[Cite as *Andrew v. Power Marketing Direct, Inc.*, 2012-Ohio-4371.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Carleton Scott Andrew,	:	
Plaintiff-Appellee/ Cross-Appellant,	:	No. 11AP-603
v.	:	(C.P.C. No. 08CVH10-14309)
Power Marketing Direct, Inc., Joseph J. Armetta and Jeffrey S. Hosking,	:	(REGULAR CALENDAR)
Defendants-Appellants/ Cross-Appellees,	:	
Prestigious Furniture Direct, Inc. et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on September 25, 2012

Nelson Levine deLuca & Horst, LLC, and *Michael W. DeWitt*, for plaintif-appellee/cross-appellant.

Cooper & Elliott, Charles H. Cooper, Jr. and *Rex H. Elliott*, for defendants-appellants/cross-appellees.

APPEAL from the Franklin County Court of Common Pleas

BRYANT, J.

{¶ 1} Defendants-appellants/cross-appellees Power Marketing Direct, Inc. ("PMD"), Joseph J. Armetta and Jeffrey S. Hosking (collectively, "defendants"), appeal from a judgment, pursuant to jury verdict, of the Franklin County Court of Common Pleas in favor of plaintiff-appellee/cross-appellant, Carleton Scott Andrew, on plaintiff's claims for breach of contract and fraud, while plaintiff appeals from the court's dismissing his

claims under R.C. Chapter 1334, Ohio's Business Opportunity Plans Act ("BOPA"). Because (1) the trial court properly denied defendants' motions for directed verdict on plaintiff's fraud and breach of contract claims, (2) the jury's damage award on the breach of contract claim was not against the manifest weight of the evidence, and (3) the trial court properly dismissed plaintiff's claims under the BOPA, we affirm.

I. Facts and Procedural History

{¶ 2} In 1997, Hosking formed PMD, a company that licensed to dealers, who independently owned and operated their own businesses, PMD's marketing and sales method for selling mattresses and furniture. The dealers purchased products through PMD, advertised those products in the classified advertising sections of newspapers pursuant to PMD's proprietary advertising methods, and then sold the products to the public out of warehouses, or clearance centers, utilizing PMD's proprietary sales strategies. At all times relevant here, Hosking was the owner, president and chief executive officer of PMD; Armetta, Jerry Williams, and Robert Swan acted as PMD's chief marketing officer, chief operating officer, and chief financial officer, respectively.

{¶ 3} Plaintiff worked in the banking industry from 1987 to 1991, after which he worked in his family's wholesale beer distributorship while simultaneously operating an Amway business. Plaintiff left the beer distributorship in 2000 and moved to Greenville, South Carolina. Because his Amway business required extensive overnight travel, plaintiff began looking for a management position that would afford him equivalent income without requiring overnight travel.

{¶ 4} In late September 2006, plaintiff discovered an online job posting for a full-time territory manager-owner position with PMD in the Greenville area at a reported salary of $75,000 to $150,000. The job posting included a link to PMD's website with its historical business overview of PMD, including the number of dealerships as well as wholesale and retail sales growth from 2000 to 2005. Of particular relevance here, the website indicated PMD in 2005 had 119 dealerships, wholesale revenue of $43,486,123 and total sales revenue of $74,662,281. The website also included dealer testimonials and favorable quotes from a prominent furniture industry trade magazine.

{¶ 5} Plaintiff submitted an online application and underwent a number of telephone interviews and one in-person interview with various personnel associated with

PMD. In each, the noted dealership and sales figures were confirmed and representations were made that an average PMD dealer earned $150,000 annually. Stephen McCarthy, PMD's regional director of placement, and Bert Harbin, PMD's national director of placement, contacted plaintiff in early November 2006 and offered him the right of first refusal on the Greenville territory. Plaintiff explained that due to ongoing obligations with his Amway business, he would be unable to open the PMD dealership until the end of January 2007, but Harbin indicated a delay in opening would not present a problem.

{¶ 6} Utilizing the statistics from PMD's website and a brochure PMD supplied during the recruiting process, along with his own projections based upon those statistics, plaintiff obtained a line of credit from a bank to finance the license fee and initial capitalization for the territory. On November 16, 2006, plaintiff signed the license agreement, including the revisions to the timeline Harbin approved, and returned it to PMD, along with a $10,000 check and a signed installment cognovit promissory note for $24,000.

{¶ 7} Plaintiff then formed a limited liability company, Affordable Interiors Direct, LLC, through which he planned to operate his PMD dealership. In January 2007, plaintiff and his wife attended an out-of-state training conference and opened the dealership later that month. In early February 2007, Tim Lucero, a PMD trainer, spent three days on-site with plaintiff making suggestions and fine-tuning various aspects of the dealership and, in late April 2007, plaintiff attended PMD's basics training seminar. PMD also provided additional training and updated information via weekly conference calls and e-mails that were made available to all dealers.

{¶ 8} Plaintiff's dealership lost money. Plaintiff attributed his declining sales figures to competition with Don Mintz, a former PMD dealer who had "disappeared" and later opened a competing dealership in plaintiff's geographical area in violation of the non-compete clause in his PMD contract. (Tr. Vol. II, 98-99.) As a means of competing with Mintz, plaintiff in mid-May 2007 sought access to PMD's "cheap advertiser" sales methodology. (Tr. Vol. VI, 222.) According to plaintiff, PMD never responded to his request.

{¶ 9} In mid-July 2007, plaintiff suffered a ruptured colon that required emergency surgery, a five-day hospital stay, and the use of a colostomy bag. In his first

week home from the hospital, plaintiff received an e-mail from Armetta, followed by a certified letter, stating that due to substandard dealership performance, particularly in the second quarter of 2007, plaintiff was required to submit to PMD within five days a written performance improvement plan ("PIP") outlining his proposed efforts to improve dealership performance. The letter further notified plaintiff that failure to adhere to the PIP could result in termination of the license agreement.

{¶ 10} Frustrated with the circumstances of his dealership, plaintiff began researching PMD's internal reports on the dealer website and concluded PMD misrepresented in its brochure and on its website the number of its dealerships, as well as its wholesale and retail sales for 2005. According to plaintiff, PMD's website and brochure reported fewer dealerships than actually existed, reflecting, in turn, increased average sales per dealership. Plaintiff also concluded PMD's internal reports actually reflected a decline in wholesale sales in 2005, rather than a growth as depicted on the website and in the brochure.

{¶ 11} Due in part to his on-going medical problems, plaintiff was unsuccessful in his efforts to operate the dealership throughout the late summer and early fall of 2007. On November 14, 2007, he filed a lawsuit against PMD in South Carolina. Williams informed plaintiff on November 21, 2007 via e-mail that, as a result of the pending South Carolina litigation, plaintiff no longer would have access to the dealer website. In the e-mail, Williams advised that denial of access to the website would not affect plaintiff's ability to place orders or receive service from PMD, as he could perform those functions by telephone. Unable to increase profitability, plaintiff eventually closed the dealership in December 2007.

{¶ 12} On October 7, 2008, plaintiff and Affordable Interiors Direct, Inc., filed a complaint against PMD, Prestigious Furniture Direct, Inc., PMD's affiliated entity and/or successor in interest, Hosking, Armetta, Williams, and Swan, asserting causes of action for BOPA violations, fraud or fraudulent concealment, negligent misrepresentation, intentional infliction of emotional distress, civil conspiracy, breach of contract, promissory estoppel, unjust enrichment, piercing the corporate veil, declaratory judgment, and bad faith.

{¶ 13} Pursuant to a Civ.R. 12(B)(6) motion filed by the defendants named in the complaint, the trial court, by journal entry filed January 23, 2009, dismissed plaintiff's BOPA, negligent misrepresentation, promissory estoppel, unjust enrichment, declaratory judgment, piercing the corporate veil, and bad-faith claims, dismissed his fraud claim as deficient under Civ.R. 9(B), granted leave to replead that claim, and denied defendants' motion regarding plaintiff's claims for intentional infliction of emotional distress, civil conspiracy, and breach of contract. On February 9, 2009, plaintiff filed an amended complaint against the defendants named in the original complaint and added a new defendant, Premier Furniture Direct, Inc., PMD's affiliated entity and/or successor in interest. In his amended complaint, plaintiff asserted causes of action for fraud or fraudulent concealment, intentional infliction of emotional distress, civil conspiracy, and breach of contract.

{¶ 14} On the same day, plaintiff filed a motion for reconsideration of the trial court's January 23, 2009 decision dismissing his BOPA claims. Defendants opposed the motion for reconsideration and filed a motion to dismiss the claims set forth in the amended complaint. By journal entry filed September 21, 2009, the trial court denied both motions. Defendants then filed an answer, and PMD asserted a counterclaim for breach of contract.

{¶ 15} Pursuant to a summary judgment motion of the defendants named in the second complaint, the trial court, by journal entry filed May 20, 2010, granted summary judgment against plaintiff on his intentional infliction of emotional distress and civil conspiracy claims, but denied summary judgment on plaintiff's claims for fraud and breach of contract, as well as PMD's breach of contract claim. The matter proceeded to jury trial on the remaining claims. At the close of plaintiff's case, defendants moved for a directed verdict on all claims asserted against all defendants. The trial court granted defendants' motion as to Swan and dismissed him from the case but denied the motion as to the remaining defendants.

{¶ 16} In accord with the jury's verdict, the trial court, by entry filed June 24, 2011:

- rendered judgment for plaintiff against PMD for $770,000 in compensatory damages and $10,000 in punitive damages;
- ordered PMD to pay plaintiff's attorney fees in the amount of $146,052.27;

- rendered judgment for plaintiff against Hosking and Armetta jointly and severally with PMD for compensatory damages of $270,000, for plaintiff on PMD's counterclaim, and for Swan and Williams;
- determined pursuant to Civ.R. 54(B) there was no just reason for delay an appeal of the adjudicated claims, even though plaintiff's claims in the nature of corporate successor or fraudulent conveyance against PMD, Armetta, Hosking, Pretigious Furniture Direct, Inc. and Premier Furniture Direct, Inc. had not been resolved.

II. Assignments of Error

{¶ 17} Defendants assign the following errors on appeal:

> [I.] The Trial Court Erred By Denying The Motion For Directed Verdict As To The Breach of Contract Claim[.]
>
> [II.] The Trial Court Erred By Injecting Into Plaintiff's Contract Claim The Concept Of "Failure To Act In Good Faith[.]"
>
> [III.] The Trial Court Erred In Instructing The Jury Regarding The Burden Of Proof Regarding Plaintiff's Fraud Claim[.]
>
> [IV.] The Trial Court Erred By Failing To Grant A Directed Verdict To [sic] As To Plaintiff's Fraud Claim[.]
>
> [V.] The Jury's Verdict Was Against The Manifest Weight Of The Evidence[.]
>
> [VI.] The Trial Court Erred By Admitting Irrelevant And Prejudicial Evidence[.]
>
> [VII.] The Trial Court Erred By Examining Witnesses In A Manner That Was Prejudicial To Defendants[.]

{¶ 18} Plaintiff assigns one error on cross-appeal:

> The trial court erred when it granted Defendant-Cross Appellee Power Marketing Direct, Inc.'s ("PMD") Motion to Dismiss Plaintiff-Cross-Appellant Carleton S. Andrew's ("Andrew") claim pursuant to the Ohio Business Opportunity Plans Act, Ohio Revised Code § 1334.01, *et seq*. ("BOPA" or the "Act") because it erroneously included initial inventory in

the calculation of "initial payment," as that term is defined in R.C. 1334.01(G)

III. First, Second, Third, Fourth, and Fifth Assignments of Error – Directed Verdict and Manifest Weight

{¶ 19} Defendants' first, second, third, and fourth assignments of error contend the trial court erred in denying their motion for directed verdict on plaintiff's breach of contract, fraud and damages claims; their fifth assignment of error contends the damages award on the breach of contract claim is against the manifest weight of the evidence. Ancillary to their contentions are their claims that the trial court erroneously permitted plaintiff's breach of contract claim to proceed on bases not pled and not tried by consent, erroneously inserted into plaintiff's breach of contract claim the failure to act in good faith, and erroneously instructed the jury on the burden of proof on plaintiff's fraud claim. For ease of discussion, we first consider defendants' ancillary claims.

A. *Ancillary Claims – Breach of Contract*

1. Unpleaded issues

{¶ 20} Defendants first contend the trial court erroneously permitted plaintiff's breach of contract claim to proceed on bases not pled or tried by consent. At trial, plaintiff claimed PMD breached the license agreement by (1) not allowing him to utilize PMD's "cheap advertiser" methodology, (2) subjecting him to a PIP, and (3) terminating his access to PMD's dealer website. In arguing the motion for directed verdict, defendants asserted plaintiff's amended complaint alleged only that PMD breached the license agreement by terminating his access to PMD's website. Defendants further contended the additional bases were not tried with the parties' consent. The trial court rejected PMD's argument, noting the lack of objection "earlier in the case or at the pretrial conference with respect to the specificity or lack thereof of the contract claims." (Tr. Vol. VII, 133.)

{¶ 21} To support their argument on appeal, defendants rely on *Wolk v. Paino,* 8th Dist. No. 94850, 2011-Ohio-1065, where the court stated that "[i]n their complaint, appellants narrowly limited their cause of action to the allegation that Lacy breached her duty by allowing Wolk to waive the inspection. By making the allegations in the complaint so specific, appellees were not put on notice of any other alleged breaches." *Id.* at ¶ 36. *Wolk* does not advance defendants' contentions.

{¶ 22} Defendants are correct that the factual narrative in plaintiff's amended complaint did not specifically assert PMD denied plaintiff access to the "cheap advertiser" methodology or wrongly subjected him to a PIP and thus breached the license agreement. Plaintiff, however, broadly asserted in his cause of action for breach of contract that plaintiff and PMD entered into a license agreement, plaintiff performed his obligations under the agreement, PMD failed to perform its duties under the agreement, and plaintiff was damaged. Unlike *Wolk*, a summary judgment case, plaintiff did not narrowly limit his cause of action for breach of contract only to the website access issue.

{¶ 23} Moreover, even if plaintiff's complaint cannot be said to encompass the "cheap advertiser" and PIP issues, the record establishes they were tried with the parties' implied consent. Civ.R. 15(B) provides that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Here, the parties did not expressly consent to trying the other two aspects of plaintiff's breach of contract claim. Nor, however, did defendants object, so the question is whether plaintiff's two additional breach of contract issues were tried with the parties' implied consent. *State ex rel. Evans v. Bainbridge Twp. Trustees*, 5 Ohio St.3d 41 (1983).

{¶ 24} Among the "[v]arious factors to be considered in determining whether the parties impliedly consented to litigate an issue" are whether (1) "[the parties] recognized that an unpleaded issue entered the case," (2) "the opposing party had a fair opportunity to address the tendered issue or would offer additional evidence if the case were to be tried on a different theory," and (3) "whether the witnesses were subjected to extensive cross-examination on the issue." *Id.* at paragraph one of the syllabus. As the court explained, "Under Civ.R. 15(B), implied consent is not established merely because evidence bearing directly on an unpleaded issue was introduced without objection; it must appear that the parties understood the evidence was aimed at the unpleaded issue." *Id.* at paragraph two of the syllabus. As *Evans* acknowledged, "[a]n implied amendment of the pleadings under Civ.R. 15(B) will not be permitted where it results in substantial prejudice to a party." *Id.* at paragraph one of the syllabus. "Whether an unpleaded issue is tried by implied consent is to be determined by the trial court, whose finding will not be disturbed, absent showing of an abuse of discretion." *Id.* at paragraph three of the syllabus.

{¶ 25} Here, the trial court did not abuse its discretion in determining, in essence, that the additional issues were tried with the parties' full awareness and implied consent. The trial court noted defendants did not object during earlier stages of the proceedings to the lack of specificity in the amended complaint. Similarly, plaintiff's opening statement asserted, without objection from defendants, that plaintiff would testify PMD breached the license agreement by "failing to provide advertising programs * * * putting him on company probation in violation [of] company rules," and "denying him access to order product on their website." (Tr. Vol. I, 31.)

{¶ 26} Moreover, plaintiff and other witnesses, including Armetta and Hosking, testified extensively about all three of the alleged breaches without defendants' objection, and defendants cross-examined all three witnesses on the issues. As the trial court observed, PMD did not object to the unpleaded issues until moving for directed verdict at the close of plaintiff's case. The "cheap advertiser" and PIP issues thus were tried with the parties' awareness and implied consent, and defendants suffered no prejudice from the trial court's submitting the issues to the jury.

2. Contractual "failure to act in good faith"

{¶ 27} Defendants next contend the trial court erred in infusing into plaintiff's breach of contract claim a "failure to act in good faith." The trial court instructed the jury it might "find that some of the parties' written terms left certain details a bit open, and left room for judgment calls or for the exercise of some discretion in contract performance. In considering promises of that sort, you are advised that it is implied in every contract that the parties will act in good faith toward one another." (Tr. Vol. VII, 247-48.)

{¶ 28} Relying on *Hamilton Ins. Servs., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270 (1999), defendants argue on appeal that no implied covenant of good faith arises, because plaintiff's allegations of breach pertain to matters the license agreement specifically covered. *See id.* at 274, citing *Kachelmacher v. Laird,* 92 Ohio St. 324 (1915), paragraph one of the syllabus (noting "[t]here can be no implied covenants in a contract in relation to any matter specifically covered by the written terms of the contract itself"). *Hamilton* does not apply because, unlike the contract here, the contract in *Hamilton* did not provide discretion to one party to determine certain terms of the contract. *See Littlejohn v. Parrish*, 163 Ohio App.3d 456, 2005-Ohio-4850 (1st Dist.)

{¶ 29} In *Littlejohn*, the plaintiffs mortgaged their home to the defendants. The note specified no penalty for prepayment but provided that " '[a]ny prepayment shall be subject to approval of holder(s) hereof.' " *Id.* at ¶ 3. When the plaintiffs attempted to prepay the note, the defendants repeatedly refused to grant their approval. Drawing on Colorado law, the court decided the contract included an implied duty to act in good faith, explaining that such duty is " 'generally used to effectuate the intentions of the parties or to honor their reasonable expectations' and 'applies when one party has discretionary authority to determine certain terms of the contract.' " *Id.* at ¶ 25, quoting *Amoco Oil Co. v. Ervin*, 908 P.2d 493 (Colo.1995). The court concluded that because the parties specifically deferred the decision on approval for prepayment and provided the defendants with discretion over this issue, the implied duty of good faith applied. *Id.*

{¶ 30} Here, the license agreement provided PMD with discretionary authority to determine certain terms of the contract. With regard to a PIP, the license agreement expressly states that PMD would notify a dealer if, in PMD's sole discretion, the dealer's performance fell below acceptable levels. PMD's brief acknowledges its discretionary authority, and Hosking testified PMD made concessions to other dealers in the past in requiring a PIP in circumstances similar to those involving plaintiff.

{¶ 31} Hosking also testified he exercised discretion in permitting dealers to utilize PMD's "cheap advertiser" methodology. Hosking admitted dealers needed to obtain his permission to employ the methodology and plaintiff sought, but was denied, such opportunity; PMD again acknowledges as much in its brief. Because the license agreement afforded PMD discretionary authority to determine certain terms of the contract, the implied duty of good faith applied, and the trial court did not err in so instructing the jury.

B. *Directed Verdict – Breach of Contract*

{¶ 32} Defendants primarily contend the trial court erred in denying PMD's motion for directed verdict on plaintiff's breach of contract claim. A motion for directed verdict should be granted when, "after construing the evidence mostly strongly in favor of the party against whom the motion is directed, 'reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party.' " *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, ¶ 3, quoting Civ.R. 50(A)(4).

{¶ 33} By contrast, a motion for directed verdict must be denied when substantial, competent evidence has been presented from which reasonable minds could draw different conclusions. *Kroh v. Continental Gen. Tire, Inc.*, 92 Ohio St.3d 30, 31 (2001). As a result, if the evidence is conflicting on a particular issue or a "combination of circumstances exists requiring a determination as to the credibility of witnesses in order to deduce the true facts" relative to a particular issue, the ultimate resolution of the issue is solely within the province of the jury, and the motion must be denied. *Posin v. A.B.C. Motor Court Hotel, Inc.*, 45 Ohio St.2d 271, 276 (1976). Appellate review of a trial court's decision on a motion for directed verdict is de novo. *Abbott v. Jarrett Reclamation Servs., Inc.*, 132 Ohio App.3d 729, 738 (7th Dist.1999).

{¶ 34} To prove a breach of contract, a plaintiff must establish the existence and terms of a contract, the plaintiff's performance of the contract, the defendant's breach of the contract, and damages or loss to the plaintiff. *Powell v. Grant Med. Ctr.*, 148 Ohio App.3d 1, 10 (10th Dist.2002). Defendants first claim PMD did not breach its contract with plaintiff in denying plaintiff's request to utilize its "cheap advertiser" sales strategy, so the trial court should have directed a verdict for PMD on the issue. Defendants point out that the license agreement does not specifically mention the "cheap advertiser" sales strategy, so its refusal to permit plaintiff to employ it could not constitute a breach of the license agreement.

{¶ 35} The "cheap advertiser" sales strategy allowed PMD dealers to undercut competitor pricing by advertising a very low-priced mattress with the goal of turning phone inquiries about that product into sales for it and other higher-priced products. Plaintiff testified he wanted to utilize the "cheap advertiser" sales strategy to compete with Mintz, who routinely advertised mattresses at prices lower than those plaintiff advertised.

{¶ 36} Hosking testified the sales methodology was reserved for dealers in highly competitive markets who needed to increase their call volume; he stated he denied plaintiff's request because plaintiff was already receiving an average number of calls. In contrast, Harbin testified the "cheap advertiser" sales methodology was more concerned with profitability rather than generating phone calls. Harbin opined that plaintiff not having access to the program would have a "devastating" effect on plaintiff's dealership given plaintiff's competition with Mintz. (Tr. Vol. IV, 175.)

{¶ 37} Paragraph 1 of the license agreement provided plaintiff "an exclusive License to use the Intellectual Property described herein for the operation of the Business in the [applicable] Territory." The "Intellectual Property" referenced in paragraph 1 is described in Exhibit A of the license agreement and includes "advertising strategies and methodologies." Paragraph 2 of the license agreement promised "on-going support" to enable plaintiff "to establish and operate the Business," specifying PMD would provide some support regarding advertising strategies, merchandising concepts, promotional techniques and managerial advice.

{¶ 38} Plaintiff argues that PMD's "cheap advertiser" program falls under the broad category of paragraph 2's "on-going support" and is "intellectual property" under paragraph 1 in the form of "advertising strategies and methodologies." Although defendants assert a dealer's participation in PMD's "cheap advertiser" sales methodology was within its sole discretion and plaintiff would not have benefited from use of such strategy, their contentions do not claim the services fall outside the license agreement but only that PMD retained discretion.

{¶ 39} To survive a motion for directed verdict, plaintiff needed only to present substantial, credible evidence from which reasonable minds could draw different conclusions as to whether the "cheap advertiser" sales strategy constitutes "on-going support," "intellectual property," or both, under the license agreement and whether PMD's refusal to allow plaintiff's participation in the sales methodology breached those terms of the contract. The trial court thus correctly concluded that plaintiff presented legally sufficient evidence to warrant submitting plaintiff's breach of contract claim to the jury on that basis.

{¶ 40} Defendants also contend PMD did not breach the license agreement when it terminated plaintiff's access to PMD's website because not only did the agreement not specify a particular manner by which dealers could order products from PMD, but PMD allowed plaintiff to order products by telephone after terminating his access to the website. Again appearing to rely on paragraphs 1 and 2 of the license agreement, plaintiff testified PMD never responded to his repeated telephone calls following termination of his website access. Plaintiff noted that because he "ran [his] business basically from that database," denying him access to it effectively terminated his business. (Tr. Vol. II, 183.)

Given the conflicting evidence, including the issue of telephonic ordering, the trial court properly concluded that such issue should be submitted to the jury for resolution.

{¶ 41} PMD further claims it did not breach the license agreement when it placed plaintiff on a PIP, so the trial court erred in failing to direct a verdict in PMD's favor on the issue. Paragraph 13 of the license agreement addresses a PIP and required plaintiff to use his "reasonable best efforts to operate the Business and to gain sales of inventory" that PMD made available. If, in PMD's sole discretion, plaintiff's efforts fell "below acceptable levels for the Territory," then PMD was to notify plaintiff of his "perceived deficiency" and PMD's "expectation for the Territory." On receiving that written notification, plaintiff was to submit to PMD "within **Five (5)** business days a written plan outlining" his "proposed efforts to improve the performance of the Territory," with PMD retaining the right to require plaintiff to "make adjustments to the Performance Improvement Plan." (Emphasis sic.)

{¶ 42} Defendants contend that because both the license agreement and PMD's policies and procedures provided PMD with discretion to require a PIP, its decision to place plaintiff on a PIP could not constitute a breach of the license agreement. At trial, plaintiff asserted PMD's placing him on a PIP was premature, as PMD's own policies and procedures provided that dealership performance could not be evaluated until 90 days after the dealer completed PMD's basics training seminar. Plaintiff maintained that because he had not completed the seminar until late April 2007, he was ineligible for dealer performance assessment until August 2007. Noting his PIP letter indicated PMD evaluated his dealer performance for the second quarter 2007, plaintiff argued that PMD's early assessment violated the terms of the license agreement.

{¶ 43} Neither party, to prove or disprove plaintiff's contentions, sought to admit into evidence the provisions of PMD's policies and procedures manual on which plaintiff based his argument. The trial court thus had no way to verify whether the policies and procedures manual included the provisions upon which plaintiff based his argument. Because the validity of plaintiff's claim turned on plaintiff's credibility regarding the applicable provisions of PMD's policies and procedures manual, "a combination of circumstances exist[ed] requiring a determination as to the credibility of witnesses in order to deduce the true facts" on the issue. *Posin* at 276. Accordingly, the ultimate

resolution of the issue resided with the jury. The trial court properly denied PMD's motion for directed verdict on plaintiff's claim that PMD breached the license agreement when it prematurely placed him on a PIP.

{¶ 44} Plaintiff also suggested at trial that PMD's placing him on a PIP while he recuperated from surgery breached the implied covenant of good faith inherent in the license agreement. Plaintiff testified that following his surgery and before he was placed on the PIP, his wife called his PMD trainer, Lucero, and reported plaintiff's medical condition. Armetta and Hosking both testified that, at the time plaintiff was placed on the PIP, they did not know the extent of plaintiff's medical problem or his anticipated recovery period. In addition, both stated that had plaintiff timely informed PMD that his medical condition prevented him from improving his performance, PMD could have suspended the requirement, since PIP placement was discretionary.

{¶ 45} Because the evidence conflicts as to when PMD became aware of plaintiff's medical condition, and because the timing and extent of PMD's knowledge bear upon whether PMD breached the covenant of good faith in subjecting plaintiff to a PIP during his medical crisis, the jury was required to resolve the conflict. The trial court properly concluded that such issues should be submitted to the jury for resolution.

C. *Ancillary Issue – Fraud Claim*

{¶ 46} As to plaintiff's fraud claim, defendants preliminarily contend the trial court improperly instructed the jury as to the burden of proof. Over defendants' objection, the trial court instructed the jury that plaintiff was required to prove his fraud claim by a preponderance of the evidence. Defendants argue that plaintiff was required to prove his fraud claim by the higher standard of clear and convincing evidence. "A determination of the burden of proof is a question of law." *Brothers v. Morrone-O'Keefe Dev. Co., LLC,* 10th Dist. No. 05AP-161, 2006-Ohio-1160, ¶ 17, citing *Acuity, Inc. v. Trimat Constr.,* 4th Dist. No. 05CA2, 2005-Ohio-6128, ¶ 17. An appellate court reviews questions of law de novo. *Brothers,* citing *Cleveland Elec. Illuminating Co. v. Pub. Utilities Comm.,* 76 Ohio St.3d 521, 523 (1996).

{¶ 47} A party seeking an equitable remedy, such as declaratory judgment, reformation or rescission of a contract, must prove a fraud claim with clear and convincing evidence, while a party seeking a monetary remedy must prove fraud by the

preponderance of the evidence. *Household Finance Corp. v. Altenberg*, 5 Ohio St.2d 190 (1966), syllabus. *See also Takis, L.L.C. v. C.D. Morelock Properties, Inc.*, 180 Ohio App.3d 243, 2008-Ohio-6676, ¶ 29 (10th Dist.); *Doyle v. Fairfield Machine Co., Inc.*, 120 Ohio App.3d 192, 206 (11th Dist.1997). Here, plaintiff did not seek an equitable reformation or rescission of the license agreement but compensatory and punitive damages resulting from defendants' alleged fraudulent misrepresentations. Preponderance of the evidence thus was the required standard of proof, and the trial court did not err in so instructing the jury.

D. *Directed Verdict – Fraud Claim*

{¶ 48} Defendants primarily contend the trial court erred in denying their directed verdict motion on plaintiff's fraud claims, as plaintiff failed to present any evidence that any of the defendants made false representations about PMD's wholesale and retail revenues and average dealer income or that his reliance on such representations was justified.

{¶ 49} Under Ohio law, to prevail on a fraudulent misrepresentation claim a plaintiff must prove: (1) a representation, or if a duty to disclose exists, concealment of a fact, (2) that is material to the transaction at issue, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent to mislead another into relying on it, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance. *Burr v. Stark Cty. Bd. of Commrs.*, 23 Ohio St.3d 69, 73 (1986).

{¶ 50} "Fraudulent conduct may not be established by conjecture; it must be proved by direct evidence or justifiable inferences from established facts." *Doyle* at 207, citing *Pumphrey v. Quillen*, 102 Ohio App. 173, 177 (9th Dist.1955). "In proving knowing falsity and intent to mislead or deceive, a plaintiff is not necessarily required to present direct evidence, such as a confession by the tortfeasor that he knowingly deceived [the] plaintiff. Rather, a plaintiff may present circumstantial evidence to show the required knowledge or intent." *Doyle* at 208.

{¶ 51} At trial, plaintiff claimed defendants fraudulently misrepresented during interviews, on PMD's website, and in PMD's brochure the number of PMD dealerships,

PMD's wholesale and retail revenues, as well as average dealer income, and he justifiably relied on those misrepresentations in entering into the license agreement with PMD. To support his claims, plaintiff testified the PMD website linked to PMD's advertisement for the territory manager-owner position represented that in 2005, PMD had 119 dealerships, wholesale revenue of $43,486,123 and total sales revenue of $74,662,281. During interviews, PMD recruiters Trina Clegg and Cindy Dunteman confirmed plaintiff's interpretation of the advertisement. Plaintiff also testified Clegg and Dunteman informed him during interviews that the average PMD dealer earned $150,000 in the first year of operation. Clegg later provided plaintiff with a position description stating the average PMD dealer made over $100,000 net profit each year, and Dunteman corroborated Clegg's income representation.

{¶ 52} Plaintiff further testified PMD's brochure included representations identical to those included on the website regarding the number of dealerships, total wholesale revenue, and total retail sales for 2005. Plaintiff noted the brochure included a statement that the total retail sales figure represents the retail sales reported to PMD by the entire PMD dealership base. Although plaintiff acknowledged the brochure's disclaimer that the retail sales figures were unaudited and approximate, he testified he believed the figures to be accurate enough to rely on in assessing whether to enter into the license agreement.

{¶ 53} Plaintiff stated he utilized the figures obtained from the website and brochure in preparing projections for future profits. He discussed his projections with McCarthy, who confirmed the average PMD dealer netted more than $100,000 annually. Plaintiff further testified Williams, Armetta, and Hosking all confirmed that PMD was a $40 million wholesale and $70 million retail business in 2005, while Hosking stated an average first-year dealer made approximately $150,000. Plaintiff testified that because those involved in the recruiting process independently corroborated the 2005 dealership wholesale sales and retail sales figures, and average dealer income as represented on the website and in the brochure, and because they assured him the figures were derived from dealer statistical input, he believed the representations to be accurate and relied on them in making the decision to enter into a license agreement with PMD.

{¶ 54} Plaintiff's evidence, if believed, supports a finding that PMD, Armetta and Hosking knowingly or recklessly made false representations about PMD's financial health

and dealer income potential with the intent to persuade plaintiff to purchase a PMD dealership. For instance, despite the information PMD personnel provided and confirmed to him during the interview process that the website and brochure accurately portrayed PMD as a $40 million wholesale and $70 million retail business in 2005, PMD's internal reporting system demonstrated a different number of dealerships for 2005, apparently prompting Williams and Hosking both to testify that the statistics on the website and in the brochure were not intended to suggest 119 dealerships generated the stated wholesale and retail revenues.

{¶ 55} Moreover, Williams, Armetta, and Hosking all admitted that the $40 million wholesale revenue figure included over $9 million in revenue from a separate, non-PMD related enterprise. Harbin testified PMD's internal reports revealed that PMD's 2005 wholesale revenue was actually down $9 million from 2004 and the inaccurate wholesale revenue figure effectively depicted PMD as a growing company to prospective dealers while PMD actually suffered a 25-30 percent decline in wholesale revenue. Harbin stated that depicting PMD as a declining business would negatively affect prospective dealers' perception of the company. Williams similarly admitted that had the brochure and website not included the $9 million, PMD would likely not have been viewed as a growing company. As to the retail sales numbers, McCarthy, Harbin, and Richard Dooley, a former PMD dealer and national director of placement, all testified that those figures were derived from subjective and potentially inaccurate dealer input.

{¶ 56} In addition, although Clegg, Dunteman, McCarthy, and Hosking all represented to plaintiff during the recruitment process that an average PMD dealer earns between $100,000 and $150,000 in the first year of operation, McCarthy and Harbin, both of whom worked as district managers responsible for managing other dealers, testified PMD never collected net income data from the dealers. Harbin similarly testified the average dealer income PMD reported was completely unsubstantiated; his 2004 informal survey of dealers revealed that average dealer income was $78,000 before taxes.

{¶ 57} Indeed, McCarthy testified he left PMD in large part due to questionable ethics PMD employed in recruiting, including its erroneous representations about wholesale and retail revenue and average dealer income. McCarthy stated he ultimately discovered "the numbers that I was promoting were not really what was going on." (Tr.

Vol. III, 234.) Harbin likewise testified about PMD's questionable recruiting tactics, noting Hosking insisted recruiters promote PMD as $100,000 per year business opportunity without supporting figures or rationale. Harbin admitted he regretted not informing plaintiff of his doubts about the accuracy of PMD's representations concerning wholesale revenue and average dealer income.

{¶ 58} Construed most strongly for plaintiff and not evaluated for credibility, the evidence is sufficient to create a jury question on the issues of knowledge and intent such that a directed verdict in favor of defendants on plaintiff's fraud claim against PMD, Armetta, and Hosking would have been inappropriate.

{¶ 59} Defendants, however, contend plaintiff's reliance upon PMD's representations on its website and in its brochure was not justified, pointing to the disclaimer that the retail sales figures were unaudited and approximate. Defendants contend plaintiff could not reasonably rely on the figures in the brochure or website without asking for the operating reports or figures upon which the approximate and unaudited figures were based.

{¶ 60} "Reliance is justified if the representation does not appear unreasonable on its face and if, under the circumstances, there is no apparent reason to doubt the veracity of the representation." *Trepp, LLC v. Lighthouse Commerical Mtg., Inc.*, 10th Dist. No. 09AP-597, 2010-Ohio-1820, ¶ 21, citing *Lepara v. Fuson*, 83 Ohio App.3d 17, 26 (1st Dist.1992). Courts may consider various factors in determining whether reliance is justifiable, including the nature of the transaction, the form and materiality of the representation, the relationship of the parties, the respective intelligence, experience, age, and mental and physical condition of the parties, and their respective knowledge and means of knowledge. *Findlay Ford Lincoln-Mercury v. Huffman*, 3d Dist. No. 5-02-67, 2004-Ohio-541, ¶ 22, quoting *Finomore v. Epstein*, 18 Ohio App.3d 88, 90 (8th Dist.1984), quoting *Feliciano v. Moore*, 64 Ohio App.2d 236, 241 (10th Dist.1979).

{¶ 61} Plaintiff testified he questioned both Clegg and Dunteman extensively about his interpretation of the 2005 wholesale and retail figures set forth in the brochure and on the website, and both confirmed the validity of his interpretation. Plaintiff reviewed the brochure with McCarthy and discussed the projections plaintiff prepared based upon the statistics contained in the brochure. Williams, Armetta, and Hosking all confirmed to

plaintiff that PMD was a $40 million wholesale and $70 million retail business in 2005. Clegg, Dunteman, McCarthy, and Hosking all represented to plaintiff that an average PMD dealer made between $100,000 and $150,000 annually, with Dunteman providing a detailed explanation about how the average dealership income figures were derived. Plaintiff testified he believed for two reasons the representations to be accurate and thus relied on them in making the decision to enter into a license agreement with PMD. Firstly, all those involved in recruiting independently corroborated the 2005 dealership wholesale sales and retail sales figures and average dealer income as represented on the website and in the brochure. Secondly, they independently assured him the figures were derived from dealer statistical input.

{¶ 62} The jury could find plaintiff's testimony reasonable, as at the time he executed the license agreement plaintiff had nothing to base his decision on but the information contained on the website and in the brochure, along with the representations of those involved in recruiting who verified that information. Under such circumstances, plaintiff arguably had no reason to doubt the veracity of the representations, especially when plaintiff lacked access to PMD's dealer website and its internal reports containing accurate figures about PMD's financial condition until after he executed the license agreement. "Where the means of obtaining the information in question were not equal, the representations of the person believed to possess superior information may be relied upon." *Fort Washington Resources, Inc. v. Tannen*, 858 F.Supp. 455, 460 (E.D.Pa.1994).

{¶ 63} Corroborating plaintiff's testimony, McCarthy testified he believed plaintiff, in deciding to become a PMD dealer, relied on the figures included on the website and in the brochure, as well as on McCarthy's representations during the interview that those numbers were accurate. Harbin's testimony supports the same conclusion, as Harbin would not have regretted his failure to inform plaintiff of his doubts about the accuracy of the average dealer income figure and the 2005 wholesale figures had he not been convinced of plaintiff's reliance.

{¶ 64} Again, the evidence, construed most strongly for plaintiff and not evaluated for credibility, is sufficient to create a jury question on the issue of plaintiff's justifiable reliance such that a directed verdict in favor of defendants on plaintiff's fraud claim against PMD, Armetta, and Hosking would have been inappropriate.

E. *Directed Verdict - Damages – Breach of Contract*

{¶ 65} At trial, plaintiff sought damages of $150,000 per year for five years in lost profits basing his damages claim on PMD's representation that an average dealer earned $150,000 in net income per year. The jury split its compensatory damage award of $770,000 between the contract and fraud claims. On appeal, defendants challenge only the contract award.

{¶ 66} "The remedies available for breach of contract * * * include both actual and consequential damages, such as lost future profits." *Telxon Corp. v. Smart Media of Delaware, Inc.*, 9th Dist. No. 22098, 2005-Ohio-4931, ¶ 103, citing *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App.3d 137, 144 (9th Dist.1996). Lost profits may be recovered only if: (1) profits were within the contemplation of the parties at the time the contract was made; (2) the loss of profits was the probable result of the breach of contract; and (3) the profits are not too remote or speculative. *Telxon* at ¶ 103, citing *Charles R. Combs Trucking, Inc. v. Intl. Harvester Co.*, 12 Ohio St.3d 241 (1984), paragraph two of the syllabus.

{¶ 67} Defendants contend plaintiff's claim for lost future profits is remote and speculative. "Remote or speculative means that both the existence and amount of lost profits must be shown with reasonable certainty." *Telxon* at ¶ 108, citing *Gahanna v. Eastgate Properties, Inc.*, 36 Ohio St.3d 65 (1988), syllabus. " 'The damages may not be merely * * * possible or imaginary. Although lost profits need not be proven with mathematical precision, they must be capable of measurement based upon known reliable factors without undue speculation.' " *Telxon* at ¶ 108, quoting *McNulty v. PLS Acquisition Corp.*, 8th Dist. No. 79025, 2002-Ohio-7220, ¶ 87, fn. 14. " 'Evidence of lost profits from *a new business venture receive greater scrutiny* because there is no track record upon which to base an estimate.' " (Emphasis sic.) *Id.* " 'A new business may establish lost profits with reasonable certainty through the use of such evidence as expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and any other relevant facts.' " *Telxon* at ¶ 109, quoting *AGF, Inc. v. Great Lakes Heat Treating Co.*, 51 Ohio St.3d 177 (1990), paragraph three of the syllabus.

{¶ 68} Plaintiff did not present any expert testimony, economic or financial data, or market surveys and analyses to support his claim for lost future profits. Plaintiff,

however, presented evidence that PMD's recruiting process included multiple representations that an average PMD dealer earned $150,000 annually and that PMD's breaching the contract prevented him from successfully realizing such annual profits. Such evidence, construed in favor of plaintiff and not evaluated for credibility, supports the trial court's conclusion that plaintiff presented legally sufficient evidence to allow plaintiff's damages claim to proceed to the jury.

F. *Manifest Weight of the Evidence – Damages for Breach of Contract*

{¶ 69} Defendants' fifth assignment of error claims the jury's damages award on plaintiff's breach of contract claim is against the manifest weight of the evidence. In determining whether a civil judgment is against the manifest weight of the evidence, an appellate court must review the entire record to determine if the judgment is supported by "some competent, credible evidence." *Sotos v. Edel*, 10th Dist. No. 02AP-1273, 2003-Ohio-6471, ¶ 86, citing *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978). "[U]nder the civil manifest-weight-of-the-evidence standard, 'a [reviewing] court has an obligation to presume that the findings of the trier of fact are correct.' " *Corrigan v. Illuminating Co.*, 122 Ohio St.3d 265, 2009-Ohio-2524, ¶ 34, citing *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 24, quoting *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). A reviewing court will not reverse a civil judgment as being against the manifest weight of the evidence unless the evidence cannot be interpreted in a way that supports the verdict. *Cent. Motors Corp. v. Pepper Pike*, 73 Ohio St.3d 581, 584 (1995).

{¶ 70} Plaintiff's case presents a somewhat unusual scenario in terms of profits from the contract at issue, in that plaintiff presented evidence establishing that PMD's personnel and recruiting materials repeatedly and consistently represented that an average dealer earned $150,000 in net income per year. Plaintiff testified that PMD's breaching the contract prevented him from becoming a successful PMD dealer, thus entitling him to lost profits equal to PMD's representations of $150,000 for half of the contract term, 5 years. Plaintiff also presented evidence that he paid $20,000 toward the license fee. Such evidence supports the jury's $770,000 compensatory damage award. Although the record does not disclose how the jury arrived at its decision to award $500,000 on the contract claim and $270,000 on the fraud claim, "[t]he fact-finder has

the discretion to award damages within the range of evidence presented at trial, so long as a rational basis exists for its calculation." *Sharifi v. Steen Automotive, LLC,* No. 05-10-01150-CV (Tex.App.-Dallas) (June 14, 2012). Because the $500,000 award on the contract claim was within the range of evidence presented at trial, we cannot agree with defendants that it was against the manifest weight of the evidence.

{¶ 71} Defendants also contend plaintiff's damages contentions are inconsistent, in that he rested his lost profits claim on defendants' net income representations but at the same time asserted they were fraudulent. Plaintiff cannot recover the same damages twice, once for breach of contract and once for fraud. Plaintiff's compensatory damages award, however, does not exceed the maximum recoverable under either claim alone. Accordingly, we cannot say the verdict is against the manifest weight of the evidence on the basis defendants' posit.

{¶ 72} For the reasons stated, defendants' first, second, third, fourth and fifth assignments of error are overruled.

IV. Sixth and Seventh Assignments of Error – Evidentiary Rulings and Court's Questions

A. *Evidentiary Rulings*

{¶ 73} Defendants' sixth assignment of error contends the trial court erred in admitting irrelevant and prejudicial evidence at trial. A trial court has broad discretion concerning the admission or exclusion of evidence; in the absence of an abuse of discretion that materially prejudices a defendant, a reviewing court generally will not reverse an evidentiary ruling. *State v. Issa,* 93 Ohio St.3d 49, 64 (2001); *State v. Barnes,* 94 Ohio St.3d 21, 23 (2002) (noting a trial court abused its discretion when it "acted unreasonably, arbitrarily, or unconscionably").

{¶ 74} Defendants contend the trial court erred in admitting evidence, over objection, that (1) PMD's website advertisement for a territory manager was part of a bait-and-switch scheme to lure plaintiff into becoming a dealer, (2) plaintiff's Amway business lost over $100,000 while he was a PMD dealer and his home went into foreclosure after his dealership closed, (3) former PMD dealers filed lawsuits against PMD for breach of contract and fraud, (4) a PMD dealer committed suicide, (5) PMD executives were

ambivalent about a PMD dealer's drinking problem, and (6) PMD dealers were dissatisfied with PMD's management.

{¶ 75} Although defendants broadly assert the evidence was prejudicial, arguing it cumulatively achieved the desired effect of arousing the jury's ire and sympathy as manifested in an unreasonable and specious damage award, defendants failed to demonstrate precisely how the court abused its discretion in admitting the evidence or how the evidence prejudiced them. Indeed, some of the evidence arguably is relevant to plaintiff's fraud and breach of contract allegations and the damages arising from them. Even if the evidence regarding the dealer suicide and PMD's reaction to a dealer's drinking problem were wrongly admitted, the impact of the evidence at issue is difficult to discern in the face of ample competent, credible evidence supporting the jury's verdict apart from that defendants' challenge. Finally, although perhaps not sufficient in the face of truly prejudicial evidence, the trial court admonished the jury not to allow sympathy or prejudice to influence its deliberations. A jury may be presumed to follow the trial court's instructions. *Pang v. Minch,* 53 Ohio St.3d 186, 195 (1990). Defendants' sixth assignment of error is overruled.

B. *Judge's Questions*

{¶ 76} Defendants' seventh assignment of error asserts the trial court erred in examining witnesses in a manner suggesting the trial court "looked with skepticism and/or disfavor on the defendants' arguments." (Appellant's brief, at 32.) As examples, defendants cite excerpts from the trial court's questioning of Williams, Armetta, and Hosking.

{¶ 77} Pursuant to Evid.R. 614(B), a trial court "may interrogate witnesses, in an impartial manner, whether called by itself or by a party." Because Evid.R. 614(B) permits the trial court discretion to decide whether or not to question a witness, appellate courts must review the trial court's questioning under an abuse of discretion standard. *Brothers* at ¶ 10, citing *State v. Johnson,* 10th Dist. No. 03AP-1103, 2004-Ohio-4842, ¶ 10.

{¶ 78} A trial court is obligated to control the proceedings before it, to clarify ambiguities, and to take steps to ensure substantial justice. *Brothers* at ¶ 11, citing *State v. Stadmire,* 8th Dist. No. 81188, 2003-Ohio-873, ¶ 26, quoting *State v. Kay*, 12 Ohio App.2d 38, 49 (8th Dist.1967). Accordingly, a trial court should not hesitate to pose

pertinent and even-handed questions to witnesses. *Brothers,* citing *Klasa v. Rogers,* 8th Dist. No. 83374, 2004-Ohio-4490, ¶ 32.

{¶ 79} Evid.R. 614(B), however, requires the court to question impartially and thus tempers a trial court's ability to question a witness. *Brothers* at ¶ 12. If the trial court's questions can reasonably indicate to the jury the court's opinion of the witnesses' credibility or the weight to be given that witnesses' testimony, the questions are prejudicially erroneous. *State ex rel. Wise v. Chand,* 21 Ohio St.2d 113 (1970), paragraph four of the syllabus. "[A]bsent ' "any showing of bias, prejudice, or prodding of a witness to elicit partisan testimony, it will be presumed that the trial court acted with impartiality [in * * * [its] questions from the bench] in attempting to ascertain a material fact or to develop the truth." ' " *Brothers* at ¶ 12, quoting *State v. Baston,* 85 Ohio St.3d 418, 426 (1999), quoting *Jenkins v. Clark,* 7 Ohio App.3d 93, 98 (2d Dist.1982). "A trial court's questioning of a witness is not impartial merely because it elicits evidence that is damaging to one of the parties." *Brothers* at ¶ 12, citing *Klasa* at ¶ 32.

{¶ 80} Defendants' counsel did not object to the trial court's allegedly improper questions to Williams, Armetta, and Hosking and thus arguably waived this issue on appeal. *Metaullics Sys. Co. L.P. v. Molten Metal Equip. Innovations, Inc.,* 110 Ohio App.3d 367, 370 (8th Dist.1996). Even had defendants not waived this issue, the court did not err.

{¶ 81} Defendants challenge the trial court's question to Williams that asked whether Williams ever compared the financial data on PMD's website and brochure to its internal financial reports. When Williams responded that he did not recall if he had ever done so, the court inquired, "Never"? (Tr. Vol. V, 113-14.) Williams again responded that he did not recall having done so. Defendants contend the jury could infer from the court's question that it did not believe Williams' answer.

{¶ 82} Defendants also challenge the trial court's questions to Armetta concerning plaintiff's PIP. On plaintiff's questioning, Armetta testified he sent plaintiff the e-mail placing him on the PIP due to substandard dealership performance. Armetta acknowledged he was aware of plaintiff's medical condition at the time he sent the e-mail but stated company policy constrained him to place plaintiff on the PIP. Armetta further testified that had plaintiff indicated in his PIP plan he was ill and needed additional time

to rectify the dealership issues, PMD would have worked with plaintiff as it had with other dealers who experienced personal difficulties.

{¶ 83} At this point, the trial court noted Armetta's earlier testimony that PMD waived company policy regarding a PIP under certain circumstances and asked Armetta if he could have afforded plaintiff such a waiver. Armetta testified that although he could have waived the policy, he did not because an exception for plaintiff would have led to similar exceptions for other dealers. Armetta further stated that had plaintiff responded to the PIP with information about his medical condition, PMD possibly could have persuaded another dealer to assist plaintiff in operating his dealership. When Armetta testified "there was no communication [by plaintiff] on [his medical] issue," the trial court stated, "[b]ut you obviously had some communication before you wrote your [PIP] letter. You knew he had been ill or had the surgery." (Tr. Vol. V, 298.) Armetta responded that "[w]e found out after he was already home from the hospital," prompting the trial court to state, "I understand, but still, you found out before you sent your letter reluctantly putting him on PIP. And I'm trying to find out what you were thinking about and what alternatives you felt [you had] available. That's all." (Tr. Vol. V, 298-99.) Defendants contend the trial court's inquiries inadvertently suggested to the jury that Armetta should have handled plaintiff's PIP differently.

{¶ 84} With regard to Hosking, defendants contest the trial court's questions about the company-owned store in Dallas incorporated in Texas under the name Nuance Fine Furniture. Hosking testified he included the $9.3 million wholesale revenue and the $18 million in retail sales from the Dallas location in PMD's 2005 figures because he "owned [it] * * * [it was] part of PMD * * * [it was] part of what I did." (Tr. Vol. VI, 182.) Hosking, however, also testified the financial information for Nuance was not included on PMD's tax return but on its own tax return.

{¶ 85} Later, when the trial court asked whether Nuance actually was a "company-owned" store, Hosking stated he was a partner and that Nuance was "the one that handled the accounting." (Tr. Vol. VI, 247.) The trial court, in an apparent attempt to clarify the relationship between Hosking, PMD, and Nuance, questioned Hosking about insurance claims. Hosking stated he, rather than PMD or Nuance, was identified individually as the insured under various insurance policies. His response caused the trial court to inquire,

"And you're telling me that you would have been the person, notwithstanding this Texas corporation, that had control of the Dallas operation for things like fire insurance, even though you didn't file tax returns for it"? (Tr. Vol. VI, 248.) Defendants contend the trial court's questioning unintentionally signaled the jury that the court found Hosking's explanation to be incredible.

{¶ 86} Here, the trial court's questioning arguably was designed to elicit testimony that more fully revealed the facts of this rather complicated case. *Keklak v. The Ohio State Univ. Hospitals*, 10th Dist. No. 88AP-358 (Mar. 9, 1989), citing *Gilhooley v. Columbus Ry. Power & L. Co.*, 20 Ohio N.P. (N.S.) 545 (noting a trial court may, in its discretion, ask witnesses proper and pertinent questions designed to develop the true character of the transaction in question, which counsel has failed to propound, and thereby elicit testimony which more fully reveals the true facts of the case). Contrary to defendants' contentions, nothing in the substance or tenor of the trial court's colloquies with Williams, Armetta, and Hosking suggests bias on the part of the court against any of the witnesses or defendants in general. Defendants failed to overcome the presumption of impartiality.

{¶ 87} Moreover, although they perhaps would not be sufficient in the face of questions that reveal a trial judge's partiality, the court more than once instructed the jury not to assign special meaning to the trial court's questions or actions, and the jury presumably followed those instructions. *Pang* at 195. Defendants' seventh assignment of error is overruled.

V. Cross-Appeal - Business Opportunity Plans Act

{¶ 88} Plaintiff's single assignment of error on cross-appeal contends the trial court erred in dismissing his claim that defendants violated R.C. Chapter 1334, Ohio's Business Opportunity Plans Act, BOPA. The trial court filed an entry dismissing many of the claims asserted in the original complaint, including the BOPA claim, and subsequently denied plaintiff's motion to reconsider that issue. Plaintiff filed an amended complaint that did not include a BOPA claim.

{¶ 89} Defendants initially respond that plaintiff's failure to include the BOPA claim in his amended complaint precludes him from challenging the dismissal of that claim on appeal. Ordinarily, when a plaintiff files an amended complaint that omits a cause of action asserted in the original complaint, the plaintiff is precluded from raising

an appeal as to the abandoned cause of action. *See, e.g., Douglas v. The Athens Masonic Temple Co.*, 115 Ohio App. 353, 354-55 (4th Dist.1961). Plaintiff's cross-appeal, however, arises from a somewhat unique procedural posture.

{¶ 90} In disposing of defendants' motion to dismiss plaintiff's original complaint, the trial court included language in its entry stating that "plaintiff (or plaintiffs) shall file an Amended Complaint within 15 days. They shall take care to eliminate all claims dismissed above." (Jan. 23, 2009 entry, at 20.) Because the trial court specifically ordered plaintiff not to include any of the previously dismissed claims in his amended complaint, plaintiff did not reassert the BOPA claim. Under such circumstances, plaintiff did not abandon the claim when he failed to include it in his amended complaint. To find otherwise would effectively preclude appellate review of plaintiff's BOPA claim.

{¶ 91} Appellate review of a trial court's decision to dismiss a case, pursuant to Civ.R. 12(b)(6), is de novo. *Singleton v. Adjutant Gen. of Ohio*, 10th Dist. No. 02AP-971, 2003-Ohio-1838. In order for a court to dismiss a case pursuant to Civ.R. 12(B)(6), "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus. The court must presume all factual allegations in the complaint are true and draw all reasonable inferences in favor of the nonmoving party. *Bridges v. Natl. Engineering and Contracting Co.*, 49 Ohio St.3d 108, 112 (1990).

{¶ 92} The issue to be resolved is whether the license agreement is a "business opportunity plan" under the provisions of R.C. Chapter 1334. R.C. 1334.01(D) defines a business opportunity plan as "an agreement in which a purchaser obtains the right to offer, sell, or distribute goods or services" under delineated conditions, one of which specifies that "[t]he purchaser is required to make an initial payment greater than five hundred dollars, but less than fifty thousand dollars, to the seller or an affiliated person to begin or maintain the business opportunity plan." R.C. 1334.01(D)(2).

{¶ 93} The same statute defines "initial payment" to mean "the total amount a purchaser is obligated to pay or the amount of the promissory note that was signed by the purchaser with the seller prior to or during the first six months after commencing operation of the business opportunity plan. If an agreement sets forth a specific total sale price for purchase of a business opportunity plan, which is to be paid partially as a down

payment, followed by specific monthly payments, 'initial payment' means the entire total sale price." R.C. 1334.01(G). "Initial payment" does not include any payment for sales demonstration equipment and materials, so long as, generally speaking, the materials are supplied at cost, the total price is less than $500, and the materials are not for resale. When a seller violates any provision, an individual purchaser has the right to rescind the transaction and, if damaged, recover the greater of three times the amount of actual damages, or $10,000. R.C. 1334.09(A).

{¶ 94} The trial court found the license agreement did not satisfy the statutory requirements of R.C. 1334.01(D) and thus did not constitute a business opportunity plan subject to the requirements of R.C. Chapter 1334 because plaintiff was required to make an "initial payment" of $57,990, which included the $30,000 one-time license fee and the $27,990 in initial inventory plaintiff purchased from PMD. In so concluding, the trial court looked to two sources. It determined the license agreement unambiguously provided that payment for the initial inventory was part of the license fee paid PMD, as paragraph six of the license agreement defined the license fee to include both inventory acquisition to operate the business as well as the one-time license fee of $30,000. It also looked to R.C. 1334.01(D)(2), specifying "initial payment" are the funds needed both "to begin" and "to maintain" the business opportunity plan, and the court concluded the payment over and above $30,000 was necessary to maintain the business.

{¶ 95} The trial court properly interpreted both the statute and the license agreement. An "initial payment" under R.C. 1334.01 includes the amount plaintiff was "obligated" to pay "prior to or during the first six months after commencing operation of the business opportunity plan" in order to "begin or maintain" the business. Plaintiff's contention that he was not "obligated" to pay anything beyond the one-time license fee in order to "begin" the business is unpersuasive. Practically speaking, plaintiff could not "begin" the business without having any inventory to sell, and he was contractually required to purchase inventory from PMD. Moreover, plaintiff ignores that his "initial payment" includes funds he was obligated to pay in order to "maintain" the business. Just as he could not "begin" his business without inventory, neither could he "maintain" his business without inventory.

{¶ 96} Nor is plaintiff persuasive in asserting the current version of R.C. 1334.01(G) limits application of the six-month time period to promissory notes. The only difference in the first sentence in the former and current versions of R.C. 1334.01(G) is the addition of the language regarding promissory notes that states " '[i]nitial payment' means the total amount a purchaser is obligated to pay *or the amount of the promissory note that was signed by the purchaser with the seller* prior to or during the first six months after commencing operation of the business opportunity plan." (Emphasis added.) The additional language was intended to ensure that the six-month time period applied to promissory notes in addition to the total amount a purchaser is obligated to pay.

{¶ 97} Plaintiff is similarly unpersuasive in asserting that the General Assembly's applying the six-month time period only to promissory notes evidences its "intent to remove all other payments, such as inventory, from the 'initial' payment." (Cross-appellant's brief, at 18.) To the contrary, R.C. 1334.01(G) expressly excepts certain payments from the definition of "initial payment," and inventory payments are not listed among the exceptions. The General Assembly's failure to expressly except inventory payments from the definition of "initial payment" reflects the General Assembly's intent to include such payments.

{¶ 98} Finally, plaintiff cites case law that is inapposite. *See Campbell v. TES Franchising, LLC,* 12th Dist. No. CA2004-06-151, 2005-Ohio-2271 (not addressing whether the $25,000 initial payment included inventory payments); *Wells v. Jackie Fine Arts, Inc.*, No. C-2-86-0374 (S.D.Ohio Sept. 25, 1989) (not addressing whether inventory purchases constitute "initial payment" under R.C. 1334.01(D)(2)); *Peltier v. Spaghetti Tree, Inc.*, 6 Ohio St.3d 194 (1983) (resolving whether the sale of franchise agreements was regulated by R.C. Chapter 1334 or R.C. Chapter 1707, not whether inventory purchases constitute "initial payment" under R.C. 1334.01(D)(2)).

{¶ 99} The fourth of the cases plaintiff cites, *Bell v. Natl. Safety Assocs., Inc.*, No. C-3-90-400 (S.D. Ohio Oct. 4, 1993), supports the trial court's action dismissing plaintiff's BOPA claim. There, the plaintiff and the defendant entered into an arrangement granting the plaintiff the right to distribute the defendant's products. The defendant argued the arrangement did not satisfy R.C. 1334.01(D)(2), and thus did not constitute a business

opportunity plan because the parties' arrangement was a two-step transaction: the plaintiff paid $20 to become a dealer and then paid $5,000 to purchase the defendant's products, becoming, incidentally, a direct distributor at the same time. The plaintiff contended the arrangement was a one-step process whereby he paid the required $5,020 to become a direct distributor. The court found a genuine issue of material fact as to whether the arrangement satisfied R.C. 1334.01(D)(2), and in particular whether the parties intended the arrangement to be a single contract or two separate agreements.

{¶ 100} Here, no independent designation arose based upon plaintiff's purchase of inventory. Plaintiff's one-time license fee and inventory obligations were included in the same section of the same agreement, which expressly noted that both obligations "collectively" constituted the "License Fee." Moreover, although *Bell* is factually distinguishable, it is instructive to the extent it suggests that inventory purchases can be included in the "initial payment" requirement of R.C. 1334.01(D)(2). The *Bell* court noted the plaintiff's payment of $5,000 to purchase the defendant's products would be part of an initial payment; the only question in *Bell* was whether that initial payment was part of the same business opportunity as the $20 payment. *Bell* does not advance plaintiff's argument.

{¶ 101} Accordingly, the trial court properly dismissed plaintiff's BOPA claim, and we therefore overrule plaintiff's single cross-assignment of error.

VI. Disposition

{¶ 102} Having overruled defendants' seven assignments of error as well as plaintiff's single cross-assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and TYACK, JJ., concur.