

**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 SUPPLEMENTAL EXHIBIT TO ITS
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 Supplemental Exhibit to its Motion to Reconsider the Court’s Partial Denial of IFC’s Motion to Dismiss and Supplemental Motion to Dismiss, states as follows:

1. On April 24, 2008, IFC filed its Motion to Reconsider the Court’s Partial Denial of IFC’s Motion to Dismiss and Supplemental Motion to Dismiss in part based on the FTC’s admission on April 22, 2008 that it cannot demonstrate that NorVergence was a Ponzi scheme.
2. IFC indicated in its Motion that it would submit the April 22, 2008 transcript to the Court once it received the transcript from the court reporter. IFC has now received the transcript and attaches it hereto as Exhibit 1.
3. The pertinent excerpt of the FTC’s admission is as follows:

The Court: Well, was it – let me ask this. Was it the scheme by NorVergence? You just said it wasn’t a Ponzi scheme.

Mr. Schroeder: Your Honor, I have never said it was a Ponzi – it was not a Ponzi scheme. I do believe it was . . . I’m not sure that the

record will prove that point. It will simply prove that NorVergence got its money 80 percent from the rental agreements, 20 percent from consumers for services, and that they were paying a lot more for services than what they were collecting from the consumers for services.

See Exhibit 1 hereto, p 53.

WHEREFORE, IFC CREDIT CORPORATION respectfully requests that this Court grants 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

By: s/ Debra R. Devassy

Stephen C. Schulte
Jeffrey M. Wagner
Winston & Strawn LLP
35 W. Wacker Dr.
Chicago, IL 60601
PH: (312) 558-5600
FAX: (312) 558-5700
sschulte@winston.com
jvwagner@winston.com

Alex Darcy
Debra R. Devassy
Askounis & Darcy, P.C.
333 N. Michigan Avenue, Suite 510
Chicago, IL 60601
PH: (312) 784-2400
FAX: (312) 784-2410
adarcy@askounisdarcy.com
ddevassy@askounisdarcy.com

Vincent T. Borst
Borst & Collins, P.C.
180 N. Stetson, Suite 3400
Chicago, IL 60601
PH: (312) 861-7100
FAX: (312) 861-0022
vtborst@borstcollins.com

Peter J. Deeb

Frey, Petrakis, Deeb, Blum & Briggs, P.C.
1601 Market Street, Suite 2600
Philadelphia, PA 19103
PH: (215) 563-0500
FAX: (215) 563-5532
pdeeb@fpdb.com

SERVICE LIST

I hereby certify that on May 2, 2008, I electronically filed the foregoing *IFC Credit Corporation's Supplemental Exhibit to Its Motion to Reconsider the Court's Partial Denial of IFC's Motion to Dismiss and Supplemental Motion to Dismiss* with the Clerk of the Court using the CM/ECF system, which will send notification to the following CMF participants:

Beth Anne Alcantar

balcantar@ifccredit.com,jzinke@ifccredit.com

Vincent Thomas Borst

vtborst@borstcollins.com

Jennifer E. Gaylord

jgaylord@borstcollins.com

David M. Horn

dhorn@ftc.gov

Justin Lennon Leinenweber

jleinenweber@winston.com

Robert J. Schroeder

rschroeder@ftc.gov

Stephen Charles Schulte

sschulte@winston.com,ECF_CH@winston.com

Maxine R. Stansell

mstansell@ftc.gov

Jeffrey Mark Wagner

jwagner@winston.com,ECF_CH@winston.com

Steven M. Wernikoff

swernikoff@ftc.gov

and I hereby certify that I caused a copy of the foregoing to be served upon the following:

Peter J. Deeb
Frey, Petrakis, Deeb, Blum
& Briggs, PC
pdeeb@fpdb.com

Kathryn Carleton Decker
Federal Trade Commission
kdecker@ftc.gov

Jennifer Larabee
Federal Trade Commission
jarabee@ftc.gov

by electronic mail.

By: s/ Debra R. Devassy_____

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1 **TRANSCRIBED FROM DIGITAL RECORDING**

2 IN THE UNITED STATES DISTRICT COURT

3 NORTHERN DISTRICT OF ILLINOIS

4 EASTERN DIVISION

5 FEDERAL TRADE COMMISSION,)

6 Plaintiff,)

7 vs.) No. 07 C 3155

8 IFC CREDIT CORPORATION,) Chicago, Illinois

9 Defendant.) April 22, 2008

10) 3:54 P.M.

11 TRANSCRIPT OF PROCEEDINGS - Motions and Pretrial Conference

12 BEFORE THE HONORABLE JEFFREY COLE, Magistrate Judge

13 APPEARANCES:

14 For the Plaintiff: FEDERAL TRADE COMMISSION

15 915 Second Avenue

16 Suite 2896

17 Seattle, Washington 98174

18 BY: MR. ROBERT J. SCHROEDER

19 MR. DAVID M. HORN

20 MS. MAXINE R. STANSELL

21 FEDERAL TRADE COMMISSION

22 55 West Monroe Street

23 Suite 1825

24 Chicago, Illinois 60603

25 BY: MR. STEVEN M. WERNIKOFF

For the Defendant: WINSTON & STRAWN LLP

35 West Wacker Drive

Chicago, Illinois 60601-9703

BY: MR. STEPHEN CHARLES SCHULTE

PAMELA S. WARREN, CSR, RPR

Official Court Reporter

219 South Dearborn Street

Room 1928

Chicago, Illinois 60604

(312) 294-8907

NOTE: Please notify of correct speaker identification.

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1 (Proceedings held in open court:)

2 THE CLERK: 07 C 3155, FTC versus IFC Credit

3 Corporation, motion hearing and final pretrial conference.

4 THE COURT: I'm so sorry to keep you all.

5 MR. SCHROEDER: Your Honor, this is Maxine Stansell

6 for the Federal Trade Commission. My co-counsel stepped out

7 for just a second.

8 THE COURT: Oh, that's okay. Nice to see you. I

9 passed by your building when I was in Washington last week a

10 couple of times. Pretty building.

11 MR. SCHROEDER: Your Honor, also with me is Steven

12 Wernikoff from our Chicago office.

13 THE COURT: Hi, Mr. Wernikoff.

14 MR. WERNIKOFF: Good afternoon, your Honor.

15 (Brief interruption.)

16 THE COURT: Nice to see you again.

17 MR. SCHULTE: Oh, sorry. I thought we were waiting, I

18 didn't know.

19 Steve Schulte, one of the lawyers for defendants.

20 I'll let the other folks introduce themselves.

21 MR. BORST: Vince Borst also on behalf of IFC Credit

22 Corporation.

23 MR. DEEB: Peter Deeb, your Honor, also on behalf of

24 IFC, and my first time before your Honor.

25 THE COURT: Hi, Mr. Deeb.

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1 **APPEARANCES: Continued**

2 ASKOUNIS & DARCY

3 333 North Michigan Avenue

4 Suite 510

5 Chicago, Illinois 60601

6 BY: MR. DAVID ALEXANDER DARCY

7 FREY, PETRAKIS, DEEB, BLUM

8 & BRIGGS, P.C.

9 1601 Market Street

10 Suite 2600

11 Philadelphia, Pennsylvania 19013

12 BY: MR. PETER J. DEEB

13 BORST & COLLINS, LLC

14 Two Prudential Plaza

15 180 North Stetson Street

16 Suite 3400

17 Chicago, Illinois 60601

18 BY: MR. VINCENT THOMAS BORST

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1 MR. DEEB: Pleasure to make your acquaintance.

2 MR. DARCY: And Alex Darcy on behalf of IFC Credit

3 Corporation.

4 THE COURT: Good afternoon, everybody.

5 MR. SCHROEDER: Robert Schroeder on behalf of the

6 Federal Trade Commission.

7 THE COURT: Mr. Schroeder.

8 MR. HORN: Dave Horn, your Honor, for the Federal

9 Trade Commission.

10 THE COURT: Hi, Mr. Horn. You came all the way in for

11 this, huh?

12 You all did.

13 Well, thanks, everybody, and I'm so sorry to keep you

14 all waiting.

15 Let me get the stuff that I need. So have a seat,

16 please.

17 (Brief interruption.)

18 THE COURT: Don't stand up.

19 Okay. The first thing, let me take up with you this

20 -- the motion for -- it is the defendant's motion to bar

21 recovery of settlement proceeds as part of FTC's restitution

22 claim.

23 This obviously we need a briefing schedule on,

24 Mr. Schulte?

25 MR. SCHULTE: We filed the motion, Judge. As the

5
 1 Court recalls we had that --
 2 THE COURT: Oh, I'm sorry, this is the defendant's
 3 one. I am so sorry. You're right.
 4 MR. SCHULTE: Yeah. Well, it is our motion to bar --
 5 THE COURT: Yeah.
 6 MR. SCHULTE: -- recovery, and it really arises out of
 7 that escrow motion that was pending for a while, and then was
 8 withdrawn, I believe, at the end of March by the FTC, less than
 9 a month ago.
 10 THE COURT: Right.
 11 MR. SCHULTE: And then as part of their -- I don't
 12 know if Mr. Schroeder wants to file anything else. They did
 13 file, as part of that escrow motion, a supplemental
 14 memorandum -- I forget what it is called -- but we attached it
 15 as Exhibit C to our motion, supplemental -- I can get the right
 16 name of it. It is something like supplemental --
 17 THE COURT: Supplemental --
 18 MR. SCHULTE: -- supplemental memorandum in support of
 19 authority because that -- one of the issues when the Court will
 20 recall, if your Honor will recall --
 21 THE COURT: I asked --
 22 MR. SCHULTE: -- was whether or not they had the right
 23 to even get the settlement proceeds.
 24 THE COURT: Right.
 25 MR. SCHULTE: So then they withdrew their motion. And

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 1 -- very, very quickly if the trial goes forward. I mean, but
 2 we can do this -- I just don't want you to be under too much
 3 pressure because whether you take a week or ten days or 14 days
 4 isn't going to make one bit of difference. I want you to be
 5 sure that you have adequate time and we can get it all done.
 6 MR. SCHROEDER: I think we better ask for two weeks
 7 then, your Honor.
 8 THE COURT: Then let's take 14 days to respond.
 9 MR. SCHROEDER: Thank you.
 10 THE COURT: And how much to reply, Mr. Schulte? Ten?
 11 MR. SCHULTE: That would be great.
 12 THE COURT: All right. Ten to reply.
 13 So what are the dates then, Carolyn?
 14 MR. SCHROEDER: Are we going from today, Judge?
 15 THE COURT: Yes, from today.
 16 THE CLERK: The 8th.
 17 THE COURT: For the response?
 18 THE CLERK: I'm sorry, the 6th.
 19 THE COURT: May 6?
 20 THE CLERK: May 6th.
 21 And the reply will be May 13.
 22 MR. SCHROEDER: That only gives us seven days. I
 23 thought it was ten days.
 24 THE COURT: Ten days, Carolyn.
 25 MR. SCHROEDER: May 16th is that a weekday?

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 1 then as part as of this -- we decided we needed to have that
 2 resolved because of some things that have occurred since then,
 3 which includes the settlement of the national class action when
 4 IFC was sued out in New Jersey --
 5 THE COURT: Right.
 6 MR. SCHULTE: -- four years ago by other lessees, and
 7 now they have entered into a settlement there.
 8 So there have been -- this has been a very fluid case,
 9 Judge, since we were here, and, you know, in the past several
 10 months.
 11 THE COURT: Well, let me ask the government. Do you
 12 folks want to file something in addition to Exhibit C or should
 13 I just rely on Exhibit C?
 14 MR. SCHROEDER: Your Honor, I think we would like to
 15 file a response.
 16 THE COURT: Okay. So how much time do you need to do
 17 that?
 18 MR. SCHROEDER: I think we would like a week, your
 19 Honor.
 20 THE COURT: Okay. Is that enough time?
 21 MR. SCHROEDER: Well, given the press of trial, I
 22 guess our position is, your Honor, this is something that
 23 should be resolved during the course of trial and after trial
 24 so we -- we can file --
 25 THE COURT: This is something we can resolve instant

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 1 THE CLERK: The 16th, that's a Friday.
 2 MR. SCHROEDER: Is that a weekday?
 3 THE CLERK: That's a Friday.
 4 THE COURT: Okay. So that will take care of that.
 5 MR. SCHROEDER: Thank you.
 6 THE COURT: Now let's talk about the motion for a
 7 continuance. Who wants to speak to that?
 8 MR. SCHULTE: I can go first, Judge. The Court will
 9 recall when we were here back in December and we agreed to this
 10 expedited schedule which set the trial, and then we amended it
 11 by three weeks, the case had -- the landscape of this, of all
 12 these leases has changed dramatically in that four- or
 13 five-month period.
 14 The Court may recall --
 15 THE COURT: Why?
 16 MR. SCHULTE: Why? Because back -- the totality of
 17 the number of leases -- lessees involved is 746.
 18 Since then, as I reported to the Court back in
 19 December that IFC was going to continue to try to settle cases
 20 and had the right to do that. Courts promote settlements. We
 21 have done -- in fact done that with lessees.
 22 There are lawsuits, as the Court knows, going on in
 23 Illinois. There are lawsuits going -- there is the Exquisite
 24 Caterers that I'll come to in a second where IFC is a defendant
 25 in New Jersey.

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1 There is a Weir -- another Weir Group of people suing
 2 us. There is lawsuits all over the place.
 3 And this has been going on for -- since 2004, almost
 4 four years. And in light of what's happened in the past five
 5 months, Judge, where the initial group of lessees involved is
 6 746, by -- there have been 200 and -- I don't have my numbers
 7 exactly, but there have been 249 or '50 settlements, including
 8 100 plus in the past -- just in the past three months since I
 9 was here in December when we were talking about that.
 10 The -- then just last week the Court in New Jersey in
 11 the Exquisite Caterers where IFC is a defendant in that case,
 12 along with some other parties, who also settled over various
 13 periods of time before us on terms similar to ours, approved a
 14 national class settlement.
 15 There are now 266 people who have -- who are in that
 16 class. 233 have opted out.
 17 So now we're down to 30 percent of the universe of
 18 initial -- of initial group of lessees.
 19 In the meantime we are continuing, Judge, to talk
 20 settlement with those folks. And I can tell you in the -- just
 21 yesterday we got an email that said five more cases have
 22 settled. So --
 23 THE COURT: You have collected approximately \$2
 24 million so far in settlements.
 25 MR. SCHULTE: 1.9, Judge.

11

1 THE COURT: But the government's view of it is is you
 2 have no business collecting anything.
 3 MR. SCHULTE: Well, that's why we filed the motion to
 4 bar the recovery -- that very point, Judge, so that --
 5 THE COURT: But, Mr. Schulte, what you ought to do, it
 6 seems to me, is you want to -- you want to have the permission
 7 to continue to do the very thing the government contends is
 8 unfair.
 9 MR. SCHULTE: Judge, I don't see how they can contend
 10 it is unfair, if you know all the facts, which is there are 40
 11 leasing companies who bought paper from NorVergence.
 12 THE COURT: No, but that's --
 13 MR. SCHULTE: Though but the --
 14 THE COURT: That's a defense, Mr. Schulte, that's
 15 not --
 16 MR. SCHULTE: I understand. But it is not unfair,
 17 Judge. How it could it be unfair if all those other leasing
 18 companies have entered into settlements similar to what we're
 19 doing and nothing has happened to them? So if that practice
 20 has been continuing for four years now --
 21 THE COURT: So let me ask this -- maybe I should ask
 22 the government. Why are you being singled -- you're saying
 23 you're being singled out. Yes?
 24 MR. SCHULTE: Judge, I don't know why they singled us
 25 out.

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1 THE COURT: Well, that's approximately 2 million.
 2 MR. SCHULTE: Right, that's right. I just wanted
 3 to -- I wanted to try to give you better -- as good a number as
 4 we can get.
 5 And, Judge, the cost to our client of over \$14 million
 6 for these leases. Our client has lost over \$10 million on this
 7 matter. So that's -- all they are trying to do is -- they
 8 would like to get the whole matter settled, and they are doing
 9 their best to do that, Judge.
 10 And so when we filed -- because of the change in the
 11 landscape, especially with the recent New Jersey settlement, it
 12 seems to me while I would love to have our client pay us all
 13 lawyers money, I think it is in the best interests of our
 14 client to try to continue to settle cases if they can.
 15 And that's why we think asking for a short 30 day or
 16 whatever the Court deems appropriate to do that would be more
 17 appropriate than lawyers from their side, lawyers from our side
 18 spending resources of our client. We don't have the resources
 19 of the government, unfortunately, but we are here to defend the
 20 case.
 21 THE COURT: Sure you do.
 22 MR. SCHULTE: Well, unfortunately, we don't, Judge. I
 23 would like to say we do, but -- and to me representing this
 24 client, it seems to me, that it would be in their better
 25 interest, in light of how the landscape has changed --

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1 THE COURT: I mean, is that the fact? Are you being
 2 singled out?
 3 I shouldn't say that.
 4 MR. SCHULTE: I --
 5 THE COURT: Are you the only ones who are affected by
 6 this suit in the sense that nobody else has been sued, and yet
 7 they have done at least on a nominal basis the same things?
 8 Are there 40 sort of similarly situated companies who
 9 are going about their business with no interference from the
 10 government, and you're the only folks who have been sort of
 11 targeted?
 12 MR. SCHULTE: That's my understanding.
 13 Mr. Deeb could more appropriately answer that. That's
 14 why we have multiple people here, Judge.
 15 THE COURT: Okay.
 16 MR. SCHULTE: He represents a number of other leasing
 17 companies, and maybe he can address that better than I could.
 18 I just want -- so the record is active.
 19 MR. DEEB: The issue, your Honor, with regard to the
 20 settlement is not the fact that we're being singled out, and
 21 that may be something that comes up during trial, it may not.
 22 That's not the point that's being made here. It is that the
 23 people who are entering into settlements are doing so fully
 24 aware of the FTC's action, and they are making their own
 25 private deal as to we want this to be over as to us.

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1 There is no -- I'm not aware of any allegation that
 2 people can't do that. In fact, that's strongly supported by
 3 federal case law, and any decision that I have ever seen, the
 4 right of private litigants to enter into settlements.
 5 In fact, as Mr. Schulte mentioned, these settlements
 6 have been going on, and I represented a number of other leasing
 7 companies, for the past four years by 35, 40 different leasing
 8 companies. And nobody has jumped in and said, you can't settle
 9 these cases because there may be something wrong.
 10 Yes, the FTC is arguing that it is unfair as to us
 11 going forward and collecting on these leases, but that's
 12 different than settling it. That's the subtle difference that
 13 we're making here.
 14 And then if you take away the right of a litigant to
 15 settle, I don't know where that leaves us in terms of how we
 16 make our legal system work.
 17 So they are not saying --
 18 THE COURT: Well, but their position though, you not
 19 having been here, is essentially everything that has transpired
 20 is the consequence of IFC's -- I use the word illicit as a
 21 synonym for unfair behavior -- and but for that illicit conduct
 22 you wouldn't be -- your folks would not be in the position, the
 23 enviable position of being able to collect a dime.
 24 MR. DEEB: And let's assume that is true, your Honor,
 25 let's assume that -- and just for purpose of this discussion --

15

1 a -- because it has a more icky flavor.
 2 MR. DEEB: Uh-huh.
 3 THE COURT: But had you not conducted yourself in the
 4 way that you did, you never would have had the chance to
 5 settle. And so what you are really doing is sort of profiting
 6 by your own wrong. And that this intervening event of the
 7 lawyers is not a sanitizing event from an analytical
 8 perspective before.
 9 That's all they are saying. I don't -- I don't know
 10 if they are right or wrong.
 11 I mean, the issue isn't free from doubt.
 12 In fact, my initial reaction to it was, when this
 13 first came up is, well, these people have lawyers, they don't
 14 have to settle, and maybe they shouldn't.
 15 MR. DEEB: In the case, your Honor -- and this is
 16 cited in our brief -- FTC versus Amrep. That's a Southern
 17 District of New York decision.
 18 The Court considers the issue of settlements that are
 19 occurring that may or may not affect the right to restitution
 20 that the FTC is seeking.
 21 THE COURT: Your position is that that case doesn't
 22 govern, and to the extent it has any relevancy, it supports
 23 you.
 24 MR. DEEB: Correct, your Honor. And it supports us
 25 because it says that if there are other damages that they can

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1 THE COURT: Right.
 2 MR. DEEB: -- we acted illicitly and that we wouldn't
 3 be in this position.
 4 The people that we're settling with know this. They
 5 have their own legal claims, and they have decided that they
 6 want to settle with us having that knowledge. That's the
 7 cornerstone of how our legal system works.
 8 THE COURT: You folks want me to decide the question
 9 of the scope of the restitution remedy in this case without
 10 having an informed record to do it. And that's what happens if
 11 you -- if one puts off -- I'm not saying you may -- maybe
 12 we'll decide not to -- it is better to put it off for 30 days.
 13 But ultimately how does one decide what the
 14 appropriate remedy is if you don't know what happened?
 15 MR. DEEB: Well, that's exactly the point, your Honor,
 16 that we addressed in the brief, and I'm sure that Mr. Schroeder
 17 will address in his.
 18 It is our belief and our submission that this is not a
 19 factually intensive issue because there aren't allegations in
 20 this case that the settlements that are taking place are not at
 21 arm's length. In fact --
 22 THE COURT: I agree with you, but isn't -- that's not
 23 the point that the government makes. The point the government
 24 makes is you have no business -- you wouldn't have been here
 25 had you not conducted yourself in an illicit -- I use that as

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1 recover, that's okay. But if the litigants decide they want to
 2 settle with full knowledge and at arm's length -- we're not
 3 talking about fraudulent occurrence in the settlement right
 4 now -- then that is supported by the legal system. That's not
 5 an element of damages because it has been taken out of the
 6 damages that may be recovered by the government.
 7 Now there are cases that they rely upon, and all those
 8 do not involve arm's length settlements. If there is -- the
 9 only cases relied upon -- this is from their supplement
 10 memorandum, to be fair, because they haven't fully responded
 11 yet -- but the cases they rely upon in that supplemental
 12 memorandum are not cases where there have been arm's length
 13 settlements.
 14 They are cases -- and what the Courts look at and say,
 15 the settlement itself was fraudulent. They -- it wasn't arm's
 16 length, it was on the back of a form. It was something that
 17 was slipped in. People didn't know what they were doing.
 18 That's not the case here. We have a court-approved class
 19 action that's going forward. We have people represented by
 20 counsel. And we have, I believe, the FTC saying, all of these
 21 things we'll stipulate are at arm's length, the settlements.
 22 THE COURT: No question about it.
 23 MR. DEEB: We still think we have a right --
 24 THE COURT: And they admit -- they also admit that
 25 they had never done this before.

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1 MR. DEEB: Correct, your Honor. They said they never
 2 did this before, and there is no authority backing up the right
 3 to do so.
 4 So what we are submitting to the Court that you
 5 don't need a factual record because they have already admitted
 6 to the facts necessary to make the ruling, unless they come up
 7 with case law that convinces your Honor otherwise.
 8 THE COURT: Let's assume you're right, let's assume
 9 that Mr. Horn gets up and Mr. Schroeder gets up and they say,
 10 you know what, this is a crummy idea to try to interfere with
 11 these settlements, it is dumb, we're not going to do it --
 12 MR. DEEB: Uh-huh.
 13 THE COURT: -- the chairman of the FTC won't let us do
 14 it. We want to go ahead with the trial because what they did
 15 was illicit, it was unfair, and it was deceptive. The fact
 16 that you get to keep 2 million bucks doesn't have a thing to do
 17 with whether this case goes forward.
 18 MR. DEEB: Well, your Honor, I don't want to get into
 19 settlement negotiations --
 20 THE COURT: Does it?
 21 MR. DEEB: -- because -- it does.
 22 THE COURT: But they have said -- they have said that
 23 they have no intention of settling this case, and they are not
 24 going to settle this case. And -- do you want me to read you
 25 what they actually said?

19

1 regard to --
 2 THE COURT: Nothing good can be more straightforward.
 3 MR. DEEB: And maybe that the appellate division
 4 agrees, your Honor.
 5 But that certainly is something that's going to be
 6 hanging out there. We're looking at a lot of expense going
 7 forward beyond this trial that just doesn't make any sense once
 8 you -- when Mr. Schulte was before you in December, we're
 9 talking six, seven hundred people, now we're talking somewhere
 10 around 200 people.
 11 As that number gets like this, it just doesn't make
 12 sense to try this case anymore, whether we completely
 13 capitulate to the FTC's position or whether we find a common
 14 ground based upon the way things are going.
 15 So it is just not that we're trying to delay, because
 16 it is always been in our interest to get this in to trial and
 17 get it done quickly, it is the circumstances, the way these
 18 settlements have fallen and the way the class action occurred.
 19 And resolutions were made with regard to objections and getting
 20 them resolved and things like that that have led us to we're on
 21 the verge of trial and we're short time to make this work.
 22 Otherwise we wouldn't be here. I love to try cases.
 23 That's what I do.
 24 THE COURT: Are you going to be here for this?
 25 MR. DEEB: I absolutely am. I have been involved,

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1 (Laughter.)
 2 THE COURT: They oppose the motion. The FTC has
 3 worked hard to meet the schedule and are ready to proceed.
 4 IFC's asserted justification that settlement is likely is not
 5 accurate. Unless there is a significant change in the position
 6 taken by IFC, there is no prospect of settlement of this
 7 matter.
 8 That's pretty straightforward.
 9 MR. DEEB: And, your Honor, we got from the FTC,
 10 through Mr. Schroeder, their settlement position, which I'm not
 11 going to state because it is --
 12 THE COURT: I don't want it hear.
 13 MR. DEEB: -- not appropriate before your Honor.
 14 THE COURT: Right.
 15 MR. DEEB: We got -- this is our position going in
 16 today in case it comes up, there is a settlement position.
 17 What happens when you trick the amount of people that are
 18 affected by that settlement position, the ability of IFC with
 19 its financial issues, to the extent they have some, to consider
 20 that settlement and to go forward and say, you know what, I
 21 think this is crummy, I think this is unfair, but given the
 22 cost -- and, your Honor, let's again be fair, we're not just
 23 talking about the trial, we're talking about submissions after
 24 the trial and a bench trial, we're talking about some very
 25 thorny issues with regards to the definition of consumer with

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1 your Honor, with the NorVergence since the very beginning, four
 2 years. And I have been involved in this case the entire time.
 3 So although I haven't had the benefit of being before your
 4 Honor, I have been very much plugged into what's been going on
 5 in the case.
 6 And this is not about we want to delay or cause
 7 problems, this is about it makes common sense. And I hate to
 8 say this because, again, I like to try cases, but occasionally
 9 it makes common sense to find a way to settle a case.
 10 Now that's true even if your Honor --
 11 THE COURT: But the issues -- but the issues here for
 12 the government -- you have an adversary who is a sort of sui
 13 generis adversary.
 14 MR. DEEB: Uh-huh.
 15 THE COURT: Money means nothing --
 16 MR. DEEB: Yes.
 17 THE COURT: -- generally.
 18 MR. DEEB: Well, I --
 19 THE COURT: Cost don't have any meaning to the
 20 government.
 21 MR. DEEB: See, you know, I would like to believe,
 22 your Honor, and knowing Mr. Schroeder and Mr. Horn and some of
 23 the people that I have gotten to know in this case, and
 24 certainly Mr. Brooks, who was their predecessor, there is
 25 always somebody else out there for them to pursue and to

21

1 protect the world from.

2 THE COURT: But where will you have an issue teed up

3 as clearly as you have, what you have now said is this

4 wonderful issue that you think is so delicate and thorny, of

5 the meaning of a critical word in their enabling statute? My

6 goodness, this chance may never come again.

7 MR. DEEB: Your Honor, and if I could put aside the

8 interest of my client, I would be pushing big time to do

9 this --

10 THE COURT: I'm not concerned about that. I'm telling

11 you what the government looks at. And so to them this isn't a

12 question of dollars and cents. And you have to persuade them.

13 MR. DEEB: And, your Honor, you're absolutely right,

14 and this is -- and as I suggested in the motion, which I had a

15 hand in writing, that not only does it make sense just by the

16 turn of recent events to give us an opportunity to let this

17 happen, because it is in the interest of client and it is in

18 the interest of the Court to stop the spending of money and

19 time and resources, I believe it is also in the interest of the

20 FTC, even though you're right that money doesn't affect them

21 the same way because they have other things they would like to

22 pursue as well.

23 So are we going to spend six months, nine months,

24 another year on this case and a situation where we have gotten

25 the numbers down to a point where it doesn't make sense? On

23

1 talk about this today because -- well, we'll see.

2 But, I mean, in light of that extraordinary

3 stipulation that you have submitted to me, things might be

4 different than --

5 MR. DEEB: Which is yet --

6 THE COURT: -- at least the way I mean, I wrote that

7 opinion based upon what I believed was taking it, I concede to

8 you, to a -- drawing all inferences in favor of the government,

9 maybe the case -- the complexion of the case has changed, I

10 don't know.

11 MR. DEEB: Yet another issue, your Honor. And, you

12 know, one of things that we had trouble with with regard to the

13 pretrial order is that there are some decisions that will

14 greatly impact how this case goes forward, and that certainly

15 is one ruling on that outstanding motion that will impact as to

16 how we proceed.

17 THE COURT: Which outstanding motion?

18 MR. DEEB: The one with regard to that admission, the

19 extraordinary admission that you just mentioned.

20 THE COURT: I know we have got other things here. I

21 have not seen anything else. You filed a bunch of things, and

22 I haven't seen them.

23 MR. DEEB: That's one of them, your Honor.

24 THE COURT: Okay.

25 MR. DEEB: So we have --

22

1 timing alone it makes sense to give us another breath of air to

2 try to get it done.

3 And then a whole separate issue is this question of

4 the settlements. If your Honor agrees, and I don't know that

5 you will, but looking at the briefs if you agree that the

6 factual record is set up and you can make a decision on that

7 issue, whichever way you rule, this case has to settle. There

8 is no way that the IFC can go forward and try this case in the

9 face of their settlement moneys are going to be turned back

10 again them.

11 THE COURT: Sure. Of course you can.

12 MR. DEEB: Well, they could if they are forced to,

13 your Honor, but I think --

14 THE COURT: Of course -- of course you can. I

15 don't -- with all deference I don't accept that at all.

16 In fact, if anything, that's the trigger and the

17 ultimate motivator to keep going.

18 MR. DEEB: Well, IFC has always very firmly believed

19 in its position, your Honor, that they are innocent of any

20 wrongdoing in this case, and I wouldn't suggest otherwise.

21 But --

22 THE COURT: And Mr. Schroeder is extraordinarily --

23 MR. DEEB: Extraordinarily passionate in his belief on

24 behalf of the government.

25 THE COURT: Because I really have to -- we're going to

24

1 THE COURT: Is there an issue about that?

2 MR. DEEB: I don't know is the answer to that, your

3 Honor. It is not a motion that I am handling.

4 THE COURT: Okay.

5 MR. DEEB: But I'm sure from Mr. Schroeder's point of

6 view --

7 THE COURT: We'll find out.

8 MR. DEEB: -- there is a small issue.

9 THE COURT: We'll find out today what --

10 MR. DEEB: Exactly.

11 THE COURT: It is all about.

12 It does -- it is, I think, consistent -- well, let's

13 see where we go.

14 All right. I do understand your position and --

15 MR. DEEB: I would --

16 THE COURT: -- settlements are really the life blood

17 of the system. Without them this would be -- the whole legal

18 system crumbles. (Unintelligible) only more so. You know, I

19 think there is the percentage of trials in this country

20 is -- it is down -- it is less than 2 percent of all cases

21 filed are tried, and it may be less than a percent. And even

22 with that the system totters.

23 MR. DEEB: If, your Honor --

24 THE COURT: You have a willing ear in terms of the

25 presentation.

25

1 MR. DEEB: I know --

2 THE COURT: But there are --

3 MR. DEEB: -- federal judges hear the same thing, your
4 Honor.

5 THE COURT: No. But there are also other interests.
6 This is a different kind of the case. And, you know, you can't
7 (unintelligible) you need a partner. And you better find out
8 if the government wants to dance with you.

9 MR. DEEB: Yes.

10 THE COURT: If they don't --

11 MR. DEEB: And just addressing the point, your Honor,
12 with regard to the settlements, because your Honor raised it,
13 if in fact I'm correct and that the government is not
14 challenging the arm's length nature of the settlements that
15 have been entered into between IFC and the lessees, then any
16 position that would warrant them saying we could still undo
17 these settlements basically undoes the very nature of what your
18 Honor just described. Because you can't have a final
19 settlement anymore.

20 THE COURT: But that is not --

21 MR. DEEB: Any --

22 THE COURT: That's not --

23 MR. DEEB: If a non-fraudulent settlement can be
24 declared false --

25 THE COURT: That's just not true. The character of

27

1 But at least as I read the complaint accusing you of
2 unfairness and deception.

3 MR. DEEB: Well, the decision, your Honor -- another
4 case that we cited to In Re Baldwin, Second Circuit, Court of
5 Appeals upheld an injunction precluding -- the lower court
6 precluding the attorney generals from filing actions trying to
7 declare settlements invalid. Again, the same type of
8 reasoning.

9 THE COURT: I haven't ready any of them, and I promise
10 you I'll read them intently. And you may well be right.

11 And, as I say, when I heard this position from the
12 government, and Mr. Schulte very eloquently made the
13 presentation that you are making, it -- you know, it gave me a
14 lot of pause.

15 MR. DEEB: If your Honor --

16 THE COURT: I haven't thought it through enough.

17 MR. DEEB: I understand, your Honor. And if -- and if
18 in fact there was some greater, greater good, and this money
19 was going to be taken and sprinkled amongst whatever people
20 around the country to help them out for whatever reason, and
21 that was an independent issue of the settlements, then maybe I
22 could understand the arguments.

23 THE COURT: What's going to happen to the money?

24 MR. DEEB: The case law, your Honor, FTC versus
25 Febre, this is a Seventh Circuit decision, it goes back to the

26

1 every act, Holmes said, depends on the circumstances in which
2 it is done. Schenck against the United States.

3 And so to say that every settlement gets undone
4 because you can't be certain of it is simply not true.

5 It does -- this is a very unique case. The government
6 may be overreaching, and it may not be overreaching, we'll see.

7 But it isn't so to say that in a case like this if you
8 were to lose, and if somebody in the Court of Appeals were to
9 conclude you were wrong, that this threatens the sanctity of
10 settlements through the nation. And that's the kind of in
11 terrorem argument that was made in the briefs, and it is one I
12 don't accept.

13 You may be right, but I don't accept it.

14 MR. DEEB: And I stated it, your Honor, because it is
15 referenced in a couple of the decisions that we have cited to.
16 And certainly I would leave that to your Honor's discretion.

17 It certainly does, at least, take away a little bit of
18 the oomph in terms of when we reach a final accord, arm's
19 length transaction, Court approval, attorneys involved, and
20 then it gets -- the consideration gets taken out, that has to
21 have some more ramification than just that particular case.

22 THE COURT: But you're not going to find often a case
23 like this where the government is breathing down your neck and
24 accusing you of -- I'm not sure now what they are accusing you
25 of now of. We're going to find out.

28

1 consumers as long as they can be identified. If they can't be
2 identified, it goes to the U.S. Treasury. They can all be
3 identified in this case. So the net effect of allowing the
4 money to go back to the government here is to imbue the
5 consideration that was presented in these settlements.

6 THE COURT: Let's go back and talk about the -- is
7 there anything else, Mr. Schulte, you want to talk to me about
8 with -- what happens if -- let's say you ask for 30 days, what
9 happens at the end of 30 days, what are you going to tell me
10 then?

11 MR. DEEB: Well, we're either going to be -- I'm
12 sorry, that was addressed to you, Steve.

13 I would assume, your Honor, that we'd either be
14 settled or we'd proceed with trial, your Honor.

15 MR. SCHULTE: And maybe -- I didn't know --

16 THE COURT: You are going to tell me then that the
17 universe of people is even less because you have done some more
18 settlements --

19 MR. SCHULTE: I would --

20 THE COURT: -- and if you just had a little more time,
21 we could get rid of everything.

22 MR. DEEB: I would admit to you then, your Honor, that
23 the only way we'd ask for additional time was with the consent
24 of the FTC.

25 If the two of us say we needed three more days to

29

1 complete settlement, it is going forward.

2 THE COURT: Since you have plugged into this, as you

3 said, you're aware -- and I did this. I mean, I was

4 responsible for this.

5 MR. DEEB: Absolutely.

6 THE COURT: I talked the FTC out of going forward with

7 a motion for preliminary junction. And Mr. Horn was as miffed

8 as he could be.

9 And I did it -- and Mr. Schulte was sort of an

10 accomplice -- on the basis of what's the point of going through

11 all this, let's take this all with the trial, and we can do it

12 all then. And that made sense to me. The government didn't

13 like that idea. And I kind of, sort of talked him into it.

14 I also talked him into, I think, the idea of this

15 escrow. And I talked to Mr. Schulte into that for sure. I

16 mean, I forced him to go and talk to your people. And nobody

17 seemed to like that idea.

18 Then I talked them out of going forward with this

19 motion to increase the escrow. And all of this, all of it,

20 every time I made that pitch to the government, it was all on

21 the strength of why are we doing this. There are certain

22 practicalities to this. I mean, at the end it was an

23 analytical argument that, you know, \$150,000 doesn't strike me

24 as an irreparable harm. And for whatever reason they didn't go

25 ahead.

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1 are just a few days short of maybe making this all go away and

2 flipping over another year's worth of time on this case going

3 forward, I think it is at least worthy of consideration.

4 THE COURT: The other thing that I found troubling,

5 and I want to hear from the government, is on page 2 where

6 there is discussion of litigation in several other

7 jurisdictions.

8 MR. SCHROEDER: Which motion, Judge?

9 MR. DEEB: In the motion for continuance, I presume.

10 THE COURT: In the motion for a continuance.

11 (Brief interruption.).

12 THE COURT: These other litigation matters in which

13 IFC is involved all substantially predate the present action

14 brought by the FTC. Accordingly the IFC has had no choice but

15 to litigate these matters or negotiate a settlement. It goes

16 on and on and on.

17 I mean, the fact that these -- that this litigation

18 predates this strikes me as sort of an observation or

19 chronology with no relevance at all. So what?

20 When we set this schedule -- and I didn't pick the

21 dates, you picked the dates. Your client -- your client picked

22 the dates. It then got put off. And I contend -- by the way,

23 folks, I'm content to do anything that you all are agreed to

24 doing.

25 And I -- but now to talk about other matters and other

30

1 And now you're asking me to say to the government -- I

2 want to hear from them -- you know, let's wait some more. And

3 in the fullness of time maybe this will go away; when they are

4 saying to me, no, it won't.

5 MR. DEEB: Your Honor, I wasn't plugged in during

6 those discussions. And it was the right to decision with

7 regard to the injunction, in my humble opinion --

8 THE COURT: I agree.

9 MR. DEEB: -- because with -- the whole case would

10 have had to have been tried twice.

11 THE COURT: I couldn't agree with you more.

12 MR. DEEB: So it was actually in the interest of the

13 government to do it this way as much as it was anybody else.

14 THE COURT: They sure didn't perceive it that way.

15 MR. DEEB: They might not have felt that way, but they

16 would have spent the time twice to do it. And that was the

17 road we were going down.

18 I agree with everything that has happened so far in

19 this case. And I think it has been designed, your Honor, to

20 allow the parties to proceed with due haste. I think what you

21 are going to hear today is that it has been a bumpy ride, as we

22 have been trying to get this case ready for trial and

23 scrambling to get everything done by this date. But both

24 parties have tried in good faith to do so.

25 But when you come up to the end of the road and you

32

1 pending cases, unless this is simply part of the -- your

2 discussion about let's see if we can get this settled --

3 MR. DEEB: That's all, your Honor. It wasn't meant to

4 justify the continuance, it was meant to explain to the Court

5 that we had no choice but to go forward with settlement

6 discussions. We weren't trying to somehow or other secret

7 money in --

8 THE COURT: But that had --

9 MR. DEEB: -- by the FTC.

10 THE COURT: But that had always been the plan, that

11 you were going to go forward. The government was sort of upset

12 you were going to go forward. I thought that was perfectly

13 fine. Dreamed up together, collectively this idea of the

14 escrow, which sort of turned out to be a big nothing, but it is

15 what it is.

16 So let's do this. I do understand what you are

17 saying. As you can tell I'm not particularly kindly disposed

18 toward it. That doesn't mean I won't do it. I really want to

19 hear what the government's position is, so let's --

20 MR. DEEB: Certainly, your Honor.

21 THE COURT: Mr. Horn?

22 MR. DEEB: Thank you.

23 THE COURT: Thank you.

24 MR. SCHROEDER: Thank you, your Honor. Mr. Schroeder

25 for the Federal Trade Commission.

33

1 THE COURT: Hi, Mr. Schroeder. I'm sorry.
 2 (Brief interruption.)
 3 MR. SCHROEDER: I think we laid out our position
 4 fairly clearly or our opposition to the motion. We don't see a
 5 significant change in circumstances, either since December or
 6 certainly since late February and again in the middle of March
 7 when we talked about whether there was any impact from the New
 8 Jersey settlement on this action.
 9 I think what I can gather from defendant's position it
 10 is that there is a substantial change in posture if your Honor
 11 rules in their favor on the motion to bar settlement proceeds.
 12 And other than that I don't see a change here.
 13 The class action settlement in New Jersey was first
 14 filed as a proposed settlement in late February. And in -- on
 15 March 13th your Honor contacted Mr. Borst and myself to talk
 16 about whether the settlement would have any impact on this
 17 case, and we both answered no. Absolutely nothing has changed
 18 since then.
 19 THE COURT: Where do you all stand with Judge Murray?
 20 MR. DARCY: Alex Darcy for IFC, your Honor.
 21 THE COURT: Hi, Mr. Darcy.
 22 MR. DARCY: Well, the last bit of excitement he
 23 entered a sua sponte preliminary injunction against IFC
 24 preventing us to going forward and consummating the settlement
 25 in New Jersey.

35

1 THE COURT: No, no.
 2 MR. SCHROEDER: -- of settlement proceeds. However, I
 3 would note a couple of things on that. I think we have to
 4 separate out the issue of whether consumers who have agreed to
 5 a settlement are going to get money back or not from the issue
 6 of whether there is relief for the Federal Trade Commission in
 7 protecting the public interest in deterring other parties in
 8 similar situations from attempting to profit from or at least
 9 taking money from illegal practices.
 10 Here we have heard nearly \$2 million in the last
 11 year. That's about since we filed the complaint. And that is
 12 the kind of money that provides an incentive to keep doing this
 13 until somebody comes in and stops.
 14 Some of the cases we cite in our supplemental
 15 memorandum on the issue note that if the government could not
 16 proceed if there was a settlement by a class action, then there
 17 would be a race to the courthouse doors between the government
 18 and class action lawyers, and that would not be a good thing.
 19 So we do have an argument to make on that.
 20 THE COURT: Let's say that tomorrow Judge Easterbrook
 21 writes an opinion and -- in a case like this and says you can't
 22 get the money. Does the case go forward?
 23 MR. SCHROEDER: Your Honor, at that point I think we
 24 would certainly look at our options and decide whether the
 25 case -- let's assume that there are only half the consumers

34

1 We took him up on emergency motion on appeal. The
 2 appellate court said there was an ex parte order that he
 3 entered, so we had to go back and ask him to vacate it. Went
 4 back and asked him to vacate it. He went ahead and vacated it
 5 provided that we agreed to an extra ten-day opt out period for
 6 the lessees in New Jersey.
 7 And so that -- he vacated his order, and we did give
 8 the lessees an extra ten days. And that expired, I believe, on
 9 Monday of this week.
 10 THE COURT: What's your opt out rate?
 11 MR. DARCY: Steve, what's the opt out rate?
 12 MR. SCHULTE: It is -- it had to be postmarked by
 13 Monday, April 21st, Judge.
 14 And what's today, the 22nd?
 15 Yesterday.
 16 THE COURT: What's -- what -- so far what is it or --
 17 MR. SCHULTE: I have -- we have heard nothing yet,
 18 Judge. I don't -- I don't have an -- if I had it I would be
 19 happy to give it to you.
 20 THE COURT: Yeah.
 21 MR. SCHULTE: I don't have any information on it.
 22 THE COURT: Thank you very much, Mr. Darcy.
 23 MR. SCHROEDER: Your Honor, a few more points. I
 24 don't propose to argue our opposition to their motion to bar
 25 recovery --

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1 left or a third of the consumer left, we might look at the case
 2 differently. I can't tell you how we would.
 3 And obviously it would depend on what Judge
 4 Easterbrook said. If he said, number one, you can't undo the
 5 settlements; number two, the consumers can't get their money
 6 back; and, number three, FTC, you can't get it back in
 7 disgorgement either, we would reevaluate our position. But we
 8 do not think that is the law. And until that is determined, we
 9 think we need to continue with this case.
 10 And to the extent that defendants thought this issue
 11 needed to be resolved before trial, we filed our supplemental
 12 motion maybe six weeks ago, maybe longer than that. They knew
 13 this issue was important. The New Jersey settlement was filed
 14 as a proposal. And they waited until the eve of trial to file
 15 it. And that seems only designed to be able to go forward and
 16 collect money from these New Jersey consumers so that they can
 17 use it for whatever purpose and it won't be available at the
 18 end of the day.
 19 And we think there has been enough collected already
 20 and consumers shouldn't have to pay more.
 21 THE COURT: Well, Mr. Deeb admitted that that was the
 22 whole point, they wanted to go forward to collect.
 23 (Laughter).
 24 MR. SCHROEDER: And, your Honor --
 25 THE COURT: I understand that. That's -- that's the

37

1 name of the game.

2 MR. SCHROEDER: One thing on my stipulation is, as we

3 indicated in our response to their motion, my attempt there, as

4 our attempts have been all along, is to articulate for the

5 defendant what our case is and what we're trying to prove. And

6 the issue there was, well, IFC did know NorVergence was a fraud

7 when they took the contracts. And it seems to me it

8 would -- we would look foolish if we came into your courtroom

9 and said, they knew it was a fraud, they knew services weren't

10 going to be delivered, but they took the contracts anyway

11 because they wanted to buy all this litigation they have gotten

12 into.

13 No rational business is going to do that, and I don't

14 think the record will show that they did. However, the

15 information --

16 THE COURT: Tell me, what's your theory of the case?

17 MR. SCHROEDER: The theory of the case is that from

18 the information they had they could see --

19 THE COURT: Because you -- as I read the complaint,

20 apart from the opening line of the complaint, which is very

21 titillating, you say that they should have known that these

22 folks -- that there was likely deception -- which I thought was

23 an odd choice of words -- but that they were likely deceived

24 into signing on. Now --

25 MR. SCHROEDER: That's correct.

39

1 They built an operation that allowed them to bring in a lot of

2 money. But we don't know where the money went. And it is

3 unfortunate that we don't because if we did we probably

4 wouldn't be here.

5 THE COURT: Let me ask you this. NorVergence had no

6 idea that there was fraud going on you say. They assumed

7 further, hypothetically, that they thought that this was a

8 straight-up deal and that all of these services were going to

9 go on and everything would go on into perpetuity or as long as

10 it could go on in a perfectly reasonable way.

11 MR. SCHROEDER: Where I disagree with that statement,

12 your Honor, is that that it was a straight-up deal.

13 THE COURT: Well, they didn't -- but I thought you

14 said NorVergence --

15 MR. SCHROEDER: (Unintelligible.)

16 THE COURT: -- IFC didn't know.

17 MR. SCHROEDER: What they knew --

18 THE COURT: They didn't know that the money was being

19 siphoned off.

20 MR. SCHROEDER: But they knew what -- no, they didn't

21 know the money was being siphoned off. They knew that the

22 money that was being paid under the equipment rental agreements

23 was really the money that consumers were paying for services,

24 but the consumers didn't know that. Consumers thought they are

25 paying for services, they will get services. If they don't get

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1 THE COURT: -- is that the theory of the case?

2 Because that's not -- and yet you say, well, of course they

3 didn't know anything.

4 MR. SCHROEDER: No, I didn't say they didn't know

5 anything, your Honor. I said they didn't know that NorVergence

6 wasn't going to provide the services. IFC assumed NorVergence

7 would provide the services. However what they knew was --

8 THE COURT: How would they do that? If -- I forgot

9 the overwhelming lion's share of the money was going to IFC

10 with a pittance going to NorVergence, how are we going to keep

11 up the payments and --

12 MR. SCHROEDER: NorVergence is going to keep up with

13 the payments using the money that they are paid up front by the

14 finance companies. Their revenues in one time period

15 NorVergence's were \$41 million, which was mostly money coming

16 from the finance companies. Their costs of goods sold was

17 about \$8 million at that point in time.

18 THE COURT: What happened to all the money?

19 MR. SCHROEDER: The bankruptcy trustee, I believe,

20 hired a forensic accountant, and they never found the money or

21 at least they have not to date. I really don't know.

22 I want to --

23 THE COURT: Well, they were good at one thing.

24 (Laughter.)

25 MR. SCHROEDER: A lot of it was spent, your Honor.

40

1 services, they don't have to pay. That's what our record will

2 show.

3 IFC, on the other hand, had enough information to know

4 that the money coming in on these rental agreements, those were

5 for services. And consumers were deceived into signing those

6 contracts.

7 In a perfect world NorVergence delivers the services,

8 consumers get them, IFC gets paid, and everybody goes home

9 happy. But the perfect world didn't happen. And where the

10 responsibility lies, because NorVergence is gone, is with the

11 finance company.

12 THE COURT: Well, I have to think this through, but it

13 strikes me that your stipulation and what you are saying now

14 may well alter the ultimate theory on which my -- on which I

15 mean, I wrote that opinion on.

16 MR. SCHROEDER: I read your opinion on the motion to

17 dismiss as completely --

18 THE COURT: (Unintelligible) I hope you did.

19 (Laughter.)

20 MR. SCHROEDER: -- as -- as completely consistent --

21 THE COURT: Outside this room no one will read it, so

22 I hope you read it.

23 MR. SCHROEDER: We read it as completely consistent

24 with our theory of the case, which is IFC knew of a defense to

25 consumers paying the contracts. They would have the defense if

41

1 they didn't get services because they were deceived into
 2 entering into those contracts. And because IFC knew that it
 3 doesn't have (unintelligible) holder in due course status, and
 4 it can collect on those contracts.

5 THE COURT: Okay.

6 MR. SCHROEDER: Thank you, your Honor.

7 THE COURT: All right. So you -- in other words you
 8 object -- you object to the motion. You don't see this as a
 9 situation in which you and IFC are going to settle this case.

10 MR. SCHROEDER: Your Honor, there is a great deal of
 11 history on settlement. And, of course, I won't be sharing that
 12 either unless we end up with a settlement conference before
 13 someone at some point. But based on everything we know there
 14 is not any reasonable prospect of settlement at this point.

15 THE COURT: Okay. Well, the motion to continue the
 16 trial date is denied.

17 And I'll deal with the restitution remedy when the
 18 briefs are filed and they are done.

19 What -- let's go through what's filed today. I have a
 20 courtesy copy of IFC Credit's pretrial memorandum, which
 21 appears --

22 (Brief interruption.)

23 MR. SCHROEDER: Your Honor, we filed -- we delivered
 24 to your chambers what we and counsel have been able to agree to
 25 date.

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1 put in a paper that just said, a one-page paper that said, FTC
 2 said their pretrial memo is stated in their motion for summary
 3 judgment.

4 THE COURT: Oh.

5 MR. SCHULTE: Our pretrial memo said it was stated in
 6 our motion to reply in response to theirs.

7 THE COURT: Okay. I got it.

8 MR. SCHULTE: Our motion --

9 MR. SCHROEDER: The problems with traveling, your
 10 Honor, that cover letter is only on our one-page pretrial
 11 memorandum. There was no cover letter, and I apologize for
 12 that --

13 THE COURT: That's okay.

14 MR. SCHROEDER: -- on our proposed documents. So we
 15 just delivered to your chambers two copies of what we had
 16 worked out to date on the pretrial order. We didn't
 17 electronically file anything. I thought that was the proper
 18 procedure.

19 THE COURT: Yeah, that's fine.

20 So the index -- I just want to make sure I have
 21 everything, so --

22 MR. SCHULTE: (Unintelligible.)

23 THE COURT: -- the index from the pretrial order
 24 schedules is what I have.

25 The pretrial memoranda or memorandum are going to be

42

1 THE COURT: Okay. One is captioned indexed pretrial
 2 order schedules. I guess it is the same thing, right?

3 MR. SCHROEDER: That is the order --

4 THE COURT: Two copies.

5 MR. SCHROEDER: And perhaps that page belongs in
 6 another place, your Honor. That is the document.

7 THE COURT: Okay.

8 So where it says please -- enclosed please find a
 9 courtesy copy of IFC Credit's -- Corporation's pretrial
 10 memorandum.

11 Is that this? No?

12 MR. SCHULTE: Judge, that is -- I don't think so. You
 13 don't mind me approaching.

14 THE COURT: Yeah, please.

15 MR. SCHULTE: No.

16 MR. SCHROEDER: Your Honor --

17 MR. SCHULTE: I think the -- I think what your Honor
 18 is referring to is Mr. Schroeder and I each agreed, because
 19 your order had said we'd file --

20 MR. SCHROEDER: Pretrial.

21 MR. SCHULTE: -- pretrial memoranda, and then we sent
 22 an email --

23 THE COURT: And I told you all you didn't -- you could
 24 file -- you could file anything.

25 MR. SCHULTE: By the time we got that, we each then

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1 the motions for summary judgment.

2 MR. SCHULTE: And our motion --

3 MR. SCHROEDER: We basically filed a one-page pretrial
 4 memorandum that says please consider the --

5 THE COURT: I got it. I got it.

6 MR. SCHROEDER: And ours was the motion for summary
 7 judgment -- our motion for summary judgment and our reply and
 8 our response to their motion plus our motion to bar recovery
 9 settlement proceeds.

10 And the document entitled index is in fact the
 11 pretrial order itself.

12 THE COURT: I got it.

13 MR. DARCY: Your Honor, just to give you a head's up,
 14 our answer is duly due tomorrow and --

15 THE COURT: Your answer to what?

16 MR. DARCY: To the complaint.

17 (Laughter.)

18 MR. DARCY: And we're aware of a statute of
 19 limitations issue. So we may brief that slightly
 20 because -- they have a three-year statute of limitations for
 21 restitution. They are saying that we knew --

22 THE COURT: Mr. Darcy, let me ask you a question,
 23 why -- because (unintelligible) -- why isn't there an answer on
 24 file? I didn't even realize that.

25 MR. DARCY: Because it is 14 days from the date that

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1 you issued your opinion, your Honor, on the motion to dismiss.

2 THE COURT: You're right.

3 MR. SCHROEDER: I think the opinion was dated April

4 9th or 10th or something like that.

5 THE COURT: You're right. You're right. You're

6 right.

7 So what are you going to do, you're going to now raise

8 a statute of limitations defense?

9 MR. DARCY: Well, your Honor, to the extent that they

10 are trying to -- let me back up.

11 They are saying that we knew the deception from day

12 one when we brought the first lease which was in October --

13 THE COURT: I thought now that he is saying you didn't

14 know of any deception.

15 MR. DARCY: No, your Honor.

16 MR. SCHULTE: It is changing theory, Judge. That's

17 kind of the problem.

18 MR. DARCY: Well, your Honor, just to give you a

19 flavor for what you are -- you're not going to see at trial,

20 you know, your opinion with respect to Count 2. You talked

21 about the inevitability of the transaction, having --

22 inevitably stuff is not coming in. They don't have the forces

23 to show that NorVergence was a Ponzi scheme. They have no

24 executives from NorVergence testifying. And the gentleman from

25 Adtran, Chris Thompson, your Honor, is going to testify in

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1 THE COURT: It may be different. And maybe all those

2 cases that are cited in there, and there is lots and lots of

3 them, are going to ultimately be, as I said -- in the opinion I

4 said that they weren't dispositive. Maybe they will be

5 dispositive.

6 MR. DARCY: Right. And, your Honor, we did take issue

7 with your fundamental principle. We are saying that

8 fraud -- fraud in the contract transaction is a foreseeable

9 contingency, and that this clause would -- you wouldn't sign

10 this clause. I mean this clause is incredibly one-sided.

11 THE COURT: You may be right.

12 MR. DARCY: And so --

13 THE COURT: Yeah, no, I understand.

14 MR. DARCY: But in the context of the statute of

15 limitations, your Honor, the problem is they are saying that we

16 knew from October 2003.

17 THE COURT: Well, I am -- excuse me, Mr Darcy. I'm

18 hearing today that there was no (unintelligible) -- that there

19 was no inevitability about this. I mean --

20 MR. DARCY: That's correct.

21 THE COURT: -- what I said in the opinion was that

22 what the lessees, in quotes, couldn't possibly have known and

23 couldn't have had any reason to anticipate was that the

24 (unintelligible) of was on the transaction from the beginning.

25 Now that's the normal situation -- and Judge

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1 excruciating detail how NorVergence's telecommunications

2 network actually worked and how they have an operations center

3 and a testing lab, which is going to be their contradiction to

4 the NorVergence salespeople who didn't know anything about how

5 NorVergence's operation, technical operations side of the

6 business.

7 So this whole notion that NorVergence was a Ponzi

8 scheme, you're never going to see that in this case. They are

9 down to this last straw which was that the lessees were

10 deceived and they are turning into the leases because they

11 believed that the contracts for -- weren't for services. They

12 have an opportunity to read those leases, didn't do so --

13 THE COURT: Well, I --

14 MR. DARCY: -- went ahead and signed them anyway --

15 THE COURT: I understand. And there is a lot more

16 cases that I put in than you folk -- about that issue than you

17 folks have.

18 MR. DARCY: Right.

19 THE COURT: And it was a matter of grave concern to me

20 when I read it, and that's why it seems to me that maybe the

21 theory of the case is different -- now is different than it was

22 articulated in the complaint when you took the complaint and

23 drew up a reasonable inference in a light most advantageous to

24 the FTC.

25 MR. DARCY: Oh.

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1 Easterbrook has said, and others, you don't have to presume the

2 people you're dealing with are liars.

3 There was nothing foreseeable about this as opposed to

4 the situation in Count 3 where you could -- of course problems

5 could arise. You could be the plaintiff. You could be the

6 defendant. You agree to a contract. You knew that in that

7 contract there was a forum selection clause. You agreed to

8 it. And I thought that was different.

9 Now what I am hearing is something very, different

10 maybe, than what was sort of the analytical foundation on which

11 I mean, I wrote that opinion.

12 But I put all those cases in there for, obviously, a

13 bunch of different reasons. One, they are relevant; and, two,

14 they -- I thought they might come into play later on and --

15 MR. SCHROEDER: Your Honor --

16 THE COURT: I mean, I guess what you are really saying

17 to me, Mr. Schroeder, is -- and I know your position is, and I

18 talked about that, is that, you know, there was a pile of

19 papers and they couldn't really have known and who knows what

20 their -- what the salesmen were doing, and we're going to find

21 all that out.

22 But if it comes to pass, hypothetically, that these

23 people are handed nine or eight pieces of paper, and that's why

24 in the footnote there is an opinion of -- concurring opinion by

25 Judge Rovner about how eight pieces of paper is no big deal,

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1 and most of these pieces of paper were simplicity themselves.
 2 So weren't even -- they weren't even contract documents in a
 3 sense. I mean, they were very easy to read.
 4 If it comes to pass that everybody thought this was on
 5 the square, and these people could look at this and they knew
 6 what they were signing onto, and IFC was doing this all -- this
 7 also in good faith, then I'm not -- I don't know where we come
 8 out.
 9 I mean -- but I do think, Mr. Schroeder, that it may
 10 change things a bit, I just don't know for sure.
 11 MR. SCHROEDER: Your Honor, the case we will present
 12 will definitely not be one where everybody acted in good faith
 13 from day one.
 14 THE COURT: That was sure. But I was led to believe,
 15 not only from the complaint, but early on when I spoke with you
 16 folks and -- and I can't -- I can't remember chapter and verse,
 17 but I kind of remember at our very first things we were talking
 18 about and we needed an evidentiary hearing. And Mr. Schulte
 19 was adamant that we did, and you said we didn't because it was
 20 all so clear from all the affidavits of what was going on and
 21 what people knew and --
 22 MR. SCHROEDER: What was clear was and -- what the
 23 testimony will show is that the contract, the equipment rental
 24 agreement that IFC is attempting to collect on, misstates the
 25 true consideration, the consideration that because represented

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1 not tell people that they were going to have to pay if they
 2 didn't get services. If people asked --
 3 THE COURT: Well, no, but Judge Easterbrook or Posner
 4 has written recently an opinion -- maybe it is one of the IFC
 5 cases that said -- I think it is -- that says it isn't a fraud
 6 to tell somebody what's in or not in the contract. You can
 7 read it yourself. In fact, it was Judge Posner's opinion in
 8 the Aliano Brothers case.
 9 MR. SCHROEDER: The consumer testimony and the
 10 salesperson testimony will show clear misrepresentations, your
 11 Honor.
 12 THE COURT: But you exonerate IFC.
 13 MR. SCHROEDER: No. The record will show that IFC
 14 knew those misrepresentations being made and the consumers were
 15 being deceived.
 16 THE COURT: But how is it, Mr. Schroeder, that you
 17 exonerate IFC in the way that you seem so eager to do in the
 18 deposition?
 19 MR. SCHROEDER: I was not exonerating them at all, I
 20 was simply trying to say we thought we do not think if
 21 IFC had known that NorVergence was a Ponzi scheme and was going
 22 under, they would have under -- they would not have been a sane
 23 business to take those contracts because they bought -- they
 24 would have bought the litigation they bought.
 25 Our point is they saw an opportunity to do a lot of

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1 to these consumers by NorVergence salespeople, that was
 2 represented in the brochures from NorVergence, it was
 3 represented by their salespeople.
 4 It will also show that IFC with all the information it
 5 had received from NorVergence and the information it got as it
 6 started taking in these contracts of the great price
 7 disparities for what was essentially the same equipment, they
 8 knew or at least they closed their eyes to it that these
 9 contracts were not about a piece of equipment, they were about
 10 telephone services.
 11 And no reasonable consumer is going to sign a
 12 five-year agreement to pay hundreds of dollars a month to a
 13 finance company for a piece of equipment that's not going to
 14 deliver them anything, that is dependent solely on some other
 15 party. They have been let off the hook with these -- and I
 16 think they are fairly complicated contractual documents. But
 17 the consumer testimony and the NorVergence salesperson
 18 testimony will stand for what it does.
 19 They didn't have reason to know this -- they were
 20 deceived. And IFC had the information in which they --
 21 THE COURT: On the face of the document it says what
 22 it says.
 23 MR. SCHROEDER: Along with a sales presentation that
 24 involved non-binding applications. You will hear testimony
 25 from NorVergence salespeople that they were -- that they did

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1 business. They went with the hope that NorVergence would keep
 2 going and to deliver the services. But they knew the consumers
 3 were deceived into signing these contracts. And therefore when
 4 the services aren't delivered, when the consideration of the
 5 consumers were pitched, is not delivered, the consumers have
 6 offense against IFC --
 7 THE COURT: So let me ask you this --
 8 MR. SCHROEDER: -- just like they did against
 9 NorVergence.
 10 THE COURT: -- supposing that the consumer was just
 11 told, look, you're going to save a lot of money, here's our
 12 package, take a look at it, I'll get back to you tomorrow.
 13 Guy comes back, and the consumer says, I think this is
 14 great. I love this.
 15 MR. SCHROEDER: We probably wouldn't be here today if
 16 that's all the record showed. It will show much more than
 17 that, your Honor.
 18 THE COURT: So it is really -- the focus has really
 19 been on what -- on what NorVergence salespeople did?
 20 MR. SCHROEDER: There will be focus on that certainly
 21 because what the consumers understood when they were signing
 22 these contracts determines whether they have a defense
 23 (unintelligible). And what IFC knew at the same time when they
 24 acquired the contracts is what makes it, unde- --
 25 THE COURT: So it is not your position that this was

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1 all structured in a way to allow a clever, shall we say, factor
 2 to be able to make a killing and essentially be able to
 3 insulate itself from conduct and punishment simply by saying,
 4 well, all I did was I bought the paper, and I didn't know
 5 anything.

6 MR. SCHROEDER: This was the scheme by NorVergence.
 7 But I don't think that a finance company --

8 THE COURT: Well, was it -- let me ask this.
 9 Was it the scheme by NorVergence? You just said it
 10 wasn't a Ponzi scheme.

11 MR. SCHROEDER: Your Honor, I have never said it was a
 12 Ponzi -- it was not a Ponzi scheme. I do believe it was.

13 MR. SCHULTE: (Unintelligible.)

14 MR. SCHROEDER: I'm not sure that the record will
 15 prove that point. It will simply prove that NorVergence got
 16 its money 80 percent from the rental agreements, 20 percent
 17 from consumers for services, and that they were paying a lot
 18 more for services than what they were collecting from the
 19 consumers for services.

20 MR. SCHULTE: So?

21 MR. SCHROEDER: What they did with their money and
 22 whether they could actually survive in this business by doing
 23 that, I don't know.

24 MR. DARCY: Your Honor, the transcript you ought to
 25 read for this trial is Chris Thompson. He's from Adtran. He

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1 technology. Only 5 percent of carriers, Mr. Thompson
 2 testified --

3 THE COURT: Well, Judge Easterbrook, who is probably
 4 as knowledgeable as -- well, not as Bill Gates, but pretty
 5 knowledgeable -- didn't think much of the product.

6 MR. SCHROEDER: Your Honor, Mr. Darcy and I probably
 7 won't agree on very much about this case. I think we both
 8 agree -- I agree with him that the Thompson deposition is
 9 crucial. He testifies that NorVergence paid Adtrin \$1278 for
 10 each of the matrix boxes. And the evidence shows that they
 11 were sold prices ranging from 10,000 to --

12 THE COURT: 160.

13 MR. SCHROEDER: -- well over \$100,000.

14 THE COURT: Right.

15 MR. SCHROEDER: That's correct.

16 And you -- the testimony Mr. Thompson gives is, if we
 17 brought him in as a witness he's our witness and he gave the
 18 testimony exactly as we thought he would, because it is the
 19 truth. It is just basic technical facts which we should have
 20 been able to stipulate long ago.

21 Mr. Darcy can argue about concessions that I have
 22 made. All I'm trying to do is make a truthful statement for
 23 the record.

24 MR. DARCY: Well, your Honor, the point is his
 25 testimony is going to directly contradict the salespeople's

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1 has no interest in this case. We took a preservation
 2 deposition of him. They are based in Huntsville, Alabama. He
 3 spends a good ten pages of his deposition describing the
 4 NorVergence telecommunications network and how this particular
 5 equipment, which is a matrix 250 and a matrix 750 box and also
 6 what they call the Soho matrix, which was an off-the-shelf
 7 product from Adtran, how they worked.

8 And one of the things he tells you or says in his
 9 deposition is that these products were manufactured by Adtran
 10 for the small, medium business market segment throughout the
 11 United States. And literally every carrier in the United
 12 States that you can point -- shake a finger at bought these
 13 products for their customers.

14 And so this whole notion that somehow a couple
 15 criminals were sitting in New Jersey hatching up a plan to
 16 target small businesses, churches, and non-profit
 17 organizations, is just -- it is just not going to be there.
 18 All that evidence is gone.

19 Mr. Schroeder just conceded to you right now that he
 20 doesn't think the evidence is going to necessarily show that
 21 this was a Ponzi scheme because it wasn't. Because they had a
 22 ream telecommunications thing. They had a testing facility.
 23 They had equipment all over the country to route their calls.
 24 And they were using new proprietary technology. They were
 25 using ATM -- voice over ATF as opposed to voice over IP

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1 testimony from NorVergence. Every one of the salespeople from
 2 NorVergence testifies at some point in their deposition that
 3 the matrix box be plugged into a wall and into their local
 4 carrier. It could -- it had to be routed through NorVergence's
 5 telecommunications center in New Jersey. That's why when they
 6 mailed out business, you couldn't just call up your local
 7 carrier and use it because that would be preprogrammed.

8 MR. SCHROEDER: I don't think there is a lot of use --
 9 your Honor, and Mr. Darcy testifying -- actually Mr. Thompson
 10 does testify that you could plug it in and it just had to be
 11 configured to go to regular places. And the way Adtran changed
 12 it for NorVergence was to configure it so it was easy to plug
 13 into NorVergence's network.

14 There is -- I don't disagree with that part of it, but
 15 that it was -- that it was something special and somehow
 16 magical and made \$1278 worth 160,000. There is nothing in the
 17 record that will indicate that.

18 MR. DEEB: Your Honor, if I may be, just on the one
 19 point, and I apologize for jumping in.

20 THE COURT: Don't be silly.

21 MR. DEEB: I mentioned earlier that I was involved
 22 with NorVergence from the very beginning, and I am. And what's
 23 important is not so much what any of the attorneys are telling
 24 you is true or not true, it is what the evidence that's going
 25 to be presented to your Honor at trial.

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1 You're not going to get evidence that it's a Ponzi
 2 scheme. You're not going to get in evidence -- any evidence
 3 that the technology didn't work. With all due respect to Judge
 4 Easterbrook, he didn't have that evidence either. He just had
 5 some bald face statements, such as the ones that are in the
 6 complaint, and maybe nobody contradicting them on behalf of
 7 NorVergence because IFC is not NorVergence. IFC has never been
 8 NorVergence.

9 I could tell, your Honor, in exercise of some type of
 10 academic interest, exactly what the workout people found when
 11 they went into NorVergence, and why a lot of this doesn't make
 12 sense and why it wasn't a Ponzi scheme. That's neither here
 13 nor there because it is not going to be presented.

14 What also isn't going to be presented is any tie in to
 15 this pricing theory. There are tons of reasons that companies
 16 employ different pricing theories as to equipment, sometimes
 17 the very identical equipment and sometimes altered equipment.
 18 Mr. Schroeder is not going to put any evidence on as to that.
 19 He's not going to have an expert come in here and say, this is
 20 the pricing scheme they used and this was inappropriate.

21 Your Honor made mention earlier to a pittance was
 22 being addressed to the services and all the money was going to
 23 the equipment. Well, the equipment was the revolution that
 24 allowed this type of service to be presented. Why does that
 25 not make sense? Has there never been an example of taking a

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1 The salespeople have been mentioned prominently. We
 2 have objected, initially, to the testimony of the salespeople.
 3 We have objected to the exhibits being submitted with the
 4 salespeople, because what do each of the salespeople say? Had
 5 no interaction with IFC whatsoever? Absolutely none.

6 So in the absence of any possible contact with IFC,
 7 what possible relevance or probative value --

8 THE COURT: But one makes that judgment at the end of
 9 the evidence, not at the beginning.

10 MR. DEEB: I understand, your Honor. And I guess I'm
 11 just trying to bring forth building on Mr. Darcy's point that
 12 this thing has shifted. And the case that's now before your
 13 Honor is not the one that is set forth in the complaint.

14 A lot of this evidence is not going to be presented.
 15 And a lot of it is going to be based upon argument made by the
 16 government not based upon direct, certainly not direct. And in
 17 some instances very weak circumstantial facts.

18 MR. SCHROEDER: Your Honor, perhaps the complaint was
 19 not a model of clarity because it is a relatively unique case.
 20 However, the case presented in the complaint and the case that
 21 will be presented at trial are similar in one very important
 22 respect, they were both based on the allegation that the
 23 equipment rental agreement misstated the consideration and that
 24 consumers were deceived into signing it. And IFC had knowledge
 25 of --

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1 loss leader with regard to service with the hope of turning the
 2 business around and selling peripherals at a later time after
 3 gaining market share? These questions have been asked of
 4 various people, and nobody has an answer. And your Honor is
 5 not going to hear any evidence as to whether or not the price
 6 structure put forth by NorVergence was a good one, a bad one or
 7 in between other than the fact that the business eventually
 8 went bankrupt. And a lot of good businesses go bankrupt, your
 9 Honor.

10 So where we are right now is the testimony that you
 11 are going to hear with regard to why IFC knew, Mr. Schroeder's
 12 words, why they knew there was a deception is his testimony.
 13 It is not going to be an expert. It is not going to be a
 14 witness. He's going to say there is a wide divergence in
 15 prices, that means there had to be service --

16 THE COURT: That's -- in fairness to the government,
 17 that's just one of the factors that the complaint articulated.

18 MR. DEEB: It, is your Honor. And the only factors
 19 that will be supported --

20 THE COURT: I thought that was certainly the least of
 21 them, and I didn't mention it in the opinion.

22 MR. DEEB: There will be other factors, and they won't
 23 be supported as well. There is not going to be evidence as to
 24 exactly how the pricing was done and what evidence there is as
 25 to what IFC knew. There isn't.

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1 THE COURT: Well, let me ask you. It didn't misstate
 2 -- let me see.

3 It didn't mistake the consideration, it explicitly
 4 said what it was doing. Now it didn't say why it was doing
 5 that.

6 I made certain arguments, I guess, in favor of the
 7 complaint as to why that was being done. And I -- as I
 8 understand it you're basically disavowing that --

9 MR. SCHROEDER: Well --

10 THE COURT: -- and that's fine.

11 I'm only concerned with one thing, and that's trying
 12 to do the best I can and find out the truth. And if the
 13 government loses, two bad, then that's what the process is
 14 about.

15 MR. SCHROEDER: Well, what we meant about misstating
 16 consideration is that misstated consideration through the whole
 17 transaction that had been represented to consumers, that they
 18 were deceived into thinking that this equipment was going to
 19 deliver the promised savings. And actually, as you know, IFC's
 20 verbal audit to every customer repeated that
 21 misrepresentation. You pay on this thing, you're guaranteed
 22 the savings --

23 THE COURT: But, see, this is where I'm sort of
 24 mystified, and I don't want to keep going on. Although I'll
 25 stay here with you all night if you want. I don't mean to rush

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1 you, but I know you guys can't wait to get out of here.

2 But I am alone tonight. My wife is out for dinner, so

3 this is (unintelligible).

4 (Laughter.)

5 THE COURT: Something to keep me off the streets.

6 MR. SCHROEDER: Your Honor, we do have an 8:00 o'clock

7 plane.

8 THE COURT: All right.

9 MR. SCHROEDER: If it doesn't --

10 THE COURT: No, no, no --

11 MR. SCHROEDER: -- (unintelligible) you're going --

12 THE COURT: You're going to meet your 8:00 o'clock

13 plane.

14 I just want to say one thing, when you put forth all

15 these sort of discrete things that you put in the complaint,

16 they are not there so you can fill up a bunch of pages. I

17 mean, one draws inferences from them, and I did that. I mean,

18 that 1906 mail fraud case that I just love, I don't remember

19 where I came across that, really articulated what I thought the

20 complaint was about, that this was this transaction that was

21 hedged about with all of the trappings of honesty when it was

22 no such thing at all. And you're now saying to me, well, all

23 these different things that they did really don't indicate

24 much. And if you say, yes, they really do indicate a lot, then

25 that's inconsistent with your willingness to say that they

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1 Honor. The winning side gets to write their own findings of

2 fact, which were submitted unmodified.

3 Second, the basis for our appeal is they didn't put on

4 any evidence from NorVergence in that case. All they did was

5 cross examine Mr. Estok, who was IFC's former vice president in

6 charge of the NorVergence portfolio, with sarcastic questions.

7 And that's a part of our -- part of the basis of our appeal.

8 Like that's -- sarcastic questions are not evidence --

9 THE COURT: Right.

10 MR. DEEB: -- that's some (unintelligible) evidence.

11 So --

12 MR. HORN: And I submit to you, your Honor, that the

13 government here is taking the higher path, that the evidence

14 doesn't support that being the case, and they can't support

15 that --

16 THE COURT: No, and I appreciate that. I'm just a

17 little mystified because you have got all these snippets and

18 tidbits of things that are strung together, I thought -- you

19 know, in an interesting way. And what's the point if you don't

20 draw negative inferences, what's the point of having those

21 things in there?

22 MR. SCHROEDER: Your Honor, I hope I am understanding

23 what our position is as to what NorVergence did. It was

24 engaged in blatant deception to get consumers to sign these

25 contracts.

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1 didn't -- they weren't involved in this, they didn't know.

2 Let me ask this, Mr. Schroeder. How did the Texas

3 Court of Appeals conclude that IFC was a part of the fraud?

4 MR. SCHROEDER: The Texas Court of Appeals, I believe,

5 has concluded that the contract -- the Court made a number of

6 findings.

7 THE DEEB: Trial court, your Honor. Trial court.

8 That case is on appeal. It is pending.

9 THE COURT: Okay.

10 MR. DEEB: It hasn't --

11 THE COURT: But somebody came up with, you know, the

12 idea that there was some evidence -- not that it is right, but

13 that there was some evidence warranting a finding of fraud.

14 Was that bench trial? A jury trial?

15 MR. DEEB: It was a bench trial, your Honor, at a

16 county court. It is our position it is not res judicata under

17 Texas law. We --

18 THE COURT: Oh, I'm not concerned about the res

19 judicata aspect. I'm just concerned about sort of the -- some

20 court finds that this is a fraud, I assume they have got an

21 elevated standard of fraud in Texas.

22 MR. DEEB: Well --

23 THE COURT: And the government now says in here is all

24 they knew was that the consideration wasn't properly stated.

25 MR. DEEB: Well, in Texas a couple of things, your

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1 Then (unintelligible) the finance companies so it

2 could bring in money right away and do whatever it wanted with

3 it.

4 I think it was a Ponzi scheme. We said it in the

5 complaint. I don't know that you will conclude that at the end

6 of the trial. But I think you will conclude that they were

7 engaged in serious deception and that they violated the law by

8 doing what they did.

9 THE COURT: Well, is it your position then that IFC is

10 a victim too. I don't mean in the same sense.

11 I know your position.

12 I don't mean in the same sense that --

13 (Laughter.)

14 THE COURT: -- you know, that the hapless

15 consumers -- I don't even like that word -- the hapless

16 consumers were, but are they kind of a victim too?

17 MR. SCHROEDER: Your Honor, I think that is the case.

18 They are kind of a victim, but they are a victim of their own,

19 shall we say, greed by taking these contracts when they knew

20 that the consumers were lied to.

21 MR. SCHULTE: He stipulated the opposite. The FTC has

22 never taken the position that IFC knew NorVergence was engaged

23 in fraud when it bought the contracts.

24 THE COURT: And that there is no knowledge that

25 (unintelligible) expectation services would be (unintelligible)

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1 --

2 MR. SCHROEDER: But what they did --

3 THE COURT: -- until the contract.

4 MR. SCHROEDER: What they did do know, and what I have

5 stated there, was that NorVergence, well, engaged in deception

6 and IFC knew that. They didn't know that NorVergence was going

7 to go belly up and not deliver the services. But they did know

8 that the consumers were deceived and they were taking

9 advantage --

10 THE COURT: So the idea was --

11 MR. SCHROEDER: -- a lot of business.

12 THE COURT: They knew that the crooks were going to

13 honor their contracts.

14 MR. SCHROEDER: They didn't know they were crooks,

15 your Honor.

16 THE COURT: They knew that -- you say, Mr. Schroeder,

17 that you knew that the people were deceived by IFC -- by

18 NorVergence. It is -- I mean, I guess you certainly could say,

19 well, these people engaged in the Ponzi scheme but they were

20 really going to make good on the contracts.

21 MR. SCHROEDER: Perhaps I used my words too freely. I

22 don't think IFC knew it was a Ponzi scheme. I think they knew

23 NorVergence lied to consumers.

24 But they thought this is a business law that looks

25 like it is working, let's take (unintelligible) action, and

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1 the consumers have been deceived into thinking they were going

2 to get --

3 THE COURT: But wasn't it the whole --

4 MR. SCHROEDER: -- (unintelligible).

5 THE COURT: Wasn't that the whole idea of structuring

6 the way that the ERAs were structured?

7 MR. SCHROEDER: That was NorVergence's idea, yes, your

8 Honor.

9 THE COURT: Okay.

10 MR. SCHROEDER: And IFC thought it had a good chunk of

11 business collecting from people for five years of telephone

12 services. But they knew those people signed those contracts

13 because they were deceived by NorVergence. And because of

14 that, they know there is a defense (unintelligible). If

15 NorVergence were still holding the equipment rental agreements

16 and not delivering services, nobody would make those consumers

17 pay. IFC only gets in a different status if it takes them

18 without any (unintelligible) --

19 THE COURT: Well, some would pay. I mean, can the

20 Iowa court conclude that was a -- well, I'm wrong, that was

21 just as to whether IFC could collect.

22 MR. SCHROEDER: (Unintelligible) whether IFC can

23 collect or not depends on what their knowledge was.

24 THE COURT: That's right.

25 MR. SCHROEDER: It is basic (unintelligible.)

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1 they took it. But they knew that consumers were lied to and

2 (unintelligible) --

3 THE COURT: (Unintelligible) and say even after the

4 company was in bankruptcy and everybody kind of knew what was

5 going on, you say they -- their cupidity was so great that they

6 were still trying to feast off the dead carcass, and you don't

7 think that indicates any kind of anything.

8 MR. SCHROEDER: Well, that one, your Honor, they

9 didn't get their hands on those contracts --

10 THE COURT: Well, not for want of trying though.

11 MR. SCHROEDER: But if they had, I don't think any

12 Court would ever consider that they could -- that they could --

13 THE COURT: No, but you miss my point. Under 404(b),

14 for example, intent can be measured by antecedent -- by

15 subsequent as well as antecedent conduct. That's what I

16 thought the point of this was was to demonstrate that one could

17 infer things earlier from what was being done later, that

18 whether you look at it as a pattern of conduct or a willingness

19 to take advantage of wrongdoing as evidence of what was going

20 on the whole time.

21 MR. SCHROEDER: I think they were willing to take

22 advantage of the consumers who signed those contracts at the

23 end, but at that point they weren't having to pay any money for

24 them. I don't think that a finance company would buy a massive

25 default like you get when somebody doesn't deliver the services

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1 THE COURT: Right.

2 MR. SCHROEDER: (Unintelligible) technical point. If

3 these were pure service contracts, which (unintelligible) they

4 would be enforceable by (unintelligible). And that rule

5 changed in 2001. The old rule in 1906 was -- had to be a sale

6 or lease of equipment to enforce later (unintelligible) laws.

7 That language is gone now from 9403, and Mr. Borst and I will

8 be happy to testify, because we have spent the last seven years

9 litigating a hell or high water service contract in Tennessee.

10 There are plenty of people out there who will sign a hell or

11 high water service contract.

12 MR. SCHULTE: And your Honor touched on the key point,

13 at least from our position, your Honor. And this is

14 Mr. Borst's (unintelligible) to the big time, although I don't

15 drag him up here to add to the voices being heard. These

16 documents are not complicated. Then say what they say, and

17 they say that what is owed is owed. And these people entered

18 into these things voluntarily. There is not any argument being

19 presented that they were forced to sign these contracts or that

20 they were deceived into putting their signatures on something

21 that was not an ERA.

22 And what we are going to hear from the government is

23 that the circumstantial evidence of some sort made it such that

24 IFC knew that the consideration was wrong. Well, that's not

25 what the documents say, your Honor. And I think it is going to

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1 take an awful lot more than that under the standard the
 2 government has to show to prove that IFC had any role
 3 whatsoever in what was going on between NorVergence and the
 4 lessees, even if that in fact was what happened.
 5 Because, remember, there isn't going to be good
 6 evidence as to how much the equipment really cost versus how
 7 much the services really cost.
 8 In fact, your Honor, I would be willing to bet that
 9 your Honor never hears any testimony as to how much was being
 10 paid for the T-1 lines that were the part of the services.
 11 THE COURT: By NorVergence?
 12 MR. SCHULTE: By NorVergence.
 13 THE COURT: What's the issue now -- and I'll let you
 14 all go because I don't want to keep anybody.
 15 What's the issue about the binding nature of the
 16 stipulation? Is there some issue about that? You mentioned
 17 that.
 18 MR. DARCY: Well, there is a motion that we filed to
 19 have this stipulation that was entered of the record deemed
 20 admitted, which --
 21 MR. SCHULTE: That's one of the motions that --
 22 MR. DARCY: That's one of the motions that's pending,
 23 Your Honor. Their stipulation is attached to it, and
 24 it -- sorry.
 25 MR. SCHROEDER: And the reason for our opposition,

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1 MR. BORST: (Unintelligible). And that's what we are
 2 asking is that this -- that these stipulations be put in as
 3 admissions.
 4 What the motion also argues is that, you know -- you
 5 can -- let's assume for purposes of this argument that
 6 NorVergence did make all of these misrepresentations to these
 7 lessees, not consumers, lessees when they were entering into
 8 these equipment leases, that really goes to fraudulent
 9 inducement.
 10 What affects a holder in due course is fraud and fact,
 11 and that's the only real defense to a holder in due course.
 12 And what we argued is that by virtue of these stipulations, the
 13 FTC has admitted that IFC had no knowledge of any kind of a
 14 defense, such as fraud and fact and the lessees were providing
 15 the bait and switch. In other words --
 16 THE COURT: What I conclude those things mean is a
 17 question of law. As a factual matter Mr. Schroeder doesn't
 18 object to that being a stipulation of the government's
 19 position.
 20 MR. SCHROEDER: As long as it is one stipulation.
 21 They offer it as two, so they can read the first one, the word
 22 fraud, anyway they want to, and I offer it -- I made the second
 23 statement in the record so that it would be clear why --
 24 THE COURT: Well, argue about something that need not
 25 be argued?

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1 your Honor, is because they take the stipulation and add to it
 2 that therefore the FTC stipulated that IFC was a
 3 (unintelligible), and that is the furthestest thing from
 4 anything that --
 5 THE COURT: The stipulation is what it is.
 6 MR. SCHROEDER: Exactly.
 7 THE COURT: The rest of it doesn't count.
 8 MR. BORST: That's not what exactly what we argued,
 9 Judge. It's one thing --
 10 THE COURT: Mr. Borst, do you object to the --
 11 whatever you said at the deposition being the government's
 12 position being sort of a binding admission on the government's
 13 MR. BORST: No, your Honor. As long as both
 14 statements, which were separated by a couple of pages are --
 15 THE COURT: Together.
 16 MR. BORST: Yes.
 17 THE COURT: Well, they want that. They think that's
 18 better than -- the one reinforces the other.
 19 MR. BORST: That's all this motion asks for, Judge.
 20 And I can read the stipulations for you. They say what they
 21 say.
 22 Mr. Schroeder (unintelligible) and it is attached to
 23 our --
 24 THE COURT: I read it.
 25 MR. SCHROEDER: I don't think it is necessary that --

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1 MR. SCHROEDER: (Unintelligible.)
 2 THE COURT: What you want to do is why don't you just
 3 get -- make this up, put the two things together with an
 4 appropriate citation. You can ellipsis this to show that they
 5 came at separate points, or the way you have done it here. And
 6 beyond that there is not going to -- he doesn't have to
 7 stipulate -- I mean, it is not -- it is a factual stipulation.
 8 MR. BORST: Well, it is a legal and a factual
 9 stipulation, Judge.
 10 THE COURT: Yes, I guess it is.
 11 MR. BORST: I mean, that's the problem.
 12 And in our motion I'm not trying to -- it wasn't my
 13 intent to separate these to try to make them say something
 14 else. What I am saying is that these two should be read
 15 together. You know, I state that they said this at this page,
 16 and then give the next various paragraph --
 17 THE COURT: You don't have to draw a further
 18 conclusion. You don't have to drawn any conclusion. It simply
 19 is what it is, and I'll decide what it means.
 20 MR. BORST: And in fact, your Honor, in uncontroverted
 21 facts that we offered to them, we simply offered that quote as
 22 one of the uncontroverted facts. It is a fact in this case
 23 that we made that statement.
 24 What it means is subject of argument.
 25 MR. COURT: Right.

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1 MR. BORST: That's all I am asking in the motion in
 2 limine is that those two statements be deemed to be admitted
 3 facts.
 4 THE COURT: Let's do this. Which number is this? I
 5 want to make this simple.
 6 MR. SCHROEDER: This is Document 148.
 7 THE COURT: Here's what I am going to do. I'm -- just
 8 to be -- so that we can keep track of these, and given the way
 9 you have done this, I'm going to deny 148 without prejudice to
 10 its refile along the lines we have just talked about.
 11 MR. BORST: Or we could file a stipulation.
 12 THE COURT: That's what I mean.
 13 MR. BORST: But as far as --
 14 THE COURT: But --
 15 MR. BORST: As opposed to filing or denying it, what
 16 we'll do is we'll file the stipulation.
 17 THE COURT: But I need to have this so it is not
 18 hanging around.
 19 MR. BORST: So deny it without prejudice?
 20 THE COURT: Denied without prejudice based along the
 21 lines that we have discussed.
 22 And what you ought to do is have a joint stipulation
 23 in which the government -- it is hereby stipulated that, and
 24 then put in the two things with an appropriate citation from
 25 where. And we don't even need to do that. It is an

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1 THE COURT: That's truly a factual stipulation that
 2 doesn't do, Mr. Borst, what you want it to do.
 3 MR. SCHROEDER: That, your Honor --
 4 MR. BORST: So that's why I'm asking for
 5 clarification.
 6 MR. SCHROEDER: -- is one I had offered previously,
 7 that FT -- that we will stipulate that we stated -- we made
 8 these statements.
 9 MR. BORST: Well --
 10 MR. SCHROEDER: As to what they mean, though, it is
 11 all argument.
 12 THE COURT: That's not what I understood this whole
 13 discussion for the last hour or so to be, that this was a
 14 stipulation of the FTC's position in this case.
 15 MR. SCHROEDER: That's correct.
 16 THE COURT: And that's different. Now I can't make
 17 you stipulate to that which you don't want to stipulate to.
 18 But I think you ought to figure out what it is that you -- not
 19 what you said, but what it is you're willing to stipulate to as
 20 a positional matter.
 21 And then I'll decide whether that makes them the
 22 holder in due course, not a holder in due course, you know,
 23 (unintelligible) a used horse, I don't know.
 24 But you have said to me what your position is.
 25 MR. SCHROEDER: Right.

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1 independent stipulation. And that's it. It doesn't have to be
 2 any more than that. The rest you can argue to me.
 3 MR. BORST: Thank you, your Honor.
 4 THE COURT: You'll get the benefit, and the government
 5 doesn't object. So do it as a -- you could either do it as
 6 your own stipulation as an unopposed defendant's, you
 7 know -- it should be a joint stipulation.
 8 MR. BORST: We can put it in uncontroverted facts if
 9 that works for your Honor.
 10 THE COURT: Well, it is going to get lost in the
 11 uncontroverted facts.
 12 MR. BORST: Okay.
 13 THE COURT: You could do it there too. But for
 14 purposes of whatever appeals there would be, this is a matter
 15 that obviously is of great significance to the defendant and it
 16 ought not to get lost. It should be somewhere where it
 17 has -- it is kind of a standalone thing. And that's -- and,
 18 see, we'll just get rid of it that way.
 19 MR. BORST: I would just -- just so I'm clear, and,
 20 you know, getting past my sometimes slowness, what your Honor
 21 is looking for is something to the effect that the government
 22 stipulates that and such and such a deposition it states, and
 23 we'll just quote the language.
 24 THE COURT: Well, he's willing to go beyond that.
 25 MR. BORST: Okay.

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1 THE COURT: All you need to do is put it in words that
 2 are satisfactory to you and to the defense.
 3 MR. BORST: That can create a problem for us, your
 4 Honor. We feel like our case is stated with as much clarity as
 5 we can offer in our motion for summary judgment. I think we
 6 have made it pretty clear there --
 7 THE COURT: Then I guess what's going to happen,
 8 Mr. Borst, you can do it as a stipulation in which he concedes
 9 he said it.
 10 Do you concede that what you have said is the
 11 government's position in this case? Because I'm sure what we
 12 have talked about.
 13 MR. BORST: It is much more than that, Judge.
 14 MR. SCHROEDER: Well --
 15 THE COURT: Well, let's see if we can get the first
 16 thing first.
 17 MR. DEEB: Can we settle it, your Honor, by simply
 18 having it read into the record at trial and say, the government
 19 stipulated as files of record, and read the stipulation?
 20 THE COURT: No, but that's not what he wants to do.
 21 He wants to say this is what I said at the deposition. Okay.
 22 Now we get to the further question of, well, what does
 23 that mean? And what -- of what consequence is that, and is
 24 that a stipulation of -- is it now binding here?
 25 The government has taken a position in this case, you

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1 would like to take advantage of that. You're going to have to
 2 work out the language with Mr. Schroeder.
 3 MR. BORST: And, your Honor --
 4 THE COURT: If you can't, then we'll have to figure it
 5 out.
 6 MR. SCHROEDER: Well --
 7 MR. BORST: (unintelligible) be able to work out a
 8 language.
 9 THE COURT: But, you know, don't ask --
 10 MR. BORST: (Unintelligible) language.
 11 THE COURT: Don't ask for more than you're entitled
 12 to.
 13 All right. Well, thanks, everybody. This is -- I'm
 14 sorry to drag this out, but I -- this really does help me a
 15 lot.
 16 All right. The other thing, the other reason that I
 17 am denying this trial is I really set all this time aside so
 18 that I could give you the time. In 30 days I'm not going to be
 19 able to do this again. I just can't. I mean, I actually
 20 looked at my own calendar, and there is no way to give you the
 21 sort of back to back unlimited time that I thought, one, that
 22 you wanted, and, two, that the issues really deserved.
 23 Now if you think you can resolve this with the
 24 government, you ought to take a real shot at it now. And I
 25 don't want to know and don't need to know what your agreements

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1 you folks come back. We can do this on the phone.
 2 MR. SCHROEDER: We can do it by phone?
 3 THE COURT: Absolutely.
 4 So let's pick a date.
 5 MR. SCHROEDER: I think that's in our interest because
 6 we have witnesses, as we indicated --
 7 THE COURT: Right.
 8 MR. SCHROEDER: -- coming from out of town. And our
 9 schedule was based on getting some number of them done each
 10 day, including Monday.
 11 THE COURT: Well, what's --
 12 MR. BORST: Well, tomorrow we're in depositions on --
 13 THE COURT: Well, give me your schedule. I'll work
 14 around your schedule.
 15 MR. BORST: Thursday.
 16 MR. SCHROEDER: Friday would be fine.
 17 THE COURT: Carolyn, let's see what's on our calendar.
 18 THE CLERK: Thursday at 12:00 o'clock the trial will
 19 resume. And Friday
 20 THE COURT: What trial will resume?
 21 MR. BORST: This one you just had.
 22 THE CLERK: The one you just had.
 23 THE COURT: No, it is not. We're done. Oh, they are
 24 just coming in to -- we're going to talk about post trial.
 25 THE CLERK: Okay.

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1 are.
 2 And I don't know what I am going to do about the
 3 restitution thing. We'll deal with that as we go along.
 4 MR. SCHROEDER: Your Honor, I guess you have denied
 5 our motion to continue the trial. And so there are some other
 6 things that are in this pretrial order, and we need -- all the
 7 parties want clarification on.
 8 THE COURT: Okay.
 9 MR. SCHROEDER: And, you know, there is objections to
 10 exhibits. There is objections to depositions.
 11 THE COURT: Okay.
 12 MR. SCHROEDER: I mean, is this something you want to
 13 take up the first day of trial?
 14 THE COURT: Yes. Uh-huh.
 15 THE SCHROEDER: Okay.
 16 THE COURT: We have got the time. And I take it now,
 17 in light of the forecast that I -- that's being made -- let me
 18 just take this. It will take one second. I'm really sorry.
 19 (telephone interruption.)
 20 THE COURT: Sorry.
 21 MR. SCHROEDER: That's okay, Judge.
 22 THE COURT: Or do we want to get together before the
 23 28th?
 24 MR. SCHROEDER: Whatever your Honor wishes.
 25 THE COURT: Well, I know you -- I don't want to make

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1 THE COURT: That's fine.
 2 THE CLERK: And Friday --
 3 THE COURT: How about 1:00 o'clock?
 4 MR. BORST: Thursday?
 5 THE COURT: Thursday.
 6 And we'll call you, Mr. Schroeder. Is that okay?
 7 MR. SCHROEDER: That's fine, your Honor.
 8 THE COURT: Okay. I'll work on the rulings for the
 9 next couple of days.
 10 MR. BORST: Do we have to be here, your Honor, or --
 11 MR. SCHROEDER: Can we call in or -- for the settlement
 12 conference call?
 13 THE COURT: Somebody has to be here --
 14 MR. BORST: Okay.
 15 THE COURT: -- from the defense side.
 16 Well, you can all call in, except for Mr. -- for
 17 somebody. Somebody needs to be here.
 18 MR. BORST: We have to have a strawman.
 19 With permission
 20 THE COURT: The (unintelligible) have to have a
 21 strawman
 22 MR. DEEB: With permission of the Court, your Honor, I
 23 would like to call in since --
 24 THE COURT: Absolutely.
 25 MR. DEEB: -- Philadelphia is a little bit -- not

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1 quite as bad as Seattle, but it is still can be problematic.

2 THE COURT: No, that's fine.

3 MR. SCHULTE: Your Honor, Judge Murray has got us in

4 Skokie on Thursday.

5 THE COURT: He's got you where?

6 MR. SCHULTE: In Skokie on Thursday.

7 MR. BORST: I'm sure Mr. Schulte and I can be here

8 Thursday.

9 (Unintelligible colloquy.)

10 MR. SCHULTE: What time is your --

11 THE COURT: 1:00 or 1:30?

12 THE CLERK: 1:30.

13 MR. SCHULTE: Can you do it later or --

14 THE COURT: Well, I can do whatever you want to do.

15 MR. BORST: Do you want to do it early in the morning

16 perhaps?

17 MR. DEEB: The other people are coming at noon.

18 THE COURT: What about 9:30? 9:00 o'clock?

19 THE CLERK: 9:00 o'clock you have a motion. 9:00

20 o'clock another motion.

21 MR. SCHULTE: Your Honor, it could be --

22 THE CLERK: Yeah, it is --

23 MR. SCHULTE: 9:30 is okay.

24 THE COURT: Let's do 9:30.

25 9:30, Thursday. And somebody from --

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1 MR. BORST: You want to take it up at trial?

2 THE COURT: What's the motion to strike? What do you

3 want to strike?

4 MR. BORST: Your Honor, do you remember in this case

5 the parties had to identify the witnesses early on so we could

6 depose them all?

7 THE COURT: Right.

8 MR. BORST: So then --

9 THE COURT: Oh, that's their new -- their 15 --

10 MR. BORST: 15 declarations.

11 THE COURT: Right. No, that I got -- we've got to do

12 that. Sorry. We're going to do that.

13 Motion in limine to exclude the attorney-client

14 privileged email. Is that the thing that I didn't consider and

15 that I said in the footnote I'm not considering?

16 MR. BORST: Well --

17 THE COURT: Is that --

18 MR. SCHROEDER: That we said to your Honor not to

19 consider.

20 THE COURT: And I didn't. And that's -- that's the --

21 MR. SCHROEDER: I think that motion --

22 MR. BORST: We're not offering it.

23 Yeah, this motion was filed, Judge, you may recall.

24 It was -- the timing on the motion.

25 THE COURT: So you're not offering this,

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1 MR. BORST: We'll be here, your Honor.

2 THE COURT: Okay. Great.

3 MR. SCHROEDER: Are we going to cover the other

4 motions that are pending too, Judge?

5 THE COURT: Well, who's with -- tell me if this

6 exhausts everything.

7 MR. SCHROEDER: If your Honor looks at -- if I may

8 interject, page 3 of the proposed pretrial order is, Item J,

9 the following motions are currently pending. We have got the

10 motions in limine. We're going to work on those. And we have

11 got a couple more.

12 THE COURT: Oh, right. You're right. This is -- this

13 is good.

14 Let me show you -- let me tell you what I have got and

15 see if you follow along and you're Number 3.

16 I have got defendant's motion to continue. That we

17 did.

18 Defendant's motion to strike pursuant to Rule 56(e).

19 I'm not doing that.

20 Defendant's motion in limine to exclude reference to

21 NorVergence, and that's Number 146, that's pending.

22 MR. BORST: When you say not doing 56(e), Judge --

23 THE COURT: Well, what --

24 MR. BORST: -- not taking it up now or --

25 THE COURT: Right.

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1 Mr. Schroeder.

2 MR. SCHROEDER: No. And he's withdrawing the motion,

3 I take it, Mr. Borst?

4 MR. BORST: As long as it is granted. If it is

5 granted.

6 THE COURT: Well, (unintelligible) to grant it because

7 there is nothing to grant. If he is not offering it, there is

8 just --

9 MR. BORST: Well, the only problem I have, Judge, is

10 that it is still attached as an exhibit to the complaint as it

11 is a matter of the record.

12 MR. SCHULTE: And it is an allegation in the

13 complaint.

14 MR. BORST: It is an allegation in the complaint.

15 MR. SCHULTE: If they withdraw that paragraph --

16 MR. SCHROEDER: We will agree -- we would agree to the

17 Court striking that exhibit to the complaint if that would be

18 the way to do this.

19 THE COURT: Right. I can't strike -- I can't -- you

20 can't get rid of the thing, it is in the Court file.

21 MR. SCHROEDER: But we can stipulate that --

22 THE COURT: Why don't you --

23 MR. SCHROEDER: -- not consider the document.

24 THE COURT: Exactly. Let's do this. File a

25 stipulation with -- I'm going to -- Number 144 will be

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1 withdrawn.

2 MR. BORST: Is that the attorney-client privilege?

3 THE COURT: Yes.

4 In lieu of that you're going to come up with a joint

5 stipulation that will say that the government is not offering

6 the Exhibit 144. I have not and will not consider whatever

7 paragraph or whatever reference that thing is.

8 You say it is an exhibit to the complaint?

9 MR. BORST: It is referenced in the complaint.

10 MR. SCHROEDER: It is attached.

11 (Unintelligible colloquy.)

12 MR. BORST: It is quoted in the complaint. It is an

13 exhibit to the motion for preliminary injunction --

14 THE COURT: Oh.

15 MR. BORST: -- which is (unintelligible).

16 MR. SCHROEDER: No, no, no, no, no.

17 Oh, yes. I'm sorry, you're right.

18 MR. BORST: Right.

19 THE COURT: And then it is withdrawn as an exhibit to

20 the motion for preliminary --

21 MR. BORST: I guess it has been withdrawn.

22 MR. SCHROEDER: Preliminary injunction motion has been

23 withdrawn, your Honor, so we can simply say that --

24 THE COURT: No, I just want to be sure that the

25 stipulation covers all bases. That it is withdrawn from any

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1 and it was the day we filed the motion.

2 It has a substantive piece of material that had we had

3 it we would have used in the depositions of their experts. We

4 thought it reasonable to have another opportunity to talk to

5 them about this particular document, which we can do in a very

6 painless way, I'm sure, but we thought it deserved a motion.

7 THE COURT: So what's the problem?

8 MR. BORST: There is not a problem, your Honor. This

9 is something that was available on the website prior to the

10 deposition. The request by -- and I'm not complaining, but the

11 request --

12 THE COURT: I know. But what's the -- they are

13 not -- they are not obligated to go to the -- to websites.

14 Are they?

15 MR. SCHROEDER: No.

16 THE COURT: You're obligated to --

17 MR. BORST: The request was the day before the

18 deposition, your Honor. And it was conceded by Mr. Schroeder

19 that we wouldn't have a response in time for the deposition.

20 So now after the fact we have produced the

21 communications in compliance in good faith, and he says he

22 wants another shot at the expert. It is just --

23 THE COURT: Let's do this. How long will it take?

24 MR. SCHROEDER: I think we could probably do phone

25 depositions, it would take 15 minutes or a half an hour.

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1 filing for all purposes and will not be considered -- will not

2 be offered in any way, will not be considered by the Court.

3 And do it as a stipulation. And leave a place for me to sign,

4 and I'll sign off on it.

5 MR. SCHROEDER: We should have no problem.

6 THE COURT: So 144 will be withdrawn then in lieu of

7 the stipulation.

8 The motion to bar recovery of settlement proceeds,

9 that's just pending.

10 Then there is pending motions by FTC.

11 The plaintiff's motion to strike, we'll do that.

12 Number 142, the motion in limine and memorandum of

13 points and authorities in support to admit declarations into

14 evidence at trial pursuant -- now that's sort of the corollary

15 of 56(e). Right?

16 MS. BORST: Right.

17 MR. SCHROEDER: That's correct, your Honor.

18 THE COURT: Right. So that's 160 and 140 are the same

19 thing.

20 The plaintiff's motion to reopen the depositions of

21 IFC experts's witnesses. I missed that. What's that?

22 MR. SCHROEDER: Your Honor, we made that motion

23 because we had made a request to defendant for communications

24 with one of their expert witnesses. We reminded them to

25 provide the information. We got it 30 days after the request,

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1 THE COURT: Okay. You have got 45 minutes.

2 MR. BORST: Of --

3 MR. SCHROEDER: Now, your Honor, the --

4 THE COURT: To --

5 MR. SCHROEDER: -- exhibit (unintelligible) for the

6 one expert, but it is an exhibit that's relevant to the second

7 expert whose testimony was two days later, Mr. -- he gave me

8 that expert's materials before his deposition, but didn't give

9 me this item, which I definitely would have used on that expert

10 too because they are both in the same.

11 THE COURT: Let's do this. Take the -- a half hour to

12 45 -- no more than 45 minutes -- hopefully you will do this in

13 a half an hour -- by phone, and it won't be such a huge big

14 deal.

15 MR. SCHROEDER: Your Honor, do I get access to both of

16 the experts though --

17 THE COURT: Yes, I said to both.

18 MR. SCHROEDER: Okay. A half hour each one then.

19 THE COURT: I need 45 minutes. You want a half hour,

20 you have a half hour.

21 (Laughter.)

22 MR. BORST: Can I try 15 minutes, your Honor?

23 THE COURT: Half hour.

24 With the understanding, Mr. Schroeder, you'll try to

25 do it in less.

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1 MR. SCHROEDER: Yes, your Honor, absolutely.

2 MR. BORST: One last --

3 THE COURT: So Number 190 is granted, with the proviso

4 that it shall not exceed -- of either expert shall not exceed

5 half hour and will be by telephone.

6 If there is an issue where there is a problem, you'll

7 just call me.

8 MR. BORST: Very well, your Honor.

9 THE COURT: And if the guy, you know, suddenly

10 confesses to something and you decide you need more than a half

11 hour, call and --

12 MR. SCHULTE: One last -- hate to be a -- keep

13 dragging this out. One last motion that was pending was a

14 motion in limine -- well, sorry -- motion to strike witnesses.

15 But our motion in limine to exclude reference to a

16 NorVergence, Inc., pricing model.

17 THE COURT: I'm sorry, I missed that.

18 MR. SCHULTE: Judge, what this goes to is the issue of

19 how NorVergence priced the leases that you -- we heard a lot of

20 talk about that earlier today. You know, was it all equipment,

21 was it all services.

22 Whatever it was, we don't know because the computer

23 program that was allegedly used to price these models has never

24 been reviewed by any party. We're not saying the FTC failed to

25 produce something they should have, we're saying it has been --

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1 MR. SCHROEDER: Your Honor, we have one other pending

2 motion, and that is our motion to strike witnesses. There are

3 three witnesses that have been on their witness list since the

4 very beginning of --

5 THE COURT: I don't have that on my list.

6 Oh, I'm sorry, 142, okay.

7 MR. SCHROEDER: Yeah, that's --

8 THE COURT: Okay. I got it.

9 MR. SCHROEDER: And that's -- those --

10 THE COURT: What is this?

11 MR. SCHROEDER: These are three individuals from

12 NorVergence that we have never -- we have never had an

13 opportunity to depose. And defendants have -- apparently has

14 tried to find them and hasn't been able to find them. And

15 we're worried at this late date about having witnesses sprung

16 on us. That was the first half of the motion.

17 The second half of the motion was that under the court

18 rules, one expert per topic. And it looks like the two experts

19 at least that one of them completely overlaps the other one,

20 so we raise that as an objection as well.

21 THE COURT: But I can't tell that until I hear it.

22 And their position was as to the two expert thing that they are

23 separate people. And I can't make that judgment.

24 MR. BORST: But we're not going to pay to have two

25 experts come and say the same thing, your Honor. We are not

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1 not been available to them, it is not available to us. It has

2 never been looked at.

3 The witnesses that have talked about it all say, well,

4 you know, we think it did this, we heard it did that. They

5 never looked at the model.

6 And so on that basis we think that any reference to

7 this alleged pricing model that somehow, you know, they cram

8 that in one end and it spit out documents out the other end,

9 that should all be excluded from any reference whatsoever.

10 MR. SCHROEDER: Your Honor --

11 THE COURT: Mr. Schroeder.

12 MR. SCHROEDER: -- I think it is our responsibility to

13 lay a foundation for any testimony we have. What the defendant

14 appears to be doing is trying to exclude evidence about

15 something before your Honor even has a chance to see what it is

16 and if it seems premature --

17 THE COURT: Well, I mean, it does sound --

18 MR. SCHULTE: Well, there is no evidence.

19 THE COURT: Well, Mr. (Unintelligible), but it does

20 sound like it is a-- not really so much as a motion in limine

21 as a foundational issue which we can deal with like any other

22 (unintelligible).

23 Here's what I am going to do. Based on that I'm going

24 to deny 146 without prejudice, of course, to your reraising the

25 issue at trial.

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1 that foolhardy. The testimony --

2 (Unintelligible colloquy.)

3 THE BORST: -- will be separate and entirely different

4 perspective as one person being somebody who is with the

5 equipment leasing association his entire life.

6 THE COURT: Okay.

7 MR. BORST: The other person being someone who worked

8 in leasing companies for a good part of his and much more

9 detail oriented.

10 So we can address that at trial, but I don't think

11 that's going to be a problem.

12 THE COURT: Okay. So this --

13 MR. BORST: As to the witnesses, which is the -- I

14 don't know if it was a separate motion or the first part of

15 that motion, we haven't found those individuals yet, your

16 Honor. So it may be that they don't get used. They have the

17 same information that we have available so they have not had

18 any more success than we have.

19 If for some reason

20 THE COURT: Have you folks talked to them --

21 MR. BORST: I have --

22 THE COURT: -- or their legal representatives?

23 MR. BORST: The only legal representatives we have

24 haven't been able to put us together with them. The one says

25 that he still represent them he thinks, but he can't -- doesn't

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1 have forwarding information.

2 I actually got some information to him in the hope

3 that some messages would filter their through and he would

4 contact back, that being Mr. Leibrock and he hasn't heard.

5 All I will submit, your Honor, is that he shouldn't be

6 precluded because we're not trying to surprise anybody. If we

7 find somebody suddenly, I would, of course, make them available

8 for deposition prior to putting their testimony at trial. It

9 is not a situation where IFC is trying to create a situation of

10 unfair surprise. It is just that we haven't found them. They

11 haven't found them.

12 And a motion -- an order precluding their testimony is

13 I think, as Mr. Schroeder just mentioned --

14 THE COURT: Okay.

15 MR. BORST: -- premature at best.

16 THE COURT: Here's what I'm going to do, I'm going

17 to -- based on that I'm going to deny 142 without prejudice to

18 whatever may happen at trial.

19 I do think if you got the name of lawyers, you should

20 give them to the government.

21 MR. BORST: We have.

22 MR. SCHULTE: In fairness we did provide him with the

23 name of the lawyer, your Honor.

24 THE COURT: So you're all, hopefully at least, on

25 even --

95

1 how do you do that when they haven't had a chance to examine

2 him?

3 MR. BORST: We haven't had a chance to --

4 (Unintelligible colloquy.)

5 THE COURT: I'm only talking about -- let's not do it

6 that way.

7 (Laughter.)

8 THE COURT: Because there isn't the necessary

9 symmetry. The (unintelligible) depose may not exist.

10 But at least as to you folks, how do you -- how do you

11 introduce the testimony?

12 MR. BORST: The way I would --

13 THE COURT: Unless the government doesn't care.

14 MR. BORST: The way I would introduce it, your Honor,

15 is that there was a party similarly situated, that being the

16 Florida Attorney General, which wasn't present in the situation

17 with the declarations, that makes this evidence, I believe, in

18 terms of reliability and fairness, equitable (unintelligible).

19 Much more reasonable than the evidence being submitted by the

20 FTC.

21 THE COURT: And what was this -- in what kind -- in

22 the case brought by --

23 MR. BORST: It was an action under a little FTC act

24 brought by the Florida Attorney General against a group of

25 leasing companies, including IFC.

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1 MR. SCHULTE: We are.

2 THE COURT: There would be no basis to strike these

3 folks.

4 MR. BORST: One other point, your Honor, and this is

5 not in a position at the moment because I'm hoping it is not

6 going to be relevant. And when your Honor argues and rules on

7 the motion to strike the declarations on Friday, it goes a

8 certain way.

9 But the one witness, Mr. Leibrock, who we haven't been

10 able to locate, has been deposed, but he's not been deposed in

11 this case. He was deposed in an action involving IFC brought

12 by the Florida Attorney General. And the Florida Attorney

13 General took the deposition and videotaped the deposition,

14 actually, your Honor. And that testimony is available to both

15 sides.

16 Now I have not submitted, and we have not submitted on

17 behalf of IFC, that testimony to be admitted into trial here, I

18 may change -- we may change our position on that, depending

19 upon the Court's ruling on these declarations where we haven't

20 had a chance to depose the witnesses. They were taken outside

21 of our control. And if they are going to come in and be

22 considered as evidence in this proceeding, then it may be that

23 we decide to submit Mr. Leibrock's deposition transcript on the

24 same principle and have that considered as well.

25 THE COURT: Now how -- leaving the other people aside,

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1 MR. SCHROEDER: Your Honor, we would object to the

2 introduction of that testimony. We were not involved in that

3 case. I have read the deposition. The testimony I think can

4 be read many different ways. I believe if I had an opportunity

5 to question Mr. Leibrock, his testimony would be very

6 consistent with Mr. Thompson, who Mr. Darcy thinks makes a

7 strong case for IFC. But without having that opportunity, what

8 he says is going to be twisted many different ways, and I don't

9 think it would be fair to introduce that.

10 I think it is quite different from our consumer

11 declarants because our argument there is they do have the

12 indicia of reliability because they corroborate and are

13 corroborated by the testimony of the consumer witnesses and the

14 NorVergence salespeople, and that's our position.

15 THE COURT: And you have a particular -- you are

16 relying on the residual exception to the hearsay rule?

17 MR. DARCY: Yes.

18 MR. BORST: Your Honor --

19 THE COURT: I have to tell you I -- I think it is

20 incredible that the extent to which -- I mean, I read the cases

21 that you cited, and they sure seem to say what you say. And I

22 was flabbergasted that that's -- I mean, I wrote an article on

23 the residual except -- the old residual exceptions to the

24 hearsay rule several years ago -- some years ago, and I was

25 flabbergasted then and what comes in. But this really blew me

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1 away.

2 MR. SCHROEDER: Your Honor, we are -- we do not

3 practice in this district, at least my office. We are familiar

4 with other districts where it does happen. We understand --

5 THE COURT: Oh.

6 MR. SCHROEDER: -- that things happen differently in

7 this district.

8 THE COURT: No, no, because it is -- it is as free

9 inclusive, here is the (unintelligible) anywhere else.

10 The only person I have ever seen write a different

11 kind of opinion is Judge Easterbrook, and it was in a criminal

12 case that sort of has not gotten played. But I thought his

13 opinion was extraordinarily, that the stuff that comes

14 in -- diaries come in. I mean, the most astonishing things.

15 I remember when I made up this catalog of things for

16 this article, I just -- I was breath -- breathless. So I have

17 got to look at those cases again.

18 MR. BORST: Your Honor, just keep in mind, the

19 context, the whole point was they were supposed to identify the

20 lessee.

21 THE COURT: Right, no --

22 MR. BORST: This (unintelligible) defendant to do

23 that.

24 THE COURT: (Unintelligible) arguing but doesn't come

25 in under the hearsay rule. Yours is a discovery violation.

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1 be witnesses by way of declaration.

2 MR. SCHULTE: Judge, what happened in December when we

3 talked to you at the evidentiary hearing, as the Court may

4 recall, you required each side to disclose their witnesses.

5 That was part of the whole discussion.

6 THE COURT: I thought I ordered you.

7 MR. SCHULTE: You ordered it. That's right.

8 And so they picked certain folks, and we took their

9 depositions. These folks that they are listing now we never --

10 THE COURT: And you took everybody's deposition who

11 was listed, I think.

12 MR. SCHULTE: That's correct.

13 MR. BORST: That's right.

14 MR. SCHULTE: And now they put 15 more people in that

15 they never listed before until now. That's the whole point.

16 MR. BORST: And, your Honor, they are not using

17 certain people who we did take depositions of because they

18 decided not to use them.

19 THE COURT: Because they didn't like the testimony?

20 MR. BORST: Well, that's -- I'm not presuming, your

21 Honor, but I --

22 (Unintelligible colloquy.)

23 MR. SCHROEDER: Your Honor, indicates if you would

24 like an order we can do --

25 THE COURT: No, no, I was really being facetious.

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1 MR. BORST: Right.

2 THE COURT: I understand.

3 MR. BORST: Because (unintelligible) guys.

4 THE COURT: Right.

5 MR. BORST: They are not saying --

6 THE COURT: What -- refresh my memory. How do you

7 respond to that?

8 MR. SCHROEDER: Your Honor, our position is we have

9 had these people at -- these declarations as evidence which we

10 offered at preliminary injunction, we have offered at summary

11 judgment. We have told counsel through --

12 THE COURT: Now you withdrew -- in fairness you

13 withdrew the motion for preliminary injunction and, therefore,

14 nobody knew what was in play. And things changed as cases

15 evolve.

16 MR. SCHROEDER: Your Honor, we have talked about this

17 issue with counsel. I don't have correspondence back and

18 forth, but we have let them know throughout this proceeding

19 that we intended to offer the declarations at trial. They had

20 every opportunity to talk to these people or to come up with

21 other consumers who have a different story to tell.

22 THE COURT: But it is not what they -- it is what

23 you're doing. And they are shaking their head no that they

24 didn't know, and they have represented under Rule 11 that they

25 didn't have -- they didn't know that these folks were going to

100

1 I assume that when people don't use witnesses it

2 is -- they have a strategic reason for not doing so, and that's

3 the name of the game.

4 But it is -- when I read this, I -- it is a little

5 troubling to me that you didn't put these people down as

6 witnesses that you were going to use. I mean, the fact that

7 they are testifying by declaration doesn't make them any the

8 less witnesses. They are witnesses.

9 MR. SCHROEDER: Your Honor --

10 THE COURT: They are just witnesses on two pieces of

11 paper.

12 MR. SCHROEDER: I'm sorry about that, your Honor. Our

13 practice is to put in declarations as exhibits, to list

14 witnesses, only the people that we are -- that we are bringing

15 in through real testimony.

16 We would ask simply that your Honor withhold ruling on

17 the motion and make a decision after seeing the evidence at

18 trial.

19 MR. SCHULTE: No, Judge, we can't be -- that's not

20 fair to us.

21 MR. BORST: We can't cross examine them.

22 MR. SCHULTE: Yeah.

23 THE COURT: What you are saying is I should wait and

24 hear what the actual evidence evidence is --

25 MR. BORST: No what we should is --

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1 THE COURT: -- hear evidence.

2 MR. BORST: -- then we should have an opportunity to

3 depose them before trial. I mean that was your order.

4 MR. SCHULTE: That was the order -- that's how

5 (unintelligible) since December, Judge.

6 THE COURT: It is -- and I know there was no -- the

7 kind of shenanigans that often go on. I know that's not what's

8 going on here, Mr. Schroeder. But it doesn't make it any

9 easier or better for the defense than if they did it to you and

10 you -- you're -- they are at a huge disadvantage now.

11 And, obviously, you took these 15 because they are

12 good. That's the prejudicial. That's why they are being used.

13 I mean, you didn't use bad people, you used people who

14 were helpful.

15 MR. SCHROEDER: And the ones who were available, your

16 Honor.

17 THE COURT: No, I know, but everybody is available.

18 Look --

19 MR. SCHULTE: Judge, they have taken preservation

20 depositions. We have done that all -- there is six or seven

21 preservation depositions of these lessees that they have

22 already taken.

23 MR. SCHROEDER: Again, your Honor --

24 MR. SCHULTE: You know, they want to put them in

25 and --

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1 we'll withdraw the motion. There is no need for further

2 discovery in this case. We -- as we indicated in our motion --

3 MR. SCHULTE: That's fine.

4 MR. SCHROEDER: -- we think our evidence of live

5 witnesses, witnesses by preservation deposition, NorVergence

6 salespersons is more than sufficient to prove our case.

7 (Unintelligible colloquy.)

8 THE COURT: Which number is the one we're talking

9 about?

10 MR. SCHULTE: The 56(e).

11 THE COURT: 142?

12 MR. BORST: Well, it is our -- it is our --

13 THE COURT: Hold on.

14 MR. BORST: Rule 56(e).

15 THE COURT: So defendant's motion to strike pursuant

16 to a 56(e) is denied as moot.

17 MR. BORST: No, it is granted.

18 MR. SCHROEDER: It is 140 --

19 THE COURT: No. 140 is withdrawn.

20 MR. SCHULTE: (Unintelligible).

21 THE COURT: And therefore 160 denied as moot.

22 MR. BORST: Yes, your Honor.

23 MR. SCHULTE: In their statement of facts, your Honor,

24 they may rely on this declaration to the motion for summary

25 judgment. So I think we should grant the 56(e) motion.

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1 THE COURT: Mr. Schroeder.

2 MR. SCHULTE: -- (unintelligible) depositions, and

3 we'll have the trial in a month from now.

4 THE COURT: No ill will to what you have done. I want

5 you to understand that. And I'm not just saying it to be, you

6 know, nice or politically correct. I don't believe that for a

7 second. I think that everybody in this case has operated with

8 the greatest degree of fun and professionalism.

9 I don't know what you guys are doing outside here, but

10 I mean I really look forward to this. It is fun. As I said to

11 you I wish this had gone all night, but I -- but that doesn't

12 have anything to do with it. If I thought you were trying to

13 stick it to them, I would simply rule against you.

14 What you want me to do is not rule, let the evidence

15 come -- let all the evidence in, other than your 15, and then

16 what? Then what happens? Then I should think about it after

17 that? Because I'm not sure that that does any good.

18 Either they get stricken or they are going to be able

19 to take the depositions.

20 MR. SCHROEDER: Your Honor, if that's --

21 THE COURT: That's for sure.

22 MR. SCHULTE: Your Honor, we'd be happy to do that.

23 We'd be happy to take their deposition, and we can get it done

24 quickly.

25 MR. SCHROEDER: If that's the choice, your Honor,

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1 MR. SCHROEDER: Their motion does apply to summary

2 judgment as well, and we would assert --

3 THE COURT: Oh, I --

4 MR. SCHROEDER: -- summary judgment, and it is

5 perfectly appropriate --

6 MR. BORST: Yeah.

7 MR. SCHROEDER: -- to our declaration.

8 MR. BORST: No.

9 MR. SCHULTE: No.

10 THE COURT: Well --

11 MR. SCHULTE: For the same reason, your Honor, we

12 would oppose it.

13 THE COURT: Well, but, no. The point now is you can

14 go and depose these people if that's what you want to do. But

15 I don't know.

16 MR. SCHULTE: Judge, we're not on trial and --

17 THE COURT: I know.

18 MR. SCHULTE: -- we had hoped that we would have a

19 summary judgment ruling --

20 THE COURT: But --

21 MR. SCHULTE: -- I understand the Court had a

22 (unintelligible).

23 THE COURT: I don't know how you could have possibly

24 thought that.

25 MR. SCHULTE: Well, Judge --

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1 THE COURT: Hold on. Hold on.

2 MR. SCHULTE: I understand.

3 (Laughter.)

4 THE COURT: But he at least smiled.

5 MR. SCHULTE: I did, Judge.

6 (Laughter.)

7 MR. SCHULTE: I will say to the Court when we did that

8 schedule, I'll tell you, in all honesty, I didn't anticipate

9 that there was going to be --

10 THE COURT: Me neither.

11 MR. SCHULTE: Because I wouldn't have put that

12 schedule together that we did. And I mean no way. I mean, I

13 practiced law for 30 something years, and I know that -- I'm

14 thinking of that. I said there is no way that I anticipate

15 what ultimately happened when we did that schedule.

16 THE COURT: Well, this was one of the most unusual

17 things, I have to tell you, I had ever seen in that --

18 I -- even when this case is over, I am going to just keep this.

19 (Laughter.)

20 THE COURT: It is going to sit there because it is

21 now, I don't know, a foot and a half high. It is kind of a

22 reminder of something, I'm not sure what.

23 But I don't know you could have thought I was going to

24 rule on a motion for summary judgment when we're going to trial

25 in a couple of minutes.

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1 judgment motion, the trial then has to get put off while you

2 decide the motion because I can't decide that for you. You

3 know, Frank Easterbrook could decide that motion over the

4 weekend; I can't.

5 Well, if 140 --

6 MR. SCHULTE: Those declarations are withdrawn.

7 That's 140.

8 THE COURT: Withdrawn.

9 And then the motion to strike pursuant to Rule 56(e),

10 it seems to me in light of -- I'm going to deny that motion as

11 moot because of the way we're doing this. We're going to

12 trial. It is an -- do you know what I am saying?

13 MR. SCHULTE: But --

14 THE COURT: In other words, it is not there. It is

15 not something I'm going to consider to your detriment.

16 MR. DEEB: Unfortunately, Judge, you have pushed off

17 consideration of the motions for summary judgment until after

18 trial, and they are still in there.

19 THE COURT: Well, and if you read the cases that I

20 cited, at least one of them, and I think it is Easterbrook's

21 opinion, although it is an unreported opinion --

22 MR. DARCY: Rendered moot after --

23 THE COURT: Exactly.

24 MR. DARCY: -- (unintelligible) trial.

25 THE COURT: That's the whole point.

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1 MR. SCHULTE: Your Honor, and when we -- as I said --

2 THE COURT: For the government, not just you.

3 MR. SCHULTE: No, I understand.

4 When we did that, we were trying to -- we were trying

5 to back into the trial date --

6 THE COURT: I know.

7 MR. SCHULTE: -- (unintelligible).

8 THE COURT: I know what were you trying to back into.

9 MR. SCHULTE: Yeah. We were trying to do what we

10 could to meet everyone's concerns. And then it grew into what

11 it grew into.

12 So we would like those to be stricken from that

13 56 -- under 56(e). We never had the opportunity to depose

14 those people.

15 THE COURT: Well, here's what I am going to do.

16 I'm -- let me think about this for a second.

17 (Brief interruption.)

18 THE COURT: Look, I'm going to -- I'm not going to

19 decide this on the strength of summary judgment papers when

20 we're going to trial in a few days. And I put that in an

21 order, and I explained to you why.

22 You know, if it turns out I don't have the discretion

23 to do that, well, it will come as a surprise to every Judge in

24 this building.

25 You know, even on the eve of trial you file a summary

108

1 What am I going to do? Let's say the government puts

2 in its wealth of evidence, and it proves Mr. Schroeder's -- his

3 concession was improvident and it becomes grotesque. But he

4 has a really lousy Rule 56 motion. So what do I do? You guys

5 win because his Rule 56 motion isn't as good as his trial

6 evidence?

7 So that's what I am going to do, I'm going to deny 160

8 as moot in light of the fact they are going to trial, and

9 Number 140 is withdrawn.

10 MR. DEEB: Your Honor, maybe we can handle this if

11 we're still doing this conference. I think you went through

12 most of the motions.

13 THE COURT: I think I did.

14 The ones -- let me see. The continuance is done.

15 The motion to strike is done.

16 Then NorVergence pricing model I have to do, right,

17 146?

18 MR. SCHULTE: Yes.

19 MR. BORST: Yes.

20 THE COURT: Defendant's motion to matters conclusively

21 established.

22 MR. BORST: We're going to do a stipulation on that,

23 Judge.

24 THE COURT: Stipulation, that's right.

25 MR. BORST: And also on the --

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1 THE COURT: So that -- that's denied as moot also,
 2 right?

3 MR. BORST: I believe so, Judge.

4 THE COURT: Right, okay. The defendant's motion in
 5 limine to exclude attorney-client privilege.

6 MR. BORST: We are going to do a stipulation on that
 7 too, Judge.

8 THE COURT: Right.
 9 Defendant's motion to bar recovery of settlement
 10 proceedings, that's just -- that's pending.

11 MR. SCHULTE: Briefing schedule. You set a briefing
 12 schedule. May 6th and May 16th.

13 THE COURT: The motion to strike the NorVergence
 14 witnesses is denied.

15 The plaintiff's motion in limine and memorandum
 16 in -- the only one that's left is the 50 declarations which
 17 is -- I mean, you withdrew that.

18 MR. SCHULTE: No, they withdrew it.

19 THE COURT: So we're done.

20 MR. SCHULTE: No, we have the pricing motion.

21 MR. SCHROEDER: That was denied without prejudice.

22 MR. SCHULTE: Yeah. You ruled on that.

23 THE CLERK: Right.

24 MR. SCHROEDER: You denied that without with
 25 prejudice.

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1 of here to catch this plane.

2 MR. SCHROEDER: We can do some --

3 THE COURT: I mean, you're not taking a cab, are you,
 4 you'll take the train out there?

5 MR. SCHROEDER: Well, we were going to take a cab.

6 THE COURT: Oh, don't take a cab.

7 MR. BORST: It is easier to take the train.

8 MR. SCHROEDER: Okay.

9 THE COURT: Take the train.

10 MR. SCHROEDER: If someone will point us in that
 11 direction.

12 MR. SCHULTE: I'll take them right there, Judge.

13 THE COURT: Point him in the right direction.

14 MR. SCHULTE: Don't worry.

15 (Laughter.)

16 MR. BORST: I will get them there. I just wanted to
 17 bring it your attention because it has to get addressed at some
 18 point.

19 MR. SCHROEDER: And we could do that Thursday morning
 20 if we're still going to do that.

21 THE COURT: That's my question, is do you want to do
 22 that Thursday morning?

23 MR. SCHULTE: It is a lot of material, Judge.

24 MR. BORST: There is also.

25 MR. SCHULTE: And there is 500 exhibits. They have

110

1 THE COURT: Okay. Yeah, the pricing was denied
 2 without prejudice.

3 MR. SCHROEDER: So all that's left is the motion to
 4 bar recovery of settlement proceeds.

5 MR. SCHULTE: Which is being briefed.

6 THE COURT: That's right. And that's not a trial
 7 motion.

8 MR. BORST: Correct.

9 MR. DEEB: The only other thing we would bring to the
 10 Court's attention, your Honor, just because it is going to be a
 11 major housekeeping issue, and if Mr. Schroeder is actually
 12 planning on putting witnesses on on Monday, is we have a group
 13 of preservation depositions, which I presume Mr. Schroeder
 14 plans on --

15 THE COURT: Handing me.

16 MR. DEEB: -- just handing to you where there are
 17 objections in those depositions.

18 There is also objections to --

19 THE COURT: But we can go over those together.
 20 (Unintelligible colloquy.)

21 MR. DEEB: (Unintelligible) submitting, your Honor.

22 MR. SCHROEDER: (Unintelligible) conference on
 23 Thursday.

24 THE COURT: Well, now the question is do we need to
 25 get together on Thursday? Because I need to get you guys out

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1 530 exhibits.

2 MR. BORST: 530 exhibits. There is objections to
 3 exhibits. There is objections to --

4 THE COURT: Let's get together Thursday morning.

5 MR. BORST: -- excerpts of testimony.

6 MR. SCHROEDER: And in the meantime --

7 THE COURT: (Unintelligible) exhibits?

8 No.

9 MR. SCHROEDER: You don't have the exhibits yet.

10 MR. SCHULTE: But we have ours, which we can give you.

11 MR. SCHROEDER: You have the list.

12 THE COURT: What I need is I would like -- 530
 13 exhibits.

14 MR. SCHROEDER: Well, it is really about 400 and --

15 THE COURT: Is that joint or is that --

16 MR. BORST: No, that's plaintiff's.

17 MR. SCHULTE: That's 18 binders, Judge.

18 THE COURT: I should have granted the continuance.

19 MR. SCHROEDER: (Unintelligible) still open.

20 THE COURT: You went in reverse order. You should
 21 have started with this.

22 MR. BORST: Should have started with that fact. I was
 23 (unintelligible) objections, your Honor. I can tell you that
 24 was a lot of fun. The --

25 THE COURT: Well, get me the books.

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1 MR. SCHROEDER: We can work some of this out.
2 MR. BORST: We are still massaging the pretrial order
3 for that matter, your Honor, because it has been a huge task,
4 and we'll do the best we can.
5 THE COURT: All right. Well, this was very
6 productive.
7 And I'll see you guys Thursday. And have a safe trip
8 back. And they'll tell you how to take the train.
9 MR. SCHROEDER: Good.
10 THE COURT: If you don't show up to the conference,
11 I'll know what happened to you.
12 MR. SCHROEDER: Thursday at 9:30, your Honor.
13 MS. STANSELL: Your Honor, do you want the exhibits
14 before Thursday?
15 THE COURT: No, no. Whenever you can get them. You
16 know, whenever you folks get me the stuff, then that will be
17 fine. Just be sure the other side has copies as well.
18 MR. SCHROEDER: They do.
19 MR. BORST: One other request, your Honor, is that on
20 Thursday you tell us what happened in that case that we
21 listened to today.
22 (Laughter.)
23 MR. BORST: I have to know. Well, I mean --
24 THE COURT: I don't know what -- you saw all the
25 evidence.

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1 MR. BORST: No, we missed the key witness. What's her
2 name?
3 MR. SCHROEDER: Lablanca.
4 THE COURT: No, she didn't testify. They did all
5 through deposition.
6 MR. BORST: Oh, my God.
7 THE COURT: One side says I got (unintelligible), and
8 they threw me out, and the other guy says -- that he got there
9 at 3:30, and it was past the time, and I told her wait here and
10 (unintelligible).
11 (Unintelligible colloquy.)
12 MR. SCHULTE: Thank you, your Honor.
13 THE COURT: Thank you nice to see you.
14 (Which concluded the proceedings in the above-entitled
15 matter.)
16
17 CERTIFICATE
18
19 I hereby certify that the foregoing is a transcript of
20 proceedings before the Honorable Jeffrey Cole on April 22,
21 2008.
22 DATED: April 29, 2008
23
24
25