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March 7, 2005

Frederick C. Horn, Esquire
Fox, Rothschild, O'Brien & Frankel, LLP
1250 South Broad Street
P.O. Box 431
Lansdale, PA 19446-0431

Re: Norvergence Matters

Dear Mr. Horn:

Please allow this letter to illuminate recent developments of which you may not be aware and perhaps correct some misconceptions that may or may not be guiding your current litigation strategy in the various Commerce Commercial Leasing ("Commerce") actions now pending in Montgomery County.

Many of you have consistently argued before the Court, whether in your various pleadings or personally to either Judge Tilson or Donald Martin, Esquire that "several" states' Attorneys General are investigating Commerce and have already or are on the verge of filing suit against Commerce. This is incorrect. The Attorney General of the State of Florida is, thus far, the only state Attorney General to file suit. Originally, the Florida AG moved aggressively to involve its good offices in this controversy but has, more recently, stepped back from its aggressive posture. The injunction it sought has been shelved and a hearing on the issuance of an injunction put off until probably September. This was done at the request of the Florida Attorney General not the leasing companies. Additionally, there is a Motion to Dismiss the Florida AG's Complaint that will be decided in April, perhaps obviating the need to consider any injunction request. The Florida judge has also been apprised that a Summary Judgment motion, if necessary, will be filed well prior to any decision on the injunction request.

Various other state Attorneys General have proposed settlements with unacceptable terms that have been consistently rejected by the leasing companies, Commerce included. Although Commerce has demonstrated a willingness to engage in settlement discussions, it will not resolve

its claims for any sum that does not reflect a fair compromise by all parties. Commerce remains resolute in its determination to see these claims through to conclusion if no amicable resolution is achieved. Despite the leasing companies' absolute rejection of settlements that do not represent such a compromise, these various Attorneys General have elected to refrain from initiating suit. Presumably, continuing efforts at settlement will continue if a more reasonable compromise is proposed. Commerce, while certainly not speaking for, nor intending to speak for, other leasing companies, can nevertheless categorically state its intention to eschew settlements with state Attorneys General until a more realistic proposal is presented that reflects a more rational approach at sharing the loss both sides have incurred.

Conversely, it is clear, the Florida investigation has lost all momentum, as the Florida AG has been unable to establish any facts that implicate the leasing companies, and especially Commerce, in any wrongdoing. In connection therewith, the deposition of Steven Leibrock, former head of IT for NorVergence, was taken on Friday, February 18, 2005. Mr. Leibrock spent several hours during the deposition explaining how the NorVergence "network" operated and how it connected to the matrix box sold by NorVergence to its customers. Contrary to accusations that may have been alleged prior to the deposition, he maintained that the system "worked" and provided customers with savings due to the use of one T-1 line for transmission of both voice and data signals, thus allowing businesses to eliminate multiple phone lines and long distance charges. He also explained how NorVergence designed the network at the NorVergence NOC (network operations center) and how NorVergence integrated the NOC with the hardware, allowing the signals transmitted on the T-1 line to be separated and directed as warranted. His testimony completely undercuts the defendants' position that the transaction did not create value for the customer or that it was predicated upon a fraudulent scheme. He has neither been implicated nor made a party in any lawsuit prior to this testimony.

With respect to the issue of jurisdiction, recent decisions have upheld the particular forum selection clause found in the NorVergence form contract both in this jurisdiction and elsewhere. *See e.g.*, Commerce Commercial Leasing, LLC v. Jay's Fabric Center, 2004 WL 2457737 (E.D.Pa.). This decision has already been cited in numerous briefs filed with courts around the country. A California state court decision also just recently upheld the forum selection clause appearing in the form agreement utilized by NorVergence. This decision joins a growing number of opinions upholding the parties right to freely contract on issues such as the forum selection clause included in this particular form lease. Furthermore, the Equipment Leasing Association has determined that it will no longer remain on the sidelines during this unjustified assault on an important and critical segment of interstate commerce. It recently filed an *Amicus Curae* brief in one lawsuit and has manifested its intent to similarly involve itself in various actions pending around the country. Finally, Congress has also expressed an interest in coming to the defense of the equipment leasing industry and those efforts will be publicly forthcoming in the near future.

Recent settlements, on the eve of trial, have also reinforced the validity of Commerce's claim. In *AJV Automotive v. Popular Leasing*, a case that was scheduled for trial on February 14 in New Jersey, the plaintiff agreed to a settlement of the action that resulted in Defendant Popular Leasing obtaining in excess of 65% of its counter-claimed amount. Other settlements,

some subject to confidentiality provisions, have likewise resulted in acceptable settlements for the leasing companies involved.

The Federal Trade Commission has now apparently narrowed its initial broad inquiry into this matter focusing instead on the issue of forced placed insurance by leasing companies. Although this was not raised during Mr. Babicki's deposition, I have been assured that Commerce did not force place insurance for any NorVergence Lessee. I am thus confident that the FTC will ultimately conclude that Commerce engaged in no deceptive practices.

At both the recent deposition of Martin F. Babicki. Executive Vice President of Partners Equity Capital Company, held in Lansdale on February 28, and at his deposition in Chicago on January 6. 2005. it became clear that the "facts" that many were hoping to establish to corroborate their claim that a fraud was perpetrated upon their clients by NorVergence, with the assistance of Commerce, did not materialize. It should now be apparent that Commerce was assigned these Equipment Rental Agreements from NorVergence through a sound and widely accepted business model routinely utilized throughout the country, codified in Article 2A of the UCC and adopted in all states in which the lessees are located.

It cannot now be seriously disputed that Commerce paid substantial sums to purchase this paper from NorVergence and that your client not only signed a Delivery and Acceptance certificate but also, as you now know, verified its receipt and acceptance of the equipment in a telephone conversation with Commerce. It was during this conversation that Commerce identified the Pennsylvania address as the place to which payments should be remitted and asked your client for **any** reason that the transaction should not be funded and payment remitted by Commerce to NorVergence. Without exception, payment to Norvergence for the assignment of the paper did not occur until after this telephone verification and approval by your client. As Mr. Babicki testified, Commerce's written records, including its long distance telephone bills, will corroborate these telephonic verifications with your clients and establish Commerce's claim of negligent misrepresentation.

With ever mounting evidence that these transactions were completely, thoroughly, competently and legally completed, it is clear that Commerce will ultimately prevail. We have been informed that there appears to be a current circulating that there are benefits to be obtained by ratcheting up the legal expense for Commerce. I can assure you, however, that as litigation proceeds and victory after victory continues, my client's settlement demand will continue to rise to factor in the legal costs of recovery. That process has already begun, as some of you have discovered. Nevertheless, it still seems that the best option for everyone is to settle these matters at a fair number and through a process where all parties are reminded of the rising costs associated with this litigation. My client remains willing to effectuate settlements where all parties would share the expenses that these transactions have caused. This would translate to a settlement at 50% of the claimed amount at this juncture. This is a reasonable demand when compared to the settlements executed in the Popular Leasing and other matters. All other inconsistent demands previously articulated are now withdrawn.

Moreover, attempts to suggest that a forum selection clause that does not name the jurisdiction where suit may be brought, or that your client would have refrained from leasing equipment if the jurisdiction were disclosed to be Pennsylvania is disingenuous. First, the free transferability of financial paper, like the paper involved here, is a significant inducement for companies to finance these transactions. The benefit of initiating litigation where its business is conducted, in the unlikely event such litigation is necessary, to recover on this paper is a major component affecting its free transferability and a leasing company's willingness to purchase the paper. By way of example in another area of interstate commerce, every credit card your client carries was issued pursuant to a contract that has a forum selection clause that designates a forum for litigation other than your client's home state. Every form contract your client enters into involving a foreign corporation has an equally creditor-friendly forum selection clause. If you seriously persist in advancing this argument on behalf of your clients then you must know that we will seek discovery of these contracts and an explanation why your client finds it acceptable to agree to allow a credit card company to initiate suit in a foreign jurisdiction while maintaining that it is unacceptable to agree to a similarly inconvenient forum selection clause for a company promising, and until its recent financial difficulties, delivering, considerable telecommunications savings. It is also our intent to seek discovery of all business leases executed by your client for an examination of the similarities between the NorVergence form lease and leases for all other business equipment in your client's possession.

The hope to prevail on the issue that a more appropriate jurisdiction is New Jersey, where Commerce Bank has a principal place of business, rather than Pennsylvania, will likely be equally unavailing. As the Operating Agreement should have disclosed, Partners Equity Capital Company ("PECC") was contractually required to engage in transactions in the Commerce name until certain conditions occurred. It is clear that PECC is the real party in interest with the right to enforce its non-payment remedies against your defaulting clients, and equally clear that PECC is located in Horsham, Montgomery County, Pennsylvania. Pennsylvania law thus provides that a simple motion to amend the caption to properly designate the real party in interest, a party that is nevertheless already otherwise involved in the lawsuit but under an incorrect designation, solves the problem. As the Operating Agreement clearly demonstrates, there were contractual obligations that prevented using PECC's name at the time the overwhelming majority of these lawsuits were initiated. Moreover, New Jersey, a jurisdiction no less inconvenient for all lessees, has also adopted Article 2A of the UCC.

According to the United States Department of Commerce, as of 1993, approximately one-third of new capital invested in equipment in this country was invested through leasing. This trend was one impetus for the enactment of Article 2A. Article 2A thus grew out of the need for a uniform codification of leasing transactions. "This codification was greatly influenced by the fundamental tenet of the common law as it has developed with respect to leases of goods: freedom of the parties to contract." UCC §2A-101, Comment (Relationship of Article 2A to Other Articles). Since the first enactments of Article 2A, leasing has become the nation's most popular equipment acquisition method: eight out of ten small businesses lease their equipment. Now more than 80% of American businesses rely on leasing to acquire their equipment. American businesses leased approximately $218 billion of equipment in 2004. Leases

containing the provisions found in the NorVergence form lease have been widely used by the leasing industry for quite some time. Thus, as you can well appreciate, the defenses asserted by NorVergence lessees are perceived as an assault against these principles and thus leasing companies, and their allies, have, and will, proceed accordingly.

I trust you will realize the considerable benefit to buying peace for your clients by engaging us in settlement discussions now, as many lessees have already done previously. To facilitate settlement however, if you believe that discussions would be more productive through the use of a neutral arbiter, we are willing seek the assistance of the Court and Judge Tilson. In light of the recent developments discussed above and Commerce's continued unrelenting and unremitting resolve to recover what it has lost by way of your clients' nonpayment, settling now will provide cost certainty for your clients as the legal expenses can do nothing but continue to grow. It has and continues to be Commerce's goal to eliminate these costs at terms that are fair to all parties.

I would appreciate your written reply to my client's continuing efforts to obtain an amicable resolution of this litigation.

Very truly yours,

LAMM, RUBENSTONE, TOTARO & DAVID, LLC

By: _____
STEPHEN LEVIN, ESQUIRE

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