thus, the voluntary payment doctrine had no bearing on the relief plaintiffs or Class Members were seeking because both Plaintiffs and the Class sought damages *only* for those loans taken out during the period before they learned (for Plaintiffs) or could have learned (for Class Members) from counsel that Defendant was charging over 120% APR. And because, as discussed in Section I(A)(2)(b), post-facto knowledge cannot be applied retroactively for purposes of the voluntary payor doctrine, these loans were irrelevant to the defense. Accordingly, before trial, Plaintiffs sought exclusion of evidence and argument as to the post-litigation loans taken out by Plaintiffs. Not only was this evidence irrelevant, it was likely to confuse or mislead the Jury; Plaintiffs therefore sought exclusion under Rules 401 and 403 of the Federal Rules of Evidence. *See* ECF No. 222 at PageID #: 6555.

The Court declined to exclude this evidence and argument, and Defendant proceeded to argue in its opening statement and closing argument that some (but not all) of the named Plaintiffs "kept using Early Access and voluntarily paying the dollar for $10 borrowed with full knowledge of the fee; and in some of those cases, for some of those plaintiffs, they kept doing it after this litigation was filed." Tr. Day 2, ECF No. 250 at PageID #: 7288:12-16; *see also* Tr. Day 9, ECF No. 8927:9-13 ("And the fact that most of them kept using the Early Access product even after their lawyers filed this lawsuit demonstrates that plaintiffs understood the cost of the contract to be a dollar for ten all along, not the APR that they learned about later."). During Plaintiffs' case-in-chief, Plaintiffs made it clear to the Jury that they were not seeking damages for the loans taken out by any Plaintiffs after filing litigation—and therefore after having become aware that they were being charged more than 120%

APR. The Court initially precluded Mr. McKinney from testifying to this effect. S*ee* Tr. Day 2, ECF No. 253 at PageID #: 7467:4-25.

Before Ms. Fyock testified, though, counsel and the Court revisited this issue. *See* Tr. Day 4, ECF No. 263 at PageID #: 8308:4-8311:25. Plaintiffs' counsel explained that neither the Plaintiffs nor any Class Member was seeking damages for any Early Access Loans taken after becoming involved in litigation. After hearing argument from both sides, the Court allowed Ms. Fyock to testify that she understood that she was not seeking damages after the filing of her lawsuit. *Id.* at PageID #: 8309:11-14; 8311:3-24. Plaintiffs' expert also explained to the Jury that the damages figure excluded all overcharges attributable to the loans the class representatives took out after they filed their suit. *See* ECF No. 263 at PageID #: 8402-03 (Olsen Tr. at 97:8-98:16).

At Defendant's urging, the Court revisited this issue at the charge conference. There, Defendant's counsel argued that, since Class Members' claims extended past the filing of the lawsuit, the jury must be instructed to consider Named Plaintiffs' actions after filing suit. ECF No. 275 at PageID #: 8749:20-50:12. Specifically, Defendant argued that "the fact that these named plaintiffs, knowing everything they know, still took Early Access loans shows that was a voluntary action and that the actions of all the class are voluntary." *Id.* at PageID #: 8753:1-6. The Court correctly noted that Plaintiffs "were on notice of the lawsuit" whereas the rest of the class "wouldn't necessarily be aware of the lawsuit until the notice went out." ECF No. 275 at PageID #: 8752:13-22. Nonetheless, over Plaintiffs' objection, the Court included the following statement in the one-paragraph instruction of the voluntary payment doctrine: "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." This instruction was erroneous, confusing, and prejudicial for several reasons.

Defendant's justification for the instruction—that "the fact that these named plaintiffs, knowing everything they know, still took Early Access loans shows that was a voluntary action and that the actions of all the class are voluntary"—is legally and factually incorrect. First, any knowledge that Plaintiffs gained through meeting with counsel years later cannot, as a legal matter or logically, apply to whether Plaintiffs themselves had full knowledge of all relevant facts *before* meeting with counsel, which is "[t]he relevant issue" for voluntary payment: what Plaintiffs believed "at the time of payment." *Hazelwood,* 2021 WL 664059, at *4. Thus, there is no basis to impute Plaintiffs' post-litigation knowledge to their pre-litigation conduct. But that is exactly what the Court's instructions and interrogatory permitted, if not demanded, the jury do.

Second, there is no legal or logical basis to impute the knowledge of Plaintiffs after meeting with counsel and learning that they were being charged over 120% APR to the entire Class. That is, there is no basis to impute knowledge to the entire Class when information was only conveyed by counsel to Plaintiffs. *See L.I. Head Start Child Dev. Servs., Inc. v. Econ. Opportunity Comm'n of Nassau Cnty., Inc.*, 558 F. Supp. 2d 378, 398 (E.D.N.Y. 2008), *aff'd,* 710 F.3d 57 (2d Cir. 2013) ("in a class action case knowledge of the plaintiffs' counsel is not imputed to the plaintiffs in the class" where "[t]here is no evidence . . . that any of the 77 plaintiffs had any knowledge of the facts that would constitute any knowledge, no less actual knowledge, of any of the material facts").

All of the evidence at trial indicated that Plaintiffs were unaware of the fact that they were being overcharged until they met with counsel. The Class Members never met with counsel. Thus, the fact that some Plaintiffs made some payments with knowledge the APRs were more than 120% after meeting with counsel is irrelevant to the claims of the Class. It is also irrelevant to the voluntary payor defense because Plaintiffs were not seeking any damages for loans following this knowledge-conferring event. And even though Defendant bore the burden of proving its affirmative defense, it never presented any evidence that any other class members knew they were being charged over 120%

APR. To the contrary, both of the banking experts in the case testified that, because APR calculations are complex, Class Members would not have performed them or had actual knowledge of the true APRs. ECF No. 253 at PageID #: 7384-85 (Oliver Tr. at 52:23-53:4) (testifying that banking industry does not expect customers to calculate APRs on loans); ECF No. 262 at PageID #: 8136-37 (Grice Tr. at 64:21-65:2) (testifying that it is understood in banking industry that APR for a deposit advance product is difficult to calculate).

In fact, in certifying the breach-of-contract class, this Court correctly characterized Plaintiffs' post-litigation loans as an individualized issue, rather than a class-wide one. There, in response to Defendant's arguments that common issues would not predominate over individual issues because some named Plaintiffs "continued to pay the flat fee of 10% after they had allegedly been overcharged on one or more loans, and even after they had filed this lawsuit," the Court characterized this as an "affirmative defense[] peculiar to some individual class members." ECF No. 150 at PageID #: 2392-93. In other words, the Court recognized that the fact that some Plaintiffs continued to take loans after filing litigation was a narrow, individualized issue, not one representative of the class as a whole.

However, the Court took a 180 degree turn from its Class certification ruling and instead of excluding this irrelevant and individualized evidence, the Court improperly highlighted this evidence to the Jury as specific evidence of class-wide knowledge. But Plaintiffs' conduct after gaining knowledge from their counsel is not probative of voluntary payment on the part of Class Members (or even on the part of Plaintiffs with respect to loans paid prior to gaining such knowledge). Yet, by highlighting just this evidence within a short instruction that failed to provide meaningful guidance, the Court invited the Jury to moor itself to this single irrelevant fact. And the Jury apparently did so: the Jury found that the voluntary payment doctrine "applied," even though the *only* evidence of any Plaintiff or Class Member paying with full knowledge of all relevant facts *at the time of payment* occurred

when some Plaintiffs took out some Early Access loans after meeting with counsel, which loans were not even at issue in the lawsuit because Plaintiffs were not seeking damages for them.

As a result, a new trial is required. *Miami Valley*, 725 F.3d at 580 (ordering new trial where jury was instructed to focus on information that was irrelevant under proper standard, reasoning that "applying the instructions," a jury "would have no option" but to find for the defendant).

3. The Court's voluntary payment instruction was further inadequate because the Jury was not instructed that the Early Access Agreement violated the Truth in Lending Act, or that the Jury could (or should) consider whether the contract was misleading in determining whether Plaintiffs and the Class paid with full knowledge of all relevant facts.

In instructing the Jury on voluntary payment, not only did the Court highlight irrelevant evidence of Plaintiffs' conduct after initiating suit and then encourage the Jury to improperly impute that to the Class without a demonstration by Defendant of actual knowledge on behalf of Class Members, but the Court also simultaneously declined to instruct the Jury as to relevant information that it could properly consider. Plaintiffs requested that, in order to "balance" the language regarding Plaintiffs' post-suit conduct, the Court instruct the Jury 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." ECF No. 275 at PageID #: 8790:11-21. The Court refused to provide that instruction. Similarly, the Court also declined to instruct the Jury that Defendant had violated TILA by misrepresenting the APR on Early Access Loans to its customers and failing to disclose the actual APR that it charged – which, as Plaintiffs argued, was determinative of Defendant's sole affirmative defense. ECF No. 242 at PageID #: 7147-48. The Court characterized the requested instruction as "argument," and declined to give the instruction. ECF No. 275 at PageID #: 8790:22, 8791:6-8.

But unlike the instruction requested by Defendant (and given by the Court), the instruction that Plaintiffs requested was a correct statement of law and would have provided meaningful guidance

to the Jury. As discussed above (*see* Sec. I(A)(1)), as a matter of law, a party cannot benefit from the equitable defense of voluntary payment when it has misled the opposing party. At the very least, the Jury should have been instructed that it could consider Defendant's misrepresentation when assessing Plaintiffs' knowledge. The Court's failure to do so, particularly where the instruction already provided inadequate guidance and erroneous information, further confused a confusing instruction, causing prejudice that necessitates a new trial on voluntary payment. *Pivnick*, 552 F.3d at 488 (6th Cir. 2009).

C. The single interrogatory posed to the Jury on voluntary payment was deficient, prejudicial, and resulted in injustice

The Court posed a single interrogatory to the Jury on voluntary payment: "Did Defendant prove by the greater weight of the evidence that the voluntary payment doctrine applies to the class?" ECF No. 272-1 at PageID #: 8644. This interrogatory compounded the erroneous and prejudicial voluntary payment instruction, did not conform to the evidence and argument presented at trial, and resulted in inconsistent findings—any of which is sufficient to require a new trial, but which together demonstrate severe injustice.

First, the jury interrogatory on voluntary payment replicated, and therefore compounded, the inadequacy in the jury instructions. Plaintiffs requested the following interrogatory: "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%?" ECF No. 221-1 at PageID #: 6540. As knowledge of the $1 for $10 term was uncontested, the purpose of this more specific interrogatory was to indicate to the Jury which facts were relevant to voluntary payment that were actually in dispute. The Court declined to provide this additional guidance, asking only the vague question of whether the voluntary payment doctrine "applie[d]." Because the Jury received only the most general of interrogatories on voluntary payment, the interrogatories added to—rather than remedied—the inadequate, confusing, and misleading nature of the voluntary payment instruction, described above.

Second, under Federal of Civil Procedure 49, where a jury's answers to interrogatories are "inconsistent with each other and one or more is also inconsistent with the general verdict, judgment must not be entered; instead, the court must direct the jury to further consider its answers and verdict, or must order a new trial." Fed. R. Civ. P. 49(b)(4). Because the Jury's responses were inconsistent, and the Jury was not afforded the opportunity to remedy the inconsistency, a new trial is required.

Here, the Jury's findings were inconsistent because the Jury found that Defendant breached the Early Access Agreement by charging Plaintiffs and the Class more than 120% APR. Accordingly, the Jury necessarily rejected Defendant's argument that the 120% APR term was not reflective of Early Access's "cost" or material to payment, but rather was a promise of a fixed APR that Defendant breached. It was therefore inconsistent for the Jury to simultaneously find that Plaintiffs and the Class had full and actual knowledge of all relevant facts when they paid their Early Access Loans given the total lack of evidence that Plaintiffs or the Class were aware that they were being charged over 120% APR. *Tipton v. Michelin Tire Co.*, 101 F.3d 1145, 1150 (6th Cir. 1996) (interrogatory answers inconsistent where, in light of the jury instructions, one answer indicated that product was not defective whereas other answer indicated product was defective); *Watts v. United Parcel Serv.*, 378 F. App'x 520, 531 (6th Cir. 2010) (jury's response to interrogatory that plaintiff was "treated differently…because of her sex" could not be reconciled with response that sex was not a determining factor in certain employment decisions); *Homann v. Norfolk S. Ry. Co.*, No. 2:14-CV-40, 2018 WL 5842485, at *4 (N.D. Ind. Nov. 8, 2018) (ordering new trial because jury's findings were inconsistent in light of the positions taken by the parties at trial on related factual issues); *Spellman v. Momme*, No. CIV.A. 14-3365, 2015 WL 2069231, at *6 (E.D. Pa. May 5, 2015) (new trial warranted where "because of the jury's confusion, our failure to probe the jury's inconsistent answers led to an inaccurate verdict.").

In an attempt to cure this error and to avoid a new trial, Plaintiffs requested—before the Jury was discharged—that a special interrogatory be posed to the Jury asking "at what point in time or –

parenthetical -- (date) do you find that the class made payment will full knowledge of all factual circumstances relating to Fifth Third's breach of the APR term?" ECF No. 277 at PageID #: 9028 (Argument at 29:15-19). Plaintiffs requested this additional interrogatory in order to clarify the basis for the Jury's voluntary payment verdict, in an attempt to cure the inconsistency before the Jury was discharged. *Id.* at PageID #: 9017-18 (Argument at 18:2-19:4). This, in fact, is the purpose of Rule 49: "The purpose of the rule is to allow the original jury to eliminate any inconsistencies without the need to present the evidence to a new jury," and such a request must be made "before the jury [is] discharged." *Radvansky v. City of Olmstead Falls*, 496 F.3d 609, 618-19 (6th Cir. 2007) (internal quotation marks and citations omitted). Though Plaintiffs timely made this request, the Court ultimately denied it.[13] As the original Jury cannot now clarify its findings, a new trial is required.

D. The Court allowed Defendant to present improper legal argument on its voluntary payment defense, resulting in further prejudice to Plaintiffs.

Adding to the improper and confusing instruction and the improper interrogatory, Defendant presented erroneous legal argument on voluntary payment. Because there was a "reasonable probability that the verdict of [the] jury [was] influenced by such conduct, it should be set aside." *Kay v. United of Omaha Life Ins. Co.*, 562 F. App'x. 380, 386 (6th Cir. 2014) (trial court abused its discretion in allowing extensive argument around an extraneous issue without providing any curative instruction).

First, Defendant should not have been permitted to argue the voluntary payor defense at all given that it had misrepresented the APR on Early Access loans in a misleading manner and in violation of federal law. Second, in both opening and closing statements, Defendant argued to the Jury that Plaintiffs' knowledge of the $1-for-$10 fee was sufficient to find that Plaintiffs claims were barred by voluntary payment. *See, e.g.*, ECF No. 250 at PageID #: 7319:18-22 ("[I]f you find that the

[13] Though the Court denied the request, the Court did note that "the way we've written the questions it does not allow them to differentiate between the time frames, and that is kind of concerning … ." ECF No. 277 at PageID #: 9026 (Argument at 27:11-14).

plaintiffs knew that they were paying a dollar for ten and voluntarily paid a dollar for ten and did, in fact, actually pay a dollar for ten, then they can't cannot [sic] recover this money"); 7320:8-10 ("what matters and what you should be looking for in the evidence at trial is whether plaintiffs voluntarily made a decision to pay a dollar for ten"). As described in Sections I(A)(2)(a) and (b) above, though, the APR—i.e., the cost of Early Access loans expressed as a yearly rate—was also a relevant fact. Particularly where the Court did not provide any guideposts to the Jury on what facts the Jury could consider, this erroneous argument was highly prejudicial and, because it was suggested throughout trial via witness questioning, likely influenced the Jury. *See City of Cleveland v. Peter Kiewit Sons' Co.*, 624 F.2d 749, 756 (6th Cir. 1980) (setting aside verdict where defense counsel "continuously sought to plant the seed in the minds of the jurors" of impermissible information).

Second, in closing arguments, Defendant misstated the law in two critical ways, both of which impermissibly shifted the burden of proof on its affirmative defense. Specifically, Defendant argued that the Jury must find in its favor if the Jury found that Plaintiffs paid "voluntarily," ignoring the legal standard that voluntary payment only applies where an individual pays a claim "with full knowledge of all relevant facts." ECF No. 276 at PageID #: 8949 (closing argument at 1118:14-15) ("But what's important for this defense is whether the customers made the payments they made voluntarily."). The difference here is vital: the ordinary meaning of "voluntary" is "proceeding from the will or from one's own choice or consent,"[14] suggesting that recovery of any payment was "voluntary" unless Plaintiffs proved duress. But Plaintiffs were not required to show duress to defeat voluntary payment; instead, Defendant was required to show full and actual knowledge of all relevant facts at the time of payment.

In addition, Defendant argued that Plaintiffs voluntarily paid because they did not testify that they had relied on the 120% APR disclosure. ECF No. 276 at PageID #: 8947 (closing argument at

[14] *See* www.merriam-webster.com/dictionary/voluntary.

116:1-8). But that again was a misstatement of law; it was impermissible for Defendant to suggest that Plaintiffs bore the burden of establishing reliance on Defendant's affirmative defense. Particularly in light of the inadequate and confusing instructions and interrogatory on voluntary payment, Defendant's argument likely influenced the Jury, to Plaintiffs' detriment. *City of Cleveland*, 624 F.2d at 756 (court should "examine, on a case-by-case basis, the totality of the circumstances" in order to determine whether "there is a reasonable probability that the verdict of a jury has been influenced" by improper conduct); *Miami Valley*, 725 F.3d at 580-81 (reference to erroneous instructions in closing argument "further magnify[ied] an erroneous standard," and circumstances warranted reversal); *c.f. Jones v. Federated Fin. Reserve Corp.*, 144 F.3d 961, 967 (6th Cir. 1998) (new trial required where jury instruction set a higher burden than required by law).

Ultimately, the several errors and inadequacies with respect to the voluntary payment instruction (and the resulting jury confusion), the related interrogatory, and Defendant's repeated misstatements of the law resulted in severe unfairness and prejudice to Plaintiffs and the Class. The Court should therefore exercise its "duty as well as [its] power" to order a new trial because, if it does not, an injustice will result. *Davis by Davis*, 912 F.2d at 133 (quotation marks and citation omitted).

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court enter judgment as a matter of law on Defendant's affirmative defense of voluntary payment and the issue of notice or, in the alternative, order a new trial on voluntary payment and on damages.

Dated: May 25, 2023

Respectfully submitted,

/s/ Hassan A. Zavareei

Hassan A. Zavareei (pro hac vice)
Anna A. Haac (pro hac vice)
Shana Khader (pro hac vice)
TYCKO & ZAVAREEI LLP
2000 Pennsylvania Avenue NW, Suite 1010

Washington, D.C. 20006
Telephone: (202) 973-0900
Facsimile: (202) 973-0950
hzavareei@tzlegal.com
ahaac@tzlegal.com
skhader@tzlegal.com

Dennis R. Lansdowne (0026036)
Stuart E. Scott (0064834)
Kevin C. Hulick (0093921)
SPANGENBERG SHIBLEY & LIBER LLP
1001 Lakeside Avenue East, Suite 1700
Cleveland, OH 44114
Telephone: (216) 696-3232
Facsimile (216) 696-3924
dlansdowne@spanglaw.com
sscott@spanglaw.com
khulick@spanglaw.com

Jason K. Whittemore (pro hac vice)
WAGNER MCLAUGHLIN, PA
601 Bayshore Blvd., Suite 910
Tampa, FL 33606
Telephone: (813)-225-4000
Facsimile: (813) 225-4010
Jason@wagnerlaw.com

Class Counsel for Plaintiffs

CERTIFICATE OF SERVICE

On May 25, 2023, a true and correct 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/ Hassan A. Zavareei

Hassan A. Zavareei (pro hac vice)
Anna A. Haac (pro hac vice)
Shana Khader (pro hac vice)
TYCKO & ZAVAREEI LLP
2000 Pennsylvania Avenue NW, Suite 1010
Washington, D.C. 20006
Telephone: (202) 973-0900
Facsimile: (202) 973-0950
hzavareei@tzlegal.com
ahaac@tzlegal.com
skhader@tzlegal.com

Class Counsel for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In re: Fifth Third Early Access Cash Advance Litigation	)	CASE NO. 1:12-CV-00851
	)	HON. MICHAEL R. BARRETT

[PROPOSED] ORDER GRANTING PLAINTIFFS' MOTION FOR JUDGMENT AS A MATTER OF LAW

Upon consideration of Plaintiffs' Motion, and finding that good cause exists, the Court GRANTS the Motion in part.

Specifically, the Court hereby enters JUDGMENT as a matter of law against Defendant on it voluntary payor defense, which is equitable in nature, and not available to a party like Fifth Third, who systematically understated and thus misrepresented the APR on Early Access Loans, in violation of the Truth in Lending Act, notwithstanding that the evidence presented at trial showed that Fifth Third knew the APRs on these loans would on average be almost triple the 120% that the Jury found was promised by the contract, which Fifth Third breached. The Jury's verdict finding breach of contract is amply supported by the evidence presented at trial. However, because Fifth Third failed to provide an accurate APR to consumers and because there was no evidence presented at trial that any consumer, including Plaintiffs, knew the true APRs they were charged on their loans for the loans at issue at trial (those for which relief was sought)

, neither Plaintiffs nor any Class Member had full knowledge of all relevant facts with respect to these loans, which is required to show voluntary payment. Accordingly, Defendant failed to meet its burden on voluntary payor, such that judgment as a matter of law against Defendant on this issue is warranted.

The Court also enters JUDGMENT as a matter of law against Defendant on its claim that Fifth Third modified the Early Access Loan contract to remove the 120% APR promise. The plain language of the Early Access contract requires Fifth Third to provide notice "to you," referring to its customers, which notice must be provided in advance of any "effective date." All of the extrinsic evidence at trial as to the type of notice contemplated by this provision further favored Plaintiffs' interpretation that direct notice to a customer was required, which is likewise consistent with the contract's plain language. In addition, to the extent there is any ambiguity, r r r requires the Early Access contract to be construed strictly against Fifth Third as the drafter with unequal bargaining power. Based on all of that, the Court finds as a matter of law that direct notice to a customer was required under the Early Access contract. The evidence at trial was further undisputed that no such notice was provided. Accordingly, Defendant failed to meet its burden on contract modification with respect to the removal of the 120% APR term, such that judgment as a matter of law against Defendant on this issue is also warranted.

Plaintiffs' request for a new trial on voluntary payor and contract modification is thus moot and therefore DENIED without prejudice at this time.

The Court further directs the Parties to submit briefing on the issue of whether and how the issue of damages should be tried, if at all. Given that the evidence at trial on damages was largely undisputed, judgment as a matter of law may be appropriate on the issue of damages as well, and the Court asks for the Parties to provide input in that regard within thirty (30) days of this Order.

IT IS SO ORDERED.

_____ _____

DATE

HONORABLE JUDGE MICHAEL R. BARRETT
UNITED STATES DISTRICT JUDGE