UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DISCOVER BANK,

Plaintiff,

v.

Case No. 2:03-cv-686
JUDGE GREGORY L. FROST
Magistrate Judge Mark R. Abel

NEW VISION FINANCIAL, LLC,

Defendant.

OPINION AND ORDER

This matter comes before the Court for consideration of a combined motion to dismiss/motion for judgment on the pleadings with a supporting memorandum filed by Discover Bank (Docs. # 23, 24), a memorandum in opposition filed by New Vision Financial, LLC (Doc. # 31), and a reply memorandum filed by Discover Bank (Doc. # 32).

I. Background

Defendant-Counter Claimant, New Vision Financial, LLC ("New Vision"), is a Georgia corporation that purchases delinquent credit card accounts for subsequent collection. Plaintiff-Counter Defendant, Discover Bank, is a Delaware corporation with offices in Hilliard, Ohio that routinely sells delinquent accounts.[1] Following discussions between Discover Bank and a company known as Enhanced Asset Management, which was acting on behalf of New Vision, the parties to this litigation entered into an agreement in January 2001 in which New Vision

[1] In its counterclaims, New Vision also names Discover Financial Services, Incorporated, Discover's servicing agent. (Doc. # 19, at 9.) For ease of discussion and in accordance with the parties' briefing, the Court shall simply refer to Discover Bank.

would purchase delinquent credit card accounts from Discover Bank.

The relationship between the parties deteriorated within three months. According to New Vision, Discover Bank's placement manager had represented to New Vision during negotiations that Discover Bank would sell the credit card accounts without engaging in adverse selection, a procedure in which Discover Bank would hand off carefully selected, less-than-desirable accounts to New Vision. New Vision contends, however, that Discover Bank was not only engaging in adverse selection, but that the company admitted it in a May 14, 2001 communication to Enhanced Asset Management. As a result of improper selection procedures, New Vision contends, Discover Bank was intentionally selling high-balance accounts instead of random accounts; it is apparently more difficult to collect on high-balance accounts.

As an outgrowth of discussions between the parties, New Vision and Discover Bank executed amendments to their initial agreement at least twice, once on October 1, 2001 and once on July 10, 2002.[2] These amendments altered several specific terms of the account purchase agreement, but provided that "[e]xcept as amended hereby, the Agreement shall be and remain [*sic*] unchanged and in full force and effect in accordance with its terms." (Doc. # 1, Ex. B, October 1, 2001, and July 10, 2002 Letters.)

New Vision's collection problems allegedly continued. The company asserts, for

[2] The Court notes that there is a discrepancy in the pleadings regarding the number of amendments. In its Complaint, Discover Bank asserts the existence of the October 2001 and July 2002 amendments, *as well as* a February 8, 2002 amendment. (Doc. # 1, at 7 ¶14.) New Vision recognizes only the October 2001 and July 2002 amendments in its Answer, however, and denies the allegation of a February 8, 2002 amendment. (Doc. # 19, at 3 ¶¶13-14.) In its counterclaims, New Vision again recognizes only the October 2001 amendment. (Doc. # 19, at 13 ¶36, 16 ¶57.) Accordingly, three observations are necessary: (1) the February 8, 2002 amendment attached to the Complaint contains the same incorporating language as the other amendments (Doc. # 1, Ex. B, February 8, 2002 Letter); (2) for purposes of this Order, the Court must accept New Vision's facts as correct; and (3) although not discussed in Section II.C of this Order, the Court notes here that the factual discrepancy places in dispute one of the amendments involved in Discover's Fed. R. Civ. P. 12(c) motion and its request for relief.

example, that Discover Bank had begun to sell New Vision an unusual number of accounts in which the debtor had obtained legal representation, which also complicates collection procedures and, depending upon the collection procedures employed, can lead to violations of the Fair Debt Collection Practices Act. New Vision also contends that the accounts it received contained a disproportionate number of Texas and Florida accounts, which are more difficult to collect due to state law.

New Vision admits that it has not purchased any accounts from Discover Bank since October 25, 2002. Discover Bank therefore terminated the parties' agreement as of April 1, 2003 (Doc. # 25, Ex. 4, March 10, 2003 Letter) and filed the instant case on July 30, 2003. (Doc. # 1.) Following an unsuccessful attempt at dismissing or transferring the action, New Vision answered the Complaint on January 30, 2004. (Doc. # 19.) As part of its answer, New Vision asserted the following five counterclaims against Discover Bank: fraud/intentional misrepresentation, fraud in the inducement, fraud and deceit, negligent misrepresentation, and unjust enrichment. (Doc. # 19, at 18-20.)

On March 12, 2004, Discover Bank filed a combined motion to dismiss New Vision's affirmative defenses and the foregoing counterclaims and a motion for judgment on the pleadings on the issue of liability. (Doc. # 23.) Following various procedural entanglements concerning filing deadlines, that dual motion is now ripe for adjudication.

II. Discussion

Discover Bank seeks dismissal under Fed. R. Civ. P. 12(b)(6). Dismissal is warranted under that rule " 'only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.' " *Sistrunk v. City of Strongsville*, 99 F.3d 194,

197 (6th Cir. 1996) (quoting *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984)), *cert. denied*, 520 U.S. 1251 (1997). The focus is therefore not on whether a plaintiff will ultimately prevail, but rather on whether the claimant has offered "either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Rippy ex rel. Rippy v. Hattaway*, 270 F.3d 416, 419 (6th Cir. 2001) (quoting *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988)). In making such a determination, a court must

" 'construe the complaint liberally in the plaintiff's favor and accept as true all factual allegations and permissible inferences therein.' " *Sistrunk*, 99 F.3d at 197 (quoting *Gazette v. City of Pontiac,* 41 F.3d 1061, 1064 (6th Cir. 1994)). A court need not, however, accept conclusions of law or unwarranted inferences of fact. *Perry v. American Tobacco Co., Inc.*, 324 F.3d 845, 848 (6th Cir. 2003).

Discover Bank also seeks judgment under Fed. R. Civ. P. 12(c), which provides that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." In considering the Rule 12(c) filing, the Court must construe New Vision's allegations in the light most favorable to that party, accept all of New Vision's factual allegations as true, and determine whether New Vision undoubtedly can prove no set of facts in support of its counterclaims that would entitle the company to relief. *See Ziegler v. IBP Hog Market, Inc.*, 249 F.3d 509, 512 (6th Cir. 2001); *Mixon v. State of Ohio*, 193 F.3d 389, 400 (6th Cir. 1999). As with a motion to dismiss, the Court need not accept as true legal conclusions or unwarranted factual inferences. *Mixon*, 193 F.3d at 400.

Given the substantive similarity of the foregoing standards and the operative facts involved, the following discussion shall resolve both aspects of Discover Bank's combined

motion.

A. Fraud Counterclaims

Because New Vision's first four counterclaims involve fraud or misrepresentation, the Court shall discuss these claims together. The substance of New Vision's claims is that Discover Bank supplied false information to New Vision regarding its account selection procedures and that New Vision suffered loss as a result of having justifiably relied on this information in entering into the agreement and amendments with Discover Bank. To prevail under Ohio law,[3] the company must demonstrate the elements of fraud:

> "(a) a representation or, where there is a duty to disclose, concealment of a fact,
> "(b) which is material to the transaction at hand,
> "(c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,
> "(d) with the intent of misleading another into relying upon it,
> "(e) justifiable reliance upon the representation or concealment, and
> "(f) a resulting injury proximately caused by the reliance."

Cohen v. Lamko, Inc., 10 Ohio St.3d 167, 169, 462 N.E.2d 407, 409 (1984) (quoting *Friedland v. Lipman*, 68 Ohio App.2d 255, 429 N.E.2d 456, paragraph one of the syllabus (1980)). *See also Greenberg v. Life Ins. Co. of Virginia*, 177 F.3d 507, 515 (6th Cir. 1999) (noting same elements but mistakenly omitting element of intent) (citing *Burr v. Board of County Comm'rs. of Stark County*, 23 Ohio St. 3d 69, 73, 491 N.E.2d 1101, 1102 (1986) (including intent element)). To prevail on its counterclaim/defense of fraud in the inducement, New Vision must prove Discover Bank made a knowing, material misrepresentation with the intent of inducing New Vision's reliance and that New Vision in fact relied upon the misrepresentation to its detriment. *See ABM*

[3] The Court recognizes that although the parties' agreement calls for application of Delaware law, both parties agree that Ohio law should control these claims. (Doc. # 24, at 15 n.5; Doc. # 31, at 5.)

Farms, Inc. v. Woods, 81 Ohio St. 3d 498, 502, 692 N.E.2d 574, 578 (1998). Finally, to prevail on its negligent misrepresentation counterclaims/defense, New Vision must demonstrate that Discover Bank supplied false information for the guidance of New Vision in their business transactions, that New Vision suffered pecuniary loss caused by its justifiable reliance on the information, and that Discover Bank failed to exercise reasonable care or competence in obtaining or communicating the information. *See Delman v. City of Cleveland Heights*, 41 Ohio St. 3d 1, 4, 534 N.E.2d 835, 838 (1989). *See also Greenberg*, 177 F.3d at 517.

Discover Bank argues that New Vision cannot satisfy the foregoing requirements because the latter company cannot prove justifiable reliance. The bank denies any allegation of adverse selection and counters that even if it were true, the agreement language and New Vision's conduct nonetheless as a matter of law excuse any adverse selection and the allegedly false representations made during negotiations.

To support its contentions, Discover Bank points to several provisions of the parties' agreement. For example, an agreement provision states:

> Buyer [New Vision] represents, warrants and certifies to Seller [Discover Bank] 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 business. Buyer further represents, warrants and certifies that it has knowledge and experience on 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 it has not relied in entering into this Agreement upon any oral or written information provided by Seller of 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 material to its purchase, and is entering into this transaction solely on the basis of that investigation and Buyer's own judgment.

(Doc. # 1, Ex. A, at 7-8 ¶8.1.) Another agreement provisions disclaims that Discover Bank made any express or implied warranties or representations as to the collectability, form, or sufficiency of any account; this same provision also states that New Vision "acknowledges and agrees that the sale of accounts as provided herein is made on an 'as is' condition and basis with all faults." (Doc. # 1, Ex. A, at 12, Article X.) Additional language in that section expressly disclaims "any [past, present, or future] representation, warranty, promise, covenant, agreement or guarantee of any kind or character whatsoever" that Discover Bank made or implied in regard to "the nature, quality or condition of the accounts, ... the income to be derived from the accounts, ... the suitability of the accounts for any and all activities and uses which buyer may intend, or ... any other matter with respect to the accounts." (Doc. # 1, Ex. A, at 12, Article X.) The agreement further contains an integration clause stating that "[t]here are no promises or other agreements, oral or written, express or implied, between the parties other than as set forth in this Agreement" (Doc. # 1, Ex. A, at 16 ¶ 13.9) and permits Discover Bank to resell unpurchased accounts and recover from New Vision any deficiency in the event of New Vision's default (Doc. # 1, Ex. A, at 4 ¶ 3.5).

Discover Bank contends that the foregoing contract provisions prove dispositive because New Vision's allegedly fraudulent representations were not only outside the written agreement, but also were wholly disavowed by that agreement (and, therefore, by the incorporating letters of amendment). The Court agrees with these arguments.

In so doing, the Court finds persuasive the rationale employed in *Goodyear Tire &*

Rubber Company v. Chiles Power Supply, Incorporated, 7 F. Supp. 2d 954 (N.D. Ohio 1998). In addressing a claim under Ohio law that Goodyear Tire & Rubber Company had engaged in fraud, the *Goodyear* court stated:

> [I]f Goodyear committed fraud in inducing any ... contract, it could not rely on the language of the contract for relief. As Judge Dowd has noted, "[a seller] cannot rely on a provision of the contract to bar [a buyer's] claim when the claim alleges the contracts were induced through fraud." *Invacare Corp. v. Sperry Corp.*, 612 F.Supp. 448, 451 (N.D. Ohio 1984). But ... fraud requires reasonable reliance. 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. After all, in disclaiming all external representations, one party effectively warns another that such representations are worthless.

Id. at 962-63. That is precisely the scenario before the Court today.[4]

Necessarily crediting New Vision's alleged facts as true, the Court accepts for the present purposes that Discover Bank initially made representations that it did not engage in adverse selection. The parties then entered into a contract that disavowed all representations not contained in the written agreement. That same contract also provided that New Vision was not relying on any such representations. This scenario was repeated a number of times, with each amendment, by incorporation, disavowing all external representations and disclaiming any reliance on those representations. In other words, by mutual agreement, the parties to this case agreed that nothing Discover Bank had said outside the contract was necessarily true and that nothing New Vision did was a result of anything Discover Bank had said. They agreed as part of

[4] In contrast, the factual scenario in *Goodyear* ultimately mandated a different result. There, the *Goodyear* court found a genuine issue at that stage of the proceedings over whether the standard disclaimers had ever been accepted by the complaining party. *Goodyear Tire & Rubber Co.*, 7 F. Supp. 2d at 964. That court also recognized that the disclaimer failed to comply with a statutory requirement for disclaiming a warranty of merchantability. *Id*. at 966. In the instant case, however, there is no allegation that the disclaimers were not part of the parties' agreements, and New Vision fails to point to any intervening statutory requirement mandating a specific form of disclaimer.

the basis of their bargain, then, to establish a legal fact that resolves the justifiable reliance issue. To conclude otherwise would be to invalidate provisions of the contract with no basis for such action. It would permit New Vision to agree to a contract term (no reliance) and then disavow that portion (and others) of the agreement at whim, in order to hold Discover Bank to a purported oral representation that the contract's fair warning provision voids. The Court declines to rewrite contract law in such a manner.

New Vision argues that there is a basis for such judicial revision of the parties' agreement. The company asserts that the core issue for today is whether Discover Bank's extrinsic representations in effect trump the contractual disclaimers, which New Vision dismisses as meaningless boilerplate. This argument implicates Ohio's parol evidence rule, which may bar recognition of the alleged denials of adverse selection, or which may permit Discover Bank's alleged repeated material misrepresentations to come in and support a theory of justifiable reliance.

The parol evidence rule in Ohio provides that " 'absent fraud, mistake or other invalidating cause, the parties' final written integration of their agreement may not be varied, contradicted or supplemented by evidence of prior or contemporaneous oral agreements, or prior written agreements.' " *Galmish v. Cicchini*, 90 Ohio St. 3d 22, 27, 734 N.E.2d 782, 788 (2000) (quoting 11 Williston on Contracts § 33:4, at 569-70 (4th ed. 1999)). *See also Thomasville Furniture Indus., Inc. v. JGR, Inc.*, 3 Fed. Appx. 467, 475 (6th Cir. 2001). The fraud exception is of interest here, because "the parol evidence rule does not prohibit a party from introducing parol or extrinsic evidence for the purpose of proving fraudulent inducement." *Galmish*, 90 Ohio St. 3d at 28, 734 N.E.2d at 789. Further, even where there is an integration clause in a

written agreement, a party may still assert parol evidence to prove fraud, *id*. at 29, 734 N.E.2d at 790, because fraud can never be merged, *id*. at 28, 734 N.E.2d at 789. The policy underlying the exception for fraud is sound:

> "[I]f the courts were to hold, in an action on a written contract, that parol evidence should not be received as to false representations of fact made by the plaintiff, which induced the defendant to execute the contract, they would in effect hold that the maxim that fraud vitiates every transaction is no longer the rule."

Id. (quoting 37 Am. Jur. 2d, Fraud and Deceit § 451, at 621-22 (1968)).

The fraud exception is not all-encompassing in scope, however. The Ohio Supreme Court has explained that the parol evidence rule

> may not be avoided "by a fraudulent inducement claim which alleges that the inducement to sign the writing was a promise, the terms of which are directly contradicted by the signed writing. Accordingly, an oral agreement cannot be enforced in preference to a signed writing which pertains to exactly the same subject matter, yet has different terms."

Id. at 29, 734 N.E.2d at 790 (quoting *Marion Prod. Credit Ass'n v. Cochran*, 40 Ohio St. 3d 265, 533 N.E.2d 325, paragraph three of the syllabus (1988)). Thus, when allegations of promissory fraud and an integrated agreement are involved, the false promise must be either independent of or consistent with the written agreement for the evidence to be admissible. *Id*. at 30, 734 N.E.2d at 791.

Here, the written agreement is silent as to the specific account selection procedures that Discover Bank employs; the agreement, in fact, disavows any representation as to the nature or character of the accounts and defines them "as is." The alleged parol evidence that speaks to selection procedures is therefore inconsistent with the written agreement, then, in that it provides

limitations on selection procedures when the written agreement imposes no such limitations (and in fact disavows them).[5]

This is not a case in which the parol evidence reveals that a "promisor had no intention of honoring his promise and thus had fraudulent intent." *Watkins & Son Pet Supply v. Iams Co.*, 254 F.3d 607, 613 (6th Cir. 2001) (citing *Williams v. Edwards*, 129 Ohio App.3d 116, 124, 717 N.E.2d 368, 374 (1998)). *See also Galmish*, 90 Ohio St. 3d at 30-31, 734 N.E.2d at 791-92 (extrinsic evidence offered to show lack of intent to honor a promise implied in the written agreement). In such a case, the parol representations target the validity and not the terms of the agreement. But this is a case in which the extrinsic evidence contradicts, or varies, the actual terms of the written agreement. The alleged extrinsic representations place a limitation on the nature of the accounts/selection procedures (by promising no adversely selected accounts) that the contract does not (by describing "as is" accounts with no qualifications as to their nature or character). The parol evidence rule thus operates to preclude the consideration of Discover Bank's alleged material misrepresentations concerning its account selection procedures.

Accepting as true for the present purposes the alleged statements by Discover Bank, the Court finds that the parol statements cannot inform the issue of justifiable reliance. The parol evidence rule excludes consideration of the purported representations. Moreover, even if considered, these representations are disavowed by the agreement itself; any reliance on them is

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[5] The Court recognizes that one of the cases on which New Vision relies, *Atlantic Credit & Finance Special Finance Unit, LLC v. MBNA America Bank, N.A.*, No. Civ.A. 700CV00846, 2001 WL 856704 (W.D. Va. June 4, 2001), is distinguishable because the contract in that case *did* speak to the selection procedures employed. *Id*. at *4 n.5. This fact renders puzzling that court's discussion of parol statements as surviving broad disclaimers and supporting a fraud claim, given the apparent breach of contract argument. In any event, that case is not controlling and proves unpersuasive.

thus unreasonable as a matter of law.[6] By entering into the various agreement amendments, which incorporated the disclaimers, the sophisticated purchaser New Vision repeatedly agreed that any claimed reliance on the alleged subsequent misrepresentations was equally unjustified as a matter of law. Although the procedural posture of this case compels Discover Bank to make a curious argument, its dispositive argument amounts to the theory that New Vision should have known better than to take Discover Bank on its word, regardless of whether that subsequently disavowed word was intentionally or negligently false.

The Court agrees with these arguments and concludes that, even accepting New Vision's factual pleadings as true, the company agreed to a contract that invalidated any justifiable reliance on disavowed representations as a matter of law. New Vision's first four counterclaims and its related asserted defenses therefore fail. Having thus resolved the justifiable reliance issue, the Court need not and does not decide the validity of Discover Bank's remaining moot arguments–such as waiver–targeting the fraud-related claims.

B. Unjust Enrichment

The substance of New Vision' counterclaim for unjust enrichment is that it paid for accounts from Discover Bank with certain characteristics that made the accounts worth the price paid. By selling accounts without those characteristics, New Vision alleges, Discover Bank was

[6] New Vision contends that the Sixth Circuit requires that fraud claims survive a motion to dismiss because justifiable reliance involves a factual-inquiry. But *Greenberg v. Life Insurance Company of Virginia*, 177 F.3d 507, the primary case upon which the company relies, is distinguishable. The contract in that case contained internal inconsistencies, some of which supported the unsophisticated consumers' fraud claims. *Id*. at 516. Further, the court of appeals explained that the *Greenberg* integration clause/disclaimer did not control in that case only because of language in other written documents that was explicitly incorporated into the integrated agreement. *Id*. at 518-19. Here, the contract at issue lacks such similar language supporting New Vision's claims. Further, the *Greenberg* court's discussion of the nature of a justifiable reliance inquiry lacks much substantive analysis; that court's recitation of the law and its abrupt conclusion hardly states a *per se* rule that a court can never grant a motion to dismiss that targets justifiable reliance. *Id*. at 516-17.

unjustly enriched. Discover Bank argues that it is also entitled to prevail on this theory of unjust enrichment.

Ohio law defines "[u]njust enrichment [as] an equitable doctrine to justify a quasi-contractual remedy that operates in the absence of an express contract or a contract implied in fact to prevent a party from retaining money or benefits that in justice and equity belong to another." *Turner v. Langenbrunner*, No. CA2003-10-099, 2004 WL 1197213, at *5 (Ohio App. June 1, 2004). The doctrine does not apply where there is a valid, enforceable contract involved that governs the parties' relationship. *Id*. *See also Hartley v. Dayton Computer Supply*, 106 F. Supp. 2d 976, 984 (S.D. Ohio 1999) (collecting cases). Moreover, absent the extrinsic evidence upon which New Vision relies to define the characteristics of the accounts–the disavowed parol representations that cannot be considered here–there is no set of facts alleged to provide a basis for the unjust enrichment counterclaim. The Court therefore agrees that New Vision's unjust enrichment argument is invalid.

C. Affirmative Defenses

New Vision has raised a number of defenses in its Answer, ranging from res judicata to the statute of frauds to a blanket assertion of "all of the affirmative defenses set forth in Rule 12, Federal Rules of Civil Procedure." (Doc. # 19, at 7 ¶39-48, 8 ¶49.) In its memorandum in support of its combined motion, Discover Bank first argues that the defenses raised are conclusory allegations that, because they lack any supporting factual contentions, must be dismissed as a matter of law. (Doc. # 24, at 27.) Accordingly, Discover Bank argues, it is entitled to judgment on the pleadings under Fed. R. Civ. P. 12(c) because there are then no alleged defenses (*i.e.*, the only facts in the pleadings support Discover Bank's breach-of-contract

claim). In its reply memorandum, however, Discover Bank cites a number of cases as "stand[ing] for the unremarkable position that affirmative defenses are not facially deficient simply because they fail to allege underlying facts." (Doc. # 32, at 16 n.6.) New Vision in turn argues that it has sufficiently pled its defenses, which it asserts do not need to contain extensive factual allegations.

This Court finds Discover Bank's argument wanting. The bank's premise–that it is entitled to judgment because there are no contrary facts–depends on there being no affirmative defenses. To overcome this hurdle, Discover Bank asks this Court first to *dismiss* the affirmative defenses. But the method by which to attack the sufficiency of how an affirmative defense is pled is to file a *motion to strike* the defense as insufficient under Fed. R. Civ. P. 12(f).

Rule 12(f) provides:

> Upon motion made by a party before responding to a pleading, or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

Here, New Vision raised its affirmative defenses in its January 30, 2004 Answer. (Doc. # 19.) Although Discover Bank could thereafter respond to the counterclaims raised in that same filing, the pleadings had closed in regard to Discover Bank's claims on that date. Thus, no responsive pleading to the affirmative defenses was permitted, which means that under Rule 12(f), Discover Bank had 20 days after the service of the Answer in which to move to strike the affirmative defenses as insufficient. But Discover Bank waited until March 12, 2004 to attack the sufficiency of how New Vision pled its affirmative defenses. The majority of these defenses

therefore remain intact.[7]

Thus, although recognizing the spartan nature of the Answer, the Court cannot say that New Vision undoubtedly can prove no set of facts in support of its counterclaims that would entitle the company to relief. The question of the ultimate validity of those still-viable affirmative defenses remains. Similarly, the question of whether New Vision was required to plead its affirmative defenses with specific supporting factual contentions remains open, because the Court does not elect to inquire into the sufficiency of the responsive pleading at this time, save for the foregoing observation as to the invalidity of the fraud- and negligent misrepresentation-related defenses. The Court notes, however, that a defendant may plead an affirmative defense in general terms as long as the pleading sufficiently provides a plaintiff fair notice of the nature of the defense. *See* 5 Charles Alan Wright & Arther R. Miller, *Federal Practice and Procedure* § 1274 (3d ed. 2004). *Cf. Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d 1439, 1445 (6th Cir. 1993) ("The Supreme Court has held that the purpose of Rule 8(c) is to give the opposing party notice of the affirmative defense and a chance to rebut it."); *American Motorists Ins. Co. v. Napoli*, 166 F.2d 24, 26 (5th Cir. 1948) ("Under our very liberal rules of pleading, although a plea of contributory negligence must be affirmatively set forth, it need not be predicated upon extensive factual allegations. A plea that simply states that complainant was guilty of contributory negligence, as in the case at bar, is sufficient."). Given the disposition of today's motion in regard to the issue of liability, the time to rebut the affirmative defenses is now at the summary judgment stage.

[7] Given today's decision, those affirmative defenses predicated on the alleged fraud discussed herein (and the alleged negligent misrepresentation, to the extent New Vision's defenses might rely on it) are invalidated.

III. Conclusion

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Discover Bank's combined motion to dismiss New Vision's counterclaims and affirmative defenses and to enter judgment on the pleadings for Discover Bank on the issue of liability. (Doc. # 23.) New Vision's counterclaims and corresponding fraud/misrepresentation-related defenses are therefore **DISMISSED**, but Discover Bank is not entitled to judgment on the pleadings on the issue of liability.

IT IS SO ORDERED.

/s/ Gregory L. Frost
GREGORY L. FROST
UNITED STATES DISTRICT JUDGE