COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

Preferred Capital, Inc.,	)	COA Number	Lower Court Number
	)	85706	CP CV-542500
Appellant,	)	85707	CP CV-544485
	)	85723	CP CV-542159
	)	85731	CP CV-540119
	)	85732	CP CV-543000
vs.	)	85733	CP CV-542329
	)	85743	CP CV-542101
	)	85744	CP CV-540101
	)	85745	CP CV-544566
Thomas E. Strellec, Jr., et al.,	)	85775	CP CV-542878
	)	85776	CP CV-542102
Appellees.	)	85777	CP CV-538120

BRIEF ON APPEAL OF *AMICI CURIAE,* ATTORNEYS GENERAL OF THE STATES OF CONNECTICUT, FLORIDA, ILLINOIS, LOUISIANA, MASSACHUSETTS, MICHIGAN, NEW YORK, OHIO, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, AND TEXAS IN SUPPORT OF APPELLEES

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SUMMARY OF ARGUMENT

The Attorneys General for the states of Connecticut, Florida, Illinois, Louisiana, Massachusetts, Michigan, New York, Ohio, Pennsylvania, Rhode Island, South Dakota, and Texas ("Amici"), as *amici curiae*, submit this brief in support of Appellees in accordance with the Court's scheduling order dated February 2, 2005. Amici urge this Court to affirm the lower courts' dismissals for lack of jurisdiction and to bar enforcement of the floating forum selection clause contained in Appellees' NorVergence contracts.

This Court has previously held that a floating forum selection clause is invalid and should affirm that precedent in this appeal.[1] The Court should reject the arguments of the Equipment Leasing Association of America, Inc. ("ELA") because the only cases ELA relies upon involve valid forum selection clauses where the parties stipulated to a single, specific jurisdiction to hear disputes arising out of the contract. Instead, the Court should rely on cases the Amici cite which have found floating forum selection clauses to be invalid since they fail to put the customer on notice of where it would be required to defend an action.

Additionally, ELA's economic argument is better directed at a legislative body. The Court's decision will directly affect more than 500 similarly situated customers of Appellant Preferred Capital, Inc. ("Preferred Capital") whose cases are pending in Cuyahoga and Summit County Courts of Pleas, as well as thousands of other small businesses across the nation whose livelihoods are jeopardized by NorVergence-related

[1] *See Copelco Capital, Inc. v. St. Mark's Presbyterian Church*, 2001 WL 106328 *3 (Ohio App. 8th Dist., Feb. 1. 2001) (unpublished) *(*Exh. 1).

collection actions that could be or have been instituted by over twenty (20) different finance companies, including Preferred Capital.

This Court should affirm the lower courts' decisions in favor of giving small businesses and non-profits fair notice in forum selection clauses and prevent Preferred Capital from using Ohio's courts as a default mill.

STATEMENT OF THE ATTORNEYS GENERAL'S INTERESTS ON APPEAL

The Amici, acting under their respective consumer protection statutes, are seeking to protect customers of Preferred Capital, NorVergence and/or other leasing companies against unfair trade and deceptive practices by these companies in their financing activities. A number of the state Attorneys General have issued subpoenas or requests for information, sent cease and desist requests, filed bankruptcy proofs of claim for damages, and/or filed suit against Preferred Capital, NorVergence, and/or the other leasing companies.[2] The decision this Court enters in this consolidated appeal will affect more than just the twelve Appellees; this Ohio appellate court is the pinnacle of litigation for the 500 plus cases pending in Cuyahoga and Summit Counties involving the NorVergence contracts assigned to a special master in the Cuyahoga County Court of Common Pleas.[3] Furthermore, this Court's decision may be cited as legal precedent on the issue of the validity of the NorVergence floating forum selection clause as the Amici pursue their own NorVergence state investigations and litigation. Over 11,000 small

[2] Those states include, but are not limited to, California, Colorado, Connecticut, Florida, Illinois, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina, Pennsylvania, and Texas.

[3] The customers in these cases reside in the Amici States and elsewhere throughout the nation.

businesses nationwide, including some Ohio businesses,[4] likewise may find themselves subject to collection actions in foreign jurisdictions due to the NorVergence floating forum selection clause.

STATEMENT OF FACTS

Amici adopt and incorporate by reference the Statement of Facts contained in Appellees' Brief on Appeal filed with this Court.

ARGUMENT

I. THE TRIAL COURTS PROPERLY DISMISSED THE ACTIONS BECAUSE THE NORVERGENCE FLOATING FORUM SELECTION CLAUSE IS UNFAIR AND UNREASONABLE.

ELA argues that the NorVergence floating forum selection clause was proper (ELA 7).[5] This argument fails. The general rule for forum selection clauses is that they are enforceable unless they are unfair or unreasonable. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10-11 (1972); *Kennecorp Mortgage Brokers, Inc. v. Country Club Convalescent Hospital*, 66 Ohio St. 3d 173, 175 (1993). One of the major rationales to allow forum selection clauses is to eliminate uncertainty by permitting the parties to agree in advance on a forum acceptable to both of them. *See M/S Bremen,* 407 U.S. at 13; *Central Ohio Graphics, Inc. v. Alco Capital Resource, Inc.*, 221 Ga. App. 434, 435-436 (1996).

In contrast, contracts containing floating forum selection clauses (*i.e.,* forum selection clauses that fail to specify a particular jurisdiction) do not create this certainty

[4] The Ohio Attorney General's Office is aware of a number of Ohio small businesses that executed leases with NorVergence and, similar to Appellees, may find themselves haled into court in distant forums based on NorVergence contracts that contain the floating forum selection clause.

[5] ELA's Brief on Appeal will be referred to as (ELA [page]).

because those clauses fail to provide a party with notice of the location of the forum where it could be sued. *See Copelco Capital, Inc. v. St. Mark's Presbyterian Church*, 2001 WL 106328 at *3 (Ohio App. 8th Dist., Feb. 1, 2001) (unpublished) (Exh.1). In determining whether a floating forum selection clause is unfair or unreasonable, this Court considers a number of factors: (1) whether the lessees could reasonably anticipate being called into the distant forum; (2) whether the contract named a specific jurisdiction; or (3) whether the parties against whom enforcement was sought were sophisticated businesspeople. *See Copelco Capital, Inc.*, 2001 WL 106328 at *4. In examining these factors, this Court should hold the NorVergence floating forum selection clause to be unfair and unreasonable and therefore invalid because: (1) it fails to provide adequate notice where a party may be sued by not specifying a jurisdiction; (2) it is not clear and conspicuous in the contract; and (3) it seeks to be enforced against small, unsophisticated businesses.

A. The Floating Forum Selection Clause Fails To Provide Appellees With Adequate Notice Of Where They May Be Sued.

Here, the NorVergence floating forum selection clause is unfair and unreasonable because, on the face of the finance agreements, Appellees had no notice that they could be sued in Ohio.[6] NorVergence, in its contract, did not clearly or conspicuously name the specific jurisdiction where the customer could be sued. See NorVergence Equipment Rental Agreement of DSC Associates, Inc. (Exh. 2). Instead, the NorVergence contract

[6] The issue of whether the NorVergence contracts are leases as opposed to rental or service contract financing agreements is not presently before this Court. Nonetheless, the Amici do not concede that the NorVergence agreements are leases and reserve their rights to argue against such a contention in the future.

provides that:

> This agreement shall be governed by, construed and enforced in accordance with the laws of the State in which Rentor's principal offices are located or, if this Lease is assigned by Rentor, the State in which the assignee's principal offices are located, without regard to such State's choice of law considerations and all legal actions relating to this lease shall be venued exclusively in a state or federal court located within that State, such court to be chosen at Rentor or Rentor's assignees' sole option.

(See Exh. 2). Such a complex provision, with no clear indication where a party might face suit, only increases the uncertainty among the parties. Rather than setting forth a specific jurisdiction, or one reasonably likely, the forum for resolution of future disputes is left to ***any place in the country*** depending solely upon the unilateral conduct of NorVergence or its assignee **after** the parties executed the contract.

Consequently, Appellees never anticipated that they would be sued in Ohio because they lacked any notice that NorVergence would assign the contracts to Preferred Capital. *See*, *e.g.*, Affidavit of Kenneth Nehiley, Sterling Asset and Equity, Corp., dated November 10, 2004 (Exh. 3 at ¶¶27-28), and Affidavit of Ashok Patel, Flexo Converters, Inc., dated October 29 , 2004 (Exh. 4 at ¶¶25-26). Only after Appellees executed the agreements did NorVergence, a New Jersey corporation, assign Appellees' contracts to Preferred Capital, an Ohio corporation headquartered in Cuyahoga County. *See, e.g.,* Exh. 3 at ¶¶27-28 and Exh. 4 at ¶¶25-26. At the time of execution of the finance agreements, NorVergence never told Appellees that they would assign Appellees' contracts to Preferred Capital and therefore Appellees would be consenting to jurisdiction in Ohio. Id. NorVergence was located in New Jersey while the twelve Appellees were located in various states including: Connecticut, Florida, Georgia, Michigan, New Jersey, North Carolina, Pennsylvania, and Texas. Since neither NorVergence nor Appellees

were based in Ohio, Appellees had no reasonable expectation that they would be sued in Ohio. *See Copelco Capital, Inc.*, 2001 WL 106328 at *4 (holding that the floating forum selection clause was unreasonable because lessee could not reasonably anticipate being sued in the foreign jurisdiction as no jurisdiction was specified in the contract and neither of the original contracting parties were based in the jurisdiction where suit was initiated).

This Court and the Ohio Supreme Court have approved the use of forum selection clauses ***only*** where the contract explicitly specifies the jurisdiction. *See Information Leasing Corp. v. Jaskot*, 151 Ohio App. 3d 546, 549, (2003) ("You consent to the jurisdiction and venue of any court located in the State of Ohio"); *D. Wallace Nicholson,* 127 Ohio App. 3d at 599 ("The parties hereto voluntarily consent and allow the courts of the State of North Carolina to assume jurisdiction over any disputes and controversies between the parties, arising out of or concerning this Agreement"); *Automotive Illusions, LLC v. Reflex Enterprises*, 2002 WL 1821676 (Ohio App. 10th Dist., Aug. 6, 2002) (unpublished) (Exh. 5) ("venue in the state or federal courts of San Antonio, Bexar County, Texas"); *Four Seasons Enterprises v. Tommel Finance Services, Inc.*, 2000 WL 1679456 (Ohio App. 8th Dist., Nov. 9, 2002) (unpublished) (Exh. 6) ("In the event of any litigation related to the lease or the guarantee, venue and jurisdiction shall be proper in any state or federal court in the State of Colorado"); *Kennecorp Mortgage Brokers, Inc.,* 66 Ohio St. 3d at 176 (forum selection clause selecting Ohio as forum was valid). In contrast, this Court and others have held that floating forum selection clauses are invalid because they lack certainty and notice. *Copelco Capital, Inc.* involved a 60-month lease for a copier where the lease provided "Lessee hereby consents to personal jurisdiction in the . . . appropriate State court in the state of assignee's corporate headquarters." The

lease was assigned to a New Jersey leasing company, which sued the lessee there. When the New Jersey judgment was brought to Ohio for enforcement, this Court distinguished the floating forum selection clause from *Kennecorp* and other cases upholding the validity of forum selection clauses. While part of the basis for the distinction was that the lessee was not a business engaged in business for profit, this Court also held that:

> Unlike the contract in *Kennecorp*, and other cases where Ohio courts have upheld the validity of forum selection clauses, the forum selection clause contained in appellants' contract failed to specify the jurisdiction of a particular court. . . . Consequently appellants could not reasonably anticipate being called into the courts of New Jersey to defend their contractual agreement. . . .

See Copelco, 2001 WL 106328 at *4. Thus, this Court concluded that "enforcement of the forum selection clause contained in the contract would be unreasonable." *Id.* Here, the same result should follow.

Other courts have likewise found floating forum selection clauses to be invalid. An Illinois federal court rejected the NorVergence floating forum selection clause on the ground that "the failure to specify a particular jurisdiction renders the lessee incapable of knowing where an assignee might file suit. . . . As such, the contract lacks an essential element regarding forum selection. . . . Put simply, no selected forum is identified in the agreement." *See IFC Credit Corporation* v. *Eastcom, Inc.*, 2005 WL 43159 (N.D. Ill. Jan. 7, 2005) (unpublished) (Exh. 7). *See also IFC Credit Corporation v. Century Realty Funds, Inc.*, No. 04-C-5908, (N.D. Ill. Mar. 4, 2005) (unpublished) (Exh. 8).

In an Appellate Division case of the New Jersey Superior Court, a leasing contract required that the lessee "consent to the jurisdiction of any local, state or federal court located within our or our assignee's state . . ." *Copelco Capital, Inc. v. Shapiro,*

331 N.J. Super 1, 4 (2000). The *Shapiro* court held that the floating forum selection clause was unfair and unreasonable because the lessee could not identify the jurisdiction in which an action will be brought and the assignee's identity was not known prior to signing the contract. *Id.* The court found the provision ineffective and in conflict with the very purpose of forum selection clauses:

> Enforcing a clause such as the one at issue here is also inconsistent with the doctrinal underpinnings of the majority rule that forum selection clauses should be given effect. The rule rests, at least in part, on the idea that in a realm of free contract the parties should be allowed to agree in advance to a mutually satisfactory forum, thus insuring a predictable and neutral locus for the resolution of any dispute. . . . We fail to see how the instant clause furthers these objectives. The fact that the forum selection clause before us could easily have resulted in a 'proper forum' anywhere in the entire country - - a forum that would not be identifiable until sometimes after the agreement was entered into - - violates the notice requirement . . . and militates in favor of a finding that the clause is both unfair and unreasonable . . . .

Shapiro, 331 N. J. Super. at 6-7 (citations omitted). *See also Hunt* v. *Superior Court (Commercial Money Center),* 81 Cal. App. 4th 901, 908 (2000) (provision that party "Freely Consent to Personal Jurisdiction of the Applicable Jurisdiction" does not give adequate notice to the party agreeing to the jurisdiction and thus no valid contract with respect to such clause exists); *Whirlpool Corp.* v. *Certain Underwriters at Lloyd's London*, 278 Ill. App. 3d 175, 180 (1996) (contract provided party will submit to the jurisdiction of any court of competent jurisdiction within the United States was held not to create a binding forum selection clause. "Good policy dictates that a true forum selection clause should be clear and specific. This clause is not"). Thus, the NorVergence floating forum selection clause does not provide appropriate notice and therefore this Court should find it unreasonable and invalid.

B. Enforcing The Floating Forum Selection Clause Is Fundamentally Unfair Because It Is Not Clear and Conspicuous.

Furthermore, Appellees would have difficulty finding the contract's language describing the forum, even if that language was clear or specific. The NorVergence contract contains two pages of small, densely packed print. The floating forum selection clause is a mere three lines in the midst of a 20 plus paragraph agreement; is on the reverse of the agreement; is in 6 point typeface; and is not in heavy bold type, underlined, or capitalized (Exh. 2). Thus, enforcing such language would be fundamentally unfair. *See First Federal Financial Service, Inc. v. Derrington's Chevron, Inc.*, 230 Wis. 2d 553, 561 (1999) (determining that forum selection was unconscionable where the clause was in small type on the backside of the agreement); *Leasefirst v. Hartford Rexall Drugs, Inc.*, 168 Wis. 2d 83, 90 (1992) (determining that forum selection clause was unconscionable where the clause was in small type and the lessee did not read the clause).

C. Appellees Are Small and Unsophisticated Businesses Against Whom Enforcement Of The Floating Forum Selection Clause Would Be Fundamentally Unfair And Cause Undue Hardship.

The NorVergence floating forum selection clause is also fundamentally unfair because Appellees are small and unsophisticated businesses that did not have equal bargaining power with NorVergence or the subsequent assignees. The Ohio Supreme Court, relying on *M/S Bremen,* held that forum selection clauses are "prima facie valid in the commercial context so long as the clause has been freely bargained for." *Kennecorp Mortgage Brokers*, 66 Ohio St. 3d at 175.[7] Appellees classify themselves as small and

[7] The *M/S Bremen* decision involved two sophisticated companies, one American, one German, that contracted to have drilling equipment towed from Louisiana to Italy. The

unsophisticated businesses with some operating "family operated businesses." *See, e.g.,* Affidavit of Joseph Percario, Vice President of Percario Home Center, Inc., dated October 21, 2004 at ¶26. (Exh. 9). Appellees likewise do not operate their businesses outside of their home states and mostly do business in the vicinity of towns where they are located. *See, e.g.*, Exh. 9 at ¶27. Additionally, most, if not all, of Appellees did not have in-house legal counsel to examine the lease and therefore Appellees lacked equal bargaining power with NorVergence. In contrast, NorVergence was a sophisticated business which issued over $200 million in contracts in more than 20 states. *See Derrington's Chevron, Inc.*, 230 Wis. 2d at 561 (holding that factors of unequal bargaining power existed in a contract with a floating forum clause where the lessee was a small business owner, the floating forum clause was drafted by the lessor, and the clause was not explained to the lessee). Thus, the combination of these characteristics underscore the unfairness of applying the NorVergence floating forum selection clause to the Appellees.

The floating forum selection clause is unreasonable and unfair because its enforcement would also result in undue hardship to Appellees by requiring Appellees to travel or transport witnesses to Ohio, a distance that would render access to the courts economically impractical. If the clause is enforced, Appellees as a practical matter will have no meaningful access to the courts because the likely cost of trying to defend this

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negotiated contract specified any dispute must be treated before the London Court of Justice. The United States Supreme Court observed that the parties had sought to provide for a neutral forum for resolution of future disputes. It held the "elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element of international trade, commerce and contracting." *M/S Bremen v. Zapata Off- Shore Co.*, 407 U.S. 1, 10-11 (1972). The *M/S Bremen* Court further noted there was strong evidence that the forum clause was a vital part of the agreement.

suit remote from Appellees' places of business quickly will equal or exceed the amount in dispute. *See, e.g.*, Exh. 3. For the other 500 plus similarly situated small business customers with cases pending in Cuyahoga and Summit County Courts of Pleas, some may not be able to afford to defend out-of-state lawsuits and, consequently, Preferred Capital will file default judgments against these customers and domesticate the judgments in Appellees' home jurisdiction. This practice circumvents legitimate collection efforts. Thus, this Court should affirm the lower courts' decisions and not allow Preferred Capital to use the floating forum selection clause to obtain default judgments.

II. BY AFFIRMING THE LOWER COURTS' DECISIONS, THIS COURT WILL NOT ALTER THE LEASING INDUSTRY.

Without legal or factual support, ELA asserts that disapproval of the NorVergence floating forum selection clauses will put into question all forum selection clauses and therefore disrupt the economies of the leasing industry. ELA 5. This contention is unfounded.

Despite ELA's argument, the leasing industry has flourished for many years without the need for the one-sided, floating forum selection clauses used in the NorVergence agreements. ELA 1-2. In fact, courts and governmental agencies have previously invalidated distant forum selection clauses without hindering the growth of the leasing industry.[8] As early as 1974, the Federal Trade Commission ("FTC") challenged venue waiver contract provisions and distant forum lawsuits. *See West Coast Credit Corp.*, 84 F.T.C. 1328, 1329-30 (1974) (Exh.10) (FTC prohibited venue

[8] ELA describes this industry as "a large and expanding sector of the American and world economy." (ELA 1-2).

provisions allowing suit in a distant county that was still in customer's state); *Spiegel, Inc. v. F.T.C.,* 540 F.2d 287, 294 (7th Cir. 1976) (FTC properly determined that Spiegel's practice of suing out-of-state consumers in its home jurisdiction of Illinois was an unfair business practice within the meaning of the F.T.C. Act). While the focus of those suits was injury to individuals as consumers, the order in *Spiegel* also addressed small businesses as consumers. *See Spiegel, Inc.*, 86 F.T.C. 425, 439 (1975) (Exh. 11). The administrative law judge and Commission opinions both expressly considered the injury caused to "small businesses" by distant forum actions and prohibited distant suits against them. *Id.* at 439 (FTC found Spiegel's practice of suing out-of-state consumers in Spiegel's home jurisdiction of Illinois to be an unfair business practice). Courts have since applied the legal limitations on the use of distant forum selection clauses to the leasing industry. *See Central Ohio Graphics, Inc.*, 221 Ga. App. at 435 (holding that floating jurisdictional clause was unreasonable and therefore invalid); *Shapiro*, 331 N. J. Super. at 6-7 (same); *Derrington's Chevron, Inc.*, 230 Wis. 2d at 563-65 (holding that leasing company's forum selection clause was unconscionable); *Leasefirst*, 168 Wis. 2d at 89-90 (holding that leasing company's floating forum selection clause was unconscionable).

The significance of this legal history is twofold. First, it shows a longstanding awareness of the problem of distant forum lawsuits and the need to remedy abuses. Second, it shows that the finance and leasing industry has survived, and even thrived, in the face of limitations on distant forum lawsuits. ELA overstates the facts when its suggests that a decision to uphold the floating forum selection clauses in favor of small businesses, nonprofit organizations, churches, and municipalities (the majority of

NorVergence customers) will result in the evaporation of available credit to these entities by the leasing industry. ELA 5-6. Despite the *Spiegel* rulings in the mid-1970s limiting the use of distant forum selection clauses and the emergence of similar case law in the leasing context, the leasing industry continues to thrive some thirty years later and "generates billions of dollars each year in leases." ELA 1; *see also* ELA 2 ("ELA presently has some 791 members located throughout the United States and in foreign countries").

Furthermore, ELA also fails to show any appreciation for the enormous costs NorVergence customers have incurred as a whole. Several state Attorneys General and the Federal Trade Commission recently filed proofs of claim in the NorVergence bankruptcy case that attempt to quantify the exposure of these customers. For example, the Massachusetts Attorney General filed a claim for more than $8 million on behalf of Massachusetts NorVergence customers (Exh. 12), the Florida Attorney General filed a claim for approximately $20 million on behalf of Florida NorVergence customers (Exh. 13), and the Federal Trade Commission has filed a claim for more than $200 million for all NorVergence customers nationwide (Exh. 14). These proofs of claim indicate the significant amount of money NorVergence customers have at stake. Thus, this Court should recognize the financial harm that may be exacted against the NorVergence customers.

Preferred Capital will experience minimal financial harm if this Court affirms the lower courts' decisions, especially compared to the harm that Appellees will face otherwise. Even if Preferred Capital cannot sue Appellees in Ohio, Preferred Capital will not be denied its day in court. Instead of selecting a forum that would be unreasonable to

the Appellees, Preferred Capital will merely need to re-file its actions in the jurisdictions where Appellees reside. *See Derrington's Chevron, Inc.*, 230 Wis. 2d at 564 (noting that leasing company could litigate case in lessee's home jurisdiction without undue expense). Thus, this Court should uphold the lower courts' decisions because they will not significantly affect Preferred Capital or the leasing industry.

CONCLUSION

For these reasons, the floating forum selection clauses contained in the NorVergence contracts are unfair and unreasonable. This Court should affirm the lower courts' decisions invalidating them.

Respectfully submitted,

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APPENDIX

Exh.

1. *Copelco Capital, Inc. v. St. Mark's Presbyterian Church*, 2001 WL 106328 *3 (Ohio App. 8th Dist., Feb. 1. 2001)

2. NorVergence Equipment Rental Agreement of DSC Associates, Inc. (from record below)

3. Affidavit of Kenneth Nehiley, Sterling Asset and Equity, Corp., dated November 10, 2004 (Exh. 3 at ¶¶27-28) (from record below)

4. Affidavit of Ashok Patel, Flexo Converters, Inc., dated October 29 , 2004 (from record below)

5. *Automotive Illusions, LLC v. Reflex Enterprises*, 2002 WL 1821676 (Ohio App. 10th Dist., Aug. 6, 2002)

6. *Four Seasons Enterprises v. Tommel Finance Services, Inc.*, 2000 WL 1679456 (Ohio App. 8th Dist., Nov. 9, 2002)

7. *IFC Credit Corporation* v. *Eastcom, Inc.*, 2005 WL 43159 (N.D. Ill. Jan. 7, 2005)

8. *IFC Credit Corporation v. Century Realty Funds, Inc.*, No. 04-C-5908, (N.D. Ill. Mar. 4, 2005)

9. Affidavit of Joseph Percario, Vice President of Percario Home Center, Inc., dated October 21, 2004 (from record below)

10. *West Coast Credit Corp.*, 84 F.T.C. 1328, 1329-30 (1974)

11. *Spiegel, Inc.*, 86 F.T.C. 425, 439 (1975)

12. Commonwealth of Massachusetts Proof of Claim, filed February 25, 2005, in NorVergence, Inc. bankruptcy, No. 04-32709, U.S. Bankruptcy Court, District of New Jersey

13. State of Florida Department of Legal Affairs and Florida Consumers Proof of Claim, filed February 26, 2005, in NorVergence, Inc. bankruptcy, No. 04-32709, U.S. Bankruptcy Court, District of New Jersey

14. Federal Trade Commission Proof of Claim, filed February 22, 2005, in NorVergence, Inc., bankruptcy proceeding, No. 04-32709, U.S. Bankruptcy Court, District of New Jersey