[Cite as *Koons v. Ozzy's Cash & Go Auto, L.L.C.*, 2021-Ohio-3337.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

DYLAN J. KOONS, et al.,	:	
	:	Case No. 20CA3919
Plaintiffs-Appellees,	:	
	:	
v.	:	DECISION AND JUDGMENT
	:	ENTRY
OZZY'S CASH AND GO AUTO, LLC,	:	
	:	
Defendant-Appellant.	:	**RELEASED: 09/16/21**

APPEARANCES:

Ozzy's Cash and Go Auto, LLC, Pro Se[1], Appellant.

Mark J. Cardosi, Southeastern Ohio Legal Services, Portsmouth, Ohio for Appellees.

Wilkin, J.

{¶1} This is an appeal from a Scioto County Court of Common Pleas judgment that found appellant, Ozzy's Cash and Go Auto, LLC ("Ozzy's), liable to Dylan J. Koons and Tiffany Koons ("the Koons") for damages caused by its breach of warranties on two automobiles purchased by the Koons. Ozzy's asserts a single assignment of error: the court erred in not determining the proper measure of damages for a breach of an implied warranty for the sale of personal property. After reviewing Ozzy's arguments, the applicable law, and the record, we overrule Ozzy's sole assignment of error, and affirm the trial court's judgment in favor of the Koons.

[1] Appellant's brief in this matter was filed by retained counsel prior to disciplinary action by the Supreme Court of Ohio.

BACKGROUND

{¶2} In April 2018, the Koons purchased a 2007 Hummer H3 SUV and a 2010 Chevrolet Traverse from Ozzy's. Including tax, the price of the Hummer was $10,851.08, but the Koons were credited $1,500 for a trade-in, and they made a $2,000 down payment. The Koons also purchased "gap protection" for $576, an "extended warranty" for $1,989.00, and paid $33.50 to license and register the Hummer. The Koons financed the balance of $9,949.58 at a 22.99 annual percentage interest rate, which resulted in 51 monthly payments of $307.40.

{¶3} Including tax, the purchase price of the Traverse was $15,532.38, but the Koons were credited $3,400 for a trade-in. The Koons also purchased an "extended warranty" for $1,736.00, and paid $33.50 to license and register the Traverse. The Koons financed the balance of $13,901.88, at a 22.99 annual percentage interest rate, which resulted in 54 monthly payments of $415.43.

{¶4} The day after their purchase, the Koons had "severe mechanical issues" with the Traverse, causing it to be inoperable; it got stuck in second gear and the power steering failed. The Koons returned the vehicle to Ozzy's, and it was eventually taken to Tim Short Auto to be repaired. After 3 ½ months, the Traverse was returned to the Koons, but the power steering still did not work. The Koons have driven the Traverse a total of 358 miles since the date of its purchase.

{¶5} About a week-and-a-half after the Koons purchased the Hummer, its transmission locked-up. Ozzy's eventually towed the Hummer to Tim Short Auto

for repair. After 3 ½ months, it was returned to the Koons and was functional, but it continued to leak fluid from the transmission. The Koons have driven the Hummer a total of 3,485 miles since the date of its purchase.

{¶6} Approximately three weeks after they purchased the vehicles, the Koons asked Ozzy's to rescind the purchase agreements for both vehicles. However, Ozzy's refused stating that the Koons would have to wait 30 days " 'for the warranty to kick in.' "

{¶7} The Koons filed a five-count complaint against Ozzy's alleging (1) breach of contract and breach of expressed and implied warranties, (2) violation of the Consumer Sales Practices Act, (3) revocation of acceptance of the purchase agreements, (4) violation of the Magnuson Moss Warranty Act, and (5) common law duties, fraud and misrepresentation. The Koons subsequently amended their complaint adding the Credit Acceptance Corporation (CAC) as a defendant, which moved to arbitrate their claims. However, before the trial court resolved CAC's motion, the Koons dismissed CAC as a party with prejudice.

{¶8} The Koons' remaining claims against Ozzy's were addressed in a bench trial. After considering the evidence presented by the parties, the trial court issued a decision and entry that included findings of fact and conclusions of law. The court found that the Koons failed to prove a violation of the Consumer Sales Practices Act, or common law fraud or misrepresentation. The court further found that the "as is" clauses in both automobile purchase agreements were contingent upon the Koons *not* purchasing extended warranties. Because the Koons purchased extended warranties for both vehicles, the court found that

the "as is" clauses were negated, and consequently both vehicles were covered under implied warranties, "including the duty to act in good faith, as to those warranties." The court found that Ozzy's violated those warranties. The court also found a violation of the Magnuson Moss Act, which provides federal rights that permit enforcement of state law warranty violations.

{¶9} Applying R.C. 1302.66, the court found that "significant mechanical problems" caused both vehicles to be "non-conforming" goods, that qualified the Koons to revoke their acceptance of both purchase agreements. The court concluded that Ozzy's "put[ing] off" the Koons' efforts to revoke the agreements caused them to incur $13,405.38 in damages. Ozzy's appeals this judgment, regarding the damage award.

ASSIGNMENT OF ERROR

THE COURT ERRED IN NOT DETERMINING THE PROPER MEASURE OF DAMAGES FOR A BREACH OF AN IMPLIED WARRANTY FOR THE SALE OF PERSONAL PROPERTY

{¶10} Ozzy's argues that the trial court erred in awarding the Koons $13,405.38 in damages. Ozzy's asserts that the trial court was required to calculate the Koons' damages pursuant to R.C. 1302.88(B). This provision provides the measure of damages for breach of a warranty, which "is the difference at the time of acceptance between the value of the goods accepted and the value they would have been as warrantied," absent special circumstances under R.C. 1302.88(B). In support of this proposition, Ozzy's cites *Eckstein v. Cummins*, 46 Ohio App. 2d 192, 193-96, 347 N.E.2d 549 (6th Dist.1975) and *Goddard v. General Motors*, 60 Ohio St.2d 41, 396 N.E.2d 761

(1979). Ozzy's argues that because there is no evidence showing the difference in value as set forth under R.C. 1302.88(B), the Koons' "claim should be dismissed."

{¶11} In response, the Koons do not address Ozzy's assertion that the trial court erroneously failed to apply R.C. 1302.88(B) in determining their damages. Instead, the Koons claim that if a trial court determines that rescission of a contract is justified, the court has discretion to fashion a decree that will return the parties to their respective position they occupied before they entered the contract, citing *Hubbard v. AASE Sales, LLC*, 2018-Ohio-2363, 104 N.E.3d 1027, ¶ 59 (5th Dist.). The Koons argue that the $13,405.38 damages award placed both parties in the position that they occupied before the contract, i.e., Ozzy's paid back the money that Koons made toward the vehicles. The Koons also assert that the $13,405.38 is supported in the record pursuant to the purchase agreements. Therefore, the Koons maintain that we should affirm the trial court's judgment.

Law and Analysis

1. Standard of Review

{¶12} When a party "challenges the trial court's choice or application of law, our review is de novo." *Hampton v. Lively*, 2020-Ohio-4713, 159 N.E.3d 810, ¶ 13 (4th Dist.), citing *Pottmeyer v. Douglas*, 4th Dist. Washington No. 10CA7, 2010-Ohio-5293, ¶ 21. This means that in our review, we afford the trial court no deference in determining what statutory provision applies. *See State v. Blanton*, 2018-Ohio-1278, 110 N.E.3d 1, ¶ 50 (4th Dist.), citing *State v. Sufronko*,

105 Ohio App.3d 504, 664 N.E.2d 596 (4th Dist.1995). We apply a de novo review of Ozzy's assertion that the trial court was required to apply R.C. 1302.88(B) to calculate the Koons' damages.

{¶13} To the extent that Ozzy's also argues that the trial court's award of damages was speculative, a "plaintiff must show its entitlement to damages in an amount ascertainable with reasonable certainty." *Bevens v. Wooten Landscaping, Inc.*, 4th Dist. Pike No. 11CA819, 2012-Ohio-5137, ¶ 16, citing *Allied Erecting & Dismantling Co., Inc. v. Youngstown,* 151 Ohio App.3d 16, 2002-Ohio-5179, 783 N.E.2d 523, ¶ 64 (7th Dist.); *Interstate Gas Supply, Inc. v. Calex Corp.,* 10th Dist. Franklin No. 04AP-980, 2006-Ohio-638, ¶ 59. "Generally, we will uphold a trial court's judgment as long as the manifest weight of the evidence supports it—that is, as long as some competent and credible evidence supports it." *Bevens* at ¶ 12, citing *Eastley v. Volkman,* 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17. Therefore, a damage award "should not be overturned as being against the manifest weight of the evidence if some competent and credible evidence supports that judgment." *Knox v. Ludwick*, 4th Dist. Ross No. 00CA2569, 2001-Ohio-2604, ¶ 3, citing *C.E. Morris Co. v. Foley Construction Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978). And, "[f]actual findings of the trial court are to be given a great amount of deference because the trial court is in a better position 'to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' " *Id*., quoting *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

2. Analysis

{¶14} We begin by recognizing that the trial court concluded that Ozzy's breached implied warranties pertaining to the Koons' vehicles, and that the Koons properly revoked the acceptance of the purchase agreements for both vehicles under R.C. 1302.66. These holdings are not disputed in Ozzy's appeal. Rather, Ozzy's contends that the trial court erred in not applying R.C. 1302.88(B) when it calculated the Koons' damages for revocation. We will therefore adopt the trial court's finding that the Koons revoked the purchase agreements and solely address the appropriate calculation of damages.

{¶15} "Since the adoption of Article 2 of the Uniform Commercial Code in 1962, the law in Ohio governing contracts for the sale of goods has been codified in R.C. Chapter 1302." *Hughes v. Al Green, Inc.*, 65 Ohio St. 2d 110, 111, 418 N.E.2d 1355 (1981). Therefore, when a buyer's "action is grounded upon what is in essence an alleged breach of a contract for the sale of a motor vehicle, 'goods' as defined in R.C. 1302.1(A)(8), resolution of this dispute must be guided by the provisions of R.C. Chapter 1302, unless superseded by other statutory provisions." *Id.* (footnotes omitted). R.C. 1302.85 states:

> (A) Where the seller fails to make delivery or repudiates or *the buyer* rightfully rejects or *justifiably revokes acceptance* then with respect to any goods involved, * * * the buyer may cancel and whether or not he has done so may *in addition to recovering so much of the price as has been paid*[.] (Emphasis added.)

{¶16} The Eighth District Court of Appeals has addressed the calculation of damages for the breach of warranties where the buyer properly revoked its

acceptance of an automobile in *Arrow Int'l, Inc., v. Rolls-Royce Motors, Inc.*, 8th Dist. Cuyahoga Nos. 50305, 50341, 1986 WL 4665 (April 17, 1986). Similar to the instant case, the defendant in *Arrow Int'l* argued that "the proper measure of damages * * * is the difference between the value of the goods accepted and the value of the car had it been as warrantied," pursuant to R.C. 1302.88. *Id*. at * 9. In rejecting this argument, the court of appeals reasoned that "[r]evocation of acceptance and recovery of damages for breach of warranty are two distinct remedies under the Uniform Commercial Code. While the buyer may pursue either remedy or both, each is treated in a different section of the Code and offers a separate form of relief." *Id*. Because the trial court in *Arrow Int'l* found that the buyer properly revoked acceptance of the automobile, the court found that "the 'value-received' basis for damages under R.C. 1302.88 inapplicable *where acceptance of the goods has been revoked*." (Emphasis added.) *Id*., citing *Frontier Mobile Home Sales, Inc.* v. *Trigleth*, 505 S.W.2d 516 (Ark.1974); *Gawlick v. American Builders Supply, Inc.,* 519 P.2d 313 (N.M.App.1974). Instead, the court of appeals held that "[a] buyer who justifiably revokes acceptance of goods under R.C. 1302.66 is entitled to the purchase price paid in addition to incidental or consequential damages" under R.C. 1302.85 and 1302.89, respectively. *Id*.

{¶17} The Sixth District Court of Appeals has also addressed the proper measure of damages for the breach of a warranty where the buyer revoked a purchase agreement for goods. *Ball Works, Inc. v. Lima Lawnmower, Inc.,* 6th Dist. Lucas No. L-96-237, 1997 WL 362464 (June 27, 1997). In *Ball Works*, the trial court concluded that the seller of a lawnmower breached an implied warranty

of fitness for a particular purpose and that the buyer properly revoked the purchase agreement under R.C. 1302.66. *Id*. at * 3. Then "[t]he trial court found that, pursuant to R.C. 1302.88 and .89, due to the breach, [the buyer] is entitled to judgment and damages totaling the $1,965.20 already paid." *Id*.

{¶18} On appeal, the seller argued that the trial court erred in awarding the buyer the return of the purchase price paid, relying on *Eckstein v. Cummins*, 41 Ohio App.2d 1, 321 N.E.2d 897 (6th Dist.1974), and *Eckstein v. Cummins*, 46 Ohio App.2d 192, 347 N.E.2d 549 (6th Dist.1975). *Id*. at * 6. The court in *Ball Works* found that the *Eckstein* case was distinguishable because the buyer in *Eckstein* did not revoke the purchase agreement, but the buyer in *Ball Works* did. *Id*. Therefore, similar to the decision in *Arrow Int'l,* the court in *Ball Works* concluded that "the appropriate measure of damages is set forth in R.C. 1302.85, not R.C. 1302.88 and .89." *Id*. The court noted that

> [a]lthough the trial court stated it was awarding damages pursuant to R.C. 1302.88 and .89, its computations were consistent with the measure of damages set forth in R.C. 1302.85. Accordingly, this court finds that the trial court was correct in finding that Ball Works is entitled to recover as much of the purchase price as has already been paid.

Id., citing R.C. 1302.85.

{¶19} Nevertheless, Ozzy's cites *Eckstein,* 46 Ohio App. 2d 192, 347 N.E.2d 549 and *Goddard*, 60 Ohio St.2d 41, 396 N.E.2d 761 in support of the proposition that the trial court erred in not relying on R.C. 1302.88 to calculate the Koons' damages after revocation of the purchase agreements. However, as made clear in *Ball Works*, *Eckstein* is distinguishable from this case. In *Eckstein*, the buyer did not revoke the purchase agreement, so his damages were

controlled by R.C. 1302.88, unlike the instant case, in which the Koons did revoke the purchase agreements; therefore, their damages are calculated under 1302.85.

{¶20} *Goddard* is similarly unsupportive of Ozzy's argument. In *Goddard* the buyer of a vehicle successfully sued the manufacturer and seller for breach of an express warranty. *Goddard* at 41-43. *Goddard* holds that "Where a new car express warranty limits a buyer's remedy to repair and replacement of defective parts, but the new car is so riddled with defects that the limited remedy of repair and replacement fails its essential purpose, the buyer may institute an action to recover damages for breach of warranty under R.C. 1302.88(B)." *Id*. at syllabus. However, unlike the present case, there was no mention that the buyer revoked or even attempted to revoke the purchase agreement for the automobile. Consequently, we do not find *Goddard* instructive in addressing the proper calculation of damages due to a breach of warranty, *when the buyer has revoked the purchase agreement*.

{¶21} We agree with *Ball Works* and *Arrow Int'l* that a trial court may award damages under R.C. 1302.85 for the purchase price paid where the buyer has revoked the purchase agreement for goods, which in this case involved two vehicles. Both decisions are consistent with the plain language of R.C. 1302.85, and awarding a buyer the monies paid under these circumstances is consistent with the purpose of rescission, which is "to restore the parties to their original positions as if the contract had never been formed." *Bell v. Turner*, 4th Dist. Highland Nos. 12CA14, 12CA15, 2013-Ohio-1323, ¶ 22. Consequently, we find

Ozzy's argument that the trial court was required to calculate the Koons' damages after revocation of the purchase agreements under R.C. 1302.88(B) lacking in merit. Despite this conclusion, our analysis is not yet complete.

{¶22} The trial court did not cite R.C. 1302.85, or any other authority, in calculating the Koons' $13,405.38-damage award, nor did it indicate how it arrived at that particular amount. However, a review of the purchase agreements for the vehicles herein reveals the following.

{¶23} The price of the Hummer was $10,851.08. After making a $2,000 down payment, receiving a $1,500 credit for a trade-in, purchasing gap coverage for $576, purchasing an extended service warranty for $1,989.00, and paying $33.50 to license and register the vehicle, there was $9,949.58 left to be financed. Financing $9,949.58 at a 22.9% annual percentage rate, resulted in 51 monthly payments of $307.40 per month.

{¶24} The price of the Traverse was $15,532.38. After receiving a $3,400 credit for a trade-in, purchasing an extended service warranty for $1,736.00, and paying $33.50 to license and register the vehicle, there was $13,901.88 that remained to be financed. Financing $13,901.88 at a 22.9 annual percentage rate, resulted in 54 monthly payments of $415.42.

{¶25} Mr. Koons testified that he made nine monthly payments on both vehicles for a total of $6,505.38. The sum of the down payment ($2,000), both trade-in credits ($1,500 and $ 3,400), and the nine months of payments for both vehicles ($6,505.38), totals $13,405.38. This is the exact amount of damages

that the trial court awarded to Koons, and essentially represents the amount of "the purchase price paid" by the Koons. Therefore, we find that the damage award is supported by "some evidence" and is "ascertainable with reasonable certainty." And, finally, similar to the court's reasoning in *Ball Works*, although the trial court herein did not specifically cite R.C. 1302.85 in its decision, because the damages it awarded to the Koons are consistent with that provision (i.e., they recovered monies paid on the vehicles), we find that the trial court did not err in calculating the Koons' damage award. *See Ball Works*, 1997 WL 362464, at *6. Therefore, we overrule Ozzy's assignment of error.

CONCLUSION

{¶26} Having overruled Ozzy's sole assignment of error, we affirm the trial court's decision and entry in favor of the Koons.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

For the Court,

BY: _____
Kristy S. Wilkin, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

[Cite as *Marks v. Raymond*, 2021-Ohio-3375.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

JOSEPH PATRICK MARKS	:	
	:	
Plaintiff-Appellant	:	Appellate Case No. 29065
	:	
v.	:	Trial Court Case No. 2018-CV-5119
	:	
DEBORAH RAYMOND, et al.	:	(Civil Appeal from
	:	Common Pleas Court)
Defendants-Appellees	:	
	:	

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O P I N I O N

Rendered on the 24th day of September, 2021.

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WELBAUM, J.

{¶ 1} Plaintiff-appellant, Joseph Patrick Marks, appeals from a judgment of the Montgomery County Court of Common Pleas in favor of defendants-appellees, Deborah and Brian Raymond, on Marks' breach-of-contract claim. For the reasons outlined below, the judgment of the trial court will be affirmed.

Facts and Course of Proceedings

{¶ 2} On November 2, 2018, Marks filed a complaint against his adult daughter, Deborah, and her husband, Brian ("the Raymonds"), alleging breach of contract, unjust enrichment, quantum meruit, conversion, and statutory claims for damages. In response to the complaint, the Raymonds filed an answer denying each of Marks' claims. The Raymonds also filed a counterclaim against Marks alleging breach of contract, fraud, and promissory estoppel. The matter ultimately proceeded to a two-day bench trial on January 5 and 6, 2021.

{¶ 3} Prior to trial, Marks withdrew his conversion and statutory damages claims, and the Raymonds withdrew their claim of fraud. The parties also filed several stipulations. The parties stipulated that Marks and the Raymonds had entered into an oral agreement under which Marks had agreed to pay for the construction of an addition onto the Raymonds' home in Tennessee that would accommodate Marks' living there. In exchange for Marks funding the addition to the Raymonds' home, the Raymonds agreed that Marks could live with them after the addition was completed and that Deborah would take care of Marks due to his failing mental and physical health.

{¶ 4} The parties also stipulated that Marks and Deborah opened a joint checking account so that Deborah could pay Marks' bills, including the bills for the construction

project. The parties further stipulated that Deborah never spent any funds from the joint account in an unauthorized manner. The parties, however, disagreed on the amount of money that Marks agreed to pay for the construction project. Marks initially claimed that he only agreed to pay for half the cost of the project, whereas the Raymonds claimed that Marks agreed to pay for the entire project.

{¶ 5} The parties additionally stipulated that Marks and Deborah got into a heated argument on August 16, 2018, after Marks wrongly accused Deborah of stealing $35,000 from the joint bank account. There is no dispute that Deborah used the $35,000 to pay the general contractor who was hired to build the addition onto the Raymonds' home. The parties also stipulated that on August 18, 2018, the Raymonds participated in a recorded speakerphone conversation with Marks, one of Marks' other daughters, Kimberly Buckley, and Kimberly's husband, Pete Buckely ("the Buckleys"), in order to discuss Marks' living situation. The parties further stipulated that Marks never moved to Tennessee and that Marks never told the Raymonds to stop construction on their home because he would not be moving to Tennessee.

{¶ 6} At trial, Marks called the Buckleys to testify on his behalf. Marks also called Deborah to testify as if on cross-examination. For the defense, the Raymonds presented testimony from Deborah, the general contractor who built the addition, Billy Mathis, and the realtor who listed and sold Marks' home in Ohio, Sue Piersall. The Raymonds also called Marks to testify as if on cross-examination. The following is a summary of the testimony and evidence presented at trial.

{¶ 7} In March 2017, Marks discovered that one of his daughters, Cheryl, had been improperly taking money out of his bank account while she had been an authorized user.

As a result, Deborah came to Ohio from Tennessee in order to help Marks with his finances after removing Cheryl from his bank account. On March 15, 2017, Marks opened a new joint bank account with Deborah's help and made Deborah an authorized user. From this joint bank account, Deborah paid Marks' bills and managed his funds.

{¶ 8} While Deborah was in Ohio helping Marks, she and the Buckleys discussed Marks' failing mental and physical health. They also discussed the possibility of Marks moving to Tennessee to live with Deborah and her family so that Deborah could care for Marks. Deborah indicated that in order for Marks to move in with her, it would be necessary to build an addition onto her home.

{¶ 9} Following this discussion, and after returning to Tennessee, Deborah started getting quotes from contractors for the cost of building an addition onto her home. After Deborah discussed the matter with Marks, on December 28, 2017, the Raymonds signed a construction contract with Mathis, who had been hired to build the addition. Marks was on the phone with the Raymonds at the time the contract was signed. The contract, which was admitted into evidence, listed the estimated cost of the project as $74,229. *See* Def.'s Ex. B. Marks agreed that the contract price would be paid from his money in the joint bank account that Deborah was authorized to access.

{¶ 10} Prior to the Raymonds' signing the contract, Marks had the opportunity to speak with Mathis on the phone and ask questions about the project. At one point, Marks told Mathis that if the project "is going to cost me 70-something-thousand dollars, * * * I just need to know what I'm getting." Trial Trans., p. 208. At the time the contract was signed, and after his conversation with Marks, Mathis understood that the addition was being built for Marks and that Marks would be paying for the project. Mathis also

understood that Deborah would be handling the day-to-day needs for the project and would be making the periodic payments.

{¶ 11} Once the contract was signed, construction of the addition began in March 2018. The parties understood that once the addition was completed, Marks would move to Tennessee to live with the Raymonds. In the meantime, Marks would be in Ohio working with a realtor, Piersall, to sell his home in Huber Heights. Piersall also helped Marks sell some of his personal property in order to downsize for the move to Tennessee.

{¶ 12} On May 24, 2018, Marks drove from Ohio to Tennessee and stayed with the Raymonds for several days. During this time, Marks observed the progress on the construction project and spoke with multiple construction workers. Marks also brought down some of his personal property that he wanted to have with him once he moved in with the Raymonds. While visiting, Marks expressed no dismay about the construction project.

{¶ 13} On July 23, 2018, Marks made a second trip to Tennessee and brought more of his property with him. The following day, Marks tripped on a broken floorboard in the Raymonds' kitchen and angrily said "this goddamned place has been a [sic] disarray from the beginning." Trial Trans., p. 95. Deborah then told Marks that she could not afford to fix the floor and that she did not "have money falling out of [her] ass like Kimberly." *Id*. In response, Marks threw his cup into the sink and angrily stormed out of the kitchen. Marks immediately drove back to Ohio without saying anything to Deborah and would not answer Deborah's phone calls for several days.

{¶ 14} At the time Marks stormed out of the Raymonds' house, Deborah had paid $37,944.10 from the joint bank account for the construction project, and $5,742.98 from

her own personal account for certain change orders. Approximately $35,000 still had to be paid for the project. Given Marks' behavior, and because Deborah had observed how Marks acted in previous disputes with her sisters Cheryl and Kimberly, Deborah was concerned that Marks would remove her from the joint bank account, meaning that Deborah would have to pay the remaining $35,000 with her own funds, which she did not have. As a result, the day after Marks stormed out of her house, Deborah withdrew $35,000 from the joint bank account and transferred it to her own personal account so that she would be able to make the final payments to Mathis. This was different than other withdrawals she had made from the joint account, as Deborah usually wrote checks directly to Mathis. There is no dispute, however, that Deborah used the $35,000 for the construction project.

{¶ 15} The day after Deborah made the $35,000 transfer, the bank called Marks and alerted him to the large withdrawal. After being alerted of the withdrawal, Marks and his daughter Kimberly went to the bank to see what was going on. While at the bank, a bank employee, who was familiar with Marks' financial history, said "we think we have another Cheryl on our hands." Trial Trans., p. 34. Marks then froze his joint bank account with Deborah so that Deborah could no longer access it. Once the account was frozen, Deborah was alerted to the change and attempted to call the bank to find out what was going on. The bank employees, however, would not tell Deborah anything. Marks also continued to ignore Deborah's phone calls.

{¶ 16} On July 28, 2018, Marks eventually called Deborah and told her that he would be arriving in Tennessee the following day. This was Deborah's first contact with Marks since he stormed out of her house four days earlier. At this point, given Marks'

bank activity, Deborah assumed that Marks knew about the $35,000 transfer.

{¶ 17} On July 29, 2018, Marks arrived at the Raymonds' residence and moved the rest of his belongings into the house. Marks never said anything to Deborah about the frozen account or the $35,000 transfer. Deborah assumed everything was fine since Marks acted as if nothing was wrong and moved in the rest of his belongings.

{¶ 18} On August 1, 2018, Marks drove back to Ohio in order to close on his house. The closing, however, got delayed until August 10, 2018. Marks stayed in Ohio for the closing, but he could not move to Tennessee until the addition was completed on August 17, 2018. As a result, Deborah purchased a hotel room for Marks to stay in until the addition was ready. During this time, Marks would not answer any of Deborah's phone calls.

{¶ 19} On August 16, 2018, the day before Marks was supposed to move to Tennessee, Marks called Deborah and told her that he did not like her taking the $35,000 from his account. Marks also told Deborah that he had only agreed to pay for half of the project, which he had already paid. Deborah, however, had no idea what Marks was talking about, since Marks had previously agreed to pay for the entire project. As their conversation continued, Marks accused Deborah of stealing his money and demanded all of his money back. Marks also told Deborah to start sending his paperwork and bills to Kimberly to handle. Deborah asked Marks where he was going to stay and Marks told her: "I'll be fine. * * * I'll figure it out. I always do." Trial Trans., p. 105. Based on their conversation, Deborah assumed that Marks was no longer moving to Tennessee. Deborah was heartbroken by Marks' theft accusation.

{¶ 20} As suspected, Marks did not move to Tennessee on August 17th as

planned. On August 18, 2018, Marks, the Raymonds, and the Buckleys took part in a recorded speakerphone conversation in order to discuss Marks' living situation. *See* Pl.'s Ex. 1 and 2. During the conversation, the Buckleys tried to explain that the theft accusation was based on a misunderstanding and that Marks still wanted to move in with the Raymonds. Marks, however, never stated that he still wanted to move to Tennessee and was, for the most part, silent during the call.

{¶ 21} The Buckleys also told the Raymonds that Marks wanted to speak with the Raymonds face to face about the issue. The Raymonds, however, declined that idea and said that Marks could speak to them right then and there over the phone. In response to this, Marks said: "Keep the fucking money. Forget it. It's over." Pl.'s Ex. 1. As the conversation continued, Deborah made it clear that Marks' theft accusation had hurt her tremendously and that, because of his actions, Marks was no longer welcome to move into her home.

{¶ 22} At the conclusion of this call, there was an understanding that Marks would not be moving to Tennessee at any point and that he would instead go and retrieve all of his personal property and bring it back to Ohio. The day after the call, Kimberly's husband, Pete, drove Marks to Tennessee and Marks retrieved all of his property. Marks later moved into an assisted living facility in Ohio.

{¶ 23} After trial, the parties submitted post-trial briefs. In Marks' brief, Marks conceded that the balance of the evidence established that he had agreed to pay for the entire cost of the addition. The parties agreed that the total cost of the addition (not including upgrades and other work requested by the Raymonds) came in under budget at $69,644.73. The Raymonds conceded that they were responsible for certain

upgrades they made to their home as a result of the addition, and that because of this, Marks was owed $7,106.12.

{¶ 24} Given that there was no dispute that an oral contract existed between the parties, the trial court only considered the parties' breach of contract claims, because claims for quantum meruit, unjust enrichment, and promissory estoppel do not apply when there is a contract. *See John D. Smith Co., L.P.A. v. Lipsky*, 2d Dist. Greene No. 2019-CA-65, 2020-Ohio-3985, ¶ 54; *Han v. Univ. of Dayton*, 2015-Ohio-346, 28 N.E.3d 547, ¶ 46 (2d Dist.).

{¶ 25} After reviewing the parties' breach of contract claims, the trial court found that neither party had breached the oral contract at issue. In so holding, the trial court found that Marks had not breached the contract because he had paid for the entire cost of the addition as agreed. The trial court also found that Deborah's reciprocal agreement to care for Marks following the construction of the addition never came to fruition because Marks did not move in with the Raymonds as planned. The trial court found that Marks' failure to move in with the Raymonds was not the result of the Raymonds breaching the contract, but was instead the result of the parties mutually abandoning the contract.

{¶ 26} Based on its mutual abandonment finding, the trial court held that neither party could sue for breach of contract or recover damages, except for the $7,106.12 that the Raymonds offered to return to Marks. Therefore, given these findings, the trial court entered a judgment in favor of the Raymonds on Marks' breach-of-contract claim, a judgment in favor of Marks on the Raymonds' breach-of-contract claim, and awarded Marks a total sum of $7,106.12.

{¶ 27} Marks now appeals from the trial court's judgment, raising two assignments

of error for review.

First Assignment of Error

{¶ 28} Under his first assignment of error, Marks raises three arguments challenging the trial court's finding that the parties mutually abandoned their contract. Marks first argues that the Raymonds waived the defense of mutual abandonment by failing to raise it as an affirmative defense in their answer to Marks' complaint. Marks also argues that the evidence did not establish that he intentionally relinquished his rights under the contract as required for mutual abandonment. Marks lastly argues that even if the parties had mutually abandoned their contract, the trial court still erred because it did not restore the parties to their original position by ordering the Raymonds to return the entire cost of the addition to Marks.

Standard of Review

{¶ 29} "Whether the parties mutually agreed to abandon the contract is a question of fact for the trier of fact to determine." *Fornshell v. Tiller*, 12th Dist. Warren No. CA93-07-051, 1994 WL 12301, *2 (Jan. 18, 1994), citing *Mooney v. Green*, 4 Ohio App.3d 175, 178, 446 N.E.2d 1135 (12th Dist.1982). *Accord Reiter Dairy, Inc. v. Ohio Dept. of Health*, 10th Dist. Franklin No. 01AP-944, 2002-Ohio-2402, ¶ 15. "The standard of review for questions of fact on appeal is whether the record contains sufficient competent, credible evidence going to all the essential elements of the case to support the trial court's judgment." *Golden v. Dept. of Highway Safety*, 10th Dist. Franklin No. 95API12-1616, 1996 WL 325489, *3 (June 11, 1996), citing V*ogel v. Wells*, 57 Ohio St.3d 91, 566 N.E.2d

154 (1991). "In determining whether the record contains the necessary competent, credible evidence, a reviewing court must weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether in resolving conflicts in the evidence, the finder of fact clearly lost its way." *In re P.A.*, 10th Dist. Franklin No. 17AP-728, 2018-Ohio-2314, ¶ 13, citing *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 20. "However, reviewing courts 'must always be mindful of the presumption in favor of the finder of fact.' " *Id.*, quoting *Eastley* at ¶ 21. "[A]n appellate court must not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial court." *Myers v. Garson*, 66 Ohio St.3d 610, 616, 614 N.E.2d 742 (1993).

Mutual Abandonment

{¶ 30} " 'Abandonment is the intentional relinquishment of a known right. A contract will be treated as abandoned when the acts of one party inconsistent with the existence of the contract are acquiesced in (accepted) by the other party.' " *Barton v. Patterson*, 2d Dist. Miami No. 79-CA-3, 1979 WL 208605, *3 (Aug. 14, 1979), quoting *Hodges v. Ettinger*, 127 Ohio St. 460, 463, 189 N.E. 113 (1934). Therefore, "[p]arties to a contract may mutually relinquish or abandon their rights under a contract when one party acts inconsistently with the existence of the contract and the other party acquiesces." (Citations omitted.) *Tucker v. Young*, 4th Dist. Highland No. 04CA10, 2006-Ohio-1126, ¶ 24; *Snell v. Salem Ave. Assocs.*, 111 Ohio App.3d 23, 31, 675 N.E.2d 555 (2d Dist.1996). "The contract is then dissolved and the parties are placed in their

original positions, with no potential suit for breach of contract." *Snell* at 31, citing *Hunter v. BPS Guard Servs.*, *Inc*., 100 Ohio App.3d 532, 541, 654 N.E.2d 405 (10th Dist.1995). " '[M]utual abandonment of a contract need not be express, but can be inferred from the conduct of the parties and the surrounding circumstances.' " *Hunter* at 541, quoting *Dickson v. Wolin*, 9th Dist. Summit No. 2442, 1934 WL 2590 (Nov. 27, 1934).

Mutual Abandonment Was Tried by Implied Consent

{¶ 31} As noted above, Marks initially claims that the Raymonds waived the defense of mutual abandonment because they failed to raise it as an affirmative defense in their answer to Marks' complaint. We disagree.

{¶ 32} Mutual abandonment of a contract is an affirmative defense that is waived if it is not asserted in a responsive pleading. *Buckeye Telesystem, Inc. v. MedCorp., Inc*., 6th Dist. Lucas No. L-05-1256, 2006-Ohio-3798, ¶ 31. "[A] trial court cannot sua sponte raise an affirmative defense on behalf of a defendant who fails to do so." *O'Brien v. Olmsted Falls*, 8th Dist. Cuyahoga Nos. 89966, 90336, 2008-Ohio-2658, ¶ 14, citing *Thrower v. Olowo*, 8th Dist. Cuyahoga No. 81873, 2003-Ohio-2049. However, "Civ.R. 15(B) allows issues not raised by the pleadings to be tried by the express or implied consent of the parties[.]" *Molique v. Allen*, 2d Dist. Montgomery No. 19897, 2004-Ohio-460, ¶ 12.

{¶ 33} For there to be implied consent to try an unpleaded issue, "it must appear that the parties understood the evidence was aimed at the unpleaded issue.' " *Id*. at ¶ 14, quoting *State ex rel. Evans v. Bainbridge Twp. Trustees*, 5 Ohio St.3d 41, 46, 448 N.E.2d 1159 (1983). " 'Various factors to be considered in determining whether the

parties impliedly consented to litigate an issue include: whether they recognized that an unpleaded issue entered the case; whether the opposing party had a fair opportunity to address the tendered issue or would offer additional evidence if the case were to be retried on a different theory; and whether the witnesses were subjected to extensive cross examination on the issue." *Id.*, quoting *Evans* at 45-46. "[A]n issue may not be tried by implied consent where it results in substantial prejudice to a party." *Id.*

{¶ 34} In this case, the Raymonds did not specifically raise mutual abandonment as an affirmative defense in their responsive pleading, but they did raise the defense of acquiescence. Acquiescence is defined as: "A person's tacit or passive acceptance; implied consent to an act." *Black's Law Dictionary* (11th ed. 2019). As previously discussed, "[p]arties to a contract may mutually relinquish or abandon their rights under a contract when one party acts inconsistently with the existence of the contract and the other party *acquiesces*." (Emphasis added.) *Tucker,* 4th Dist. Highland No. 04CA10, 2006-Ohio-1126, at ¶ 24; *Snell*, 111 Ohio App.3d at 31, 675 N.E.2d 555. Therefore, by pleading acquiescence, the Raymonds implicitly raised the issue of mutual abandonment, as mutual abandonment involves one party acquiescing to the other party's acts that are inconsistent with the contract.

{¶ 35} The Raymonds also asserted "waiver" as an affirmative defense. " 'Waiver presupposes a full knowledge of an existing right or privilege and something done designedly or knowing to relinquish it.' " *Dayspring of Miami Valley v. Carmean*, 2d Dist. Clark No. 2007-CA-28, 2007-Ohio-7159, ¶ 32, quoting *Russell v. Dayton*, 2d Dist. Montgomery No. 8520, 1984 WL 4896, *3 (May 18, 1984). Thus, waiver "consists of an intention to relinquish [a right or privilege.]" *Id*. at ¶ 34, quoting *Russell* at *3. Similarly,

" '[a]bandonment is the intentional relinquishment of a known right.' " *Barton*, 2d Dist. Miami No. 79-CA-3, 1979 WL 208605, at *3, quoting *Hodges*, 127 Ohio St. at 463, 189 N.E. 113. Therefore, by pleading waiver, the Raymonds raised the issue of whether Marks intentionally relinquished his rights under the contract, which is synonymous with abandoning the contract.

{¶ 36} In addition to asserting acquiescence and waiver as affirmative defenses, the Raymonds argued in support of summary judgment that they "relied on Marks' conduct, and believed that they had an understanding that Marks would not move, and they owed no money to Marks" and claimed that this understanding "appeared mutual * * * until Marks sued at the urging of Kimberly Buckley and counsel." Defendant's Reply to Summary Judgment (Dec. 5, 2019), p. 10. Based on this argument, and based on the Raymonds assertion of acquiescence and waiver as affirmative defenses, we find that the issue of mutual abandonment of the contract was sufficiently raised prior to trial, thereby placing Marks on notice of the mutual abandonment defense. We also find that Marks had a fair opportunity to address the issue of mutual abandonment and, in fact, did so at trial when the parties testified regarding their understandings of how and why their oral agreement went awry. Therefore, given the specific circumstances of this case, we find that the issue of mutual abandonment was tried by implied consent of the parties and that Marks was not prejudiced as a result.

{¶ 37} For the foregoing reasons, Marks' claim that the Raymonds waived mutual abandonment as an affirmative defense lacks merit.

Competent Credible Evidence Supported Mutual Abandonment Finding

{¶ 38} Marks next claims that the trial court's mutual abandonment finding was erroneous because the evidence failed to establish that he intentionally relinquished his rights under the contract. We, however, find that there was clear and convincing evidence to the contrary. Among that evidence was Deborah's testimony indicating that, on the day before Marks was supposed to move to Tennessee, Marks accused her of theft and, in so many words, indicated that he was no longer moving into the Raymonds' home.

{¶ 39} The audio-recorded speakerphone conversation that took place two days later also tended to indicate that Marks no longer wanted to move in with the Raymonds. Although the Buckleys told the Raymonds that Marks still wanted to move in, Marks never said that himself during the call, and the Buckleys' statements cannot be imputed to Marks. Significantly, Marks can be heard on the call telling the Raymonds to: "Keep the fucking money. Forget it. It's over." Pl.'s Ex. 1. Also, during his deposition, Marks testified that he knew he was not going to move to Tennessee halfway through the construction project, which was well before the parties' speakerphone conversation took place. *See* Def.'s Ex. A, p. 109-110. There was also no dispute that, the day after the speakerphone conversation, Marks retrieved all of his belongings from Tennessee and returned them to Ohio. Furthermore, at trial, Marks testified that he still did not want to live with the Raymonds.

{¶ 40} The foregoing testimony and evidence established that Marks decided that he did not want to move in with the Raymonds well before the Raymonds retracted their offer to have him live with them. It also established that Marks told the Raymonds to forget the contract and keep the money. Following that conversation, Marks immediately

retrieved his belongings from Tennessee and returned to Ohio. From this conduct, it can be inferred that Marks intended to abandon his rights under the contract. *See Hunter*, 100 Ohio App.3d at 541, 654 N.E.2d 405, quoting *Dickson,* 9th Dist. Summit No. 2442, 1934 WL 2590 (" 'mutual abandonment of a contract need not be express, but can be inferred from the conduct of the parties and the surrounding circumstances' ").

{¶ 41} Marks, however, argues that the fact that he obtained an attorney and had his attorney send the Raymonds a letter demanding his money back shortly after the speakerphone conversation demonstrated that he did not intend to relinquish his rights under the contract. There was, however, evidence in the record establishing that Marks had little to do with retaining counsel, sending the demand letter, and even filing the subsequent lawsuit. During his deposition, Marks testified that he was not the one who sought out the attorney who sent the demand letter. Rather, Marks testified that it was the Buckleys who had "done just about everything." Def.'s Ex. A, p. 82. Moreover, when Marks was asked to identify a copy of his complaint, Marks testified: "I didn't file it. * * * I didn't have actually nothing to do with it." *Id*. at 16. When asked who filed the lawsuit, Marks said: "Kimmy handled that." *Id*. Marks also testified that he had never seen the complaint before and thereafter expressed a complete lack of understanding of what the lawsuit was about. *Id*. at 17 and 119.

{¶ 42} Even assuming the record contained conflicting evidence on the issue of whether Marks intentionally relinquished his rights under the contract, the fact remains that there was competent, credible evidence in the record to support a finding that Marks did, in fact, relinquish his rights. "We, as a reviewing court, may not re-weigh conflicting evidence where some competent, credible evidence exists to support the judgment

below." *Eden v. Smith*, 4th Dist. Pickaway No. 83 CA 16, 1985 WL 6546, *1 (Feb. 26, 1985); *Betlin Manufacturing Co. v. Reco Sporting Goods*, 2d Dist. Clark No. 1898, 1984 WL 5366, *1 (July 9, 1984). For the foregoing reasons, we find no merit to Marks' claim that the evidence failed to establish that he intentionally relinquished his rights under the contract.

Restoring Parties to Pre-Contract Position is Impossible

{¶ 43} Marks lastly argues that even if the parties mutually abandoned their contract, the trial court still erred by failing to restore the parties to their pre-contract positions. According to Marks, the trial court should have done this by ordering the Raymonds to pay Marks the entire cost of the addition. In support of this claim, Marks relies on *Areawide Home Buyers, Inc. v. Manser*, 7th Dist. Mahoning No. 04 MA 154, 2005-Ohio-1340, wherein the Seventh District Court of Appeals explained that:

> [A] contract may be rescinded based upon an abandonment theory, which entails breach and acceptance of or acquiescence to that breach, giving rise to an inference of mutual consent from the surrounding facts and circumstances. * * *
>
> When rescission is imposed for such reason, the parties should be restored to status quo as much as possible. A purchaser generally should recover the money paid on the purchase price. Specifically, the vendee on a real estate contract should receive his down payment back upon rescission for mutual failure to perform.

(Citations omitted.) *Id*. at ¶ 28 and 30.

{¶ 44} We find it significant that *Areawide* concerned a contract for the purchase of real estate. Given the nature of such a contract, the parties can be restored to their pre-contract positions by simply exchanging money. Because the present case involves a construction contract, and because the construction contemplated by the contract has already been completed, this is not a case wherein the parties can be returned to their pre-contract positions through an exchange of money. This is particularly true here since the Raymonds' home will never be the same as the result of the addition being built and since Marks sold his home as a result of the parties' agreement. Therefore, simply ordering the Raymonds to pay Marks the cost of the addition will not restore the parties to their pre-contract positions, and Marks' claim otherwise lacks merit.

{¶ 45} Most importantly, we find that requiring the Raymonds to pay Marks the cost of the addition would have been unjust given the unique circumstances surrounding the parties' agreement and their post-agreement interactions. The record indicates that Marks knew the Raymonds could not afford to pay for the addition themselves and that he had agreed to pay for the entire addition. The record also indicates that Marks had doubts about the construction project and doubts about living with the Raymonds, but did not communicate any of these doubts to the Raymonds. Rather, Marks allowed the construction project to continue all the way to completion and then demanded his money back because he no longer wanted to move there. Under these circumstances, we do not find that it would have been fair to require the Raymonds to pay for the entire cost of the addition.

{¶ 46} While the addition arguably increased the value of the Raymonds' home, any such value will not be realized unless the Raymonds sell their home, and the trial

court was not in a position to order such a sale. As noted in *Areawide,* "the parties should be restored to status quo *as much as possible*." (Emphasis added.) *Areawide*, 7th Dist. Mahoning No. 04 MA 154, 2005-Ohio-1340, at ¶ 30. Although it was impossible to place either party in their pre-contract position, we find that the trial court's order for the Raymonds to return $7,106.12 to Marks restored the parties to status quo as much as possible.

{¶ 47} For all the foregoing reasons, Marks' first assignment of error is overruled.

Second Assignment of Error

{¶ 48} Under his second assignment of error, Marks contends that the trial court erred by finding that the Raymonds did not breach the parties' contract. In support of this claim, Marks argues that the Raymonds breached the contract by refusing to allow Marks to move in with them.

{¶ 49} As previously discussed, the abandonment of a contract necessitates at least one party acting inconsistent with the terms of the agreement and the other party acquiescing to the other party's conduct, thus resulting in the contract being dissolved by the mutual assent of both parties. *Hunter*, 100 Ohio App.3d at 541, 654 N.E.2d 405, citing *Hodges*, 127 Ohio St. at 463, 189 N.E. 113. In other words, abandonment "entails breach and acceptance of or acquiescence to that breach, giving rise to an inference of mutual consent from the surrounding facts and circumstances." *Areawide*, 7th Dist. Mahoning No. 04 MA 154, 2005-Ohio-1340, at ¶ 28, citing *Hodges* at 463. Therefore, for purposes of abandonment, one or both of the parties must have breached the contract somewhere along the line.

{¶ 50} In this case, even if the trial court had found that the Raymonds breached the contract by not letting Marks move in with them, the outcome of the case would not have changed because there was competent, credible evidence in the record establishing that Marks acquiesced to any such breach, which ultimately supported the trial court's mutual abandonment finding. This included Marks' deposition testimony and Deborah's trial testimony indicating that Marks decided not to move to Tennessee well before the Raymonds prohibited him from living with them. This also included the recorded speakerphone conversation during which Marks told the Raymonds: "Keep the fucking money. Forget it. It's over." Pl.'s Ex. 1. There was also no dispute that, following the speakerphone conversation, Marks immediately retrieved his belongings from Tennessee and returned to Ohio. From this conduct, it can be inferred that Marks acquiesced in the Raymonds' decision prohibiting him from moving in with them, as the evidence established that Marks did not really want to move in with the Raymonds either. Accordingly, even if the trial court had found that the Raymonds breached the contract, there was competent, credible evidence in the record establishing that Marks acquiesced in that breach, thus relinquishing his rights under the contract as necessary for mutual abandonment.

{¶ 51} For the foregoing reasons, Marks' second assignment of error is overruled.

Conclusion

{¶ 52} Having overruled both assignments of error raised by Marks, the judgment of the trial court is affirmed.

. . . . . .

TUCKER, P.J. and EPLEY, J., concur.

Copies sent to:

Todd E. Bryant
Kevin A. Bowman
Hon. Michael W. Krumholtz

[Cite as *Uren v. Dahoud*, 2021-Ohio-3425.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

JAMES T. UREN,	:	APPEAL NO. C-170438 TRIAL NO. A-1406892
and	:	
JOSEPHINE KHOO-SMITH,	:	*O P I N I O N.*
Plaintiffs-Appellees,	:	
	:	
vs.	:	
WILLIAM SCOVILLE, Individually and on behalf of his IRA, et al.,	:	
Defendants,	:	
and	:	
DAVID DAHOUD,	:	
Defendant-Appellant.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: September 29, 2021

Santen & Hughes, *Brian P. O'Connor* and *Charles E. Reynolds*, for Plaintiffs-Appellees,

James R. Hartke, for Defendant-Appellant.

WINKLER, Judge.

{¶1} This appeal is brought by defendant-appellant David Dahoud following the entry of summary judgment by the Hamilton County Court of Common Pleas in favor of plaintiffs-appellees James T. Uren and others, collectively "the class," in the amount of $195,473 representing Dahoud's "net winnings" in an alleged "Ponzi scheme." The trial court determined on cross-motions for summary judgment that the class was entitled to "claw back" Dahoud's alleged gain arising out of the scheme. Because the class established entitlement to summary judgment and Dahoud did not, we affirm.

Background Facts and Procedure

{¶2} This class-action lawsuit was filed in November 2014. According to the amended complaint, nondefendants Glen Galemmo and his affiliated entities, which we refer to collectively as "Galemmo," perpetuated a criminal fraud by operating a Ponzi scheme. Some persons and entities who invested money in that scheme from January 1, 2002, to July 26, 2013, suffered a "net loss," meaning "the funds invested exceeded the total of all funds received in the form of purported income or return of principal."

{¶3} The class of "net losers" sought to claw back money from several named defendants, including Dahoud, on the theory that certain transfers they received from Galemmo, a "debtor" under Ohio's Uniform Fraudulent Transfer Act, R.C. Chapter 1336, were in violation of R.C. 1336.04(A)(1) and (2), resulting in "unjust enrichment."

{¶4} Among other things, the class alleged that Dahoud received transfers of "cash or cash equivalents" from Galemmo during a time period when Galemmo

was "insolvent" that exceeded the sum of funds Dahoud had deposited with Galemmo, without Galemmo receiving "any reasonably equivalent value" in exchange. Further, the class alleged the transfers to Dahoud were made "with the actual intent to hinder, delay, or defraud the Class as creditors of Galemmo" and that Dahoud had a "business relationship" with Galemmo "at the time" of the subject transfers. Finally, the class alleged that Galemmo had paid Dahoud "approximately 2 to 3 percent of $10,000,000 of investor's funds" for referring others to invest in Galemmo's scheme.

{¶5} In his answer, Dahoud denied all substantive allegations. The class moved for summary judgment against Dahoud in October 2016. In support, the class relied upon the affidavit of Brian P. O'Connor, one of their attorneys, and certain exhibits attached to that affidavit. The class contended these exhibits, coupled with the stipulation concerning the business records of the banks, contained the detailed facts establishing the class claims under the caselaw related to Ponzi schemes and fraudulent transfers. *See Bash v. Textron Fin. Corp.*, 524 B.R. 745, 757 (N.D.Ohio 2015); *Warfield v. Byron*, 436 F.3d 551, 558-560 (5th Cir.2006).

{¶6} Counsel for the class explained the import of the business record stipulation with respect to establishing the claims in the context of a Ponzi scheme: "If you deposit this money, you get credit for this. You withdrew this money, you get debited for this amount."

{¶7} Dahoud also moved for summary judgment. In support, Dahoud filed his own affidavit with attached exhibits, and the affidavit of expert Joseph B. Mansour with attached exhibits. Dahoud primarily relied upon a legal argument, abandoned on appeal, that he could not be subject to the claw-back claims because he believed he was, by contract, only a "limited partner" in a specific Galemmo fund,

the Queen City Investment Fund II, LLC, ("Fund II"). Dahoud additionally took the conclusory position that he had invested more with Galemmo than he had withdrawn over the years.

{¶8} Both parties opposed the other party's motion for summary judgment, and also moved to strike the affidavits submitted by the opposition in support of summary judgment. Dahoud then filed a reply in support of summary judgment and a supplemental affidavit with additional exhibits.

{¶9} On November 21, 2016, the trial court held a hearing on the motions. In an entry dated November 28, 2016, the trial court granted the class's motion for summary judgment against Dahoud, entered a judgment against Dahoud for $195,473 plus interests and costs, and denied Dahoud's cross-motion for summary judgment. The court also ruled on the pending motions to strike affidavits. In doing so, the court denied Dahoud's motion to strike O'Connor's affidavit and granted the class's motion to strike Dahoud's and Mansour's affidavits, but noted that the later evidence was ineffective for summary-judgment purposes even if considered.

{¶10} Eventually, the claims against the other defendants in the case were resolved by way of settlement, dispositive motion, or trial. The trial court then entered a final judgment disposing of all claims. That July 11, 2017 judgment incorporated by reference the prior orders appealed in this case. Dahoud filed a timely appeal that this court consolidated with appeals filed by several other defendants. The consolidated appeals were delayed by a bankruptcy stay. That stay has been lifted and the appeals by the other defendants have been dismissed. Accordingly, we proceed only on Dahoud's appeal.

Assignments of Error and Standards of Review

{¶11} Generally, Dahoud's three assignments of error challenge the court's resolution of the cross-motions for summary judgment and the evidentiary rulings leading to that determination.

{¶12} Summary judgment is governed by the provisions of Civ.R. 56. Under Civ.R. 56(C), summary judgment is proper when the moving party establishes that "(1) no genuine issue of any material fact remains, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *State ex rel. Duncan v. Mentor City Council*, 105 Ohio St.3d 372, 2005-Ohio-2163, 826 N.E.2d 832, ¶ 9, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977).

{¶13} When ruling on a motion for summary judgment, the court is permitted to consider only "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." Civ.R. 56(C).

{¶14} Of particular importance to this case is Civ.R. 56(E), which provides that "[s]upporting and opposing affidavits shall be made upon personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to matters stated in the affidavit." Civ.R. 56(E). Further, "[s]worn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit." *Id*.

{¶15} Thus, Civ.R. 56(E) governs the proper procedure for introducing evidentiary matter that does not fit into any of the categories referenced in Civ.R.

56(C)—the evidentiary matter must be incorporated by reference in a " 'properly framed affidavit.' " *Douglass v. Salem Community Hosp.*, 153 Ohio App.3d 350, 2003-Ohio-4006, 794 N.E.2d 107, ¶ 25 (7th Dist.), quoting *Biskupich v. Westbay Manor Nursing Home*, 33 Ohio App.3d 220, 222, 515 N.E.2d 632 (8th Dist.1986), citing *State ex rel. Corrigan v. Seminatore*, 66 Ohio St.2d 459, 467, 423 N.E.2d 105 (1981).

{¶16} Generally, we review a trial court's evidentiary decisions for an abuse of discretion. *Douglass* at ¶ 20. But we apply a de novo standard of review to issues of law, including whether summary judgment was proper. *See Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8.

Class Carried Summary-Judgment Burden

{¶17} Dahoud's first and second assignments of error are related. In part, he contends the trial court erred when granting summary judgment for the class because O'Connor's affidavit was not sufficient to authenticate the attached exhibits.

{¶18} Dahoud maintains that O'Connor lacked the personal knowledge to authenticate the attached documents. The authenticity challenge is directed to whether the affiant, here O'Connor, sufficiently demonstrated the attachments were true and accurate copies of what O'Connor purported them to be; O'Connor was not swearing to the truth of the underlying facts.

{¶19} In the introductory paragraph, O'Connor swore that he was counsel for the class, he was over the age of 18, under no disability, and that he "ma[d]e this affidavit upon personal knowledge."

{¶20} He then purported to authenticate "as a true and correct copy" three exhibits: (1) a copy of "the Plea Agreement entered into by Galemmo in United States v. Galemmo, United States District Court, Southern District of Ohio[,] Case No. : 13-

141"; (2) several pages from a deposition purportedly taken of Galemmo, and (3) bank records such as cancelled checks evincing the transactions between Galemmo and Dahoud, as well as a summary of those transactions.

{¶21} Dahoud suggests that nothing short of a certified copy of the plea agreement satisfies the authentication requirement. But, the "[v]erification required by Civ.R. 56(E) of documents attached to an affidavit supporting or opposing a motion for summary judgment is satisfied by an appropriate averment in the affidavit itself." *Seminatore*, 66 Ohio St.2d 459, 423 N.E.2d 105, at paragraph three of the syllabus; *Olverson v. Butler*, 45 Ohio App.2d 9, 12, 340 N.E.2d 436 (1oth Dist.1975).

{¶22} Although O'Connor could have used more precise words when authenticating the plea agreement, his statement conveys his knowledge that the attached plea agreement is a true and accurate copy filed in the federal criminal action not because someone told him, but because he obtained it from the docket for the criminal case. Considering that O'Connor is an attorney and the exhibit contains an electronic file stamp across the top of each page showing it was filed on "12/17/13 in case:1:13-cr-00141-HJW," the trial court's acceptance of O'Connor's averment is reasonably based and not an abuse of discretion.

{¶23} Dahoud argues the trial court took "judicial notice" of the plea agreement, even though a court may not take judicial notice of another court's docket. *See, e.g., Natl. Distillers & Chem. Corp. v. Limbach*, 71 Ohio St.3d 214, 643 N.E.2d 101 (1994). The trial court did note in its entry that it was taking "judicial notice" of the "Court records attached to" O'Connor's affidavit. But it is unclear whether the court was merely taking judicial notice that plea agreements are docketed in criminal cases, which is permissible under Evid.R. 201(B), or that the

court was taking judicial notice of the document, which is not permitted. Regardless, O'Connor's affidavit was sufficient to meet the authentication requirement with respect to the plea agreement, even if the trial court also erroneously took "judicial notice" of the document.

{¶24} We arrive at a different conclusion with respect to the excerpted portions of the Galemmo deposition. O'Connor failed to assert facts explaining where he obtained the deposition excerpts, and the attached pages do not indicate that the deposition was taken in this case. The class, however, presents an additional theory for consideration of those deposition pages.

{¶25} The class contends that O'Connor's failure to authenticate the pages as "true and accurate" was remedied when the class filed the complete Galemmo deposition with the trial court. *See* Civ.R. 32. Because the deposition was separately filed, the class argues the trial court properly considered it as evidence in support of the class's motion for summary judgment.

{¶26} A deposition filed in the action is one type of evidentiary material identified in Civ.R. 56(C) that a court may properly consider when granting summary judgment. Our record reflects that the Galemmo deposition was filed after the interlocutory grant of summary judgment to the class, but long before final judgment was entered in the action. Dahoud never challenged that filing in the trial court or in this appeal, even though he was notified of the filing, and he has never asserted that the pages attached to O'Connor's affidavit were inaccurate. Considering these circumstances, we hold that the trial court's failure to strike the part of O'Connor's affidavit relating to the Galemmo deposition pages for lack of authentication was harmless error remedied when the class separately filed the deposition before the entry of final judgment. *See* Civ.R. 61.

{¶27} Next we address the bank records. O'Connor attached to his affidavit a "summary spreadsheet of transfers of funds between David Dahoud and Galemmo and the Galemmo Entities" as well as the "supporting bank records for each entry contained on the spreadsheet." He further averred that "the bank records are true and correct copies of business records obtained from financial institutions in response to a subpoena." This language is important because a few days before the summary-judgment hearing, the parties, including Dahoud, filed a joint stipulation regarding the bank records. That stipulation provided that "the bank records provided by U.S. Bank, KeyBank, and Bank of America * * * are authentic records of regularly conducted business activities."

{¶28} The import of O'Connor's affidavit was to verify that the attached financial records were those subpoenaed from the financial institutions. As O'Connor explained that he is an attorney in the case, we cannot say the trial court abused its discretion by accepting O'Connor's verification of the attached records from the financial institutions.

{¶29} Based on this analysis, we conclude that the trial court did not err by considering the exhibits attached to O'Connor's affidavit as "true and correct" copies that could be considered for summary-judgment purposes. Thus, Dahoud has failed to demonstrate that the trial court erred by granting summary judgment for the class because this evidence was not authenticated.

Dahoud's Supplemental Affidavit and Attached Exhibits were Insufficient

{¶30} Dahoud additionally argues that the court erred by entering summary judgment against him. To that end, Dahoud contends that his supplemental affidavit tendered with his reply memorandum introduced evidence of other transactions that

should have been taken into account when calculating his losses. This evidence, he asserts, demonstrates that he would be a net loser, not a net winner, even if the class could prove the class allegations that Galemmo transferred funds to him during a Ponzi scheme.

{¶31} Dahoud attached to his supplemental affidavit several groups of documents. The first relate to schedule K-1 forms issued by Galemmo that showed losses not reflected in the class's net-loser analysis. Dahoud however, acknowledged that the K-1 forms issued by Galemmo were fraudulent. Thus, this evidence did not demonstrate an absence of a genuine issue of material fact.

{¶32} The next group of documents relate to Dahoud's argument that $165,000 transferred to him from Galemmo represented "employment commissions received from Galemmo" for his work related to "Fund II" and should not have counted as "winnings" in the net-loser analysis. In this case, that argument mainly implicates the part of the fraudulent-transfer statute addressing constructively-fraudulent transfers. Specifically, it implicates the provision concerning whether the "debtor"—here Galemmo—received "a reasonably equivalent value in exchange for the transfer." R.C. 1336.04(A)(2).

{¶33} Dahoud provides no legal authority for his contention that he should be credited for his "commissions" related to Galemmo's fraudulent scheme. The caselaw we found is contrary to his position. *See Warfield*, 436 F.3d at 559-560. Thus, we conclude that this evidence did not demonstrate the absence of a genuine issue of material fact.

{¶34} Finally, Dahoud presented a check issued to him from Galemmo in the amount of $49,500. He contends that the bank records collected by the class

omitted this deposit to his investment account and, therefore, the class did not consider this contribution when applying the net-loser analysis.

{¶35} Dahoud averred that "he received check no[.] 1206 from Fund II and signed the back of this check back to Fund II to add as an additional investment-deposit to my account." Dahoud also attached to his supplemental affidavit a document containing a copy of the front of the check and a handwritten note indicating that "[t]his check was not cashed by David Dahoud but was given back to Queen City to reinvest."

{¶36} The class argues the notation on the exhibit indicates that the check was written but never cashed and, therefore, the check never actually caused any funds to move between accounts. This is why, the class explains, the check did not show up in Galemmo's bank records. The class concludes that because money never changed hands as a result of the check, evidence of the check does not affect the analysis of whether and to what extent Dahoud profited from the Ponzi scheme. Secondarily, the class argues that if the check had been deposited by Dahoud and caused a financial transaction to occur, those funds would have been an additional profit for Dahoud for which he would have been liable to the net losers in the Ponzi scheme. Dahoud does not refute these class arguments, which are supported by the record and the caselaw.

{¶37} Based on our review, we conclude that none of the evidence Dahoud submitted with his supplemental affidavit demonstrates the existence of a genuine issue of material fact as to the class claims. Further, we conclude that reasonable minds can come to but one conclusion and that conclusion is adverse to Dahoud, even when the evidence and stipulation is construed most strongly in his favor. Thus, we affirm the trial court's entry of summary judgment for the class on the cross-

motions for summary judgment. Accordingly, we overrule the first and second assignments of error.

No Error with Respect to Initial Dahoud and Mansour Affidavits

{¶38} In his third and final assignment of error, Dahoud contends the trial court erred in striking his initial affidavit in support of summary judgment and that of his expert, Mansour. With respect to this evidence, the trial court explained that even if it considered the evidence, that evidence would not affect the court's analysis. In other words, the evidence did not weigh on the existence or absence of a material fact.

{¶39} A harmless evidentiary ruling is not a ground for reversal. *See* Civ.R. 61. Dahoud has not demonstrated any prejudice—how the evidence, if considered, affected the trial court's resolution of the cross-motions for summary judgment. Accordingly, we overrule this assignment of error.

Conclusion

{¶40} In summary, we affirm the trial court's grant of summary judgment for the class on the cross-motions for summary judgment.

Judgment affirmed.

MYERS, P.J., and **CROUSE, J.,** concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.

2021 WL 4310597
Only the Westlaw citation is currently available.
United States District Court,
N.D. Ohio, Western Division.

R. Todd Sterling, Plaintiff,
v.
Experian Information Solutions, Inc., et al., Defendants.

Case No. 3:19-cv-2993
|
09/22/2021

Jeffrey J. Helmick, United States District Judge

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION AND BACKGROUND

***1** On December 17, 2019, Plaintiff R. Todd Sterling filed a *pro se* Complaint in the Allen County, Ohio Court of Common Pleas seeking monetary damages, a 50-point addition to his credit score, and an order from the court requiring the use of a single credit score computation model. (Doc. No. 1-2 at 4-5). Defendant Trans Union, LLC removed the matter to this court based on federal question jurisdiction because Sterling's Complaint alleged claims under the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* ("**FCRA**"). (Doc. No. 1).

On June 15, 2021, Defendant Experian Information Solutions, Inc. ("Experian") filed a motion to dismiss under Rule 12(b)(6). (Doc. No. 73). In response, Sterling filed a motion for leave to file an Amended Complaint. (Doc. No. 74). Experian opposed Sterling's request for leave to amend the Complaint, (Doc. No. 75), and Sterling replied. (Doc. No. 76).

A. Overview of Credit Scoring

Credit scoring is a system used to determine an individual's eligibility for credit cards, insurance policies, certain services, loans, or mortgages. [1] Essentially, it represents how likely an individual is to make timely payments or repay the loan. [2] The score is calculated based upon information in the credit file such as: an individual's repayment history, the types of loans taken out, total debt owed, and the length of time the individual has retained lines of credit. [3] But requests for certain types of loans may require review of additional information not contained in the credit file; for example, applications for mortgages may consider annual income or the amount of down payment available. [4]

These credit files are maintained by consumer reporting agencies, who then provide "consumer reports" (commonly called "credit reports") to third-party companies upon request. *See* 15 U.S.C. § 1681a(f). Experian, Equifax, and Trans Union are all consumer reporting agencies who assemble separate credit files based upon the information reported to them by third parties. [5] , [6] Because these credit files are dependent on outside reporting, each company's credit file may contain different data which may ultimately affect the credit score. [7]

***2** But a consumer's credit score is not only a reflection of the credit file's contents; scores also depend on the timing of the request and the scoring model (i.e., mathematical formula) used. [8] There are multiple commercial credit scoring models available as well as custom-made scoring models used only by particular institutions. [9] Most consumers are familiar with their FICO score but this is an oversimplified misnomer – actually, there over 28 different FICO scoring models that can be used depending on the credit product at issue. [10] For example, the FICO scoring model used when applying for a home mortgage may be different than that relied upon if the consumer applies for a credit card. [11] These various scoring models reflect that different industries place importance on different risk factors. [12] These risks are quantified by weighing the core factors in the credit file (i.e., payment history, credit utilization, age of credit accounts etc.) differently depending on which factors best reflect the individual's likelihood of repaying that particular credit or loan request. [13]

Importantly, when a consumer views or purchases a credit score "it is likely that the credit score that the consumer receives will not be same score as that purchased and used by a lender to whom the consumer applies for a loan." [14] This difference may be attributable to many factors, including the lenders' option to use whatever scoring model it chooses. [15] Consumer reporting agencies offer lenders multiple scoring models for purchase based on the type of credit or loan for which the consumer applied. [16] It is also possible for lenders to purchase a consumer report from a consumer reporting agency but then apply its own custom scoring model to

the data contained within the consumer report.[17] Thus, an individual's credit score depends on the contents of their credit file, the type of credit or loan for which the consumer applied, when the consumer report is purchased, and the scoring model selected by the creditor or lender to whom they applied.

B. Overview of the FCRA

***3** The **FCRA's** purpose is to require consumer reporting agencies to adopt reasonable procedures that are fair and equitable to consumers regarding confidentiality, accuracy, relevancy, and proper utilization of consumer credit information. 15 U.S.C. § 1681(b). In essence, the **FCRA** establishes industry-wide procedures that must be followed when assembling consumer information and communicating that information to others. The **FCRA** applies to consumer reporting agencies, furnishers of information (such as a consumer's existing lender), and the users of consumer credit information (such as a consumer's potential lender). *See* §§ 1681g, 1681m & 1681s-2.

Under the statute, the main responsibilities of consumer reporting agencies are to ensure accuracy of consumer reports, provide consumer reports only for permissible purposes, and reasonably investigate consumer disputes regarding reported information. *See* §§ 1681b, 1681c, 1681e, 1681i. They are also required to provide disclosures to consumers about their statutory rights under the **FCRA** and the contents of their credit files. §§ 1681g & 1681h. Like consumer reporting agencies, furnishers of information must provide accurate and complete information, and investigate consumer disputes regarding the accuracy of furnished information. § 1681s-2. Users of information are responsible for obtaining consumer reports only for permissible purposes and providing specific notices to consumers if it takes adverse action based on the information in the consumer report. § 1681m.

The **FCRA** does not mandate the use of a specific credit scoring model. The statute defines "credit score" as "a numerical value or a categorization derived from a statistical tool or modeling system used by a person who makes or arranges a loan to predict the likelihood of certain credit behaviors...." § 1681g(f)(2)(A)(i). This definition tacitly acknowledges the realities of credit scoring - mainly that there are multiple tools and models used to calculate credit scores. The fact that Congress contemplated this reality is underscored by the **FCRA's** disclosure mandate, requiring "a statement indicating that the information and credit scoring model may be different than the credit score that may be used by the lender[,]" anytime a consumer requests their credit score from a consumer reporting agency. § 1681g(f)(1).

The statute also makes clear that consumer reporting agencies are not responsible for any adverse actions taken by lenders based off the consumer report. § 1681m(a)(3)(B) (users must provide consumers with "a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken..."). Thus, the **FCRA** provides a procedural framework for entities operating in the credit industry but it does not provide consumers an alternate path to recovery in the event of an adverse decision by a lender.

C. Factual Background

Sterling's Complaint named consumer reporting agencies Experian, Trans Union LLC, Equifax Information Services LLC, and Credit Karma, Inc. (Doc. No. 1-2). Service was timely completed on all Defendants except for Experian. On March 29, 2021, Sterling moved for default judgment against Experian, (Doc. No. 57), but I denied the motion because Sterling had failed to properly serve Experian. (Doc. No. 59). Experian was finally served with the Complaint on May 4, 2021, (Doc. No. 64), more than a year after the deadline for amending the pleadings established in the case management order and only shortly before the close of discovery. (*See* Doc. No. 20; Non-document Order of December 15, 2020). Defendants Trans Union, Equifax, and Credit Karma were dismissed with prejudice following settlements with Sterling. (*See* Doc. Nos. 51, 58, & 66). Experian is the sole remaining Defendant.

***4** Sterling's Complaint arises from the denial of an application for a home mortgage. (Doc. 1-2 at 2-4). Approximately four years ago, Sterling began working to repair his low credit rating. (*Id*. at 2). Throughout this period, he opened multiple credit lines and alleges he maintained a "perfect payment history," which resulted in positive changes to his credit score. (*Id*. at 2-3). On September 30, 2019, Sterling's credit score was reported as 624 by Credit Karma, and 621 by Trans Union and Equifax. (*Id*. at 3). That same week, he initiated an application for a VA home mortgage loan with his local Huntington Bank. (*Id*.). Huntington Bank conducted a credit check and purchased scores of 589 from Experian, 585 from Trans Union, and 570 from Equifax. (*Id*.). Subsequently, Sterling purchased credit score monitoring from both Experian and Trans Union, who both reported

scores of 621. (*Id*. at 3-4). Sterling was ultimately denied the mortgage loan by Huntington Bank. (*Id*. at 2).

Sterling alleges the consumer reporting agencies are engaged in a fraudulent scheme to prevent certain "undeserving" customers from obtaining financing. (*Id*. at 4). As examples of this scheme, Sterling alleges the consumer reporting agencies: do not diligently update customer activity or scores, intentionally report false scores to increase usage of certain credit cards or credit monitoring programs owned by the consumer reporting agencies, commit theft when the consumer reporting agencies accept monthly fees for ineffective credit monitoring, maintain a "secret list of people blackballed due to prior credit mistakes," and "intentionally sabotage" consumers by reporting "soft scores" online but "hard scores" to financial institutions. (*Id*.).

Sterling's Complaint has been liberally interpreted as raising claims for violation of the **FCRA** and common-law fraud. (*See* Doc. No. 1-2; Doc No. 54 at 3, fn.2) *but see* *Pliler v. Ford*, 542 US. 225, 231 (2004) (District courts "have no obligation to act as counsel or paralegal to *pro se* litigants.").

II. STANDARD

Rule 12 provides for the dismissal of a lawsuit for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss under Rule 12(b)(6), "even though a complaint need not contain 'detailed' factual allegations, its 'factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true.' " *Ass'n of Cleveland Fire Fighters v. City of Cleveland, Ohio*, 502 F.3d 545, 548 (6th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The plaintiff must offer more than conclusory allegations or legal conclusions masquerading as factual allegations. *Twombly*, 550 U.S. at 555 (The complaint must contain something more than "a formulaic recitation of the elements of a cause of action."). A complaint must state sufficient facts which, when accepted as true, state a claim "that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (explaining that the plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully" and requires the complaint to allow the court to draw the reasonable inference that the defendant is liable for the alleged misconduct). In the case of a *pro se* litigant, courts will construe their pleadings liberally but "[l]iberal construction does not require a court to conjure allegations on a litigant's behalf." *Martin v. Overton*, 391 F.3d 710, 714 (6th Cir. 2004) (quoting *Erwin v. Edwards*, 22 F.App'x 579, 580 (6th Cir. 2001)).

Because Sterling states allegations of fraud, Rule 9(b)'s heightened pleading standard applies. Fed. R. Civ. P. 9(b). Rule 9(b) requires a plaintiff: "(1) to specify the allegedly fraudulent statements; (2) to identify the speaker; (3) to plead when and where the statements were made; and (4) to explain what made the statements fraudulent." *Republic Bank & Trust Co. v. Bear Stearns & Co., Inc.*, 683 F.3d 239, 247 (6th Cir. 2012). This heightened pleading requirement applies to all fraud claims, including those brought by *pro se* plaintiffs. *See, e.g., Tucker v. U.S. Bank, N.A.*, No. 1:13CV1260, 2014 WL 1224362, at *3 (N.D. Ohio Mar. 24, 2014) ("The fact that Plaintiff is proceeding pro se does not relieve him from his duty to meet the minimal requirements for alleging fraud."); *McGowan v. Ditech Fin.*, No. 1:18cv270, 2018 WL 2364932, at *2 (N.D. Ohio May 23, 2018).

III. ANALYSIS

A. FCRA Claim

***5** Sterling's Complaint has been construed as making a claim for relief under § 1681e(b) which requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy of the information" contained in the consumer report. 15 U.S.C. § 1681e(b). A "consumer report" is any communication by a consumer reporting agency bearing on the consumer's credit worthiness or credit standing. § 1681a(d)(1). Importantly, a consumer report is one furnished *to a third party* for the purpose of evaluating authorized credit, insurance, or employment decisions. *See* § 1681a(f); *see also Brown v. Wal-Mart Stores, Inc.*, 507 F. App'x 543, 546 (6th Cir. 2012); *Collins v. Experian Info. Sols., Inc.*, 775 F.3d 1330, 1335 (11th Cir. 2015) ("A 'consumer report' requires communication *to a third party,* while a 'file' does not."); *Sgouros v. Transunion Corp.*, No. 14 C 1850, 2016 WL 4398032, at *4 (N.D. Ill. Aug. 18, 2016) ("Because no *third party* ever received that score, it is not considered a 'consumer report[.]' ") (emphasis added).

To succeed on his § 1681e(b) claim, Sterling must prove: "(1) [Experian] reported inaccurate information about [him]; (2) [Experian] either negligently or willfully failed to follow

reasonable procedures to assure maximum possible accuracy of the information about [him]; (3) [he] was injured; and (4) [Experian]'s conduct was the proximate cause of [his] injury." *Nelski v. Trans Union, LLC*, 86 F. App'x 840, 844 (6th Cir. 2004).

The Complaint alleges a single instance of Experian issuing a consumer report to Huntington Bank on September 30, 2019, (Doc. No. 1-2 at 3); yet Sterling does not allege anything about this consumer report was inaccurate per se. He notes the "drastic difference" between his online Experian credit score, 621, and the score Huntington Bank purchased from Experian, 589. (*Id.*). But the "drastic difference" between the scores does not show that the 589-score furnished to Huntington Bank in the "consumer report" was inaccurate. As discussed above, multiple models are used to calculate credit scores. It is clearly stated on the landing page of Experian's website: "Your lender or insurer may use a different FICO Score than FICO Score 8, or another type of credit score altogether."[18] Yet, the Complaint lacks any allegation regarding the scoring model Huntington Bank utilized to evaluate Sterling's application. Thus, it is impossible to determine from the face of Sterling's Complaint whether any "drastic difference" resulted from improper calculation (and is therefore, inaccurate) or merely resulted from the use of different scoring models.

Remaining are Sterling's conclusory allegations of industry-wide fraudulent score calculations. (*See* Doc. No. 1-2 at 3-4). But these conclusory allegations are not sufficient to establish inaccuracy for purposes of § 1681e(b). *See, e.g., McComas v. Experian Info. Sols., Inc.*, No. 5:14-371, 2015 WL 4603233, at *5 (E.D. Ky. July 29, 2015) (dismissing § 1681e(b) claim because allegations of inaccuracy did not demonstrate injury or causation); *Bailey v. Equifax Info. Servs.*, LLC, No. 13-10377, 2013 WL 3305710, at *5 (E.D. Mich. July 1, 2013) ("Plaintiff makes conclusory allegations that the report is inaccurate and misleading. These allegations are insufficient."); *Johnson v. Experian Corp.*, No. 4:12-CV-609, 2013 WL 3282882, at *1 (E.D. Tex. June 27, 2013) (dismissing **FCRA** claim "because Plaintiff does not allege that an item of information in his credit report is inaccurate, which is a requirement of **FCRA** claims..."). Even accepting Sterling's version of events as true, the factual allegations are insufficient to state a claim for relief under § 1681e(b) because he has not alleged any inaccuracy in his consumer report.

B. Fraud

***6** Sterling's Complaint also asserts fraud generally against all consumer reporting agencies. (*See* Doc. No. 1-2). To establish a claim of fraud under Ohio law, there must be:

> (1) a representation or, where there is duty to disclose, concealment of a fact; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred; (4) with the intent of misleading another into relying upon it; (5) justifiable reliance upon the representation or concealment, and; (6) a resulting injury proximately caused by the reliance.

Aetna Cas. and Sur. Co. v. Leahey Constr. Co., 219 F.3d 519, 540 (6th Cir. 2000) (citing *Cohen v. Lamko, Inc.*, 462 N.E.2d 407, 409 (Ohio 1984)).

As best as I can determine, the crux of Sterling's fraud claim is that the score shown on Experian's website is not the same as the score in the consumer report provided to Huntington Bank. But Experian provides an explicit notice on its landing page that lenders could use different scoring models other than the FICO Score 8 utilized by Experian.[19] In the face of such clear notice as to the existence of other credit scoring models, Sterling's reliance on the online Experian credit score as his sole possible credit score was unjustified.

As to the specific allegations, Experian is identified by name in only three paragraphs. (*See* Doc. No. 1-2 at 3, ¶¶18-20). Each of these allegations relate to the score Experian reported either online or to Huntington Bank on or around September 30, 2019. But as discussed above, different scores, by themselves, are not evidence of inaccuracy or, in the context of Sterling's fraud claim, falsity. None of these allegations explain how the scores reported were false and thus, fail to meet Rule 9(b)'s pleading standard. *See* *Republic Bank*

& Trust Co., 683 F.3d at 247 (to satisfy Rule 9(b), plaintiff must explain how the statement is fraudulent).

Turning now to the collective fraud allegations against "Defendants," "credit bureaus," or "credit agencies," it is unclear to what extent Experian's conduct is implicated in these allegations. (Doc. No. 1-2 at 3-5, ¶¶ 21, 24, 27, 28, 34, 35; Statement of Claim). In the context of Rule 9(b)'s heightened pleading requirements, such collective pleading is generally impermissible because it does not adequately identify the circumstances surrounding each defendant's alleged wrongdoing. *See Jiaxi Hu v. Chan*, No. 1:15-CV-709, 2016 WL 4269065, at *6 (S.D. Ohio Aug. 15, 2016); *see also Sears v. Likens*, 912 F.2d 889, 893 (7th Cir. 1990) ("A complaint that attributes misrepresentations to all defendants, lumped together for pleading purposes, generally is insufficient [to meet Rule 9(b)'s particularity requirements].") (further citation omitted). Yet, even assuming Experian is the sole defendant implicated by these pleadings, these general and conclusory allegations do not provide Experian with "the minimum degree of detail necessary to begin a competent defense." *U.S. ex rel. SNAPP, Inc. v. Ford Motor Co.*, 532 F.3d 496, 504 (6th Cir. 2008).

***7** Rule 9(b) requires a plaintiff to plead "the time, place, and content of the alleged misrepresentation on which he or she relied...." *Yuhasz v. Brush Wellman, Inc.*, 341 F.3d 559, 563 (6th Cir. 2003) (further citation omitted). Sterling's collective allegations do not specify any of these elements. For example, paragraph 21 states:

> Plaintiff alleges that the credit agencies are intentionally reporting fraudulent scores to keep the Plaintiff and likely other citizens from obtaining new loans even after repairing his credit for reasons yet to be revealed.

(Doc. No. 1-2 at 3). Not only does this allegation fail to identify a relevant time frame for when this fraudulent activity occurred but it also lacks a description of where the misrepresentation was made, such as a website page or consumer report. Even after inferring the time and place from the other allegations of the Complaint, the allegation is still deficient as there is no explanation as to why the credit score Experian reported was false. For example, there are no allegations that Experian improperly calculated the score based on the information in his credit file or that Experian applied a different scoring model to Sterling's credit file than it advertises. Without additional facts, merely stating the score is fraudulent lacks the necessary specificity to meet Rule 9(b)'s heightened pleading requirements.

Lastly, I decline to infer falsity of all credit scores based solely on Sterling's unsupported assertions of an industry-wide conspiracy to punish certain consumers. *See Johnson v. Trans Union LLC*, Civil No. 12-5272, 2013 WL 1187063, at *1 (E.D. Pa. Mar. 22, 2013) (collecting cases in support of dismissing complaints which present "fantastical allegation[s]" or "surpass[ ] all credulity"). Even accepting the Complaint's allegations as true, Sterling has failed to meet the heightened pleading requirements of Rule 9(b) because he does not adequately plead the time, place, and content of any false statements by Experian. In sum, he has not stated a plausible claim of fraud for which relief could be granted.

C. Leave to Amend Complaint

Also pending is Sterling's motion for leave to amend his Complaint. (Doc. No. 74). Although leave to amend is often liberally granted, where, as here, the deadline for amending the complaint has already passed, "a plaintiff first must show good cause under Rule 16(b) for failure earlier to seek leave to amend before a court will consider whether amendment is proper under Rule 15(a)." *Leary v. Daescher*, 349 F.3d 888, 909 (6th Cir. 2003). "The primary measure of Rule 16's 'good cause' standard is the moving party's diligence in attempting to meet the case management order's requirements." *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 625 (6th Cir. 2002) (further citation omitted). "In determining whether the 'good cause' standard is met, the district court must consider whether the amendment will prejudice the party opposing it." *Korn v. Paul Revere Life Ins. Co.*, 382 F. App'x 443, 449 (6th Cir. 2010).

If good cause under Rule 16 is shown, I must then evaluate the proposed amendment under Rule 15(a) which directs leave to "be freely given when justice so requires." Fed. R. Civ. P. 15(a). "Nevertheless, leave to amend 'should be denied if the amendment is brought in bad faith, for dilatory purposes,

results in undue delay or prejudice to the opposing party, or would be futile.' " *Carson v. U.S. Office of Special Counsel*, 633 F.3d 487, 495 (6th Cir. 2011) (quoting *Crawford v. Roane*, 53 F.3d 750, 753 (6th Cir. 1995)). A motion for leave to amend may be denied for futility "if the court concludes that the pleading as amended could not withstand a motion to dismiss." *Midkiff v. Adams Cnty. Reg'l Water Dist.*, 409 F.3d 758, 767 (6th Cir. 2005) (citation omitted).

***8** The deadline for amending the pleadings established in the case management order was April 16, 2020. (Doc. No. 20). Sterling did not file his motion to amend the Complaint until more than a year after this deadline had passed on June 21, 2021. (Doc. No. 74). In his motion and reply briefing, Sterling provides no justification or explanation for his failure to seek leave earlier and does not address the "good cause" standard. (*See* Doc. Nos. 74-1 & 76). Instead, he restates his allegations regarding an industry-wide fraudulent credit scoring scheme while also raising one new allegation regarding Experian's reinvestigation of a credit file remark at some unspecified time. (*Id.*).

Sterling has not met his burden of demonstrating good cause due to his lack of diligence in seeking amendment. *See Inge,* 281 F.3d at 625. Sterling initially filed his Complaint in December 2019, and despite being one of the named defendants, Experian was not served with the Complaint until May 4, 2021. By this time, the deadline to amend the pleadings had passed (April 16, 2020) and discovery was almost closed (May 17, 2021); yet, at no time in the preceding 17 months had Sterling sought to amend his Complaint. Throughout this period, Sterling actively participated in the litigation, including exchanging discovery and negotiating settlements with the other Defendants. It was only after Experian moved to dismiss his Complaint that Sterling sought amendment.

Sterling's delay was not only lengthy but unexcused as the proposed amendment[20] does not raise new facts or legal theories that could only have been learned after the deadline to amend had passed. *See Ross v. Am. Red Cross*, 567 F. App'x 296, 306 (6th Cir. 2014) ("A plaintiff does not establish 'good cause' to modify a case schedule to extend the deadline to amend the pleadings where [he] was aware of the facts underlying the proposed amendment to [his] pleadings, but failed, without explanation, to move to amend before the deadline."). The core of Sterling's proposed amended Complaint remains the same – that consumer reporting agencies manipulate and defraud consumers by providing consumers a credit score based off a particular model (in this instance, FICO Score 8), while also offering lenders the ability to purchase consumer credit scores calculated by utilizing different credit scoring models.

The only new allegation relates to Experian's response to a credit file inquiry regarding a disputed debt, but Sterling does not provide specific dates or details regarding this exchange. (*See* Doc. 74-1 at 2). In its opposition to the motion for leave, Experian asserts that this debt was removed on August 29, 2019, and is no longer reflected in Sterling's credit file. (Doc. No. 75 at 3, fn.2). Sterling does not contest either of these assertions in his reply. (*See* Doc. No. 76). Thus, it appears Sterling was aware of the facts surrounding any alleged claim related to a credit file inquiry well before he initiated this litigation. This assumption is also supported by the fact that Sterling and Experian have not exchanged any discovery, so the factual basis for new allegations were either already known by Sterling or learned over the course of the litigation but not timely acted upon. *See Leary*, 349 F.3d at 909 (finding plaintiffs did not show good cause where they were "obviously aware of the basis of the claim for many months, but nonetheless failed to pursue the claim until after it was brought to their attention by [defendant's motion].") (internal quotation marks and further citation omitted). Sterling's lack of diligence in moving to amend prior to the expiration of the deadline (or any other time in the following year) does not support a finding of good cause.

***9** While a movant's diligence is the touchstone of the Rule 16 analysis, the presence or absence of prejudice to the non-movant is also a consideration. *See, e.g., Amos v. PPG Indus., Inc.*, No. 2:05-CV-70, 2015 WL 13757306, at *4 (S.D. Ohio May 15, 2015) ("The focus is primarily upon the diligence of the movant; the absence of prejudice to the opposing party is not equivalent to a showing of good cause."); *Korn*, 382 F. App'x at 450 ("Even if the Court were to agree that an amendment would not have prejudiced [non-movant], prejudice to [non-movant] is merely a consideration that informs whether [movant] has satisfied the 'good cause' requirement of the *Leary* standard.").

Procedurally, Sterling's case against Experian is still in its early stages such that amendment at this point would not create apparent prejudice to Experian. But the sole reason the case has not progressed is due to Sterling's own failure to properly serve Experian at the time of initial filing. It hardly

seems equitable that Sterling's lack of diligence in litigating his case against Experian can now be used as a shield against a finding of prejudice. *See* *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 807 (6th Cir. 2005) ("Delay, however will become 'undue' at some point, placing an unwarranted burden on the court, or 'prejudicial', placing an unfair burden on the opposing party.") (internal quotation marks and further citation omitted). Even so, Sterling only requested leave to amend after Experian filed a motion to dismiss identifying the deficiencies of the Complaint. Sterling's reply in support of his motion for leave indicates an intent to re-formulate his previous allegations to address Experian's arguments. (*See* Doc. No. 76 at 2). This is prejudicial to Experian. *See Hometown Folks, LLC v. S&B Wilson, Inc.,* No. 1:06-CV-81, 2007 WL 3069639, at *5 (E.D. Tenn. Oct. 18, 2007) (noting the prejudice where proposed amendment was in attempt to circumvent defendant's motion for summary judgment).

Ultimately, the delays in this case are solely attributable to Sterling and the prejudice to Experian, while not overwhelming, is demonstrable. Thus, Sterling has failed to carry his burden of establishing good cause under Rule 16. *See* *Bridgeport Music*, 410 F.3d 792 (affirming denial of motion for leave to amend on grounds of unjustified delay and in absence of finding of prejudice). These findings of undue delay and prejudice are also relevant, and apply in equal force, to the Rule 15(a) analysis.

Even if I found that Sterling had good cause for his failure to seek amendment earlier, his motion for leave to amend his Complaint would be denied as futile under Rule 15(a). While Sterling did not provide a proposed Amended Complaint, his briefing in support of the motion indicates he plans to re-state his criticisms of the multi-model credit scoring system. (*See* Doc. Nos. 74-1 & 76). As already discussed, this theory does not state a plausible claim for relief.

Put simply, there is no statutory requirement for Experian to calculate credit scores using the same models as other consumer reporting agencies or lenders, and the decision to do so is not fraudulent. *See* § 1681g (f)(1) ("Upon request of a consumer for a credit score, a consumer reporting agency shall supply to the consumer a statement indicating that the information and credit scoring model may be different than the credit score that may be used by the lender..."). Thus, permitting an amendment that re-asserts the same defective argument and will not withstand a motion to dismiss would be futile. *Midkiff,* 409 F.3d at 767.

***10** To the extent Sterling seeks to bring forth a new claim under § 1681i for Experian's reinvestigation of a disputed credit file entry, amendment would also be futile. Sterling's briefings provide an over-simplified version of the details surrounding this alleged violation. Particularly, Sterling fails to state the date he became aware of and then disputed the remark, with whom he disputed the remark (the debt reporter or Experian), and the results of that dispute. Regardless, Experian asserts Sterling requested a credit file inquiry on June 28, 2019, and the debt was removed from his file on August 29, 2019. (Doc. Nos. 75 at 3, fn.2). Sterling does not contest these assertions. (*See* Doc. No. 76). This is important because "[t]o state a claim under § 1681i, a plaintiff must also demonstrate that [he] suffered damages proximately caused by the defendant's violation of that provision." *Alexander v. Experian Info. Sols., Inc.,* No. 3:06CV00067, 2007 WL 9783239, at *9 (M.D. Tenn. Apr. 12, 2007).

If it is undisputed that this debt was no longer reflected on Sterling's credit file as of August 29, 2019, it could not have had any effect on Huntington Bank's decision to deny Sterling a home mortgage when it requested his consumer report from Experian on September 30, 2019. As there is no causal relationship between Sterling's alleged violation and the damages he claims, it would be futile to permit amendment. *Midkiff,* 409 F.3d at 767.

IV. CONCLUSION

For the reasons stated above, I find Sterling's Complaint fails to allege sufficient facts to demonstrate a plausible claim for relief. Furthermore, Sterling has not shown the good cause necessary under Rule 16 to allow for amendment of his Complaint outside of the established deadline. Even if he had, I would deny his motion for leave to amend his Complaint as futile. While Sterling's aim of a simplified and more transparent credit scoring system may be laudable, he cannot achieve that aim through this judicial action. I therefore deny Sterling's motion for leave to amend his Complaint, (Doc. No. 74), and grant Experian's motion to dismiss pursuant to Rule 12(b)(6). (Doc. No. 73).

So Ordered.

s/ Jeffrey J. Helmick

United States District Judge

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Footnotes

1 *Credit Scores*, Fed. Trade Comm'n, Consumer Info., https://www.consumer.ftc.gov/articles/credit-scores (last updated May 2021).

2 *Id*.

3 *Id*.

4 *Id*.

5 *See* Louis DeNicola, *When is a Credit File Created?,* Experian (May 4, 2020), https://www.experian.com/blogs/ask-experian/when-is-a-credit-file-created/.

6 Nationwide consumer reporting agencies, like Experian, are not the only consumer reporting agencies; others exist to service certain business sectors and/or specific needs, such as insurance or rental companies, or background check agencies. *See generally* Consumer Financial Protection Bureau, *List of Consumer Reporting Companies* (Jan. 2020), https://files.consumerfinance.gov/f/documents/cfpb_consumer-reporting-companies-list.pdf.

7 DeNicola, *supra*. *See also* *Standfacts Credit Servs., Inc. v. Experian Info. Sols., Inc.*, 405 F.Supp.2d 1141, 1159 (C.D. Cal. 2005) ("[N]o two credit reports, even of the same customer, are identical. Each report is created by collecting and sorting tens of thousands of data points, including information regarding a previously generated credit report.").

8 *See You have many different credit scores*, CFPB, https://files.consumerfinance.gov/f/documents/201702_cfpb_credit-score-explainer.pdf (last accessed July 21, 2021).

9 *See* CFPB, *Key Dimensions and Processes in the U.S. Credit Reporting System,* 12 (December 2012), https://files.consumerfinance.gov/f/201212_cfpb_credit-reporting-white-paper.pdf ("Additionally, the NCRAs and other third-party development companies develop both generic and custom scoring models. Many lenders also develop and use proprietary scoring models derived from credit report information.").

10 *See FICO Scores Versions*, myFICO, https://www.myfico.com/credit-education/credit-scores/fico-score-versions (last visited July 21, 2021).

11 *Id*.

12 *See* FDIC -Div. of Supervision and Consumer Protection, *Risk Management Examination Manual for Credit Card Activities*, 51 (March 2007), https://www.fdic.gov/regulations/examinations/credit_card/pdf_version/ch8.pdf ("Scoring models are developed by analyzing statistics and picking out cardholders' characteristics thought to be associated with creditworthiness. There are many different ways to compress the data into scores, and there are several different outcomes that can be modeled."). *See also How are Credit Scores Calculated?*, Equifax, https://www.equifax.com/personal/education/credit/score/how-is-credit-score-calculated/ (last visited July 21, 2021).

13 *See* Megan DeMatteo, *This is the credit score lenders use when you apply for a mortgage*, CNBC (Dec. 2, 2020), https://www.cnbc.com/select/which-credit-score-used-when-applying-for-mortgage/ ("The FICO 8 model is known for being more critical of high balances on revolving credit lines. Since revolving credit is less of a factor when it comes to mortgages, the FICO 2, 4 and 5 models, which put less emphasis on credit utilization, have proven to be reliable when evaluating good candidates for a mortgage.").

14 CFPB, *Report to Congress on Credit Scores: The impact of differences between consumer- and creditor-purchased credit scores*, 1 (July 9, 2011), https://files.consumerfinance.gov/f/2011/07/Report_20110719_CreditScores.pdf.

15 *Id.* at 4-5.

16 *Id*.

17 *Id*.

18 https://www.experian.com, Experian (last visited July 13, 2021).

19 *See* https://www.experian.com, Experian (last visited July 13, 2021).

20 Sterling's motion for leave to amend did not include a proposed Amended Complaint outlining the amendments or new allegations, so I have distilled likely allegations from the narrative in the memorandum supporting his motion. (*See* Doc. No. 74-1).