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

FEDERAL TRADE COMMISSION,	)	
	)	Case No. 07 C 3155
Plaintiff,	)	
	)	
v.	)	
	)	Magistrate Judge Cole
IFC CREDIT CORPORATION,	)	
	)	
Defendant.	)	
	)	

IFC CREDIT CORPORATION'S MOTION TO RECONSIDER THE COURT'S PARTIAL DENIAL OF IFC'S MOTION TO DISMISS AND SUPPLEMENTAL MOTION TO DISMISS

NOW COMES Defendant IFC Credit Corporation ("IFC"), by and through its attorneys, and for its Motion to Reconsider the Court's Partial Denial of IFC's Motion to Dismiss and Supplemental Motion to Dismiss, pursuant to Federal Rules of Civil Procedure 60 and 12(b)(6), states as follows:

INTRODUCTION

IFC brings this Motion to Reconsider due to a dramatic shift in the facts relied upon by the Federal Trade Commission (the "FTC") in support of its remaining causes of action, as well as the Court's own comment that its ruling on IFC's Motion to Dismiss might have been different had it known of the facts now stipulated to by the FTC. Remarkably, the FTC now stipulates that: (1) it will not be able to demonstrate that NorVergence was a Ponzi scheme[1]; (2) IFC did not know of any fraud by NorVergence when it purchased the Equipment Rental Agreements ("ERAs"); (3) IFC believed that NorVergence would fulfill its separate services obligations to the Lessees when it

[1] IFC has ordered the transcript from the April 22, 2008 hearing and will file it with the Court once it is finalized.

purchased the ERAs; and (4) the predicate conduct forming the basis of the FTC's deception claim against IFC occurred when IFC purchased each ERA. The FTC's stipulations undercut the Court's analysis in denying IFC's Motion to Dismiss as to Counts I and II of the FTC's Complaint.

The FTC filed suit against IFC on June 6, 2007. IFC filed its Motion to Dismiss the FTC's Complaint on July 11, 1007. On April 10, 2008, this Court granted IFC's Motion to Dismiss with respect to Count III and denied the motion with respect to Counts I and II. The Court found that, construing the allegations of the FTC's Complaint as true, the FTC stated a claim for "deception" under Count I in that IFC allegedly lulled the Lessees into accepting the equipment by repeating NorVergence's representations of telecommunications savings during the verbal audits, "thereby reinforcing the impression that payments under the ERAs were for telecommunications services." *See* Memorandum Opinion and Order, pp. 27-28, 35. The Court sustained Court II solely on the ground that, because the FTC alleges that NorVergence engaged in a "massive fraudulent scheme," the Lessees could not have reasonably avoided the injury because "they could not have known (or learned) of NorVergence's precarious financial situation or the massive fraud being perpetrated on consumers throughout the country." *Id.* at 35.

On February 25, 2008, the FTC conceded that IFC was unaware of any alleged fraud by NorVergence when it purchased the ERAs, and that IFC believed that NorVergence would provide telecommunications services to the Lessees:

> [T]he FTC has never taken the position that IFC knew NorVergence was engaged in fraud when it bought the contracts. Just from my Economics 101, I agree that we don't think that that would have made financial sense. Why would you do that? That's not our case. So we can stipulate to that.
>
> * * *

> I don't think that the evidence will show that IFC bought these contracts knowing that NorVergence wasn't going to provide the services. That's what would have been a bad financial decision. We do allege and will continue to allege and we think the evidence proves that when IFC took the contracts, it knew that the customers expected to get services for their payments under the rental agreements and that the customers were deceived into thinking their payments under the rental agreements would get them services. But I do believe the record will also show that IFC at that point in time expected that NorVergence would come through and do the services.

See Excerpt of Dep. of Trebels, attached hereto as Exhibit 1.[2] On April 22, 2008, the FTC admitted in open court that, contrary to the allegations of its Complaint, it cannot produce evidence at trial that NorVergence was a Ponzi scheme.

The above-referenced stipulations contradict the allegations set forth in the FTC's Complaint, which were relied upon as true by the Court in ruling on IFC's Motion to Dismiss. Further, in its Supplemental Memorandum Regarding the Court's Equitable Authority to Order Full Relief for All Consumers, the FTC affirmatively states that the "predicate conduct" which gives rise to the FTC's causes of action was IFC's purchase of the ERAs with knowledge that the ERAs were procured through deception. This admission gives rise to a statute of limitations defense not previously briefed by IFC in its Motion to Dismiss.

ARGUMENT

Federal Rule of Civil Procedure 60 provides that a party may seek relief from an order due to newly discovered evidence. Fed. R. Civ. P. 60(b)(2) (West 2008). "Motions to reconsider serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." *Caisse Nationale de Credit Agricole v. CBI*

[2] The stipulations can also be found in IFC's Statement of Uncontested Facts, ¶¶ 24-25, attached to IFC's Motion for Summary Judgment as Exhibit A.

Industries, Inc., 90 F.3d 1264, 1269 (7th Cir. 1996). To support a motion for reconsideration based on newly discovered evidence, the moving party must show both that the evidence was newly discovered or unknown to it until after the hearing and that it could not with reasonable diligence have discovered and produced the evidence during the pendency of the motion. *Id.*

When ruling on a Rule 12(b)(6) motion to dismiss, the court must construe the complaint in the light most favorable to the plaintiff and accept all factual allegations as true. *The Northern Trust Company v. Peters*, 69 F.3d 123, 129 (7th Cir. 1995). A complaint should be dismissed when the nonmoving party can prove no set of facts consistent with its complaint that would entitle it to relief. *Id.*

Here, the FTC has drastically altered and thus effectively limited its claims by making the aforementioned stipulations, completely undercutting the Court's analysis in ruling on the Motion to Dismiss. Now, IFC is being forced to try a case which should have been dismissed as a matter of law. Accordingly, the Court should reconsider its ruling.

1. **The Court should reconsider denial of IFC's Motion to Dismiss with respect to Count II.**

Count II of the Complaint was sustained solely on the ground that, because the FTC alleges that NorVergence engaged in a "massive fraudulent scheme," the Lessees could not have reasonably avoided the injury. *See* Memorandum Opinion and Order, p. 35. As an initial matter, IFC respectfully disagrees with the Court's contention that allegations of fraud should circumvent the unambiguous terms of the ERAs' waiver of defense clause. *See Chrysler Credit Corp. v. Nancy Marino*, 63 F.3d 574, 579 (7th Cir. 1995) (***when a***

party signs a contract that contains a waiver of defense clause, it cannot later assert the defense of fraud because the party already waived all of its defenses) (emphasis added).

However, Count II fails even if the Court's contention is accepted. On April 22, 2008, the FTC admitted in open court that it has absolutely no evidence that NorVergence engaged in a Ponzi scheme. Moreover, the FTC concedes that IFC had no knowledge of NorVergence's alleged fraud and in fact IFC ***believed*** that NorVergence would provide telecommunications services to the Lessees under its separate services contract when it purchased the ERAs. *See* Exhibit 1 hereto. Verbal admissions and stipulations are judicial admissions. *McCaskill v. SCI Management Corp.*, 298 F.3d 677, 680 (7th Cir. 2002) ("The verbal admission by SCI's counsel at oral argument is a binding judicial admission, the same as any other formal concession made during the course of proceedings."); *Keller v. United States*, 58 F.3d 1194, 1198 n. 8 (7th Cir. 1995) ("Judicial admissions are formal concessions on the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them. ***They may not be controverted at trial or on appeal.***" (emphasis added)). Thus, based on the FTC's admission that it cannot present evidence of NorVergence's alleged Ponzi scheme, there is no evidence that the Lessees' alleged succumbing to the "massive fraud" was inevitable and thus unavoidable. Accordingly, Count II must be dismissed, because the Lessees could have reasonably avoided the injury by refusing to sign the ERAs as drafted.

IFC brings this Motion to Reconsider now because this newly discovered evidence was unknown to it and it could not have discovered and produced the evidence with reasonable diligence during the pendency of the Motion to Dismiss. IFC filed its Motion to Dismiss on July 11, 2007. Though the FTC made the stipulation regarding

IFC's good faith on February 25, 2008, the FTC just admitted on April 22, 2008 in open court that it cannot prove NorVergence engaged in a Ponzi scheme. Because the Court ruled on IFC's Motion to Dismiss on April 10, 2008, this new evidence was discovered and produced after the pendency of that motion.

2. The Court should reconsider denial of IFC's Motion to Dismiss with respect to Count I.

Count I of the Complaint was sustained on the ground that IFC allegedly "lulled" the Lessees to accept the equipment by repeating NorVergence's representations of telecommunications savings during the verbal audits. *See* Memorandum Opinion and Order, pp. 27-28, 35. However, as the FTC admitted in open court, it cannot prove that NorVergence engaged in a Ponzi scheme and will not produce evidence of the same at trial. Moreover, the FTC stipulated that IFC had no knowledge of NorVergence's alleged fraud and in fact IFC ***believed*** that NorVergence would provide telecommunications services to the Lessees under its separate services contract when it purchased the ERAs. *See* Exhibit 1 hereto. Verbal admissions and stipulations are judicial admissions that cannot be controverted at trial. *McCaskill v. SCI Management Corp.*, 298 F.3d 677, 680 (7th Cir. 2002); *Keller v. United States*, 58 F.3d 1194, 1198 n. 8 (7th Cir. 1995). Given this newly discovered evidence, Count I cannot stand and must be dismissed.[3]

The Court contends that, under the Complaint's allegations, it can infer that IFC did not believe that the ERAs were true equipment leases and that the predominant purpose of the transaction between the Lessees and NorVergence was the financing of telecommunications services, which scheme IFC endorsed by "lulling" the Lessees. *See* Memorandum Opinion and Order, pp. 27-28. Now, the FTC concedes that IFC did not

[3] For the reasons discussed above, IFC could not have discovered and produced this evidence with reasonable diligence during the pendency of the Motion to Dismiss.

know of any fraud, that no massive scheme will be demonstrated, and that IFC purchased the ERAs believing that NorVergence would perform. Consequently, no "lulling" as a matter of law could have occurred because there was no fraud at the transactions' inception.

The FTC's claim that the ERAs deceptively identify their consideration and that IFC knew of this "deception" before it purchased the ERAs is nothing more than the "I did not read it defense," which fails as a matter of law. *Regensburger v. China Adoption Consultants, Ltd.*, 138 F.3d 1201, 1207 (7th Cir. 1998) ("[I]t is difficult to believe that the [plaintiffs] could have relied on the oral representations in the face of clear and unambiguous language in the Agreement. At the very least the contractual language should have given the [plaintiffs] a reason to question the prior representations.")

A contracting party cannot enter into a contract believing the consideration for the contract is one thing (based on the oral representations of the NorVergence sales personnel), ***but not read the contract, although having been given the opportunity to do so***, and then complain the contract does not accurately identify the parties' agreement. *Id.* ("A party who could have discovered the fraud by reading the contract, and in fact had the opportunity to do so, cannot later be heard to complain that the contractual terms bind [him] . . . [A] party who signs an instrument relying upon representations as to its contents when he has had an opportunity to ascertain the truth by reading the instrument and has not availed himself of the opportunity, cannot be heard to say that he was deceived by misrepresentations."); *Pierce v. Atchison Topeka & Santa Fe Railway Co.*, 65 F.3d 562, 569 (7th Cir. 1995) ("Fraudulent inducement is not available as a defense

when one had the opportunity to read the contract and by doing so could have discovered the misrepresentation.") Accordingly, Count I must be dismissed.

3. The Court should grant IFC's Motion to Dismiss because the FTC's claims for restitution and disgorgement are barred by the statute of limitations.

The FTC's Complaint seeks "preliminary and permanent injunctive relief, including rescission of contracts, cessation of collections, restitution, disgorgement of ill-gotten gains, and other equitable relief[.]" *See* Complaint, ¶ 1. The FTC's Complaint incorrectly cites to 15 U.S.C. § 53(b), the section dealing with injunctive relief, as authority for these remedies. *Id.* The FTC's claims for restitution and disgorgement of ill-gotten gains must be brought under Section 57b, which awards relief such as "rescission or reformation of contract, the refund of money or return of property, the payment of damages[.]" 15 U.S.C. § 57b (West 2008). Section 57b has a three year statute of limitations:

> No action may be brought by the Commission under this section more than 3 years after the rule violation to which an action under subsection (a)(1) of this section relates, or the unfair or deceptive act or practice to which an action under subsection (a)(2) of this section relates…"

15 U.S.C. § 57b(d) (West 2008); *see e.g., United States of America v. The Building Inspector of America, Inc.*, 894 F.Supp. 507, 513 (1995).

The FTC's lawsuit, filed against IFC on June 6, 2007, attempts to void ERAs purchased between October 2003 and June 2004. *See* Complaint. The FTC contends that IFC knew of NorVergence's alleged deception at the time it purchased each ERA – "IFC purchased contracts it knew or had reason to know were procured by deception; ***this predicate conduct long predated its actions to collect against individuals and sue many of them in state court.***" *See* FTC's Supplementary Memorandum Regarding Court's

Equitable Authority to Order Full Relief for All Consumers, p. 10 (emphasis added); *see also* Complaint. Therefore, the predicate conduct or "rule violation" under Section 57b took place each time IFC purchased an individual ERA between October 2003 and June 2004. Under Section 57b's three year statute of limitations, because the FTC filed suit on June 6, 2007, the FTC can seek restitution and disgorgement only for any ERA purchased ***on or after*** June 6, 2004. Accordingly, the FTC's claims in Counts I and II relating to the ERAs purchased by IFC on or prior to June 5, 2004 are barred by the FTC Act's three year statute of limitations and must be dismissed.

4. Conclusion

The stipulations of fact by the FTC admitting there is no evidence that IFC had knowledge of NorVergence's alleged fraud changes the facts to be taken as true by the Court in ruling on IFC's Motion to Dismiss. Accordingly, IFC incorporates by reference its Motion to Dismiss and asks the Court to reconsider its ruling as to Counts I and II of the FTC's Complaint. Also, the recent stipulation of fact by the FTC as to IFC's alleged predicate conduct giving rise to the FTC's causes of action establishes a statute of limitations defense preventing the FTC from setting forth a claim upon which relief may be granted.

WHEREFORE, IFC CREDIT CORPORATION respectfully requests that this Court grant its Motion to Reconsider the Court's Partial Denial of IFC's Motion to Dismiss and Supplemental Motion to Dismiss.

Respectfully Submitted,

IFC CREDIT CORPORATION

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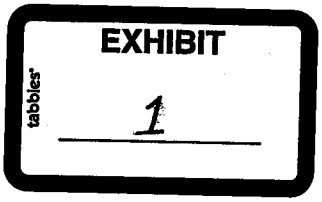
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FEDERAL TRADE COMMISSION,
Plaintiff,
vs. No. 07 CV 3155
IFC CREDIT CORPORATION,
Defendant.

The deposition of RUDOLPH DOUGLAS TREBELS, called by the Plaintiff for examination, taken pursuant to notice, agreement, and by the provisions of the Rules of Civil Procedure for the United States District Courts pertaining to the taking of depositions, taken before Tina M. Alfaro, CSR No. 084-004220, a Notary Public within and for the County of Cook, State of Illinois, and a Certified Shorthand Reporter of said State, at the offices of Askounis & Borst, 180 North Stetson, Chicago, Illinois, on the 25th day of February, A.D., 2008 at 11:00 a.m.



APPEARANCES:

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REPORTED BY: Tina Alfaro
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DEPOSITION OF RUDOLPH DOUGLAS TREBELS

FEBRUARY 25, 2008

(Witness sworn.)

WHEREUPON:

RUDOLPH DOUGLAS TREBELS,

called as a witness herein, having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. SCHROEDER:

Q. Would you please state your full name for the record.

A. Rudolph Douglas Trebels.

Q. And where do you reside?

A. XXXXXXXXXXXXXXXXXXXXXXXXXXXX XXXXXXXXX

Q. Have you had your deposition taken before in a matter relating to the NorVergence contracts, N-O-R-V-E-R-G-E-N-C-E?

A. Yes.

Q. How many times?

A. Once.

Q. Was that in the Rosenbloom matter?

A. Yes.

know when you've had a chance to flip to page 9 of Exhibit 12.

A. Okay.

Q. This is dated as of October 10, 2003; do you see that?

A. Yes.

Q. During this time period when you did this original Master Program Agreement, would that hold true, you didn't have any indication that there was any fraudulent conduct going on?

A. Our normal bad debt is about 1 percent a year. So there's no reason in the world that we would possibly have entered into buying contracts and invest more than the full net worth of the company if we thought there were any issues like this. I mean it just is unfathomable that us or any of the other leasing companies would do that.

I know you feel different, but it's just --

MR. SCHROEDER: Let me state on the record the FTC has never taken the position that IFC knew NorVergence was engaged in fraud when it bought the

contracts. Just from my Economics 101, I agree that we don't think that that would have made financial sense. Why would you do that? That's not our case. So we can stipulate to that.

MR. BORST: Okay.

BY MR. BORST:

Q. Just following on too with the amendment, which is at page 18 of the agreement. This is a later time period at March 16, 2004. Was there any concern on IFC's part in this time period, March of '04, we're about four or five months down the road, that NorVergence was engaged in any kind of fraudulent conduct?

A. No.

Q. And nothing like that motivated IFC's desire to enter into the amendment agreement to the Master Program Agreement?

A. No. They had asked us to look at buying a little bit deeper into the credit process and that there were some delays in the -- I'm not sure if it was here or later, but along the way there were some delays in getting the T1s connected, and that's where

has collected from its NorVergence lessees come as a result of settling various pieces of litigation related to the NorVergence equipment rental agreements?

A. Yes.

Q. And does IFC continue to actively pursue settlement with its lessees?

A. Yes.

Q. As you sit here today, for any of those lessees, if you know the answer to this question, for any of those lessees that are settling, is it your understanding they are doing so voluntarily or it's something they wish to do?

A. Yes.

MR. BORST: I have no further questions.

MR. SCHROEDER: I have one. It's more a clarification of my stipulation. I told you what we didn't think, and I want the record to reflect what we do.

I don't think that the evidence will show that IFC bought these contracts knowing that NorVergence wasn't going to provide the services. That's what

would have been a bad financial decision. We do allege and will continue to allege and we think the evidence proves that when IFC took the contracts, it knew that the customers expected to get services for their payments under the rental agreements and that the customers were deceived into thinking that their payments under the rental agreements would get them services. But I do believe the record will also show that IFC at that point in time expected that NorVergence would come through and do the services. That's my question. What's your answer? Just kidding.

I'm done.

MR. BORST: I'm done. We'll reserve signature, and what that means is you'll get an opportunity to review your transcript. You can't change a no to a yes or a yes to a no, but if you think the court reporter has somehow mistranscribed an answer, you can make a correction and so note it on the errata sheet.

(Whereupon, at 3:46 p.m., the signature of the witness having been reserved, the