Nos. 15-1465 & 15-1468

In the United States Court of Appeals for the Sixth Circuit

SETARA TYSON,
Plaintiff-Appellee-Cross-Appellant,

v.

STERLING RENTAL, INC., dba CAR SOURCE
Defendant-Appellant-Cross-Appellee

AND

AL CHAMI AND RAMI KAMIL,
Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court for the Eastern District of Michigan

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT SETARA TYSON (FOURTH BRIEF)

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INTRODUCTION

Car Source's 55-page brief contains Abraham Lincoln quotations, Better Business Bureau records, a generic defense of yo-yo scams, dire warnings about public benefits, and ten pages of ad hominem attacks on Ms. Tyson's trial counsel. But not once does it offer a coherent justification for Car Source's decision to ignore federal law. Although ECOA's notice requirements are not arduous, Car Source refuses to accept that it must follow them. In its view, requiring compliance would encourage "frivolous, nuisance suit[s]." But had Car Source simply given Ms. Tyson the reasons behind its decision to revoke her credit, this lawsuit might have been avoided. That is not too much to ask.

Car Source likewise offers no defense of the district court's holdings on injunctive relief and the economic-loss doctrine. ECOA authorizes an injunction for *any* "aggrieved applicant," 15 U.S.C. § 1691e(c)—not, as the district court believed, only in actions brought by the Attorney General. And there should be no question that Michigan's conversion statute overrides the common-law economic-loss doctrine. It authorizes a statutory-conversion claim "in addition to any other right or remedy," meaning that it "work[s] alongside" *all other* "available" remedies. *Aroma Wines & Equip. v. Columbian Distr. Servs.*, 497 Mich. 337, 357 n.51 (2015). Common-law rules "must yield" in the face of a conflicting statutory provision. *Pulver v. Dundee Cement Co.*, 515 N.W.2d 728 (Mich. 1994).

ARGUMENT

I. There is no material factual dispute concerning Car Source's violation of federal law.

A. The district court correctly held that Car Source violated ECOA's notice requirement because the dealership "offered Ms. Tyson a set of credit terms, then revoked her credit after attempting to change the terms of her existing arrangement, and failed to provide the required explanation because it 'did not even know what the ECOA was.'" Tyson Br. 22. Car Source disputes none of this.

Instead, Car Source's response is that the court "improperly decided" that federal law "provide[s] protection for a person who lies about their income when purchasing a used car." Third Br. 4. From the "start," Car Source contends, it was "lied to" when Ms. Tyson "misrepresented her income on her credit application." Third Br. 33–34. But no record evidence supports this claim, and Car Source cites none. Specifically, Car Source repeats the claim that Ms. Tyson "lied" on her application no less than a dozen times (e.g. at 4, 12, 33, 48) but never backs up that assertion with record evidence. Here is a typical example:

> The District Court ignored the fact that Ms. Tyson lied significantly on her credit application stating that she made $1,800.00 per month rather than the $1,000.00 per month which she actually made. Car Source has, and continues to maintain that Ms. Tyson brought a frivolous, nuisance suit under the ECOA just like the one described by the Sixth Circuit in *Lewis, supra*.

Third Br. 41.[1] The absence of any record support dooms Car Source's appeal. As the district court found, Car Source has "presented no admissible evidence" that Ms. Tyson "lied about her income." [Reconsideration Order, R. 58, Page ID #973.] Needless to say, there can be no "material question of fact" where a party's "attempts to create" one are "without support in the record." *Daniels v. Woodside*, 396 F.3d 730, 735–36 (6th Cir. 2005).

Nor can a party manufacture a genuine factual dispute by raising wholly speculative assertions that are "contradicted by other documentary evidence." *Bout v. Bolden*, 22 F. Supp. 2d 646, 648 (E.D. Mich. 1998). For example, Car Source claims that, because Ms. Tyson "did not say specifically that she made exactly $1,817.38 a month," and allegedly "told" a Car Source employee "that she made $900.00 every two weeks," the district court should have inferred that Ms. Tyson "affirmatively" lied about her income. Third Br. 50, 46, 51. But far from establishing that she "lied" when she came in to purchase a car, the record conclusively shows that Ms. Tyson—like most first-time car buyers—did everything right. When she visited Car Source, she brought "copies of her two most recent pay stubs" and copies of her most recent "bank statements from Bank of America"

[1] This is by no means the only example. *See, e.g.*, Third Br. 33–34 ("Car Source and its individual defendants were lied to when Ms. Tyson told them she made $900 every two weeks . . . . Specifically, Ms. Tyson misrepresented her income on her credit application."). But, as with the other assertions, Car Source cites nothing in the record to support this claim.

[Tyson Decl., R. 41-2, Page ID #419]—a fact Car Source itself confirmed. [See Kamil Depo., R. 44-2, Page ID #640.] These paystubs accurately showed that she grossed "about $1,000 per month." [Tyson Decl., R. 41-2, Page ID #419.] Car Source's speculation cannot "contradict any of the specific factual assertions contained" in the record. [Reconsideration Order, R. 58, Page ID #972.]

Documentary evidence aside, Car Source's own procedures undermine its factual argument. The system that Car Source used to process Ms. Tyson's deal required Car Source to "fill in all the information off of the pay stub." [Lun Depo., R. 41-10, Page ID #505.] And, when it passed the contract on to its financer, the dealer included "Ms. Tyson's pay stubs to prove her income." [*Id.*, Page ID #504.] Even Credit Acceptance—Car Source's own financing company—disputed the notion that Ms. Tyson "lied." When asked what could explain any discrepancy between Ms. Tyson's documentation of her income and Car Source's, it concluded that Car Source either "chose the wrong way" to complete the credit application or "entered [the information] incorrectly." [*Id.*, Page ID #510.]

B. All this speculation over a discrepancy on the credit application, while misguided, is also legally irrelevant. A creditor is not released from ECOA's "strict" notice requirements whenever it can point to a discrepancy in a consumer's credit application. *Fischl v. Gen'l Motors Acceptance Corp.*, 708 F.2d 143, 146 (5th Cir. 1983). To the contrary, it is precisely when a creditor discovers what it believes to be a

problem with a consumer's application that leads it to reject or alter the original terms that it *must* provide "specific reasons" to the consumer for its decision. 15 U.S.C. § 1691(d)(3). That way, a consumer can "know" the reasons behind any adverse change and "rectify" any mistake. S. Rep. No. 94-589 (1976), at 406. Had Car Source complied with federal law, Ms. Tyson could have learned whether Car Source "may have acted on misinformation or inadequate information," and taken steps to "rectify the mistake." *Fischl* 708 F.2d at 146 (internal quotations omitted).

Car Source claims (at 35) that the district court "misapplied the law" but offers little in the way of meaningful explanation.[2] It resists (at 26–27, 36–39) the district court's conclusion that it qualifies as a "creditor" under ECOA but offers no theory underpinning its resistance. How could it? For ECOA's notice requirements, car dealers who "restructure[] the terms of the sale in order to meet the concerns of the creditor," "insist on more money down," and "set the annual [APR] associated with the sale" fall on the "'creditor side" of the continuum. *Treadway v. Gateway Chevrolet Oldsmobile Inc.*, 362 F.3d 971, 980 (7th Cir. 2004). Car

[2] That said, much of Car Source's brief simply repeats verbatim its original (and meritless) arguments. For instance, Car Source recycles its claim that ECOA's notice requirements are triggered only after a credit applicant "initially prove[s] that she was qualified for the credit, and that despite her qualification for the credit she was turned down." *Compare* Car Source Opening Br. 11 *with* Third Br. 42. And Car Source contends, as it did in its opening brief, that it "never revoked the contract." *Compare* Car Source Opening Br. 13 *with* Third Br. 3. For the reasons explained in our opening brief, these arguments are still wrong. *See* Tyson Br. 28–29 (addressing the first argument); 26 (addressing the second).

Source performs all of these functions: It "sets every material term" of its financing agreements, including the "interest rate or APR," the "down payment owed," and the "monthly payment owed." [Partial MSJ Order, R. 55, Page ID #938; Lun Depo., R. 44-12, Page ID #733.] And it "routinely restructures deals" when faced with a lender's decision not to fund an original set of terms. [Partial MSJ Order, R. 55, Page ID #938; Lun Depo., R. 44-12, Page ID #733.]

Car Source also suggests (at 27) that, because Credit Acceptance has "always" "controlled" the terms of a car buyer's financing, Car Source itself should not be subject to ECOA's notice requirements. But that is wrong as a factual matter. As the district court determined, Car Source—not Credit Acceptance—controlled the "entire[]" credit offer—including "every single element of the extension of credit." [Opinion and Partial MSJ Order, R. 55, Page ID #940, 939.]

And even if (counterfactually) true, ECOA requires a creditor "to provide notice of an adverse action" even where the creditor "does not ultimately control the cause of the adverse action." *Cross v. Prospect Mortg., LLC*, 986 F. Supp. 2d 688, 693 (E.D. Va. 2013). As the Seventh Circuit has explained, a car dealer is required to comply with ECOA's notice requirements even if the car dealership lacks the ability to grant credit itself. *Treadway*, 362 F.3d at 976. That holds even "if the dealer forwarded the credit application to a lender and that lender determined that the applicant was not creditworthy." *Id.* So, even if a car dealer "does not have

complete control over the relevant adverse action," it "still has a duty to notify the applicant of the adverse under the ECOA." *Cross*, 986 F. Supp. 2d at 693.[3]

C. Car Source also elects not to defend the district court's decision to deny injunctive relief under ECOA. For good reason: the statute clearly authorizes it. A district court may grant to any "aggrieved applicant" "such equitable and declaratory relief as is necessary to enforce the requirements imposed." 15 U.S.C. § 1691e(c). The district court denied Ms. Tyson's request for injunctive relief, but *only* because it believed that ECOA categorically barred private litigants from seeking it. [Partial MSJ Order, R. 55, Page ID #941] (quoting 12 C.F.R. § 1002.16(b)(4) and holding that relief is limited to "civil action[s] brought by the Attorney General"). As the cases cited in our opening brief (at 32) explain, that is not what the statute says; injunctive relief is available to any party aggrieved by a creditor's noncompliance—including private litigants. This Court should therefore reverse and remand with instructions to issue an appropriate injunction.

D. A final point: Although this Court has warned that "ad hominem attacks" have "no place in a judicial proceeding," *Mills v. City of Barbourville*, 389

[3] Car Source's heavy reliance (at 38–40) on *Fultz v. Lasco Ford, Inc.*, 2007 WL 3379684 (E.D. Mich. Nov. 13, 2007) fails. There, unlike here, the court determined that the car dealers had not taken *any* "adverse action on [the consumer's] credit applications." *Id.* at *7. "Having taken no adverse action," the court explained, the dealers "had no obligation to provide" ECOA's required adverse action notice. *Id.* As a result, the court held that it "need not decide" whether those particular car dealers qualified as "creditors" under ECOA. *Id.*

F.3d 568, 581 (6th Cir. 2004), Car Source's brief is replete with unfounded attacks on one of Ms. Tyson's lawyers, Ian Lyngklip. Here are a few examples:

- Claiming (at 13) that Mr. Lyngklip "rush[ed] to the courthouse to file a lawsuit . . . before he even knew the facts of the case and with no application of the facts to the laws he was suing under."
- Claiming (at 13) that "Mr. Lyngklip did his best to stir up litigation" and "completely ignor[ed] his client's interest" in pursuing the case.
- Asserting (at 14) that Mr. Lyngklip attempted "to intimidate finance employees of [Credit Acceptance]" and, in the process, committed an "ethical violation."

Mr. Lyngklip, who has been representing Michigan consumers for 20 years, is a nationally recognized consumer advocate—a recipient of the Consumer Advocate of the Year Award from the National Association of Consumer Advocates and the Frank Kelly Award from the Michigan State Bar's Consumer Law Section, as well as a former adjunct clinical professor. Needless to say, Car Source's assertions are both unjustified and baseless—and they have no place in this litigation.

II. The economic-loss doctrine does not bar the conversion claim.

Our opening brief explained (at 34–40) that the district court erred in concluding that Michigan's common-law economic-loss doctrine bars a specific statutory claim for conversion under Mich. Comp. Laws § 600.2919a. Not only is that conclusion inconsistent with the text of § 600.2919a(2), which states that the statutory claim for conversion can proceed "in addition to any other right or remedy . . . at law or otherwise," but it also contradicts Michigan's longstanding

rule that "if there is a conflict between the common law and a statutory provision, the common law must yield." *Pulver v. Dundee Cement Co.*, 515 N.W.2d 728 (Mich. 1994). In holding that the common-law economic-loss doctrine trumps a Michigan statutory cause of action, the district court lacked the benefit of the Michigan Supreme Court's most recent "emphasi[s]" that § 600.2919a(2) allows a statutory conversion claim to categorically "work alongside" *all other* "available" remedies. *Aroma Wines*, 497 Mich. at 357 n.51. That recent instruction, taken together with the text of § 600.2919a(2), requires reversal here.

Car Source makes no serious effort to defend the district court's dismissal of this claim. In fact, in over 50 pages of briefing, Car Source references the economic-loss doctrine exactly twice (at 6) and says only that, to reverse here would "completely abrogate[]" the economic-loss doctrine. Third Br. 6. But, of course, that is the point: The "specific language used in the statutory conversion provision M.C.L. 600.2919a(2) provides that relief for a claim of statutory conversion" is "clear, unambiguous," and "explicitly indicates the cumulative nature of statutory conversion claims." *Dep't of Agriculture v. Appletree Marketing, LLC*, 779 N.W. 2d 237, 242 (Mich. 2010). The Michigan legislature, in other words, *did* "abrogate" the economic-loss doctrine when it enacted § 600.2919a, by "creat[ing] a separate statutory cause of action for conversion 'in addition to any other right or remedy.'" *Aroma Wines*, 497 Mich. at 340. That choice leaves no room for common-law rules

like the economic-loss doctrine, which "bars tort recovery and limits remedies" to those available for breach of contract. *Neibarger v. Universal Cooperatives, Inc.*, 486 N.W. 2d 612, 613 (Mich. 1992). Where the legislature has specifically enacted a statutory claim, the economic-loss doctrine is both "irrelevant to" and "inconsistent with" that "legislative choice." *Kailin v. Armstrong*, 643 N.W. 2d 132, 149 (Wis. App. 2002).

CONCLUSION

The district court's grant of summary judgment in favor of Ms. Tyson should be affirmed, but its dismissal of Ms. Tyson's statutory-conversion claims should be reversed and the case should remanded for further proceedings—including proceedings for the entry of injunctive relief under ECOA.

Respectfully submitted,

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December 3, 2015

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 2,511 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). The brief also complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Baskerville) using Microsoft Word 2010.

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December 3, 2015

CERTIFICATE OF SERVICE

I certify that, on December 3, 2015 the foregoing brief was served on all parties or their counsel of record through the CM/ECF system.

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