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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

In re	]	Chapter 7
	]	
NorVergence, Inc.,	]	Case No. 04-32079/RG
	]	
Debtor.	]	
	]	
DIVERSIFIED AEROSPACE SERVICES, LLC; 2-MEN HOUSTON, LLC; MGM MORTGAGE, INC.; M&D CONTRACTING; HK VENTURES; FAIRVIEW PROPERTY TAX RECOVERY, LLC; EQUITY AMERICA MORTGAGE SERVICES, INC.; ECLASSIFIED CONGLOMERATE, INC., d/b/a EZRENTLIST. COM; DEAN INSURANCE AGENCY, INC.; CRAIG & SONS TERMITE & PEST CONTROL; BIRCH WOOD NURSING HOME PARTNERSHIP; CALL1STO PHARMACEUTICALS, INC.; BUSINESS CENTRAL OF SARASOTA, LLC; BEAUTE CRAFT SUPPLY COMPANY; BANANA BANNER; AVP ENTERTAINMENT INC.; APPLIED SCIENCE INC.; AES STELLAR AIR, INC.; ADVERTISER'S DISPLAY BENDER CO., INC.; BROOKSTREET SECURITIES CORPORAT1ON; MEYER CHATFIELD, INC.; COMMUNITY BANK OF LEMONT; DEVITA	]	Adversary No. 04-2862

BECKER PHYSICAL THERAPY, P.C.; COFER AGENCY; MONMOUTH HEALTH MANAGEMENT INC.; INDUSTRY PUBLICATIONS, INC.; WEST BROWARD REAL ESTATE, INC.; S.P. PAZARGAD ENGINEERING CONSTRUCTION, INC.; INDUSTRIAL WATER TECHNOLOGIES, INC.; BURTON INDUSTRIES, INC.; MAIN EVENT CATERER; VIP CARE PAVILION; SPICER PLUS; BOB DENTON APPAREL SALES; H & H PRODUCTS CO.; BILL BEHRLE ASSOCIATES; CORKY'S AUTO PARTS, INC.; ZEUS BUILDERS, LLC, Plaintiffs, v. IFC CREDIT CORP., CHARLES FORMAN, TRUSTEE, AND ACCESS INTEGRATED TECHNOLOGIES, INC., Defendants.	Hearing Date: September 26, 2005 10:00 a.m. Oral Argument Requested

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANTS CHARLES FORMAN, TRUSTEE AND IFC CREDIT CORP.

Plaintiffs, West Broward Real Estate, Inc., VIP Care Pavilion, S.P. Pazargad Engineering Construction, Inc., Spicer Plus, Industrial Water Technologies, Inc., Bob Denton Apparel Sales, Burton Industries, Inc., H&H Products Co., Main Event Caterer, Zeus Builders, LLC, and Corky's Auto Parts, Inc., on behalf of themselves and their respective individual guarantors ("Plaintiffs"), hereby file this Memorandum of Points and Authorities In Support of their Motion for Summary Judgment Against Defendant Charles Forman, Trustee ("Forman") for Chapter 7 debtor NorVergence, Inc. ("NorVergence"), and Defendant IFC Credit Corp. ("IFC") and state as follows:

INTRODUCTION

From 2002 until its involuntary bankruptcy on June 30, 2004, NorVergence's principal business was re-selling telecommunications services that it purchased from common carriers or others, principally to consumers who were small businesses, non-profit organizations, churches and municipalities. (See Federal Trade Commission v. NorVergence, Inc., United States District Court for the District of New Jersey, Case No. 04-cv-05414, Default Judgment and Order, June 29, 2005, Findings at p. 4, ¶ 7, attached as Exhibit 1 to the Certification of Andrew J. Kelly, Esq. being filed simultaneously herewith).[1] NorVergence marketed its services as integrated, long-term packages, including landline and cellular telephone service and Internet access. Id. NorVergence promised to provide consumers with heavily discounted telecommunications services for a long term, usually five (5) years, in exchange for consumers' payments. Id., at ¶ 8.

Consumers signed applications and agreements with a total price equal to the promised monthly payments over five (5) years. Id. Most of these payments were allocated to a rental agreement for a "Matrix" or "Matrix Soho," which was, in actuality, either a common router or firewall that cost between $200 and $1,550. Id. The total cost to the customer was $7,000 to $340,000, with an average cost of $29,291. Id. The price of the rental agreement had nothing to do with the cost of the Matrix, which itself was an incidental part of the promised services. Id. The rental agreements on their face, however, purported to cover only the Matrix box. Id.

Once NorVergence obtained signed rental agreements for the Matrix from its customers, including Plaintiffs, it assigned the agreements to finance companies, including IFC. Id., at ¶9. IFC, like the other finance companies who bought these agreements, have insisted that consumers, including the Plaintiffs in the instant action, continue to pay on those agreements

[1] Unless otherwise noted, all references to Exhibits 1 through 5 herein refer to the Exhibits annexed to the Certification of Andrew J. Kelly, Esq. being filed simultaneously herewith.

even though the telecommunications services NorVergence promised to Plaintiffs were never provided or were not provided at least since August 2004. Id. When the Plaintiffs refused to make payments for the rental of equipment that does not work, and, in many cases, has never worked, IFC sued the Plaintiffs in Illinois, a forum far from the residences of all of the Plaintiffs. See Affidavits of Plaintiffs attached as Group Exhibit 2, and copies of the IFC complaints brought against Plaintiffs in Illinois attached as Group Exhibit 3.

The Default Judgment and Order obtained by the Federal Trade Commission ("FTC") from the U.S. District Court in the District of New Jersey on June 29, 2005 established these matters as a matter of fact and law. The District Court found that, in connection with the sale and financing of telecommunications services and related products, NorVergence violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a) through the false representations and failures to disclose material facts detailed in its Findings at p. 5-6, ¶¶ 13-14. The District Court further found that NorVergence's practice of including provisions in its rental agreements authorizing it or its assignees to file lawsuits in specified or unspecified venues other than consumers' locations or the locations where consumers executed the contracts with NorVergence was likely to cause substantial injury to consumers that could not have been reasonably avoided and that was not outweighed by any countervailing benefits to consumers or to competition. See Exhibit 1, Findings at p. 6-7, ¶ 15. The District Court found that this practice was unfair and in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). Id.

The District Court further found that, with assignments of the consumers' lease agreements to finance companies including IFC, NorVergence gave to IFC the means and instrumentalities for the commission of deceptive and unfair act or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). See Exhibit 1, Findings at p. 7, ¶ 16.

Specifically, the District Court found that NorVergence provided those finance companies (including IFC) with rental agreements from the consumers that allowed IFC and the other finance companies to: (A) misrepresent that consumers such as Plaintiffs owe money on the rental agreements, regardless of whether NorVergence provided the promised telecommunications services; and (B) file collection suits against consumers such as Plaintiffs in distant forums, far from where the consumers are located. Id.

Plaintiffs now seek summary judgment in this adversary case declaring that Plaintiffs' consumer financing agreements are void and unenforceable by Forman or any other person or entity including IFC under federal law as decided by the District Court, and that the actions of IFC in misrepresenting to Plaintiffs that they owe money on the assigned NorVergence rental agreements regardless of whether they were provided with the promised telecommunications services and in filing collection suits against Plaintiffs in Illinois, a forum distant to Plaintiffs, constitute deceptive and unfair acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

Plaintiffs also seek summary judgment in this adversary case declaring that Plaintiffs' consumer financing agreements are void and unenforceable by Forman or any other person or entity including IFC under applicable New Jersey state law. The Findings of the District Court and the Affidavits of Plaintiffs annexed as Group Exhibit 2 establish that the NorVergence equipment rental agreements, in their entirety, are void *ab initio* as a matter of New Jersey law for violation of the provisions of N.J.S.A. 56:8-1, et seq., the New Jersey Consumer Fraud Act ("CFA"). For the reasons set forth herein, Plaintiffs respectfully submit that this Court should determine that NorVergence obtained Plaintiffs' consumer financing agreements by practices that violated the CFA, declare that the finding that NorVergence obtained Plaintiffs' consumer

financing agreements by practices that violated the CFA constitutes a real defense against IFC or any assignee that attempts to enforce those agreements, and further declare that the "floating jurisdiction and venue" provision in the agreements violates the CFA and is void and unenforceable as a matter of law.

IFC CREDIT CORPORATION.

IFC Credit Corporation is a finance company headquartered in Morton Grove, Illinois. IFC invested heavily in NorVergence, then a start-up company, effectively providing it with venture capital to carry out its fraudulent sales. IFC entered into a "Master Program Agreement" with NorVergence on October, 10, 2003. *See* Exhibit 4, Estok Affidavit, at ¶5. IFC admits that the NorVergence business plan showed its customers were purchasing "telephone service," although NorVergence had those consumers sign an agreement for "telephone service" and one for "equipment." Id. (As can be seen from the consumers' affidavits and exhibits appended to the Estok affidavit described below, as well as in the District Court's Findings described above, the payments called for in the service agreements were virtually token payments in comparison to the equipment payments, although NorVergence was really selling a service package, including landlines, Internet, and cellular services.) NorVergence would then "assign" the "equipment" agreement to IFC for separately established "assignment prices" in exchange for IFC's investment in NorVergence's working capital. Id., "Master Program Agreement" attached as Exhibit A, ¶2.

In an effort to shift IFC's investment risk to NorVergence's consumer customers, it was agreed between IFC and NorVergence that the equipment rental agreements would provide that "the performance due under the Assigned Service Agreements was not contingent upon in any way on [NorVergence's] performance of [its telephone] service agreements." Id. at ¶5. So long

as NorVergence's "telephone service customers" were provided with telephone service as promised by NorVergence, the Assigned Rental Agreements were worth tens of millions of dollars. Id. at ¶15. However, IFC was also aware that the rental equipment and Rental Agreements "may have no value without [NorVergence's] telephone services." Id.

IFC did not act as an independent third-party finance company in its dealings with NorVergence. In its Master Program Agreement, it acknowledges that the process of its acceptance of the NorVergence Assigned Equipment Agreements was "contrary to IFC's standard credit policy." Id. at ¶5, Master Program Agreement, Exhibit A, at ¶1. The values assigned to each individual equipment rental agreement bore absolutely no relationship to the "Matrix" equipment "purchase" which was allegedly being financed for NorVergence by IFC. Again, as seen in the consumer affidavits and exhibits appended to the Estok affidavit described below, as well as in the District Court's Findings described above, the price of the "rental" was based entirely on the amount of services promised, without any relationship to the equipment.

The values assigned to the equipment rental agreements acquired by IFC in this case range from a low of $2,700 to a high of $154,377, for the very same piece of equipment! (*See* Exhibit 4 Estok Affidavit at ¶10, Exhibit C thereto, "2nd June 16 Security Agreement", Exhibit A thereto (list of Collateral Equipment Rental Agreements), showing three (3) separate "Matrix" rental agreements with Blasko Auto Leasing, Inc. at three different locations at Rutherford, Budlake and Fort Lee, New Jersey, for $2,700 each, Exhibit A at p.11 and one (1) "Matrix" rental agreement with Meyer Chatfield, Inc. in Jenkintown, Pennsylvania, for $154,377, Exhibit A at p.15). Meyer Chatfield was being charged over **57 times more** than Blasko was being charged (154,377 divided by 2,700) for the same piece of equipment.

To better illustrate the unusual and corrupt nature of the NorVergence - IFC agreements, let's imagine that the product being financed was a 2005 Jeep Grand Cherokee automobile, rather than a "Matrix" box. The MSRP base price for a 2005 Jeep Grand Cherokee is $27,050.[2] Using the same price disparities seen in "Matrix" rental agreements acquired by IFC in this case, the rental contracts for the Jeep Grand Cherokee would start at $27,050 and range up to $1,541,850 ($27,050 times 57 = $1,541,850). Even adding the best options and luxuries available, it is patently absurd to think that any objective good faith financing company would not instantly realize this was a sham and a fraud.

As the NorVergence fraud began to unravel in 2004, IFC changed its master agreement with NorVergence four times in rapid succession in an effort to protect its investment in NorVergence. On March 16, 2004, IFC and NorVergence entered into an Amendment Agreement, amending and restating the Master Program Agreement.. *See* Exhibit 4, Estok Affidavit, ¶5. This amendment sought to further limit IFC's financial losses due to the increasing customer defaults caused by NorVergence's failure to deliver the promised telecommunication services. It was also designed to improve IFC's financial position in the event of a NorVergence bankruptcy. *See* Exhibit 4, Estok Affidavit, Exhibit A thereto. In May of 2004, IFC and NorVergence entered into another Amendment Agreement, amending and restating the Master Program Agreement. *See* Exhibit 4, Estok Affidavit, ¶5. This amendment provided for a "hold back" by IFC of an additional 25% of funding liabilities to NorVergence for all equipment rental agreements funded by IFC after April 26, 2004. *See* Exhibit 4, Estok Affidavit, Exhibit A thereto.

Within days after Quest Communications briefly cut-off service to NorVergence customers for nonpayment by NorVergence, and exactly two weeks before NorVergence's

[2] *See* http://www-5.jeep.com/vehsuite/VehicleSelector.jsp for source of MSRP price information.

involuntary Chapter 11 filing, IFC and NorVergence entered into two (2) separate security agreements on June 16, 2004. *See* Exhibit 4, Estok Affidavit at ¶¶ 9-10, and Exhibits B & C thereto. Through these agreements, IFC acquired a security interest in an additional 256 equipment rental agreements held by NorVergence and valued at over $15 million. Id. IFC paid nothing for this additional security. Id. On June 25, 2004, five days before NorVergence's bankruptcy, IFC attempted to perfect its alleged security interest in these new "Collateral Rental Agreements" by filing a UCC-1 Financing Statement on NorVergence with the New Jersey Department of Treasury, UCC section. Id., Exhibit D.

Shortly after the bankruptcy was filed, IFC asked for relief from stay to take possession of those Collateral Rental Agreements (Main Docket 156). The Fraud Victims and the FTC both appeared and filed objections to IFC's motion(Main Docket Nos. 528 and 575). IFC then withdrew its motion without prejudice to litigate the issues in this Adversary (Docket No. 1) brought by the Fraud Victims on November 1, 2004. This Court's confirming Order was entered on November 23, 2004 (Main Docket No. 662). This Courts' Order entered on May 31, 2005 in this Adversary (Docket No. 29) and the FTC's district court judgment against NorVergence has now voided those "Collateral Rental Agreements."

On February 28, 2005, IFC filed a Proof of Claim in the NorVergence bankruptcy case for an unsecured, nonpriority claim in the amount of $15,368,827.75 for its expected losses on rental agreements that had been assigned to IFC. (See Exhibit 4, last 2 pages, IFC Proof of Claim, Claims Docket No. 696). In its Proof of Claim, IFC alleges as follows.

> NorVergence, Inc breached certain of its representations, covenants and warranties to IFC, made certain misrepresentations, and/or breached its agreement with IFC under which IFC had received certain assignments of certain rental agreements, resulting in a claim believed to be not less than $15,368,827.75 plus costs interest and attorneys' fees.

Id.

It is evident from the IFC Proof of Claim that IFC believes that NorVergence, with which IFC worked closely from October 2003 to the day of NorVergence's bankruptcy, is responsible for IFC's losing millions of dollars in its high-profit, high-risk financial investment in start-up NorVergence. At the same time, IFC is seeking to make the innocent plaintiff consumer fraud victims and other defrauded NorVergence consumers pay for the fraud it financed by suing the innocent consumer plaintiffs in a distant forum (Cook County, Illinois) for the full "contract price" of the worthless rental agreements.

PLAINTIFFS SEEKING SUMMARY JUDGMENT

On May 19, 2005 and on June 13, 2005, as authorized by the Joint Order Scheduling Pre-trial Proceedings and Status Conference entered on May 19, 2005, the following additional plaintiffs joined in this adversary proceeding in a Second Amended Caption to Adversary Complaint:

1. West Broward Real Estate, Inc.;
2. VIP Care Pavilion;
3. S.P. Pazargad Engineering Construction, Inc.;
4. Spicer Plus;
5. Industrial Water Technologies, Inc.;
6. Bob Denton Apparel Sales;
7. Burton Industries, Inc. and Clark Johnson;
8. H&H Products Co.;
9. Main Event Caterer;
10. Zeus Builders, LLC; and
11. Corky's Auto Parts, Inc.

(See Amended Caption to Adversary Complaint, filed herein on May 19, 2005, Docket No. 27; and Second Amended Caption to Adversary Complaint, filed herein on June 13, 2005, Docket No. 31). These eleven (11) small business consumer Plaintiffs from New Jersey to California now move for summary judgment in this adversary proceeding.

The original twenty-six (26) plaintiffs[3] in this action reached a settlement with IFC approved by the Court on May 31, 2005. (See Stipulation and Order re: Settlement Agreement, signed May 31, 2005, Docket No. 29). This settlement did not include the additional eleven (11) Plaintiffs listed above. Id., at page 3, ¶2; see also Document re: Steven D. Cundra, Esq. letter dated July 20, 2005 re: IFC Credit Corp., et al. filed by Andrew J. Kelly on behalf of Diversified Aerospace Services, LLC, filed herein on July 21, 2005, Docket No. 33). The remaining defendant, Access Integrated Technologies, Inc., has agreed to settle with the original twenty six (26) plaintiffs, and the parties anticipate filing a Stipulation and Order for the Court's review and approval in the very near future.[4]

STANDARD OF REVIEW

Summary judgment will be granted if the record establishes that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Jama v. U.S. INS, 343 F. Supp. 2d 338, 377 (D.N.J. 2004); United States v. Rushing, 287 B.R. 343, 349 (D.N.J. 2002). An issue of material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the non-movant. In deciding a motion for summary judgment, the Court must construe the facts and reasonable inferences in a light most favorable to the non-movant. However, only disputes about facts that might affect the outcome of the suit under governing law will preclude entry of summary judgment.

Once the initial moving party has carried its initial burden of establishing an absence of a genuine issue of material fact (the substantive law will identify which facts are "material"), the non-movant must do more than simply show that there is some metaphysical doubt as to those

[3] The original twenty-six (26) plaintiffs in this action are identified in the Amended Complaint, Exhibit A thereto, filed on November 18, 2004. See Docket No. 3.

[4] A draft of the proposed Stipulation and Order has already been circulated among the parties' respective counsel for their and their clients' approval.

facts. No issue for trial exists unless the nonmoving party can adduce sufficient evidence favoring it on the disputed factual issue such that a reasonable jury could return a verdict in that party's favor. See generally Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1987); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-249 (1986); Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

ARGUMENT

I. THE UNDISPUTED FACTS ESTABLISH NORVERGENCE HAS COMMITTED FRAUD AGAINST PLAINTIFFS, AND PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT UNDER FEDERAL LAW AS DECIDED BY THE UNITED STATES DISTRICT COURT.

There is no genuine issue of fact that NorVergence has committed fraud upon the Plaintiffs. Under both federal and New Jersey state law, the NorVergence consumer financing agreements acquired by IFC are void and unenforceable as a matter of law. Therefore, summary judgment should be granted in favor of the Plaintiffs.

A. The District Court's Default Judgment and Order

The District Court has found that NorVergence acquired the consumer financing agreements from its customers (including Plaintiffs) by fraudulent means in violation of federal law and then furnished the finance companies (including IFC) to whom it assigned those agreements with the means and instrumentalities to commit further deceptive and unfair acts or practices violating federal law, to wit, the FTC Act, 15 U.S.C. § 45. The FTC Act prohibits unfair or deceptive acts or practices in or affecting commerce. Id. The activities of NorVergence and IFC are in or affecting commerce, as "commerce" is defined in 15 U.S.C. § 44. See Exhibit 1, Default Judgment and Order, dated June 29, 2005 at p. 2. NorVergence provided IFC with the Plaintiffs' consumer financing agreements that allowed IFC to: 1) misrepresent to the Plaintiffs that they owed money on the agreements, regardless of whether NorVergence

provided the promised telecommunications services; and 2) file collection suits against Plaintiffs in Illinois, a venue far from where the Plaintiff consumers are located and one that they never agreed to, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). See Exhibit 1, Findings at p. 7, ¶ 16.

In the FTC Default Judgment and Order, the District Court found, *inter alia*, that

> 1. provisions in the NorVergence rental agreements authorizing it or its assignees to file lawsuits in specified or unspecified venues other than consumers' locations or the locations where consumers executed the contracts with NorVergence was likely to cause substantial injury to consumers in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).
>
> 2. NorVergence provided others with the means and instrumentalities for the commission of deceptive and unfair acts or practices in violation of Section 5(a) of the FTC Act by furnishing third-party finance companies with rental agreements from consumers that allowed the finance companies to misrepresent that consumers owe money on the rental agreements regardless of whether NorVergence provided the promised telecommunications services and to file collection suits against consumers in distant forums.

Id. at pp. 6-7. These findings are entitled to full deference from this Court.[5] See In re Docteroff, 133 F. 3d 210, 214-215 (3d Cir. 1997); In re Bush, 62 F. 3d 1319, 1324 (11th Cir. 1995); In re Daily, 47 F.3d 365, 368-369 (9th Cir. 1995)

[5] Pursuant to Paragraph 6 of its Master Lease Agreement, NorVergence is required to repurchase Assigned Rental Agreements if NorVergence breaches any representation, covenant, or warranty in the Master Lease Agreement or any customer defaulted in its first payment on the assigned lease agreements. (See Exhibit 4 *infra* at fn. 5, Estok Affidavit, ¶ 6-7). IFC contends that these obligations of the debtor NorVergence have been triggered and filed a Proof of Claim on February 28, 2005 for in excess of $15,368,827.75. (See Claim No. 696, appended to the Estok Affidavit). Accordingly, the NorVergence agreements held by IFC pre-petition have been voided by Paragraph A and/or C of the District Court's Default Judgment and Order. (See Exhibit 1, page 9, ¶¶ A and C).(IT

B. The Affidavits Executed By The Plaintiffs Establish That What Was Done By NorVergence and IFC Is the Same Conduct that Entitled the FTC to the Judgment and Order Detailed Above.

Plaintiffs in the instant matter have been the victims of the same fraud perpetuated by NorVergence and IFC that the District Court found in its Judgment and Order. (See Group Exhibit 2, Affidavits of Scott Colton (VIP Care Pavilion Ltd.); Lawrence C. Chesler (Spicer Plus, Inc.); Joel Thevoz (Main Event Caterers, Inc.); Parviz Pazargad (S.P. Pazargad Engineering Construction Inc.); Kevin Keil (Zeus Builders, LLC); Alan Oshins (West Broward Real Estate, Inc.); Morris Hartley (H&H Products, Co.); Bob M. Denton (Bob M. Denton Apparel Sales); Clark Johnson (Burton Industries, Inc.); Richard Demartino (Industrial Water Technologies, Inc.); and Carmine E. Ravenola (Corky's Auto Parts, Inc.)).

Each of the Plaintiffs entered into discussions with an account representative of NorVergence to bundle all of their phone, cell phone, and Internet services for a substantial savings for a five-year term. Id., at ¶ 5. The NorVergence representative told each plaintiff that all of those discount phone services depended on the rental of a high-tech piece of equipment NorVergence call the "Matrix™", which would be part of the complete bundled unified telecommunication services agreement and would create the promised substantial savings in the total costs of each plaintiff's telecommunication services. Id.

Each plaintiff signed applications and agreements at the outset with a total price equal to the promised monthly payments over five years. Id., at ¶ 6. This included a rental agreement, signed on behalf of each plaintiff with NorVergence for the "Matrix™" telecommunications equipment and services. Id. Each plaintiff later discovered that the equipment did not provide

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IS FURTHER ORDERED that: A. Any consumer financing agreement owned or held in whole or part by NorVergence is void and unenforceable by any person or entity. … C. To the extent that NorVergence has a residual, contingent, or similar right to any consumer financing agreement not currently owned or held by NorVergence, those agreements shall be null and void and unenforceable by any person or entity as of the time that NorVergence's residual, contingent, or similar right matures or becomes effective.).

any of the heavily discounted telecommunications services as represented by NorVergence, and, in fact, did not work at all. Id., at ¶¶ 6-7.

When Plaintiffs refused to pay for services never provided, IFC filed collection suits against each of the Plaintiffs and individual guarantors in Illinois, IFC's principal place of business.[6] Each of the lawsuits misrepresented that the Plaintiffs owed the alleged accelerated balances "due" on their NorVergence consumer financing agreements regardless of whether NorVergence provided the promised telecommunications services. (See Complaints, Group Exhibit 3)[7]. In fact, none of the Plaintiffs were ever provided with the telecommunications services promised by NorVergence. (See Group Exhibit 2, at ¶ 7). IFC is suing each of the Plaintiffs in Illinois despite the fact that none of these Plaintiffs reside or do business in Illinois, a forum distant from their residences and places of business. Id., at ¶¶ 1-4.

The Plaintiffs were not informed that their financing agreements were going to be assigned to an Illinois company, IFC, when they signed the NorVergence agreements. Id., at ¶8. Nor were any of the Plaintiffs informed that the pre-printed fine print on the back of their agreements contained a "floating" venue provision would purportedly allow undisclosed assignees, like IFC, to file lawsuits in unspecified venues like Illinois. Id., at ¶¶ 10, 12. The "floating" venue provision on the back of the lease agreements were not negotiated or agreed-upon terms of the agreement and they were never discussed with any plaintiff by any employee of NorVergence. Id., at ¶ 10.

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[6] Copies of the IFC complaints brought against Plaintiffs in Illinois are attached hereto as Group Exhibit 3.

[7] IFC was aware that the "Matrix" equipment was worthless without the promised telecommunications services at the time it was filing its lawsuits against Plaintiffs in Illinois. See Affidavit of John Estok, IFC's Chief Operations Officer, dated July 20, 2004, submitted in support of IFC's Application for Relief from Automatic Stay, at ¶ 15. (See Docket No. 156, Attachment # 1, at ¶ 15 thereto, stating that the NorVergence "Rental Agreements . . . may have no value without telephone service"), The Estok Affidavit and Attachments are annexed as Exhibit 4.

IFC recently committed additional violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a) by sending threatening letters to some of the Plaintiffs. In those letters, IFC threatened additional legal actions against Plaintiffs for claims of "Fraud in the Inducement" and "Misrepresentation" if the Plaintiffs did not pay the balance owed on their equipment rental agreements "by 5pm on June 24, 2005." See Group Exhibit 2, Affidavit of Parviz Pazargad, at ¶ 13 and Exhibit B thereto, a true copy of the letter dated June 13, 2005 from IFC to S. P. Pazargad Engineering Construction Inc., the Affidavit of Joel Thevoz, at ¶ 13 and Exhibit B thereto, a true copy of the letter dated June 13, 2005 from IFC to Main Event Caterers, Inc. in Arlington, Virginia, and the Affidavit of Kevin Keil, Exhibit thereto, a true copy of the letter dated June 13, 2005 from IFC to Zeus Builders, LLC.

Based on the judicial findings of the District Court and the facts set forth in Plaintiffs' Affidavits, the plaintiffs are entitled to the entry of summary judgment in this adversary case declaring that Plaintiffs' consumer financing agreements are void and unenforceable by IFC or any other person or entity under federal law and that the actions of IFC in misrepresenting to Plaintiffs that they owe money on the assigned NorVergence rental agreements regardless of whether they were provided with the promised telecommunications services, and in filing collection suits against Plaintiffs in Illinois, a forum distant to Plaintiffs, constitute deceptive and unfair acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). Id.

C. The Floating Venue Provision is Null and Void.

The use of distant forum to commence legal actions has long been frowned upon because it denies consumers and small businesses a meaningful chance to defend themselves in court. In Fed. Trade Comm'n v. Leasecomm Corp., et al., Civ. Action No. 03-11034-REK (D. Mass. 2003), the FTC challenged a leasing company's use of a distant forum contract clause in a case

involving the alleged use of leases to finance fraud. In the Leasecomm matter, the FTC alleged that Leasecomm's practices of including provisions in its financing contracts authorizing it to file lawsuits in venues other than the customer's place of residence or the location where the customer executed the contract, and of filing lawsuits under those provisions were likely to cause substantial injury that could not be reasonably avoided, and were not outweighed by countervailing benefits to consumers or competition. Therefore, the FTC argued that Leasecomm's practices were unfair and violative of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). The Massachusetts federal court agreed with the FTC and ordered:

> Defendants are permanently restrained and enjoined from instituting collection suits against customers in a forum other than the county where the customer resides at the commencement of the action, or in the county where the customer signed the contract sued upon; …

(See Leasecomm Stipulated Permanent Injunction, May 29, 2003, at p. 6, attached as Exhibit 5).

In Spiegel, Inc. v. FTC, 540 F.2d 287 (7th Cir. 1976), the Seventh Circuit upheld the FTC's authority under Section 5 of the FTC Act[8] to prohibit Spiegel's use of a distant forum and the FTC's setting of a standard for what constitutes an appropriate forum. As with NorVergence, the FTC charged Spiegel with violations of Section 5 of the FTC Act, which prohibits unfair business practices, by instituting collection suits in Cook County, Illinois against retail credit mail order purchasers who reside in other states. Id., at 290. The Court rejected Spiegel's appeal of the FTC's order for Spiegel to "cease and desist from instituting suits except in the county where the defendant resides at the commencement of the action, or in

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[8] Section 5 of the Federal Trade Commission Act, *15 U.S.C. § 45*(a)(6) states *inter alia*:

> "The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in or affecting commerce."

the county where the defendant signed the contract sued upon." Id.

The facts in the instant matter are even more compelling than those before the court in Spiegel. In Spiegel, the mail order purchasers knew they were doing business with an Illinois company. The Spiegel case also did not involve any claim of fraud or misrepresentation in the sale of Spiegel's products, and there was no allegation that Spiegel had ever executed on the distant forum judgments. Thus, as far as the FTC and the Seventh Circuit were aware, the financial injury of having to defend in a distant forum was only hypothetical. Moreover, the order in Spiegel was not limited to "consumer" transactions but also addressed small business transactions.[9] Thus, the Spiegel decision and order apply to distant forum practices affecting both individuals and small businesses remains good law today.

Further, Spiegel makes clear that the FTC is not bound by state law decisions when it interprets the FTC Act:

> Assuming *arguendo* that jurisdiction under Illinois law is proper, we still believe that the FTC has the power to enjoin Spiegel from bringing the suits.

Id., at 292. Furthermore, it is well established that a systematic use of a distant forum in collection suits violates the FTC Act. See *e.g.*, FTC. v. Leasecomm, Inc., *supra*; In the Matter of West Coast Credit Corporation, 84 FTC 1328 (Dkt. C-2600, 1974) ("By requiring borrowers to waive statutory venue provisions, respondent effectively deprives them of rights otherwise available to move for a change of forum. Therefore, such use of venue waiver provisions is unfair.").

The Judgment and Order obtained by the Federal Trade Commission against NorVergence is well grounded in the law, and Plaintiffs are entitled to its protections. See

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[9] See In re Spiegel, Inc., 86 FTC 425, 439 (1975), *aff'd.*, Spiegel, Inc. v. FTC, 540 F.2d 287 (7th Cir. 1976).

Docteroff, 133 F.3d at 214-215; Bush, 62 F.3d at 1319; Daily, 47 F.3d at 368-369. In addition to finding that the actions of IFC in misrepresenting to Plaintiffs that they owe money on the assigned NorVergence rental agreements regardless of whether they were provided with the promised telecommunications services, and in filing collection suits against Plaintiffs in Illinois, a forum distant to Plaintiffs, constitute deceptive and unfair acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a) as prayed for *supra*, the Court should also make a separate finding that the "floating venue" provision of the NorVergence rental agreements is null and void.

II. PLAINTIFFS ARE ALSO ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF NEW JERSEY LAW.

A. The Plaintiffs' Equipment Rental Agreements Are Void *Ab Initio* For Violation of the New Jersey Consumer Fraud Act.

On December 3, 2004, the New Jersey Attorney General, Division of Consumer Affairs, filed a Motion to File Amicus Curiae Brief ("Amicus Motion") in this case. (See Docket No. 5). The Amicus Curiae Brief appended to the Amicus Motion argued that the CFA precludes IFC (and other NorVergence assignees) from enforcing the NorVergence equipment rental agreements. (See Exhibit 4, Attachment 2 to the Amicus Motion). On January 10, 2005, this Court entered its Order Granting the Motion and Authorizing the New Jersey Attorney General's Application To Appear as an Amicus Curiae in this adversary proceeding. (See Docket No. 10). Plaintiffs now adopt the arguments of the New Jersey Attorney General as presented in the Amicus Curiae Brief by reference and as more fully set forth herein.

1. The New Jersey Consumer Fraud Act Protects the Plaintiffs in the Instant Matter.

Plaintiffs adopt the position taken by the New Jersey Attorney General that New Jersey law applies in this case because (1) the equipment rental agreements state that they should be governed by New Jersey law because NorVergence's principle offices are located in New Jersey,

and (2) NorVergence planned and orchestrated its business plan from New Jersey and executed the NorVergence rental agreements in New Jersey. See Amicus Curiae Brief, at pp. 6-7. Plaintiffs, by their Affidavits, further attest to the fact that they understood that the equipment rental agreements would be construed under and governed by the laws of New Jersey when they signed their agreements even though most, but not all, of the Plaintiffs resided outside New Jersey. (See Group Exhibit 2, at ¶ 12).

This position is supported by the case law. In Kugler v. Haitian Tours, Inc., 120 N.J. Super. 260, 269 (Ch. Div. 1972), the court held that the CFA "prohibits unlawful practices in New Jersey without limitation as to the place of residence of the persons imposed upon." (emphasis added). In Boyes v. Greenwich Boat Works. Inc., 27 F.Supp. 2d 543, 547 (D.N.J. 1998), the District Court added that it "has little doubt that the New Jersey Legislature intended its Consumer Fraud statute to apply to sales made by New Jersey sellers even if the buyer is an out-of-state resident and some aspect of the transaction took place outside of New Jersey." NorVergence is a New Jersey seller, and the Plaintiffs are consumers who purchased goods and services from NorVergence under an agreement that, when signed by Plaintiffs, provided for (and was understood by the Plaintiffs to provide for) the application of New Jersey law. (See Group Exhibit 2, at ¶ 12 and Exhibit A). Therefore, the CFA protects the Plaintiffs in the instant matter.

There is no doubt that Plaintiffs are "consumers" within the meaning of the New Jersey CFA. The CFA does not limit consumer transactions to transactions that relate to the sale of "goods or services for personal, family, or household use." In Hundred E. Credit Corp. v. Eric Schuster Corp., 212 N.J. Super. 350, 356 (App. Div. 1986), *cert. denied*, 107 N.J. 60 (1986), the appellate division rejected the position that the CFA was limited to sales and advertising of merchandise for personal, family, or household use and held that it protected business entities

that purchased business merchandise. *Accord* Kavkv v. Herbalife Int'l of Am., 359 N.J. Super. 497, 504 (App. Div. 2003).

Indeed, after concluding that the CFA includes business entities, the Hundred E. Credit Corp. court stated that:

> Business entities, like individual consumers, cover a wide range. Some are poor, some wealthy; some are naive, some sophisticated; some are required to submit, some are able to dominate. Even the most world-wise business entities can be inexperienced and uninformed in a given consumer transaction. Unlawful practices thus can victimize business entities as well as individual consumers. It may well be, of course, that certain practices unlawful in a sale of personal goods to an individual consumer would not be held unlawful in a transaction between particular business entities; the Act largely permits the meaning of "unlawful practice" to be determined on a case-by-case basis.

Id. at 356-57 (citations omitted). Therefore, the Plaintiffs in this action are entitled to the same protection from the CFA as individual consumers.

2. The Plaintiffs' Equipment Rental Agreements Are Void *Ab Initio* For Violation of the New Jersey CFA.

New Jersey Courts have repeatedly held that obligations that purportedly arise out of violations of the CFA are void and unenforceable. For example, in Cox v. Sears Roebuck & Co., 138 N.J. 2, 23 (1994), the New Jersey Supreme Court "conclude[d] that an improper debt or lien against a consumer-fraud plaintiff may constitute a loss under the Act, *because the consumer is not obligated to pay any indebtedness arising out of conduct that violates the Act*." (emphasis added). In Huffmaster v. Robinson, 221 N.J. Super. 315 (N.J. Super. 1987), the court had to determine whether an auto repairman who had failed to provide a written estimate or to obtain a written authorization for work he performed could enforce an oral contract for the work performed. The court held that "[c]ontracts involving consumer fraud as defined in our act and our administrative code are … unenforceable by violators because," among other things, "[t]hey are void, being contrary to public policy as expressed in the act." Id., at 322 (citation omitted).

The same reasoning was adopted in Blake Constr. v. Pavlick, 236 N.J. Super. 73, 79-80 (N.J. Super. 1989)[10](home improvement contractor who failed to comply with CFA requirement that all changes to a home improvement contract must be in writing and signed by the consumer is precluded from enforcing oral agreement to do additional work). In Scibek v. Longette, 339 N.J. Super. 72, 82-86 (N.J. Super. 2001), the appellate division (a) reversed a trial court's decision to allow an auto repair dealer to collect the reasonable value of the services it rendered to complete a repair even though it provided those services, whose value was in dispute, without providing a written estimate or obtaining a written authorization, and (b) upheld the trial court's decision to deny the consumer's counterclaim for a violation of the CFA because the consumer had failed to establish that it had suffered an ascertainable loss.

In the instant matter, each Plaintiff's rental agreement was obtained as a result of a practice that violated the CFA because:

A. It was a deceptive practice to advertise the Matrix or the Matrix Soho as equipment that helped to provide unlimited telecommunication services or to save telephone or internet costs; and

B. It was a deceptive practice to rent the Matrix or the Matrix Soho pursuant to agreements whose monthly payments were based on the consumer's average monthly payments for the same services and whose total payments were a significant multiple of the cost of purchasing the equipment.

See Exhibit 1, Findings at p. 3-7, ¶¶ 8-9, 13-16; see also Group Exhibit 2, at ¶¶ 5-7.

In addition, the face of each NorVergence rental agreement provides grounds for finding that it was obtained by practices that violate the CFA. First, the paragraph called "Article 2A Statement" includes the following statement suggesting that the agreement qualifies as a finance lease under Article 2A of the Uniform Commercial Code:

[10] Blake Constr. was subsequently overruled on other grounds.

> YOU AGREE THAT IF ARTICLE 2A OF THE UNIFORM COMMERCIAL CODE IS DEEMED TO APPLY TO THE RENTAL, THE RENTAL WILL BE CONSIDERED A FINANCE LEASE THEREUNDER. YOU WAIVE YOUR RIGHTS AND DEFENSES UNDER ARTICLE 2A OF THE UCC.

See Group Exhibit 2, Exhibits A thereto, p. 2.

In fact, the Plaintiffs' rental agreements are not finance leases pursuant to New Jersey statute because NorVergence selected and supplied the rental equipment. Although these agreements are not Article 2A finance leases, the false suggestion that they qualified as finance leases created the false impression that the total rental payments approximated the cost of purchasing the equipment plus a reasonable profit for NorVergence. In fact, when the rental payments (up to $340,000) are compared with the cost of purchasing the equipment (up to $1,550), they provide NorVergence with an astronomical and unconscionable "profit" or "return on investment" of over **21,900 %**. See Exhibit 1, Findings at p. 4, ¶ 8.

Equally deceptive is the fact that, although the rental agreements on their face purported to cover only the Matrix box, the price of the rental agreement had nothing to do with the cost of the Matrix, which itself was an incidental part of the promised services. Id. Indeed, given that the monthly rental payment depended on how much the rentor had been paying for its telecommunications services, rather than the cost of the rented equipment, the agreement is deceptive and fraudulent on its face for this reason as well. See Exhibit 1, Findings at p. 4-6, ¶ 8-9, 13-14. The fact that the promised services have never been provided further evidences an intent to deceive and defraud the plaintiff fraud victims. See Group Exhibit 2, at ¶ 7.

In addition, each Plaintiff's rental agreement includes the following statement suggesting that the Plaintiffs were given information about the comparative costs of purchasing and renting the equipment that enabled them to make a reasoned decision about whether to rent or purchase:

> You understand that the Equipment may be purchased for cash or it may be rented. By signing this Rental, you acknowledge that you have chosen to rent the Equipment from us for the term of this Rental, and that you have agreed to pay the specified rental payment and other fees described herein.

See Group Exhibit 2, Exhibits A thereto, p. 2.

In actuality, the Plaintiffs were not given (a) the option to purchase the rental equipment or (b) information about the costs of purchasing the rental equipment. This is another example that Plaintiffs' NorVergence rental agreements were obtained by a deceptive practice that violates the New Jersey CFA and are void and unenforceable thereunder.

Finally, the "Equipment Rental Agreements" prepared by NorVergence and IFC violate the CFA on their face because contain provisions that are so ambiguous and contradictory that no reasonable consumer could ever understand what they were signing and what its provisions mean. For example, the document does not disclose or identify its legal status, i.e., a true lease, an Article 2A Finance Lease, a negotiable instrument, what?. Although it clearly implies that it is an "Article 2A Finance Lease under the UCC," the language does not actually say that it is an Article 2A Finance Lease. Rather, it actually says that "**If** Article 2A is deemed to apply to the Rental, …". Id.

Nor does it disclose or clearly identify what law is to be applied. Rather, it only states that "if this Lease is assigned," "this agreement shall be governed by, construed and enforced in accordance with the laws of the State in which . . . the assignee's principal offices are located," an assignee and state unknown to the plaintiffs at the time of contracting. Id. However, while the consumer plaintiffs did not know that their agreement was assigned to IFC and that IFC would later claim that the agreements were governed by Illinois law, both NorVergence and IFC knew that was their plan. *See* Exhibit 4, Estok Affidavit, ¶¶ 5-6, and Exhibit A. In furtherance of their documented scheme, neither IFC or NorVergence disclosed their extensive preplanned arrangements to plaintiffs. Id., Exhibits A-D. *See also*, IFC Credit Corporation section, *supra*, at pp. 6-10.

B. IFC Cannot Enforce the Plaintiffs rental agreements as a Matter of Established New Jersey Law.

1. IFC Does Not Meet the Standards of a "Holder in Due Course"

Clearly, IFC can not claim that it acted as an independent third-party finance company in good faith and without knowledge in its dealings with NorVergence. IFC invested heavily in NorVergence, then a start-up company, effectively providing it with venture capital. IFC entered into a "Master Program Agreement" with NorVergence on October 10, 2003. *See* Exhibit 4, Estok Affidavit, at ¶5. IFC admits that the NorVergence business plan was to enter into separate agreements with its "telephone service customers," one for "telephone service" and one for "equipment." *Id.* NorVergence would then assign the "equipment" agreement to IFC for separately established "assignment prices" in exchange for IFC's investment in NorVergence's working capital. Id., "Master Program Agreement" attached thereto, ¶2.

In an effort to shift IFC's investment risk to NorVergence's consumer customers, it was agreed between IFC and NorVergence that the equipment leases would provide that "the performance due under the Assigned Service Agreements was not contingent upon in any way on [NorVergence's] performance of [it's telephone] service agreements." Id. at ¶5. So long as NorVergence's "telephone service customers," were provided with telephone service as promised by NorVergence, the Assigned Rental Agreements were worth tens of millions of dollars. Id. at ¶15. However, IFC was also aware that the rental equipment and Rental Agreements "may have no value without [NorVergence's] telephone services." Id.

The values assigned to each individual equipment rental agreement bore absolutely no relationship to the "Matrix" equipment "purchase" which was allegedly being financed for NorVergence by IFC. The values assigned to the equipment rental agreements acquired by IFC in this case range from a low of $2,700 to a high of $154,377, for the very same piece of

equipment! (*See* Exhibit 4 Estok Affidavit at ¶10, Exhibit C thereto, "2nd June 16 Security Agreement", Exhibit A thereto (list of Collateral Equipment Rental Agreements), showing three (3) separate "Matrix" rental agreements with Blasko Auto Leasing, Inc. at three different locations at Rutherford, Budlake and Fort Lee, New Jersey, for $2,700 each, Exhibit A at p.11 and one (1) "Matrix" rental agreement with Meyer Chatfield, Inc. in Jenkintown, Pennsylvania, for $154,377, Exhibit A p.15).

As the NorVergence fraud began to unravel in 2004, IFC entered into four agreements in rapid succession in an effort to protect its investment in NorVergence. On March 16, 2004, IFC and NorVergence entered into an Amendment Agreement, amending and restating the Master Program Agreement. *See* Exhibit 4, Estok Affidavit, ¶5. This amendment sought to limit IFC's financial losses due to the increasing customer defaults caused by NorVergence's failure to deliver the promised telecommunication services and to make certain provisions to improve IFC's financial position in the event of a NorVergence bankruptcy. *See* Exhibit 4, Estok Affidavit, Exhibit A thereto. In May of 2004, IFC and NorVergence entered into a further Amendment Agreement amending and restating the Master Program Agreement. *See* Exhibit 4, Estok Affidavit, ¶5. This amendment provided for a "hold back" by IFC of an additional 25% of funding liabilities to NorVergence for all equipment rental agreements funded by IFC after April 26, 2004. *See* Exhibit 4, Estok Affidavit, Exhibit A thereto.

Finally, on February 28, 2005 IFC filed a Proof of Claim in the NorVergence bankruptcy case for an unsecured nonpriority claim in the amount of $15,368,827.75. (See Exhibit 4, last 2 pages, IFC Proof of Claim, Claims Docket No. 696. In its Proof of Claim, IFC alleges as follows.

> NorVergence, Inc. breached certain of its representations, covenants and warranties to IFC, made certain misrepresentations, and/or breached its agreement with

> IFC under which IFC had received certain assignments of certain rental agreements, resulting in a claim believed to be not less than $15,368,827.75 plus costs interest and attorneys' fees.

Id. After losing millions of dollars in its high-profit, but high-risk financial investment in start-up NorVergence, IFC now seek to re-write history and attempt to shift its loss to the innocent consumer fraud victims by now claiming that it was an unknowing "good faith purchaser for value." IFC's was not the ordinary routine of equipment finance leasing under Article 2A of the UCC. Any effort to claim that mantle mocks the industry it tries to embrace. There was nothing "normal" or "routine" about IFC's corrupt involvement with NorVergence and the fraud it facilitated on the innocent plaintiff consumer fraud victims in this case.

2. Even if IFC Could Be Qualified as a "Holder in Due Course," It Would Still Be Subject to the "Real Defense" of Illegality and Fraud

Even if IFC could establish that it qualified as a "holder in due course" and was therefore not liable to the same fraud that plagues NorVergence, it would still be subject to the "real defense" of illegality and would be precluded from enforcing the rental agreements against the Plaintiffs in the instant matter.

Each NorVergence rental agreement includes the following provision:

> **YOU MAY NOT SELL, PLEDGE, TRANSFER, ASSIGN OR SUBRENT THE EQUIPMENT OR THIS RENTAL.** We may sell, pledge or transfer all or part of this Rental and/or the equipment without notifying you. The new owner will have the same rights that we have, but not our obligations. You agree that you will not assert against the new owner any claims, defenses or set-offs that you may have against us. (emphasis added).

See Group Exhibit 2, Exhibits A thereto, p. 2. In addition, the first page of the agreement states that "[y]our obligation to make Rental Payments for the entire term are not subject to set off, withholding or deduction for any reasons whatsoever" and the last paragraph of the agreement, called "Other Conditions," includes the following statements:

> YOUR DUTY TO MAKE THE RENTAL PAYMENTS IS UNCONDITIONAL DESPITE EQUIPMENT FAILURE, DAMAGE, LOSS OR ANY OTHER PROBLEM.
>
> NO BREACH BY RENTOR OR ANY OTHER PERSON WILL EXCUSE YOUR OBLIGATION TO ANY ASSIGNEE.

See Group Exhibit 2, Exhibits A thereto, p. 2.

The apparent purposes of these additional provisions are: (a) to give NorVergence and its assignees, through contract, the benefits that N.J.S.A. 12A:2A-407 gives to the lessors and assignees of Article 2A finance leases through statute; and (b) to protect NorVergence and its assignees from the claims and defenses to payment that a lessee would otherwise have against them.

However, the rights of an assignee of a lease that is not a finance lease are subject to N.J.S.A. 12A: 9-403 ("Section 9-403"), which controls when an agreement not to assert claims or defenses is enforceable against an account debtor. Section 9-403(b) states, in pertinent part, that:

> Except as otherwise provided in this section, an agreement between an account debtor and an assignor not to assert against an assignee any claim or defense that the account debtor may have against the assignor is enforceable by an assignee that takes an assignment: (1) for value; (2) in good faith; (3) without notice of a claim of a property or possessory right to the property assigned; and (4) without notice of a defense or claim in recoupment of the type that may be asserted against a person entitled to enforce a negotiable instrument under 12A:3-305(a). (emphasis added).

N.J.S.A. 12A: 9-102(a)(2) defines an "account" to include "a right to payment of a monetary obligation, whether or not earned by performance, (i) for property that has been or is to be sold, leased, licensed, assigned or otherwise disposed of." N.J.S.A. 12A:9-102(a)(3) defines an "account debtor" as a "a person obligated on an account, chattel paper, or general intangible" but not including a "person obligated to pay a negotiable instrument, even if the instrument

constitutes part of chattel paper."[11]

Thus, pursuant to New Jersey statute, each Plaintiff is an account debtor and each Plaintiff's agreement not to assert the claims, defenses or setoffs is enforceable unless one of the exceptions set forth in Section 9-403(b) applies or another provision of Section 9-403 controls the issue of enforceability.

Then, Section 9-403(c) states that:

> Subsection (b) does not apply to defenses of a type that may be asserted against a holder in due course of a negotiable instrument under 12A:3-305(b).

It follows that an assignee of an account debtor who takes for value, in good faith and without notice of the claims or defenses set forth in Section 403(b), is still subject to "defenses of a type that may be asserted against a holder in due course of a negotiable instrument under 12A:3-305 b." N.J.S.A. 12A:3-305(b) identifies these defenses, the so called "real defenses," as the defenses set forth in N.J.S.A.12A:3-305(a)(l):

> a defense of the obligor based on infancy of the obligor to the extent that it is a defense to a simple contract, duress, lack of legal capacity, or illegality of the transaction which, under other law, nullifies the obligation of the obligor, fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or essential terms, or discharge of the obligor in insolvency proceedings. (emphasis added).

Consequently, even if a defendant/assignee such as IFC can establish that it took the assignment of the NorVergence rental agreements (1) for value, (2) in good faith, and (3) without notice of the claims or defenses set forth in Section 3-305(a)(l), it would, notwithstanding the lessee's agreement not to assert claims, defenses or set offs, still be subject to the "real defense"

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[11] N.J.S.A.12A:9-102(a)(11) defines "chattel paper" to mean "a record or records that evidence both a monetary obligation and a security interest in specific goods, a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, a lease of specific goods, or a lease of specific goods and a license of software used in the goods. In this paragraph 'monetary obligation' means a monetary obligation secured by the goods and includes a monetary obligation with respect to software used in the goods.

of "illegality of the transaction which, under other law, nullifies the obligation of the obligor." As discussed *infra*, a contract obtained by a practice that violates the CFA provides a basis for this defense.

C. Each Plaintiff Has a Real Defense Based On Violations of the CFA Associated With the NorVergence Agreement.

New Jersey courts have held that in order to establish illegality as a real defense to a contract you must do more than show that the contract "is rooted in an illegal transaction or stems from a transaction prohibited by statute or public policy." New Jersey Mort. & Inv. Corp. v. Berenyi, 140 N.J. Super. 406, 409 (App. Div. 1976) (citing to the New Jersey Study Comment on N.J.S.A. 12A:3-305(2)(b)). You must also show that the statute, by its own terms, nullifies the obligation of the obligor. Id., at 409-10. Examples of statutes that provide a basis for a real defense are: (a) N.J.S.A. 2A:40-3, which states that a note given in payment of a gambling debt "shall be utterly void and of no effect" and (b) N.J.S.A. 17:11A-58, which states that "[a]ny obligation on the part of the borrower arising out of a secondary mortgage loan shall be void and unenforceable unless such secondary mortgage was executed in full compliance with the provisions of this act."[12] Westervelt v. Gateway Fin. Serv., 190 N.J. Super. 615, 622-23 (Ch. 1983). Therefore, the issue is whether the CFA, by its own terms, nullifies the obligations of consumers who sign contracts that violate the CFA.

Although New Jersey case law unanimously supports the position that a contract that violates the CFA is void and unenforceable, no case concerns the rights of an assignee or establishes that the CFA, by its own terms, "nullifies the obligation of the obligor." Instead, each relies on general statements about the purpose of the CFA and the principle that the CFA, as

[12] The Secondary Mortgage Loan Act has been repealed. This does not, however, affect the analysis.

remedial legislation, should be interpreted liberally to protect the consumer. See Cox, 138 N.J. at 15-16; Scibek, 229 N.J. Super., at 77-78; Huffmaster, 221 N.J. Super. at 19-20.

Scott v. Mayflower Home Imp. Corp., 363 N.J. Super. 145, (Law Div. 2001), which followed Scibek, concerned the rights of an assignee. In Scott, the court had to determine whether the financial institution assignees of home repair contracts, promissory notes and mortgages could enforce them against home owners who alleged that the contracts, notes and mortgages were obtained in violation of the CFA and other laws. Id., at 151-52. Scott differed from this case in that the agreements at issue were subject to 16 C.F.R. § 433.2, the FTC Holder Rule, and included the notice required by that rule.[13] Id., at 151, 154. In response to the plaintiffs' request for rescission, the defendant assignees argued that because rescission was an equitable remedy, the court had to equitably weigh the facts surrounding each contract before rescinding it. Id., at 160. The court stated that contracts that "violate or were obtained by practices which violate the New Jersey Consumer Fraud Act ... are void and unenforceable," and then elaborated:

[13] The FTC Holder Rule states that it is an unfair practice for a seller to "take or receive a consumer credit contract which fails to contain the following provision in at least ten point, bold face, type":

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT THERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HERE UNDER.

16 C.F.R. § 433.1(i) defines a "consumer credit contract" as "any instrument which evidences or embodies a debt arising from a 'Purchase Money Loan' transaction or a 'financed sale' as defined in paragraphs (d) and (e) of this Section." Paragraph (d) of 16 C.F.R. § 433.1 defines a "purchase money loan" and paragraph (e) defines "financing a sale" as transactions that involve a "consumer" which is defined in 16 C.F.R. § 433.1(b) as "[a] natural person who seeks or acquires goods or services for personal, family or household use." Because the NorVergence Agreements do not relate to the purchase of goods or services "for personal, family, or household use," they do not implicate the FTC Holder Rule.

> [T]he issue is not whether a valid contract should be rescinded on equitable grounds. The contracts here are invalid and unenforceable. To enforce contracts which violate or were obtained by practices which violate important regulatory statutes enacted for the benefit of consumers would be clearly contrary to public policy and the authority of the Legislature.

Id., (citations omitted). Because the court held that the FTC Holder Rule applied to the assignees in Scott, it did not have to reach the issue of whether the illegality of the contracts was a defense against an assignee who takes an assignment (1) for value, (2) in good faith, and (3) without notice of the claims or defenses set forth in Section 3-305(a)(1). Thus, the issue remains as to whether the CFA, by its own terms, "nullifies the obligation of an obligor" who enters into a contract obtained by a practice that violates the CFA.

The Division of Consumer Affairs ("Division"), which is the agency charged with the responsibility of enforcing the CFA, submits that N.J.S.A. 56:8-2.11 and N.J.S.A. 56:8-2.12 should be interpreted as providing the requisite basis. Based on the principles set forth in In re Public Service Elec. And Gas Co.'s Rate Unbundling, 167 N.J. 377, 383-84 (2001), the Division has broad authority to liberally interpret Sections 2.11 and 2.12 to accomplish the Legislature's goals and the Court should defer to a Division interpretation that advances those goals unless it is plainly unreasonable. *Accord* Matturri v. Bd. Of Trustees of the Judicial Retirement System, 173 NJ 368, 381-82 (2002) (citations omitted) (courts generally give substantial deference to the interpretation an agency gives to a statute it is charged with enforcing and will accept the agency's interpretation unless it is plainly unreasonable). As discussed below, the Division's interpretation of Sections 2.11 and 2.12 advances the Legislature's goal of "protect[ing] the consumer against imposition and loss as a result of fraud and fraudulent practices by persons engaged in the sale of goods and services," and is not plainly unreasonable. Scibek, 339 N. J. Super. at 77 (citation omitted). Therefore the Division's interpretation is entitled to the Court's

deference.

The Division's interpretation begins with N.J.S.A. 56:8-2.11 which states:

> Any person violating the provisions of the within act shall be liable for a refund of all moneys acquired by means of any practice declared herein to be unlawful.

N.J.S.A. 56:8-2.12 adds that: "The refund of moneys herein provided for may be recovered in a private action...." Id. These sections are independent of N.J.S.A. 56:8-19 which gives a consumer who suffers "any ascertainable loss of moneys or property as a result of the use or employment by another person of any method, act, or practice declared to be unlawful under this act" a right to treble damages and attorney's fees. As a result, Sections 8-2.11 and 8-2.12 provide a statutory basis to support the claim that any contract for the payment of money acquired by means of, or obtained by, a practice that violates the CFA is void and unenforceable, regardless of whether the consumer suffered an ascertainable loss as a result of entering the contract. *A fortiori* these sections also provide the consumer with a defense to paying any alleged monetary obligation that arises out of a contract obtained by a practice that violates the CFA.

Sections 8-2.11 and 8-2.12 do not adopt the language of N.J.S.A. 2A:40-3, which states that a note given in payment of a gambling debt "shall be utterly void and of no effect." Nor do they adopt the language of N.J.S.A. 17:11A-58, stating that "[a]ny obligation on the part of the borrower arising out of a secondary mortgage loan shall be void and unenforceable unless such secondary mortgage was executed in full compliance with the provisions of this act." Nonetheless, Sections 8-2.11 and 8-2.12 can and should be interpreted as having the same effect as those provisions, *i.e.*, giving consumers whose alleged obligations arise out of practices that violate the CFA an unconditional right to a refund and a defense against any person, including

any assignee, who makes a claim for payment.[14] This interpretation clearly advances the remedial purposes of the CFA of protecting all consumers from deceptive and unconscionable practices. Because it advances the remedial purposes of the CFA and is reasonable, it is entitled to the Court's deference.

D. The Floating Jurisdiction Provision Is Null and Void.

The "floating jurisdiction" provision in the NorVergence agreements is included in the following paragraph:

> APPLICABLE LAW: .... 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's or Rentor's assignee's sole option.

See Group Exhibit 2, Exhibits A thereto, p.2. IFC may argue that it can use the "floating jurisdiction" provision in the NorVergence Agreement to circumvent the Plaintiffs' rights under New Jersey law to use the fact that the agreement was obtained by a practice that violates the CFA as a real defense against any assignee that attempts to enforce the agreement. According to this argument, NorVergence could circumvent New Jersey law by assigning the NorVergence agreements to IFC who could then use the "floating jurisdiction" provision to enforce the agreements in Illinois, the state where its principal offices are located, in accordance with Illinois law, which may not provide the Plaintiffs with a real defense. There is no dispute that the

[14] Interpreting the CFA as giving every consumer a real defense against any assignee of a contract that violates the CFA does give consumers the protections that N.J.S.A. I 2A:9-403 provides to individual consumers who acquire goods or services for personal, family or household use. N.J.S.A. I 2A:9-403 essentially says that the contracts that are subject to the FTC Holder Rule, i.e., consumer credit contracts for personal, household or family goods, should be interpreted as if they complied with the FTC Holder Rule. Therefore, it gives those consumers the right to assert claims for breach of contract and breach of warranty that do not qualify as violations of the CFA against assignees of their consumer credit contracts. The Division's interpretation of the CFA does not give the small business consumers in this case an analogous right.

NorVergence Agreements that are the subject of this adversary proceeding are, by their own terms, governed by New Jersey law at their inception. Therefore, the Court can stop any attempt to use the "floating jurisdiction" provision to circumvent New Jersey law by applying New Jersey law to issue a declaration that the "floating jurisdiction" provision violates the CFA and, therefore, should be stricken as void and unenforceable.

In Danka Funding, L.L.C. v Page, Scrantom, Sprouse, Tucker & Ford, P.C., 21 F.Supp. 2d 465, 468 (D.N.J. 1998) and Copelco Capital Inc. v. Shapiro, 331 N.J. Super. 1, 3-4 (App. Div. 2000), the courts had to determine whether to enforce the following paragraph in a lease for Konica copying machines:

> Choice of Law: The rental and each schedule shall be governed by the internal laws for the state in which our or our assignee's principal corporate offices are located. You consent to the jurisdiction of any local, state, or federal court located within our or our assignee's state, and waive any objection relating to improper venue. Copelco Capital, 331 N.J. Super., at 11.

In Danka Funding, 21 F.Supp. 2d at 473, the District Court enforced the provision, while in Copelco Capital, 331 N.J. Super. at 7-8, the Appellate Division refused to enforce the same provision. At first blush, it appears that courts are split about whether "floating jurisdiction" provisions are consistent with New Jersey law. In fact, however, it is not necessary for this Court to choose between the District Court's position in Danka Funding and the Appellate Division's position in Copelco Capital (even though the later state court appellate decision interpreting state law should control) because, as discussed below, neither position conflicts with the conclusion that the "floating jurisdiction" provision at issue in this case violates the CFA.

Danka Funding concerned a lease agreement for a copying machine where the lessee was located in Georgia, the agreement was negotiated in Georgia and the lessor assigned the agreement to a company whose principal offices were located in New Jersey. Danka Funding,

21 F.Supp. 2d at 467-68. Copelco Capital concerned a lease agreement for a copying machine where the lessee was located in Missouri, the agreement was negotiated in Missouri and the lessor assigned the agreement to a company whose principal offices were located in New Jersey. Copelco Capital, 331 N.J. Super. at 3. In each case, the issue was whether a New Jersey court should permit a New Jersey assignee of a lease agreement between parties that had no connection to New Jersey to use the agreement's "floating jurisdiction" clause as the lessee's consent to jurisdiction in New Jersey. Danka Funding, 21 F. Supp. 2d at 465; Copelco Capital, 331 N.J. Super. at 1. Because the lease agreement was not offered or sold from New Jersey or to a New Jersey consumer, there was no basis for claiming that it was subject to the CFA.

In sharp contrast here, each NorVergence agreement was promoted and sold by a company located in New Jersey. Therefore, the Plaintiffs are protected by the CFA. Haitian Tours, Inc., 120 N.J. Super. at 269 (the CFA "prohibits unlawful practices in New Jersey without limitation as to the place of residence of the persons imposed upon"); Greenwich Boat Works, Inc., 27 F.Supp. 2d at 547 (there is "little doubt that the New Jersey Legislature intended its Consumer Fraud statute to apply to sales made by New Jersey sellers even if the buyer is an out-of-state resident and some aspect of the transaction took place outside New Jersey"). In addition, at the time each Plaintiff entered into the NorVergence Agreement, it had an additional reason to believe that its agreement was governed by New Jersey law: that agreement, by its own terms, stated that it was governed by the law of the state where NorVergence's principal offices were located, *i.e.*, New Jersey. (See Group Exhibit 3, at ¶12 and Exhibit A thereto). It follows that each Plaintiff Fraud Victim is protected by the CFA and the issue of whether the "floating jurisdiction" provision violates the CFA is front and center in this case.

Both the District Court and the Appellate Division began their analysis by assuming that

a freely negotiated forum selection clause is valid and should be enforced in the absence of one or more of the following compelling reasons not to enforce it: (a) it was procured by fraud, undue influence or unequal bargaining power; (b) the chosen forum is seriously inconvenient for trial; and (c) enforcement would seriously violate or contravene a strong public policy of the forum state. Danka Funding, 21 F. Supp. 2d at 470; Copelco Capital, 331 N.J. Super. at 4. Because the forum selection provision before each court was in a lease agreement that was not protected by the CFA, neither court was required to consider, and neither court considered, the issue of whether its "floating jurisdiction" provision violated New Jersey's strong public policy with respect to consumer protection. That issue -- whether a "floating jurisdiction" provision in a lease that can be assigned without the consumer lessor's consent violates the CFA -- is precisely the issue before this Court.

The New Jersey Uniform Commercial Code, N.J.S.A. 12A:1-12 (2004) (the "UCC"), limits what law governs a consumer lease and what judicial forum is appropriate for resolving disputes that arise under it. N.J.S.A. l2:2A-103(e) defines a "consumer lease" as a lease by a lessor regularly engaged in the business of leasing to a natural person "who takes under the lease primarily for a personal, family or household purpose." N.J.S.A. 12:2A-l06 places the following limits on the power of the parties to a consumer lease to choose what law governs it and what judicial forum is appropriate for resolving disputes that arise under it:

> (1) If the law chosen by the parties to a consumer lease is that of a jurisdiction other than a jurisdiction in which the lessee resides at the time the lease agreement becomes enforceable or within 30 days thereafter or in which the goods are to be used, or if the goods are to be used in more than one jurisdiction none of which is the residence of the lessee, in which the lease is executed by the lessee, the choice is not enforceable.
>
> (2) If the judicial forum chosen by the parties to a consumer lease is a forum that would not otherwise have jurisdiction over the lessee, the choice is not enforceable.

Id. Clearly, if the NorVergence Agreements were consumer leases under the UCC, then neither feature of its "floating jurisdiction" provision, *i.e.*, the requirement that the law governing the lease is the law of the state where an assignee's principal offices are located or the requirement that venue is mandatory in that state, would be enforceable. If these requirements are not enforceable in consumer leases under the UCC, then they should not be enforceable in this case because, as discussed *supra*, the CFA protects business consumers. Although courts have recognized that a practice that violates the CFA in a sale of personal goods may not violate the CFA in a sale to a business, they also recognize that some business consumers are "poor ... naive ... [or] required to submit," Hundred E. Credit Corp., 212 N. J. Super. at 356-357, and, therefore, are 'just as vulnerable to unconscionable business practices as a private consumer." Dreier Co., Inc., 218 N.J. Super. at 273.

In this case, where the consumers are small businesses who were targets of an aggressive campaign to promote the Matrix box that "contained valuable, unique, and proprietary property that could route each user's services to the lowest communications carrier" and allowed each user to obtain the lowest prices on its telephone and internet services, the CFA should provide at least some protection against "floating jurisdiction" provisions to small business consumers who are not protected by the UCC. This is particularly so when the Plaintiffs have each attested to the fact that, during the negotiations, the pre-printed fine print on the back of the NorVergence rental agreement, specifically, the "floating the forum and jurisdiction selection clause," was not negotiated, discussed, or agreed upon between any of the Plaintiffs and any employee of NorVergence. (See Group Exhibit 2, at ¶¶10, 12). None of the Plaintiffs negotiated or discussed any "boiler-plate" terms in their rental agreements with NorVergence or anyone associated with IFC. Id., at ¶¶ 11-12

In any event, the "floating jurisdiction" provision in the NorVergence agreements has the following features that are designed to undermine the lessee's rights under the lease:

1. It has a governing law provision that requires a lessee to sign an agreement without knowledge of, or control over, what State's law will govern the agreement in the event of an assignment. As a result, it subjects the lessee to the risk of being bound by laws that may be radically different from the laws it anticipated when it signed the agreement.

2. It has a mandatory venue provision that requires a lessee to sign an agreement without knowledge of, or control over, where it will be subject to suit, or be able to sue, in the event of an assignment. As a result, it subjects the lessee to a risk of: (a) being sued in a state that, but for the lessee's purported agreement, otherwise has no jurisdiction over it; and (b) increased costs of defending itself.

3. It is in a form agreement that was prepared by NorVergence or its assignees and presented to each lessee on a take it or leave it basis.

4. There is no reciprocity of risk between the lessee and the assignee with respect to the governing law or the mandatory venue provision.

New Jersey courts have held that "[t]he standard of conduct contemplated by the unconscionability clause is 'good faith, honesty in fact and observance of fair dealing"' and that the "word 'unconscionable' must be interpreted liberally so as to effectuate the public purpose of the CFA." Associates Home Equity Servs., Inc. v. Troup, 343 N.J. Super. 254, 278 (App. Div. 2001) (citation omitted). They have also held that the prohibition on unconscionable practices is not intended to "erase the doctrine of freedom of contract, but to make realistic the assumption of the law that the agreement has resulted from real bargaining between parties who had freedom of choice and understanding and ability to negotiate in a meaningful fashion." Id. (citation omitted). The "floating jurisdiction" provision in the NorVergence agreements is unconscionable and a violation of the CFA precisely because it required the Plaintiffs to accept,

on a "take or leave it" basis, an extremely disadvantageous term, which no reasonable lessee would have accepted without demanding additional consideration. Therefore, pursuant to its power under N.J.S.A. 56:8-19, the Court should hold that the "floating jurisdiction" provision violates the CFA.

The NorVergence agreements also state, in the section called "Other Conditions," that:

> If any term of this Rental conflicts with the any law in a state where the Rental is to be enforced, then the conflicting term shall be null and void to the extent of the conflict, but this will not invalidate the rest of the Rental.

Based on this provision and the Court's determination that the "floating jurisdiction" provision violates the CFA, the Court should rewrite the Applicable Law section of the NorVergence agreements so that they state that the law that governs the agreement and the mandatory venue for actions that arise under the agreements are determined by the State in which the Rentor's, i e, NorVergence's, principal offices are located and eliminate the unconscionable provision that they change when the agreement is assigned.

CONCLUSION

For the forgoing reasons, Plaintiff Fraud Victims respectfully request that this Honorable Court find that there are no disputed issues of material fact and grant them summary judgment as prayed for herein as a matter of law. In addition, Plaintiff Fraud Victims respectfully request that the Court order Defendants to pay Plaintiffs reasonable attorney's fees in this matter.

Dated: August 11, 2005

Respectfully submitted,

/s/

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