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

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I. INTRODUCTION

On the day the Jury reached its verdict in this case, it was clear to all in the courtroom that the Jury had lost its way. The Jury's finding that Defendant breached the Early Access Agreement by charging an excessive APR but was not liable because of "voluntary payment," even though Plaintiffs did not know they were paying more than the agreed rate, does not square. This is especially so because Defendant's own misrepresentations caused Plaintiffs' lack of knowledge.

Plaintiffs seek judgment under Rule 50 because the Jury should never have considered the voluntary payment doctrine. Ohio law provides that the defense is unavailable to a party that misleads another. It is an equitable defense, and Defendant did not act equitably. Even if the defense were available (it is not), Plaintiffs' knowledge of whether they were being charged over 120% APR is a relevant fact. Yet, as Defendant concedes, there was no evidence that Plaintiffs knew the APRs that they were in fact being charged. Thus, the verdict is not supported by legally sufficient evidence.

If the Court does not grant Plaintiffs' Rule 50 motion (it should), then it must order a new trial on voluntary payment under Rule 59. In arguing otherwise, Defendant repeatedly ignores the proper standards and refuses to meet Plaintiffs' arguments head on. Defendant does not respond to Plaintiffs' primary argument: that it was not a single wave of error that harmed Plaintiffs, but a slowly rising tide that eventually washed away a fair trial. The Jury was confused by an inadequate and misleading instruction and improper argument, and ultimately reached a verdict that was both contradictory and against the manifest weight of the evidence. The issue must be retried.

II. ARGUMENT

A. The Court should grant Plaintiffs' Rule 50 motion.

1. Plaintiffs are entitled to judgment as a matter of law on Defendant's voluntary payment defense.

a. Plaintiffs did not waive their equitable argument, as Plaintiffs previously argued that Fifth Third's misrepresentation of the 120% APR term barred the voluntary payment defense.

Defendant misstates the requirements of a Rule 50(a) motion, seemingly requiring that Plaintiffs utter "magic words." Rule 50, however, "'does not require technical precision in stating the grounds of the motion.'" *Jordan v. City of Cleveland*, 464 F.3d 584, 595 (6th Cir. 2006) (quoting 9A Charles Alan Wright & Arther R. Miller, Federal Practice and Procedure § 2533, at 310 (2d ed. 1994). The Sixth Circuit has held that "where Rule 50(a)'s purpose—i.e. providing notice to the court and opposing counsel of any deficiencies in the opposing party's case prior to the sending it to the jury—has been met, courts usually take a liberal view of what constitutes a pre-verdict motion sufficient to support a post-verdict motion." *Kusens v. Pascal Co., Inc.*, 448 F.3d 349, 361 (6th Cir. 2006) (citation omitted); *see also Arch Ins. Co. v. Broan Nu-Tone, LLC*, 509 F. App'x 453, 462 n. 5 (6th Cir. 2012) (a party need not make an argument with "technical precision" in the Rule 50(a) motion to preserve it for purposes of a Rule 50(b) motion). In *Kusens*, the Sixth Circuit found that the defendant had not waived its post-verdict argument that the plaintiff failed to prove three of the elements for a claim for discharge of an employee against public policy when the pre-verdict motion was a "generalized no-duty-of-care argument challenging the sufficiency of plaintiff's negligence claim." *Id.* at 362.

In this case, Plaintiffs argued in their Rule 50(a) motion that Fifth Third was not entitled to invoke the voluntary payment defense because it misrepresented the APR. *See* ECF No. 268-1 at PAGEID # 8601-02 (two pages devoted to this topic); ECF No. 275 at PAGEID # 8825 (Tr. 178:17-18) ("if you are misleading the customer, then you cannot have voluntary payor."). While, at trial, Plaintiffs did not use the word "equity," there is no magic in such incantation. The substance of the

argument raised at trial and that Plaintiffs raise now is the same: because Fifth Third misrepresented the APR, they should not be able to invoke the equitable defense of voluntary payment.[1]

b. Voluntary payment is an equitable defense under Ohio law.

The doctrine of voluntary payment has long been recognized as an equitable defense. *See* ECF No. 284 at PAGEID # 9433; *see also, e.g.*, 42 *Corpus Juris Secundum*, Implied Contracts § 8 (including voluntary payment in a list of equitable defenses). Defendant chides Plaintiffs for not citing Ohio cases specifically holding that voluntary payor is an equitable defense and that unclean hands prevents its application. *See* ECF No. 287 at PAGEID # 9515. But Ohio courts have long recognized that the defense is equitable in nature. A review of historical jurisprudence confirms this basic legal point.

In Ohio, law and equity merged for most civil actions in 1853. 51 Ohio Laws 57 (1853); Ohio Civ. R. 2, Staff Notes (1970). Prior to the merger, courts of law had no jurisdiction or authority to adjudicate equitable claims or defenses, *see, e.g.*, *Carey v. Richards*, 1860 WL 3968, at *3 (Ohio Com. Pl. Oct. 1860) ("A justice of the peace has no *equity* powers; and he can therefore only determine the rights of parties as they appear at law.") (emphasis in original), and courts of equity "had no jurisdiction in a case at law, nor could they consider or pass upon a legal defense, or a counter-claim, not strictly equitable in its character," *Porter v. Wagner*, 36 Ohio St. 471, 474 (1881).

Thus, a defendant in an action at law could not raise an equitable defense there; they were required to assert them separately in a court of chancery. *See Spencer's Lessee v. Marckel*, 1826 WL 20, at *1 (Ohio July 1826) (adopting rule that a defendant could not raise an equitable defense (such as

[1] At the very least, Plaintiffs' post-trial motion is the "logical extension" of the argument Plaintiffs presented in their Rule 50(a) motion, which is all that is required to preserve the argument for a post-trial motion. *E.E.O.C. v. Go Daddy Software, Inc.*, 581 F.3d 951, 963 (9th Cir. 2009) (holding that defendant's argument that witness did not report protected activity to employer covered Rule 50(b) argument that there was insufficient evidence of termination due to protected activity, as this argument was the "logical extension" of argument that the reported activity was not reported to the decisionmaker in a retaliation lawsuit).

fraud) in an action for ejectment and must instead "assert his right in a court of chancery"). Conversely, if a court of equity were to rule on a legal defense, that would be "erroneous and constitut[e] grounds for a reversal." *Sauer v. Cincinnati St. Ry. Co.*, 5 Ohio N.P. 108 (Super. 1898) (emphasis omitted).

Accordingly, one way to determine whether a defense has its roots in law or equity is to examine its treatment before the 1853 merger. In that era, voluntary payment emerged in Ohio jurisprudence as an equitable defense to certain types of assumpsit claims. *See, e.g.*, *Graham v. Cooper*, 1848 WL 145, at *1 (Ohio Dec. 1848); *Job v. Collier*, 1842 WL 43, at *1 (Ohio Dec. 1842); *Com. Bank of Cincinnati v. Reed*, 1842 WL 59, at *2 (Ohio Dec. 1, 1842); *State v. Franklin Bank of Columbus*, 1840 WL 18, at *3 (Ohio Dec. 1840). Because assumpsit was "an equitable action" that sought recovery "upon equitable principles," courts were required to "look into the relative situation of the parties." *Smith v. Bing*, 1827 WL 10, at *2 (Ohio Dec. 1827); *see also Doolittle v. McCullough*, 12 Ohio St. 360, 367 (1861) ("The action of assumpsit is termed an equitable action."). The voluntary payment doctrine in Ohio was thus born in equity, and continues to live in equity.

Prior to 1853, moreover, chancery courts and the Ohio Supreme Court (while ruling on claims brought purely in equity) ruled on the defense on multiple occasions—something they would have lacked jurisdiction at equity to do if the defense had been a legal one. *See, e.g., Darst v. Brockway*, 1842 WL 54, at *2, *6 (Ohio Dec. 1842) (awarding restitution of money paid for void patents in action brought in chancery where purchaser acted "without knowledge of the facts" and rejecting defendants' argument that "equity will furnish no relief" because money was paid voluntarily); *Shelton v. Gill*, 1842 WL 41, at *2 (Ohio Dec. 1842) (voluntary payment defense raised in bill in chancery seeking injunction); *Smith v. Loring*, 1826 WL 53, at *8 (Ohio Dec. 1826) (voluntary payment defense raised in bill in chancery to settle partnership concern).

And even nearly a century after the merger of law and equity, the Ohio Supreme Court shed light on the equitable nature of the voluntary payment defense. When discussing voluntary payor in

the context of contribution (itself an equitable doctrine), the Court explained that the defense is "based upon the fundamental doctrine that contribution rests upon principles of equity and natural justice; that one who, with knowledge of the facts and without legal liability, makes a payment of money, thereby becomes a volunteer; and that *equity* will not aid a volunteer." *Farm Bureau Mut. Auto. Ins. Co. v. Buckeye Union Cas. Co.*, 67 N.E.2d 906, 911 (Ohio 1946) (emphasis added).[2]

And because voluntary payor is itself an equitable defense, the conduct and respective positions of the parties is the paramount consideration when evaluating an equitable defense like voluntary payor. "[O]ne of the most familiar maxims of equity jurisprudence" applies to the defense: "He who seeks equity, must do equity." *Shelton*, 1842 WL 41, at *2. Otherwise, equity has the potential to be transformed from a doctrine rooted in fairness into a tool for injustice. *Townsend v. Alexander*, 1825 WL 6, at *1 (Ohio June 1825) ("Before he has a right to ask equity he must do equity. He must come with clean hands, if he expects to obtain the aid of this court.").

Fifth Third's formalistic approach flies in the face of this cardinal rule and distorts this Court's equitable authority. The Court has wide latitude to ensure that justice is done in the case. *Berry v. Bowling*, 132 N.E.3d 1127, 1134 (Ohio Ct. App. 2019) ("Once a party invokes the trial court's equitable jurisdiction, the court possesses discretionary authority to weigh the parties' competing interests and

[2] *Nationwide Life Ins. Co. v. Myers*, 425 N.E.2d 952 (Ohio Ct. App. 1980), which Fifth Third misleadingly quotes (ECF No. 287 at PAGEID # 9515), is consistent with this body of case law. The Court of Appeals stated there that an insurer who paid out a claim improperly while "having knowledge of all of the facts in the case" could not recover due to the voluntary payor defense. *Id.* at 955, 956. It *then* stated that the insurer's claim of "payment because of a mistake of fact, coupled with a mistake as to whom the money should have been paid under the contract of insurance," was "not a claim of equity." *Id.* at 956. In other words, a claim of mistake, despite having knowledge of all the facts, was not a claim of equity because Ohio's "common law rule" prevented such a claim. *See id. Myers* says nothing about whether the voluntary payment defense is itself a "claim of equity" or a claim of law. And it says nothing about whether a party like Fifth Third, who violated federal law through a misleading APR misrepresentation, can avail itself of an equitable defense like voluntary payor (it cannot).

exact an equitable division of their property rights."). Allowing Fifth Third to prevail on an equitable defense after it misled its customers and concealed its unlawful conduct is the antithesis of equity.

c. In accordance with principles of equity, Ohio law precludes a party that has misled another from claiming voluntary payment.

In line with these equitable principles, the law on the voluntary payment doctrine, both in Ohio and elsewhere, provides that misrepresentation precludes its application—just as Plaintiffs argued in their Rule 50(a) motion. *See Schwebel Baking Company v. FirstEnergy Solutions Corp*., No. 4:17-cv-974, 2018 WL 1419477, at *5 (N.D. Ohio Mar. 21, 2018) (defendant's misleading representation of the charges it levied on plaintiff undermined its voluntary payment defense); *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). The law also matches common sense: where one party misrepresents the facts, the other party cannot have paid with full knowledge of the facts.

Because Fifth Third mispresented the 120% APR, it prevented Plaintiffs from having full knowledge of the facts. In *Arlington Video Productions, Inc. v. Fifth Third Bancorp*, for example, the Sixth Circuit instructed Fifth Third that the voluntary payment doctrine was inapplicable when it misrepresented costs. 569 F. App'x 379, 389 (6th Cir. 2014). In that case, which dealt with business banking accounts, the Sixth Circuit held that Fifth Third "did not disclose" the relevant charges it levied against customers. *Id.* Because of that, customers did not voluntarily pay since they lacked full knowledge of the facts. *Id.* Defendant attempts to distinguish *Arlington Video* on the grounds that it is a case "where customers were charged fees without prior notice or explanation of what they were paying." *See* ECF No. 287 at PAGEID # 9522. If anything, though, this case is more egregious than *Arlington Video*. Here, Defendant misled Plaintiffs with a false explanation of what they were paying, complete with a bogus formula that hid the true APRs on Early Access. *See, e.g.,* ECF No. 262 at PAGEID # 8282 (Carpenter Tr. at 210:6-8) (testifying that formula in contract always produces an

APR of 120%). In both *Arlington Video* and this case, Fifth Third deprived customers of a full understanding of the facts through its actions, rendering the voluntary payment doctrine inapplicable.

d. The Jury's finding is not supported by legally sufficient evidence because there was no evidence that Plaintiffs or any other consumer knew they were paying over 120% APR.

At its core, Defendant's argument is that a reasonable jury could have determined that Plaintiffs knew they were paying $1 for every $10 borrowed. Of course; that is not in dispute. But there is also no dispute that Plaintiffs did not know the actual APRs they were being charged were well in excess of 120%. The pertinent dispute that this Court must resolve is whether Plaintiffs could have had knowledge of all relevant facts if they did not know the actual APRs they were paying. In other words: was the actual APR a relevant fact for purposes of the voluntary payor defense to apply?

Yet, Defendant has *never explained* how knowledge of the APR paid is not relevant a fact for purposes of voluntary payment. And it unquestionably is. This is a case about a breach of the 120% APR term. The Jury found that Defendant breached the contract by charging higher APRs. The single most important fact in evaluating Defendant's voluntary payment defense must be whether Plaintiffs knew they were paying more than 120% APR at the time they paid each loan for which they are seeking damages. Defendant's response, that Plaintiffs purportedly "knew the bargain they were getting," relates only to contract interpretation and the parties' intent, not whether Plaintiffs knew they were paying more than 120% APR. Defendant also argues that Plaintiffs *could have* calculated the APRs. But even if this were sufficient to satisfy voluntary payment (it is not), there is zero evidence that any Plaintiffs knew how to calculate the APRs. All evidence was to the contrary,[3] including Plaintiffs' own testimony and Defendant's bogus formula that always results in a 120% APR.

[3] *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).

As a full trial has established that these facts are undisputed, the Court must make a legal determination as to what the legally relevant facts were. *See, e.g., Leonard v. Warden, Ohio State Penitentiary*, No. 1:09-CV-056, 2015 WL 2341094, at *29 (S.D. Ohio May 14, 2015), *aff'd,* 846 F.3d 832 (6th Cir. 2017) (it is "error [to] instruct[] the jury to consider all relevant evidence—that is to make the relevance determination"); *c.f. Wellington v. Lake Health Sys., Inc.*, No. 1:19-CV-0938, 2020 WL 1031537, at *2 (N.D. Ohio Mar. 3, 2020) (courts routinely provide limiting instructions to juries where evidence may be relevant to one issue, but not another).

If the excessive APR is a relevant fact for purposes of proving the voluntary payment defense as Plaintiffs submit, then the Court should hold that the voluntary payment doctrine does not apply and grant judgment to Plaintiffs. Conversely, if the Court would come to the remarkable conclusion that knowledge of the APRs charged—the central fact in this case—is irrelevant, the Court should rule in Defendant's favor. Either way, this Court must decide the pure legal issue of whether the undisputed fact that, at the time of payment, Plaintiffs did not know the APRs on their loans exceeded 120% is relevant.[4]

In its opposition, Defendant cites *Industrial Fabricators, Inc. v. National Cash Register Corporation* as a newly found, instructive case that disposes of Plaintiffs' argument. But *Industrial Fabricators* lacked an affirmative misrepresentation analogous to Defendant's continued misstatement to Plaintiffs and Class Members that they were receiving Early Access loans at a 120% APR No. 83 AP-13, 1984 WL 4669 (Ohio App. Ct. Mar. 8, 1984). In *Industrial Fabricators*, the court found that the at-issue payment was made under a mistake of law when the parties (both sophisticated businesses) disagreed as to whether the contractual price was per unit or per part, but had no factual dispute. *Id.* at *2. The jury

[4] What the Court may *not* do is conclude that it was for the Jury to decide what knowledge and facts are relevant to prove a voluntary payment defense.

found that the contract stated the price per unit. *Id.* But the appellate court concluded that voluntary payment applied because the defendant admitted there was no mistake of fact. *Id.* at *3.

Here, though, there was no evidence that Plaintiffs knew their loans had APRs exceeding 120%.[5] Further, unlike in *Industrial Fabricators*, Defendant falsely confirmed that Plaintiffs were paying 120% APR at the time they took out the loans and after they paid them back. *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%). This is distinct from *Industrial Fabricators*, where the billing invoice only listed the price as per part, meaning that the payor there, a sophisticated business entity, knew it was paying only a price per part. By contrast, when a customer took out an Early Access loan, they were provided two cost terms: $1 for every $10 and 120% APR, and, as the Jury found, Defendant was bound by both.[6]

[5] In fact, the only mistake of law that Defendant points to is another attempt to claim that $1 for $10 is what the parties contracted to pay. The Jury rejected that argument, finding that the Early Access Agreement promised a 120% APR.

[6] As anticipated, Defendant also invokes *Wears Kahn McMenamy v. JPMorgan Chase Bank, N.A.*, but, in doing so, ignores Plaintiffs' argument as to why the case is inapposite. No. 2:12-cv-812, 2013 WL 1689030 (S.D. Ohio Apr. 18, 2013). Defendant again references it because the plaintiff in that case claimed that the defendant's practice was misleading. *See* ECF No. 287 at PAGEID # 9522. As Plaintiffs noted in their opening brief, however, the *Wears* court held the defendant's actions were not misleading. By contrast here, the Court found Defendant misstated the APR on Early Access loans. *See* ECF No. 284 at PAGEID # 9437.

2. Plaintiffs did not waive their notice argument and there is no evidence that Fifth Third provided proper notice.

Contrary to Defendant's argument, Plaintiffs did make a Rule 50(a) motion on the issue of notice. The motion was made during trial, after Plaintiffs rested their case in chief. *See* ECF No. 259 at PAGEID # 7891-92 (Tr. at 13:16-14:2); *Id* at PAGEID # 7893 (Tr. at 15:16-20).

Rule 50(a)(2) provides that "[a] motion for judgment as a matter of law may be made at any time before the case is submitted to the jury." While it was previously required that a Rule 50(a) motion be made at the end of all evidence, that is no longer the law: "[t]he 2006 Amendment to Rule 50 . . . dispensed with the requirement that a party must renew its Rule 50(a) motion at the close of all the evidence in order to preserve the ability to bring a [Rule 50(b) motion]." *Ford v. County of Grand Traverse*, 535 F.3d 483, 490 (6th Cir. 2008). Thus, Plaintiffs did not waive this argument.

And on the merits, Plaintiffs have shown that judgment should be granted in their favor on this issue through two different theories: the contractual language and Ohio law. *First*, Defendant ignores Plaintiffs' argument that the terms of the Early Access Agreement state that Fifth Third can only amend the agreement "by providing notice" of the amendment. JX-2006 at p. 7. Although Defendant points to instances when it changed other portions of the contract, it is undisputed that Defendant never provided actual notice to its customers about the removal of the 120% APR term. *See* ECF No. 262 at PAGEID # 8257, 8260, 8288-89, 8299-300 (Carpenter Tr. at 185:5-8, 188:15-19, 216:24-217:3, 227:23-228:4); ECF No. 289 at PAGEID # 9674 (Mendelsohn Tr. at 110:1-5).

Second, Plaintiffs have shown that Ohio law provides special protection for customers who enter into adhesive contracts, including a requirement of direct notice. *See* ECF No. 284 at PAGEID # 9451-53. Defendant's only response is that this law does not control. On summary judgment, though, the Court intimated that was the proper standard. *See* ECF No. 209 at PAGEID # 6055. And given that Ohio law requires direct notice of amendment for insurance contracts—a specific form of adhesive contract—it stands to reason that this is the case for all adhesive contracts. *See MDC*

Acquisition Co. v. Traveler's Property Cas. Co. of America, 545 F. App'x 398, 400 (6th Cir. 2013) (citation omitted). And there is no dispute that Defendant has not met this burden.

Accordingly, the Court must grant judgment to Plaintiffs on this issue.

B. The Court should order a new trial on voluntary payment to avoid an injustice.

1. Defendant ignores the proper inquiry and Plaintiffs' primary argument; the Court must conduct a holistic review.

The Sixth Circuit has clearly laid out the inquiry a district court must employ in evaluating a motion for a new trial: "the governing principal . . . 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) (quotation marks and citation omitted). In its response, Defendant ignores this standard altogether. Instead, Defendant applies a mishmash of inapplicable standards, including those applicable to motions under Rule 50 and upon appellate review of such motions. *See, e.g.,* ECF No. 287 at PAGEID # 9535, 39 (arguing under an "abuse of discretion" standard, not applicable here); *id.* at PAGEID # 9535 (discussing "harmless error"); *id.* at PAGEID # 9528 (discussing "reversible error"). In so doing, Defendant misses Plaintiffs' primary argument and asks the Court to impermissibly narrow its inquiry. The Court should roundly reject this invitation.

Contrary to the inapplicable authority cited by Defendant, the district court, which is most familiar with the issues in the case and the details of the trial, is imbued with ample discretion to evaluate the arguments presented by the movant and to determine whether a new trial is required to "prevent a miscarriage of justice." *See Max Rack, Inc. v. Core Health & Fitness, LLC*, 40 F.4th 454, 470 (6th Cir. 2022), *reh'g denied*, 2022 WL 3237492 (Aug. 10, 2022); *Holmes v. City of Massillon, Ohio*, 78 F.3d 1041, 1045 (6th Cir. 1996); *see also Allied Chem. Corp. v. Daiflon, Inc.,* 449 U.S. 33, 36 (1980) (per curiam) ("The authority to grant a new trial . . . is confided almost entirely to the exercise of discretion on the part of the trial court."). The question here is not whether the Court committed "reversible error" as

to any particular issue. The question is whether, considering the problematic conduct as a whole, a new trial is required in the interest of justice.

Further, although Defendant dedicates significant portions of its response to arguing that certain arguments have been "waived" by Plaintiffs, the waiver doctrine is not applicable to motions under Rule 59. Considering this precise question, the Sixth Circuit determined that applying a strict waiver rule "would be contrary to the structure and spirit of Rule 59, which provides district courts with the discretion to grant new trials in the interest of justice." *Park West*, 692 F.3d at 549. The Court further reasoned that declining to impose a waiver rule was "more consistent with our precedent where we have declined to impose an objection requirement in order for a party to preserve the right to relief in the form of a new trial." *Id.* at 548-49 (collecting cases).[7] In sum, Defendant's myriad arguments around waiver miss the point of Rule 59, and the Court should reject them. *See Cooper v. Steak N Shake, Inc.*, No. 5:18-CV-417-MAS, 2020 WL 3022464, at *3 (E.D. Ky. Mar. 2, 2020) (Sixth Circuit law "allows a trial court to grant a Rule 59 motion even where the moving party failed to object at trial, particularly where opposing counsel made improper comments during closing argument.").

Finally, and most importantly, in requesting a new trial on voluntary payment, Plaintiffs argue that a cumulative set of issues surrounding the treatment of Defendant's affirmative defense of voluntary payment led to a trial on that issue that was fundamentally flawed. Sixth Circuit law promises Plaintiffs a holistic inquiry on this question. *See, e.g., Burks v. O'Connor, Kenny Partners, Inc.*, 33 F. App'x 781, 784 (6th Cir. 2002) (new trial must be granted where trial was "unfair to the moving party"; upholding decision to grant new trial on damages, given the jury's inconsistent findings regarding the actions of one of the parties); *Michigan First Credit Union v. Cumis Ins. Soc., Inc.*, 641 F.3d 240, 251 (6th

[7] The Circuit Court also noted that a district court may grant a new trial *sua sponte*, and that "[t]he Supreme Court has described 'the authority of trial judges to grant new trials' under Rule 59(a) as 'large,'" both of which counsel against a strict waiver rule for new trial motions. *Id.* at 548-59 (quoting *Gasperini v. Ctr. for Humanities, Inc.,* 518 U.S. 415, 433 (1996)).

Cir. 2011) ("errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair," necessitating a new trial (internal quotation marks and citation omitted)); *CFE Racing Products, Inc. v. BMF Wheels, Inc.*, 793 F.3d 571, 590 (6th Cir. 2015) (court must "analyze the totality of the circumstance" in assessing prejudicial trial conduct upon which motion is based); *Pivnick v. White, Getgey & Meyer Co, LPA*, 552 F.3d 479, 488 (6th Cir. 2009) (any claimed errors in jury instructions must be viewed in light of the relevant instruction "as a whole").

Defendant does not even address this argument. Instead, Defendant focuses on each tree, rather than the forest. But Plaintiffs do not need to prove that a *single tree* destroyed the entire forest. If Plaintiffs can show problems with the health of a forest as a whole, even if due to some trees being undergrown, others having heavy needle loss, or still others being infected with a fungus, then Plaintiffs must prevail. Accordingly, this Court must do what is required under Rule 59 and holistically review the trial as to voluntary payment. Such a review commands a new trial on this issue.

2. The Jury's verdict was against the weight of the evidence; Defendant effectively concedes that no trial evidence supported a finding that Plaintiffs knew they were paying more than 120% APR.

In responding to Plaintiffs' argument that there was no evidence that Plaintiffs knew they were paying more than 120% APR, Defendant points again to evidence that Plaintiffs were aware of the 10% finance charge. *See* ECF No. 287 at PAGEID # 9527.[8] But this is beside the point. Defendant

[8] Defendant's sole argument regarding APR—that since Plaintiffs did not believe the fee would vary based on the length of the loan, they *knew* they were not being charged based on an APR—is expressly contradicted by the record evidence. *See, e.g.*, ECF No. 253 at PAGEID # 7457 (McKinney Tr. 2-125:2-11) (testifying that he did not know how APR was calculated but that, based on the contractual language, he "thought $1 for $10 was 120 percent APR"); ECF No. 255 at PAGEID # 7515 (Harrison Tr. 24:4-15; 24:19-25:16) (testifying that he did not know how APR was calculated); *id.* at 7567 (L. Laskaris Tr. 74:20-75:6; 75:9-76:19) (testifying that she was unable to verify whether APR was calculated correctly); ECF No. 263 at PAGEID # 8323 (Fyock Tr. 18:13-19:19) (testifying that she did not know how to calculate APR and assumed based on contractual language that the 10% finance

does not attempt to explain how knowledge of the finance charge demonstrates that Plaintiffs knew they were paying more than 120% APR, which is the term that the Jury found Defendant breached. Defendant cannot explain this because there is no explanation other than error. The Court must thus find that the Jury's determination on voluntary payment was against the weight of the evidence.

3. The treatment of voluntary payment at trial, including the jury instructions, flawed verdict form, and improper argument, led to an unfair trial on voluntary payment.

Plaintiffs urge this Court to order a new trial on the issue of voluntary payment because the trial on this issue was fundamentally flawed. First, the short jury instruction on the issue was erroneous, misleading, and inadequate in the following respects:

1. The instruction failed to provide any guidance as to what facts were relevant in analyzing voluntary payment, providing inadequate guidance and erroneously leaving the relevance question (a legal question) to the Jury. This allowed the Jury to only consider $1 for $10 and ignore the APR.

2. The instruction erroneously directed the Jury that it could consider Plaintiffs' post-lawsuit loans. The Court thereby highlighted irrelevant evidence to the Jury, and erroneously instructed that the Jury could consider it.

3. The Court did not instruct the Jury that it could or should consider the fact that Defendant violated TILA or that the contract was misleading, which is a proper instruction of law. This left Jurors with the impression that Defendant could misrepresent key terms in violation of the law and still succeed on voluntary payment.

Defendant's improper argument heightened and compounded these problems. And the Jury's request for additional information evidenced the Jury's confusion on this issue. Viewed as a whole, the Jury was not properly instructed on voluntary payment, the Jury was confused about voluntary payment, and the Jury—laboring under this misapprehension and confusion—rendered an inconsistent verdict. Under these circumstances, it would be an injustice for the verdict to stand. In response, Defendant argues that none of the individual issues constitutes reversible error. Defendant misses the point.

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charged equaled 120% APR). Defendant also ignores that the formula it wrote instructing customers how to calculate an APR was wrong.

a. Confusing and inadequate jury instruction.

On Point 1, Defendant does not even address Plaintiffs' argument that, by failing to provide any instruction to the Jury on relevance, the Court inadequately instructed the Jury as to the law. Instead, Defendant harps on voluntary payment being a question of fact. Plaintiffs do not dispute that the question of *knowledge* is generally a question of fact. But it was improper for the Court to put the Jury in the position of determining what facts were *relevant*; this is a core function of the Court. *See, e.g., Leonard*, 2015 WL 2341094 at *29 (it is "error [to] instruct[] the jury to consider all relevant evidence—that is, to make the relevance determination"); *In re Davol, Inc./C.R. Bard, Inc., Polypropylene Hernia Mesh Prod. Liab. Litig.,* No. 2:18-CV-01320, 2022 WL 2654983, at *2 (S.D. Ohio July 8, 2022) (in medical product liability case, in instructing jury on consumer expectations test, court was required to instruct jury that the "relevant consumer" was the surgeon, not the patient); *c.f. Wellington*, 2020 WL 1031537 at *2 (courts routinely provide limiting instructions to juries where evidence may be relevant to one issue, but not another); *FTC v. Chemence, Inc.*, 209 F. Supp. 3d 981, 984 (N.D. Ohio 2016) (under Rule 26, court determines what evidence is relevant to claims and defenses). By leaving *relevance* up to the Jury, the Court did not "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,* 552 F.3d at *488.

On Point 2, Defendant offers no explanation or analysis as to why some Named Plaintiffs' actions in taking out loans after initiating litigation, for which they claimed no damages, were purportedly relevant to voluntary payment by the Class. Defendant argues that this evidence was relevant to *breach*, which is immaterial to the question of whether the evidence was relevant to voluntary payment. *See* ECF No. 287 at PAGEID # 9532-33.[9] Defendant then proclaims, without

[9] Furthermore, by arguing that this testimony was relevant to breach, Defendant undermines its own argument that Plaintiffs were required to object to the introduction of this evidence in order to preserve the right to advance its Rule 59 arguments. That is, even if objection were required under

explanation, that a jury could infer from the fact that Named Plaintiffs took out loans *after* meeting with counsel that *pre-suit payments by the Class* were voluntary. Defendant does not attempt to explain how or why this is so, even though Plaintiffs have explained at length why it is not. *See* ECF No. 284 at PAGEID # 9461-63.[10] Defendant only proclaims, once again without analysis, that a contrary result would mean that the class should not have been certified. That is not a question before the Court. Ultimately, with *no other evidence in the record* that any Named Plaintiff or Class Member understood they were paying over 120% APR at *any time*, it is highly likely that the Jury assigned heavy weight to this (irrelevant) post-lawsuit evidence in erroneously determining that the voluntary payment doctrine "applied" to each and every loan.

On Point 3, the Court's refusal to instruct the Jury that the APR term violated the Truth in Lending Act or that the Jury could consider whether the contract was misleading, Defendant contends only that such instructions would not be statements of law. *See* ECF No. 287 at PAGEID # 9535. This is incorrect. As described above, numerous cases have held that misrepresentation precludes the application of the voluntary payment doctrine. (*See* Sec. II.A.1.c, *supra*.) Defendant's cases, in which a court declined to give a one-side *factual* narrative, are inapposite. *See U.S. v. Frost*, 125 F.3d 346, 372 (6th Cir. 1997) (no error where court declined to give instruction detailing criminal defendant's narrative, including that defendant "says that she followed the instructions of her major professor" and that she "had nothing to do with the mailing" of certain documents); *United States v. Downs*, 1999 WL 130786, at *5 (6th Cir. 1999) (no error where court declined to instruct the jury as to the defendant's factual theory, "*i.e.,* that . . . the drugs and paraphernalia belonged to" another person who

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Rule 59 (it is not), certainly Plaintiffs were not required to object to the admission of testimony that was relevant for other purposes in order to preserve an argument as to the proper jury instructions.

[10] In fact, the Court did not instruct the Jury as to how these loans might be relevant either—whether to just Named Plaintiffs' damages or to the Class, or for what time period—further confusing the Jury.

resided with him). At bottom, stating a correct proposition of law does not "place the Court's thumb on the scales" in one party's favor. And, particularly where the Court emphasized in the instruction the *irrelevant* evidence of loans for which no damages were claimed, it was extremely prejudicial for the Court to refuse to instruct the Jury on the relevance of Defendant's misleading conduct.

b. Jury question demonstrates the Jury's confusion.

Plaintiffs argue that the Jury's question on voluntary payment evidences the Jury's confusion and the inadequacy of the instruction. In response, Defendant once again cites inapplicable authority. The Court did not, as Defendant claims, "direct [the Jury's] attention to the precise paragraph of the constitutionally adequate instruction that answer[ed] its inquiry." *See* ECF No. 287 at PAGEID # 9531 (quoting *Waddington v. Sarausad*, 555 U.S. 179, 196 (2009)). Instead, here, the Jury explicitly asked for *more information*: "can we get more information on the voluntary payment doctrine? i.e. full document." ECF No. 277 at PAGEID # 9008 (Tr. 8:23-25). The Court *did not provide any more information*. Thus, unlike the cases on which Defendant relies, here, it is beyond dispute that the Court did not provide the information that the Jury sought. This speaks to the inadequacy of the instruction as well as to the confusion under which the Jury was required to deliberate and render a verdict.

c. Inadequate verdict form and contradictory Jury findings.

Defendant devotes most of its discussion regarding the verdict form to arguing about waiver and abuse of discretion, neither of which, as addressed above, is applicable under Rule 59. In response to the substance of Plaintiffs' argument—that the Jury's findings on breach and on voluntary payment were inconsistent—Defendant only offers the basic proposition that voluntary payment is recognized as a defense to breach of contract law. *See* ECF No. 287 at PAGEID # 9540. This is neither here nor there. Defendant does not even attempt to rebut Plaintiffs' argument or authority that the Court must look to the presentation of evidence and argument in the individual case to determine whether a jury's findings are inconsistent. And doing so here, as laid out by Plaintiffs, the Jury's finding that the

voluntary payment doctrine "applies" (to all loans) conflicts with the finding that Defendant breached the contract by charging more than 120% APR.[11] *See* ECF No. 284 at PAGEID # 9465.

Furthermore, the Court's instruction that the Jury could consider Named Plaintiffs' post-lawsuit loans erroneously suggested to the Jury that knowledge of the APR at *any point* meant that the voluntary payment doctrine "applied," regardless of when they may have gained knowledge of the relevant facts. It also erroneously forced the Jury to determine that Plaintiffs and Class Members had knowledge at *all times* (and as to all loans), or *at no time time*. This was legally incorrect, as knowledge must be held at the time of payment for the defense to succeed. *Hazelwood v. Bayview Loan Serving, LLC,* No. 1:20-cv-726, 2021 WL 664059, at *4 (S.D. Ohio Feb. 19, 2021). And, since there was no evidence in the record that the any Plaintiff knew at any point *before* meeting with counsel that they were paying over 120% APR, it is likely that the Jury made its determination based on this irrelevant post-lawsuit conduct. Had the Court allowed a supplemental interrogatory to the Jury on the time period to which voluntary payment applied, this would have clarified the Jury's reasoning.

d. Defense counsel's improper argument.

Defendant also misses the mark regarding its improper statements at closing: Defendant argues that counsel's conduct was not "egregious" or "outrageous." ECF No. 287 at PAGEID # 9541-42. But this is the applicable standard where counsel's conduct is the *only* claimed source of error, which is not the case here. As discussed above, the inquiry here is a holistic one, and the Court must consider Defendant's misstatements of the law in the context of the other errors surrounding voluntary payment. Moreover, contrary to Defendant's conclusory arguments, defense counsel's

[11] Further, the Court directed the Jury to determine the Parties' intent as to the APR term or, if not possible, apply *contra proferentum*. ECF No. 270 at PAGEID # 8627-28. To the extent the Jury's finding rests on intent, the Jury must have determined that the Parties intended a loan of 120% APR, as APR is understood in the banking industry. There is a clear conflict between that intent and a finding that Plaintiffs and Class Members paid with full knowledge of all relevant facts, since there was no evidence that any Plaintiff or Class Member knew they were paying over 120% APR for any loan at issue.

statements were in fact *misstatements of the law*—particularly as to what makes a payment "voluntary" under the doctrine, and the burden of proof.[12] *See* ECF No. 284 at PAGEID # 9466-68. As laid out by Plaintiffs, they were not simply Defendant's "view of the evidence" or Defendant's "emphasis" on certain portions of the jury instructions. *See id.*

Instead of attempting to explain the purported legal basis for its impermissible argument, Defendant raises non sequiturs. First, Defendant insists that, at times, counsel got the standard right. But this does not undo the prejudice of making multiple impermissible legal arguments, and Defendant does not cite any authority suggesting that it does. As to Defendant's argument on impermissibly shifting the burden of proof, Defendant claims that it merely "[p]oint[ed] out the absence of evidence." *See* ECF No. 287 at PAGEID # 9542. Not so. Defendant insinuated to the Jury that, in order to avoid voluntary payment, Plaintiffs must prove duress or must prove reliance. *See* ECF No. 284 at PAGEID # 44-45. This was an improper shifting of the burden.

All of these errors, taken together, infected the trial—rendering the trial on voluntary payment fundamentally unfair. The Court therefore has the duty to order a new trial on that issue.

4. A partial new trial on voluntary payment is the appropriate remedy.

The Court should grant Plaintiffs' motion for judgment as a matter of law on voluntary payment and on notice, in which case the only issue to be retried would be damages. However, if the Court declines to grant Plaintiffs' Rule 50 motion, a partial new trial on voluntary payment is appropriate; there is no reason to disturb the Jury's finding on breach.

Defendant's primary argument against a partial new trial is another non sequitur: Defendant argues that, since evidence related to breach is also relevant to voluntary payment, breach must also

[12] Contrary to Defendant's unfounded assertion and as explicitly laid out in Plaintiffs' brief, Plaintiffs *do* take issue with the comment that "the jury must find in its favor on the voluntary payment doctrine if the payment was made 'voluntarily.'" This is an inaccurate statement of the law. *See* ECF No. 284 at PAGEID # 9467.

be retried if voluntary payment is retried. *See* ECF No. 287 at PAGEID # 9543-44. But overlapping evidence is no basis to disturb the Jury's finding on breach, it is only a question of what evidence may be presented at the new trial—an issue that, as with any trial, the Court can adjudicate leading up to and during a new trial. Furthermore, *Gasoline Products*, relied upon heavily by Defendant, is distinguishable. There, the jury's finding indicated that it had found breach of contract on a counterclaim and calculated damages. But, unlike the present case, the contract was based on an oral proposal and certain correspondence. Thus, when the court found that the damages instruction was erroneous, it found that a new trial was required on the contract claim, too, because the jury's finding did not specify details material to calculation of damages such as "the terms of the contract; and the dates of formation and breach." 283 U.S. 494, 499 (1931). Simply put, the jury's finding could not inform a second jury of what the breached contract even was. Here, there is no such complication: the terms of the contract at issue are written and standardized.[13] Because voluntary payment and damages are distinct legal issues, a partial new trial is entirely appropriate and will not prejudice Defendant.

III. 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 or, in the alternative, order a new trial on that issue and on damages.

[13] Defendant notes that the Jury made no finding as to "when the breach ended," presumably referring to the issue of whether or when Defendant effectuated notice of the removal of the APR term in the Early Access Agreement. *See* ECF No. 287 at PAGEID # 9544. Should the Court conclude notice cannot be determined as a matter of law (it can), the evidence to be presented to at trial is minimal: evidence of the notices that Defendant claims to have sent, and evidence of industry practices. This issue can easily be presented in a new trial without disturbing the Jury's finding of breach.

Dated: July 13, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

On July 13, 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,

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