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

FEDERAL TRADE COMMISSION, Plaintiff, v. IFC CREDIT CORPORATION, Defendant.	Case No. 07 C 3155 Magistrate Judge Jeffrey Cole **FTC REPLY IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE SUPPLEMENTAL AUTHORITY**

The FTC moved for leave to file as supplemental authority the Seventh Circuit's decision in *IFC Credit Corp. v. Burton Industries, Inc.*, 2008 U.S. App. LEXIS 11617 (7th Cir. July 30, 2008). IFC filed a Response arguing that:

1. The Seventh Circuit's comments on the facts of the NorVergence fraud, in both *Burton Industries* and a previous case, are "wholly unsupported";

2. The FTC has (IFC says) admitted it cannot prove NorVergence was a Ponzi scheme;

3. *Burton* is limited to a narrow issue never before raised by the FTC; and

4. A document signed by consumers upon delivery of the Matrix box, the "Delivery and Acceptance Certificate," wipes out the conditions precedent for effectiveness of the Equipment Rental Agreement, which conditions are stated in other documents signed by consumers, typically at the same time they signed the ERA.

The FTC now files this Reply to these points.

1. NorVergence Fraud. IFC begins with a leap–that because Burton's attorneys did not depose any of IFC's witnesses, there was "absolutely no evidence in the record" of fraud by NorVergence. The premise seems to be that without depositions, there is no evidence. The FTC differs with this premise, but leaving that aside, the trial court in *Burton* made numerous references to evidence, including exhibits to at least one deposition. *IFC Credit Corp. v. Burton*

Industries, Inc., 2007 U.S. Dist. LEXIS 46580 (N.D.Ill. 2007). The trial court entered summary judgment for Burton, dismissing IFC's contract claims.

IFC launches a similar accusation at Judge Easterbrook's opinion in *IFC Credit Corp. V. United Business & Industrial Federal Credit Union*, 512 F.3d 989, 991 (7th Cir. 2008). There, the Court began with these words:

> Norvergence sold telecommunications equipment and services--or claimed to do so. After three apparently flourishing years it collapsed. The supposedly wondrous equipment it sold or rented, which it called a Merged Access Transport Intelligent Xchange (MATRIX) device, turned out to be a standard integrated-access box with none of the benefits that Norvergence had touted.

512 F.3d at 991. IFC says those words were dicta and again "wholly unsupported" by the evidence. Below, however, the trial Court had stated, "the record is replete with evidence upon which the jury reasonably could have found fraud *in factum* on the part of NorVergence." *IFC Credit Corp. v. United Business & Industrial Federal Credit Union*, 474 F.Supp.2d 945, 956 (N.D.Ill. 2006), *reversed on other grounds and remanded*, 512 F.3d 989. IFC was party to these cases and had an opportunity to make its view of the facts known to the courts that decided them.

2. FTC Statement. In another leap over logic, IFC persists in claiming that the FTC has conceded it "cannot prove that NorVergence was a Ponzi scheme." As support, it supplies a quotation in which FTC counsel says he thinks NorVergence *was* a Ponzi scheme, that he has never said it was not, and that while he is not sure the evidence will prove it was a Ponzi scheme, it will prove that consumers were "paying a lot more for services than what they [NorVergence] were collecting from the consumers for services."

Rather than attempting to contravene the FTC's evidence, perhaps because it cannot, IFC persists in twisting this and other quotations from FTC counsel. Indeed, IFC acknowledges that aside from its groundless statute of limitations argument, IFC's motion to reconsider is based entirely upon oral statements by FTC counsel in the midst of a deposition last February and in a discussion of those remarks at the pretrial conference. The FTC has explained those remarks. *See* FTC Opposition to IFC Motion to Reconsider and Supplemental Motion to Dismiss at 4-8 (filed May 6, 2008). There, we pointed out that by using the term "fraud" in a very narrow sense–a sense that is sometimes used internally at the FTC–we had inadvertently left the

mistaken impression that we were not alleging that IFC knew of deception by NorVergence. We have corrected that impression. We also pointed out in our Opposition to the Motion to Reconsider that what we have to prove is not "fraud" (which can mean different things) but deception (whose meaning is well defined) and IFC's knowledge of that deception. At trial, the FTC will present abundant evidence that NorVergence deceived consumers (and from which the Court can conclude NorVergence was a Ponzi scheme) and that IFC knew about that deception when it purchased the Equipment Rental Agreements from NorVergence. Indeed, much of this evidence has already been presented to the Court, and IFC is well aware of it.

IFC continues to claim steadfastly that the FTC's true position is contained in a couple of oral statements that were misinterpreted and whose misinterpretation has already been corrected. IFC deliberately overlooks the FTC's complaint, the FTC's evidence, and the FTC's extensive briefing of the motions for preliminary injunction, to dismiss, to reconsider, and for summary judgment. These filings provide ample detail on how IFC has violated the FTC Act, and are not overcome by any extraneous statements.

3. *Burton* Applies. The *Burton* court holds that the ERA is properly read together with the other agreements signed by consumers as part of the same transaction. 2008 U.S. App. LEXIS 11617 at *10-12. The Seventh Circuit reads the ERA together with the Non-Binding Hardware Application. Its logic requires consideration of the Non-Binding Services Application as well. Every consumer in this case signed all three of those documents plus several more. IFC's assertion that the *Burton* decision is not applicable to this case is wishful thinking.

What *Burton* provides is a contractual framework for analyzing the transaction between NorVergence and the consumers–which, as this Court pointed out in declining to dismiss Counts I and II, is to be considered but is not dispositive. *Burton's* holding that agreements signed together as part of the same transaction need to be read together is not surprising, and is clearly relevant. IFC argues that the Seventh Circuit was wrong, but explains no factual distinction that should make this Court disregard the Seventh Circuit's analysis of the transaction. Further, in its complaint, preliminary injunction motion, summary judgment briefs and other filings, the FTC has already alleged and provided evidence concerning the confusion sown by NorVergence's numerous "non-binding" documents with their varying statements about what events had to

occur before they and the ERA would become binding. The FTC's allegations about this are not new, but even if they were, the *Burton* holding is a legal principle that this Court must consider.

It makes no sense to limit *Burton* to its narrow facts, where the Matrix was never "mounted" (true for some but not all consumers), and ignore *Burton* when analyzing the plight of consumers whose Matrix was never connected (many consumers), never produced any services at all (many), failed to deliver the promised savings for more than a short time (all), or was not an amazing new technology adaptable to other providers if NorVergence failed (all).

4. Delivery & Acceptance Certificate

IFC argues that the Delivery & Acceptance Certificate was overlooked by the Seventh Circuit. Had the Seventh Circuit read the Delivery & Acceptance certificate, IFC is confident, it would have found that the D&A "extinguished" the Non-Binding Hardware Application, the Non-Binding Services Application, and apparently everything else NorVergence had consumers sign except for the ERA. However, IFC offers no explanation for how the D&A upends the Seventh Circuit's holding that the ERA never existed because the condition precedent in the Non-Binding Hardware Application was never met.

IFC sees nothing in the following scenario that offends the FTC Act:

(a) NorVergence lulls consumers into signing the ERA with claims that it is "non-binding" and that consumers are merely making "reservations" for scarce resources. Consumers execute other documents that describe the ERA as "non-binding." Written confirmation of mounting, mutual decisions to move forward, final consent of all parties–these are just some of the conditions that, under these documents, had to be met before the ERA became binding.

(b) NorVergence delivers but does not connect a Matrix box, then has the consumer sign a "Delivery & Acceptance Certificate" which, in addition to confirming delivery and acceptance, states that "there are no side agreements." (It does not say the Matrix has been mounted, installed, or connected.)

(c) NorVergence's successor in interest later argues that the "non-binding" documents signed by consumers are rendered non-existent by the Delivery & Acceptance Certificate–in

other words, that NorVergence's delivery receipt was perfectly effective in rendering nearly all of NorVergence's own potpourri of documents null and void.

Perhaps this way of doing business seems acceptable to IFC because it is not so different from IFC's own practice: calling consumers to confirmed selected facts about the NorVergence transaction but carefully avoiding mentioning that they would have to pay full price for the Matrix for five years whether or not they ever got the promised telecom services and the promised savings from NorVergence. At any rate, the Seventh Circuit heard and had an opportunity to read IFC's arguments about the effect of the D&A. It rejected them.

The cases IFC cites on pages 3 and 4 of its Opposition are inapposite. None involves a seller seeking to wipe out its own elaborate, multi-document written representations to consumers with a subsequent, deceptively labeled written representation to the contrary.

5. Conclusion

The Seventh Circuit's *Burton* decision provides a useful framework for analysis of the transaction between NorVergence and the consumers who have been and are being harmed by IFC's conduct. The FTC respectfully asks the Court to grant its motion for leave to file supplemental authority.

Respectfully submitted,

Dated: August 27, 2008

s/ Robert J. Schroeder

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CERTIFICATE OF SERVICE

I, David M. Horn, one of the attorneys for the FTC in this matter, hereby certify that I will serve the appended motion upon the following counsel for Defendant IFC by filing the motion electronically through the Court's ECF system, which notifies each of them by email:

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and that I will take these steps no later than today, August 27, 2008.

s/ David M. Horn

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