IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DISCOVER BANK,	:	
	:	Civil Action No. C2-3-686
Plaintiff,	:	
	:	Judge Gregory L. Frost
-against-	:	
	:	Magistrate Judge Mark R. Abel
NEW VISION FINANCIAL, LLC.,	:	
	:	
Defendant.	:	

PLAINTIFF DISCOVER BANK'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS DEFENDANT NEW VISION FINANCIAL LLC'S AFFIRMATIVE DEFENSES AND COUNTERCLAIMS, AND FOR PARTIAL JUDGMENT ON THE PLEADINGS

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PLAINTIFF DISCOVER BANK'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS DEFENDANT NEW VISION FINANCIAL LLC'S AFFIRMATIVE DEFENSES AND COUNTERCLAIMS, AND FOR PARTIAL JUDGMENT ON THE PLEADINGS

Preliminary Statement

Plaintiff Discover Bank respectfully submits this memorandum of law in support of its motion: (1) to dismiss defendant New Vision Financial, LLC's ("New Vision") affirmative defenses and counterclaims contained in its Answer and Counterclaims herein ("Answer"), pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim, and (2) for partial judgment on the pleadings in favor of Discover Bank on the issue of liability pursuant to Fed. R. Civ. P. 12(c).

As demonstrated below, New Vision has materially breached a written contract that imposed a continuing obligation upon it to purchase delinquent credit card accounts from Discover Bank (the "Agreement"). As a direct and proximate result of New Vision's material breach, Discover Bank has sustained mitigation damages of approximately $850,000, as well as lost profits of no less than $2 million, and other incidental damages.

In an attempt to cloud these proceedings and to delay the inevitable entry of a money judgment against it, New Vision has purported to interpose a host of baseless affirmative defenses and counterclaims against Discover Bank. All of these affirmative defenses and

counterclaims arise out of the spurious allegation that Discover Bank was engaged in "adverse selection" of accounts, and that Discover Bank somehow intentionally or negligently misrepresented this supposed fact to New Vision. Of course, Discover Bank denies that it was ever engaged in the practice of adverse selection, but this issue is immaterial for purposes of the instant motion. As shown below, New Vision's affirmative defenses and counterclaims must fail as a matter of law.

First, the plain and unambiguous language of the parties' Agreement bars all of New Vision's affirmative defenses and counterclaims as a matter of law. Pursuant to the Agreement, New Vision expressly disclaimed reliance upon any alleged representations and warranties regarding the creditworthiness or quality of any and all purchased accounts. New Vision also expressly acknowledged and agreed that it conducted its own due diligence with respect to the purchased accounts. New Vision further expressly acknowledged and agreed that it was buying the accounts strictly on an "as is" basis. Thus, even if Discover Bank was engaged in adverse selection (which was not the case), New Vision forever waived and relinquished the right to assert such a claim under the Agreement based upon any legal theory. Having entered into the Agreement at arms' length, and having expressly disclaimed reliance upon any representation or warranty except as set forth in the Agreement, New Vision cannot now attempt to interpose affirmative defenses or counterclaims that are foreclosed by the very contract it freely and voluntarily signed.

Second, according to New Vision's own allegations, it purportedly learned that Discover Bank was engaged in adverse selection several months after it executed the Agreement. However, New Vision did not attempt to rescind the Agreement, or to sue Discover Bank upon the fraud and negligence theories that New Vision has now concocted purely for tactical

purposes. Instead, on three separate occasions -- October 1, 2001, February 8, 2002 and July 10, 2002 -- New Vision signed amendments to the Agreement whereby it negotiated lower prices for the accounts it was purchasing, and extended the term of the parties' Agreement, all with full knowledge of its purported adverse selection claim.

At no time did New Vision attempt to negotiate or obtain any contractual prohibition against adverse selection. Indeed, in each of the three written amendments, New Vision agreed to keep in place the very disclaimers that were included in the Agreement from its inception until its termination as a result of New Vision's material breach. Given the three amendments to the Agreement, New Vision, as a matter of law, waived any and all alleged claims and defenses based upon adverse selection. Moreover, New Vision cannot possibly establish that it justifiably relied upon any alleged misrepresentation of Discover Bank because it continued to affirm and ratify the Agreement in the amendments, notwithstanding its supposed knowledge of an adverse selection claim.

As made clear in the Agreement, New Vision is a sophisticated entity that knew precisely what it was bargaining for, and that knew precisely what it was purchasing, under the Agreement. New Vision found itself in material breach of the Agreement when it refused to honor its continuing obligation to purchase accounts from Discover Bank as of October, 2002. New Vision's claims of fraud and negligence based upon adverse selection are utterly feigned and unsustainable as a matter of law. The ***only*** issue of fact that remains in this case is the amount of damages recoverable by Discover Bank under the Agreement. Accordingly, the instant motion should be granted in its entirety.

SUMMARY OF ARGUMENT

As demonstrated at Point I below (pp. 14-18), given the disclaimers in the Agreement, New Vision's claims for fraud, fraud in the inducement and negligent misrepresentation, which are all based upon the allegation that Discover Bank misrepresented its intention with respect to the quality and collectability of accounts which it would be selling to New Vision, should be dismissed on the ground that they are barred by the plain and unambiguous language of the Agreement.[1] As a matter of law, New Vision cannot prove the necessary element of justifiable reliance where, as here, it has specifically disclaimed such reliance in the Agreement and the terms of the Agreement directly contradict the supposed misrepresentation. See Citicasters Co. v. Bricker & Eckler LLP, 778 N.E.2d 663 (Ohio App. 2002); Capital Funding, VI, L.P. v. Chase Manhattan Bank USA, N.A., No. Civ.A. 01-CV-6093, 2003 WL 21672202 (E.D. Pa. March 21, 2003).

As shown at Point II below (pp. 18-20), New Vision's claims for negligent misrepresentation must be dismissed for two additional reasons. First, such a claim cannot be asserted in a situation where the claimant's damages are purely economic, such as the lost revenue alleged by New Vision herein. Instead, the claimant must show injury to person or property, which has not and cannot be alleged by New Vision. Second, the relationship between New Vision and Discover Bank was purely arms' length and lacked the special relationship of trust required to assert a claim for negligent misrepresentation as a matter of law. See Queen City

[1] All but one of New Vision's counterclaims are based upon its allegations of fraud or negligent misrepresentation, including Count I (Fraud/Intentional Misrepresentation); Count II (Fraud in the Inducement); Count III (Fraud and Deceit) and Count IV (Negligent Misrepresentation). New Vision's last claim, Count V, for unjust enrichment, simply alleges that it paid too much for accounts which were purportedly sold through a process of adverse selection. New Vision alleges various affirmative defenses, including inadequate consideration and fraud, but does not allege any additional facts supporting any of them.

Terminals, Inc. v. Gen. Am. Transport. Corp., 653 N.E.2d 661 (Ohio 1995); Picker Int'l, Inc. v. Mayo Found., 6 F. Supp.2d 685 (N.D. Ohio 1998).

As discussed at Point III below (pp. 20-21), even assuming for the sake of argument that the Agreement did not bar all of New Vision's counterclaims (which it does), and that Discover Bank made a misrepresentation about adverse selection (which it did not), New Vision waived any claim of fraud or misrepresentation when it amended the Agreement on three separate occasions with full knowledge of the supposed falsity of the very misrepresentations that form the basis of its tort counterclaims. Where, as here, a party alleges that it was wrongfully induced into entering into a contract, but then modifies the contract, obtaining more favorable contractual terms, and continues to perform, it waives any claim of fraud in the inducement. In this case, New Vision undisputedly received new and more favorable price terms with each of the three amendments (i.e., the price kept going down). By its own allegations, on each such occasion, New Vision had full knowledge of its supposed claim of adverse selection. Accordingly, the doctrine of waiver bars all of New Vision's affirmative defenses and counterclaims as a matter of law. See Sun Oil v. Dollbeer, 21 Ohio Law Abs. 176, 1936 WL 2008 (Ohio App. Jan. 11, 1936); 37 Am. Jur. 2d Fraud & Deceit § 335 (2003).

As demonstrated at Point IV below (pp. 22-24), New Vision is similarly barred from seeking relief in connection with the July 10, 2002 amendment to the Agreement as sought in its counterclaims. The plain language of the Agreement bars such recovery. Moreover, the doctrine of waiver is also preclusive. See Lamberjack v. Priesman, No. 92-OT-006, 1993 WL 24482 (Ohio App. Feb. 5, 1993).

As shown at Point V below (p. 25), New Vision's claim for unjust enrichment must also be dismissed. A claim for unjust enrichment cannot be asserted where a contractual relationship

clearly governs the parties' relationship. In this case, the parties' rights and obligations are governed by the Agreement, and no unjust enrichment claim can lie. See Wolfer Enters. Inc. v. Overbrook Dev. Corp., 724 N.E.2d 1251, 1253 (Ohio App. 1999).

Finally, as discussed at Point VI below (pp. 25-28), Discover Bank is entitled to partial judgment on the issue of liability, with the amount of its damages to be determined in later proceedings. New Vision has failed to set forth any valid defense or counterclaim that would exonerate it from its liability for material breach of the Agreement. Indeed, in its Answer, New Vision admits that it failed to accept new purchases of accounts, as it was required to do. Accordingly, the Court should enter judgment in favor of Discover Bank on the issue of liability. H-M Wexford LLC v. Encorp., Inc., 832 A.2d 129, 140 (Del. Ch. 2003).

THE FACTS

In its complaint, Discover Bank seeks approximately $850,000 in mitigation damages for New Vision's breach of the Agreement, plus an additional $2 million in lost profits, as well as other incidental damages.[2] The facts forming Discover Bank's claims and foreclosing the affirmative defenses and counterclaims interposed by New Vision are summarized immediately below.

A. The Agreement

In January 2001, Discover Bank and New Vision entered into the Agreement. Pursuant to the Agreement, New Vision agreed to purchase certain delinquent credit card accounts

[2] Copies of the Complaint in this action, with exhibits ("Complaint"), and New Vision's Answer, are annexed as Exhibit 1 and Exhibit 2 to the accompanying affidavit of Mark H. Moore, sworn to March 10, 2004 ("Moore Aff."). A copy of the Agreement and its three written amendments are annexed as exhibits to the Complaint.

identified by Discover Bank.[3] Answer at p. 11, ¶ 15. In paragraph 2.1 of the Agreement, New Vision agreed to purchase between $5 million and $15 million in unpaid balances for such accounts monthly. See Ex. A to the Complaint. Pursuant to paragraphs 1.2 and 3.1 of the Agreement, the purchase price for such accounts was to be equal to 9.28% of the unpaid balance for such accounts. Id.

The Agreement specifically provided that Discover Bank (referred to as "Seller") made no warranties or representations to New Vision (referred to as "Buyer") concerning the collectability of any account or the creditworthiness of any debtor. Id. Paragraph 8.1 of the Agreement states, in pertinent part, as follows:

> Decision to Purchase and Economic Risk. Buyer represents, warrants and certifies to Seller that it is an institutional and sophisticated purchaser in the business of buying or originating accounts of the type sold hereunder or that otherwise deals in such accounts in the ordinary course of Buyer's business. Buyer further represents, warrants and certifies that it has knowledge and experience in financial and business matters that enables it to evaluate the merits and risks of the transaction contemplated by this Agreement, and that its bid and decision to purchase the Accounts are based upon Buyer's independent evaluation of the transaction. Buyer acknowledges that the Accounts may have limited or no liquidity and Buyer has the financial wherewithal to own the Accounts for an indefinite period of time and to bear the economic risk of an outright purchase of the Accounts and a total loss of the Purchase Price for the Accounts. Buyer acknowledges that it has not relied in entering into this Agreement upon any oral or written information provided by Seller or Seller's agents, representatives, or independent contractors, and acknowledges that no employee, agent, representative or independent contractor of the Seller has been authorized to make any statements or representations other than those specifically contained in this Agreement. Buyer has made such independent investigation as it deems warranted into the nature, validity, enforceability, collectability and value of the Accounts and all other facts it deems

[3] For the limited purpose of this motion to dismiss and for judgment on the pleadings, the factual allegations of New Vision's Answer are deemed to be true. However, for the record, Discover Bank vehemently denies any charge of fraud or other wrongdoing.

> material to its purchase, and is entering into this transaction solely on the basis of that investigation and Buyer's own judgment. (Emphasis Added)

Id.

Moreover, Article X of the Agreement provides (in boldfaced and capitalized letters) that Discover Bank makes no warranty or representation concerning the quality or other aspects of the accounts:

> No warranties. Except for those expressed in this Agreement, no warranties or representations, express or implied, are or have been made by seller, or anyone acting on its behalf, particularly, without in any way limiting the generality of the foregoing, no warranties or representations regarding (i) the collectability of any account; (ii) the creditworthiness of any debtor; (iii) the form or sufficiency of any account documentation; (iv) the form or sufficiency of any collateral of any type which secures the repayment of any account; (v) the enforceability of accounts; or (vi) the validity of any collateral document or its recordation. Except as otherwise provided in this agreement, all accounts sold to buyer under this agreement are sold and transferred without recourse. Except as specifically set forth in this agreement, buyer acknowledges and agrees that seller has not made, does not make and specifically disclaims any representation, warranty, promise, covenant, agreement or guarantee of any kind or character whatsoever, whether express or implied, oral or written, past, present or future, of, as to, concerning or with respect to (A) the nature, quality or condition of the accounts, (B) the income to be derived from the accounts, (C) the suitability of the accounts for any and all activities and uses which buyer may intend, or (D) any other matter with respect to the accounts. The buyer further acknowledges and agrees that any information provided or to be provided with respect to the accounts was obtained from a variety of sources and that seller has not made any independent investigation or verification of such information and makes no representations or warranties as to the accuracy or completeness of such information. Except as specifically set forth in this Agreement, buyer further acknowledges and agrees that the sale of the accounts as provided herein is made on an "as is" condition and basis with all faults. (Emphasis Added)

Id.

Paragraph 13.9 provided that the Agreement was a fully integrated expression of the parties' agreements and understandings, and states as follows:

> Entire Agreement; Modification. This Agreement constitutes the entire agreement of the parties, superseding all other and prior agreements and understandings between the parties relating to the subject matter of this Agreement. If there is any inconsistency between the terms of this Agreement and any information incorporated herein by reference, the terms of this Agreement shall govern. There are no promises or other agreements, oral or written, express or implied, between the parties other than as set forth in this Agreement. No change or modification of, or waiver under, this Agreement shall be valid unless it is in writing and signed by duly authorized representatives of Seller and Buyer. (Emphasis added)

Finally, in paragraph 3.5 of the Agreement, the parties agreed that upon a default by New Vision, Discover Bank is entitled to the following remedies:

> (i) [to] enforce specific performance of Buyer's obligations under this Agreement and/or
>
> (ii) [to] exercise any other right or remedy Seller may have at law or in equity by reason of the default, including but not limited to, reselling any unpurchased Accounts and seeking any deficiency against Buyer and the recovery of attorneys fees incurred by Seller in connection with Buyer's default. (Emphasis added)

B. The Amendments

Following execution of the Agreement, the parties entered into three separate written amendments to the Agreement, each of which provided more advantageous (i.e. lower) prices for New Vision than did the original Agreement. Copies of the amendments are annexed as Exhibit B to the Complaint. See also Answer p. 3 ¶ 14 ("the Agreement and any amendments thereto speak for themselves"). In particular, the parties entered into the following written amendments to the Agreement:

1. On or about October 1, 2001 (the "October 1, 2001 Amendment"), an amendment was signed by both parties lowering the purchase price of accounts from 9.28% of the unpaid balance to 8.75% of the unpaid balance;

2. On or about February 8, 2002 (the "February 8, 2002 Amendment"), an amendment was signed by both parties lowering the price for the January 2002 sale of accounts to 7% of the unpaid balance; and

3. On or about July 10, 2002 (the "July 10, 2002 Amendment"), an amendment was signed by both parties lowering the purchase price of accounts to 6.85% of the unpaid balance. See Ex. B to the Complaint.

The July 10, 2002 Amendment provides in pertinent part as follows:

> Seller agrees to sell and Buyer agrees to buy all of Seller's right, title, and interest in and to the Accounts, which Seller identifies during each month through March 2003, subject to the terms and conditions set forth in this Agreement. This Agreement shall automatically renew for a one (1) year period, through March 2004, unless terminated by either party upon sixty (60) days written notice to the other party prior to March 31, 2003. The aggregate Unpaid Balance of the Accounts to be sold each month shall not be more than fifteen million dollars ($15,000,000.00). Notwithstanding the foregoing, in the event Seller desires to sell Accounts with an aggregate Unpaid Balance of more than fifteen million dollars ($15,000,000.00) in any month, Buyer may elect to purchase such additional Accounts by delivering its written consent to Seller prior to the Closing Date in any such month.

Id. Thus, under the July 10, 2002 amendment, New Vision was obligated to buy accounts from Discover Bank at least through March 2003.

Each of the Amendments provided that, except for the price and other changes set forth therein, "the Agreement shall be and remain unchanged and in full force and effect…." Id. Thus, the parties did not modify in any way the language of the Agreement which provided that New Vision would purchase the accounts on an "as is" basis and which expressly disclaimed any

warranty by Discover Bank with respect to the quality or collectability of the accounts it would sell to New Vision.

New Vision freely and voluntarily entered into each of the aforesaid amendments. What is more, by New Vision's own admission, it did so on each and every occasion with full knowledge of its supposed claim of adverse selection. One need look no further than to New Vision's answer for an admission that New Vision claimed to have learned that Discover Bank allegedly was engaged in adverse selection as early as April of 2001 and thereafter, through and including July of 2002.

To begin, New Vision alleges that, in April 2001, when it supposedly began to receive substantially different types of accounts, it concluded that it Discover Bank was engaged in "adverse selection." Answer at pp. 12-13, 17 at ¶ 21, ¶ 25, ¶ 69 and ¶ 70. Nevertheless, New Vision executed the Amendment in October 2001, obtaining a price break and pledging itself to continue to do business with Discover Bank. Complaint at ¶ 14 & Ex. B thereto; Answer at p. 3, ¶ 14; Answer at p. 13, ¶ 36.

New Vision also alleges that it independently concluded that Discover Bank allegedly had engaged in adverse selection in January and February 2002. Answer at p. 14, ¶¶ 45-56. Yet, once again, with full knowledge of its claims of adverse selection, New Vision entered into the second amendment of the Agreement on February 8, 2002. Id. It obtained another price break and continued to do business with Discover Bank under the Agreement as amended.

New Vision freely admits that it did not honor its obligations to purchase accounts under the Agreement as amended on February 8, 2002. Answer at p. 15, ¶ 50. As a result, on July 10, 2002, New Vision and Discover Bank executed the third and final amendment, providing even lower pricing for New Vision. Answer at p. 16, ¶¶ 55, 57; Complaint, Ex. B. Yet, at this time,

New Vision unquestionably had full knowledge of its alleged claim that Discover Bank was allegedly engaging in adverse selection. Still New Vision chose to obtain another price break and continued to do business with Discover Bank under the Agreement as amended.

C. New Vision's Post-July 10, 2002 Purchases

New Vision's first purchase following the July 10, 2002 Amendment occurred on September 24, 2002. New Vision purchased accounts from Discover Bank with a face value of over $14,000,000. Answer at p. 16, ¶ 59. According to New Vision, however, upon receiving the account information, it was "shocked and dismayed" to observe an "additional data field" on the disk that indicated whether or not an attorney had been retained on behalf of the debtor. See Answer at pp. 16-17, ¶¶ 60-64.

New Vision did not, however, rescind the Agreement, or tender the accounts back to Discover Bank.[4] Nor did it institute an action against Discover Bank. Instead, New Vision kept the accounts it had purchased, and, on October 25, 2002, proceeded to purchase even more accounts from Discover Bank under the terms of the amended Agreement. Answer at p. 17, ¶¶ 65-68.

D. New Vision's Material Breach Of The Agreement

Commencing on or about October 25, 2002, in material breach of the Agreement and Amendments, New Vision refused to purchase any accounts whatsoever designated by Discover Bank for the months of November and December 2002, and for the months of January, February, and March 2003. Compare Complaint at ¶¶ 16-17 with Answer at p. 4, ¶¶ 16-17. In doing so, New Vision did not rely upon any claim of adverse selection or other supposedly wrongful

[4] Notably, New Vision never alleges that Discover Bank represented that the accounts sold to it would not have debtors represented by counsel.

conduct by Discover Bank, but instead claimed that its own "extenuating circumstances" made the immediate purchase of the accounts impossible.

For example, on November 20, 2002, New Vision wrote to Discover Bank and stated as follows:

> At this time New Vision Financial LLC will not be able to make a purchase from Discover Bank in the month of November 2002, due to extenuating circumstances. This purchase may at Discover Bank's discretion, be added to the end of the New Vision Financial forward flow contract, which is scheduled to terminate March of 2003.

Ex. 3 to the Moore Affidavit. Similar letters were sent by New Vision to Discover Bank on January 23, 2003, February 20, 2003, and March 10, 2003. Id.

On February 4, 2003, and March 10, 2003, Discover Bank sent demand letters to New Vision (as detailed in the Complaint at ¶¶ 19-20). In the latter letter, Discover Bank advised New Vision that due to New Visions' breach of the Agreement, Discover Bank would have no choice but to terminate the Agreement under Article 13.12 of the Agreement, providing for termination for breach, effective April 1, 2003. Complaint ¶¶ 20-21; Ex. 4 to the Moore Aff.

New Vision made no further purchases or payments, and Discover Bank filed this lawsuit on or about July 30, 2003. Discover Bank alleges mitigation damages of $847,667.84 for the months of November-December 2002 and January-March 2003 (when it sold the accounts that New Vision should have bought to other buyers), lost profits of approximately $2 million, damages in other miscellaneous categories of $36,306.99, and reasonable attorneys' fees. Complaint at ¶¶ 22-28.

ARGUMENT

POINT I

NEW VISION'S CLAIMS FOR FRAUD AND NEGLIGENT MISREPRESENTATION SHOULD BE DISMISSED BECAUSE THEY ARE BARRED BY THE AGREEMENT AND BECAUSE IT CANNOT DEMONSTRATE THE ELEMENT OF JUSTIFIABLE RELIANCE

Discover Bank denies that it made any fraudulent or negligent misrepresentation of any kind whatsoever to New Vision. Discover Bank further denies that it engaged in any sort of adverse selection whereby New Vision was treated worse than any other outside buyer. However, the Court need not assess the credibility of the parties' witnesses in order to dismiss New Vision's counterclaims and fraud defenses. Because of the specific disclaimers in the Agreement, New Vision cannot, as a matter of law, rely on any purported misrepresentations concerning the quality or collectability of the accounts sold under the Agreement.

A. Justifiable Reliance is an Element of Both Fraud and Negligent Misrepresentation

Under Ohio law, which governs the alleged tort claims and defenses asserted by New

Vision,[5] justifiable reliance is an essential element of a cause of action for fraud, fraud in the inducement and negligent misrepresentation. See In re Adoption of Zschach, 665 N.E.2d 1070, 1078 (Ohio) ("An essential element of fraud is that the action or forbearance resulting in injury is proximately caused by the affected party's justifiable reliance on the false representation or concealment"), cert. denied, 519 U.S. 1028, 117 S.Ct. 582 (1996). See also Hildreth Mfg., L.L.C. v. Semco, Inc., 785 N.E.2d 774, 791 (Ohio App. 2003) (no fraud claim where plaintiff did not rely on alleged misrepresentation); accord Next Century Communications Corp. v. Ellis, 171 F.Supp.2d 1374, 1380 (N.D.Ga. 2001) ("failure to allege facts showing reasonable reliance requires dismissal of a claim for negligent misrepresentation"); Anderson v. Olympic Committee for Atlanta Games, Inc., 584 S.E.2d 16, 21 (Ga. App. 2003) (dismissing fraudulent misrepresentation and negligent misrepresentation claims where the alleged misrepresentations "were not statements of fact upon which the appellants could have justifiably relied"); Grey v. Eskimo Pie Corp., 244 F.Supp. 785, 794 (D.Del. 1965) ("Under Delaware law, even though a

[5] This Court should assess New Vision's fraud claims and defenses under the law of the State of Ohio. This Court is sitting in the State of Ohio, and Ohio choice of law rules apply the law of the State with the most significant contacts to fraud actions. Macurdy v. Sikov and Love, P.A., 894 F.2d 818 (6th Cir. 1990) (agreement that was allegedly induced by fraud governed by Ohio law, where the agreement was negotiated, rather than Pennsylvania, where the agreement was intended to be performed). See also Jamhour v. Scottsdale Ins. Co., 211 F.Supp.2d 941, 951-52 (S.D.Ohio 2002) (applying same choice of law rules to claim for negligent misrepresentation). This is the case even where, as here, the parties have chosen the law of a different state (here Delaware) to govern the interpretation of their contractual relationship. In re Revco D.S., Inc., 118 B.R. 468, 500-03 (Bankr. N.D.Ohio 1990).

This Court has already determined that Ohio had the most significant contacts with this action when determining that the case is being properly tried in this jurisdiction and venue. See Order dated December 31, 2003. Therefore, this Court should apply Ohio law to the tort claims asserted by New Vision.

In any event, under the law of the State of Delaware (the law chosen to apply to the parties' contract claims, under Paragraph 13.8 of the Agreement, and the state of Discover Bank's incorporation) and the law of the State of Georgia (where New Vision is domiciled), New Vision's claims and defenses in this action should be dismissed as well. Accordingly, where

representation may be false, that fact is immaterial if the person to whom it is made does not rely upon it"); H-M Wexford LLC v. Encorp., Inc., 832 A.2d 129, 142 (Del. Ch. 2003) ("Justifiable reliance is an element of common law fraud, equitable fraud, and negligent misrepresentation under Delaware law").

B. New Vision Cannot Establish That it Justifiably Relied Upon Purported Representations That Contradict the Terms of the Written Agreement or its Disclaimers

Under Ohio law, a party cannot prove the necessary element of justifiable reliance on a misrepresentation where it has specifically disclaimed such reliance in the controlling contract, or where the provisions of the contract specifically contradict the supposed misrepresentation. See Citicasters Co. v. Bricker & Eckler LLP, 778 N.E.2d 663 (Ohio App. 2002) (fraudulent inducement cannot be asserted to avoid express representations in the agreement); Lamkin v. First Community Bank, No. 00AP-935, 2001 WL 300732 (Ohio App. March 29, 2001)(to the same effect); Ed Schory & Sons, Inc. v. Society Nat. Bank, 662 N.E.2d 1074 (Ohio 1996) (dismissing claim of negligent misrepresentation that contradicted express terms of agreement); Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 7 F.Supp.2d 954, 962-63 (N.D.Ohio 1998) ("No party to a contract can claim such reliance upon any representation which is expressly disclaimed by another party, no matter what the content of the representation").

The laws of the States of Delaware and Georgia are to the same effect. Great Lakes Chem. Corp. v. Pharmacia Corp., 788 A.2d 544 (Del. Ch. 2001) (denying claim of fraud where alleged misrepresentation contradicts disclaimer in the agreement); Watson v. Zurich-Am. Ins. Co., 470 S.E.2d 684 (Ga. App. 1996) ("The only fraud which would relieve a party from an obligation which he has signed, where that party can read and write and is not otherwise under

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appropriate, Discover Bank has cited to the law of those jurisdictions in parallel to its citations to Ohio law.

any disability, is that fraud which prevents him from reading what he signed") (citation omitted); Martin v. North Am. Van Lines, Inc., 485 S.E.2d 815, 818 (Ga. App. 1997) ("the plaintiff cannot simultaneously affirm a contract which states that no representations were made and allege fraud based on such representations"), quoting Stricker v. Epstein, 444 S.E.2d 91 (Ga. App. 1994).

A factually analogous example of this principle in application is the case of Capital Funding, VI, L.P. v. Chase Manhattan Bank USA, N.A., 2003 WL 21672202 (E.D. Pa. March 21, 2003). There, the U.S. District Court for the Eastern District of Pennsylvania dismissed claims of fraudulent and negligent representation under Pennsylvania law in connection with the sale of charged off credit card debt, which claims were strikingly similar to those made by New Vision in this lawsuit.

In Capital Funding, the plaintiff alleged that, prior to entering into an agreement to purchase charged off credit card accounts from defendant Chase, it reviewed sample data concerning such accounts, and allegedly relied upon representations from Chase that it would not engage in the practice of offering "blanket" settlements to debtors prior to the sale of their accounts. The parties entered into a fully integrated written agreement under which Capital Funding, like New Vision, specifically disclaimed reliance on any representation not contained in the agreement itself. Nevertheless, Capital Funding sued Chase on the ground that it had been fraudulently induced to execute the agreement because Chase, contrary to its representations, engaged in the practice of offering blanket settlements to account holders. The Court dismissed these claims on the ground that "Pennsylvania's parol evidence rule, as interpreted by this Court, bars tort claims of fraud where the allegedly fraudulent statements are specifically contradicted by the language of an integrated contract…." Id. at *6 (citation omitted).[6]

[6] The Court declined to dismiss Capital Funding's contract claims based upon the age of the accounts. However, Capital Funding had negotiated for and obtained a specific contract

Similarly, in this lawsuit, the specific disclaimers by New Vision of reliance on any representation or warranty concerning the quality or collectability of the accounts, as detailed in Section C.3 of this memorandum, clearly bar any claim of fraud or negligent misrepresentation asserted by New Vision. New Vision represented in the Agreement (¶ 8.1) that it is a highly sophisticated purchaser of accounts. It could have insisted upon contract language prohibiting adverse selection, but did not do so.

This principle applies not only to the Agreement itself, but to the three amendments thereto, which New Vision also contends were induced by misrepresentations by Discover Bank

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provision with respect to the age of the accounts, which Chase allegedly violated. Here, in contrast, New Vision did not insist upon a contract provision prohibiting adverse selection, and it instead disclaimed any representation or warranty with respect to the quality of the accounts.

concerning adverse selection. At the time of those amendments, however, New Vision, according to its Answer, was supposedly aware that Discover Bank was engaging in adverse selection. Nevertheless, with each amendment, the parties preserved each and every disclaimer of representations and warranties contained in the original Agreement. Under the circumstances, New Vision cannot assert that it justifiably relied upon any misrepresentation concerning adverse selection with respect to the amendments to the agreement. See Citicasters, 778 N.E.2d at 666-69, and the other cases cited supra concerning the reliance element; see also McElroy v. Ohio Dept. of Transportation, No. 2003-03256-AD, 2004 WL 67231 (Ohio Ct. Cl. Jan. 14, 2004)(plaintiff could not rely upon alleged negligent misrepresentation prior to agreement concerning permit for real property, where plaintiffs were aware of problems with permit prior to executing agreement).

Accordingly, all of New Vision's counterclaims and affirmative defenses must be dismissed in their entirety.

POINT II

NEW VISION'S CLAIMS FOR NEGLIGENT MISREPRESENTATION SHOULD BE DISMISSED

It its fourth counterclaim, New Vision asserts a claim for negligent misrepresentation. However, under governing Ohio law, a party cannot seek purely economic damages from a claim sounding in tort. "[I]n the absence of injury to person or damage to other property, economic losses may not be recovered in tort theories of strict liability or negligence." Queen City Terminals, Inc. v. Gen. Am. Transport. Corp., 653 N.E.2d 661, 667 (Ohio 1995); Floor Craft Flooring, Inc. v. Parnia Community Gen. Hosp. Ass'n., 560 N.E.2d 206 (Ohio 1990) (to the same effect); Picker Int'l, Inc. v. Mayo Found., 6 F. Supp.2d 685 (N.D. Ohio 1998) (summary judgment granted dismissing software licensor's claim against licensee for negligent

misrepresentation where there was no allegation of damage to person or property). Here, New Vision does not allege that it suffered any personal or property damages, but alleges purely economic loss – its inability to collect certain accounts which it purchased. Accordingly, its claims of negligent misrepresentation must be dismissed. Accord Flintkote Co. v. Dravo Corp., 678 F.2d 942 (11th Cir. 1982) (no claim for economic losses in tort under Georgia law); In re Oriental Republic Uraguay, 821 F. Supp. 950 (D. Del. 1993) (Delaware law to the same effect).

An exception to this rule arises where a defendant, such as an accountant, has contracted with the plaintiff to provide information "for the guidance of others in their business transactions" and where there is a "special" relationship between the parties. This "special" relationship does not exist in "ordinary business transactions" and usually arises where the defendant is a professional who is in the business of rendering opinions to others for their use in guiding their business. Picker, 6 F. Supp.2d at 689-90 (finding that relationship between licensor and licensee was not such a "special" relationship), citing, inter alia, Haddon View Inv. Co. v. Coopers & Lybrand, 436 N.E.2d 212 (Ohio 1982) and Gutter v. Dow Jones, Inc., 490 N.E.2d 898 (Ohio 1986); accord Marquis Towers, Inc. v. The Highland Group, No. A03A1657, 2004 WL 178596 (Ga. App. Jan. 30, 2004)(theory of liability for negligent misrepresentation generally applies to professionals only); Guardian Constr. Co. v. Tetra Tech Richardson, Inc., 583 A.2d 1378 (Del. Super. Ct. 1990)(Delaware law to the same effect).

Here, Discover Bank and New Vision had an ordinary business relationship; not only was Discover Bank not hired to provide business information services to New Vision, but as stated in the Agreement, New Vision independently conducted its own due diligence and analyzed the information provided to it. Accordingly, Discover Bank's negligent misrepresentation claims and defenses allegedly must be dismissed in their entirety.

POINT III

NEW VISION HAS WAIVED ANY CLAIM OF MISREPRESENTATION WHICH ALLEGEDLY INDUCED THE ORIGINAL AGREEMENT AND ITS FIRST TWO AMENDMENTS

Any doubt concerning New Vision's contractual disclaimer of warranties and lack of reliance on representations by Discover Bank is dispelled by the fact that New Vision – with full knowledge of the alleged poor performance of the accounts it purchased and the alleged adverse selection issues – entered into three separate written amendments to the Agreement (in October 2001 and February and July 2002), each time lowering the price it paid for the purchase of accounts. These three amendments are fatal to New Vision's counterclaims and defenses, and require their dismissal as a matter of law.

It is hornbook law that a party who believes that it has been misled into entering into a contract ratifies the contract and waives any right to sue for fraud or misrepresentations if, with knowledge of the supposed fraud, the party receives substantial concessions from the supposed defrauder or enters into a new agreement with respect to the same subject matter.

> [G]enerally, if a party induced by misrepresentations of fraud to deal in or acquire, or to enter into a contract and thereafter, with knowledge of the deception, receives from the party guilty of fraud some substantial concession, or the parties enter into a new contract with respect of the transaction, the initially defrauded party relinquishes the right to recover or recoup damages because of the misrepresentation.

37 Am. Jur. 2d Fraud & Deceit § 335 (2003). See Sun Oil v. Dollbeer, 21 Ohio Law Abs. 176, 1936 WL 2008 (Ohio App. Jan. 11, 1936) (fraudulent inducement action dismissed where gas station operator ratified agreement with oil company when, after discovering the fraud, it accepted higher payments under the contract then specified in the contract from the oil company for a period of five months), cited in 51 Ohio Jur. 3d Fraud & Deceit § 150 (2003) ("An injured party's intelligent and intentional ratification of a contract voidable on account of fraud will

generally preclude that party from subsequently claiming fraud against the other party."); accord Klusack v. Ward, 507 S.E.2d 1 (Ga. App. 1998) (by accepting, after alleged fraud was discovered, revised deed with new property description, purchasers affirmed contract and were precluded from bringing action for fraud).[7]

Here, New Vision contends that it was fraudulently induced into entering into the Agreement and the amendments thereto. However, on three separate occasions, October 1, 2001, February 8, 2002 and July 10, 2002, it entered into amendments to the Agreement, receiving new and more favorable price terms with each of the amendments, all with full knowledge of its supposed claims of adverse selection. Therefore, New Vision waived any claim of misrepresentation which allegedly induced the original Agreement, or its amendments.

POINT IV

NEW VISION'S CLAIMS WITH RESPECT TO THE JULY 10, 2002 AMENDMENT ARE MERITLESS

New Vision contends that following the July 10, 2002 amendment to the Agreement, it received delivery of certain accounts, and immediately learned from the data provided to it by Discover Bank that certain of the account holders had retained counsel. New Vision also

[7] The doctrine has been generally accepted nationwide. For example, under California law, "'a party claiming to have been defrauded, [who] enters, after discovery of the fraud, into new arrangements or engagements concerning the subject-matter of the contract to which the fraud applies, [has] waived any claim for damages on account of the fraud.'" Matter of Masters, 37 B.R. 72 (Bankr. E.D.Mich. 1984), quoting Keylon v. Inch, 35 P.2d 73 (Wash. 1934). See also, e.g., Smith v. Roach, 126 Cal.Rptr. 29 (Cal. App. 1975) ("a plaintiff waives his right to seek damages for fraud only if, after he discovers the fraud, he makes a 'new agreement or engagement' with the other party to the original contract (the contract allegedly procured by the fraud of that party)"); United Forest Prods. Co. v. Baxter, 452 F.2d 11 (8th Cir. 1971) (plaintiff who renegotiates agreement after discovery of fraud has waived damages arising from that fraud); Wellens v. Beck, 84 N.W.2d 345 (N.D. 1957) ("It is well established by the authorities that when one who has been induced by fraud to enter into a contract, subsequently, with knowledge of the fraud, enters into another agreement respecting the same transaction with the one guilty of the fraud, he, the injured party, thereby waives and relinquishes all right to damages on account of such fraud").

contends that this made the accounts more difficult to collect, and alleges that Discover Bank's failure to disclose the fact that some account holders might be represented by counsel constituted a fraudulent omission.[8] For the reasons set forth herein, this claim is utterly meritless and should be dismissed.

A. New Vision Waived any Claim for Fraud in Connection With the July 10 Amendment

New Vision's first purchase following the July 10, 2002 Amendment occurred on September 24, 2002. According to New Vision, it was surprised to observe an "additional data field" for the accounts that indicated whether or not an attorney had been retained on behalf of the debtor. At the time that New Vision made this discovery, the Agreement, as amended, was "executory" – that is, New Vision had not commenced to perform any of its obligations pursuant to the July 10 amendment.

However, upon discovery of this supposedly fraudulent omission, New Vision did not attempt to rescind the Agreement, or tender the accounts back to Discover Bank. Nor did it institute a lawsuit against Discover Bank. Instead, New Vision kept the accounts it had purchased on September 24, 2002. Then, on October 25, 2002, New Vision proceeded to purchase even more accounts from Discover Bank under the terms of the amended Agreement. Thus, it fully ratified the Agreement, as amended, and waived any claim of fraud or misrepresentation thereunder. See Lamberjack v. Priesman, No. 92-OT-006, 1993 WL 24482 (Ohio App. Feb. 5, 1993) (performance of executory contract after knowledge of the facts making it voidable on the ground of fraud in its procurement is a waiver of any right of action for damages for the fraud), citing Baltimore & O.R. Co. v. Jolly Bros. & Co., 72 N.E. 888 (Ohio

[8] New Vision does not state whether this omission was fraudulent or negligent. However, under Ohio law, a party cannot successfully assert a claim for negligent omission. Textron Fin. Corp. v. Nationwide Mut. Ins. Co., 684 N.E.2d 1261 (Ohio App. 1996); Picker, 6

1904); see also Eve v. Rutledge, 597 N.E.2d 194 (Ohio App. 1991) (when plaintiff discovers fraud in the inducement of contract for purchase of business within three weeks of sale, but did not cease making payments for the business, plaintiff waived the fraud); Keller v. Citizens Discount Corp., 144 N.E.2d 886 (Ohio App. 1957) (to the same effect).[9]

B. New Vision Cannot Establish Justifiable Reliance on a Duty By Discover Bank to Disclose Whether the Underlying Debtors had Retained Counsel

New Vision does not allege that Discover Bank ever represented that none of the debtors owning accounts being sold would be represented by counsel. Instead, New Vision contends that Discover Bank failed to disclose the fact that some of the account debtors might be represented by counsel. However, Discover Bank cannot be held liable for failing to disclose such information to New Vision.

When New Vision executed the July 10 Amendment, it incorporated all of the same disclaimers of warranties or representations concerning collectability and quality of the accounts of accounts from the original Agreement. Accordingly, New Vision cannot have relied on any supposed omissions about the quality of the accounts, because it specifically disclaimed any such reliance. See Citicasters, 778 N.E.2d 663; and the other cases cited in Point I, supra.[10]

F. Supp.2d 685 (negligent misrepresentation does not lie for omissions under Ohio law).

[9] Accord Jernigan Auto Parts, Inc. v. Commercial State Bank, 367 S.E.2d 250 (Ga. App. 1988) (to the same effect); Little v. Georgia Power Co., 168 S.E. 107 (Ga. App. 1932) (to the same effect); Tri State Mall Associates v. A.A.R. Realty Corp., 298 A.2d 368 (Del. Ch. 1972) (to the same effect).

[10] Moreover, New Vision cannot claim it justifiably believed that none of the account debtors would be represented by counsel. Section 11.1 of the Agreement placed New Vision directly on notice that at least some account debtors would be represented by counsel. That paragraph sets forth a number of types of accounts that were "subject to repurchase" by Discover Bank, at its discretion, including "any Account which is in litigation or subject to a bankruptcy proceeding…." Id. Because New Vision knew from this that some of the accounts sold to it would already be in litigation or bankruptcy, it also had to know that some debtors would be represented by counsel.

Moreover, New Vision bargained with Discover Bank at arms' length. A party such as Discover Bank, which negotiates a contract with another at arms' length, has no duty to speak, and fraud cannot be imputed by silence. Horton v. Telxon Corp., 716 N.E.2d 786 (Ohio Ct. C.P. 1999). See also Blon v. Bank One, Akron, N.A., 519 N.E.2d 363 (Ohio 1988) ("where parties deal at arm's length, each party is presumed to have the opportunity to ascertain relevant facts available to others similarly situated and, therefore, neither party has a duty to disclose material information to the other"). Accord Matter of Enstar Corp., 593 A.2d 543, 549 (Del. Ch.) ("mere silence will not constitute fraud because there is no duty to disclose a material fact known by one party, which may cause the other party not to enter the contract"), reversed on other grounds, 604 A.2d 404 (Del. Super. Ct. 1991); Trust Co. v. Stubbs, 417 S.E.2d 373, 377 (Ga. App. 1992) (dismissing claim of fraudulent omission where plaintiff failed to demonstrate any duty to disclose).

For these reasons, New Vision's claims and defenses, to the extent they are premised on the failure by Discover Bank to disclose information about the legal representation of account debtors, should be dismissed in its entirety.

POINT V

UNJUST ENRICHMENT MAY NOT BE CLAIMED WHERE, AS HERE, AN AGREEMENT GOVERNS THE PARTIES' RELATIONSHIP

It is black letter law that no claim for unjust enrichment can lie where an express agreement governs the relationship between the parties. Wolfer Enters. Inc. v. Overbrook Dev. Corp., 724 N.E.2d 1251, 1253 (Ohio App. 1999). See also Hartley v. Dayton Computer Supply, 106 F.Supp.2d 976, 984 (S.D.Ohio 1999) ("a plaintiff may not recover if the defendant retains the disputed money or benefit under the terms of an agreement between the parties"); accord, Wood v. Coastal States Gas Corp., 401 A.2d 932, 942 (Del. 1979) ("Because the contract is the

measure of plaintiffs' right, there can be no recovery under an unjust enrichment theory independent of it"); Bonem v. Golf Club of Georgia, Inc., 591 S.E.2d 462 (Ga. App. 2003) (dismissing claim because where a "legal contract governs the dispute at issue … [plaintiff] may not rely on unjust enrichment").

The Agreement and amendments clearly govern the entire relationship between the parties. New Vision's counterclaims encompass nothing more than a dispute over the quality of accounts purchased pursuant to the Agreement. Accordingly, New Vision's counterclaim V, for unjust enrichment, must be dismissed as a matter of law.

POINT VI

NEW VISION'S AFFIRMATIVE DEFENSES SHOULD BE DISMISSED AND DISCOVER BANK IS ENTITLED TO PARTIAL SUMMARY JUDGMENT ON THE PLEADINGS AS TO NEW VISION'S LIABILITY

When considering a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), "only factual allegations must be accepted as true…. Legal conclusions, artfully crafted as factual allegations, are irrelevant." Kennerly v. Montgomery Bd. of Comm'rs, 257 F.Supp.2d 1037, 1043 n.2 (S.D.Ohio 2003) (emphasis in original). "The court may grant the motion if, on the facts as to admitted allegations, the moving party is clearly entitled to judgment." Benson v. O'Brien, 67 F.Supp.2d 825 (N.D.Ohio 1999). See also Kennerly, 257 F.Supp.2d at 1044.

A. New Vision's Conclusory Affirmative Defenses Must Be Dismissed

New Vision's affirmative defenses contain nothing but the most conclusory allegations of fact or law. Allegations in pleadings cannot be stated with merely conclusory allegations. Games Galore of Ohio, Inc. v. Masminster, 154 F.Supp.2d 1292, 1300 (S.D.Ohio 2001) (in motion for judgment on pleadings, "conclusory allegations are insufficient"); SEC v. Blackwell, 291 F.Supp.2d 673, 685 (S.D.Ohio 2003) ("conclusory statements or legal conclusions need not

be considered"). Here, New Vision's affirmative defenses contain no underlying allegations of fact. Accordingly, these affirmative defenses should be dismissed as a matter of law.

B. Discover Bank Is Entitled To Judgment On The Pleadings On Its Claim For Breach Of Contract

Without any affirmative defenses, or offsetting counterclaims, New Vision has no defense to Discover Bank's claim for breach of contract, and therefore judgment on the pleadings is appropriate.

> Under Delaware law, the elements of a breach of contract claim are: 1) a contractual obligation; 2) a breach of that obligation by the defendant; and 3) a resulting damage to the plaintiff

H-M Wexford LLC v. Encorp., Inc., 832 A.2d 129, 140 (Del. Ch. 2003).[11] See also Belcher v. Ohio Dep't of Human Servs., 48 F.Supp.2d 729, 738 (S.D.Ohio 1999) ("In Ohio, the essential elements of a cause of action for breach of contract are: 1) the existence of an enforceable contract; 2) the performance (or excuse from performance) of the contractual obligations by the party seeking relief; 3) breach or failure to fulfill contractual obligations by the other party; and 4) damages suffered by the party seeking relief as a result of the breach"); Odem v. Pace Academy, 510 S.E.2d 326, 331 (Ga. App. 1998) ("the elements for a breach of contract claim in Georgia are merely the breach and the resultant damages to the party who has the right to complain about the contract being broken") (citations omitted).

New Vision admits that it executed the Agreement and Amendments thereto. There is no allegation that Discover Bank breached the Agreement or the Amendments. In the Agreement's third amendment of July 10, 2002, New Vision agreed to purchase "all of the Seller's [Discover Bank] right, title and interest in and to the Accounts, which Seller identifies during each month

[11] The Agreement specifies that its terms should be interpreted under Delaware law. Ohio courts generally honor such choice of law provisions. Schulke Radio Prods., Ltd. v. Midwestern Broad. Co., 453 N.E.2d 683, 686 (Ohio 1983).

through March 2003. . . . [T]he aggregate unpaid balance of the Accounts to be sold each month shall not be more than fifteen million dollars ($15,000,000.00)." Ex. B to the Complaint, July 10, 2002 amendment at ¶ 2.1.

In its Complaint, Discover Bank alleges that New Vision breached the Agreement, as amended, by failing to make any purchases for the months of November and December 2002, and for the months of January, February and March 2003. Complaint at ¶¶ 16-17. In its Answer, New Vision admits the breach, stating that it "did not purchase any accounts from Discover after October 25, 2002." Answer at p. 4, ¶¶ 16-17. Thus, New Vision has fully admitted its default under the Agreement as amended.

Under paragraph 3.5 of the Agreement, upon a default by New Vision, Discover was entitled to "exercise any . . . remedy Seller [Discover Bank] may have at law or in equity by reason of the default, including but not limited to, reselling any unpurchased accounts and seeking any deficiency against Buyer [New Vision] and the recovery of attorney fees incurred by Seller in connection with Buyer's default." As set forth in the Complaint, following New Vision's default, Discover Bank mitigated its damages by selling the $15 million in accounts for the months in question which New Vision had originally committed to purchase to other purchasers, at lower prices. For this reason, Discover Bank suffered $847,667.64 in damages. Complaint at ¶¶ 22-23.

Moreover, Discover Bank is also entitled to its lost profits under the Agreement. Under the July 10, 2002 amendment to the Agreement, the parties agreed that the term of the Agreement would be automatically renewed for a one-year period from March 31, 2003 to March 31, 2004 unless written notice of termination is given 60 days prior to March 31, 2003. New Vision never provided such notice of termination. Due to New Vision's breach of the

Agreement, Discover Bank was forced to terminate the Agreement effective April 1, 2003. Because that termination was "for cause," necessitated by New Vision's breach of the Agreement, termination of the Agreement does not absolve New Vision of its liability for lost profits sustained by Discover Bank during the Agreement's renewal term of April 2003 through March 2004 (the "Renewal Term"). Discover Bank estimates that its lost profits for the Renewal Term are approximately $2 million. Complaint at ¶¶ 24-25.

Although New Vision admits that it breached the parties' Agreement by ceasing its purchases in November 2002, New Vision denied the allegations concerning Discover Bank's damages in its Answer. Thus, although Discover Bank is entitled to partial judgment on liability under Fed. R. Civ. P. 12(c), the amount of damages to which Discover Bank is entitled must await further proceedings.[12]

[12] Discover Bank also seeks $36,306.99 in incidental damages (Complaint at ¶¶ 26-27) and its reasonable attorneys' fees, as authorized by Paragraph 3.5 of the Agreement.

Conclusion

For the foregoing reasons, New Vision's counterclaims and affirmative defenses should be dismissed as a matter of law pursuant to Fed. R. Civ. P. 12(b)(6) and Discover Bank is entitled to partial judgment on the pleadings as to liability pursuant to Fed. R. Civ. P. 12(c).

Dated: Columbus, Ohio
March 12, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2004, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Rodney A. Holaday, raholaday@vssp.com, and I hereby certify that I have mailed by United States Postal Service the document to the following nonCM/ECF participants: E. Scott Dosek, Kutak Rock LLP, 8601 North Scottsdale Road, Suite 300, Scottsdale, AZ 85253, and Ira N. Glauber and Mark H. Moore, Jaffe & Asher LLP, 600 Third Avenue, New York, NY 10016.

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