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

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Preliminary Statement

Plaintiff Discover Bank respectfully submits this reply memorandum of law in further support of its motion: (1) to dismiss defendant New Vision Financial, LLC's ("New Vision") counterclaims and affirmative defenses 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).

In opposing the instant motion, New Vision contends that despite the detailed and specific disclaimers of reliance made in its Agreement with Discover Bank, New Vision is entitled to protracted discovery and a full-blown trial on its claim that it relied on purported representations concerning the quality and collectibility of accounts it was purchasing. This is the sort of argument that might be made by a poor, uneducated, elderly widow who does not even understand what a disclaimer is, and who signed a contract of adhesion in connection with the

investment of her life savings. However, as a self-proclaimed, highly sophisticated investor, New Vision cannot escape the clear language of its arms' length, fully negotiated, integrated Agreement with Discover Bank. Nor can New Vision escape its decision to ratify the express disclaimer clause of that Agreement in writing on three subsequent occasions, despite New Vision's admitted contemporaneous "suspicion" that Discover was engaged in adverse selection.

Put simply, as a matter of law, New Vision has no viable defense or counterclaim because: (i) it agreed in the Agreement that it was not relying on any representations and specifically disclaimed reliance as to the very matters at issue in this lawsuit; (ii) it acknowledged in the Agreement that it was a highly sophisticated purchaser of credit card debt, and (iii) it has admitted in its pleadings that it possessed both actual and constructive knowledge of the alleged adverse selection issue before entering into each of the three amendments to the Agreement.

In its opposition papers ("Def.'s Br."), New Vision utterly ignores the Agreement, and never cites to it, pretending that the clear and specific disclaimers simply do not exist. Yet, the Agreement is clear on its face that no representations of any kind or nature were made with respect to the accounts purchased by New Vision, as follows:

> [N]o warranties or representations, express or implied, are or have been made by [Discover Bank] … 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…. [Discover Bank] 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.

See Article X of the Agreement, attached as Exhibit 1 to the Complaint, which is attached as Exhibit A to the Affidavit of Mark H. Moore ("Moore Aff."), sworn to March 10, 2004 (boldface and capitalization omitted). The "no warranty" clauses, coupled with the acknowledgment in paragraph 8.1 of the Agreement that New Vision is a highly sophisticated party, are fatal to New Vision's affirmative defenses and counterclaims as a matter of law because there could be no reasonable reliance upon any alleged representation to the contrary.

New Vision misstates the law in contending that reliance is always an issue of fact.[1] To the contrary, as shown in Point I, numerous federal courts, applying the substantive law of the State of Ohio, have dismissed fraud claims (on both motions to dismiss and on motions for summary judgment) where the element of reasonable reliance is undisputedly absent. Thus, no discovery is needed where, as here, the party claiming fraud acknowledges that it is a sophisticated business entity and specifically disclaims reliance on the very representations giving rise to its fraud claim.

If the foregoing were not enough, New Vision admits that, shortly after the inception of the Agreement, it obtained both actual and constructive knowledge of the purported misrepresentations that form the basis for its alleged fraud and negligence claims. Despite an admitted "suspicion" that Discover was engaging in adverse selection, New Vision amended the Agreement (the "Amendments") three times. Answer at pp. 3, ¶ 14; 12-13, ¶¶ 21, 25, 36; 14, ¶¶ 45-56; 17, ¶¶ 69, 70. Rather than negotiate a "no adverse selection" obligation, New Vision negotiated instead a reduction in price in each of the subsequent amendments. In each of the

[1] New Vision does not contest that Ohio law applies to its counterclaims and affirmative defenses.

Amendments, New Vision reaffirmed that all the provisions of the Agreement, including the disclaimers, "shall be and remain unchanged and in full force and effect…." See Ex. B to the Complaint. And, after each Amendment, New Vision purchased more and more accounts from Discover Bank at lower and lower prices. Thus, any reliance by New Vision on alleged representations by Discover Bank was unreasonable as a matter of law because of New Vision's persistent decision to disregard its admitted "suspicions" of adverse selection by reaffirming the disclaimers and obtaining lower prices for the accounts.

New Vision incorrectly maintains that only "actual" knowledge is sufficient to negate reliance and establish waiver. New Vision is wrong as a matter of law. As shown in Point II, under Ohio law, constructive knowledge of fraud is sufficient to effectuate a waiver. One need not know every detail of the alleged fraud in order to waive that claim. New Vision's admitted suspicions, and its numerous accusations of adverse selection, coupled with its repeated decision to continue its relationship with Discover Bank by amending the agreement three times, are more than sufficient for this Court to conclude that the affirmative defenses and counterclaims asserted by New Vision are barred by the doctrine of waiver as a matter of law.

As shown in Point III, New Vision also waived any misrepresentation claims arising out of its allegation that Discover Bank failed to inform New Vision as to which debtors were represented by counsel. New Vision admits in its opposition brief (at 13) that it had knowledge that some of the debtors may have been represented by counsel, yet it went ahead and purchased additional accounts. Such conduct constitutes waiver as a matter of Ohio law. Moreover, New Vision cannot demonstrate that Discover Bank had any duty to disclose which debtors were represented by counsel. Absent such a duty to speak, no misrepresentation claim may lie as a matter of law.

As shown in Point IV, Discover Bank is entitled to partial judgment on the pleadings on its claim for breach of the Agreement. On a motion for judgment on the pleadings, only undisputed factual allegations are to be considered. New Vision's affirmative defenses amount to mere legal conclusions unsupported by factual allegations. There is no dispute that, pursuant to the Agreement, New Vision purchased accounts from Discover Bank and has not paid for those accounts. There is no dispute that New Vision's asserted defenses are insufficient as a matter of law. Accordingly, partial judgment on the pleadings as to liability should issue in favor of Discover Bank.

As shown in Point V, New Vision does not contest that, under Ohio law, a claim for negligent misrepresentation must be dismissed where it seeks purely economic damages. Finally, as shown in Point VI, unjust enrichment claims are barred where the parties' relationship is governed by a valid and enforceable agreement, and New Vision does not claim otherwise. Accordingly, these counterclaims must be dismissed as a matter of law.

ARGUMENT

POINT I

NEW VISION HAS NOT ALLEGED JUSTIFIABLE RELIANCE AS A MATTER OF LAW

New Vision wrongly contends that the issue of justifiable reliance inevitably presents an issue of fact that cannot be determined at the pleadings stage. Def,'s Br. 5-10. However, in numerous decisions decided under the Federal Rules of Civil Procedure and substantive Ohio law, justifiable reliance may be found as a matter of law where there is no question that the reliance of the party claiming fraud was unjustified. See Watkins & Son Pet Supply v. Iams Co., 254 F.3d 607 (6th Cir. 2001) (dismissing fraud claim on summary judgment because reliance was unjustified "as a matter of law"). See also Davis v. DCB Fin. Corp., 259 F.Supp.2d 664

(S.D.Ohio 2003) (granting motion to dismiss claim of fraud where justifiable reliance was not established on facts alleged); R.J. Wilder Contracting Co. v. Ohio Turnpike Comm'n, 913 F. Supp. 1031 (N.D.Ohio 1996) (granting motion to dismiss negligent misrepresentation claim because reliance was unjustified as a matter of law).

Indeed, many of the very cases cited by New Vision involve actions dismissed before trial because reliance was held unjustified as a matter of law. See Re/Max Int'l, Inc. v. Zames, 995 F. Supp. 781 (N.D.Ohio 1998) ("On its face, this claim [for fraud] fails"); Crown Property Dev., Inc. v. Omega Oil Co., 681 N.E.2d 1343 (Ohio App. 1996) (on motion for summary judgment, "justifiable reliance, a necessary element for both a fraud claim and a negligent misrepresentation claim, was not present in the case at bar"); Togo Int'l, Inc. v. Mound Steel Corp., 665 N.E.2d 1160 (Ohio App. 1995) (where party claiming fraud expressed belief that representations were untrue, summary judgment dismissing counterclaim of fraud was affirmed).

Dismissal is particularly warranted where, as here, a sophisticated business entity enters into an arms-length contract containing a disclaimer that specifically addresses the alleged misrepresentation. Watkins, 254 F.3d 607 (a sophisticated corporation's "reliance on Iam's representations was unreasonable as a matter of law" where alleged misrepresentations contradict the express disclaimer of the parties' integrated 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"); R.J. Wilder, 913 F. Supp. 1031 (sophisticated entity could not justifiably rely on a promise that contradicted the express disclaimer of the agreement). See also Columbia Gas Transmission Corp. v. Ogle, 51 F.Supp.2d 866 (S.D.Ohio 1997) ("The parol evidence rule bars the Ogles from arguing that Columbia Gas

made representations concerning the meaning of contract terms which were inconsistent with and refuted by the plain language of the right-of-way agreement"), aff'd 172 F.3d 47 (6th Cir. 1998), cited by New Vision in its opposition papers.[2]

It is clear from the face of the Agreement and the three Amendments that no discovery or factual inquiry is warranted here. The Agreement states that New Vision is "an institutional and sophisticated purchaser in the business of buying or originating accounts of the type sold hereunder … [with] the financial wherewithal to own the Accounts for an indefinite period of time and to bear the risk of … a total loss of the Purchase Price of the Accounts," see Agreement ¶ 8.1, and New Vision never denies this. Consistent with Ohio law, as a highly sophisticated and institutional purchaser of millions of dollars of credit card accounts each month, New Vision is bound by the Agreement it signed and has no right to assert a misrepresentation claim which is flatly at variance with its contractual agreement to buy the accounts without any warranty.

Moreover, the Agreement specifically manifests New Vision's agreement not to rely on any representations related to adverse selection. The Agreement specifically disclaims any

[2] Those cases cited by New Vision (Def,'s Br. 5-10) are distinguishable. In those cases a factual inquiry was warranted because they involved **unsophisticated consumers** who entered into agreements with boilerplate disclaimers (or no disclaimers at all), or failed to discuss the element of justifiable reliance at all. See Greenberg v. Life Ins. Co. of Va., 177 F.3d 507 (6th Cir. 1999) (unsophisticated sisters reasonably relied on promises of life insurance salesman, despite boilerplate disclaimer in policy); Amerifirst Sav. Bank of Xenia v. Krug, 737 N.E.2d 68 (Ohio App. 1999) (no discussion of whether reliance was justified because court found that there had been no misrepresentation); Leal v. Holtvogt, 70 N.E.2d 1246 (Ohio App. 1998) (unsophisticated individuals reasonably relied on representations of horse breeder where their agreement contained no disclaimer); Metropolitan Life Ins. Co. v. Triskett Illinois, Inc., 646 N.E.2d 528 (Ohio App. 1994) (no discussion of whether reliance was justified because court found that the action lacked proximate cause); Lepera v. Fuson, 613 N.E.2d 1060 (Ohio App. 1992) (unsophisticated plaintiff reasonably relied on representations of real estate agent where agreement contained no disclaimer). None of defendant's cases involve parties like New Vision who specified in their agreement that they were sophisticated persons with broad knowledge of the industry and who were specifically disclaiming reliance on the representations now claimed to provide the basis for a fraud claim.

representations based on the accounts' "collectibility," "enforceability," "nature, quality or condition," or "the suitability of the accounts." See Agreement ¶ 8.1. These factors describe the exact type of adverse selection alleged by New Vision – that the accounts were of lesser condition and were more difficult to collect. Having disclaimed reliance on these factors in the Agreement, New Vision has no right, as a matter of law, to claim it was defrauded by purported misrepresentations about these very same factors.

New Vision admits that it "repeatedly question[ed] Discover [Bank] about adverse selection." Def.'s Br. 11. Nevertheless, New Vision never requested a provision in the Agreement or in any of the three subsequent Amendments barring adverse selection. Rather, New Vision negotiated a lower price for the commercial paper and chose to continue the relationship with Discover Bank by purchasing more and more accounts even though it knew about the alleged adverse selection. Answer at p. 17, ¶¶ 65-68. Under such facts, reliance on Discover Bank's alleged assurances disclaiming adverse selection cannot be justified as a matter of law.

New Vision relies primarily on Greenberg v. Life Insurance Company of Virginia, 177 F.3d 507 (6th Cir. 1999), a case whose facts could not be more dissimilar to the situation at bar. The plaintiffs in Greenberg were two individual sisters with no business acumen, who surrendered their father's three life insurance policies to the defendant insurance company in return for new policies that they executed. The sisters contended that the written documents supplied to them from the insurance company deceived them as to the cost of the transaction and the payment of premiums. The insurance policy also contained a "boilerplate" and general disclaimer of representations, which the insurance company claimed barred plaintiffs' claims. The Sixth Circuit found that this generic disclaimer could not "trump[] the more individualized

language on the application forms and policy data information sheets." Id. at 516. Given the lack of sophistication of the plaintiffs, it is not surprising that the Court found questions of fact as to whether these unsophisticated sisters were justified in relying on the insurance company's written promises. Moreover, the Court found that there was specific contractual language supporting plaintiffs' claims, while here, New Vision asserts no contract claim whatsoever.

Unlike Greenberg, the more recent Sixth Circuit decision in Watkins & Son Pet Supply v. Iams Company, 254 F.3d 607 (6th Cir. 2001), is factually on point. Watkins, decided two years after Greenberg, demonstrates that, under Ohio law, misrepresentation claims may be dismissed as a matter of law where sophisticated business entities execute a specific disclaimer covering the very misrepresentations asserted. The plaintiff, Watkins, was defendant Iams' distributor in Michigan. Watkins claimed Iams promised to make Watkins its exclusive distributor. However, the distribution agreement stated that Iams could appoint other distributors to distribute products in Michigan. The Sixth Circuit dismissed the action on summary judgment, finding that the claimed misrepresentation was specifically contradicted by the terms of the Agreement and that any reliance by Watkins on Iams alleged promises of exclusivity were "unreasonable as a matter of law."

New Vision does not even attempt to distinguish Capital Funding, VI, L.P. v. Chase Manhattan Bank USA, N.A., 2003 WL 21672202 (E.D. Pa. March 21, 2003), cited in Discover Bank's moving brief, which involves alleged misrepresentations in the sale of accounts similar to those sold by Discover Bank to New Vision. There, the plaintiff entered into a fully integrated agreement that specifically disclaimed reliance on any representation not contained in the agreement itself. Nevertheless, the plaintiff alleged that the defendant falsely represented to it that the accounts being sold had not been previously offered "blanket" settlements. The Court

dismissed plaintiff's misrepresentation 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).

New Vision relies extensively on Atlantic Credit & Fin. Special Fin. Unit, LLC v. MBNA Am. Bank, N.A., 2001 WL 856704 (W.D. Va. 2001), an unreported decision in the Western District of Virginia, which was decided under Virginia, not Ohio, law. We believe that under Ohio's strong policies concerning the enforcement of written agreements between sophisticated business entities, that an Ohio court would have decided the case differently, and consistently with Capital Funding.

In any event, Atlantic Funding is plainly distinguishable from the instant case. First, the agreement in Atlantic Credit contained an express warranty from the seller that the accounts sold would not be subject to "selection procedures after charge off which would materially alter the character or nature of the pools of loans sold to the Buyer." Id. at *1 (emphasis supplied). The Western District of Virginia specifically relied upon that contract provision in holding that a fraud claim was stated. Id. at 4, fn.5. There is no dispute that no such warranty exists in the case at bar.

Second, unlike New Vision, the plaintiff in Atlantic Credit never amended its agreement after discovery of the "blanket settlements" and never purchased additional accounts. Rather, it brought suit immediately after discovering purported evidence of fraud. Here, in contrast, New Vision amended the Agreement three times, reaffirming its contractual disclaimers in each instance, and continued to purchase accounts from Discover Bank, thus unequivocally

demonstrating that its claimed reliance on Discover Bank's alleged misrepresentations was wholly unjustified as a matter of law.

In sum, because New Vision's reliance on the alleged misrepresentations is directly contradicted by the disclaimer, New Vision could not have reasonably relied on them as a matter of law. Therefore, all of New Vision's counterclaims and affirmative defenses must be dismissed in their entirety.

POINT II

NEW VISION KNOWINGLY WAIVED ITS CLAIMS AND DEFENSES ARISING FROM THE ALLEGED MISREPRESENTATIONS

New Vision contends that it did not waive its claims and defenses because it allegedly did not have "actual" knowledge that Discover Bank had purportedly defrauded it. However, New Vision's own admissions show that it had both actual and constructive knowledge of the alleged fraud. Rather than obtain a written agreement from Discover Bank that it would not engage in adverse selection, New Vision consciously chose to bargain and negotiate amendments on three separate occasions for a lower price for the accounts it purchased and continued to purchase accounts each month for almost two years with full knowledge of its alleged claims. This persistent pattern of behavior is a clear, intentional, voluntary and knowing waiver of any alleged claims for fraud.

Waiver is not limited to actual knowledge, but rather is often based on either actual or constructive knowledge. Weaver v. Weaver, 522 N.E.2d 574 (Ohio App. 1987) (waiver may be demonstrated through "knowledge, actual or constructive") (emphasis supplied). Constructive knowledge of fraud arises where the claimant reasonably should have discovered the underlying fraud. Jones v. Hughley, 794 N.E.2d 79 (Ohio App. 2003) (knowledge is imputed where party had "reasonable opportunity" to discover the fraud); City of Kettering v. Berger, 448 N.E.2d 458

(Ohio App. 1982) ("If by an ordinary degree of prudence the fraud could have been discovered, such opportunity is equivalent to knowledge").

Courts in other jurisdictions have held likewise. See Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima, 858 P.2d 245 (Wash. 1993) ("[w]e hold that a lesser degree of knowledge may be sufficient for a valid waiver to be found"); Sain v. Nagel, 997 F. Supp. 1002 (N.D. Ill. 1998) (plaintiff's fraud claim dismissed where plaintiffs were experts in the industry and had prior "suspicions" of the fraud).

Here, New Vision's contention that it lacked "actual knowledge" is both irrelevant and disingenuous. New Vision acknowledged in the Agreement that it is an "an institutional and sophisticated purchaser." Agreement ¶ 8.1. It repeatedly admits that it had "suspicions" of adverse selection and that it "repeatedly question[ed] Discover [Bank] about adverse selection." Def.'s Br. at 11. Armed with this knowledge, New Vision did not seek to obtain a commitment from Discover Bank not to adversely select accounts. Instead, New Vision three times elected to amend the Agreement by reducing the price it would have to pay for such accounts and then proceeded to purchase additional accounts each month. New Vision's actions are unequivocal in nature and clearly demonstrate constructive (if not actual) knowledge of the alleged adverse selection. It made the conscious decision to enter into three separate amendments and to purchase additional accounts from Discover Bank regardless of its potential claim. Under New Vision's own allegations, it has knowingly, voluntarily and intentionally waived its claims arising out of any alleged fraud.

Only one case cited by New Vision even discusses the "knowledge" element of waiver, and that case addresses the procedural rights of a claimant rather than fraud.[3] In Hoover v.

[3] New Vision's remaining cases (Def.'s Br. 10) do not deal with knowledge at all. See State ex rel. Stacy v. Batavia Local Sch. Dist. Bd. of Educ., 779 N.E.2d 216 (Ohio 2002) (only

Radabagh, 123 F.Supp.2d 412 (S.D.Ohio 2000), the plaintiff was found to lack the requisite knowledge for waiver because, as an unsophisticated individual without access to counsel, he did not understand that the express waiver he signed relinquishing his right to a hearing.[4] In contrast, sophisticated business entities, like New Vision, are presumed to understand that failure to preserve one's rights can result in waiver. This is made clear in Elsag Bailey, Inc. v. City of Detroit, Michigan, 975 F. Supp. 993 (E.D.Mich. 1997), cited in Hoover and by New Vision at Def.'s Br. 11, which states:

> [Plaintiff] was a well-counseled and sophisticated corporate entity. If it had any intention of reserving its right… it certainly could have been more direct…. Instead, [it] consciously embarked on a course that led it into this court, making pointless any attempts to resolve its problems through the contractual dispute resolution procedure.

Id. at 1004.

New Vision acknowledged in the Agreement that it is a sophisticated corporate entity. It too could have reserved its right to contest adverse selection in any of the three Amendments that it negotiated with Discover Bank. Instead, in each instance in which it was presented with accounts that raised its admitted "suspicions" of adverse selection, New Vision consciously embarked on a course in which it negotiated new Amendments that failed to mention adverse

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issue is whether waiver was voluntary); American Family Mortgage Corp. v. Acierno, 640 A.2d 655 (Del. 1994) (only issue is whether waiver was intentional); Realty Growth Investors v. Council of Unit Owners, 453 A.2d 450 (Del. 1982) (only issue is the scope of the waiver, not knowledge of the right being waived).

[4] Hoover does not even involve a claim for fraud; it involves the contractual waiver of a procedural right. It is hornbook law that when a procedural right – like a right to a jury – is waived, "complete … understanding" is not needed. State v. Bays, 716 N.E.2d 1126 (Ohio 1999). Rather, the party charged with waiver need only possess "some knowledge" of the right being waived. Id.

selection and continued to purchase accounts from Discover Bank at a lower price. Therefore, New Vision's fraud claims have been waived as a matter of law.

POINT III

DISCOVER BANK IS NOT LIABLE FOR ALLEGEDLY FAILING TO DISCLOSE WHICH DEBTORS WERE REPRESENTED BY COUNSEL

New Vision has also waived any claim of misrepresentation arising out of Discover Bank's alleged failure to identify which debtors on the accounts it sold to New Vision were represented by counsel.[5] New Vision admits in its brief that it knew that some of the debtors may have retained counsel. Def.'s Br. at 13 ("New Vision does not allege that it did not know that some of the accounts transferred from Discover Bank could involve attorneys") (emphasis omitted). This admission is fatal to its claim. After discovering this supposed omission, New Vision did not rescind the Agreement or return the accounts to Discover Bank. Instead, New Vision retained the accounts, and, one month later, chose to purchase additional accounts from Discover Bank. Answer at p. 17, ¶¶ 65-68. As shown in Point II, supra, this constitutes a voluntary, knowing and intentional waiver of any claims arising out of New Vision's efforts to collect from such accounts.

Moreover, Discover Bank had no legal duty to inform New Vision whether debtors had retained counsel. New Vision cites to no authority whatsoever holding that Discover Bank had such a duty in contract or at law. New Vision fails to cite a single case in support of its argument. Nor does New Vision even attempt to distinguish the numerous cases Discover Bank cited establishing that a party which negotiates a contract with another at arms' length has no duty to speak, and that, absent such a duty, fraud cannot be imputed from silence. E.g., Blon v.

[5] Notably, New Vision utterly fails to allege a single debtor that has been improperly contacted, and it also fails to allege any liability arising from such contact.

Bank One, Akron, N.A., 519 N.E.2d 363 (Ohio 1988); Horton v. Telxon Corp., 716 N.E.2d 786 (Ohio Ct. C.P. 1999). As New Vision cannot establish any legal duty by Discover Bank to disclose those accounts in which counsel was retained, New Vision's claims and defenses arising out of such allegations must be dismissed as a matter of law.

POINT IV

DISCOVER BANK IS ENTITLED TO PARTIAL JUDGMENT ON THE PLEADINGS AS TO NEW VISION'S LIABILITY FOR BREACHING THE AGREEMENT

New Vision contends that judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) is not warranted because its conclusorily pled affirmative defenses give Discover Bank "fair notice" of the underlying factual allegations. Def.'s Br. 14. New Vision is wrong as a matter of law. The party opposing a motion for judgment on the pleadings must demonstrate that an issue of fact exists as a result of a factual allegation in the pleadings themselves (or a reasonable inference to be drawn therefrom), or a fact of which the court may take judicial notice:

> Although inferences may be drawn from the pleadings in favor of the nonmoving party, they must be reasonable and inferences cannot be indulged in when they are contrary to the clear and unambiguous words or actions of the parties or inconsistent with matters that fall within the judicial notice doctrine

Wright & Miller, Federal Practice & Procedure § 1368. Conclusory allegations of unspecified questions of fact are insufficient. Games Galore of Ohio, Inc. v. Masminster, 154 F.Supp.2d 1292, 1300 (S.D.Ohio 2001) ("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"). See also Geupel v. Benson, 704 F. Supp. 312 (D. Mass. 1989) (motion for judgment on the pleadings "should be allowed if the undisputed facts alleged in the pleadings,

together with any facts of which the Court will take judicial notice, establish that no relief can be granted").[6]

Here, New Vision's affirmative defenses allege no facts. Accordingly, the only facts to be determined in the context of a motion for judgment on the pleadings are those undisputed facts found in the Agreement signed by the parties, in the complaint and in New Vision's counterclaims. As described above and in Discover Bank's moving papers, those allegations are insufficient as a matter of law.

The undisputed facts set forth in the pleadings – particularly the express language of the Agreement and the undisputed purchases by New Vision – unequivocally establish Discover Bank's right to partial judgment on the pleadings. New Vision admits that it executed the Agreement and Amendments thereto and agreed to purchase "all of the [Discover Bank's] right, title and interest in and to the Accounts, which Seller identifies during each month 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. New Vision also admits it breached the Agreement when it avers in the Counterclaims that it "did not purchase any accounts from Discover Bank after October 25, 2002." Answer at p. 4, ¶¶ 16-17. Thus, New Vision has fully admitted its default under the

[6] Two of the three cases cited by New Vision do not even pertain to motions for judgment on the pleading; rather, they stand for the unremarkable position that affirmative defenses are not facially deficient simply because they fail to allege underlying facts. American Motorists Ins. Co. v. Napoli, 166 F.2d 24 (5th Cir. 1948) (conclusory affirmative defense of contributory negligence could be charged to jury); Barnwell & Hays, Inc. v. Sloan, 564 F.2d 254 (8th Cir. 1977) (conclusory affirmative defense of waiver could be charged to jury). In the third and final case cited by New Vision, Edmonds v. United States, 148 F. Supp. 185 (E.D.Wisc. 1957), the plaintiff's motion for judgment on the pleadings was denied, not because the defendant had alleged a conclusory affirmative defense of fraud, but because (unlike here) there was substance behind defendant's denial of the underlying elements of the plaintiff's claims. Id. at 186.

Agreement as amended and partial judgment on the pleadings should be entered in Discover Bank's favor on the issue of New Vision's liability for breach of the Agreement.

POINT V

NEW VISION'S CLAIMS AND DEFENSES ARISING OUT OF NEGLIGENT MISREPRESENTATION SHOULD BE DISMISSED BECAUSE THEY SEEK PURELY ECONOMIC DAMAGES

New Vision does not contest that, under Ohio law, a claim for negligent misrepresentation must be dismissed where, as here, it seeks purely economic damages. E.g., 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). Accordingly, New Vision's negligent misrepresentation claims and defenses allegedly must be dismissed in their entirety.

POINT VI

NEW VISION'S COUNTERCLAIM FOR UNJUST ENRICHMENT SHOULD BE DISMISSED BECAUSE AN AGREEMENT GOVERNS THE PARTIES' RELATIONSHIP

Nor does New Vision contest that, under Ohio law, unjust enrichment claims are barred where, as here, the parties' relationship is governed by a valid and enforceable agreement. E.g., Wolfer Enters. Inc. v. Overbrook Dev. Corp., 724 N.E.2d 1251, 1253 (Ohio App. 1999). Accordingly, New Vision's counterclaim for unjust enrichment must be dismissed.

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
April 19, 2004

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 19, 2004, he electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to:

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