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**
v.	:	
	:	**Magistrate Judge Mark R. Abel**
New Vision Financial, LLC,	:	
	:	
Defendant.	:	

NEW VISION FINANCIAL, LLC'S OPPOSITION MEMORANDUM TO DISCOVER BANK'S MOTION TO DISMISS DEFENDANT NEW VISION FINANCIAL, LLC'S AFFIRMATIVE DEFENSES AND COUNTERCLAIMS, AND FOR PARTIAL JUDGMENT ON THE PLEADINGS

I. INTRODUCTION

Discover Bank's ("Discover") motion to dismiss affirmative defenses and counterclaims and for partial judgment on the pleadings (hereinafter "motion to dismiss") must be denied because Ohio law has pronounced that the issues raised in Discover's motion to dismiss are fact questions that cannot be decided on a motion to dismiss. The overwhelming weight of authority, including a majority of the cases cited by Discover, supports the proposition that justifiable reliance and waiver are fact questions and cannot be decided upon the pleadings alone. New Vision's counterclaims contain sufficient facts upon which relief may be granted. Regardless of whether this Court applies Delaware, Ohio, or Georgia law, the motion to dismiss must be denied.

Likewise, Discover's motion for judgment on the pleadings must be denied. Fed.R.Civ.P. 8(c) requires only that an affirmative defense be pled in general terms, which will be held sufficient as long as it gives the plaintiff fair notice of the nature of each defense

asserted. New Vision adequately alleged each of its affirmative defenses such that Discover's motion for partial judgment on the pleadings must be denied.

II. RELEVANT FACTS

For purposes of this motion to dismiss, the Court must accept as true the facts as alleged in New Vision's counterclaims – the subject of Discover's motion to dismiss. *Osman v. Isotec, Inc.,* 960 F.Supp.118 (S.D.Ohio 1997); citing *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

New Vision filed its counterclaims against Discover because Discover made material misrepresentations to New Vision regarding the quality of credit card accounts New Vision was to receive from Discover. These misrepresentations were made prior to the execution of the Credit Card Account Sales Agreement (the "Agreement"). S*ee ¶¶ 8-14 of New Vision's Counterclaims*. In addition, Discover faced the prospect of New Vision terminating its contractual relationship with Discover at various times during the relationship between the parties. At each turn, Discover made repeated material misrepresentations regarding the credit card accounts it sold to New Vision to induce New Vision to continue operating under the Agreement and its Amendments. *See ¶¶ 31, 33, 35, 47, 48 of New Vision's Counterclaims*. Based upon the misrepresentations made, New Vision entered into the Agreement with Discover and agreed to not terminate the Agreement on several separate occasions. *¶¶ 12, 29, 32, 35 of New Vision's Counterclaims*. New Vision was justified in relying upon the misrepresentations of Discover because it had no other source to learn and confirm the falsity of Discover's representations. New Vision's information was selected and supplied solely at the discretion of Discover. In response to direct inquiries, Discover specifically told New Vision that it did not engage in adverse selection procedures. *¶¶ 12, 31, 33, 35, 47 of New Vision's Counterclaims.*

New Vision believes that discovery yet to be conducted will confirm these allegations and reveal that Discover employed selection procedures that adversely affected the value of the loans sold to New Vision, despite repeated promises to the contrary. The motion to dismiss must be denied because New Vision has pled sufficient facts that, if proven, support its claims that Discover fraudulently induced it to enter into the Agreement, fraudulently induced New Vision to continue operating under the Agreement and its Amendments, and defrauded New Vision out of millions of dollars.

The set of facts that this Court must consider true for purposes of deciding Discover's motion are those alleged in New Vision's counterclaims. Those facts include the following:

- Prior to the execution of any agreement for sale of the credit card accounts, Enhanced Asset Management, on behalf of New Vision, requested and was provided with a sample file that Discover represented would be similar or substantially similar to the accounts New Vision would receive on a monthly basis if New Vision agreed to enter into the Agreement. ¶ 6.

- In an email dated January 21, 2001, Bob Deter, Discover's Placement Manager, represented to Kirk Moquin and John Schanck of Enhanced Asset Management that Discover would sell to New Vision fresh charged off credit card accounts without using a selection procedure and represented that Discover's method of selecting accounts to be sold would not result in adverse selection of accounts to New Vision. ¶ 12.

- Mr. Deter's representations regarding the quality of accounts being transferred, the selection procedures being employed, the cause of poor performance on Discover portfolios, and the price paid by other buyers for similar paper were, upon information and belief, all false. ¶ 47.

- The sample file and representations of Mr. Deter were material to New Vision's decision to purchase charged off credit card accounts from Discover. ¶¶ 9,10, 11.

- New Vision would not have purchased charged off credit card accounts from Discover if Discover had not lied to them about its pre-sale selection procedures. ¶ 14.

- Discover employed adverse selection procedures to insure that the higher quality accounts were delivered to its contingency agencies and that New Vision only received lower quality accounts it determined were less valuable. ¶ 34.

- Mr. Deter's representation were material to New Vision because selection procedures or adverse selection can destroy the value of a portfolio of credit card accounts. ¶ 13.

III. LEGAL ARGUMENT

Discover's motion to dismiss misstates applicable law apparently in an attempt to circumvent the ramifications of its own improper conduct and to avoid discovery. Yet the facts in New Visions counterclaims that must be considered true for purposes of Discover's motion demonstrate that Discover engaged in a scheme to defraud New Vision by initially inducing it to enter into an Agreement with misrepresentations and subsequently inducing New Vision to continue to operate under the Agreement and its Amendments through additional misrepresentations. A careful analysis of the very Ohio case law cited by Discover reveals that Discover's motion is without substance or support and must be denied. As explained below, Discover's motion to dismiss must fail because the issues that it is based upon are fact questions that are properly decided by a finder of fact.

A. Discover's Motion To Dismiss May Only Be Granted if There Are Absolutely No Facts Alleged that, if Proven, Support New Vision's Claims Against Discover.

Rule 12(b)(6) motions to dismiss for failure to state a claim upon which relief can be granted should not be granted "unless it appears *beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.*" *Osman v. Isotec, Inc.* 960 F.Supp. 118 (S.D.Ohio 1997); citing *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957) (emphasis added). *See also York v. Ohio State Highway Patrol*, 60 Ohio St.3d 143, 144, 573 N.E.2d 1063, 1064-1065 (1991); *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245 (1975). All well-pleaded allegations must be taken as true

and be construed most favorably toward the non-movant.[1] *Id.* In construing a complaint or counterclaim upon a motion to dismiss for failure to state a claim, the Court must presume all factual allegations of the complaint are true and make all reasonable inferences in favor of the nonmoving party.

B. Justifiable Reliance is a Fact Question that Cannot Be Decided Prior to a Factual Inquiry into the Relationship of the Parties, the Nature of the Transaction and Most Importantly, the Nature of the Misrepresentations.

Under Ohio law, the question of justifiable reliance, as an element of fraud, is one of fact and requires an inquiry into the relationship between the parties and cannot be decided as a matter of law based upon boiler plate contractual language. *Greenberg v. Life Ins. Co. of Virginia*, 177 F.3d 507, 516-517 (6th Cir. 1999); *Crown Property Dev., Inc. v. Omega Oil Co.,* 113 Ohio App. 3d 647, 657 (Fayette Cty. 1996) (Question of justifiable reliance, which is necessary for fraud or negligent misrepresentation claim, is one of fact and requires inquiry into relationship between parties). Ohio courts applying the general standard require an inquiry into the relationship between the parties. *Amerifirst Savings Bank of Xenia v. Krug*, 136 Ohio App. 3d 468, 487, 495 (Montgomery Cty. 1999); *see also Leal v. Holtvogt*, 123 Ohio App. 3d 51, 77 (Miami Cty 1998) (Question of justifiable reliance, existence of which is necessary to support fraud claim, is one of fact and requires inquiry into relationship between parties). When the case involves a fraudulent inducement claim, as here, the Court must also conduct a factual inquiry into the relationship between the parties. *Togo International., Inc. v. Mound Steel Corp.*, 106 Ohio App. 3d 282, 286-287 (Butler Cty. 1995).

The Court's determination of whether reliance on allegedly fraudulent representations is justifiable must also involve consideration of such factors as the nature of transaction, form and

[1] Discover attempts to minimize but concedes in a footnote the fact that thee Court must assume that each of New Vision's allegations are true when deciding Discover's motion to dismiss.

materiality of representation, respective intelligence, experience, age and mental and physical condition of parties, and their respective knowledge and means of knowledge. *Columbia Gas Transmission Corp. v. Ogle*, 51 F.Supp.2d 866, 875-876 (S.D.Ohio. 1997); *RE/MAX Intern., Inc. v. Zames*, 995 F.Supp. 781, 788 (N.D.Ohio 1998) The Court must look at the circumstances of each particular case individually and determine whether the reliance upon the misrepresentations was justified. *Metropolitan Life Ins. Co. v. Triskett Illinois, Inc.*, 97 Ohio App. 3d 228, 235 (Hamilton Cty. 1994). Each of the factors described by the Court -- the nature of the transaction, form and materiality of the representations, relationship of the parties, etc. -- are *factual* questions that require discovery. *Id.*

These issues cannot be resolved without written discovery and deposition testimony detailing the nature of the relationship, the manner in which the misrepresentations were made, the context of the misrepresentations and other facts that will support or refute New Vision's allegations. New Vision's allegations, which must be taken as true for purposes of Discover's motion, describe a scheme by Discover to induce New Vision to pay a premium price for credit card accounts only to deliver lesser accounts adversely selected in a manner inconsistent with representations made by Discover at every relevant juncture. Discover's contention that such issues can or should be decided on a motion to dismiss is inaccurate.

Even the Ohio case law cited by Discover regarding justifiable reliance demonstrates that Discover's motion is, at best, premature because the cases cited were all appeals from the grant of summary judgment -- not a motion to dismiss -- and therefore included a factual analysis of the relationship between the parties and the nature and context of the purportedly fraudulent representations. *See e.g. Lamkin v. First Community Bank*, Franklin App. No. 00AP-935, 2001

WL 300732, **1-2 (March 29, 2001) (appeal from the grant of summary judgment)[2]; *Ed Schory & Sons, Inc. v. Society National Bank*, 75 Ohio St.3d 433, 437 (Ohio 1996) (appeal from grant of summary judgment); *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 7 F.Supp.2d 954, 962-63 (N.D.Ohio 1998) (District Court decision on motion for summary judgment); *Anderson v. Olympic Committee for Atlanta Games, Inc.*, 584 S.E.2d 16, 78 (Ga. App. 2003) (Appeal from grant of summary judgment).

Indeed, Discover has done nothing but string cite Ohio and Sixth Circuit cases decided on motions for summary judgment *after* discovery into the relationship of the parties was conducted. Discover cites the inapposite cases for the proposition that the Court should dismiss New Vision's claims prior to discovery. This strategy must fail under Rule 12(b)(6) motion when considering the counterclaims asserted by New Vision.

The Sixth Circuit has refused to grant Rule 12(b)(6) relief based upon purported lack of justifiable reliance. In *Greenberg v. The Life Ins. Co. of Virginia*, 177 F.3d 507 (6th Cir. 1999), the Sixth Circuit reviewed the 12(b)(6) dismissal of a putative class action against an insurer. The insurer's Rule 12(b)(6) motion to dismiss was based, in part, upon its contention that the plaintiffs "could not show 'justifiable reliance' as a matter of law." *Id.* at 516. The Sixth Circuit disagreed and found that the plaintiffs had stated claims upon which relief could be granted. The Court specifically found that "the question of justifiable reliance is one of fact and requires an inquiry into the relationship of the parties." *Id.*; quoting *Lepera v. Fuson*, 83 Ohio App. 3d 17 (Hamilton Cty. 1992). The Appellate Court found that the District Court erred when it resolved the issue as a matter of law by attempting to quantify the value of certain contractual representations with other non-contractual ones. The District Courts should instead have analyzed "whether, taking all of the well-pled allegations as true, the sisters [plaintiffs] [could]

[2] Copies of all cited unreported cases are attached hereto pursuant to S.D. Ohio Civ. R. 7.2(b)(4).

prove any set of facts in support of their claim that would entitle them to relief. *Id*. at 516-517. Having pled justifiable reliance, the Appellate Court reversed the District Court and permitted the fraud claims to proceed.

At least one factually similar, if not identical, motion to dismiss has been decided in the same manner as required by Ohio law. *See Atlantic Credit & Finance Special Finance Unit, LLC v. MBNA America Bank, N.A.*, 2001 WL 856704 (W.D.Va. 2001). In *Atlantic Credit,* MBNA filed a motion to dismiss regarding fraudulent inducement and fraudulent misrepresentation claims filed by Atlantic Credit. Atlantic Credit alleged that MBNA fraudulently induced it to enter into an agreement for the purchase of charged off credit card accounts by making material misrepresentations and not disclosing information concerning MBNA's use of adverse selection procedures. MBNA filed a motion to dismiss Atlantic Credit's fraud in the inducement claim by arguing, as Discover now argues, that Atlantic Credit was not justified in relying upon its misrepresentations because of "broad disclaimers as to the characteristics and value of the subject loans." *Id.* at *1. MBNA told Atlantic Credit, as Discover told New Vision, that no adverse selection procedures or mass settlement activities were employed. *Id.* at *2.

MBNA argued in support of its motion to dismiss that Atlantic Credit failed to state claims upon which relief could be granted because it could not establish justifiable reliance in the face of the broad disclaimers included in the agreement. *Id* at *1. The Court denied MBNA's motion to dismiss and found that Atlantic Credit adequately pled justifiable reliance to withstand the motion to dismiss. The Court recognized that "the seller of charged off credit cards cannot divert the purchaser from making reasonable inquiries." *Id.* at *3. Atlantic Credit asked MBNA, as New Vision asked Discover, whether adverse selection procedures were utilized, and MBNA

stated that they were not. The Court found that these allegations, if proven, would support the element of justifiable reliance. *Id.* "One cannot, by fraud and deceit, induce another to enter into a contract to his disadvantage, then escape liability by saying that the party to whom the misrepresentation was made was negligent in failing to learn the truth." *Id.;* quoting *Bank of Montreal v. Signet Bank*, 193 F.3d 818, 826 (4th Cir. 1999).

Broad disclaimers do not shield a seller from liability for fraudulent misrepresentations designed to induce the buyer to enter a contract. *Bank of Montreal*, 193 F.3d at 830. Indeed, a buyer can recover for fraudulent inducement not only when the contract contains general disclaimers of warranties and liabilities, but also where the contract contains specific disclaimers that do not cover the allegedly fraudulent contract inducing representations. *Hitachi Credit America Corp v. Signet Bank*, 166 F.3d 614, 629-631 (4th Cir. 1999). (Concealment of a material fact by one who knows that the other party is acting upon the assumption that the fact does not exist constitutes actionable fraud).

Because there was no mention of adverse selection procedures in the broad disclaimers relied upon in support of its motion to dismiss, the *Atlantic Credit* Court determined that it was appropriate to look to statements made outside of the contract. Broad disclaimers of any warranties relating to value, quality, collectibility, or the accuracy of information provided to Atlantic Credit were not sufficient to disclaim oral misrepresentations regarding adverse selection. *Atlantic Credit at* *4. Because there was no specific mention or disclaimer of adverse selection procedures in the disclaimers relied upon by MBNA, the Court "could not conclude that Atlantic Credit's reliance upon MBNA's alleged misrepresentations was unjustified." *Id.*

A review of the disclaimers relied upon by Discover requires a similar result. The contract provisions relied upon by Discover in its motion to dismiss do not mention or disclaim

adverse selection and in fact provide the same disclaimers regarding value, collectibility, quality and accuracy of account information that the Court in *Atlantic Credit* specifically found were inadequate to dismiss fraudulent inducement and fraud claims. *See Discover's Motion to Dismiss,* p. 8. Under Ohio law, when a conflict exists between specific information and general boiler plate language in a contract, precedence must be given to the specific information or language. *Greenberg*, 177 F.3d at 519. New Vision asserts that Discover made material misrepresentations regarding adverse selection procedures. *See ¶¶ 12, 31, 33, 35, 47, 48, 49 of New Vision's Counterclaims.* New Vision confronted Discover about the possibility that it was utilizing adverse selection procedures and was repeatedly misled. New Vision relied upon those misrepresentations because it had no other source to obtain information to learn about and/or confirm that Discover utilized adverse selection procedures. The contract disclaimers cited, like the ones in *Atlantic Credit,* do not disclaim specific warranties regarding adverse selection. Adverse selection is not specifically mentioned in the Agreement.

New Vision's Counterclaims state valid claims for fraudulent inducement and negligent misrepresentation. Discover's motion to dismiss must be denied.

C. New Vision Did Not Waive its Claims Against Discover Because There is No Evidence in New Vision's Counterclaims that it Had Contemporaneous Actual Knowledge that Discover was Defrauding It.

Waiver is the knowing and intelligent relinquishment of a known right. *State ex rel. Stacy v. Batavia Local School Dist. Board of Education*, 97 Ohio St. 3d 269, 274 (Ohio 2002) ("Waiver is a voluntary relinquishment of a known right."); *American Family Mortgage Corp. v. Acierno*, 640 A.2d 655 (Del. 1994) (waiver "implies knowledge of all material facts and intent to waive" and the requirement that the facts be unequivocal) quoting, *Realty Growth Inv. v. Council of Unit Owners,* 453 A.2d 450, 456 (Del. Super. 1982). In determining whether the waiver was

"voluntary, knowing and intelligently made" the focus is on the facts of the particular case, "including the background, experience and conduct of the waiving party...." *Hoover v. Radabaugh*, 123 F.Supp.2d 412, 423 (S.D.Ohio 2000) quoting *Elsag Bailey, Inc. v. City of Detroit,* 975 F.Supp. 993, 1004 (E.D.Mich.1997) (internal citation and quotation omitted).

Discover's only citations in support of the proposition that New Vision waived its claims for fraud and misrepresentation is a section of America Jurisprudence and a single case. The America Jurisprudence section and case citation simply restate the general rule that a party may waive its right to claim fraud if it had *actual knowledge* that it was defrauded. Yet there is nothing in the New Vision's Counterclaims demonstrating that New Vision contemporaneously knew it was being defrauded by Discover at any relevant point in time. Consistent with this fact, New Vision has asserted that Discover knowingly took steps to cover up its fraudulent actions through repeated denials and affirmative misstatements.

New Vision did not waive its claims because it did not have actual knowledge that Discover had or was in the process of defrauding it. In fact, New Vision's counterclaims regarding adverse selections were pled "upon information and belief." *See ¶¶ 49, 52 of New Vision's Counterclaims.* Indeed, New Vision's suspicions were met with repeated assurances by Discover that no such practices occurred. *See ¶¶ 31, 33, 35, 45 of New Vision's Counterclaims.* The only way that New Vision will prove it was defrauded by Discover is through the discovery of documents, testimony of witnesses and review of evidence that, as of this point in the litigation, New Vision has not been afforded.

New Vision's counterclaims reveal that it repeatedly questioned Discover about adverse selection. *See ¶¶ 20, 29, 30, 46.* Each time New Vision personnel asked about Discover's selection procedures, Discover reassured New Vision that it did not engage in adverse selection

procedures. *See* ¶¶ *31, 33, 35, 47, 48.* New Vision's suspicions of adverse selection and subsequent confrontations regarding its suspicions do not satisfy the "knowing relinquishment of a known right" standard. New Vision could never confirm that it was actually being defrauded by Discover. It had suspicions, based upon the performance of the accounts purchased from Discover, that Discover was defrauding it. New Vision did not waive anything because there is no evidence that it actually knew it was being defrauded by Discover and how it was being defrauded.

D. New Vision's Claims Regarding Discover's Failure to Disclose to it Which of the Accounts Purchased by New Vision Had Attorneys Involved May Result in the Award of Damages.

Discover contends that New Vision's claims regarding the sudden inclusion of a new data field is "meritless" and again suggests that New Vision waived any claims against Discover or could not justifiably rely upon Discover's misrepresentations. As detailed above, justifiable reliance is a fact question that requires discovery into the nature of the misrepresentations, the relationship between the parties, materiality of the misrepresentation, experience of the parties, etc. *Greenberg* 177 F.3d at 516-517; *Crown Property Dev., Inc. v. Omega Oil Co.*, 113 Ohio App. 3d at 657 (Question of justifiable reliance, which is necessary for fraud or negligent misrepresentation claim, is one of fact and requires inquiry into relationship between parties)

Discover does not indicate at any time that the pleadings regarding its manipulation of the data do not state a claim upon which relief can be granted. Instead, Discover demands that the Court dismiss New Vision's claims based upon alleged waiver and a lack of justifiable reliance. Discover then implicitly acknowledges the factual nature of the parties dispute by providing a one-sided interpretation of dealings between the parties to argue (and dispute) facts -- a practice inappropriate for a Rule 12(b)(6) determination.

New Vision does not allege that it did not know that some of the accounts transferred from Discover could involve attorneys. The problem lies not in the fact that attorney-represented accounts were transferred to New Vision but that Discover did not identify for New Vision (until the latter part of 2002) which accountholders were represented by counsel. New Vision, through its agents, contacted accountholders to attempt to collect credit card debts. Federal law prohibits New Vision from communicating directly with an accountholder who has retained an attorney to deal with the debt. New Vision unknowingly may have been forced into a violation of the Fair Debt Collection Practices Act ("FDCPA") because Discover failed to disclose that certain accountholders were represented by counsel prior to the time of the transfer of those accounts from Discover to New Vision. The sanctions for violation of the FDCPA are severe and potentially include civil penalties, administrative fines, and personal injury damages. *See* 15 U.S.C. §§ 1692, *et seq.* New Vision is pursuing claims regarding Discover's failure to notify it of this information because, upon information and belief, it was damaged by Discover's failure to provide it with that information. New Vision intends to conduct discovery regarding the identity of accountholders represented by counsel prior to Discover's transfer of their account to New Vision. Discover's contention that New Vision waived or cannot rely upon the data that Discover provided to it are not supported by Ohio law. Discover was the only party that knew which accountholders had retained an attorney at the time those accounts were transferred to New Vision. If Discover transferred accounts to New Vision that involved debtors represented by counsel, it had an obligation to identify those accounts to New Vision.

E. New Vision's Affirmative Defenses Are Sufficiently Pleaded

Without valid legal citation, Discover incorrectly asserts under Fed.R.Civ.P. 12(c), Discover is entitled to partial judgment on the pleadings on New Vision's affirmative defenses because the affirmative defenses are merely conclusory allegations. Discover misapprehends Rule 8(c) governing affirmative defenses and selectively cites inapplicable cases out of context.

As an initial matter, courts are unwilling to grant motions brought under Fed.R.Civ.P. 12(c) unless the movant clearly establishes that no material fact remains to be resolved and that it is entitled to judgment as a matter of law. *See Owens v. Glendale Optical Co.*, 590 F.Supp. 32, 36 (D.C.Ill.1984) (citing to Wright & Miller, Federal Practice and Procedure, Civil 2d § 1368).

An affirmative defense may be pleaded in general terms and will be held sufficient as long as it gives the plaintiff fair notice of the nature of the defense. *See* Wright & Miller, Federal Practice and Procedure: Civil 2d § 1274; *see also American Motorists Ins. Co. v. Napoli*, 166 F.2d 24, 26 (5th Cir. 1948) (Reversed trial court while holding that a "plea that simply states that complainant was guilty of contributory negligence" was sufficiently pled under Fed.R.Civ.P. 8); *Edmonds v. United States*, 148 F.Supp. 185, 186 (E.D.Wisc.1957) (Denied motion for judgment based on alleged pleading of affirmative defense of fraud in general terms because defendant needed only to give "fair notice of the nature of the defense" to plaintiffs); *Barnwell & Hays, Inc. v. Sloan*, 564 F.2d 254, 255-56 (8th Cir. 1977) (Affirmed trial court's decision to permit evidence to support affirmative defense of waiver at trial even though technical word "waiver" not used among asserted affirmative defenses where other affirmative defense sufficient to give notice to plaintiff of defendant's intent to rely on waiver-based defense).

An affirmative defense simply need not contain extensive factual allegations. It is enough to plead affirmative defenses generally to put the adverse party on notice of their general

nature. Discover's case citations are inapposite to this rule of pleadings: each of Discover's cases addresses a factual scenario where a defendant moved for judgment on the pleadings as to a plaintiff's complaint or claim, *not* as to affirmative defenses.[3] In fact, Discover fails to unearth any case to support its incorrect assertion that each affirmative defense must be plead with additional fact allegations specific to the case to "prove up" each defense as if it were a complaint or claim and not a defense.

Further illustrating Discover's misapprehension of Federal law of Civil Procedure, Official Form 20 from the Appendix of Forms to the Federal Rules of Civil Procedure explains that it is sufficient to plead the affirmative defense of statute of limitations as follows:

> The right of action set forth in the complaint did not accrue within six years next before the commencement of this action.

Official Form 20 requires nothing more than this simple, even "conclusory" assertion of the affirmative defense. Pursuant to Fed.R.Civ.R. 84, the Official Forms are just that, official and approved.

For each of the foregoing reasons, New Vision's affirmative defenses are sufficiently pleaded and Discover's motion for partial judgment on the pleadings should be denied.

F. New Vision's Counterclaims and Affirmative Defenses Preclude Partial Judgment on the Pleadings to Discover

As a final argument, Discover first presumes that the Court will rule that not one of New Vision's counterclaims or affirmative defenses against Discover survive Discover's motion to dismiss and for partial judgment on the pleadings, and then asserts that judgment on liability, but

[3] *See*, *e.g.*, *Kennerly v. Montgomery Co. Bd. Of Comm'rs.*, 257 F.Supp.2d 1037, 1040 (S.D.Ohio 2003) (Review of defendant's motion for judgment on the pleadings against plaintiff's § 1983 complaint); *Benson v. O'Brien*, 67 F.Supp.2d 825, 830 (N.D.Ohio 1999) (Review of defendant government employees' motion for judgment on the pleadings based on governmental immunity against plaintiff's complaint); *Games Galore of Ohio, Inc. v. Masminster*, 154 F.Supp.2d 1292, 1300 (S.D.Ohio 2001) (Review of governmental defendants' motion for judgment on the pleadings against plaintiff's § 1983 complaint); *SEC v. Blackwell*, 291 F.Supp.2d 673, 685 (S.D.Ohio 2003) (Discover cites to trial court's application of Fed.R.Civ.P. 12(b)(6) standard of review on defendants' motion to dismiss for failure to state a claim upon which relief may be granted).

not damages, is appropriate against New Vision. For all of the reasons set forth above, New Vision respectfully suggests that Discover's presumption is incorrect: New Vision has asserted counterclaims and/or affirmative defenses sufficient to survive Discover's motion.

IV. CONCLUSION

New Vision has stated claims upon which relief can be granted. Discover's motion improperly requests 12(b)(6) dismissal of New Vision's claims based upon issues, that under Ohio law, require a factual determination. Reasonable written and deposition discovery is necessary to determine the true nature of Discover's scheme to defraud New Vision. Under well established law, Discover's motion to dismiss New Vision's counterclaims must be denied. In addition, New Vision had adequately pleaded its affirmative defenses and continues to pursue its counterclaims. Discover's motion for judgment on the pleadings on its breach of contract claim must similarly be denied.

Respectfully submitted,

Vorys, Sater, Seymour and Pease LLP

s/Rodney A. Holaday
Rodney A. Holaday (0068018)
52 East Gay Street
P.O. Box 1008
Columbus, OH 43216-1008
Telephone: (614) 464-8356
Facsimile: (614) 719-5112
E-Mail: raholaday@vssp.com

Attorneys for Defendant,
New Vision Financial, LLC

Of Counsel appearing *Pro Hac Vice*

E. Scott Dosek, Esq.
Kutak Rock LLP
8601 North Scottsdale Road
Suite 300
Scottsdale, AZ 85253
Telephone: (480) 429-5000
Facsimile: (480) 429-5001
E-Mail: e.scott.dosek@kutakrock.com

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the foregoing *New Vision Financial, LLC's Opposition Memorandum to Discover Bank's Motion to Dismiss Defendant New Vision Financial, LLC's Affirmative Defenses and Counterclaims, and for Judgment on the Pleadings* has been served as of April 9, 2004, upon the following under the CM/ECF system which will send notification of such filing to the following:

Craig A. Smith, Esq.
Gamble Hartshorn Johnson, LLC
One East Livingston Avenue
Columbus, OH 43215

By specific request, a copy of this document will also be served on April 9, 2004 upon the following by e-mail:

Mark Moore, Esq.
Jaffe and Asher
mmoore@jaffeandasher.com

s/Rodney A. Holaday
Rodney A. Holaday (0068018)
Vorys, Sater, Seymour and Pease LLP
Attorneys for Defendant,
New Vision Financial, LLC