The Bullet Point: Ohio Commercial Law Bulletin

Does my website URL constitute a "deceptive trade practice"?

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Jim Sandy and Stephanie Hand-Cannane

Deceptive Trade Practices Act

***Wooster Floral & Gifts, L.L.C. v. Green Thumb Floral & Garden Ctr., Inc.*, Slip Opinion No. 2020-Ohio-5614**

In this appeal, the Supreme Court of Ohio affirmed the lower court's decision, agreeing that the defendant's use of a domain name similar to its competitor's trade name was not a violation of the Deceptive Trade Practices Act (DTPA) as the underlying website was not likely to create customer confusion.

- **The Bullet Point:** Under the DTPA, "[a] person engages in a deceptive trade practice when, in the course of the person's business, the person causes likelihood of confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services." R.C. 4165.02(A)(2). Unlike the federal Lanham Act, Ohio's DTPA does not contain a provision that makes a person liable for the bad-faith use of a domain name that is similar to another trademark. Instead, Ohio's law requires courts to look not just at an allegedly infringing domain name, but also at the underlying content of the website. As the Court explained, "whether internet users are initially confused about the origin of a website does not matter; rather, the plaintiff must show a likelihood of confusion that goes to the source of the goods or services." In this instance, the defendant's use of a domain name similar to the plaintiff's trade name was not likely to create customer confusion about the source of the goods. The defendant's underlying website did not mention the plaintiff's trade name and it was clear on its website that customers were ordering the goods from the defendant and not another source. As such, the defendant's use of the domain name was not a deceptive trade practice under the DTPA.

Waiver of Right to Arbitrate

Fayette Drywall, Inc. v. Oettinger, 2d Dist. Montgomery No. 28636, 2020-Ohio-6641

In this appeal, the Second Appellate District affirmed the trial court's decision, agreeing that the totality of the circumstances demonstrated the defendant knowingly and intentionally waived its right to mandatory arbitration.

- **The Bullet Point:** Ohio has a strong public policy favoring arbitration. Nevertheless, the right to arbitrate may be waived like any other contractual right, even after a stay has been granted to allow the parties to arbitrate the dispute. A party seeking to prove waiver must demonstrate that "(1) the waiving party knew of the existing right to arbitrate; and (2) the totality of the circumstances demonstrates the

waiving party acted inconsistently with that known right." In conducting a totality of the circumstances analysis, Ohio courts consider four factors. Specifically, courts determine "(1) whether the party seeking arbitration invoked the jurisdiction of the trial court by filing a complaint, counterclaim, or third-party complaint without asking for a stay of the proceedings; (2) the delay, if any, by the party seeking arbitration to request a stay of proceedings or an order compelling arbitration; (3) the extent to which the party seeking arbitration has participated in the litigation, including the status of discovery, dispositive motions, and the trial date; and (4) any prejudice to the nonmoving party due to the moving party's prior inconsistent actions." In this instance, the defendant refused to undertake even the simplest of measures necessary to allow arbitration to move forward as originally scheduled or as rescheduled. As the court noted, the defendant even failed to submit the required arbitration deposit. Moreover, the defendant's delays and failure to participate in arbitration prejudiced the other parties. As such, the totality of the circumstances demonstrated that the defendant waived its right to arbitrate.

Presentment of Claim

***Saber Healthcare v. Hudgins*, 9th Dist. Summit No. 29698, 2020-Ohio-5603**

In this appeal, the Ninth Appellate District affirmed the trial court's decision, finding that the creditor's claim was barred as the creditor failed to satisfy the presentment requirements of R.C. 2117.06.

- **The Bullet Point:** Ohio Revised Code 2117.06 governs the presentment of claims against an estate in probate court. Under the statute, creditors must present their claims: (1) in writing, (2) to the executor or administrator of the estate, and (3) within six months after the decedent's death. R.C. 2117.06(A)(1), R.C. 2117.06(C). Under both the statute and Ohio case law, creditors must strictly comply with these presentment requirements or else their claims "shall be forever barred." R.C. 2117.06(C). For instance, a creditor who submits a claim to a person within the six-month period of time who is not then appointed as the administrator but who is eventually appointed as the administrator does not satisfy the presentment requirements. As explained by the court, R.C. 2117.06 does not permit the appointment of an administrator to 'relate back' to when a creditor submits its claim. Likewise, it is irrelevant if someone other than the executor has actual knowledge of the creditor's claim. Ohio Revised Code 2113.06(C) balances this strict statutory compliance requirement with allowing a creditor to be granted administration of an estate in the event one is not timely opened so as to be able to submit its claim within the six-month period. As such, when a creditor fails to properly present its claim under R.C. 2117.06 and also fails to open an estate itself under R.C. 2113.06, "the law should not come to his aid" and the creditor's claim will be barred.

Caveat Emptor

***Bayview Loan Servicing, LLC v. Griffen*, 12th Dist. Warren No. CA2020-02-013, 2020-Ohio-6666**

In this appeal, the Twelfth Appellate District reversed in part the trial court's decision, holding that the doctrine of caveat emptor prevented the purchaser from vacating the judicial sale.

- **The Bullet Point:** Known by the maxim "buyer beware," the doctrine of *caveat emptor* dictates that a purchaser of real property is charged with the knowledge of defects in the property's title where the defects are of public record and easily discoverable. Under this long-standing principle, a purchaser who fails to perform his due diligence by failing to examine public records and the title to the property "must suffer the loss caused by that failure." Stated differently, a purchaser has no recourse or relief against a defect in the property's title which would have been revealed by examining the title. The doctrine of caveat emptor applies to all sales of real property in Ohio, including judicial sales. As explained by the court, judicial sales have a certain degree of finality. This degree of finality makes it even more imperative for the winning bidder to investigate the property's title prior to submitting his winning bid as Ohio

courts will not permit the purchaser to vacate a judicial sale on the grounds of a defect in the property's title. To allow otherwise would frustrate the finality of judicial sales. In this case, the purchaser failed to investigate any public records, which clearly showed a defect in the property's title. Consequently, the purchaser was not permitted to vacate the sheriff's sale.

RESPA Claim for Trade Line Deletion

***Richissin v. Rushmore Loan Mgt. Servs., LLC,* N.D.Ohio No. 20 CV 871, 2020 U.S. Dist. LEXIS 223128 (Nov. 30, 2020)**

In this case, the United States District Court for the Northern District of Ohio granted in part the defendant's motion for judgment on the pleadings, holding that the loan servicer's failure to delete a tradeline did not constitute an error in servicing of the loan under RESPA.

- **The Bullet Point:** The Real Estate Settlement Procedures Act ("RESPA") details various obligations loan servicers have in responding to borrower inquiries. 12 U.S.C. § 2605(e). A loan servicer's duties are triggered under the statute when the borrower sends the servicer a qualified written request ("QWR") for information relating to the servicing of its loan which must include "a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error." Upon receipt of a QWR, the servicer must then "timely respond to the borrower, make any appropriate corrections, and transmit to the borrower a written notification of such correction." 12 U.S.C. § 2605(e)(2). In addition, the servicer may not report to the consumer reporting agencies information related to the borrower's overdue payment for a period of 60 days upon receiving a QWR. 12 U.S.C. § 2605(e)(3). While Section 2605 sets out the servicer's obligations, it is important to note that "not all issues arising between borrowers and servicers are subject to 12 U.S.C. § 2605(e)(3)". As the court explained, 'servicing' means "receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan…and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan." 12 U.S.C. § 2605(i)(3). In this case, the borrowers' letter to the servicer alerted the servicer that it was in breach of a settlement agreement in its failure to delete a tradeline. The court determined the servicer's actions of failing to delete a tradeline did not meet the statutory definition of "servicing" and, as such, the servicer's obligations under Section 2605(e) were not triggered by the borrowers' letter.

  The borrowers in this case also argued that the servicer violated Section 2605(k)(1)(C), which prohibits servicers from failing to "take timely action to respond to a borrower's requests to correct errors relating to allocation of payments, final balance for purposes of paying off the loan, or avoiding foreclosure, or other standard servicer's duties" upon receipt of a Notice of Error ("NOE"). In arguing that the phrase "other standard servicer's duties" imposes broader obligations on servicers than the obligations under Section 2605(e), the borrowers relied on the servicer errors outlined in 12 C.F.R. § 1024.35 and the commentary thereto ("Regulation X"). The borrowers pointed to the "catchall" phrase of 12 C.F.R. § 1024.35(b)(11), which states that the term 'error' refers to "any other error relating to the servicing of a borrower's mortgage loan." Further, the borrowers depended upon the commentary to Regulation X, which provides that "standard servicer duties are not limited to duties that constitute servicing, as defined in this rule…" and lists examples of servicer duties. The court rejected the borrowers' arguments and concluded that there is nothing on the face of the statute or Regulation X that would include credit reporting errors as within the scope of an NOE under RESPA. The court went on to explain that Congress did not expressly identify "credit reporting" anywhere as an enumerated "servicing" activity or "servicing error." (Emphasis in original). Consequently, "this demonstrates an intent that credit reporting activities would not trigger obligations under Regulation X."

contact

James Sandy
member > cleveland

T (216) 378-9911
jsandy@mcglinchey.com

Stephanie Hand-Cannane
associate > cleveland

T (216) 378-4989
shandcannane@mcglinchey.com

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SLIP OPINION NO. 2020-OHIO-5614

WOOSTER FLORAL & GIFTS, L.L.C., APPELLANT, *v.* GREEN THUMB FLORAL & GARDEN CENTER, INC., APPELLEE.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Wooster Floral & Gifts, L.L.C. v. Green Thumb Floral & Garden Ctr., Inc.*, Slip Opinion No. 2020-Ohio-5614.]

Civil law—Deceptive Trade Practices Act—Customer confusion must be measured based on a customer's confusion about the source of the goods that are offered for sale—Court of appeals' judgment affirmed.

(No. 2019-0322—Submitted May 12, 2020—Decided December 15, 2020.)

APPEAL from the Court of Appeals for Wayne County, No. 17AP0026, 2019-Ohio-63.

DEWINE, J.

{¶ 1} This case involves a dispute between two flower shops about the use of a domain name. Green Thumb Floral & Garden Center, Inc. ("Green Thumb") owns the domain name www.woosterfloral.com. Internet users who click on that

address are directed to Green Thumb's home page. This does not sit well with one of its competitors, Wooster Floral & Gifts, L.L.C., which filed a lawsuit under Ohio's Deceptive Trade Practices Act, seeking to block Green Thumb from using the woosterfloral.com address.

{¶ 2} For Green Thumb's actions to constitute a deceptive trade practice, its use of the domain name must create a likelihood of customer confusion about "the source, sponsorship, approval, or certification of goods or services." R.C. 4165.02(A)(2). We find no evidence of such customer confusion. Green Thumb's website makes it perfectly clear to internet users who end up on that site that they are ordering goods from Green Thumb. Because the court below saw things pretty much the same way, we affirm its judgment.

I. BACKGROUND

A. Wooster Floral & Gifts acquires the trade name "Wooster Floral" from its predecessor but not the domain name "woosterfloral.com"

{¶ 3} Wooster Floral, L.L.C., was a flower and gift shop that did business in Wooster, Ohio, from 2000 to 2015. The business owned a few domain names, including www.woosterfloralandgifts.com and www.woosterfloral.com. In late 2014, the shop's owner, Kimberly Gantz, decided to close the business. Toward that end, she did not renew the registration of the "woosterfloral.com" domain.

{¶ 4} After Gantz announced her intention to shut down, the store's manager, Katrina Heimberger, expressed an interest in buying the business. Heimberger and Gantz entered into a purchase agreement in January 2015. The contract specified that Heimberger was "not purchasing the business" but rather certain assets and inventory, including the use of the name Wooster Floral, for $1.

{¶ 5} Heimberger subsequently recorded the articles of organization for Wooster Floral & Gifts, L.L.C., with the Ohio secretary of state, as well as an assignment of the trade name "Wooster Floral, L.L.C.," to herself. Gantz then dissolved Wooster Floral in late 2015.

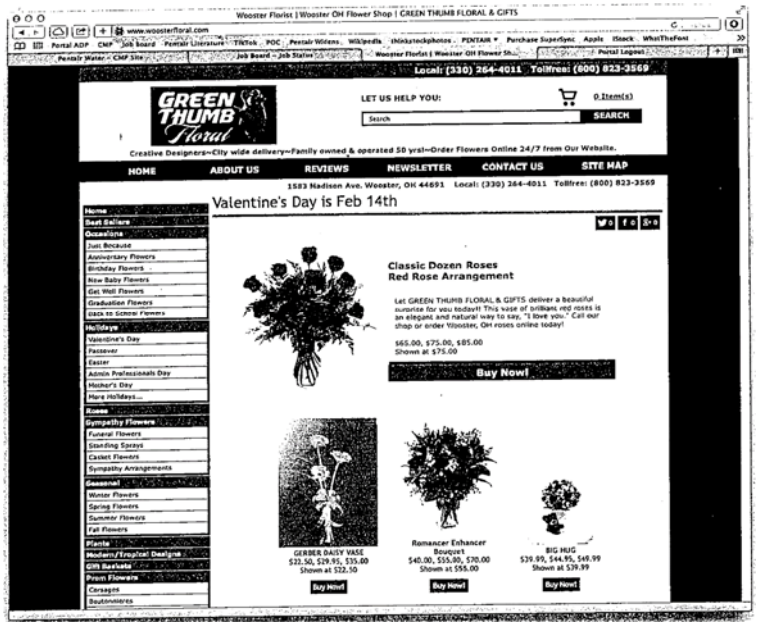
{¶ 6} Green Thumb is a competing floral and gift shop in Wooster. It has been in business for more than 50 years. At the end of 2014, Green Thumb's owner, Claudia Grimes, learned that Gantz was about to close Wooster Floral. Discovering that "woosterfloral.com" was available, Grimes purchased the name from a domain-name registrar in January 2015 and started using it to redirect internet users to Green Thumb's website: www.greenthumbfloralandgifts.com. Green Thumb uses several other domain names for the same purpose, including "woosterflowers.com" and "woosterflorist.com."

{¶ 7} When Heimberger started Wooster Floral & Gifts, she knew that Gantz no longer owned the "woosterfloral.com" domain and that Grimes had purchased it. Nonetheless, Heimberger asked Grimes to give up the domain name. After some back and forth, Grimes offered to sell the domain name to Heimberger for $2,500, but Heimberger refused, finding the price too steep.

B. Wooster Floral & Gifts sues the owner of the domain name "woosterfloral.com"

{¶ 8} In 2016, Wooster Floral & Gifts sued Green Thumb, alleging trademark infringement in violation of R.C. 1329.65 and a violation of the Deceptive Trade Practices Act, R.C. 4165.02(A)(2). Wooster Floral & Gifts sought an injunction requiring Green Thumb to surrender the domain name as well as damages and attorney's fees.

{¶ 9} The case proceeded to a bench trial. At trial, Wooster Floral & Gifts presented screenshots of the redirected website taken in early 2015. The landing page of the site looked like this:



{¶ 10} The only evidence that Wooster Floral & Gifts offered that any customer had actually been confused concerned a negative review posted on Wooster Floral & Gifts' Google Plus page. Heimberger testified that she responded to the review, writing that "[i]t sounds like you may have ordered your flowers from 1-800-flower.com and that another business filled this order." Grimes admitted that Green Thumb had filled the order that was the subject of the negative review. But she also testified that she had received that order through BloomNet, a wire service, not through www.woosterfloral.com. The customer who wrote the review did not testify.

{¶ 11} The trial court ruled in favor of Green Thumb, concluding that Wooster Floral & Gifts' trademark infringement claims failed because it did not have a registered trademark. Wooster Floral & Gifts did not challenge this holding on appeal. Regarding the claims under the Deceptive Trade Practices Act, the trial court found that Wooster Floral & Gifts possessed a valid trade name, "Wooster Floral," but could not enjoin others from using that name unless there was proof of likelihood of confusion. The court found that Green Thumb's use of the domain

name was unlikely to cause confusion as to the source of goods or services, explaining that "[t]he home page is clearly identified as 'Green Thumb Floral' " and that there is no use of the trade name "Wooster Floral" within the website.

{¶ 12} Wooster Floral & Gifts appealed, challenging the finding that there was no violation of the Deceptive Trade Practices Act. The Ninth District Court of Appeals affirmed. It found nothing within Green Thumb's website that would suggest a customer might be confused about which company is providing the goods for sale. One judge dissented, opining that there was a likelihood of confusion based on the application of an eight-factor test utilized by the Sixth Circuit Court of Appeals in determining the likelihood of confusion for claims under the federal Lanham Act. 2019-Ohio-63, 118 N.E.3d 513, ¶ 16 (Callahan, J., dissenting), citing *Frisch's Restaurants, Inc. v. Elby's Big Boy of Steubenville, Inc.*, 670 F.2d 642, 648 (6th Cir.1982).

{¶ 13} We accepted Wooster Floral & Gifts' appeal on the following proposition of law:

> A competing business owner's use of a competitor's legally valid trade name in a domain name to divert consumers to the competing business's website is a deceptive trade practice under R.C. 4165.02(A)(2) and is analyzed for likelihood of confusion at the time the trade name is used in the domain name, not by the content on the competing business's website.

See 155 Ohio St.3d 1455, 2019-Ohio-1759, 122 N.E.3d 216.

II. ANALYSIS

{¶ 14} R.C. 4165.02(A)(2) provides that "[a] person engages in a deceptive trade practice when, in the course of the person's business," the person "[c]auses likelihood of confusion or misunderstanding as to the source, sponsorship,

approval, or certification of goods or services." If a party is likely to be damaged by a deceptive trade practice under R.C. 4165.02, a court may grant injunctive relief and award actual damages. R.C. 4165.03(A)(1) and (2).

{¶ 15} In the proceeding below, the Ninth District assumed that a party who seeks injunctive relief for a violation of the Deceptive Trade Practices Act must establish a violation by clear and convincing evidence. Wooster Floral & Gifts did not challenge the use of that standard in its merit brief to this court, although it did raise the issue in its reply brief. But, of course, a party cannot raise an issue for the first time in a reply brief. *State v. Spaulding*, 151 Ohio St.3d 378, 2016-Ohio-8126, 89 N.E.3d 554, ¶ 179. So we have no occasion to examine the correct burden of proof for a claim under the Deceptive Trade Practices Act. We note, though, that even were we to apply a preponderance of the evidence standard, we would still conclude that Wooster Floral & Gifts has failed to meet its burden to demonstrate customer confusion about the source of goods or services.

A. The statute requires a likelihood of confusion as to the source of the goods

{¶ 16} Wooster Floral & Gifts' position is that there is a likelihood of customer confusion because a consumer who opens a web browser and types in "woosterfloral.com" will be directed not to its website but to Green Thumb's website. In its view, the act of redirecting—by itself—creates a likelihood of confusion. Green Thumb counters that the customer is not ultimately confused at all because once he or she arrives at the Green Thumb website, the site makes perfectly clear that one is ordering goods from Green Thumb. Thus, the dispute depends in large part on what kind of confusion the law proscribes: confusion about where the words "woosterfloral.com" typed into a web browser will lead or confusion about who is selling the products that a web user may ultimately choose to purchase.

{¶ 17} The plain language of the statute answers the question. The statute reaches conduct that "[c]auses likelihood of confusion or misunderstanding as to

the source, sponsorship, approval, or certification *of goods or services*." (Emphasis added.) R.C. 4165.02(A)(2). Thus, to run afoul of the statute, there must be a likelihood of confusion about the source of the goods and services not about where a particular domain name might lead.

{¶ 18} Wooster Floral & Gifts has failed to present any such evidence. Under the plain language of the statute, whether internet users are initially confused about the origin of a website does not matter; rather, the plaintiff must show a likelihood of confusion that goes to the source of the goods or services. The redirected website, Green Thumb's home page, clearly demonstrates Green Thumb's name, logo, and address and makes no mention of the trade name "Wooster Floral" within the website. Any reasonable internet user looking at the website can tell that it is Green Thumb that is providing the goods and that there is no indication of sponsorship, approval, or certification of goods by another entity. And a consumer who doesn't want to be there can quickly extricate himself by hitting ←.

{¶ 19} Any likelihood of confusion is further mitigated by the fact that Wooster Floral & Gifts is, at best, a fairly weak trade name.[1] The more distinctive a trade name is, the stronger it is and the greater the likelihood of confusion and the scope of protection. 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, Section 11:73 (5th Ed.2018); 1 McCarthy at Section 9:1. Wooster Floral is not a distinctive name like Kodak or John Deere that a customer strongly and immediately associates with a particular brand. *See generally Abercrombie &*

1. The trial court's conclusion that Wooster Floral is a valid trade name has not been challenged on appeal, so we must assume the correctness of that decision. A trade name is descriptive of the identity of the owner of the business and need not be affixed to the product, although it may serve to identify not only the business but also the product. *Younker v. Nationwide Mut. Ins. Co.*, 175 Ohio St. 1, 5, 191 N.E.2d 145, 148 (1963). In contrast, a trademark is a sign, word or device affixed to a product that identifies the goods of a particular seller and distinguishes them from the goods sold by another. *Id.* The definitions of the two overlap to some extent, and this court has stated that "[t]he basic principles governing trademarks and trade names are the same." *Id*. at 6.

Fitch Co. v. Hunting World, Inc., 537 F.2d 4 (2d Cir.1976) (Friendly, J.); *Kellogg Co. v. Toucan Golf, Inc.*, 337 F.3d 616, 624 (6th Cir.2003). Rather, it is a trade name that is geographically descriptive of the business—Wooster Floral & Gifts is a floral shop in Wooster. Geographically descriptive marks are generally considered weaker than marks that are inherently distinctive. Restatement of the Law 3d, Unfair Competition, Section 21, Comment i, at 232-233 (1995). It is plausible that a customer might type woosterfloral.com into a website because they are looking for Wooster Floral & Gifts' website. But a consumer might also type the address simply because they are looking for a floral shop in Wooster. A reasonable internet user might assume that JohnDeere.com will likely lead to John Deere's website, but that same user is much less likely to assume that woosterfloral.com will lead to a particular flower shop.

{¶ 20} In sum, there is nothing before us to suggest that Green Thumb's use of the woosterfloral.com domain name creates customer confusion about the source, sponsorship, approval, or certification *of goods or services*. *See* R.C. 4165.02(A)(2). Wooster Floral & Gifts has failed to produce evidence of a single consumer that has suffered any such confusion. And nothing in the evidence suggests that any reasonable consumer would be likely to suffer any confusion about the source of the goods listed for sale on Green Thumb's website. Thus, under the plain terms of the Deceptive Trade Practices Act, Wooster Floral & Gifts has failed to establish a violation.

B. Federal caselaw under the Lanham Act does not help Wooster Floral & Gifts

{¶ 21} Wooster Floral & Gifts relies primarily on federal cases decided under the Lanham Act that it says support its argument that confusion should be measured at the point in which a person initially types woosterfloral.com into a web browser. We are not convinced that these federal cases lend much assistance to its cause.

{¶ 22} The Lanham Act contains several provisions that have been applied in domain-name disputes. Most notably, the Lanham Act contains an explicit anticybersquatting provision that makes a person liable in certain circumstances for the registration or use of a domain name with the bad-faith intent to profit when the domain name contains or is similar to a trademark held by another. 15 U.S.C. 1125(d); *College Savs. Bank v. Florida Prepaid Postsecondary Edn. Expense Bd.*, 527 U.S. 666, 119 S.Ct. 2219, 144 L.Ed.2d 605 (1999). Importantly, Ohio's Deceptive Trade Practices Act does not contain a comparable provision.

{¶ 23} In addition, two other provisions of the Lanham Act have been applied to domain-name disputes. Section 32(a) of the Lanham Act makes it a violation to use a registered trademark in connection with the sale of goods or services when the use of the mark is likely to create customer confusion. Act of Nov. 29, 1999, ch. 540, 113 Stat. 219, codified at 15 U.S.C. 1114(1). Section 43(a) of the Lanham Act is the provision that is the most similar to Ohio's Deceptive Trade Practices Act, and Wooster Floral & Gifts maintains that it provides for liability on the same terms as the Ohio statute. *Id*., codified at 15 U.S.C. 1125(a)(1).

{¶ 24} That section provides for liability on the part of

> [a]ny person who, on or in connection with any goods or services * * * uses in commerce any word, term, name, * * * or any combination thereof, * * * which is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person * * *.

15 U.S.C. 1125(a)(1)(A).

{¶ 25} This language is similar in some respects to Ohio's statute but different in other respects. (The most notable difference is the federal statute's explicit reference to the use of any "word, term [or] name.") We are bound by the language of the Ohio statute not by a federal court's interpretation of a federal statute. Thus, while federal cases may provide some guidance in analyzing issues in this area, they offer only that—guidance to the extent that we find their analysis useful.

{¶ 26} The guidance that is supplied by the federal cases is not particularly helpful to Wooster Floral & Gifts. The theory advanced by Wooster Floral & Gifts has some similarities to a doctrine adopted by some federal circuits that has come to be termed "initial interest confusion." *See, e.g.*, *Playboy Ents., Inc. v. Netscape Communications Corp.*, 354 F.3d 1020 (9th Cir.2004). The idea here is that customer confusion may be shown by the deceptive use of a trade name that sparks a consumer's initial interest in a product, even if that confusion is dispelled before any sale occurs. *Id.* at 1025; *see also* 5 McCarthy, Section 25A:44, at 25A-182 through 25A-187.

{¶ 27} Wooster Floral has never explicitly relied upon the initial-interest-confusion doctrine nor has it asked this court to adopt the doctrine. Nevertheless, the dissent seizes on this somewhat controversial theory[2] and insists—without

2. The dissent's view that the initial-interest-confusion doctrine "is neither novel nor controversial," dissenting opinion at ¶ 44, is not widely shared. *See, e.g.*, Ritter & Jaffe, *The Uncertain Future of Initial Interest Confusion*, 4 Landslide 55 (2012) ("Initial interest confusion was a controversial doctrine from its inception and remains so today"); Goldman, *Deregulating Relevancy in Internet Trademark Law*, 54 Emory L.J. 507, 559 (2005) ("The 'initial interest confusion' doctrine * * * exemplifies the devolution of trademark law"); Singh, *Abolish Trademark Law's Initial Interest Confusion and Permit Manipulative Internet Search Practices*, 3 J.Bus. Entrepreneurship & L. 15, 31 (2009) ("Initial interest confusion is a flawed doctrine because it does not require a showing of likelihood of confusion, it is superfluous and inefficient, and it is also unnecessary in the Internet context, so courts should not utilize it in evaluating trademark infringement"); Klein & Glazer, *Reconsidering Initial Interest Confusion on the Internet*, 93 Trademark Rep. 1035, 1064 (2003) ("[T]he initial interest confusion doctrine is unnecessary to resolve the cases in which courts have applied the doctrine"); Rothman, *Initial Interest Confusion: Standing at the Crossroads of*

analysis—that we recognize the doctrine. Further, the dissent would have us also adopt an eight-factor test used by the Sixth Circuit in Lanham Act cases and remand this case for application of that test to the initial-interest-confusion theory. *See Frisch's Restaurants, Inc.*, 670 F.2d at 648 (adopting the eight factors used by the Ninth Circuit in *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-349 (9th Cir.1979)).

{¶ 28} Though the dissent cites a few trademark cases in which federal circuit courts have recognized the idea of initial-interest confusion, it fails to acknowledge that the federal circuits largely have found the initial-interest-confusion theory inapplicable in situations like ours where any initial confusion is quickly dissipated once the consumer lands on the website. This is for good reason. Despite the differences in language, the Lanham Act is understood to impose the same customer-confusion requirement as the Ohio statute: there must be "confusion as to the origin of the parties' goods or services." *Bird v. Parsons*, 289 F.3d 865, 877 (6th Cir.2002).

{¶ 29} For this reason, even those federal circuit courts recognizing the possibility of liability under such a theory have been reluctant to find a violation of section 32(A) or 43(A) of the Lanham Act in the context of internet-domain-name disputes. This is particularly the case when a website on which a consumer ultimately lands makes its affiliation clear. For example, in a case in which a computer company made use of the domain name clue.com, the First Circuit upheld a trial court's finding that no trademark infringement occurred on a claim brought by the manufacturer of the board game Clue. Because the website's content strongly indicated that the site had little to do with the trademark owner's business,

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Trademark Law, 27 Cardozo L.Rev. 105, 113 (2005) ("Initial interest confusion must be revisited and replaced").

the First Circuit saw no reason to "enter the 'initial interest confusion' thicket." *Hasbro, Inc. v. Clue Computing, Inc.*, 232 F.3d 1, 2 (1st Cir.2000).

{¶ 30} Similarly, in a lawsuit brought by Reverend Jerry Falwell, the Fourth Circuit found no likelihood of confusion in a detractor's use of the domain name Fallwell.com on a "gripe site" established to criticize Falwell. *Lamparello v. Falwell*, 420 F.3d 309, 317-318 (4th Cir.2005). "[E]ven if [it] were to accept the initial interest confusion theory," the court "would not apply [it to] the case at hand." *Id.* at 318. That is because to determine whether a likelihood of confusion exists as to the source of such a site, "a court must look not only to the allegedly infringing domain name, but also the underlying content of the website." *Id.* Because the contents of the website made clear that it was not affiliated with Falwell, there was no likelihood of customer confusion. *Id.* at 311, 318; *see also Passport Health, L.L.C. v. Avance Health Sys. Inc.*, 823 Fed.Appx. 141, 150 (4th Cir.2020) ("As in *Lamparello*, we decline to adopt the [initial-interest-confusion] doctrine here").

{¶ 31} The Ninth Circuit, too, has found little danger of consumer confusion when the content of a website makes its affiliation clear. Outside of the special case of a website domain that consists solely of a trademarked name (e.g., JohnDeere.com), "consumers don't form any firm expectations about the sponsorship of a website until they've seen the landing page—if then. This is sensible agnosticism, not customer confusion." *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1179 (9th Cir.2010). Indeed, reasonable internet users "fully expect to find that some sites are not what they imagine based on a glance at the domain name or a search engine summary." *Id.*; *see also* 5 McCarthy, Section 25A:44, at 25A-184 ("mere 'diversion' is not the same as 'confusion' ").

{¶ 32} The dissent would like us to remand this case for application of the Sixth Circuit's multifactor test in the context of initial-interest confusion, but the Sixth Circuit has found it unnecessary to apply the multifactor test to domain-name

disputes like this one. Instead, the Sixth Circuit has made clear that the only important question in a domain-name dispute "is whether there is a likelihood of confusion *between the parties' goods or services*." (Emphasis in original.) *Taubman Co. v. Webfeats*, 319 F.3d 770, 776 (6th Cir.2003).[3] Thus, "it is irrelevant whether customers would be confused as to the origin of the websites, unless there is confusion as to the origin of the respective products." *Id.* Similarly, in another domain-name dispute decided just this year, rather than apply the multifactor test, the Sixth Circuit explained "the 'ultimate question' in assessing the likelihood of confusion is 'whether relevant customers are likely to believe that the products or services offered by the parties are affiliated in some way." *Dassault Systèmes, SA v. Childress*, 828 Fed.Appx. 229, 250 (6th Cir.2020), quoting *Interactive Prods. Corp. v. a2z Mobile Office Solutions, Inc.*, 326 F.3d 687, 695 (6th Cir.2003). Applying de novo review to the trial court's denial of a motion for judgment as a matter of law, the Sixth Circuit found it unnecessary to even reference the eight-factor test. It simply held that there was no viable claim because the plaintiff failed to " 'explain why, assuming that such initial confusion were to take place, it would not be instantly dissipated without any harm' once the consumer clicks the * * * link and enters the website." *Id.*, quoting *Groeneveld Transport Efficiency, Inc. v. Lubecore Internatl., Inc.*, 730 F.3d 494, 519 (6th Cir.2013).

{¶ 33} Thus, a review of the federal caselaw lends further support to the result we arrive at from a plain reading of Ohio's Deceptive Trade Practices Act. Customer confusion is measured by whether a reasonable consumer who has landed on Wooster Floral's website is likely to be confused about the source of the goods

3. Because the Sixth Circuit in *Webfeats* determined that the defendant's use of his website ultimately did not implicate the Lanham Act, the dissent shrugs off as dicta the court's finding that there was no likelihood of confusion. But the fact that there are two independent reasons for a ruling does not render one of those reasons dicta, especially when the issue considered was one expressly before the court and one which the court had reason to decide—rather than merely opine—upon. *See Wright v. Spaulding*, 939 F.3d 695, 701-702 (6th Cir.2019).

offered for sale on the site. There is no reason in this case to remand for the application of the Sixth Circuit's multifactor test. That test was developed for a "different problem—i.e., for analyzing whether two competing brands' *marks* are sufficiently similar to cause customer confusion [emphasis sic]," *Multi Time Machine, Inc. v. Amazon.com, Inc.*, 804 F.3d 930, 936 (9th Cir.2015), and provides little assistance in this case.[4] Here, the plain terms of the statute are all we need to resolve the question in front of us.

{¶ 34} Under both federal precedent and the plain terms of the Ohio statute, the question is whether a consumer landing on Green Thumb's website is likely to be confused about the entity that will be fulfilling his order. The answer is clearly no. A consumer who buys flowers on Green Thumb's website after initially typing in woosterfloral.com knows full well that his order is going to be fulfilled by Green Thumb. Green Thumb's use of the woosterfloral.com domain name does not violate Ohio's Deceptive Trade Practices Act.

III. CONCLUSION

{¶ 35} Wooster Floral & Gifts, L.L.C., has failed to demonstrate that Green Thumb's use of the domain name www.woosterfloral.com causes a likelihood of confusion as to the source of goods sold on the website. We thus affirm the judgment below.

Judgment affirmed.

O'CONNOR, C.J., and KENNEDY and FISCHER, JJ., concur.

DONNELLY, J., concurs in judgment only.

FRENCH, J., dissents, with an opinion joined by STEWART, J.

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4. The dissent finds our reliance on *Multi Time Machine* to be "misplaced," since "the case before us is not a keyword-advertising case—it's a trade name case." Dissenting opinion at ¶ 51. That distinction is immaterial here because "the ultimate test" is the same for both: whether a reasonable consumer is likely to be confused as to the origin of the goods. *Multi Time Machine* at 937. That *Multi Time Machine* concerned a keyword-advertising dispute does not change the fact that, as in that case, "[o]ur case can be resolved simply by [an] evaluation of the web page at issue," *id.*

FRENCH, J., dissenting.

{¶ 36} In this court's first opportunity to address Ohio's Deceptive Trade Practices Act ("DTPA"), specifically R.C. 4165.02, the majority fails to establish a standard for courts to follow when considering whether a party's use of a disputed trade name is likely to cause confusion among consumers about the source of the goods or services. Relying exclusively on the fact that the trade name "Wooster Floral & Gifts" has a geographic component, the majority declares that it is "a fairly weak trade name," and that there can be no source confusion regarding its use. Majority opinion at ¶ 19. In my view, we should adopt the factors outlined in *Frisch's Restaurants, Inc. v. Elby's Big Boy of Steubenville, Inc.*, 670 F.2d 642, 648 (6th Cir.1982), to guide the "likelihood of confusion" analysis.

{¶ 37} The majority also rejects the idea that we can measure source confusion at the point when a consumer types a trade name into a web browser, a concept that is generally known as initial-interest confusion. I disagree. Federal courts have recognized initial-interest confusion, and we should recognize it too. Although I agree with the majority that federal courts have set a high bar for plaintiffs to prevail on a claim predicated on initial-interest confusion, I am unwilling to wholly reject the reality that a domain name itself provides source-identifying information or that consumers may be confused when a competitor uses another's trademark or trade name in a domain name. Because the trial court and the appellate court here failed to recognize that appellant, Wooster Floral & Gifts, L.L.C., could base its DTPA claim on appellee Green Thumb Floral & Garden Center, Inc.'s use of Wooster Floral's trade name as a Uniform Resource Locator[5]

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5. "Uniform Resource Locator" or "URL" is the term used to describe the location of a specific webpage, such that if a specific URL is entered into an Internet browser, a specific website will appear. *1-800 Contacts, Inc. v. WhenU.com, Inc.*, 309 F.Supp.2d 467, 474 (S.D.N.Y.2003) fn. 13, *rev'd on other grounds*, 414 F.3d 400 (2d Cir.2005). A "domain name" typically refers to the URL for the front or home page of a website. *Id.*

("URL"), I would reverse the judgment of the Ninth District Court of Appeals. I would also remand the matter to the trial court for it to consider whether Wooster Floral has proven its DTPA claim against Green Thumb. I therefore dissent from the majority's judgment.

A. This court should adopt a standard for determining if there is a "likelihood of confusion" to support a DTPA claim

{¶ 38} In Ohio, a person engages in a deceptive trade practice if in the course of her business, she "[c]auses likelihood of confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services." R.C. 4165.02(A)(2). Section 43(a) of the federal Lanham Act, codified at 15 U.S.C. 1125(a)(1), prohibits a person from using a word or name in commerce that is "likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person," 15 U.S.C. 1125(a)(1)(A). The federal courts and Ohio's appellate courts have recognized that the federal code and state statute are similar in their proscription of trade practices that cause confusion about the source of goods or services, and that they should be interpreted similarly. *See Worthington Foods, Inc. v. Kellogg Co.*, 732 F. Supp. 1417, 1431 (S.D.Ohio 1990) (R.C. 4165.02 is substantially similar to 15 U.S.C. 1125(a) such that an "analysis appropriate for a determination of liability under section 43(a) of the Lanham Act is also appropriate for determining liability under [R.C. 4165.02]"); *Yonoco's Restaurant, Inc. v. Yonoco*, 100 Ohio App.3d 11, 17, 651 N.E.2d 1347 (9th Dist.1994) (R.C. 4165.02 is substantially similar to 15 U.S.C. 1125(a)); *Profusion Indus., L.L.C. v. Chem-Tek Sys., Inc.*, N.D.Ohio No. 5:16-cv-164, 2016 WL 7178731, *3 (Dec. 9, 2016) ("The analysis of an unfair competition claim under Ohio's [DTPA] is the same as for an unfair competition claim under the Lanham Act—likelihood of consumer confusion"); *Enduring Wellness, L.L.C. v. Roizen*, 8th Dist. Cuyahoga No. 108681,

2020-Ohio-3180, ¶ 46 (DTPA is substantially similar to the Lanham Act, and Ohio courts apply the same analysis that is applicable to claims commenced under analogous federal law). The focus of the inquiry in a case brought under Ohio's DTPA or the federal Lanham Act is whether the use of the trademark or trade name is "likely to cause confusion among consumers regarding the origin of the goods offered by the parties." *Daddy's Junky Music Stores, Inc. v. Big Daddy's Family Music Ctr.*, 109 F.3d 275, 280 (6th Cir.1997).

{¶ 39} The federal courts and Ohio's appellate courts have considered eight factors to assess the likelihood of consumer confusion when one competitor uses another competitor's trade name commercially: (1) the strength of the plaintiff's mark, (2) relatedness of the goods, (3) the similarity of the marks, (4) evidence of actual confusion, (5) the marketing channels used, (6) the likely degree of purchaser care, (7) the defendant's intent in selecting the mark, and (8) the likelihood of expansion of the product lines. *See Frisch's Restaurants, Inc.*, 670 F.2d at 648; *Grubbs v. Sheakley Group, Inc.*, 807 F.3d 785, 794-795 (6th Cir.2015) (outlining the eight factors and explaining how each factor is applied); *Cesare v. Work*, 36 Ohio App.3d 26, 30, 520 N.E.2d 586 (9th Dist.1987), citing *Frisch's Restaurants, Inc.* at 648; *Leventhal & Assocs., Inc. v. Thomson Cent. Ohio*, 128 Ohio App.3d 188, 197, 714 N.E.2d 418 (10th Dist.1998), citing *Cesare* at 30 and *Frisch's Restaurants, Inc.* As the federal courts have explained, a plaintiff need not show that all, or even most, of the factors are present in any particular case to prevail on its deceptive-trade-practice claim. *Wynn Oil Co. v. Thomas*, 839 F.2d 1183, 1186 (6th Cir.1988); *see also Daddy's Junky Music Stores, Inc.* at 280 (the factors are interrelated, and not all factors may be helpful in a given case). The factors simply provide a guide for assessing the likelihood of confusion. *Wynn Oil Co.* at 1186.

{¶ 40} Although we implicitly recognized many of the eight factors before the General Assembly enacted Ohio's DTPA, we have not had the opportunity to

adopt the factors or any other standard for assessing the likelihood of consumer confusion for claims brought under Ohio's DTPA. *See Natl. City Bank v. Natl. City Window Cleaning Co.*, 174 Ohio St. 510, 190 N.E.2d 437 (1963) (considering the strength of the business, the distinctiveness of the name, whether the businesses are competitors, and the similarity of the marks in analyzing a common-law trade-name-infringement claim).

{¶ 41} Today, we have the opportunity to adopt a standard for lower courts to apply to DTPA claims, but the majority squanders the opportunity away. The majority appears to consider the strength of Wooster Floral's trade name, considering only its geographic description and whether there is evidence of actual confusion in arriving at its conclusion that Wooster Floral's DTPA claim fails because Wooster Floral has not shown a sufficient likelihood of confusion. But because the majority fails to identify any factors that lower courts may use in analyzing whether the commercial use of another's trade name causes a likelihood of confusion, it leaves unclear how Ohio's courts should analyze these issues in future cases that involve different facts or a stronger trade name. And the majority's reliance on the plain language of the statute—that is, R.C. 4165.02(A)(2)'s reference to "goods and services"—adds nothing to the analysis. Although the ultimate consideration is always whether there is a likelihood of confusion regarding the source of goods or services—no one disputes that—the question the majority fails to answer is: How does a court determine whether there is a likelihood of confusion? In my view, we should answer that question. I would formally adopt the eight factors outlined in *Frisch's Restaurants, Inc.* at 648 for courts to use in analyzing claims brought under Ohio's DTPA alleging that a defendant's use of a plaintiff's trade name causes a likelihood of confusion as to the source of the defendant's goods or services.

B. A deceptive trade-practice claim may be predicated on initial-interest confusion

{¶ 42} Wooster Floral argues that the deceptive act here is the use of the Wooster Floral trade name as a domain name to redirect prospective customers to its direct competitor's website. It argues that the deceptive act is already complete by the time the prospective customer arrives at Green Thumb's website, and it is immaterial that Green Thumb's website does not use its trade name. But the majority rejects this initial-interest-confusion argument and concludes that because Green Thumb's website does not reference Wooster Floral, consumers categorically could not be confused about which business would be filling an order when they type Wooster Floral's trade name as a URL and are automatically redirected to Green Thumb's website. Although the majority acknowledges that a "trade name is descriptive of the identity of the owner of the business," majority opinion at ¶ 19, fn. 1, it inexplicably refuses to apply that principle to a trade name that is used in a URL. Rather, the majority draws an arbitrary barrier separating the connotation of the words used in a URL from the source of the goods or services contained on the website to which the URL leads. In doing so, the majority insulates from liability a competitor who misappropriates another's trade name in its URL as long as it does not use the trade name on its website. Under the majority's rationale, there is no value to the words used in a domain name or URL; only the content on the resulting website matters.

{¶ 43} The majority's wholesale refusal to recognize initial-interest confusion would therefore foreclose a similar action even if it involved a strong trade name "like Kodak or John Deere that a customer strongly and immediately associates with a particular brand," majority opinion at ¶ 19, or if the website domain consisted "solely of a trademarked name," majority opinion at ¶ 31. I would recognize that a URL or domain name provides source-identifying information and that a defendant who uses a competitor's trade name in its URL

may cause initial-interest confusion about the source of the goods or services that the defendant is offering.

{¶ 44} Initial-interest confusion "occurs when a consumer is lured to a product by its similarity to a known mark, even though the consumer realizes the true identity and origin of the product before consummating a purchase." *Eli Lilly & Co. v. Natural Answers, Inc.*, 233 F.3d 456, 464 (7th Cir.2000); *see also Brookfield Communications, Inc. v. W. Coast Entertainment Corp.*, 174 F.3d 1036, 1062 (9th Cir.1999), quoting *Dr. Seuss Ents., L.P. v. Penguin Books U.S.A., Inc.*, 109 F.3d 1394, 1405 (9th Cir.1997) ("[T]he use of another's trademark in a manner calculated 'to capture initial consumer attention, even though no actual sale is finally completed as a result of the confusion, may be still an infringement' "). Federal courts have recognized that initial-interest confusion is actionable under the Lanham Act, including claims brought under Section 43(a) of that act, 15 U.S.C. 1125(a), and claims alleging initial-interest confusion when a trademark is used as part of a URL. *See Checkpoint Sys., Inc. v. Check Point Software Technologies, Inc.*, 269 F.3d 270, 292 (3d Cir.2001) (in a case brought under Section 43(a) of the Lanham Act, the Third Circuit joined the Second, Seventh, and Ninth Circuits in recognizing initial-interest confusion as actionable); *Eli Lilly* at 464; *PACCAR, Inc. v. TeleScan Technologies, L.L.C.*, 319 F.3d 243, 250 (6th Cir.2003), *abrogated on other grounds by KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 125 S.Ct. 542, 160 L.Ed.2d 440 (2004); *Ohio State Univ. v. Thomas*, 738 F.Supp.2d 743, 755 (S.D.Ohio 2010) (in a case alleging trademark infringement and unfair competition under the Lanham Act, the court recognized that the defendant's use of a domain name containing the plaintiff's trademark had the potential to misdirect consumers as they search for websites associated with the plaintiff). Thus, although the majority notes that the Fourth Circuit does not appear to recognize initial-interest confusion, it can hardly be said that federal circuits have "largely" found the theory inapplicable, majority opinion at ¶ 28. The theory is

neither novel nor controversial, and we should not be so quick to dismiss its applicability.

{¶ 45} In rejecting the idea of initial-interest confusion, the majority fails to appreciate that a domain name contains source-identifying information. *See PACCAR, Inc.* at 250 (a significant purpose of a domain name is to identify the entity that owns the website); *Grubbs*, 807 F.3d at 794 (domain names communicate information about the source or sponsor of the website). "When a firm uses a competitor's trademark in the domain name of its website, users are likely to be confused as to its source or sponsorship." *Brookfield Communications, Inc.* at 1066. Even if there is ultimately no source confusion, the initial-interest confusion diverts anyone looking for one website to the other site. *Id*. at 1062.

{¶ 46} For those reasons, I would allow a DTPA claim to be predicated on the initial-interest confusion that may occur when a defendant uses a competitor's trade name in a URL that directs consumers to the defendant's website. I would apply the eight factors outlined in *Frisch's Restaurants, Inc.*, 670 F.2d at 648, to those claims to determine whether the domain name itself, not just the website to which consumers are ultimately directed, causes a likelihood of confusion with respect to the source of the defendant's goods or services. In the context before us, the three most important factors are the similarity of the marks, the relatedness of the goods or services, and the use of the Internet as a marketing channel by both entities. *See id*.; *PACCAR, Inc.* at 254-255.

{¶ 47} To support its contrary conclusion, the majority claims that the Sixth Circuit has found it unnecessary to apply this multifactor test in cases involving domain names. But the cases the majority cites to support that conclusion are unavailing. In *Taubman Co. v. Webfeats*, 319 F.3d 770 (6th Cir.2003), the Sixth Circuit concluded that the parties' dispute did not implicate the Lanham Act because the defendant was not using a website that shared a name with the plaintiff's shopping mall and therefore did not constitute commercial speech. *Id.* at

775-776. Nonetheless, the court said in dicta that there was also no likelihood of confusion in the case because the defendant had a conspicuous disclaimer on its noncommercial website indicating that the website was not the mall's official website and included a hyperlink that redirected users to the plaintiff's website. *Id.* at 777. That can hardly be classified as a rejection of a multifactored-analysis approach to domain-name cases.

{¶ 48} The majority then cites *Dassault Systèmes, SA v. Childress*, 828 Fed.Appx. 229, 250 (6th Cir.2020), and represents that the Sixth Circuit did not apply the *Frisch's Restaurants, Inc.* factors there either. But the majority completely ignores that the district court in that matter *did* apply the *Frisch's Restaurants, Inc.* factors when it instructed the jury on how to analyze whether the defendant's use of the plaintiff's trademark caused a likelihood of confusion. *See Dassault Systèmes, SA v. Childress*, E.D.Mich. No.2:09-cv-10534-MOB-MJH, 2017 WL 6804231, *4 (July 14, 2017). The jury subsequently returned a verdict in favor of the defendant on the plaintiff's trademark-infringement claim. The plaintiff then filed a motion for judgment as a matter of law, arguing that the jury's decision was against the manifest weight of the evidence, and the district court denied that motion. On appeal, the Sixth Circuit needed to decide only whether the record supported the jury's finding that the defendant's website was unlikely to cause confusion in order to affirm the district court's decision on that motion. The Sixth Circuit's determination that the record supported the jury's verdict—which the jury based on an application of the *Frisch's Restaurants, Inc.* factors—does not support the conclusion that the Sixth Circuit does not follow the eight-factor analysis in domain-name cases.

{¶ 49} The majority's reliance on these cases also displays a misunderstanding about the deceptive use Wooster Floral alleges here. The majority quotes *Childress* for the proposition that a consumer's initial-interest confusion will dissipate as soon as she goes to Green Thumb's website, which does

not incorporate Wooster Floral's trade name. But *Childress* focused on the potential for a defendant's website to show up following a consumer's Internet search for a particular trade name using a search engine. The defendant in *Childress* used the plaintiff's trade name only as *part* of its domain name. . Initial-interest confusion is "not as great" when it is predicated on results that are returned through an Internet search engine, as opposed to when the trade name itself is the domain name that can be typed in as a URL. *See Brookfield Communications, Inc.*, 174 F.3d at 1062; *Interstellar Starship Servs., Ltd. v. Epix, Inc.*, 304 F.3d 936, 945 (9th Cir.2002), fn. 10 (discussing the role of search engines in the initial-interest confusion context and finding it "largely irrelevant what results when a given term is input into a search engine").

{¶ 50} Similarly, the majority's reliance on language in *Multi Time Machine, Inc. v. Amazon.com, Inc.*, 804 F.3d 930 (9th Cir.2015), stating that the eight-factor test was developed for a " 'different problem—i.e., for analyzing whether two competing brands' marks are sufficiently similar to cause customer confusion' " is misplaced. (Emphasis in *Multi Time Machine, Inc.*) Majority opinion at ¶ 33, quoting *Multi Time Machine, Inc.* at 936. The Ninth Circuit in *Multi Time Machine, Inc.* reaffirmed that the eight-factor test applies to analyzing the likelihood of customer confusion. *Id.* at 936. When the court stated that those factors were developed to analyze whether competitor's *marks* caused customer confusion, it was talking about trademarks, which are treated as functionally equivalent to trade names. *Younker v. Nationwide Mut. Ins. Co.*, 175 Ohio St. 1, 6, 191 N.E.2d 145 (1963) (recognizing that the basic principles governing trade names and trademarks are the same). The issue in *Multi Time Machine, Inc.* was whether the eight-factor test applied to a dispute involving competing *brands.* The plaintiff alleged that the defendant was infringing upon its trademark because when customers typed the plaintiff's trademark into the defendant's search bar, the results would include products made by competing brands. But the defendant was not

using the plaintiff's trademark at all. In rejecting the application of the eight-factor test in that context, the Ninth Circuit explained that "the confusion [was] not caused by the design of the competitor's mark, but by the design of the web page that [was] displaying the competing mark and offering the competing products for sale." *Id.* at 937. In the " 'keyword advertising context,' " the likelihood-of-confusion analysis turns on what the consumer saw on the screen and what she reasonably believed, given the context of the search. *Id.*, quoting *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1153 (9th Cir.2011).

{¶ 51} The case before us is not a keyword-advertising case—it's a trade-name case. Green Thumb is using Wooster Floral's trade name as a domain name to redirect potential customers to Green Thumb's website. This case falls squarely within the type of dispute that the court in *Multi Time Machine, Inc.* recognized is subject to the *Frisch's Restaurants, Inc.*, 670 F.2d at 648, eight-factor test to assess whether there is a likelihood of confusion about the source of the goods or services. *See also Interstellar Starship Servs., Ltd.*, 304 F.3d at 945; *Ohio State Univ.*, 738 F.Supp.2d at 745; *Lahoti v. Vericheck, Inc.*, 636 F.3d 501, 507-509 (9th Cir.2011) (applying the eight-factor test to a domain-name dispute); *A.B.C. Carpet Co., Inc. v. Naeini*, E.D.N.Y. No. 00-CV-4884-FB, 2002 WL 100604, *3 (Jan. 22, 2002); *Icon Health & Fitness, Inc. v. Kelley*, W.D.Texas No. 1:17-CV-356-LY, 2017 WL 6610085, *2 (Dec. 27, 2017) (applying the Fifth Circuit's similar eight-factor "digits of confusion" analysis to a domain-name dispute); *TracFone Wireless, Inc. v. Clear Choice Connections, Inc.*, 102 F.Supp.3d 1321, 1327-1328 (S.D.Fla.2015) (applying the Eleventh Circuit's similar likelihood-of-confusion factors to a domain-name dispute). Plainly, the foundation the majority uses to support its rejection of the eight-factor test from *Frisch's Restaurants, Inc.* is nothing more than a house of cards, easily toppled.

{¶ 52} Neither the trial court nor the court of appeals considered whether Green Thumb's use of Wooster Floral's trade name in a URL caused initial-interest

confusion. And neither court analyzed the likelihood of confusion under the factors set out in *Frisch's Restaurant, Inc.* Consequently, I would reverse the judgment of the court of appeals and remand the case to the trial court with an order that the court apply the factors in *Frisch's Restaurant, Inc.* to determine whether Green Thumb violated Ohio's DTPA when it used Wooster Floral's protected trade name in a URL to redirect users to Green Thumb's website.

STEWART, J., concurs in the foregoing opinion.

Tucker Ellis, L.L.P., Susan M. Audey, and Melissa Z. Kelly, for appellant.

Reynolds Law Office and Craig R. Reynolds, for appellee.

[Cite as *Fayette Drywall, Inc. v. Oettinger*, 2020-Ohio-6641.]

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

FAYETTE DRYWALL, INC., et al.	:	
	:	Appellate Case No. 28636
Plaintiffs-Appellees	:	
	:	Trial Court Case No. 2017-CV-4804
v.	:	
	:	(Civil Appeal from
JOHN R. OETTINGER, TRUSTEE, et al.	:	Common Pleas Court)
	:	
Defendants-Appellants	:	

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O P I N I O N

Rendered on the 11th day of December, 2020.

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GERHARDT A. GOSNELL II, Atty. Reg. No. 0064919 & DAMION M. CLIFFORD, Atty. Reg. No. 0077777, 115 West Main Street, 4th Floor, Columbus, Ohio 43215
Attorneys for Plaintiffs-Appellants Flapjack2 Holding Company, LLC and Michael Dixson

DALE H. MARKOWITZ, Atty. Reg. No. 0016840 & BRIDEY MATHENY, Atty. Reg. No. 0070998, 100 Seventh Avenue, Suite 150, Chardon, Ohio 44023
Attorneys for Defendant-Appellee John R. Oettinger, Trustee

DAVID K. LOWE, Atty. Reg. No. 0003179, 1500 West Third Avenue, Suite 310, P.O. Box 12310, Columbus, Ohio, 43212 Chardon, Ohio 44023
Attorney for Defendant-Appellee Restaurant Specialties, Inc.

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FROELICH, J.

{¶ 1} Flapjack2 Holding Company, LLC ("Flapjack") and its principal, Michael Dixson, jointly appeal from the trial court's order that determined Flapjack had waived its right to arbitration, vacated the stay in this matter, and returned the case to that court's active docket. The order of the trial court will be affirmed.

Factual and Procedural Background

{¶ 2} In October 2017, Fayette Drywall, Inc. and Hotopp Excavating, Inc. filed suit in the Montgomery County Court of Common Pleas against John R. Oettinger, Trustee of the Oettinger 1979 Trust ("the Trust"), along with Flapjack and Restaurant Specialties Inc. ("RSI").[1] Among other causes of action, the suit included claims for breach of contract and to foreclose on mechanics liens, all related to the plaintiffs' having not been paid for their roles in the construction of an IHOP restaurant for which RSI was the general contractor and Flapjack was the restaurant developer. Flapjack originally owned the property on which the restaurant was constructed, but it sold that property to the Trust before the lawsuit was filed. In response to the complaint, the Trust filed a third-party complaint against Dixson.

{¶ 3} When this litigation began, RSI and Flapjack already were embroiled in a dispute about the construction contract governing the IHOP project. RSI moved to stay the current suit brought by Fayette Drywall and Hotopp in its entirety, to allow RSI and Flapjack to arbitrate their dispute before this case proceeded. (*See* 1/22/18 Motion to Stay

[1] The case also involved other defendants that are not relevant for purposes of this appeal.

Proceedings Pending Arbitration.) Flapjack supported that request. (2/9/18 [Flapjack's] Response * * * to [RSI]'s Motion to Stay Proceedings Pending Arbitration.) RSI's motion relied on an arbitration provision within the construction contract, which states in part as follows:

> In those instances where the parties are otherwise unable to resolve their dispute through mediation and then [sic] the parties' dispute shall be resolved through arbitration. Arbitration shall be administered by the American Arbitration Association in accordance with its Construction Industry Arbitration Rules in effect on the date of the Contract unless the parties mutually agree to administrate [sic] under different rules. Demands for arbitration shall be made in writing and must be sent to the other Party, and filed with the person or entity administering the arbitration. * * *

(*Id.*, Exh. A, "Construction Contract," p. 36, Art. 13.3.)

{¶ 4} Determining that the dispute between RSI and Flapjack was "separate and distinct" from the plaintiffs' claims, the trial court denied the motion to stay. (6/15/18 Decision, Order and Entry Overruling [RSI]'s Motion to Stay Proceedings Pending Arbitration.) RSI and Flapjack appealed. On January 11, 2019, we reversed the trial court's order, stating:

> The trial court erred by overruling RSI's motion for a stay. Therefore, the trial court's order of June 15, 2018, is reversed, and this case is remanded to the trial court with instructions to enter a stay until the arbitration of the dispute between RSI and Flapjack has been completed.

Fayette Drywall, Inc. v. Oettinger, 2d Dist. Montgomery No. 28059, 2019-Ohio-48, ¶ 16.

On January 25, 2019, the trial court issued an order imposing a stay as directed by this Court.

{¶ 5} Shortly before the stay order was issued, RSI moved in the trial court to waive arbitration and vacate the stay of proceedings. (1/21/19 Motion to Waive Arbitration and Vacate Stay.) In support, RSI offered the affidavit of its trial counsel, who attested that RSI and Flapjack had agreed in February 2018 to arbitrate their dispute through an agreed independent arbitrator, but Flapjack then failed to pay its required initial deposit toward the arbitration fee in accordance with the arbitration agreement. (Affidavit of David K. Lowe, Esq. ¶ 3-7.) RSI's counsel further attested that Flapjack's trial attorney moved to withdraw on August 9, 2018, and that no new attorney appeared on Flapjack's behalf before the scheduled arbitration date of September 17, 2018. (*Id.* at ¶ 8-10.) As a result, the arbitration was rescheduled to the week of January 14, 2019. However, on December 7, 2018, Dixson indicated to the arbitrator and RSI's attorney that Flapjack did not wish to proceed with arbitration, and Flapjack also had not acquired new counsel or taken other measures in furtherance of arbitration. (*Id.* at ¶ 11-15.) According to the affidavit, on January 27, 2019, the arbitrator, on whom the parties had agreed, advised RSI that he would not serve in that capacity because he never received Flapjack's deposit. (*Id*. at ¶ 16.)

{¶ 6} On February 7, 2019, new counsel appeared for Flapjack and Dixson and responded to RSI's motion to waive arbitration. Flapjack and Dixson argued that RSI's request was precluded by "judicial estoppel and the law of the case doctrine." (2/7/19 [Flapjack] and [Dixson]'s Memorandum in Opposition to [RSI]'s Motion to Waive Arbitration, p. 1.) They further asserted that Flapjack "did not knowingly and intentionally

agree to waive its contractual right to arbitration." (*Id.* at p. 4.) In reply, RSI contended that Flapjack did waive its right to arbitration by breaching the terms of the arbitration agreement.

{¶ 7} RSI sought to waive arbitration, to have the stay vacated, and to proceed with the pending lawsuit. Similar testimony was elicited from the witnesses RSI presented at a hearing before the trial court on the subject motion. (*See* Tr. of 6/5/19 hearing.) Flapjack and Dixson introduced no evidence at that hearing.

{¶ 8} Finding that Flapjack "did not do its part to ensure that the arbitration was conducted," the trial court concluded that Flapjack "ha[d] waived its right to arbitrate the dispute with RSI." (11/19/19 Decision, Order and Entry Sustaining Defendant [RSI]'s Motion to Waive Arbitration and Vacate Stay; Vacating Stay, p. 6, 7.) The court therefore vacated the existing stay and directed the matter to proceed on the court's active docket. (*Id.* at p. 7.)

{¶ 9} Flapjack and Dixson appeal from that decision,[2] setting forth these two assignments of error:

> 1) The trial court erred in not entering a stay until the arbitration of the dispute between RSI and Flapjack had been completed.
>
> 2) The trial court abused its discretion in concluding that Flapjack waived its right to arbitrate its dispute with RSI.

Assignment of Error #1 – Vacating Stay Prior to Arbitration

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[2] A trial court determination that a party has waived arbitration under an arbitration agreement is a final appealable order by virtue of R.C. 2711.02(C). *Reyna Capital Corp. v. McKinney Romeo Motors, Inc.*, 2d Dist. Montgomery No. 24538, 2011-Ohio-6806, ¶ 35.

{¶ 10} Flapjack and Dixson first argue that the trial court erred because both the law of the case doctrine and the doctrine of judicial estoppel require that this matter proceed to arbitration. More specifically, they urge that the trial court lacked authority to deviate from this Court's remand instructions, and that RSI's prior request for a stay pending the completion of arbitration precludes it from now advancing a contrary position.

a. Standard of Review

{¶ 11} A review to determine whether a court properly applied the law of the case doctrine presents a question of law to which a de novo standard of review applies. *Giancola v. Azem*, 153 Ohio St.3d 594, 2018-Ohio-1694, 109 N.E.3d 1194, ¶ 13, citing *Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, 972 N.E.2d 586, ¶ 17. However, because "judicial estoppel is an equitable doctrine that a court may invoke at its discretion," *Independence v. Office of the Cuyahoga Cty. Executive*, 142 Ohio St.3d 125, 2014-Ohio-4650, 28 N.E.3d 1182, ¶ 29, we review decisions regarding the application of that doctrine for an abuse of discretion. *See Saha v. Research Inst. at Nationwide Children's Hosp.*, 10th Dist. Franklin No. 18AP-661, 2019-Ohio-1792, ¶ 31, citing *Independence*. The term "abuse of discretion" implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

b. Applicable Law

{¶ 12} Pursuant to the law of the case doctrine, "the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan*, 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (1984). That doctrine "precludes a litigant from attempting to

rely on arguments * * * which were *fully pursued, or available to be pursued*," in a prior proceeding. (Emphasis added.) *Hubbard ex rel. Creed v. Sauline*, 74 Ohio St.3d 402, 404-405, 659 N.E.2d 781 (1996). Thus, "[t]he doctrine of law of the case comes into play only with respect to issues previously determined." *Quern v. Jordan*, 440 U.S. 332, 347, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979), fn. 18, citing *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 16 S.Ct. 291, 40 L.Ed. 414 (1895). On remand, "a trial court * * * confronted with substantially the same facts and issues as were involved in the prior appeal * * * is bound to adhere to the appellate court's determination of the applicable law," *Nolan* at 3, but that court "may consider and decide any matters left open by the mandate of [the appellate] court." *Quern* at 347, fn.18, quoting *Sanford Fork & Tool* at 256.

{¶ 13} Among the reasons that may warrant deviating from the law of the case is a change of circumstances. *See, e.g., State v. Davis,* 139 Ohio St.2d 122, 2015-Ohio-1615, 9 N.E.3d 1031, ¶ 29; *State v. DeVaughns*, 2d Dist. Montgomery No. 28370, 2020-Ohio-2850, ¶ 15. In addition, the law of the case doctrine "is considered to be a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results." *Nolan* at 3.

{¶ 14} In contrast, the doctrine of judicial estoppel "forbids a party 'from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.' " *Greer-Burger v. Temesi,* 116 Ohio St.3d 324, 2007-Ohio-6442, 879 N.E.2d 174, ¶ 25, quoting *Griffith v. Wal-Mart Stores, Inc.,* 135 F.3d 376, 380 (6th Cir.1998). As characterized by another Ohio appellate court, "[j]udicial estoppel involves an attempt to deceive the court itself." *Zapor Architects Group, Inc. v. Riley*, 7th Dist. Jefferson No. 03JE27, 2004-Ohio-3201, ¶ 19. Judicial estoppel "applies only when a party

shows that his opponent: (1) took a contrary position; (2) under oath in a prior proceeding; and (3) the prior position was accepted by the court." *Cavins v. S & B Health Care, Inc.*, 2015-Ohio-4119, 39 N.E.3d 1287, ¶ 84 (2d Dist.), quoting *Smith v. Dillard Dept. Stores, Inc.,* 139 Ohio App.3d 525, 533, 744 N.E.2d 1198 (8th Dist.2000), citing *Griffith* at 380 and *Teledyne Indus., Inc. v. Natl. Labor Relations Bd.,* 911 F.2d 1214, 1217 (6th Cir.1990).

c. Analysis

{¶ 15} Here, the trial court's decision to vacate the stay and bypass arbitration did not defy the law of the case doctrine. A trial court generally enjoys some degree of latitude in effectuating an appellate court's remand order. *See, e.g., Huntington Natl. Bank v. Payson*, 2d Dist. Montgomery No. 26396, 2015-Ohio-1976, ¶ 35; *State v. Chaffin*, 2d Dist. Montgomery No. 25220, 2014-Ohio-2671, ¶ 14. The court's discretion in that regard is even broader as to matters that were not "available to be pursued" among a party's arguments on appeal. *See Sauline*, 74 Ohio St.3d at 404-405, 659 N.E.2d 781.

{¶ 16} On remand, this trial court was not presented with "substantially the same facts and issues as were involved in the prior appeal," and therefore was not bound to adhere to our directive that the matter be stayed until arbitration was completed. *See Nolan*, 11 Ohio St.3d at 3, 462 N.E.2d 410. Instead, the change of circumstances regarding Flapjack's participation in the arbitration process – specifically, Flapjack's failure to engage in actions necessary for arbitration to proceed – was so substantial as to justify the trial court's exercising its discretion to deviate from the specific directive included in the remand order. The law of the case doctrine did not govern in this instance.

{¶ 17} The trial court also did not abuse its discretion by failing to apply the doctrine

of judicial estoppel to foreclose RSI from waiving arbitration rather than adhering to the arbitration procedure it previously sought. Notably, when RSI first requested a stay in order to pursue arbitration, Flapjack had not yet engaged in the conduct that prevented arbitration from occurring – i.e., Flapjack still was represented by counsel and no arbitration fee payment had been requested but left unpaid. RSI's early request that its dispute be sent to arbitration thus was not inconsistent with its later claim that Flapjack's actions had prevented arbitration from moving ahead. RSI therefore cannot be said to have changed positions in an attempt to deceive the trial court; rather, the changed circumstances created by Flapjack's failure to comply with the terms of the arbitration agreement reached between it and RSI constituted a valid reason for RSI to seek to forgo arbitration, and a valid reason for the trial court to decline to find that RSI was judicially estopped from waiving arbitration and seeking to vacate the stay.

{¶ 18} Flapjack and Dixson's first assignment of error is overruled.

Assignment of Error #2 – Finding that Flapjack Waived Arbitration

{¶ 19} In their second assignment of error, Flapjack and Dixson assert that the trial court abused its discretion in concluding that Flapjack waived its right to arbitration. Maintaining that the record fails to demonstrate that Flapjack knowingly and intentionally relinquished that right, they observe that Flapjack raised the binding arbitration provision as an affirmative defense to the lawsuit and had only limited engagement in the litigation beyond efforts aimed at arbitrating its claims. They also urge that no party would be prejudiced by staying the case until arbitration has occurred, as only the Trust's and RSI's claims against Flapjack and Dixson remain, and no discovery has taken place between RSI and Flapjack.

a. Standard of Review

{¶ 20} When determining whether a party has waived its right to arbitration under a contractual agreement, we review for an abuse of discretion. *Paulozzi v. Parkview Custom Homes, LLC*, 2018-Ohio-4425, 122 N.E.3d 643, ¶ 12 (8th Dist.), citing *Heeden v. Autos Direct Online, Inc.*, 2014-Ohio-4200, 19 N.E.3d 957, ¶ 9 (8th Dist.) and *McCaskey v. Sanford-Brown College*, 8th Dist. Cuyahoga No. 97261, 2012-Ohio-1543. As " 'the question of waiver is usually a fact-driven issue[,] * * * an appellate court will not reverse' the trial court's decision 'absent a showing of an abuse of discretion.' " *Murtha v. Ravines of McNaughton Condominium Assn.*, 10th Dist. Franklin No. 09AP-709, 2010-Ohio-1325, ¶ 20, quoting *ACRS, Inc. v. Blue Cross & Blue Shield of Minnesota*, 131 Ohio App.3d 450, 722 N.E.2d 1040 (8th Dist.1988).

b. Applicable law

{¶ 21} "Arbitration is encouraged as a method to settle disputes, and a presumption favoring arbitration arises when the claim in dispute falls within the scope of an arbitration provision." *Baker v. Schuler,* 2d Dist. Clark No. 2002-CA-20, 2002-Ohio-5386, ¶ 30, citing *Williams v. Aetna Fin. Co.,* 83 Ohio St.3d 464, 700 N.E.2d 859 (1998). Still, "[l]ike any other contractual right, the right to arbitrate may be waived." *Murtha* at ¶ 20, citing *Rock v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 79 Ohio App.3d 126, 128, 606 N.E.2d 1054 (8th Dist.1992). Given Ohio's policy favoring arbitration, the party asserting a waiver bears the burden of proving it. *Id.*

{¶ 22} To prove waiver, a party seeking such must show "(1) the waiving party knew of the existing right to arbitrate; and (2) the totality of the circumstances demonstrates the waiving party acted inconsistently with that known right." *Murtha* at ¶

21, citing *Atkinson v. Dick Masheter Leasing, II, Inc.*, 10th Dist. Franklin No. 01AP-1016, 2002-Ohio-2499, ¶ 18. "To determine whether the totality of the circumstances supports waiver, courts consider (1) whether the party seeking arbitration invoked the jurisdiction of the trial court by filing a complaint, counterclaim, or third-party complaint without asking for a stay of the proceedings; (2) the delay, if any, by the party seeking arbitration to request a stay of proceedings or an order compelling arbitration; (3) the extent to which the party seeking arbitration has participated in the litigation, including the status of discovery, dispositive motions, and the trial date; and (4) any prejudice to the nonmoving party due to the moving party's prior inconsistent actions." *Id.* at ¶ 22, citing *Tinker v. Oldaker,* 10th Dist. Franklin No. 03AP-671, 2004-Ohio-3316, ¶ 20. "[N]o one factor is controlling in a totality of the circumstances analysis." *Pinnell v. Cugini & Cappoccia Builders, Inc.*, 10th Dist. Franklin No. 13AP-579, 2014-Ohio-669, ¶ 20.

c. Analysis

{¶ 23} The trial court did not abuse its discretion in determining that Flapjack waived its right to arbitration. It is undisputed that Flapjack was aware of the existence of that right, and the record supports the trial court's conclusion that Flapjack "acted inconsistently with that known right." *See Murtha* at ¶ 21. While we acknowledge that Flapjack has engaged only minimally in defending this litigation and that the request for a stay to permit arbitration was filed early in the case (although by RSI, not by Flapjack), those factors alone are not dispositive of the waiver issue. *See id.* at ¶ 22; *Pinnell* at ¶ 20. We cannot say that the trial court acted unreasonably, arbitrarily, or unconscionably by placing heavy emphasis on Flapjack's failure to undertake the measures necessary to allow arbitration to move forward as originally scheduled, or as rescheduled. Specifically,

Flapjack's delay in executing the arbitration agreement reached with RSI, its failure to submit the required arbitration deposit, and its failure to timely secure new counsel upon existing counsel's withdrawal all supported the trial court's conclusion that Flapjack intentionally acted in derogation of the right to arbitrate.

{¶ 24} Furthermore, we agree with the trial court's conclusion that RSI has been prejudiced by the delays attributable to Flapjack. RSI expended considerable resources not only in having its attorney negotiate an alternative arbitration agreement with Flapjack and coordinate the arbitration scheduling through an independent arbitrator, but also in negotiating settlements with other parties to the lawsuit – significantly, negotiations in which Flapjack and Dixson refused to participate. The Trust, too, arguably has been prejudiced by Flapjack's delaying the arbitration proceeding while simultaneously declining to engage in resolving the pending lawsuit.

{¶ 25} Considering the totality of the circumstances, the trial court acted within the scope of its discretion by concluding that Flapjack knowingly and intentionally waived its right to mandatory arbitration. Flapjack's and Dixson's second assignment of error is overruled.

Conclusion

{¶ 26} The trial court did not err by finding that Flapjack waived its right to arbitration, vacating the stay, and directing the matter to proceed on that court's active docket. The assignments of error raised by Flapjack and Dixson are overruled, and the order of the trial court will be affirmed.

. . . . . .

HALL, J. and WELBAUM, J., concur.

Copies sent to:

Gerhardt A. Gosnell II
Damion Clifford
Dale H. Markowitz
Bridey Matheny
David K. Lowe
Anne M. Frayne
Kevin Rouch
Thomas B. Talbot
Richard Carr
Matthew Bakota
Gillum Construction, LLC
Joshua Gillum
James Kordik
Channing Kordik
Michele Phipps
Adam Bennett
Richard Heil
Hon. Barbara P. Gorman

[Cite as *Saber Healthcare v. Hudgins*, 2020-Ohio-5603.]

STATE OF OHIO))ss: COUNTY OF SUMMIT)	IN THE COURT OF APPEALS NINTH JUDICIAL DISTRICT
SABER HEALTHCARE d/b/a/ BATH MANOR NURSING FACILITY Appellant v. DAVID P. HUDGINS Appellee	C.A. No. 29698 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. 2019 ES 00284

DECISION AND JOURNAL ENTRY

Dated: December 9, 2020

HENSAL, Judge.

{¶1} Saber Healthcare d/b/a Bath Manor Nursing Facility appeals from the judgment of the Summit County Probate Court. For the reasons that follow, this Court affirms.

I.

{¶2} David Hudgins was the guardian of the person and estate of Opal Hudgins from December 1, 2016, until her death on March 16, 2018. The decedent died intestate while residing at Saber Healthcare's facility, Bath Manor Nursing Facility ("Bath Manor"). In early June 2018, over two months after the decedent's death, Saber Healthcare sent Mr. Hudgins a computer-generated bill reflecting the unpaid balance due to Saber Healthcare for the decedent's care and treatment while residing at Bath Manor. In March 2019, over one year after the decedent's death, Mr. Hudgins applied to be appointed administrator of the decedent's estate; he was appointed as such in April 2019.

{¶3} Because the June 2018 bill remained unpaid, Saber Healthcare filed a document captioned: "Confirmation of Waiver to Dispute Validity of Claim" with the probate court in August 2019. In it, Saber Healthcare asserted that it presented a claim for its unpaid invoice to the decedent's estate in June 2018 when it sent the computer-generated bill to Mr. Hudgins. It argued that, since Mr. Hudgins did not allow or reject the claim within 30 days of presentment pursuant to Revised Code Section 2117.06, Mr. Hudgins waived any objections to that claim. Mr. Hudgins moved to strike or dismiss Saber Healthcare's filing on the basis that Saber Healthcare did not present a claim to him as the duly appointed administrator of the decedent's estate within six months of the decedent's death as required under Section 2117.06. The probate court granted Mr. Hudgins's motion the following day, but then allowed Saber Healthcare time to respond to Mr. Hudgins's motion. After additional briefing was completed, the probate court again granted Mr. Hudgins's motion.

{¶4} In granting Mr. Hudgins's motion, the probate court relied upon Section 2117.06. Section 2117.06 governs the presentment of claims against an estate and requires creditors to submit claims to the executor or administrator of an estate within six months of the decedent's death. R.C. 2117.06(B). The probate court noted that, under the Ohio Supreme Court's precedent in *Wilson v. Lawrence*, 150 Ohio St.3d 368, 2017-Ohio-1410, this statute requires strict compliance. The probate court determined that, while Saber Healthcare did submit its bill to Mr. Hudgins in June 2018 (over two months after the decedent's death), it did not properly present its claim because Mr. Hudgins was not the administrator of the decedent's estate at that time. It noted that the fact that Mr. Hudgins was eventually appointed as the administrator of the decedent's estate in April 2019 (i.e., more than one year after the decedent's death) was irrelevant; the statute requires creditors to submit their claims to the executor or administrator of an estate within six

months of the decedent's death, not to a person who is eventually appointed as the executor or administrator. The probate court cited the Tenth District's decision in *In re Estate of Curry*, 10th Dist. Franklin No. 09AP-469, 2009-Ohio-6571, to support its position in this regard. In short, the probate court concluded that there was no estate at the time Saber Healthcare sent its bill to Mr. Hudgins, and that – by the time an estate was opened – the six-month period for presenting claims had expired, thus forever barring Saber Healthcare's claim. In reaching this conclusion, the probate court noted that it is incumbent upon the creditor to procure the appointment of an administrator when one has not been appointed.

{¶5} Saber Healthcare now appeals, raising five assignments of error for this Court's review. This Court will consider the first, second, third, and fifth assignments of error together.

II.

ASSIGNMENT OF ERROR I

> THE PROBATE COURT ABUSED ITS DISCRETION AND ERRED BY FAILING TO FIND THAT SABER/BATH MANOR PROPERLY PRESENTED ITS CLAIM AGAINST THE ESTATE OF OPAL HUDGINS PURSUANT TO R.C. 2117.06(A)(1), AND THE OHIO 2ND DISTRICT COURT OF APPEALS' RULING IN CHILDREN'S MEDICAL CTR. V. WARD * * *.

ASSIGNMENT OF ERROR II

> THE PROBATE COURT ABUSED ITS DISCRETION AND ERRED BY FAILING TO FIND THAT SABER/BATH MANOR PROPERLY PRESENTED ITS CLAIM AGAINST THE ESTATE OF OPAL HUDGINS, BECAUSE A CLAIM AGAINST A DECEDENT'S ESTATE NEED NOT BE IN ANY PARTICULAR FORM.

ASSIGNMENT OF ERROR III

> THE PROBATE COURT ABUSED ITS DISCRETION AND ERRED WHEN IT FAILED TO FIND THAT SABER/BATH MANOR TIMELY PRESENTED ITS CLAIM OF THE DEBT OWED TO THE ESTATE OF OPAL HUDGINS.

ASSIGNMENT OF ERROR V

> THE PROBATE COURT ABUSED ITS DISCRETION AND ERRED WHEN IT FAILED TO FIND THAT APPELLEE DAVID HUDGINS' ACTUAL KNOWLEDGE OF SABER/BATH MANOR'S CLAIM SATISFIED THE PRESENTMENT OF CLAIMS' PARTICULARITY AND EFFICIENCY REQUIREMENTS TO ENFORCE ITS CLAIM OF DEBT AGAINST THE ESTATE OF OPAL HUDGINS.

{¶6} In its first, second, third, and fifth assignments of error, Saber Healthcare argues that the probate court erred by failing to conclude that it properly presented its claim against the decedent's estate when it sent an invoice to Mr. Hudgins in June of 2018. Specifically, Saber Healthcare argues that: (1) its claim satisfied the presentment requirements set forth in Section 2117.06(A)(1) and analyzed in the Second District's decisions in *Children's Medical Center v. Ward*, 87 Ohio App.3d 504 (2d Dist.1993) and *Gladman v. Carns*, 9 Ohio App.2d 135 (2d Dist.1964); (2) the probate court's narrow interpretation of Section 2117.06 and its failure to follow *Ward* and *Carns* constituted an abuse of discretion; (3) the probate court's reliance on *In re Estate of Curry* was misplaced in light of the factual differences between the cases; (4) it properly presented its claim because, under Section 2117.06(B), "all claims shall be presented within six months after the death of the decedent, whether or not the estate is released from administration or an executor or administrator is appointed during that six-month period[,]" meaning that Mr. Hudgins was not required to be appointed as the administrator within that six-month period; (5) it had no obligation to open the estate itself, and that suggesting that it should have done so was unreasonable and borderline unconscionable since it is in the business of health and skilled nursing, not collections; and (6) Mr. Hudgins was materially aware of its claim at the time he was appointed administrator of decedent's estate, and that providing notice to the guardian and eventual administrator of the estate constituted notice to the administrator in his capacity as a

fiduciary of the estate. For the reasons that follow, this Court rejects Saber Healthcare's arguments.

{¶7} Section 2117.06 provides, in part, that creditors of an estate shall present their claims in writing to the executor or administrator of the estate within six months after the decedent's death. R.C. 2117.06(A)(1), R.C. 2117.06(C). Otherwise, a creditor's claim "shall be forever barred[.]" R.C. 2117.06(C). As the Ohio Supreme Court has stated, this statute requires strict compliance. *Wilson v. Lawrence*, 150 Ohio St.3d 368, 2017-Ohio-1410, ¶ 14. Despite Saber Healthcare's argument to the contrary, case law indicates that submitting a claim to a person within that six-month period who is not the executor or administrator of the estate at the time, but who is eventually appointed to be the executor or administrator after that six-month period expires, does not satisfy the presentment requirements under Section 2117.06. For example, in *In re Estate of Curry*, the administrator – like here – was not appointed until more than one year after the decedent's death. *In re Estate of Curry*, 2009-Ohio-6571, at ¶ 10. The creditor argued, however, that it properly presented its claim against the decedent's estate because it advised the eventual administrator of its claim within six months of the decedent's death. *Id.* at ¶ 12. The Tenth District rejected this argument, concluding that the statute and case law do not allow for the appointment of an administrator to relate back to when a creditor submits a claim to the person who eventually becomes the administrator. *Id.* at ¶ 12-15. Consistent with *In re Curry*, this Court rejects Saber Healthcare's argument that submitting its claim to Mr. Hudgins prior to his appointment as administrator satisfied Section 2117.06.

{¶8} Regarding Saber Healthcare's argument that the probate court abused its discretion by not following the Second District's precedent in *Children's Medical Center v. Ward*, 87 Ohio App.3d 504 (2d Dist.1993) and *Gladman v. Carns*, 9 Ohio App.2d 135 (2d Dist.1964), we find its

argument unpersuasive. In its merit brief, Saber Healthcare relies on those cases to support its position that the computer-generated bill met the content requirements for a claim. The content of the bill (i.e., whether it contained the necessary information), however, was not disputed in this case. In fact, the probate court noted that it "d[id] not doubt the bill[.]" Additionally, those cases do not support Saber Healthcare's contention that it timely submitted its claim.[1] Saber Healthcare's argument in that regard presupposes that Mr. Hudgins was – or should have been considered – the administrator of the estate at that time, which he was not. Saber Healthcare's reliance on *Ward* and *Carns*, therefore, is misplaced.

{¶9} Regarding Saber Healthcare's argument that it had no obligation to open the estate itself, its argument is not supported by Section 2113.06, nor the case law interpreting the statute. Section 2113.06(C) provides, in part, that a creditor of an estate may be granted administration of an estate if one is not timely opened. *See Wrinkle v. Trabert*, 174 Ohio St. 233, 237 (1963) ("Under Section 2113.06, Revised Code, plaintiff had the power to secure the appointment of an administrator within the statutory period of limitation."). As the Ohio Supreme Court has stated, "[w]here one has a claim against an estate, it is incumbent upon him, if no administrator has been appointed, to procure the appointment of an administrator against whom he can proceed." *Id.* at paragraph two of the syllabus. It further stated that "[i]f such a party fails through lack of diligence to procure such appointment within time to properly urge his claim, * * * the law should not come

[1] We note that, in both *Ward* and *Carns*, the administrator or executor had already been appointed at the time the creditors submitted their claims. *Carns* at 137 ("[T]he record discloses clearly that it was presented to the executrix within the statutory period of four months."); *Ward* at 510 ("The evidence here shows that [the creditor] sent the bills within three months after the decedent's death, the statutory time of R.C. 2117.06(B) prior to its amendment in 1990, and that the bills were writings and were received by the administrator.").

to his aid." *Id.* at 236. We, therefore, reject Saber Healthcare's argument that the probate court abused its discretion by suggesting that Saber Healthcare could have opened the estate itself.

{¶10} Lastly, to the extent that Saber Healthcare argues that actual knowledge of a claim satisfies the presentment requirements under Section 2117.06, actual knowledge by someone who is not the executor or administrator of the estate at the time the claim is submitted is not the standard. *See In re Estate of Curry*, 2009-Ohio-6571, ¶ 12-16 (rejecting the creditor's "actual knowledge" argument); *Shepherd of the Valley Lutheran Retirement Servs., Inc. v. Cesta*, 11th Dist. No. 2018-T-0033, 2019-Ohio-415, ¶ 21-28 (addressing, in part, the creditor's argument that the eventual administrator was aware of the disputed claim prior to his appointment as administrator). Section 2117.06 requires strict compliance, which was not adhered to in this case. *See Wilson*, 2017-Ohio-1410, at ¶ 14.

{¶11} In light of the foregoing, Saber Healthcare's first, second, third, and fifth assignments of error are overruled.

ASSIGNMENT OF ERROR IV

> THE PROBATE COURT ABUSED ITS DISCRETION AND ERRED WHEN IT FAILED TO FIND THAT THE FAILURE OF APPELLEE DAVID HUDGINS TO EITHER ALLOW OR REJECT THE CLAIM WITHIN 30 DAYS, OR TO TAKE ANY OTHER ACTION WITH REFERENCE TO THE FORM OF THE CLAIM, CONSTITUTES A WAIVER OF ANY OBJECTION THERETO.

{¶12} In its fourth assignment of error, Saber Healthcare argues that the probate court erred by failing to find that Mr. Hudgins waived any objections to its claim by not allowing or rejecting the claim within 30 days of presentment as required under Section 2117.06. In response, Mr. Hudgins argues that – even if Saber Healthcare had properly presented its claim – no such waiver exists under the statute. This Court agrees.

{¶13} Section 2117.06(D) provides that:

> In the absence of any prior demand for allowance, the executor or administrator shall allow or reject all claims, except tax assessment claims, within thirty days after their presentation, **provided that failure of the executor or administrator to allow or reject within that time shall not prevent the executor or administrator from doing so after that time** and shall not prejudice the rights of any claimant. Upon the allowance of a claim, the executor or the administrator, on demand of the creditor, shall furnish the creditor with a written statement or memorandum of the fact and date of the allowance.

(Emphasis added.)

{¶14} Thus, even assuming that Saber Healthcare had properly presented its claim in June of 2018, which it did not, Section 2117.06 does not indicate that an administrator's failure to respond to the claim serves as a permanent waiver of that claim. Instead, it provides the opposite, stating that the "failure of the executor or administrator to allow or reject within that time shall not prevent the executor or administrator from doing so after that time[.]" R.C. 2117.06(D); *see Ward*, 87 Ohio App.3d at 507 ("A non-response by an administrator cannot be considered a rejection under R.C. 2117.06(D) because a non-response does not prevent an executor from later either rejecting or allowing the claim."). Saber Healthcare's merit brief provides no authority to the contrary. *See* App.R. 16(A)(7) (requiring an appellant's brief to provide "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies."). Saber Healthcare's fourth assignment of error is overruled.

III.

{¶15} Saber Healthcare d/b/a Bath Manor Nursing Facility's assignments of error are overruled. The judgment of the Summit County Probate Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

JENNIFER HENSAL
FOR THE COURT

CALLAHAN, P. J.
TEODOSIO, J.
CONCUR.

APPEARANCES:

AMY C. BAUGHMAN, Attorney at Law, for Appellant.

RALPH C. MEGARGEL, Attorney at Law, for Appellee.

[Cite as *Bayview Loan Servicing, L.L.C. v. Griffen*, 2020-Ohio-6666.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

BAYVIEW LOAN SERVICING, LLC, et al.	:	
Appellees,	:	CASE NO. CA2020-02-013
	:	O P I N I O N
- vs -		12/14/2020
	:	
CHERYL GRIFFEN, et al.	:	
Appellants.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 19-CV-91976

Clunk, Hoose Company LPA, Ethan J. Clunk, Robert R. Hoose, 4500 Courthouse Blvd., Suite 400, Stow, Ohio 44224, for appellee, Bayview Loan Servicing, LLC

John E. Sharts, 5 Fairway Drive, P.O. Box 350, Springboro, Ohio 45066-0350, for appellee, Gary E. Powers

Gregory M. Gantt Company, L.P.A., Erik R. Blaine, Gregory M. Gantt, 130 West Second Street, Suite 210, Dayton, Ohio 45402, for appellant, Cheryl Griffen nka White

S. POWELL, J.

{¶ 1} Appellant, Cheryl Griffen nka White ("Cheryl"), appeals the decision of the Warren County Court of Common Pleas granting a motion to vacate the sale of real property sold at a sheriff's sale filed by appellee, Gary E. Powers. For the reasons outlined below,

we reverse the trial court's decision and remand this matter for further proceedings.

{¶ 2} On February 19, 2019, Bayview Loan Servicing, LLC ("Bayview") filed a complaint in foreclosure against Cheryl requesting to foreclose on real property Cheryl owned located in Springboro, Warren County, Ohio. Cheryl did not file any responsive pleading to Bayview's complaint, thereby prompting Bayview to file a motion for default judgment. On July 24, 2019, the trial court granted a default judgment against Cheryl to Bayview. After providing the proper notice to Cheryl and the public at large, the property was then sold at a sheriff's sale on October 7, 2019. Powers purchased the property at the sheriff's sale for $142,000.

{¶ 3} On November 6, 2019, Powers filed a motion to vacate the sheriff's sale. In support of his motion, Powers argued that he had just been advised by Clifford Griffen, the brother of Cheryl's ex-husband, Roger Griffen, that while Cheryl and Roger were married Roger built the garage located on the property "knowingly and deliberately straddling the common property line" between that property and the adjacent property owned by their now deceased mother, Elizabeth Griffen. Powers alleged that he was also advised by Clifford that the "garage encroachment" spanned approximately 8 or 10 feet onto Elizabeth's property. Therefore, because the "boundary line issues and encroachment problems" were "not discernable upon reasonable visual inspection," Powers argued that the sheriff's sale of the property should be vacated.

{¶ 4} On November 20, 2019, Bayview filed a memorandum in opposition to Powers' motion to vacate the sheriff's sale. Two days later, on November 22, 2019, Powers filed an untitled memorandum in support of his motion to vacate. Powers' memorandum was supported by an affidavit filed by Powers' counsel, Attorney John E. Sharts. Powers' memorandum, along with Attorney Sharts' affidavit, provided a detailed overview of the ownership interests in the two adjacent properties at issue. This includes the following

passage taken from the penultimate paragraph of Powers' memorandum:

> [A] succession of intestate deaths ultimately left Elizabeth with an undivided one-third (1/3rd) interest in the premises encumbered by [a] Medicaid lien, with her four children holding even prior to her death the other undivided two-thirds (2/3rds) interest among them with and without dower, they now additionally acceding to her encumbered interest. One of them, Roger, straddles this line as well: He and his ex-wife constructed the encroachment on the subject premises, and he is a fractional owner of his deceased Mother's property on the other side, and the Medicaid lien in entirety exceeds the aggregate value of the immediate neighborhood in its entirely (sic).

{¶ 5} On December 2, 2019, Bayview filed a notice that it was withdrawing its memorandum in opposition to Powers' motion to vacate the sheriff's sale. Cheryl, however, did not file any response either in favor of or in opposition to Powers' motion to vacate .

{¶ 6} On January 6, 2020, Powers filed a Civ.R. 60(B) motion for relief from judgment. Powers' motion incorporated by reference his own affidavit, as well as a "supplemental" affidavit filed by Attorney Sharts. As part of his affidavit, Powers averred that he had conducted only a "visual inspection" of the property prior to the sheriff's sale. Powers also averred that he had contacted the Warren County Sheriff's Sale Clerk "in alarm about the reported encroachment" shortly after learning about the alleged "encroachment problem" from Clifford and that he would not have bid on the property had he been aware of this problem prior to the sheriff's sale.

{¶ 7} In his "supplemental" affidavit, Attorney Sharts averred that, after consulting with Powers, he had accessed the Warren County Geographical Information Systems ("GIS") and confirmed that there was an "encroachment problem" with the two adjacent properties. This is evidenced by a clear depiction of the garage straddling the property line between the two adjacent properties.

{¶ 8} On January 15, 2020, Cheryl moved to strike Powers' Civ.R. 60(B) motion for relief from judgment and the accompanying affidavits filed by Powers and Attorney Sharts.

Cheryl argued that Powers' motion for relief from judgment should be stricken because Powers, as the successful bidder of the property, lacked standing to participate in the case to challenge the sheriff's sale. Cheryl also argued that Powers' motion should be stricken since there was no judgment that Powers could seek relief from given the fact that the trial court had yet to confirm the sale. There is no dispute that the trial court had not, and still has not, confirmed the sheriff's sale of the property subject to this appeal.

{¶ 9} On February 18, 2020, the trial court issued a decision denying Cheryl's motion to strike. The trial court also denied Powers' motion for relief from judgment. The trial court, however, granted Powers' motion to vacate the sheriff's sale. In so holding, the trial court found Powers had standing to participate in the case because it would be "inequitable" for it to "decide matters which involve and impact Mr. Powers prior to the sale confirmation without allowing him to participate." The trial court also found the "garage encroachment onto the neighboring property was not a reasonably ascertainable defect from a visual inspection of the property," thereby making it proper for the sheriff's sale to be vacated and Powers' deposit be returned to him. Cheryl now appeals, raising two assignments of error for review.[1]

{¶ 10} Assignment of Error No. 1:

{¶ 11} THE TRIAL COURT ERRED WHEN IT GRANTED POWERS' MOTION TO VACATE THE SHERIFF'S SALE DUE TO THE WELL ESTABLISHED PRINCIPLE OF CAVEAT EMPTOR.

{¶ 12} In her first assignment of error, Cheryl argues the trial court erred by granting Powers' motion to vacate the sheriff's sale of the property.

{¶ 13} The trial court's decision whether to grant a motion to vacate a sheriff's sale

1. We note that the trial court has since granted Cheryl's motion to stay pending appeal of the distribution of the proceeds from the sheriff's sale and the return of Powers' deposit.

prior to the confirmation of the sale is reviewed under an abuse of discretion standard. *See Countrywide Home Loans Servicing, L.P. v. Nichpor*, 6th Dist. Wood No. WD-15-004, 2016 Ohio App. LEXIS 2938, *3 (Apr. 22, 2016); *see also Wells Fargo Bank, N.A. v. Fortner*, 2d Dist. Montgomery 26010, 2014-Ohio-2212, ¶ 8-9. "A decision constitutes an abuse of discretion when the trial court acted unreasonably, arbitrarily, or unconscionably." *Wells Fargo Bank v. Maxfield*, 12th Dist. Butler No. CA2016-05-089, 2016-Ohio-8102, ¶ 32, citing *Bank of Am., N.A. v. Jackson*, 12th Dist. Warren No. CA2014-01-018, 2014-Ohio-2480, ¶ 9. "'A decision is unreasonable if there is no sound reasoning process that would support that decision.'" *Stidham v. Wallace*, 12th Dist. Madison No. CA2012-10-022, 2013-Ohio-2640, ¶ 8, quoting *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161 (1990). "When applying an abuse of discretion standard, we are not free to merely substitute our judgment for that of the trial court." *BAC Home Loans Servicing, L.P. v. Mapp*, 12th Dist. Butler No. CA2013-10-193, 2014-Ohio-2005, ¶ 29.

{¶ 14} Cheryl initially argues the trial court erred by granting Powers' motion to vacate the sheriff's sale because Powers did not have standing to appear and participate in the case to protect the interest he acquired by being the successful bidder of the property at the sheriff's sale. We disagree.

{¶ 15} Although it appears Powers would not have had standing to appeal "regarding the granting or denying of confirmation of said sale," *Bank of N.Y. v. Rains*, 12th Dist. Butler No. CA2012-04-092, 2013-Ohio-2389, ¶ 27, citing *Ohio Savings Bank v. Ambrose*, 56 Ohio St.3d 53, 55 (1990), once he became the successful bidder of the property at the sheriff's sale, Powers had standing to appear and participate in the proceedings before the trial court to protect his newly acquired interest in the property. This holds true despite the fact that Powers did not first move the trial court to allow him to intervene in the case. *See, e.g., Treasurer v. Kafele*, 10th Dist. Franklin No. 05AP-252, 2005-Ohio-6618, ¶ 8 ("once [the

buyer] became the successful bidder at sheriff's sale, he had standing to appear in the trial court and to move to protect his acquired interest in the property, although better practice may have been to move to intervene prior to doing so"). Cheryl's claim otherwise lacks merit.

{¶ 16} Cheryl also argues the trial court erred by granting Powers' motion to vacate the sheriff's sale because the sale was governed by the doctrine of caveat emptor, i.e., let the buyer beware. We agree.

{¶ 17} The doctrine of caveat emptor applies in all its rigor to purchasers at judicial sales like the sheriff's sale in this case. *Holley v. Haynes*, 4th Dist. Meigs No. 450, 1991 Ohio App. LEXIS 3934, *7 (Aug. 8, 1991). "[U]nder this doctrine, a purchaser of real estate at a judicial sale will be charged with knowledge of an alleged defect in [the] title where the conditions are of public record and are easily discoverable by the purchaser." *LaSalle Bank Natl. Assn. v. Brown*, 2d Dist. Montgomery No. 25822, 2014-Ohio-3261, ¶ 47. "The duty of examining public records is especially incumbent upon a person who purchases property at a judicial sale, because in this instance the duty is based not only on general ground, but also on the consideration that the maxim, caveat emptor, applies with full force to a transaction of this character." *Roos v. H.W. Roos*, 1st Dist. Hamilton No. 5641, 1940 Ohio App. LEXIS 1108, *39 (Nov. 4, 1940). "[T]he purchaser at a judicial sale is bound to examine the title to the land himself and if he fails to do so, he must suffer the loss caused by that failure." *Spence v. First Federal Sav. & Loan Assn.*, 6th Dist. Fulton No. 91FU000020, 1992 Ohio App. LEXIS 4260, *12 (Aug. 21, 1992).

{¶ 18} "'[I]n the absence of fraud or express warranty the purchaser has no relief against a defect in the title or any restrictions appertaining to said property, nor has a purchaser at such sale any relief for any unsuitableness of the land for any particular purpose which an examination that he was free to make would have revealed.'"

Commercial Natl. Bank v. Zeis, 3rd Dist. Seneca No. 13-86-3, 1987 Ohio App. LEXIS 9129, *5-6 (Oct. 13, 1987), quoting *King v. Newark Trust Co.*, Licking C.P. No. 41123, 1957 Ohio Misc. LEXIS 306 (June 25, 1957). The record indicates that Powers conducted a visual inspection of the property prior to the sheriff's sale. Powers, however, did not conduct any further investigation of the property via any of the public records available to him. This includes, for instance, Powers' failure to investigate the property through the publicly accessible Warren County GIS website. The record instead indicates that search was done only *after* Powers consulted with Attorney Sharts. The purchaser "buys with his eyes open, at his own risk, and is without [recourse] in case there is a defect in the title of the former owner of the property bought." *Kain v. Weitzel*, 72 Ohio App. 229, 233 (1st Dist.1943). This holds true regardless of whether the mortgagee, in this case Bayview, has objected to the sheriff's sale being vacated.

{¶ 19} In light of the foregoing, although we certainly understand the difficulties that Powers may now incur by having the sale of the property reinstated in this case, we believe those difficulties are the direct result of Powers' own failure to act with the necessary due diligence prior to submitting his winning bid for the property. "[T]he primary purpose of the judicial sale is to protect the interest of the mortgagor-debtor and to promote a general policy which provides judicial sales with a certain degree of finality." *Society Natl. Bank v. Wolff*, 6th Dist. Sandusky No. S-90-13, 1991 Ohio App. LEXIS 1821, *9 (Apr. 26, 1991); *CitiMortgage, Inc. v. Roznowski*, 139 Ohio St.3d 299, 2014-Ohio-1984, ¶ 23 (emphasizing "that a judgment decree in foreclosure is a final order and that judicial sales have a certain degree of finality"); *Countrywide Home Loans Servicing, L.P. v. Nichpor*, 136 Ohio St.3d 55, 2013-Ohio-2083, ¶ 7 (noting that "judicial sales have a certain degree of finality"). To hold otherwise, thereby allowing the sheriff's sale to be vacated, would significantly thwart that purpose. Therefore, to the extent outlined above, Cheryl's first assignment of error has

merit and is sustained. The trial court's order granting Powers' motion to vacate is reversed.

{¶ 20} Assignment of Error No. 2:

{¶ 21} THE TRIAL COURT ERRED BY DENYING THE MOTION TO VACATE, (sic) THE AFFIDAVIT OF GARY E. POWERS, AND THE SUPPLEMENTAL AFFIDAVIT OF JOHN E. SHARTS.

{¶ 22} In her second assignment of error, Cheryl argues the trial court erred by denying her motion to strike the affidavits submitted by Powers and Attorney Sharts in support of Powers' Civ.R. 60(B) motion for relief from judgment. Cheryl supports this argument by again alleging that Powers did not have standing to appear and participate in this case. However, as discussed more fully above, Powers had standing to appear and participate in this case as the winning bidder of the property at the sheriff's sale. This holds true despite the fact that the trial court has yet to confirm the sale of the property. Therefore, based on the facts and circumstances here, we find no abuse of discretion in the trial court's decision to deny Cheryl's motion to strike. *See Bank of N.Y. Mellon v. Putman*, 12th Dist. Butler No. CA2012-12-267, 2014-Ohio-1796, ¶ 9 (a trial court's ruling on a motion to strike will not be reversed on appeal absent an abuse of discretion). Accordingly, finding no error in the trial court's decision, Cheryl's second assignment of error lacks merit and is overruled.

{¶ 23} Judgment affirmed in part, reversed in part, and remanded.

HENDRICKSON, P.J., and RINGLAND, J., concur.

User Name: James Sandy
Date and Time: Friday, December 4, 2020 9:52:00 AM EST
Job Number: 131468585

Document (1)

1. *Richissin v. Rushmore Loan Mgmt. Servs., LLC, 2020 U.S. Dist. LEXIS 223128*

Client/Matter: 107841.0000/00000
Search Terms: 2020 US Dist LEXIS 223128
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	-None-

Richissin v. Rushmore Loan Mgmt. Servs., LLC

United States District Court for the Northern District of Ohio, Eastern Division

November 30, 2020, Decided; November 30, 2020, Filed

CASE NO. 20 CV 871

Reporter
2020 U.S. Dist. LEXIS 223128 *

Timothy J. Richissin, et al., Plaintiffs, vs. Rushmore Loan Management Services, LLC, et al., Defendants.

Memorandum of Opinion and Order

Core Terms

borrower, servicer, credit reporting, pleadings, settlement agreement, condition precedent, mortgage loan, foreclosure, obligations, plaintiffs', tradeline, reinstatement, reporting, trigger

Counsel: **[*1]** For Timothy J. Richissin, Heidi C. Richissin, Plaintiffs: Brian D. Flick, Daniel M. Solar, Dann Law, Cleveland, OH; Marc E. Dann, DannLaw, Cleveland, OH.

For Rushmore Loan Management Services, LLC, U.S. Bank Trust National Association, As Trustee for The Loan Acquisition Trust 2017-RPL1, Defendants: Doori C. Song, Thompson Hine - Cleveland, Cleveland, OH; Jessica E. Salisbury-Copper, Thompson Hine - Miamisburg, Miamisburg, OH.

Judges: PATRICIA A. GAUGHAN, Chief United States District Judge.

Opinion by: PATRICIA A. GAUGHAN

Opinion

INTRODUCTION

This matter is before the Court upon Defendants' Motion for Judgment on the Pleadings (Doc. 14). This is a breach of contract case. For the reasons that follow, the motion is GRANTED in PART and DENIED in PART. Defendants' motion is DENIED as to count one and GRANTED as to count two.

FACTS

For purposes of ruling on the pending motion, the facts set forth in the pleadings are presumed true.

Plaintiffs Timothy and Heidi Richissin filed this lawsuit against defendants Rushmore Loan Management Services LLC ("Rushmore") and U.S. Bank Trust, N.A., as Trustee for Loan Acquisition Trust 2017-RPL1 ("U.S. Bank") alleging wrongdoing related to a settlement agreement. **[*2]**

Plaintiffs executed a promissory note and mortgage in connection with the acquisition of real property. Non-defendant Household Realty Corporation ("HRC") initiated foreclosure proceedings against plaintiffs in 2013. As part of a resolution of the foreclosure action, plaintiffs and HRC entered into a settlement agreement. The settlement agreement bound all parties, as well as their successors and assigns. Pursuant to the agreement, HRC agreed to report to the three major credit reporting agencies that the tradeline has been deleted. It appears that HRC fulfilled its obligation. The agreement provides that, prior to instituting litigation related to the credit reporting, plaintiffs would notify each of the three credit reporting agencies through the dispute processes set forth in the *Fair Credit Reporting*

Act.

According to the complaint, on or about February 1, 2017, the loan was sold to defendant U.S. Bank. At some point between the sale of the loan and September 26, 2019, defendant Rushmore improperly reinstated the tradeline. In correspondence dated September 26, 2019 ("September 26 letter"), counsel for plaintiffs informed Rushmore that they believed Rushmore committed an error in **[*3]** the "servicing of the loan" by reinstating the tradeline in contravention of the settlement agreement. Rushmore responded on October 22, 2019, acknowledging that it erroneously reinstated the tradeline. Rushmore indicated that the reporting has been "suppressed' and that it placed a "permanent block" on the account.

Plaintiffs allege that they suffered damage to their credit ratings, which prevented them from obtaining credit. Thereafter, plaintiffs filed this lawsuit containing two claims for relief. Count one is a claim for breach of contract and is asserted against both defendants. Count two is a claim for violation of the Real Estate Settlement Procedures Act ("RESPA") and is asserted only against defendant Rushmore.

Defendants move for judgment on the pleadings and plaintiffs oppose the motion.

STANDARD OF REVIEW

A "motion for judgment on the pleadings under Rule 12(c) is generally reviewed under the same standard as a Rule 12(b)(6) motion."Mellentine v. Ameriquest Mortg. Co., 515 Fed. Appx. 419, 2013 WL 560515 (6th Cir. February 14, 2013) (citing EEOC v. J.H. Routh Packing Co., 246 F.3d 850, 851 (6th Cir.2001)). "For purposes of a motion for judgment on the pleadings, all well-pleaded allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless entitled to judgment." JPMorgan Chase Bank, N.A. v. Winget, 510 F.3d 577, 581 (6th Cir.2007).

Thus, "[w]e assume **[*4]** the factual allegations in the complaint are true and construe the complaint in the light most favorable to the plaintiff." Comtide Holdings, LLC v. Booth Creek Mgmt. Corp., 335 Fed. Appx. 587, 2009 WL 1884445 (6th Cir. 2009) (citing Bassett v. NCAA, 528 F.3d 426, 430 (6th Cir. 2008)). In construing the complaint in the light most favorable to the non-moving party, "the court does not accept the bare assertion of legal conclusions as enough, nor does it accept as true unwarranted factual inferences." Gritton v. Disponett, 332 Fed. Appx. 232, 2009 WL 1505256 (6th Cir. 2009) (citing In re Sofamor Danek Group, Inc., 123 F.3d 394, 400 (6th Cir.1997). As outlined by the Sixth Circuit:

> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the statement need only give the defendant fair notice of what the ... claim is and the grounds upon which it rests."Erickson v. Pardus, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). However, "[f]actual allegations must be enough to raise a right to relief above the speculative level" and to "state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 555, 570. A plaintiff must "plead[ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

Keys v. Humana, Inc., 684 F.3d 605, 608 (6th Cir.2012). Thus, *Twombly* and *Iqbal* require that the complaint contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face based on factual content that allows the court **[*5]** to draw the reasonable inference that the defendant is liable for the misconduct alleged. Twombly, 550 U.S. at 570; Iqbal, 556 U.S. at 678. The complaint must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555.

ANALYSIS

1. Breach of contract

According to defendants, the settlement agreement requires that plaintiffs notify the three major credit reporting agencies before instituting litigation. Plaintiffs, however, fail to allege that they satisfied this condition precedent before filing this lawsuit. Plaintiffs respond that they have alleged that they "dutifully performed their obligations pursuant to the Agreement and have complied with all of its terms and conditions." According

to plaintiffs, this is sufficient to allege that they complied with all conditions precedent.

Upon review, the Court rejects defendants' argument. It is not entirely settled whether a plaintiff is required to affirmatively plead the performance of a condition precedent when performance of the condition is not an *element* of the underlying cause of action. *See, e.g.,* Brown Family Trust, LLC v. Dick's Clothing & Sporting Goods, Inc., 2014 U.S. Dist. LEXIS 19949, 2014 WL 617668 (S.D. Ohio Feb. 18, 2014). The Court, however, need not reach this issue. Federal Rule of Civil Procedure 9(c) provides that "in pleading conditions precedent, it suffices to allege **[*6]** generally that all conditions precedent have occurred or been performed." *See,* Ginsburg v. Ins. Co. of North America, 427 F.2d 1318 (6th Cir. 1970)(plaintiff satisfied Rule 9(c) by affirmatively pleading in requests for admission that she performed conditions precedent). The Court finds that plaintiffs' allegation that they have complied with all conditions to the contract satisfies the pleading requirements set forth in Rule 9(c). Thus, even assuming plaintiffs are required to plead performance of conditions precedent, they have done so here.

Defendants citations are inapposite. As an initial matter, defendants cite Ohio cases, which do not address federal pleading rules. Defendants further cite Salazar v. Progressive Northern Ins. Co., 2014 U.S. Dist. LEXIS 193253, 2014 WL 12596528 (N.D. Ohio Sept. 30, 2104). *Salazar*, however, is easily distinguishable. In *Salazar*, the court first noted that Rule 9(c) requires only a general allegation of compliance with conditions precedent. The court held, however, that dismissal may be proper where the facts pleaded by the plaintiff "contradict her general claim that she satisfied the conditions precedent to filing suit under the insurance policy." There is no such contradiction in the complaint before this Court.[1]

For these reasons, the Court finds that defendants are not entitled to judgment on the pleadings.

2. RESPA

Defendant Rushmore argues **[*7]** that judgment on the pleadings is warranted because the September 26 letter does not constitute either a qualified written request ("QWR") or a notice of error ("NOE"). According to defendant, both of these terms require that the correspondence relates to the "servicing" of the loan. Because the September 26 letter did not identify a problem with the servicing of the loan, and instead related to the reinstatement of the tradeline on plaintiffs' credit report, there can be no RESPA violation. In response, plaintiffs argue that error resolution and information requests apply regardless of whether the servicer receives a QWR. According to plaintiffs, the phrase "other standard servicer's duties," which is set forth in 12 U.S.C. § 2605(k)(1)(C) imposes broader duties on servicers than "merely responding to QWRs that relate to servicing errors." According to plaintiffs, issues related to credit reporting fall within this broad definition. Because the September 26 letter identifies a credit reporting issue, which relates to a servicing error, judgment on the pleadings is not warranted.

Upon review, the Court agrees with defendant that judgment on the pleadings is warranted with respect to plaintiffs' claim asserted **[*8]** under 12 U.S.C. § 2605 because the September 26 letter is not directed at the "servicing of the loan." 12 U.S.C. § 2605(e) sets out various obligations loan servicers have in responding to borrower inquiries. In order to trigger the servicer's statutory duties, the borrower must send the servicer a "[QWR] for information relating to the servicing of [the] loan." The QWR must include "a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error." In response, the servicer is obligated to, among other things, timely respond to the borrower, make any appropriate corrections, and transmit to the borrower a written notification of such correction. 12 U.S.C. § 2605(e)(2).

The statute goes on to impose credit reporting protection in favor of the borrower. "During the 60-day period beginning on the date of the servicer's receipt from any borrower of a qualified written request relating to a dispute regarding the borrower's payments, a servicer may not provide information regarding any overdue payment, owed by such borrower and relating to such period or qualified written request, to any consumer reporting agency." 12 U.S.C. § 2605(e)(3).

The Court finds that the September 26 letter does not relate to the "servicing of **[*9]** the loan" and, as such, defendant cannot be liable under Section 2605(e)(3). "Servicing" is a statutorily defined term. "The term 'servicing' means receiving any scheduled periodic payments from a borrower pursuant to the terms of any

[1] Defendants also rely on Prince v. NLRB, 2017 U.S. Dist. LEXIS 60663, 2017 WL 1424983 (S.D. Ohio April 20, 2017). In *Prince*, however, the *pro se* plaintiff did not dispute that he failed to exhaust his administrative remedies a condition precedent prior to filing suit.

loan...and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan." *12 U.S.C. §2605(i)(3)*. Not all issues arising between borrowers and servicers are subject to *12 U.S.C. § 2605(e)(3)*. *See, e.g.*, *Smallwood v. Bank of Am., N.A., 2015 U.S. Dist. LEXIS 160926, 2015 WL 7736876 (S.D. Ohio Dec. 1, 2015)*(requests for loan modifications are not QWRs because modifications do not qualify as "servicing" such that obligations are triggered under *Section 2605*). The complaint does not allege any error on the part of the defendant in either "receiving scheduled periodic payments" or "making...payments" on behalf of the borrower. Rather, the September 26 letter identifies "breaching a settlement agreement by failing to suppress credit reporting" as the basis for its request. (Doc. 1-1). Plaintiffs do not cite any authority supporting a conclusion that breaching the terms of a separate settlement agreement constitutes a "servicing" error. This is so even though the underlying issue is the alleged reinstatement of the tradeline. **[*10]** There is no indication that the reinstatement arose as the result of the failure of defendant to properly account for the receipt and distribution of payments made by plaintiffs. Nor is there any allegation that defendant ever improperly reported any credit information to a credit bureau.[2] Rather, the sole basis for the September 26 letter is to alert defendant that it is in breach of a settlement agreement. The Court finds that these actions do not meet the statutory definition of "servicing" and, as such, defendant's obligations under *Section 2605(e)* are not triggered by the September 26 letter.

Plaintiffs also allege that defendant violated *Sections 2605(k)(1)(C)*, which is directed at NOEs. *Section 2605(k)(1)(C)* prohibits a servicer from failing to "take timely action to respond to a borrower's requests to correct errors relating to allocation of payments, final balances for purposes of paying off the loan, or avoiding foreclosure, or other standard servicer's duties." According to plaintiffs, the phrase "other standard servicer's duties" imposes broader obligations on servicers than merely responding to requests that relate to servicing errors. In support of their position, plaintiffs rely on *12 C.F.R. § 1024.35*[3] and the commentary thereto. The provision provides **[*11]** as follows:

> (b) Scope of error resolution. For purposes of this section, the term "error" refers to the following categories of covered errors:
>
> (1) Failure to accept a payment that conforms to the servicer's written requirements for the borrower to follow in making payments.
>
> (2) Failure to apply an accepted payment to principal, interest, escrow, or other charges under the terms of the mortgage loan and applicable law.
>
> (3) Failure to credit a payment to a borrower's mortgage loan account as of the date of receipt in violation of *12 CFR 1026.36(c)(1)*.
>
> (4) Failure to pay taxes, insurance premiums, or other charges, including charges that the borrower and servicer have voluntarily agreed that the servicer should collect and pay, in a timely manner as required by *§ 1024.34(a)*, or to refund an escrow account balance as required by *§ 1024.34(b)*.
>
> (5) Imposition of a fee or charge that the servicer lacks a reasonable basis to impose upon the borrower.
>
> (6) Failure to provide an accurate payoff balance amount upon a borrower's request in violation of section *12 CFR 1026.36(c)(3)*.
>
> (7) Failure to provide accurate information to a borrower regarding loss mitigation options and foreclosure, as required by *§ 1024.39*.
>
> (8) Failure to transfer accurately and timely information relating **[*12]** to the servicing of a borrower's mortgage loan account to a transferee servicer.
>
> (9) Making the first notice or filing required by applicable law for any judicial or non-judicial foreclosure process in violation of *§ 1024.41(f)* or *(j)*.
>
> (10) Moving for foreclosure judgment or order of sale, or conducting a foreclosure sale in

[2] Plaintiffs do not allege that defendant's reinstatement of the tradeline violates any credit reporting obligations that arise pursuant to statute. Nor do plaintiffs contend that the tradeline is inaccurate. Rather, plaintiffs allege solely that defendant's obligations to maintain deletion of the tradeline arise by contract.

[3] This provision appears in *Regulation X*, which was promulgated by the Consumer Financial Protection Board. *Regulation X* expanded servicer's duties to respond to requests made by borrowers.

> violation of § 1024.41(g) or (j).
> (11) Any other error relating to the servicing of a borrower's mortgage loan.

In addition, plaintiffs point out that the commentary indicates that

> ...[S]tandard servicer duties are not limited to duties that constitute "servicing," as defined in this rule, and include, for example, duties to comply with investor agreements and servicing program guides, to advance payments to investors, to process and pursue mortgage insurance claims, to monitor coverage for insurance (e.g., hazard insurance), to monitor tax delinquencies, to respond to borrowers regarding mortgage loan problems, to report data on loan performance to investors and guarantors, and to work with investors and borrowers on options to mitigate losses for defaulted mortgage loans.

Defendant argues that there is nothing on the face of the statute or Regulation X that would include credit reporting errors **[*13]** as within the scope of an NOE under RESPA. The Court agrees with defendant. Plaintiffs do not allege or argue that the alleged breach of the settlement agreement or any failure to properly report credit information falls within the first ten enumerated categories of 12 C.F.R. § 1024.35. Rather, plaintiffs argue that credit reporting errors constitute "other" errors that relate to the servicing of a mortgage loan under category 11. But, defendant's obligation to refrain from reporting the tradeline arose as a result of a written settlement agreement, not as a "*standard* servicer duty." Moreover, even if this alleged error arose outside of the settlement agreement, the Court disagrees with plaintiffs' position that credit reporting falls within the "catchall" phrase of 12 C.F.R. § 1024.35(b)(11). Congress and the Consumer Financial Protection Board are surely well-aware that credit reporting may occur, yet this activity is not expressly identified anywhere as a "servicing duty" or servicing "error." This may be because the Fair Credit Reporting Act is a remedial statutory scheme that covers credit reporting errors.

Plaintiffs argue that 12 U.S.C. § 2605(e)(3), which imposes an obligation on servicers to suspend credit reporting, demonstrates that Congress **[*14]** understood that servicers undertake credit reporting duties. The Court finds that Section 2605(e)(3) undercuts, rather than advances, plaintiffs' position. Congress inserted this provision into RESPA, but did not expressly identify "credit reporting" *anywhere* as an enumerated "servicing" activity or "servicing error." This demonstrates an intent that credit reporting activities would not trigger obligations under Regulation X. Regardless, plaintiffs cite no law supporting their position that credit reporting constitutes a "servicing" activity under RESPA.[4]

Nor does the commentary save plaintiffs' claim. Plaintiffs argue that the commentary identifies additional types of activities, including working with "borrowers on options to mitigate loss for defaulted mortgages," that may trigger the servicer's duty to respond to an NOE. But there are no allegations in the complaint that the September 26 letter is directed at "options to mitigate loss for a mortgage in default." Accordingly, the commentary does not assist plaintiffs.

The Court also rejects plaintiffs' argument that they have stated a claim for violation of Section 2605(k)(1)(E). That provision prohibits a servicer from failing to "comply with any other obligation **[*15]** found by the Bureau of Consumer Financial Protection, by regulation, to be appropriate to carry out the consumer protection purposes of this chapter." Plaintiffs do not identify any such "other obligation."

Because plaintiffs fail to point to any provision of RESPA that is triggered by the September 26 letter, which notified defendant that it breached the parties' settlement agreement, defendant is entitled to judgment on the pleadings with respect to count two.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Judgment on the Pleadings is GRANTED in PART and

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[4] Plaintiffs argue that "several courts have *allud*ed to the fact that questions related to credit reporting raised in either QWRs or NOEs may constitute viable claims under 12 C.F.R. § 1024.35(b)(11)." (Doc. 18 at PageID 153)(emphasis added). But a cursory review of these cases demonstrates that they do not support plaintiffs' position because they do not discuss whether credit reporting issues trigger obligations under RESPA. *See,* Fowler v. Bank of America, Corporation, 747 Fed. Appx. 666, 670 (10th Cir. 2018)(rejecting plaintiffs' claim that any actual damages suffered for improper credit reporting were tied in any way to plaintiff's RESPA claims); Ponder v. Ocwen Loan Servicing, 2020 U.S. Dist. LEXIS 145132 (N.D. Ga. April 22, 2020)(summary judgment not proper where defendant generically argued that plaintiff's letters do not constitute QWRs because they were "tantamount to a continuous wild goose chase").

DENIED in PART. Defendant's motion is DENIED as to count one and GRANTED as to count two.

IT IS SO ORDERED.

/s/ Patricia A. Gaughan

PATRICIA A. GAUGHAN

United States District Judge

Chief Judge

Dated: 11/30/20

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