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DEC 19 2006
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION BY DEPUTY

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DEC 19 2006
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION DEPUTY

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

**Case No. EDCV 05-717-VAP(OPx)
MEMORANDUM OPINION**

IFC CREDIT CORPORATION, an assignee of Norvergence, Inc.,

Plaintiff,

v.

KAY AUTOMOTIVE DISTRIBUTORS, INC.,

Defendant.

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(D).

Plaintiffs filed this lawsuit in the United States District Court for the Northern District of Illinois on September 9, 2004. The case was transferred to this district on August 5, 2005. The parties waived a jury trial, and the matter was tried to the Court on November 7 and November 8, 2006, after which the Court took the matter under submission. The Court having considered the Memoranda of Contentions of Fact and Law submitted by each side, all the evidence presented during trial, and the arguments of counsel, makes the following Findings of Fact and Conclusions of Law pursuant to Federal Rule of Civil Procedure 52.

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DEC 20 2006

FINDINGS OF FACT

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1. Plaintiff IFC Credit Corporation ("IFC") is an Illinois corporation with its principal place of business in Morton Grove, Illinois. It brings this action as the assignee of Norvergence, Inc. ("Norvergence"). Defendant Kay Automotive Distributors, Inc. ("Kay") is a California corporation, whose principal place of business is Ontario, California. Jona and Annette Kardish are the sole shareholders of Kay. In the fall of 2003, Norvergence was a telecommunications company; in December 2003, IFC and Norvergence entered into a "Master Program Agreement," whereby a large number of Norvergence's contracts to provide to provide telecommunications services were assigned to IFC. [Ex. 6]
2. Defendant Kay employed Vadim Skulkin from August 2003 to December of that year. Both Skulkin and Jona Kardish, Kay's president, testified at trial that Skulkin was hired to run Kay's computer network, and that in the fall of 2003, Jona Kardish authorized him to research ways for the company to save money on its communications costs. Skulkin testified repeatedly during trial that he had "no financial authority" at Kay.
3. On October 30, 2003, Skulkin signed four contracts with Norvergence, which are the subject of this breach of contract action ("the contracts"). [Exs. 1 - 4.] The contracts obligated Kay to make monthly payments to Norvergence for five years in exchange for the lease of telecommunications equipment.
4. Without knowledge of the contracts' terms, Jona Kardish signed and submitted a credit application on behalf of Kay, believing that it was necessary to establish eligibility for discounted telephone services. [Ex. 76.]

1 5. Skulkin lacked authority to sign the contracts on behalf of Kay.
2 Skulkin's testimony on this key issue, i.e., whether either Jona or
3 Annette Kardish authorized him to sign the contracts, was baffling,
4 contradictory, and at times, simply unworthy of belief. At several points,
5 however, he did testify that he did not have the authority to enter into
6 contracts involving financial obligations, that he had been authorized
7 only to research methods for Kay to save money on its communications
8 expenses through changing its network service provider, and that he
9 did not have access to a company credit card and had to seek express
10 permission before making needed purchases of any computer
11 equipment for the company. This testimony was consistent with that of
12 Jona and Annette Kardish regarding Skulkin's lack of authority to enter
13 into contracts on behalf of Kay. Furthermore, Skulkin's testimony
14 regarding the circumstances under which he signed the contracts casts
15 further doubt on any claim that he was authorized to do so: rather than
16 signing the contracts during business hours at any of Kay's business
17 locations, for example, Norvergence representatives went to Skulkin's
18 apartment, during regular working hours on October 30 to obtain his
19 signature on the documents. This suggests to the Court that at least
20 one, and perhaps both, of these parties wanted to ensure the contracts
21 were signed without the knowledge of either of Kay's owners; again,
22 this is consistent with the credible evidence from Annette Kardish, who
23 testified that she had no knowledge whatsoever of the contracts Skulkin
24 had signed until she overheard employee discussions regarding the
25 matter.

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1 6. Skulkin did not have apparent authority to enter in the contracts. In
2 fact, he testified that he told the Norvergence representatives that he
3 had "no financial responsibility" and "no financial authority" at Kay.
4 7. Kay did not ratify Skulkin's unauthorized execution of the Norvergence
5 contracts. IFC relies on the "Clerk's/Secretary's Certificate," a
6 document it sought and obtained from Kay, to establish Skulkin's
7 authority to contract on behalf of the company. [Ex. 66.] That
8 document, Exhibit 66, purports to state on its face that Skulkin was
9 authorized to enter into contracts on behalf of Kay, and bears Jona
10 Kardish's signature as Kay's president. Kardish testified, however, that
11 when he signed Exhibit 66, it did not bear the name of Vadim Skulkin –
12 the document bore no names in the section for persons authorized to
13 enter into the Norvergence contracts. This was consistent with his
14 understanding that he, Kardish, was the only person at the company
15 authorized to sign contracts and bind the company.¹ The Court finds
16 that testimony believable, for two reasons. First, Skulkin himself
17 admitted he back-dated the document to conform to the date he signed
18 the Norvergence contracts, and at times in his confusing and
19 contradictory testimony seemed to admit he did add his own name to it
20 *after* Jona Kardish signed it. Second, Jona Kardish's testimony that he
21 signed the document without any names listed as persons authorized to
22 contract is consistent with the uncontradicted evidence regarding Kay's
23 business practices: those of a relatively small, family-run, and tightly
24 managed company, at which oversight and management responsibility
25 was divided between Annette and Jona Kardish, and at which no one

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27 ¹He later corrected this testimony to state that Annette Kardish, the 51%
28 shareholder and secretary of the corporation, also was authorized to sign contracts on
behalf of the corporation.

1 else ever had authority to enter into contracts or exercise any
2 management control over company operations. In fact, Annette
3 Kardish testified credibly that Vadim Skulkin did not have the authority
4 to purchase any equipment, including even computer parts, for his work
5 as the company's computer support employee.

6 8. Jona Kardish discharged Skulkin from his employment with Kay in
7 December, 2003. Kay's telephone service had already been
8 transferred from its former carrier to Norvergence by that time,
9 however, making Kay dependent on Norvergence in order to maintain
10 the telephone lines and numbers which were vital to its business.
11 Indeed, one of Kay's employees testified about the immense efforts he
12 expended toward implementing the telephone systems after
13 Norvergence became the provider because Kay had been using some
14 of its business telephone numbers for approximately 15 years. By
15 February 2004, after receiving telecommunications equipment that
16 Norvergence failed to install properly, and realizing that Norvergence
17 was not providing Kay with discounted, or even adequate,
18 communication services, Kay instructed its lawyer to write to
19 Norvergence and its assignees, including IFC, to demand rescission.
20 Jerome Goldstein, counsel for Kay, did so on February 17, 2004, noting
21 that Kay could not locate a lease agreement signed by an authorized
22 agent of Kay, and offering to return or make available for pick-up the
23 telecommunications equipment. [Ex. 12.]

24 9. On December 8, 10, and 16, 2003, the contracts were assigned by
25 Norvergence to IFC. [Exs. 1-4, 6.]

26 10. Annette Kardish received bills from Norvergence and its assignees in
27 early 2004. [Exs. 61-62.] She testified credibly that she was very
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1 confused by Kay's relationship with Norvergence, and that she believed
2 these bills to be for a service contract. Norvergence sent Kay several
3 reimbursement checks to avoid duplicate service charges. [Exs. 58-
4 60.] Annette Kardish used funds from these checks and from Kay's
5 corporate accounts to pay the bills from early 2004. [Exs. 57, 61-62.]
6 Mrs. Kardish testified credibly that she paid these bills for three
7 reasons: (1) Norvergence had control over Kay's phone numbers and
8 systems, and her business could not afford to risk a loss of phone
9 service; (2) Norvergence sent checks to cover most of the expenses;
10 and (3) she felt that the responsible course of action was to pay
11 questionable bills until it could be determined whether the charges were
12 proper.

13 11. Following Norvergence's involuntary bankruptcy, on July 29, 2004,
14 Goldstein sent another letter to IFC, again taking the position that the
15 leases were unenforceable and offering to return the equipment. [Ex.
16 13.]

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18 **CONCLUSIONS OF LAW**

- 19 1. The Court has jurisdiction over this breach of contract action under its
20 diversity jurisdiction, 28 U.S.C. § 1332(a). Venue is proper because
21 Defendant Kay is a California corporation whose principal place of
22 business is found in this district. 28 U.S.C. § 1332(b).
- 23 2. The Court applies the Illinois substantive law of contract to the claims
24 raised in this case. Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938);
25 see December 14, 2004 Order Denying Defendant's Motion to Dismiss
26 (noting that the parties agreed that Illinois law applies to this case).

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- 1 3. Under Illinois contract law, Skulkin lacked either actual or apparent
2 authority to bind Kay to the contracts. The existence of an agency
3 relationship, and of the purported agent's authority, generally is a
4 question of fact that must be proved by a preponderance of evidence.
5 Progress Printing Corp. v. Jane Byrne Political Comm., 235 Ill. App. 3d
6 292, 306 (1992). An agent has actual authority to take action
7 reasonably understood to be necessary or incidental to accomplish the
8 principal's objectives. Id. at 308. Here, Skulkin knew that he was not
9 authorized to bind Kay to financial obligations. Apparent authority is
10 present when a third party reasonably believes that the agent has
11 authority to act on behalf of the principal, and this belief is traceable to
12 the principal's manifestations. Id. In this case, Skulkin's repeated
13 warnings to Norvergence that he lacked authority to bind Kay on any
14 financial obligations, the circumstances of the contracts' execution, and
15 the sequence of events leading up to the Secretary's Certificate of
16 authority signed later by Jona Kardish (and back-dated by Skulkin),
17 lead the Court to conclude that Norvergence has not demonstrated
18 such a belief.
- 19 4. Under Illinois contract law, Kay did not ratify the unauthorized contracts
20 by using the equipment and making payments to Norvergence and its
21 assignees. Ratification is the equivalent of authorization, but it occurs
22 after the fact, when a principal gains knowledge of an unauthorized
23 transaction but then retains the benefits or otherwise takes a position
24 inconsistent with nonaffirmation. Id. at 310. Generally, the question of
25 ratification turns on the principal's intent to affirm. Id. A principal must
26 have "full knowledge of the facts and the choice of either accepting or
27 rejecting the benefits of the transaction." Bank of Waukegan v.
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1 Epilepsy Foundation of Am., 163 Ill. App. 3d 901, 908 (1987). The
2 principal must either retain the benefits of the transaction or take a
3 position inconsistent with nonaffirmation. Stathis v. Geldermann, Inc.,
4 295 Ill. App. 3d 844, 858 (1998). If the principal returns the benefits
5 and repudiates the act within a reasonable time, then there is no
6 ratification. Buford v. Chief, Park Dist. Police, 18 Ill. 2d 265, 270
7 (1960); Ebert v. Nassau Terrace Condominium, Inc., 145 Ill. App. 3d
8 468, 473 (1986). Further, the mere retention of the benefits of a
9 transaction cannot be held to constitute ratification if the principal does
10 not have the privilege of repudiating the unauthorized act. Wing v.
11 Lederer, 77 Ill. App. 2d 413, 418 (1966) (citing 3 Am. Jur. 2d Agency §
12 168). Here, the Kardishes lacked full knowledge of the facts and
13 circumstances surrounding the contracts. The Kardishes made several
14 attempts to return the equipment and to repudiate the unauthorized
15 contracts within a reasonable time. To the extent, if any, that contract
16 benefits were retained by Kay, this was unintentional on the company's
17 part; in fact, Norvergence and its assignees ignored Kay's offers to
18 return equipment and Kay was forced to choose between paying its
19 bills or losing its capacity to conduct business. Accordingly, the Court
20 concludes that Kay did not ratify the contracts.

- 21 5. IFC is not entitled to any relief. To prevail on its breach of contract
22 claim, IFC must prove at the threshold that there was a valid offer and
23 acceptance between Norvergence and Kay, and that Norvergence
24 validly assigned that contract to IFC. See Green v. Trinity Intern. Univ.,
25 344 Ill. App. 3d 1079, 1085 (2003). IFC also bears the burden of
26 proving that agency principles bind Kay to Skulkin's assent to the
27 contracts, or that Kay later ratified the contracts. See Progress
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Printing, 235 Ill. App. 3d at 306; Yugoslav-American Cultural Center, Inc. v. Parkway Bank and Trust Co., 289 Ill. App. 3d 728, 735 (1997) ("The burden of proving the existence of an agency relationship is on the party seeking to charge the alleged principal."). Here, the contracts are void and unenforceable against Kay because Kay neither authorized its agent to assent to the contract, nor ratified the unauthorized contract.

Dated: December 19, 2006

Virginia A. Phillips
VIRGINIA A. PHILLIPS
United States District Judge