IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FEDERAL TRADE COMMISSION, Plaintiff, v. IFC CREDIT CORPORATION, Defendant.	Civil No. 07 C 3155 Judge Joan B. Gottschall Magistrate Judge Cole

FTC'S RESPONSE TO IFC'S MOTION TO DISMISS

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I. INTRODUCTION

Plaintiff Federal Trade Commission ("FTC" or "Commission") opposes the Motion to Dismiss filed by defendant IFC Credit Corporation ("IFC"). The FTC's complaint states a cause of action against defendants, alleging that they committed unfair and deceptive practices in commerce that harmed, and continue to harm, hundreds of consumers to the tune of tens of thousands of dollars each, and that violate Section 5 of the FTC Act, 15 U.S.C. § 45.

II. STANDARD FOR MOTION TO DISMISS

A. Applicable Legal Standards

Dismissal for failure to state a claim is appropriate "only if the nonmoving party can prove no set of facts consistent with its complaint or counterclaim that would entitle it to relief." *Northern Trust Co. v. Peters*, 69 F.3d 123, 129 (7th Cir. 1995) (quoting *Warzon v. Drew,* 60 F.3d 1234 (7th Cir. 1995)). "In reviewing a dismissal under Rule 12(b)(6), we are obliged to accept all well pleaded facts alleged in the counterclaim as true and draw all reasonable inferences in favor of the nonmoving party." *Id.* This analysis thus focuses on whether the plaintiff's complaint alone, construed in a light most favorable to the plaintiff, is legally sufficient to state a claim for which relief may be granted.[1] Under this standard the FTC has properly alleged three causes of action for violation of Section 5 of the FTC Act, 15 U.S.C. § 45.

B. IFC's Motion Raises Numerous Issues Not Relevant or Appropriate to a Motion to Dismiss

The FTC has responded to all of defendant's arguments, even those not relevant or appropriate to a motion to dismiss. The only relevant issues are (1) whether the FTC Act protects small businesses, non-profits, and other organizations; (2) whether state law, policy, or court decisions that may support IFC's position in private litigation, devoid of FTC Act claims, can preempt the FTC Act; and (3) whether IFC has a Constitutional right to lie to consumers about their legal obligation to pay.

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[1] The parties are currently attempting to resolve a privilege dispute. While these discussions proceed, the FTC requests that the court disregard, for purposes of this motion to dismiss, the sentence in Complaint ¶ 47 that begins, "Indeed, a May 2004 internal circulation" and the entire quotation that follows. The FTC intends to make a similar request to the court in its Reply Memorandum in Support of Motion for Preliminary Injunction.

III. TWO DIFFERENT VISIONS OF THE FACTS

A. IFC "Facts" Are Contrary to the Complaint

As noted above, motions to dismiss are supposed to assume the facts alleged in the complaint. Defendant IFC's Motion to Dismiss instead assumes an alternative universe: one where sophisticated merchants were calmly approached and offered an opportunity to rent a valuable piece of equipment for a set price for five years; one where the rental of this equipment occurred entirely independent of any desire by the merchants to receive telecommunication services; one where the provisions of that rental agreement were clear, the boilerplate negotiable, and the intricacies of UCC Article 2A readily understood; one where IFC knew nothing about any problems with NorVergence until the latter suddenly and with no warning experienced a cash shortage and was placed into bankruptcy; one where IFC has dealt with these consumers in good faith; one where IFC has told these consumers the truth; one where IFC has respected the rights of these consumers even while politely, almost reluctantly, enforcing the contracts which the merchants did, after all, sign their names to.

In short, IFC ignores the facts alleged: that the consumers were swayed by false promises of cheap telecom services into signing a flurry of documents including an equipment rental agreement; that IFC formed a close relationship with NorVergence and bought hundreds of these contracts; that IFC knew or should have known from the start that the agreements were really to finance services; that IFC learned quickly that the consumers were not getting the services; that IFC responded by purchasing more and more contracts so it could attempt to extract payments from more and more consumers; that even after NorVergence failed and it was clear the contracts would never be worth anything, IFC tried to buy up hundreds more of them; that IFC has lied to the consumers and threatened them; and that hundreds of consumers either continue to pay exorbitant amounts to IFC or have been subjected to years of expensive litigation in a distant forum or default judgments for tens of thousands of dollars each.

B. The Facts As Actually Alleged in the FTC's Complaint

IFC helped finance a massive, fraudulent scheme by NorVergence, a reseller of telecommunications services. The victims of this fraud were small businesses, religious and other non-profit organizations, and individuals who personally guaranteed the obligations of these

organizations (collectively, "consumers"). The consumers were approached with promises of price-guaranteed, discounted telecom services. They signed a flurry of documents. One of them was styled as an "Equipment Rental Agreement" even though its predominant purpose was to finance the telecom services. It referred to a minor piece of equipment, and omitted any mention of the services that were being financed. It obligated each consumer to pay many thousands of dollars, purportedly for the minor piece of equipment. Finance companies including IFC then bought these Rental Agreements from NorVergence. Complaint ¶¶ 8-9, 11-13, 16-18, 20-21.[2]

In 2003, IFC and NorVergence entered into a complex contract (called the "Master Program Agreement"). IFC then purchased $21 million of NorVergence Rental Agreements from the fall of 2003 through the summer of 2004. NorVergence told consumers that payment on the Rental Agreements would ensure all the savings promised by NorVergence on telecommunications services. IFC knew about this promise and repeated it to its customers. ¶¶ 9, 21, 23, 26, 28, 32, 33.

IFC changed its procedures just for the Rental Agreements it bought from NorVergence. For example, a telephone script IFC used to verify consumers' acceptance of a standard lease asks if the buyers have any agreements with the vendor other than the lease. IFC avoided giving the NorVergence consumers the chance to say "yes, we signed a dozen or more other agreements with NorVergence" by omitting the question. Instead, IFC asked only whether the billing address was where the Matrix equipment was delivered and mounted. ¶¶ 35-36, 49-50, 53.

The NorVergence Rental Agreements and other information available to IFC when it acquired the Agreements demonstrated that consumers' predominant purpose in transacting business with NorVergence was to purchase a long-term package of telecommunications services. This raised the likelihood that consumers were deceived into signing the Rental Agreements, which purported to bind them to make substantial monthly payments over a lengthy term just to rent a simple piece of telecommunications equipment, with no mention of telecommunications services. The likelihood of deception by NorVergence was apparent not only from the Agreements

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[2] Unless the context indicates otherwise, citations beginning with "¶" or "¶¶" refer to paragraphs in the Complaint.

themselves, but also from materials describing NorVergence's sales pitch to consumers, from widely varying contract prices even for identical equipment, and from continuing consumer complaints. ¶¶ 13, 18, 20-24, 26-27, 31-33, 37-42. IFC knew or should have known the contracts were to finance services.

Despite receiving reports almost from the start that the equipment NorVergence had delivered to consumers had not been hooked up or was not providing the promised service, IFC's response was to keep changing the Master Program Agreement with NorVergence and to keep purchasing more rental agreements. Each change further limited IFC's risk of financial losses, as NorVergence failed to deliver services and customer defaults increased. ¶¶ 24, 26-28.

Despite making payments, many of the consumers did not receive any of the promised services and none received them for more than a few months. Nonetheless, IFC demanded payment in full on Rental Agreements ranging from $4,439 to $160,672. The fact that the Rental Agreements were worded deceptively, and appeared to finance equipment and not services, made it easier for IFC to enforce them even though the promised services were not delivered. This way, it appeared as if NorVergence had fulfilled its obligation simply by delivering the equipment. IFC falsely told consumers they had no defenses to a collection action because the minor piece of equipment mentioned in the contracts, which typically costs less than $1,300, was delivered to the consumers' premises. ¶¶ 8, 10, 19, 24-26, 29, 43-54.

In the summer of 2004, NorVergence was placed into bankruptcy, stopped providing telecom services, and went out of business. IFC continued to buy Rental Agreements almost up until the time of NorVergence's bankruptcy. IFC even sought relief from the automatic bankruptcy stay to seek over $15 million in additional rental agreements after the NorVergence bankruptcy. By then, it was obvious that no consumer would ever receive any of the promised services. ¶ 28.

Ultimately, IFC filed nearly 500 collection suits in forums distant from the consumers' business location and that of the personal guarantors. Most or all of these suits were filed after the NorVergence bankruptcy. Some consumers have challenged the jurisdiction or venue of the distant forum, with varying results. In every case, however, even a successful challenge in the distant forum adds substantially to the consumers' costs. ¶ 55.

In some cases, IFC has domesticated or executed the distant forum judgment in another distant forum. For example, IFC obtained a default judgment in Illinois against a California consumer, and then executed the judgment against a Florida branch of the consumer's California bank. ¶ 56.

A theme implicit in IFC's slanting of the facts is that it was just an innocent third party doing business as usual. The facts show that IFC was far from innocent. Nor was this business as usual for IFC. Its NorVergence forms and practices deviated significantly from the forms and practices it used for other equipment financing. ¶¶ 35-36, 48-51, 53.

Based on the facts alleged in the complaint, the FTC has stated claims on which relief may be granted. IFC's legal and "policy" arguments are both wrong and inadequate. The motion to dismiss should be denied in its entirety.

IV. THE FTC ACT PROTECTS ALL CONSUMERS INCLUDING BUSINESSES, NONPROFITS, AND OTHER ENTITIES

Defendant IFC maintains that the FTC lacks authority to bring this action because, IFC says, the word "consumer" in the FTC Act means one who buys goods or services solely for personal, family, or household purposes.[3] The FTC adamantly disputes this. IFC's view contradicts the language and history of the FTC Act, the manner in which the Commission has implemented the Act over time, and canons of statutory construction. A consumer under the FTC Act is a purchaser or user of goods or services, without restriction as to the purpose for which the purchase is made. The persons injured by IFC's conduct--small businesses, religious organizations, non-profits, and their individual principals--are consumers of telecommunications goods and services and are entitled to protection by the FTC Act.

By way of background, the FTC has Section 5 enforcement authority over both antitrust and consumer protection violations. In the consumer protection arena, every Section 5 claim the FTC brings is based upon deception, unfairness or both. Here, the FTC has alleged both a deception count (IFC misrepresented defenses to payment on the bogus rental agreements) and two unfairness counts (IFC accepted and collected on the bogus rental agreements and sued

[3] IFC Motion to Dismiss at 9 *et seq*.

consumers in a distant forum). Although the defendant lumps unfairness and deception together, the courts, the Congress, and the FTC analyze them separately and the FTC's authority in each area has evolved somewhat differently. In the end, under both deception and unfairness, the FTC may protect purchasers and users of goods and services, whether in business or not.

A. Statutory Language Does Not Limit Victims Injured by Section 5 Violations

When a court reviews an agency's construction of a statute it administers, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 842-3 (1984); *American Financial Services Ass'n v. FTC*, 767 F.2d 957, 965-971 (D.C. Cir. 1985).

The question is whether "consumer" bears its literal meaning, one that consumes (uses or purchases) goods or services, or whether Congress intended a dramatically narrower reading: individuals purchasing goods or services for nonbusiness personal, family, or household use. The broader interpretation is reasonable on its face.

Section 5 itself suggests no ambiguity, no reason to believe that a church, non-profit, or small business that is alleged to be a consumer of telecommunications services would be denied protection from unfair or deceptive trade practices under Section 5(a)(1) or unfair trade practices under Section 5(n). A remedial act "is to be construed broadly to effectuate its purposes." *Jefferson County Pharm. Ass'n v. Abbott Labs*, 460 U.S. 150, 159 (1983). A word that defines the scope of an act meant to prevent and remedy wrongful conduct should be construed broadly to fulfill that purpose. That could and arguably should end the analysis. Further analysis only strengthens this conclusion.

B. Legislative History and the FTC's Consistent Interpretation Support Reading "Consumer" In Its Broadest Sense

Courts are to defer to an agency's interpretation of the statute it enforces unless that interpretation is unreasonable in light of Congress's design. If its reading of the statute defines a term reasonably in light of the legislature's revealed design, then the agency's judgment is entitled to "controlling weight." *Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.,* 513 U.S. 251, 257 (1995). Section 5(n) of the FTC Act, 15 U.S.C.A. Section 45(n), which codified the standard for "unfairness," contains no definition of "consumer." "If a statute is silent

or ambiguous with regard to a specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron,* 467 U.S. at 843. The court need not conclude that the agency's construction is the only one permissible, or even the construction the Court would have reached if the question had initially arisen in a judicial proceeding. *Id.; see also Mattox v. FTC*, 752 F.2d 116, 124 (5th Cir. 1985) ("[The FTC's] interpretation is both permissible and reasonable, and we will not disturb it"). *See American Financial Services*, 767 F.2d at 968, 972 (FTC Credit Practices Rule upheld as "courts must give deference to the agency's interpretation" of its statute; review is limited to "reasonableness of the Commission's application of the consumer injury test to facts of case and the consistency of that application with congressional policy and prior Commission precedent").

The FTC has carefully and consistently interpreted Section 5 to protect businesses, non-profits, individuals, and other entities. The legislative history makes it clear that the FTC's interpretation is both reasonable and deserving of deference.

1. Before 1980

The original FTC Act was a product of the Progressive Era. Enacted in 1914, it simply prohibited unfair methods of competition. The Commission understood this protected purchasers, not just competitors. In the nineteen thirties, however, the Supreme Court ruled that the FTC could not bring an enforcement action unless it could prove injury to competition. H.R.REP. 103-138 (1993); 1993 WL 213734 (Leg.Hist.) at *3 (Report of House Comm. on Energy and Commerce on H.R. 2243); *see FTC v. Raladam Co.*, 283 U.S. 643 (1931). Congress remedied this in 1938 by stating that "[u]nfair methods of competition and unfair and deceptive acts or practices in commerce are hereby declared to be unlawful." H.R.REP. 103-138, at 3, 1993 WL 213734. Thus, the Commission gained authority to protect consumers or purchasers from both deception and unfairness.

In 1975 Congress enacted the Magnuson-Moss Warranty Act ("Magnuson-Moss") and the Federal Trade Commission Improvements Act ("FTCIA") as Titles I and II of Pub. L. 93-637 (1975). "Consumer" was used quite differently in these two titles. In Title I, section 101(3) of Magnuson-Moss, which is not part of the FTC Act, Congress defined "consumer" as a buyer or

transferee of any "consumer good," meaning a good "normally used for personal, family, or household purposes . . .." Magnuson-Moss Act; Pub. L. No. 93-637, Title I, Sec. 101(1), (3).[4]

In Title II, however, which, unlike Title I, amended the FTC Act, Congress did not define "consumer." According to the Senate committee report accompanying S.356, the bill that contained the Magnuson-Moss Act and FTC Improvements Act:

> It should be noted that the word "consumer" as used in title II is not related to the definition of that term in title I. The use of the word "consumer" in title II is to be read in its broadest sense and is not limited to those persons defined in section 101(3) of title I of S. 356.

S.REP. 93-151, at 27 (1973), 73 Trade Reg. (CCH) at 27 (Report of Sen. Commerce Comm. on S. 356 , May 21, 1973)(Appendix A to this memorandum).[5] Thus, while the legislative history supports limiting the definition of "consumer" in the Magnuson-Moss Act, it also supports including businesses and non-profits in the FTC Act's use of the same term. Absent an express limitation, "'consumer' . . . is to be read in its broadest sense." *Id.*

Commission law enforcement activities since at least the 1970s, and court affirmance of those actions, also support the broad definition of "consumer." In 1975, the FTC issued an order against a mail order catalogue seller for unfair practices. The Initial Decision adopted by the full Commission noted that the victims were both individuals and "small companies." This inclusion was appropriate because an individual or small company was "more likely to be unprepared to defend itself in a foreign forum than is a company which transacts a substantial amount of interstate business." *Spiegel, Inc.,* 86 F.T.C. 425, 439, 1975 FTC Lexis 107, *14-15 (1975) (citation omitted); *aff'd with minor changes not related to the quoted text, FTC v. Spiegel, Inc.*, 540 F.2d 287 (7th Cir. 1976).

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[4] "[N]othing in title I . . . shall be construed to repeal, invalidate, or supersede the FTC Act . . .." H.R.REP. 93-1107 (1974), 1974 WL 11709 (Leg.Hist.), at *7725 (Report, Interstate and Foreign Commerce Comm., H.R. 7917).

[5] The committee was commenting on the 93rd Congress's original version. The final version that passed at the end of that Congress was very similar in that it did not define "consumer" and did include a broad provision for the FTC to seek redress for "consumers." *See also* Report, Conference Comm. on S.356, S.REP. 93-1408, at 21 (1974), 1974WL 11710 (Conf.Rep.)("the nature of the relief authorized is limited only by the nature of the injury done").

2. 1980, 1994, and the Period In Between

In 1980, the Commission issued an Unfairness Policy Statement to clarify its unfairness authority, choosing to focus on practices that harmed consumers.[6] In 1994, Congress codified that Unfairness Policy Statement:

> The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

15 U.S.C.A. § 45(n).[7]

The legislative history shows that Congress's intent in 1994 was to ratify and endorse the Unfairness Policy Statement as implemented by the Commission. The conference committee reported that Section 5(n) was "derived from the 1980 policy statement of the Commission regarding unfairness, the Commission's 1982 letter on the same subject, and from subsequent interpretations of and applications to specific unfairness proceedings by the Commission." H.R. REP. 103-617, at 12 (1994), 1994 WL 385368 (Conf.Rep.) (Report, Conf.Comm. on H.R. 2243). Similarly, the committee report on the Senate version of the bill stated that Section 5(n) "is intended to codify, as a statutory limitation on unfair acts or practices, the principles of the FTC's December 17, 1980 policy statement on unfairness." S. REP. 103-130, at 11 (1993), 1993 WL

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[6] Letter, FTC Chairman Michael Pertschuk and other Commissioners to Sens. Wendell Ford and John Danforth (Dec. 17, 1980) ("Unfairness Policy Statement," *appended to Int'l Harvester,* 104 F.T.C. 949, 1070, 1984 FTC LEXIS 2, at *298-316 (1984).

[7] While IFC claims the court should follow definitions of "consumer" that lie outside the FTC Act, it is the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Dep't of Revenue of Or. v. ACF Indus., Inc*., 510 U.S. 332, 342 (1994) (citations omitted). "That rule has particular force where 'the words at issue are used in two different sections of a complex statutory scheme and those two sections serve the same purpose.'" *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1379 (Fed. Cir. 2001). As shown above, the term "consumer," which was added as part of the FTC Act's new Section 19b consumer redress authority in 1975, 15 U.S.C.A. §57b, is to be read "in its broadest sense." "Consumer" in Section 5(n), another section of the FTC Act designed to protect victims of unfair and deceptive practices, should therefore be read broadly as well.

322671 (Report, Commerce Comm. on S. 1179). In addition, the Senate committee reported that Section 5(n) "codif[ied] existing law" and that "the FTC's policy statement itself is based on the FTC's decided cases and rules." S. REP. 103-130, at 11 (1993), 1993 WL 322671. Finally, in a nod of deference toward the FTC, the House committee observed:

> [T]he Committee notes that a long line of Supreme Court decisions has established a practice of deferring to the Commission's determinations of unfairness, so long as such determinations are based on appropriate evidence on record and a reasonable basis in the law.

H.R. REP. 103-138, at 7 (1993); 1993 WL 213734. True to these expressions of Congressional intent, Section 5(n) follows closely the Unfairness Policy Statement.[8]

Given Congress's apparent intent to ratify through legislation the Commission's development and use of its Unfairness Policy Statement, understanding the meaning of "consumer" as used in the Unfairness Policy Statement is relevant to understanding Congressional intent for "consumer" in Section 5(n).

First, the 1980 Unfairness Policy Statement itself supports the broader reading of "consumer." Referring to its previous unfairness criteria that were quoted with approval in *Sperry & Hutchinson*, 405 U.S. 233, 244-45 n.5 (1972), the Commission describes the consumer injury factor, which included "businessmen" among those protected, "the most important of the three *S&H* criteria."[9] The Commission noted that since 1972, it had "continued to refine the standard of unfairness" and had "reached a more detailed sense of both the definition and the limits of these criteria."[10] The statement then states and elaborates on the criteria that were later codified as Section 5(n), 15 U.S.C. § 45(n), focusing on the third element of the *Sperry & Hutchinson* unfairness test, "substantial injury to consumers."[11] The Unfairness Policy Statement refines the concept of substantial injury, but does not even hint at any desire to remove "businessmen" from

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[8] Compare the Unfairness Policy Statement, *appended to International Harvester Co.,* 104 F.T.C. at 1070, 1073, to Section 5(n) of the FTC Act, 15 U.S.C. § 45(n), quoted above.

[9] 104 F.T.C. at 1073, 1984 FTC LEXIS 2, *298-316.

[10] *Id.* at 1072-73.

[11] *Id.* at 1073-74.

among the protected. IFC pulls statements out of context to assert that the Unfairness Policy Statement supports a narrow view of "consumer," but both the text and subsequent history indicate that IFC misreads the Policy Statement.

Second, Congress in 1994 also intended to ratify a 1982 FTC letter on unfairness. H.R. REP. 103-617, at 12 (1994)(Conf. Rep.), 1994 WL 385368. In that letter to Senators Packwood and Kasten, the Commission suggested that the Unfairness Policy Statement be codified:

> [I]t is appropriate and logical to include these three elements in a statutory definition of "unfairness." The codification of its acknowledged practices will not only aid the Commission but also **consumers and sellers** to understand the bounds of acceptable behavior without diminishing the ability of the Commission to police the marketplace.

Letter from FTC Chairman J.C. Miller, III (March 5, 1982), *reprinted in* H.R. REP. No. 156, Pt. 1, 98th Cong., 1st Sess. 27, 33 (1983) (Unfairness Policy Statement Supplement) (Appendix B) (emphasis added). Here "consumers" means the other half of transactions opposite "sellers," without suggesting the existence of any purchasers who are not consumers.

Third, in its use of its unfairness authority, especially since 1980, in both case-by-case enforcement and rulemaking, the Commission has sought to protect consumers or purchasers, whether they were businesses, non-profits, individuals, or other entities. This history was readily apparent when Congress codified the Commission's Unfairness Policy Statement.

With respect to enforcement, two actions stand out. In *Int'l Harvester Co.,* the Commission condemned as unfair International Harvester's failure to disclose "fuel geysering," a safety risk, to farmers who purchased tractors. 104 F.T.C. at 1064-67, 1984 FTC Lexis 2. Farmers typically buy tractors for commercial purposes. As support for its opinion, the Commission appended the Unfairness Policy Statement. 104 F.T.C. at 1070, 1984 FTC Lexis 2 at *305. If the Unfairness Policy Statement excluded businesses from those protected by the FTC's unfairness authority, it would have been senseless for the Commission to append that Policy Statement to this case.

In the other action, *Orkin Exterminating Co., Inc.*, 108 F.T.C. 263 (1986) *aff'd, FTC v. Orkin*, 849 F.2d 1354 (11th Cir. 1988), the Commission relied on its unfairness authority to attack a pest control firm's refusal to honor its guaranteed lifetime rate to its customers, who were

owners of homes "and other buildings." The Commission expressly ordered relief for "customers" and included "businesses" in its definition of "customer." 108 F.T.C. at 381, 1986 FTC LEXIS *3 at *92.

With respect to rulemaking, between 1980 and 1994 the Commission regularly enforced the FTC's Franchise Rule, 16 C.F.R. § 436, which not only protects businesses but is entirely about businesses. The Franchise Rule, promulgated in 1978 and amended in 2007, imposes disclosure requirements on franchisors and is specifically for the benefit of franchisees, *i.e.,* those offering, selling, or distributing goods, commodities or services. It also prohibits franchisors from failing to make refunds as promised, a provision specifically based on the FTC's unfairness authority. 16 C.F.R. § 436.9(i), *discussed in* 72 Fed. Reg. 15444, 15536 n.926 (Mar. 30, 2007) (citing Franchise Rule cases under this provision from 1984-2002).[12] A decision that the FTC has no authority to protect consumers outside the realm of personal, family or household "consumption," and no authority to protect consumers purchasing with a business purpose, would invalidate nearly 30 years of Franchise Rule enforcement.

Also between 1980 and 1994, the FTC amended the Mail or Telephone Order Merchandise Rule, 16 C.F.R. § 435, parts of which are designed to prevent unfairness. The Rule requires sellers to provide purchasers a right to cancel if the sellers are unable to ship goods within 30 days of the sale, unless some other shipment time was represented to the purchaser at the time of order. The Rule is not limited in coverage to any particular type of merchandise or buyer. In promulgating the Rule, the Commission "determined not to exempt business-to-business transactions from [the] coverage." 58 Fed. Reg. 49095, 49120-21 (Sept. 21, 1993) (Statement of

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[12] In addition, FTC franchise and business opportunity cases from 1995 to the present are summarized at http://www.ftc.gov/bcp/franchise/caselist.shtm. Franchise Rule cases filed before 1994 include *FTC v. Skaife*, 1990 U.S.Dist. LEXIS 19003 (S.D.Cal. July 25, 1990); *FTC v. Nat'l Bus. Consultants, Inc.*, 376 F.3d 317 (5th Cir. 2004)(referencing 1991 district court judgment in favor of FTC based on complaint filed in 1989); *FTC v. Am. Legal Distrib., Inc.*, No. 1:88-CV-519-MHS (N.D. Ga. 1988); *United States v. Tuff-Tire Am., Inc.*, Bus. Franchise Guide (CCH) [1985-1986 Transfer Binder] Para. 8353 (M.D. Fla. 1985). *See*, *e.g., FTC v. Hillary's Servs., Inc.*, No. 94-CV-2312 (E.D. Pa. 1994); *FTC v. Richard L. Levinger*, No. 94-0925-PHXRCB (D. Ariz. 1994); *FTC v. McKleans, Inc.*, Bus. Franchise Guide (CCH) Para. 9853 (D. Conn. 1989) (franchisors violated the Franchise Rule by, among other things, failing to provide promised refunds).

Basis and Purpose for the 1993 Amendment). Consistent with this intent, the FTC has enforced the Rule where victims of the violations were businesses.[13]

When Congress enacted § 5(n) in 1994, it approved of the Commission's activity during the preceding years when the Commission found unfairness in practices that harmed businesses, non-profits and other entities, both in rulemaking and case-by-case enforcement.

3. Since 1994

Since Congress codified the unfairness standard in 1994, the FTC has continued to interpret its unfairness authority to protect those who have purchased a good or service for business or nonprofit purposes.[14]

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[13] *See, e.g.,U.S. v. Staples, Inc.*, No. 03-10958 (D. Mass. filed May 22, 2003) (alleging Staples' sales to businesses were among its Rule violations).

[14] *See, e.g.*, *FTC v. Leasecomm Corp.*, No. 03-cv-11034 (D. Mass.filed May 29, 2003), Complaint for Injunctive and Other Equitable Relief ("PX 60"; Pleadings were provided to the court in the exhibits to the FTC Memorandum in Support of Motion for Preliminary Injunction, *i.e.,* Complaint for Injunctive and Other Equitable Relief ("PX 60") and Stipulated Final Judgment and Order ("PX 61") and Stipulated Final Judgment and Order (PX 61) (bogus "leases" used for future services, business opportunities, and investment schemes; suing the buyers in Massachusetts was also alleged unfair); *FTC v. Certified Merch. Servs.,* No. 4:02-cv-44 (E.D. Tex. stipulated final judgment entered Dec. 30, 2002)(http://www.ftc.gov/os/2002/02/cmscmplnt.pdf) (unfair debiting of merchant accounts without authorization and unilateral modification of contracts); *FTC v. Epixtar,* No. 03-CV-8511 (S.D.N.Y. Complaint filed Nov. 3, 2003; stipulated final judgment entered Nov. 21, 2006) (http://www.ftc.gov/os/caselist/0323124/031103comp0323124.pdf)(small businesses injured when phone accounts billed without prior consent); Complaint, *FTC v. Interactive Audiotext Servs., Inc.*, No. CV-03049-CBM-BQR (C.D.Cal. filed April 22, 1998) (http://www.ftc.gov/os/1998/04/abc.htm) (defendants billed and attempted to collect from consumers that called defendants' purportedly toll-free numbers to access and purchase audiotext services); Complaint, *FTC v. RJB Telcom, Inc.,* No. CV-02017-SRB (D.Ariz. filed Oct. 25, 2000) (http://www.ftc.gov/os/2000/10/rjbtelcomcomplaint.htm) (aggrieved parties include "individual[s] or entit[ies]" who have made certain arrangements for local telephone service); Complaint, *FTC v. Anderson,* No. CV - 01843 - MJP (W.D.Wash. filed Oct. 27, 2000) (http://www.ftc.gov/os/2000/10/tyandersoncomplaint.pdf) (same); *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 65 (2nd Cir. 2006) (another cramming case, victims again not limited to residential phone subscribers); Complaint, *FTC v. Merchant Processing,* CV-00533-BR (D.Or. filed Apr. 10, 2007) (http://www.ftc.gov/os/caselist/0523162/070411merchantprocess-cmplt.pdf) (small businesses and non-profits harmed in part by unilateral modification of contracts, an unfair practice under *Orkin, supra*); *FTC v. Websource Media,* H-06-1980 (S.D. Tex. Complaint filed June 12, 2006; Amended Complaint filed June 21, 2006) (http://www.ftc.gov/os/caselist/websource/060907ammendedcomplaintforinjunctive.pdf)(small businesses and non-profits injured by phone account billing without express informed consent).

In its rulemaking, as well, the FTC has continued to use unfairness authority to protect businesses. Most recently, the Telephone Sales Rule ("TSR") applies to telemarketers' calls to businesses when made "to induce the retail sale of nondurable office or cleaning supplies." 16 C.F.R. § 310.6(b)(7)(2007). Promulgated in 2003, the TSR contains provisions designed to prevent and remedy both deception, 16 C.F.R. § 310.3, and unfairness, 16 C.F.R. §310.4. *See also U.S. v. Staples, Inc.*, No. 03-10958 (D. Mass. filed May 22, 2003) (alleging Staples violated the Rule in sales "to consumers and businesses").

C. IFC's Authorities Fail to Support its Argument that the FTC May Not Protect Businesses or Non-Profit Organizations

IFC makes much of the instances where the Commission has chosen to define "consumer" more narrowly than it could have, *i.e.,* the Holder Rule, 16 C.F.R. § 433.1(b), and the Credit Practices Rule, 16 C.F.R. § 444.1(d). Motion to Dismiss at 10-12. Those definitions were, however, policy choices for specific situations. If "consumer" was generally restricted to "personal, family and household use," the position advocated by IFC, the definitions in the Holder and Credit Practices Rules would be unnecessary. The rules cited by IFC simply represent instances where the Commission expressly chose a narrower application of its authority.

IFC also claims that *American Financial Servs.* supports its argument that "'consumer' is intended to apply only to individual purchasers of goods for non-business purposes." Motion to Dismiss at 12. That is simply nonsense. *American Financial Services* upholds the Commission's authority to promulgate the Credit Practices Rule, 16 C.F.R. § 444, 767 F.2d at 957. While that rule expressly applies only to obligations received from a "natural person who seeks or acquires goods, services, or money for personal, family, or household use," 16 C.F.R §§ 444.1(d), 444.2(a), 444.3(a), 444.4(a), nothing in the rule or the court's decision says the Commission was required to impose that limitation. 767 F.2d at 972-83. *American Financial Services* actually endorses the view that courts must give deference to the FTC's interpretation of the FTC Act. *Id.* at 972. Moreover, the Commission adopted the Credit Practices Rule in 1984, 767 F.2d at 963, the same year it used its unfairness authority to protect businesses in *International Harvester*. Just as Congress routinely passes regulatory laws that exempt entities it could constitutionally cover, the FTC may choose in some matters to exercise its authority more narrowly than it can. The FTC's

failure to use its full unfairness authority in every case or rulemaking does nothing to diminish that authority.

V. IFC'S STATE LAW ARGUMENTS ARE INCORRECT AND IRRELEVANT

IFC argues as a matter of law that the FTC Act cannot apply where an unambiguous written contract exists and might be enforced by a court in private litigation. IFC provides no legal support for this novel, and clearly incorrect, argument. Whether contracts are enforceable in private actions does not affect the analysis under the FTC Act. As the Seventh Circuit stated in upholding the FTC's challenge of a distant venue contract provision:

> [T]he Commission may find a practice to be unfair within the meaning of Section 5 even though the same practice has repeatedly withstood attack in the courts.[15]

For this reason alone, IFC's argument must fail. Ignoring this, IFC simply argues what it might in a private contract action where no state or federal consumer protection issues were raised. In doing so, IFC posits facts favorable to its position and avoids even acknowledging the directly contradictory facts in the FTC complaint. The facts set forth in the FTC's Complaint, the only facts that can be considered in this motion, support a finding that these contracts should not be enforced in private actions either.[16] Thus IFC's argument fails on the facts as well as the law.

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[15] *Spiegel.*, 540 F.2d at 294-95 (a case coincidentally relevant against IFC because it challenged the use of distant forum to collect debts from consumers and small businesses).

[16] In private litigation, finance companies (including IFC) have won some and lost some. In the only reported appellate decision on the merits, the Michigan Court of Appeals upheld a trial court decision that the NorVergence Rental Agreements were "part and parcel of the agreement for a total communications package." It concluded: "Thus, the [assigned Rental Agreements], which are not agreements separate from the total telecommunications package, are voidable . . . . " *Custom Data Solutions, Inc. v. Preferred Capital, Inc.,* 274 Mich.App. 239, 244, 733 N.W.2d 102 (2006).

In a Texas case, after a full trial between IFC and a consumer, the court held:

> 21. The lease is not a finance lease. The original lessor was NorVergence, which selected the equipment. The purpose of the Lease was not to finance the acquisition of the Box but to obtain telephone savings.
> 22. IFC does not qualify as a holder in due course. It was aware of NorVergence's fraud at the time it purchased the Lease. In addition, it participated in its own fraud on SOS in connection with the lease. . . .
> 23. The entire Lease and the delivery and acceptance certificate are unconscionable due to the circumstances under which they were entered, the manner in which the terms of the Lease and delivery and acceptance were reached, and the unfairness of the Lease and delivery and acceptance. IFC grossly over-charged for the Box.

Facts throughout the FTC complaint show: the intent and understanding of the original parties (NorVergence and the consumers) was to provide services; those services would be financed principally through the Rental Agreement; and IFC knew this before it purchased even the first contract from NorVergence.[17] ¶¶ 8-9, 21, 31-34.

IFC contends that the contracts are "unambiguous" in showing that the parties intended Article 2A of the UCC to apply to the rental agreements. That is wishful thinking, literally: IFC wishes it had used its normal lease forms. As stated in the FTC complaint: "IFC's typical equipment leases contain language stating an unequivocal intent to be governed by [Art. 2A]." ¶ 35. However, here, the Rental Agreements "did not state an unequivocal intent to be covered by UCC Art. 2A." ¶ 36.[18] Their exact language, not provided in IFC's Motion, is "Article 2A statement: You agree that **if** Article 2A of the Uniform Commercial Code is deemed to apply to

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> . . .
> 25. The Lease fails for lack of consideration. . . .
> 26. IFC ratified and participated in the fraud of NorVergence.
> . . .
> 30. SOS signed the delivery and acceptance certificate before it had any opportunity to inspect the working order of the Box.
> . . .
> 34. IFC did not act in good faith in connection with the Lease. IFC ratified the conduct of NorVergence. . . ..

Specialty Optical v. IFC Credit Corp., No. CC-04-09187-C (Tex. Dallas County Ct. at Law No.3) (findings of fact and conclusions of law entered June 5, 2006)(PX 58 to Plaintiff's Motion for Preliminary Injunction). This decision is not final because IFC appealed, but it is nonetheless indicative of the range of defenses available under state law.

Under the FTC Act and state consumer protection statutes, the FTC and many states have also challenged the unlawful use of leases with unambiguous Article 2A statements, where the predominant purpose was to finance intangibles, as it is here. *E.g., FTC v. Leasecomm Corp*., No. 03-cv-11034 (D. Mass.) (filed May 29, 2003). PX 60 to FTC's Motion for Preliminary Injunction.

[17] IFC does not dispute that Article 2A does not apply to the financing of services.

[18] A further reason the Rental Agreements cannot be "finance leases" as defined in Article 2A is that § 2A-103(1)(g) requires that "the lessor [rentor] does not select, manufacture, or supply the goods." "Here, the original "rentor," NorVergence, selected and supplied the Matrix box, as well as the telecommunications services." ¶ 36. As noted by the Michigan appellate court in *Custom Data Solutions*, 274 Mich.App. at 244, as NorVergence's assignee, the finance company "stood in the shoes of Norvergence vis a vis the [NorVergence Rental Agreements]."

this rental, this rental will be considered a finance lease thereunder." ¶ 36.

IFC's reliance on the parol evidence rule as legal authority for disregarding the actual intent of the parties is misplaced. IFC's argument must fail first because there is no authority for applying the parol evidence rule to the FTC Act. Further, it would make no sense to apply that rule to immunize demonstrable (and, for purposes of the motion to dismiss, incontrovertible) fraud or deception in the signing of the contract, and the cases cited by IFC do not suggest otherwise.

The argument that consumers reasonably could have avoided the injury here falls flat as well. It should be obvious from the complexity of the Article 2A arguments presented here that no consumer when buying phone services could have understood that Article 2A would force them to pay even if they never received any services. Moreover, "IFC was in a much better position than consumers to understand that the ambiguous UCC Art. 2A paragraph could not render the Rental Agreement an Article 2A finance lease. It was also in a much better position to understand that other ambiguities or false statements in the Rental Agreement could give rise to consumers' defenses against IFC." ¶ 47.

VI. IFC'S CLAIM THAT COUNT I (DECEPTION) FAILS AS A MATTER OF LAW IS BASELESS

Count I of the Complaint alleges that IFC made deceptive statements to consumers in violation of Section 5 of the FTC Act. An act or practice is "deceptive" under Section 5 if there is a representation, omission, or practice that is likely to mislead consumers acting reasonably under the circumstances and if that representation, omission, or practice is material to the consumer's payment decision. *FTC v. Bay Area Bus. Council, Inc.*, 423 F.3d 627, 634-35 (7th Cir. 2005); *Kraft, Inc. v. FTC,* 970 F.2d 311, 314 (7th Cir. 1992); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988). Reasonable consumers are not required to doubt the veracity of express representations, and the Court may presume express claims to be material. *Kraft*, 970 F.2d at 322; *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994). Implied claims are presumed material when there is evidence that the seller intended to make the claim, *Kraft*, 970 F.2d at 322, or the claims go to the heart of the solicitation or the characteristics of the product or service offered. *Southwest Sunsites, Inc.*, 105 F.T.C. 7, 149, 1980 FTC Lexis 86, *328 (1985),

aff'd, 785 F.2d 1431 (9th Cir. 1986).

To coerce payment from its victims and discourage them from mounting a defense to its collection actions, IFC has misrepresented to the consumers that they have no defenses or counterclaims. (Complaint Count I, ¶¶ 61.a, 62.a) IFC's claims are false. Consumers have numerous defenses and counterclaims, arising both from the NorVergence fraud and from IFC's own misdeeds. ¶¶ 49, 43-54. These express claims are presumed material, *Pantron I* , 33 F.3d at 1095, and consumers who have paid anything to IFC have been injured by the entire amount paid.[19] IFC's deceptions are particularly injurious in conjunction with its threat to sue in an inconvenient, more costly distant forum. Similarly, in an effort to coerce payment, IFC has falsely claimed that the consumers defrauded IFC into paying NorVergence for the Rental Agreements. (Complaint Count I, ¶¶ 48-54) As an express claim, it is presumed material to consumers' decisions regarding payment.

A. Misrepresenting a Legal Position Can Be a Deceptive Practice.

IFC argues, as a matter of law, that misrepresenting a legal position is not a deceptive practice. However, the cases IFC cites interpret the Illinois Consumer Fraud and Deceptive Business Practices Act, not the FTC Act. These cases interpret the Illinois Act by applying the Illinois common law definition of "misrepresentation of fact." They do not consider "deceptive practices" under the FTC Act. *Randazzo v. Harris Bank Palatine, N.A.,* 262 F.3d 633, 671 (7th Cir. 2001) (citing *Notaro Homes, Inc. v. Chicago Title Ins. Co.*, 309 Ill. App. 3d 246, 249 , 722 N.E.2d 208 (1999) (citing *Randels v. Best Real Estate, Inc.*, 243 Ill. App. 3d 801, 805, 612 N.E.2d 984 (1993)).

Under Section 5 of the FTC Act, a misrepresentation is "an express or implied statement contrary to fact." FTC Deception Policy Statement (1983), *appended to Cliffdale Assocs., Inc.,* 103 F.T.C. at 174, 175 n.4 (1984) (Deception Statement). In determining deception, "the Commission will examine the overall impression created by a practice, claim, or representation." *Id.*

Deceptive practices under Section 5 of the FTC Act include misrepresenting legal rights to

[19] As noted in the complaint, a small percentage of customers may have received services for a very limited period. ¶ 10. Their injury is accordingly reduced.

consumers. *FTC v. Verity Int'l, Ltd.*, 335 F.Supp.2d 479, 497 (S.D.N.Y. 2004), *aff'd in part, remanded on other grounds*, 443 F.3d 48 (2d Cir. 2006) (upholding deception count but remanding on calculation of damages).[20] In *Verity*, the district court found that the defendants violated Section 5 of the FTC Act because they falsely "represented to consumers that they were legally obligated to pay for the Internet services provided by defendants' clients." 335 F.Supp.2d at 497. In another statute enforced by the Commission, the Fair Debt Collection Practices Act, Congress made it a deceptive act for a debt collector to "misrepresent[] the character, amount, or legal status of any debt . . . ." 15 U.S.C. § 1692l.

Congress and the FTC intended the terms "deceptive practice" and "misrepresentation" to be applied broadly to include misrepresentations of legal opinions, status, or rights. In this case, the FTC alleges deception under the FTC Act, not the Illinois Act. In addition, "there is nothing that constrains [the FTC] to follow judicial interpretations of state statutes in construing the agency's section 5 authority." *Orkin Exterminating Co., Inc.* , 849 F.2d at 1363. Therefore, whether misrepresenting consumers' legal rights qualifies as a deceptive act under Illinois state law is irrelevant.

B. IFC's Assertion That Consumers Are Unconditionally Obligated to Make Payments on the Rental Agreements Is a Misrepresentation

IFC makes absolute claims (not mere statements of opinion) when it tells consumers that they are unconditionally obligated to pay on the agreements and can raise no defenses or counterclaims. IFC argues that this is not a deceptive practice because it is always and certainly true. IFC is wrong. The rental agreements are not enforceable under the provisions of Article 2A of the UCC because NorVergence selected and supplied the equipment, *see, e.g.*, 810 Ill. Comp. Stat. 5/2A-103(g)(i) (Lexis 2007), and because the agreements are for services and are not finance leases. Further, the leases are not unconditionally enforceable under the "hell or high water" and waiver of defense clauses, as explained below. Therefore, IFC's practice of telling consumers that they are unconditionally obligated to pay on the worthless agreements is a false, misleading, and

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[20] *FTC v. Datacom Mktg. Inc.*, No. 06 C 2574, 2006 U.S. Dist. LEXIS 33029, *13 (N.D. Ill., May 24, 2006) (in preliminary injunction order, FTC likely to prevail on claim that falsely "threatening potential legal action against consumers who challenged the defendant's claim for money" was deceptive).

deceptive practice under the FTC Act.

"Hell or high water" clauses are not unconditionally enforceable. Such clauses are only enforceable in the absence of fraud and deceit. *Colorado Interstate Corp. v. CIT Group/Equip. Fin., Inc.*, 993 F.2d 743 (10th Cir. 1993) ("In the absence of fraud or deceit, which is not claimed here, it is our view that under Texas law the parties should be held to their agreement"). An Illinois state court concluded, in denying IFC's motion to dismiss, that a claim of fraud or deceit that makes the NorVergence Rental Agreements invalid would defeat the "hell or high water" clause. *Rosenblum's World of Judaica, Inc. v. IFC Credit Corp., Inc.,* Memorandum Opinion and Order, No. 04 CH 18187, Slip op. at 12 (Ill. Cook Cty. Cir. Ct. Chancery Div. Dec. 28, 2005) (Appendix C). The FTC alleges facts of fraud and deceit that would support a consumer's argument that the agreements are invalid and unenforceable. *See generally* ¶¶ 21-47.

Waiver of defense clauses are even more easily challenged than hell or high water clauses. In this case, the facts alleged in the FTC complaint make it apparent that IFC did not take the assignment in good faith and that it had notice of consumer defenses, thus defeating holder in due course status so that IFC cannot rely on the waiver clause.[21]

Throughout its complaint, the FTC alleges that IFC had notice of consumer defenses and did not take the contracts in good faith. For example:

> The likelihood of deception by NorVergence was apparent not only from the Agreements themselves, but also from materials describing NorVergence's sales pitch to consumers, from widely varying contract prices, and from continuing consumer complaints. Finally, if IFC had analyzed the value of the Matrix box as required by provisions of the Rental Agreements and applicable laws, the likely deception of consumers would also have been apparent.

¶ 31. In addition, IFC continued to purchase more contracts from NorVergence, even as it became increasingly apparent that the contracts were worthless:

> Instead of exercising its remedies against NorVergence under the Master Program Agreement, however, IFC chose not only to keep the Rental Agreements and seek its remedies against the consumer victims, but also to purchase additional NorVergence Rental Agreements. Despite receiving ever-increasing reports of

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[21] *See, e.g.*, 810 Ill.Comp.Stat. 5/9-403, Comment 3 (Lexis 2007) (principles applicable to holders in due course of negotiable instruments also apply to holders in due course of debt assignments).

> NorVergence's failures to provide promised services to consumers, IFC maintained its close relationship with NorVergence up to the date of NorVergence's bankruptcy filing.

¶ 24.[22]

Finally, IFC has completely ignored the second part of Count I. This describes IFC's misrepresentation to consumers that they have to pay IFC because the consumers victimized IFC by committing fraud in the inducement and misrepresentation. *See* ¶¶ 48-54. This count relates exclusively to IFC's own post-sale practices, not anything NorVergence did. Even if a waiver of defenses clause were enforceable, it would only protect the assignee against defenses that could have been asserted against the assignor. It would not immunize the assignee from defenses against its own, post-assignment misconduct.

Consumers clearly can assert defenses that allow them to discontinue paying on the worthless contracts. In the only reported appellate decision on the merits, the NorVergence Rental Agreements were held to be "part and parcel of the agreement for a total communications package." The court concluded: "Thus, the [assigned Rental Agreements], which are not agreements separate from the total telecommunications package, are voidable . . . . " *Custom Data Solutions, Inc. v. Preferred Capital, Inc.,* 274 Mich.App. 239, 244, 733 N.W.2d 102 (2006).[23]

It follows that representing to customers that the agreements are unconditionally enforceable is a deceptive practice under Section 5 of the FTC Act. Consumers had a legal right under the contracts to assert defenses--including that IFC was not a holder in due course, that the

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[22] Cases cited by IFC in support of granting holder status do not show consideration of all these facts. Indeed , cases cited by IFC that involve other finance companies, *e.g.*, *Liberty Bank, F.S.B. v. Diamond Paint and Supply, Inc.*, No. 05-1892, 2006 WL 2691719 (Iowa App. Sept. 21, 2006), might show a completely different set of facts regarding the closeness of the finance company's connection to NorVergence and its knowledge of underlying fraud or deception.

[23] In a recent case in this district, IFC lost on the enforceability of the NorVergence Rental Agreement. Judge Guzman found that the Rental Agreement was not an integrated contract as a matter of law and "Thus, the parole evidence rule and the merger clause are not applicable." *IFC Credit Corp., v. Burton Indus., Inc.,* No. 04 C 5906, 2007 U.S. Dist. LEXIS 46580, *11 (N.D. Ill. June 25, 2007). (summary judgment holding that Burton's only obligation was to return the Matrix box to IFC). This court ruled in the consumer's favor even without considering any state or federal consumer protection act issues.

waiver of defense clause was not enforceable, that defenses against NorVergence were also defenses against IFC, and that NorVergence committed fraud *in factum*.

C. IFC Misled Consumers Acting Reasonably under the Circumstances

Next, IFC contends that the deception count fails as matter of law because the consumers described in the FTC complaint did not act reasonably under the circumstances and were not misled. This assertion is without merit.

IFC would like this Court to believe that the consumers here were not acting reasonably under the circumstances because they should have read and understood the rental agreements and sought legal counsel, instead of relying on IFC's representations. First, by asserting that the consumer group was sophisticated and thus should be held to a high standard of reasonableness, IFC again assumes facts at odds with the FTC's allegations. Consumers that purchased services from NorVergence were generally small businesses, religious and other non-profit organizations, and individuals who personally guaranteed the obligations of these organizations. ¶ 8.[24]

Second, IFC's analysis of the reasonable consumer element of deception under the FTC Act is wrong. As stated previously, reasonable consumers are not required to doubt the veracity of express representations, and the Court may presume express claims to be material. *Kraft*, 970 F.2d at 322; *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994). Furthermore, consumers' reliance on express claims is presumptively reasonable. *FTC v. World Media Brokers, Inc.*, 2004 U.S. District LEXIS 3227, at *24-25. "When representations or sales practices are targeted to a specific audience, the Commission determines the effect of the practice on a reasonable member of that group . . ." and the reasonableness of the group is "judged in the light of the knowledge and sophistication of **that group**." FTC Deception Statement (1983), *appended to Cliffdale Assocs., Inc.,* 103 F.T.C. 110 at 177-178; ¶ 8. [25]

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[24] IFC's argument that few consumers have actually adopted IFC's legal assertions, again ignores the facts alleged in the complaint, overlooking the substantial number of consumers who to this day continue to pay thousands of dollars a year to IFC for nothing, all based on IFC's misrepresentations to them. "Paying for up to five years of unreceived phone services places a severe financial burden on many consumers, all of whom also have to pay for actual phone services to maintain their businesses or organizations." ¶ 24.

[25] IFC inappropriately refers to cases that evaluate a single business, rather than the targeted group as a whole, e.g., *IFC Credit Corp. v. Aliano Bros.,* 437 F.3d 606, 610-611 (7th Cir. 2006). Under

As alleged in the complaint, many consumers, acting reasonably under the circumstances, have suffered and continue to suffer substantial injury as a result of IFC's false representations as alleged in Count I.

D. Count I (Deception) Is Not an Improper Attack on Illinois Public Policy Regarding Commercial Law

IFC claims the deception count thwarts Illinois public policy because, it says, the UCC provisions adopted by Illinois and other states make the agreements unconditionally enforceable. First, as discussed above, the UCC provisions do not make the agreements unconditionally enforceable. Second, preventing fraud under the FTC Act is not an attack on any state's public policy.

The FTC does not accept that Illinois law is the correct law to apply to contracts executed between a seller in New Jersey (NorVergence) and buyers in located the various 50 states. But even assuming *arguendo* that Illinois law applied, IFC has ignored the fact that Illinois has a consumer protection act similar to the FTC Act. That law also evidences Illinois public policy. In applying it to the facts of the NorVergence rental agreements, the Illinois Attorney General alleged numerous violations of the Illinois Consumer Act against NorVergence.[26] *People v. Norvergence, Inc.*, No. 2004-CH-655 (Ill. Sangamon County Cir. Ct. 7th Jud. Cir. May 6, 2005)

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the FTC Act, reasonableness is not determined by the characteristics of a single, and perhaps unique, consumer within the targeted group.

IFC also cites *Allen Neurosurogical Associates, Inc. v. Lehigh Valley Health Network,* 2001 WL 41143, *5 (E.D. Penn. 2001), where neurosurgeons fought with a large hospital system over misrepresentation of corporate bylaws. The court found that a reasonable individual would seek legal advice regarding interpretations of corporate bylaws. IFC victims are not generally neurosurgeons, and interpreting corporate bylaws is not the same as trying to purchase phone services at a decent price. Small businesses, religious and non-profit organizations, and individuals do not reasonably seek legal advice every time they purchase goods or services.

[26] Three other states have sued IFC under their own consumer protection statutes, raising issues similar to those raised by the FTC here. These include Florida, http://www.myfloridalegal.com/NorVergenceComplaint.pdf , *see* Florida v. Commerce Commercial Leasing, 946 So.2d 1253 (Fla.Dist.Ct.App. 2007); Missouri (filed June 6, 2007) http://www.ago.mo.gov/newsreleases/2007/060707.htm (link to press release) (Complaint - Appendix E); and Texas v. IFC Credit Corp., No. 2007-34280 (Tex. Harris County Ct. filed June 6, 2007) (http://www.oag.state.tx.us/newspubs/releases/2007/060507ifc_pop.pdf).

(default judgment holding the NorVergence contracts void ab initio).[27] While this judgment may not be *res judicata* against IFC, it is certainly much better evidence of Illinois public policy regarding NorVergence rental agreements than IFC's interpretation of general contract law principles.

Directly relevant Illinois public policy is also evidenced in a case against another finance company whose contracts financed business intangibles but were disguised as Article 2A equipment leases. *People of the State of Illinois v. Leasecomm Corporation*, No. 03CH09154 (Circuit Court of Cook County) (complaint, final judgment, and consent decree filed May 29, 2003) (Complaint - Appendix D). The charges under the state consumer fraud statute were almost identical to those against IFC here, including that the contracts did not state what was actually being financed, that Leasecomm misrepresented that customers were precluded from raising any defenses, and that Leasecomm unfairly sued Illinois customers in a distant forum, all in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.*[28]

VII. IFC'S CLAIM THAT COUNT II (UNFAIRNESS IN ACQUIRING AND COLLECTING ON NORVERGENCE CONTRACTS) FAILS AS A MATTER OF LAW IS BASELESS

Count II alleges that IFC's practice of acquiring and collecting on the NorVergence Rental Agreements is unfair and violates FTC Act Section 5(a). 15 U.S.C. § 45(a). An act or practice is "unfair" if it causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. 15 U.S.C. § 45(n); FTC Policy Statement on Unfairness (1980), 104 F.T.C. at 1070 (1984), 1984 FTC Lexis 2, *305). Injury is sufficiently substantial under the first prong of

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[27] ¶ 16 of the Default Judgment reads: "All Equipment Rental Agreements or other contracts procured between NORVERGENCE and Illinois consumers or between finance companies and Illinois consumers as a result of a NORVERGENCE solicitation directed to an Illinois consumer are the result of deceptive and unfair practices and fraud on the part of NORVERGENCE and, therefore, are declared void *ab initio* and are unenforceable." PX 56 to FTC's Motion for Preliminary Injunction.

[28] Regarding Article 2A, the complaint charged: "LEASECOMM makes the finance contract look like an equipment lease, because Uniform Commercial Code Article 2A ("UCC Art. 2A) equipment lease provisions are significantly more favorable to lessors than the provisions relating to non-lease finance contracts. Finance contracts for business opportunities and other general intangible items do not qualify as UCC Art. 2A leases."

this standard if it causes a small harm to a large class of people, *FTC v. Windward Marketing, Ltd.,* No. 1:96-CV-615-FMH, 1997 U.S. Dist. LEXIS 17114 at *31-32 (N.D. Ga. Sept. 30, 1997), or a severe harm to a limited number of people, *International Harvester*, 104 F.T.C. at 1064, 1984 FTC Lexis 2, *255. The second prong focuses on whether the consumers had a free and informed choice that would have enabled them to avoid the unfair practice. *FTC v. J.K. Publ'ns., Inc.*, 99 F. Supp. 2d 1176, 1201 (C.D. Cal. 2000). Finally, the third prong is satisfied when the adverse consequences for consumers are not outweighed by an increase in services or benefits to consumers or competition. *Windward Mktg., Ltd.,* 1997 U.S. Dist. LEXIS 17114 at *32 (citing *Orkin Exterminating Co., Inc. v. FTC,* 849 F.2d at 1365).

IFC argues, as a matter of law, that the FTC failed to state an unfairness claim under Count II of the complaint because (1) consumers were not substantially injured; (2) consumers could have reasonably avoided the injury; and (3) equipment leasing provides a benefit to consumers and the economy. These are all factual arguments and are contrary to the allegations in the Complaint.

First, from the beginning, IFC knew or should have known that the NorVergence rental agreements falsely described their purpose, which was telecommunications services, not just the Matrix box. ¶¶ 9, 21, 23-24, 31-42. IFC's practice of acquiring and collecting on these Rental Agreements has caused substantial injury to consumers. Consumers received little or nothing that was promised, and have spent thousands of dollars in payments to IFC on the bogus Rental Agreements and to attorneys to fight IFC's relentless collection efforts. Consumers also have spent countless hours dealing with and defending against IFC. ¶¶ 10, 24, 29-30, 52, 55-57. Stated most simply, IFC financed fraud when it purchased the Rental Agreements that on their face misstate what IFC knew was actually being financed, services. For IFC to continue to purchase the Rental Agreements under these circumstances and then collect on them when they are worthless is unfair.

Second, the injury was not reasonably avoidable by consumers themselves. There was no way consumers could have known how shaky NorVergence's finances were or that the promise that services would continue even if NorVergence went out of business was unreliable. When they entered into the deal with NorVergence, consumers were presented with numerous

documents to sign. Most were labeled "non-binding." ¶¶ 16-17. They were told they would realize significant savings over the five-year period. ¶¶ 12-13, 32-33. Not being experts themselves, they were entitled to rely on the express representations of salespersons. *World Media Brokers,* 2004 U.S. District LEXIS 3227, at *24; *World Travel*, 861 F.2d at 1029. Under these circumstances, consumers had no reason to expect a finance company they had not dealt with would enforce the Rental Agreements when services were not being provided, and had no reasonable way to prevent it.[29]

Third, no legitimate countervailing benefit to consumers or competition outweighed the injury to consumers here. Small businesses and non-profits benefit from *legitimate* equipment lease financing, but there is no benefit to either consumers or competition when the finance company, at the outset, knows or should know that the leases are grounded in fraud or falsely describe their purpose. Allowing IFC to collect on bogus leases only benefits IFC. It causes substantial harm to consumers and harms competitors who play by the rules. IFC's acceptance of and collection on the Rental Agreements thus constitutes an unfair practice under the FTC Act. 15 U.S.C. § 45(n).

VIII. IFC'S CLAIM THAT COUNT III (UNFAIRNESS IN SUING CONSUMERS IN A DISTANT FORUM) FAILS AS A MATTER OF LAW IS BASELESS

Count III under the FTC Complaint claims that IFC's practice of using distant forum lawsuits is unfair and violates the FTC Act.

A. Long Established Case Law Holds Distant Forum Suits to Collect Alleged Debts to Be Unfair under the FTC Act

The unfairness of distant forum collection suits under the FTC Act is well established. The Commission brought numerous actions challenging this practice in the 1970s. In the only litigated case, *FTC v. Spiegel, Inc.*, the Seventh Circuit unambiguously upheld the FTC's authority under

[29] The only party who could reasonably have avoided injury was IFC, not the consumer victims. IFC had a recourse agreement with NorVergence and could have returned these contracts to NorVergence as soon as consumers missed their first payment, or when IFC found that NorVergence was secretly making those first payments for the consumers. Instead, the worse the problems became, the more contracts IFC bought. ¶¶ 22, 24, 26.

Section 5 of the FTC Act to prohibit use of distant forums.[30] 540 F.2d 287. The underlying Commission decision applied the principle both to suits against individual consumers and suits against small businesses.[31] No case under the FTC Act has ever overruled or controverted *Spiegel*.

The *Spiege*l decision was cited as a positive example of the FTC's use of its unfairness authority in the Unfairness Policy Statement, 104 F.T.C. at 1075 n.28. Its holding that distant forum was unfair was also codified as applied to "debt collectors" in the Fair Debt Collection Practices Act. Under this Act, debt collectors are not allowed to sue individual consumers in a forum other than one permitted under *Spiegel.* 15 USC 1692i. A violation of this statute is deemed an unfair or deceptive practice in violation of the FTC Act. 15 USC 1692l. Congress left it to the FTC to decide when to apply the *Spiegel* doctrine to violators other than "debt collectors."

Although the standard for an unfairness violation, 15 U.S.C. § 45(n) (1994), was codified after *Spiegel,* the § 5(n) emphasis on injury is clearly met here by the complaint allegations regarding substantial injury. Indeed, the instant case presents a far stronger consumer injury case than *Spiegel* and most other, settled distant forum cases.[32] In none of the settled cases except *Leasecomm,* which involved substantial injury resulting from bogus "equipment" leasing,[33] did the FTC allege, as it does here, that consumers had defenses to the suits or that the defendant was otherwise systematically violating the FTC Act with deceptive or unfair practices related to the underlying transaction. Many consumers in those cases presumably could not afford to pay and

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[30] The Commission's rationale included the costs of defending in a distant forum. 540 F.2d at 293.

[31] As stated in the Initial Decision adopted by the full Commission, "A customer of a mail-order house, be it an individual *or a small company* engaged in a one-state operation, is also more likely to be unprepared to defend itself in a foreign forum than is a company which transacts a substantial amount of interstate business." *Spiegel, Inc.,* 86 F.T.C. 425, 439, 1975 FTC Lexis 107, *14-15 (1975) (citation omitted) (emphasis added); *aff'd with minor changes not related to the quoted text*, *FTC v. Spiegel, Inc.*, 540 F.2d at 287.

[32] *E.g., West Coast Credit Corp.*, 84 FTC 1328, 1329, 1974 FTC Lexis 29, *3 (1974) ; *J.C. Penney Co.*, No. 852 3029, 109 F.T.C. 54, 1986 WL 722090 (1987) (PX 59 to FTC's Motion for Preliminary Injunction).

[33] *FTC v. Leasecomm Corp.*, No. 03-cv-11034 (D. Mass.) (filed May 29, 2003), discussed *supra.*

might have defaulted wherever the suit was filed. Here, by contrast, the FTC has alleged that IFC consumers have defenses and have been injured.

The FTC does not rely on the fact that IFC uses a "floating forum" clause, where the consumers could not possibly know where they would be sued, although this type of clause has been ruled unenforceable by a number of state courts.[34] The injury comes from IFC's decision to invoke the provision, whether by suing in Illinois, in New Jersey, or in any other jurisdiction distant from the consumer.

B. Court Decisions In Private Litigation Do Not Preempt Or Overrule *Spiegel*

Yet again, IFC contends that winning some private litigation prevents application of the FTC Act. The Seventh Circuit anticipated and rejected this argument when it decided *Spiegel*:

> [T]he Commission may find [the distant forum] practice to be unfair within the meaning of Section 5 even though the same practice has repeatedly withstood attack in the courts.

Spiegel, 540 F.2d at 294-95 (footnote omitted).

The recent decision in *IFC v. Aliano Bros.* is not to the contrary. In *Aliano*, the Seventh Circuit held that the floating venue provision in the NorVergence Rental Agreement was valid to confer personal jurisdiction in a diversity action unless Aliano could demonstrate it was "procured by fraud" or otherwise invalid. *Aliano Bros.*, 437 F.3d at 613. Here, the FTC has clearly alleged that consumers were deceived into signing a complex array of contracts they could not understand. Whether facts including substantial harm to many consumers, that are sufficient to show unfairness or deception under the FTC Act, would also satisfy the *Aliano* court in private litigation is simply irrelevant. It is also unknowable because the *Aliano* court did not confront an FTC Act claim.

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[34] The FTC does not challenge forum selection clauses in general. What it challenges is the IFC choice to sue 500 consumers in a distant forum despite its knowledge of NorVergence's practices and that every rental agreement was worthless.

Similarly, the other cases cited by IFC do not change the result here.[35] The ability of the FTC to go beyond a technical reading and application of contract language to look at the true nature of the transaction is fundamental to enforcement of the FTC Act.

C. The Factual Allegations Support a Finding of Unfairness Here

IFC's first argument, that consumers were not substantially injured, presents an issue of fact, not law. Its speculation that suits would turn out the same in a home state forum presents an issue of fact, and this fact is irrelevant. The FTC alleges that consumers were substantially injured when sued in a distant forum. "Some consumers have challenged the jurisdiction or venue of the distant forum, with varying results. In every case, however, even a successful challenge in the distant forum adds substantially to the consumers' costs." ¶ 55. The injury was exacerbated when IFC used multiple distant jurisdictions to bring legal actions against the same consumer. ¶ 56. This charge would be the same if the venue provision of the rental agreement had specified Illinois or if IFC had sued the consumers in New Jersey. The unfairness occurs when IFC chooses to enforce worthless or fraudulent contracts in a distant forum, regardless of whether the boilerplate contains a venue waiver provision.

Similar to its Count II argument, IFC asserts that consumers could have reasonably avoided the injury, another factual issue. The analysis is the same as for Count II. In addition, IFC's decision to sue in Illinois was beyond the consumer's control or ability to negotiate. A consumer's only alternative would have been to hire a lawyer to seek an expensive change of forum.

Finally, the substantial injury IFC causes consumers cannot be outweighed by benefits to consumers or competition. Clearly there is no benefit to consumers. Finance companies such as IFC may save some costs by centralizing their litigation in a single forum, but this benefit is marginal in comparison to the consumer harm, particularly where a large group of consumers with

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[35] See, e.g.,*Carnival Cruise Lines v. Shute,* 499 U.S. 585, 589-95 (1991) (no fraud alleged; provision limited forum for suits against the seller rather than, as here, suits by the seller; *M/S Breman v. Zapatz Off-Shore Co.,* 407 U.S. 1, 10 (1972) (forum selection clause not enforceable if enforcement is shown to be "unreasonable" under the circumstances).

valid defenses may be effectively precluded from raising them.[36] In sum, IFC's practice of filing distant forum collection suits in this case – when it was abundantly clear that the Rental Agreements had been procured through deception – satisfies all three elements of unfairness under the FTC Act.

IX. THE CONSTITUTION DOES NOT PROTECT IFC'S CONDUCT

IFC did not merely communicate its position to consumers and then sue them, as it would have us believe. IFC's entire range of collection activity, including demands, threats, and misrepresentations, was unfair and deceptive. It violated the law as to every rental agreement before it filed suit. Its subsequent filing of suits was abusive and added significantly to the injury, particularly when done in a distant forum, a practice long condemned by the FTC and the courts.

IFC argues that (1) the First Amendment's guarantee of Free Speech protects IFC's right to lie to consumers about their legal obligations and to make bogus threats of fraud against them in order to induce them to pay tens of thousands of dollars each for nothing; (2) the First Amendment right to petition protects IFC's right to follow through on these threats by filing actions in the courts—usually hundreds or thousands of miles away from where the consumers do business—to force them to pay tens of thousands of dollars each for nothing; and (3) a substantive Due Process theory protects some "absolute" right to file lawsuits. IFC has a rather expansive view of what the Constitution protects. It is unjustified by the law and this court should reject IFC's view.

Deceptive or unfair commercial speech, like that alleged by the FTC here, is simply not subject to any Constitutional protections. Further, IFC's own argument that its "communications" with consumers were protected free speech presumes that there is nothing misleading in the speech. Mot. to Dismiss at 40. Yet the complaint alleges that these communications were, in fact, misleading and did, in fact, mislead. As a matter of law, it is unclear how IFC expects this Court

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[36] The finance company must have local counsel or representatives in every state where it may need to domesticate and execute on its judgments. ¶ 57. While it is difficult and costly for a small business with no connection to the finance company's venue to find counsel and defend a lawsuit, the finance company benefits from economies of scale and familiarity with all the states in which it does business or has contacts.

to grant a motion to dismiss Counts I and II under the First Amendment when to do so, the Court would have to ignore the FTC's plain allegations.

A. The First Amendment Does Not Protect IFC's Deceptive or Unfair Speech

The Constitution does not protect deceptive or unfair commercial speech, like IFC's. *See, e.g., Virginia State Bd. of Pharmacy v.Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). There, the Court invalidated a state ban on pharmacies advertising or even quoting drug prices. After doing so, it hastened to add:

> [W]e of course do not hold that [commercial speech] can never be regulated in any way. Some forms of commercial speech regulation are surely permissible. . . . Untruthful speech, commercial or otherwise, has never been protected for its own sake. [citations omitted] Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. [footnote omitted] The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely. See, for example, [Virginia's consumer protection statute].

Id. at 770. The Court makes plain that deceptive speech is not protected, and its example of a permissible regulation is Virginia's ban on "deceptive or misleading advertising, inducements, writings, or documents." *See also, Kraft, Inc. v. FTC,* 970 F.2d. 311, 320 (7th Cir. 1992) (false, deceptive or misleading "commercial speech remains subject to restraint"); *FTC v. Febre,* No. 94 C 3625, 1996 U.S. Dist. LEXIS 9487, *23 (N.D. Ill., July 2, 1996) (Constitutional defenses against allegations of unfair and deceptive practices were without merit because, "The First Amendment does not thwart the efforts of the state or federal government to preclude deceptive commercial speech").

IFC cites the seminal test on commercial speech outlined in *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). Again, IFC asks this court to disregard the complaint's allegations. In *Central Hudson*, the Court overturned a broad ban on promotional advertising by public utilities. The Court prescribed a test for determining whether commercial speech has been unlawfully restrained by the government, and that test begins with the requirement that the speech "concern lawful activity and not be misleading." *Id.* at 566.

Here, however, the speech is false or misleading and is presented for the purpose of furthering unfair and deceptive conduct, not lawful activity.[37] None of IFC's conduct, as alleged in the FTC's complaint, is protected by the First Amendment guarantee of free speech.

B. Substantive Due Process and the Right to Petition Do Not Protect IFC's Conduct

IFC asserts that it has a Due Process and First Amendment right to use the courts to enforce its falsely worded and worthless contracts. It cites a string of cases that fail to support this contention. Again, IFC's Constitutional argument rests on a characterization of the facts that contradicts the allegations in the FTC's complaint.

It is important to remember that the FTC's claims against IFC do not rest entirely or even principally upon IFC's use of the courts. IFC acquired and sought to enforce purported rental agreements that IFC knew or should have known were really to finance services. It then proceeded to leave no stone unturned in its mission of recovering payments from consumers. It lied to them about their rights and turned events on their head by threatening to sue the consumers for fraud and misrepresentation. And when all else failed, it filed collection actions against them, doing so in a forum tremendously inconvenient to most of them. IFC's use of the courts has been deceptive, groundless, and part and parcel of a course of conduct that violates the FTC Act. The Constitution affords that conduct no protection.

IFC's substantive due process argument relies entirely on cases in which courts themselves allegedly imposed barriers upon plaintiffs or prospective plaintiffs. *See Tennessee v. Lane*, 541 U.S. 509 (2004) (courthouse must provide access to the disabled); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (court may not charge exorbitant filing fees to women seeking divorces); and *Snyder v. Nolen*, 380 F.3d 279, 291 (7th Cir. 2004) (prisoner whose complaint was returned by the court clerk because he was *pro se* did not make out a claim for deprivation of a Constitutional right). In each of these cases, the party at fault, allegedly, is the court's administrative arm. None of these cases has anything to do with stopping a law enforcement agency such as the FTC from preventing and remedying statutory violations.

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[37] *See Edenfield v. Fane*, 507 U.S. 761, 768 (1993) ("the State may ban commercial expression that is fraudulent or deceptive without further justification").

Turning to IFC's right to petition claim, while IFC asserts that it "has an absolute constitutional right to sue," Motion to Dismiss at 41, the right is not "absolute," and courts have delineated exceptions to it. First, "[j]ust as false statements are not immunized by the First Amendment right to freedom of speech, . . . baseless litigation is not immunized by the First Amendment right to petition." *United States v. Kaun*, 827 F.2d 1144, 1152 (7th Cir. 1987) (upholding injunction prohibiting further filing of baseless lawsuits). "First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 514 (1972).[38]

For IFC to claim its threats to sue consumers for fraud and misrepresentation, and its actual lawsuits against those consumers, are not groundless is for IFC to ignore the facts alleged by the FTC. It may not do this in a motion to dismiss. Here, IFC engaged in a course of conduct that harmed and continues to harm consumers substantially. Threatening and filing lawsuits is one part of that course of conduct, but it is not protected by free speech, the right to petition, or substantive due process. Nothing in the Constitution protects IFC Credit's conduct in this matter, nor does it prevent the FTC from asking this court to stop and remedy that conduct.

X. CONCLUSION

Reading the allegations in a light most favorable to the Plaintiff, the FTC has alleged more than enough to survive defendant's motion to dismiss. IFC posits its own facts in an effort to construct a clever stack of state-law legalisms designed to demonstrate that in spite of the outrageous unfairness of the result, hundreds of consumers will have to pay many thousands of dollars each for absolutely nothing, and there is nothing the FTC or this court or anyone else can do about it. Far from flying out of the bounds of the FTC Act, as IFC asserts, this case demonstrates what the FTC Act is for. It offers the possibility of relief for terribly misleading and unfair tactics affecting hundreds or thousands of consumers, with large individual and huge

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[38] First Amendment rights may not be used as the means or the pretext for achieving "substantive evils" [citation omitted] which the legislature has the power to control. . . . If these facts are proved, a violation of the [law] has been established. If the end result is unlawful, it matters not that the means used in violation may be lawful.

Id. at 515.

collective losses, when the costs and difficulty of individual litigation might otherwise deny most of them meaningful relief.

The FTC has stated its claims. The FTC has authority to protect businesses, non-profits and other entities in addition to individuals. IFC's state law defenses are incorrect and irrelevant to FTC Act claims. IFC's arguments to each count are either wrong on the law or grounded in its own version of the facts. IFC's motion to dismiss should be denied.

Dated: July 25, 2007

Respectfully submitted,

s/Randall H. Brook

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