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

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

IFC CREDIT CORPORATION'S MOTION TO DISMISS PLAINTIFF FEDERAL TRADE COMMISSION'S COMPLAINT FOR INJUNCTIVE AND EQUITABLE RELIEF

NOW COMES Defendant IFC Credit Corporation ("IFC"), by and through its attorneys, and for its Motion to Dismiss Plaintiff Federal Trade Commission's Complaint for Injunctive and Equitable Relief, states as follows:

INTRODUCTION

IFC is a small, privately held equipment leasing company located in Morton Grove, Illinois. Equipment leasing is a financing option by which a large number of U.S. commercial companies obtain equipment necessary for the operation of their businesses. IFC has several facets to its equipment leasing business, including "vendor leasing," a lease program in which IFC enters into an agreement with a manufacturer or distributor of equipment to provide lease financing to prospective customers. IFC also, from time to time, purchases portfolios of vendor leases for certain equipment. It was this facet of IFC's equipment leasing business that led it to purchase a portfolio of leases relating to telecommunications equipment from NorVergence, Inc. ("NorVergence") between October 2003 and May 2004.

NorVergence provided hardware, software, and communications services which delivered telephone and internet access to businesses at a discount. NorVergence's customers (the "Lessees") executed Equipment Rental Agreements (the "ERAs"), which typically were 60 month hardware leases. The Lessees also entered into separate services agreements. To generate cash flow and expand operations, NorVergence packaged and sold groups of ERAs to over thirty finance and equipment leasing companies, ranging from larger companies, such as CIT and Wells Fargo, to smaller companies, such as IFC. Between October 2003 and May 2004, IFC purchased and was assigned approximately 800 ERAs which involved NorVergence customers located throughout the United States.

After two years of rapid expansion in the telecommunications market, NorVergence unexpectedly ran out of cash in June of 2004 and was placed into bankruptcy. Shortly thereafter, it terminated operations. As a result, some Lessees ceased honoring their obligations under the ERAs. In response, IFC communicated with those Lessees, articulating and summarizing its rights under the ERAs. IFC had expended substantial assets in purchasing the ERAs from NorVergence; as IFC was not involved in the selection of the NorVergence equipment by the Lessees, it expected the ERAs to be honored pursuant to their terms. Where necessary, IFC brought legal proceedings to enforce its rights against the Lessees. Some Lessees also sued IFC in an attempt to avoid their contractual obligations.

In filing the instant action, the FTC seeks to use this Court to interfere with private rights and commercial contracts which were knowingly and voluntarily entered into between two commercial entities for the lease of business equipment and subsequently assigned to IFC. First and foremost, the FTC is without legal authority to

bring suit against IFC with respect to alleged unfair or deceptive practices surrounding contracts entered into between commercial entities. The FTC is limited by the FTC Act to taking action to prohibit unfair or deceptive practices that impact consumers who obtain goods or services for personal, family or household purposes. Second, the FTC attempts to challenge IFC's lawful enforcement of certain contract clauses that are expressly permitted by the Uniform Commercial Code, standard in the equipment leasing industry, and routinely enforced by courts – particularly in commercial settings like the case at bar. The FTC's assertion that IFC's reliance upon those contract terms and court-related collection activities constitute "deceptive" and "unfair" practices violative of Section 5 of the FTC Act is without merit. Accordingly, IFC files this Motion to Dismiss on the grounds that: (1) the FTC's Complaint exceeds the scope of the FTC's authority under the FTC Act since this lawsuit does not seek to protect "consumers" but instead seeks to unwind corporate contracts; (2) the FTC fails to state a claim upon which relief can be granted; and (3) the FTC's proposed application of the FTC Act to enjoin IFC's court-related collection activities infringes upon IFC's First Amendment and due process rights.

STATEMENT OF FACTS

NorVergence, now-defunct, leased equipment and sold discounted telecommunications services to corporate Lessees. *See generally* Complaint, ¶ 8. The Lessees leased the equipment (the "Matrix boxes") pursuant to the ERAs and represented that, "**[T]he Equipment will not be used for personal, family or household purposes.**" *See* ERAs, p. 1, Group Exhibit 1 hereto (emphasis added).[1] The Matrix boxes were used

[1] Though the FTC repeatedly referenced the various documents the Lessees signed and the text contained therein and attached them to its Motion for Preliminary Injunction, the FTC failed to attach the documents

in conjunction with the discounted telecommunications services to be provided by NorVergence. *Id.* On October 10, 2003, IFC and NorVergence entered into a Master Program Agreement, which governed the terms of the parties' relationship, and IFC purchased payment rights under various ERAs between October 2003 and May 2004. *See* Complaint, ¶¶ 9, 17, 21, 23. NorVergence was eventually placed into Chapter 11 bankruptcy in June 2004, which subsequently converted to a Chapter 7 in July 2004, and as a result was unable to provide telecommunications services to the Lessees. *See generally* Complaint ¶¶ 25, 28.

The ERAs' are short, two-page contracts. *See* ERAs, Group Exhibit 1. The ERAs' subject matter is limited, as they discuss only the lease of the Matrix boxes and make no reference to telecommunications services, other than to expressly and unambiguously advise that the Lessees' duty to make payments on the ERAs would continue, regardless of any problems with services. Above the Lessee's initials, the ERAs state:

> **YOUR DUTY TO MAKE THE RENTAL PAYMENTS IS UNCONDITIONAL DESPITE EQUIPMENT FAILURE, DAMAGE LOSS OR OTHER PROBLEM. RENTER IS RENTING THE EQUIPMENT "AS IS", WITHOUT ANY WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WARRANTIES OF MERCHANABILITY OR FITNESS FOR A PARTICULAR PURPOSE IN CONNECTION WITH THIS AGREEMENT. IF THE EQUIPMENT DOES NOT WORK AS REPRESENTED BY THE MANUFACTURER OR SUPPLIER, OR IF THE MANUFACTURER OR SUPPLIER OR ANY OTHER PERSON FAILS TO PROVIDE SERVICE OR**

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as exhibits to its Complaint. *See generally* Complaint, ¶ 16; Exhibit 29 to FTC's Motion to Preliminary Injunction. For the Court's convenience, IFC attaches the referenced documents in its Motion to Dismiss. Because the FTC has made these documents part of the public record by attaching them to its Motion for Preliminary Injunction, the Court may take judicial notice of the documents without converting the Motion to Dismiss into a Motion for Summary Judgment. *See Doherty v. City of Chicago*, 75 F.3d 318, 325, n. 4 (7th Cir. 1996); *Davis v. Bayless*, 70 F.3d 367, 372, n. 3 (5th Cir. 1995).

> **MAINTENANCE, OR IF THE EQUIPMENT IS UNSATISFACTORY FOR ANY REASON, YOU WILL MAKE ANY SUCH CLAIM SOLELY AGAINST THE MANUFACTURER OR SUPPLIER OR OTHER PERSON AND WILL MAKE NO CLAIM AGAINST US.**

See ERAs, p. 2 (capitalization and emphasis in original). For telecommunications services, the Lessees executed separate services contracts. *See* Exhibit 29 to the FTC's Motion for Preliminary Injunction, p. 57.

The ERAs also contain the following provisions, which are known in the leasing industry as "hell or high water" clauses:

> **Your obligation to make all Rental Payments for the entire term are not subject to set off, with holding or deduction for any reason whatsoever.**

See ERAs, p. 1 (emphasis in original) (located above parties' signatures).

> **NO WARRANTIES: We are renting the equipment to you "AS IS". WE MAKE NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE IN CONNECTION WITH THIS AGREEMENT...You agree to continue making payments to us under this Rental regardless of any claims you may have against the supplier or manufacturer. YOU WAIVE ANY RIGHTS WHICH WOULD ALLOW YOU TO: (a) cancel or repudiate the Rental; (b) reject or revoke acceptance of the Equipment; (b) grant a security interest in the Equipment; (d) accept partial delivery of the Equipment; (e) "cover" by making any purchase or Rental of substitute Equipment; and (f) seek specific performance against us.**
>
> **YOU UNDERSTAND THAT ANY ASSIGNEE IS A SEPARATE AND INDEPENDENT COMPANY FROM RENTOR/MANUFACTURER AND THAT NEITHER WE NOR ANY OTHER PERSON IS THE ASSIGNEE'S AGENT. YOU AGREE THAT NO REPRESENTATION, GUARANTEE OR**

> **WARRANTY BY THE RENTOR OR ANY OTHER PERSON IS BINDING ON ANY ASSIGNEE, AND NO BREACH BY RENTOR OR ANY OTHER PERSON WILL EXCUSE YOUR OBLIGATIONS TO ANY ASSIGNEE.**

See ERAs, pp. 1, 2 (emphasis and capitalization in original). Thus, the Lessees contractually agreed to take the equipment in "**AS IS**" condition and free of any express or implied warranties. The ERAs also contain the following waiver of defenses clause:

> **ASSIGNMENT: YOU MAY NOT SELL, PLEDGE, TRANSFER, ASSIGN OR SUBRENT THE EQUIPMENT OR THIS RENTAL. We may sell, assign or transfer all or any part of this Rental and/or the Equipment without notifying you. The new owner will have the same right that we have, but not our obligations. You agree you will not assert against the new owner any claims, defenses or set-offs that you may have against us.**

See ERAs, p. 2, Assignment Paragraph (emphasis in original).

The Lessees each also executed Delivery and Acceptance Certificates ("D&As") after the Matrix boxes were delivered, which certified as follows:

> The undersigned certifies that it has received and accepted all the Equipment described in the Equipment Rental Agreement between NorVergence, Inc. (Rentor) and the undersigned [Name of Lessee] (Renter) dated [Date of ERA]. The Equipment conforms with our requirements. There are no side agreements or cancellation clauses given outside the Equipment Rental Agreement.
>
> I have reviewed and I understand all of the terms and conditions of the Equipment Rental Agreement. I AGREE THAT THE RENTAL PAYMENT UNDER THE EQUIPMENT RENTAL AGREEMENT WILL BEGIN 60 DAYS FROM THE DATE OF THIS DELIVERY AND ACCEPTANCE CERTIFICATE AND SHALL CONTINUE THEREAFTER FOR THE FULL LENGTH OF THE STATED INITIAL TERM OF THE EQUIPMENT RENTAL AGREEMENT AND IN ACCORDANCE WITH ITS TERMS AND

> CONDITIONS. I was not induced to sign this by any assurances of the Rentor or anyone else. I have had a reasonable opportunity to inspect the goods.

See D&As, Group Exhibit 2 hereto (capitalization in original); *see generally* Complaint, ¶ 49. Prior to accepting assignment of an ERA, in addition to confirming that a D&A was executed by the Lessee, IFC took the extra step of also verbally confirming with each Lessee that the Matrix equipment was delivered. *See generally* Complaint, ¶ 50.

After NorVergence's bankruptcy, when the Lessees stopped making payments owed to IFC under the ERAs, IFC notified the defaulting Lessees via correspondence of their unconditional obligation to make payments under the ERAs' terms and their waiver of defenses against IFC, regardless of service or other problems. *See generally* Complaint, ¶¶ 10, 61. IFC subsequently sent demand letters to those Lessees. When the defaulted accounts were not resolved, IFC filed lawsuits against the Lessees in the state and federal courts of Cook County, Illinois, pursuant to the ERAs' forum selection clause, which provides:

> This agreement shall be governed by, construed and enforced in accordance with the laws of the State in which Rentor's principal offices are located or, if this Lease is assigned by Rentor, the State in which the assignee's principal offices are located, without regard to such State's choice of law considerations and all legal actions relating to this Lease shall be venued exclusively in a state or federal court located within that State, such court to be chosen at Rentor or Rentor's assignee's sole option. You hereby waive right to a trial by jury in any lawsuit in any way relating to this rental.

See generally Complaint, ¶ 57; ERAs, p. 2, Applicable Law paragraph.

In its lawsuits against the NorVergence Lessees, IFC has relied upon the contract provisions (*e.g.* "hell or high water" and waiver of defenses clauses), maintaining that

they are enforceable under Articles 2A and 9 of the Uniform Commercial Code ("UCC"), and thus the Lessees are obligated to make payments due under the ERAs. *See* Complaint, ¶¶ 10, 43, 45. IFC has also maintained that when the Lessees executed the D&As, certifying that they accepted the equipment and that it "conform[ed] with [their] requirements," and confirmed during the verbal audit that they received the equipment, the Lessees thereby fraudulently induced IFC to accept assignment of the ERAs from NorVergence. *See* Complaint, ¶¶ 48, 52.

IFC's representations of its legal rights to the Lessees are more than colorable. The forum selection clause upon which IFC relied in bringing suit in Illinois and about which the FTC complains has been validated by the Seventh Circuit, as well as numerous state and federal appellate courts. *IFC Credit Corporation v. Aliano Brothers, et al.*, 437 F.3d 606 (7th Cir. 2006); *Pure Solutions, Inc. v. IFC Credit Corporation*, 2006 WL 1316974 (11th Cir. May 15, 2006); *Preferred Capital, Inc. v. Associates in Urology*, 453 F.3d 718 (6th Cir. 2006); *Secure Financial Services, Inc. v. Popular Leasing USA, Inc.*, 391 Md. 274, 892 A.2d 571 (Md. 2006); *Sterling National Bank v. Eastern Shipping Worldwide, Inc.*, 2006 WL 3592323 (N.Y. App. Div. 2006). The "hell or high water" and waiver of defenses clauses similarly have been validated by state and federal courts as well. *Liberty Bank, F.S.B. v. Diamond Paint and Supply, Inc.*, 2006 WL 2691719 (Iowa App. Sept. 21, 2006); *F.C.V., Inc. v. Sterling National Bank*, 2006 WL 1319822, *6 (D.N.J. May 12, 2006).[2]

Notwithstanding the plain language of the ERAs and the numerous court decisions validating IFC's efforts to enforce its contract rights, the FTC filed the instant

[2] The Court can take judicial notice of these court decisions. *See Doherty v. City of Chicago*, 75 F.3d 318, 325, n. 4 (7th Cir. 1996); *Davis v. Bayless*, 70 F.3d 367, 372, n. 3 (5th Cir. 1995).

three-count Complaint against IFC, alleging that IFC violated Section 5 of the FTC Act in the following manner: (1) IFC's representations to the Lessees that they have no defense to payment on the ERAs under their terms and that the Lessees are obligated to pay IFC under a fraudulent inducement theory is a deceptive practice (Count I); (2) IFC's acceptance of and collection on the ERAs is an unfair practice (Count II); and (3) IFC's filing of suits in Illinois pursuant to the ERAs' forum selection clause is an unfair practice in that Illinois is a distant forum for many of the Lessees (Count III). The FTC also filed a Motion for Preliminary Injunction. IFC now moves to dismiss the Complaint for the reasons set forth below.

ARGUMENT

1. Standard of Review.

When ruling on a Rule 12(b)(6) motion to dismiss, the court must construe the complaint in the light most favorable to the plaintiff and accept all factual allegations as true. *The Northern Trust Company v. Peters*, 69 F.3d 123, 129 (7th Cir. 1995). A complaint should be dismissed when the nonmoving party can prove no set of facts consistent with its complaint that would entitle it to relief. *Id.* When the exhibits contradict the allegations of the complaint, the exhibits trump the allegations of the complaint. *Thompson v. Illinois Department of Professional Regulation*, 300 F.3d 750, 754 (7th Cir. 2002).

2. The FTC's Complaint exceeds the scope of its authority under the FTC Act because the allegedly injured parties are not "consumers," but rather merchants utilizing the goods at issue for business purposes only.

Section 5 of the FTC Act provides that the FTC is "empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of

competition in or affecting commerce and unfair or deceptive acts or practices affecting commerce." 15 U.S.C. § 45(a)(2) (West 2007). The Act further provides:

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

15 U.S.C. § 45(n) (West 2007) (emphasis added). The Act therefore limits the FTC's authority to regulate only those practices which harm consumers.

Here, the FTC is not purporting to remediate any injury to "consumers." Instead, the FTC seeks to have this Court unwind corporate contracts, entered into by and between businesses, and ultimately assigned to IFC, another small business. That is not the purpose for which the FTC Act empowers the FTC to operate. Clearly, the term "consumer," used in its ordinary context, cannot be interpreted to include merchants acquiring goods for business use only, such as the Lessees at bar. Indeed, this is conceded by the FTC in its own rules. When the FTC has promulgated rules, published in the Code of Federal Regulations, which define this same term, it has repeatedly defined the term "**consumer**" as "**a natural person who seeks or acquires goods or services for personal, family, or household use.**" *See* 16 C.F.R. § 433.1(b) (2007) (emphasis added). *See also* 16 C.F.R. § 429.0(b) (2007); 16 C.F.R. § 444.1(d) (2007). At no time has the FTC defined "consumer" to include business entities of any size.

The FTC promulgated Rule 433.1 in conjunction with Rule 433.2, which provides that any consumer credit contract must contain specific language that the holder of the contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services. 16 C.F.R. § 433.2 (2007). The FTC promulgated Rule 433.2 (commonly referred to as the "FTC Holder Rule") in recognition of the material difference between consumers and commercial entities: sophistication. Prior to the FTC Holder Rule's adoption, debtors to consumer credit contracts were subject to the holder in due course rule, which cut off all personal defenses against a holder in due course of a negotiable instrument. Preservation of Consumers' Claims and Defenses, Unfair or Deceptive Acts or Practices, 40 Fed.Reg. 53,206 (Nov. 18, 1975). In reiterating the reason for the FTC Holder Rule, the FTC discussed the general purpose of the holder in due course rule, which was first articulated in *Miller v. Race*, 97 Eng. Rep. 398 (K.B. 1758):

> The rationale behind this decision was the social utility to be obtained from a system which encouraged and protected commercial transactions. If businessmen were required to look behind an instrument which on its face was negotiable, the soundness of the entire commercial system would be threatened.

Preservation of Consumers' Claims and Defenses, Unfair or Deceptive Acts or Practices, 40 Fed.Reg. at 53,207 (Nov. 18, 1975). The FTC contrasted this rationale with the plight of consumers:

> While the principles articulated in *Miller v. Race* have validity in commercial exchanges and transfers, their application to consumer credit sales is anomalous. Consumers are not in the same position as banks, bond issuers, or shippers of freight; nor are they in an equivalent position to vindicate their rights against a payee.

Preservation of Consumers' Claims and Defenses, Unfair or Deceptive Acts or Practices, 40 Fed.Reg. at 53,207 (Nov. 18, 1975). Thus, the FTC specifically exempted commercial entities from the FTC Holder Rule in express recognition that commercial financing is entirely different from consumer financing. Similarly, UCC Section 9-403, which deals with the enforceability of waiver of defenses clauses in the commercial context, carves out an exception for those contracts that fall within the purview of the FTC Holder Rule. 810 ILCS 5/9-403, Comment 5 (West 2007).

Furthermore, the legislative history of the FTC Act also reveals that the term "consumer" is intended to apply only to individual purchasers of goods for non-business purposes. *See, e.g., Am. Financial Svcs Ass'n v. FTC*, 767 F.2d 957 (D.C. Cir. 1985) (setting forth the evolution of the FTC, dating back to 1914). The FTC is a creation of Congress, and the extent of the FTC's authority can be decided only by considering the powers Congress specifically granted it in the light of the statutory language and background. *Am. Financial*, 767 F.2d at 965 (*quoting National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 674 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974)) (unfair or deceptive acts or practices language intended to protect "individual purchasers"; "The Commission is hardly free to write its own law of consumer protection.")

Congress created the FTC in 1914 and delegated to it the power to determine and prevent "unfair methods of competition" in commerce. *Am. Financial*, 767 F.2d at 965 *(citing* 15 U.S.C. s. 45(a)(1)). In 1938, Congress enacted the Wheeler-Lee Amendment. Ch. 49, § 3, 52 Stat. 111 (1938) (codified at 15 U.S.C. s. 45(a)); *Id.* at 966. This amendment broadened the language of section 5 to read:

> The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and *unfair or deceptive acts or practices in commerce*.

Id. (*citing* 15 U.S.C. § 45(a)(6)) (emphasis added). Congress' intent was affirmatively to grant the Commission authority to protect consumers as well as competitors. *Id.* at 967.

> By the proposed amendment to section 5, the Commission can prevent such acts or practices which injuriously affect the general public as well as those which are unfair to competitors. In other words, this amendment makes the **consumer**, who may be injured by an unfair trade practice, of equal concern, before the law, with the **merchant or manufacturer** injured by the unfair methods of a dishonest competitor.

Id. (emphasis added), (*quoting* H.R. Rep. No. 1613, 75th Cong., 1st Sess. 3 (1937)). Hence, it is Congress' intent that individual consumers are to be protected by the FTC Act's prohibition against "unfair trade practices," whereas merchants and manufacturers are to be protected by the FTC Act's prohibition against "unfair competition."

Controversy over the FTC's consumer protection activities in the late 1970s resulted in criticism of the vagueness and breadth of the unfairness doctrine. *Id.* at 969. Concerned that the FTC was overstepping its bounds, Congress solicited statements and held oversight hearings on the question of whether the FTC's unfairness authority should be altogether eliminated or permanently restricted. *Id.* at 970. In 1980, at the request of Congress, the FTC responded to that criticism by drafting a Policy Statement, delineating the limits of the FTC's consumer unfairness jurisdiction. *See id.*; Letter from Federal Trade Commission to Senators Ford and Danforth (Dec. 17, 1980), *reprinted in* H.R. Rep. No. 156, Pt. 1, 98th Cong., 1st Sess. 33-40 (1983) and at http://www.ftc.gov/bcp/policystmt/ad-unfair.htm. In this Policy Statement, the FTC

conceded that it does not have the jurisdiction to interfere in disputes where the alleged injury is one which "consumers" could reasonably have avoided on their own. *See* FTC Policy Statement, p. 3. In explaining this limitation on its jurisdiction, the FTC states:

> Normally, we expect the marketplace to be self-correcting, and we rely on consumer choice—the ability of **individual consumers** to make their own private purchasing decisions without regulatory intervention—to govern the market. We anticipate that consumers will survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory.
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> * * *
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> In some senses any injury can be avoided—for example, by hiring independent experts to test all products in advance, or by private legal actions for damages—but these courses may be too expensive to be practicable for **individual consumers** to pursue.

See FTC Unfairness Statement, p. 3 and n. 19 (1980)(emphasis added) (appended to *International Harvester Co.*, 104 F.T.C. 949, 1070 (1984)). Hence, the FTC's own Policy Statement confirms that the "consumers" intended to be protected under the FTC Act's prohibition against unfair trade practices are **individuals**, who generally lack the sophistication and the means to protect themselves from unfair practices, rather than **merchants** such as the Lessees at bar.

This statement of the FTC's own policy clearly recognizes that the FTC cannot intervene merely because "it believes the market is not producing the 'best deal' for consumers." *Am. Financial*, 767 F.2d at 992 (dissent). Determining what "deal" is best for consumers presumes that consumers are unable, without the benevolent guidance of the federal bureaucracy, to make purchasing decisions for themselves. *Id.* Such a paternalistic approach to consumer protection is "fundamentally incompatible with the

liberal assumption that each person is the best judge of his or her own needs." *Id.*, (*quoting* R. Reich, *Toward a New Consumer Protection*, 128 U. Pa. L. Rev. 1, 14 (1979)).

The FTC must concede that the overwhelming majority of actions it has instituted pursuant to Section 5 of the FTC Act have been with respect to true individual consumers. In recent years, much like in the 1970s, the FTC has attempted to expand its authority pursuant to Section 5 of the FTC Act. It has done so by bringing several actions pursuant to Section 5 with respect to business entities. Nevertheless, IFC has found no reported decision by which a party has challenged or a court has expressly approved the expansion of the definition of the term "consumer" as used in the FTC Act to include business entities of any size acquiring goods for strictly commercial use.

Several reported decisions involve unfair trade practices cases brought by the FTC with respect to business entities pursuant to Section 5 of the FTC Act. However, none of these decisions addresses, even in dicta, the core issue of whether the FTC has the proper authority to bring such actions for the purported protection of business entities acquiring goods for strictly commercial use, as opposed to true consumers. *See, e.g.*, *FTC v. Datacom Mktg. Inc.*, 2006 U.S. Distr. LEXIS 33029, at *13 (May 24, 2006) (involving a scheme to sell business directories to other businesses); *FTC v. Cyberspace.com*, 453 F.3d 1196 (9th Cir. 2006) (involving mail solicitation for internet service to both individual consumers and small businesses). In neither of these cases was the issue raised as to whether the FTC has the authority to bring claims on behalf of commercial entities by characterizing them as "consumers." Instead, those defendants

apparently waived this jurisdictional defense, so that the courts were not required to resolve this issue. Hence, this issue is a matter of first impression for this Court.

Nonetheless, the FTC's promulgation of regulations consistently limiting their scope to only natural persons purchasing goods for "personal, family, or household use" and the FTC's own Policy Statement demonstrate that the instant commercial Lessees are not "consumers" entitled to protection under the FTC Act. The parties who have allegedly suffered injury are commercial entities or merchants who used the equipment at issue in their businesses. Indeed, each Lessee expressly affirmed in the ERAs that the "Equipment will not be used for personal, family or household purposes." *See* ERAs, p. 1, Group Exhibit 1. Thus, the Lessees are not "consumers" or "natural person[s] who seek[] or acquire[] goods or services for personal, family, or household use." 16 C.F.R. § 433.1(b) (2007). The FTC is not empowered to use the FTC Act to unwind business contracts that the Lessees and/or the FTC have decided, after the fact, may be economically disadvantageous to the Lessees due to NorVergence's collapse. Accordingly, the FTC does not have the authority to invoke the FTC Act in this case.

3. The Complaint must be dismissed because IFC's rights are enforceable under the UCC.

A. UCC Article 2A governs the ERAs.

This case involves a question of contract interpretation, and the legal principles are straightforward. The interpretation of an unambiguous written contract is a question of law. *Dean Management, Inc. v. TBS Construction, Inc.*, 339 Ill. App. 3d 263, 790 N.E.2d 934 (Ill. App. Ct. 2003). Courts should construe contracts to effectuate the parties' intention as set forth by the written language, not from the parties' present interpretation. *W.W. Vincent and Co. v. First Colony Life Insurance Co.*, 351 Ill. App. 3d

752, 757, 814 N.E.2d 960, 966 (Ill. App. Ct. 2004). Further, a court will not change a contract merely because it or one of the parties comes to dislike its provisions. *Berryman Transfer and Storage Co., Inc.*, 345 Ill. App. 3d 859, 863, 802 N.E.2d 1285, 1288 (Ill. App. Ct. 2004).

When a contract is unambiguous, the court should only look to the four corners of the instrument and give contract terms their plain and ordinary meaning. *Dean*, 339 Ill. App. 3d at 269. Disagreement between the parties over the meaning of a contract provision does not render the provision ambiguous. *Young v. Allstate Ins. Co.*, 351 Ill. App. 3d 151, 157, 812 N.E.2d 741, 748 (Ill. App. Ct. 2004). Instead, an ambiguity exists only if the contract language is susceptible to two or more reasonable interpretations. *Dean*, 339 Ill. App. 3d at 269. If, however, the contract terms can be given certain or definite legal meanings, then the contract is not ambiguous and the court will construe the agreement as a matter of law. *Id.* Further, parol evidence is not admissible to render a contract ambiguous, which on its face, is capable of being given a definite legal meaning. *Vincent*, 351 Ill. App. 3d at 757.

Here, the contract language is clear and unambiguous. The ERAs, on their face, are equipment leases as they state, "We agree to rent to you and you agree to rent from us the Equipment listed below (the "Equipment")." *See* ERAs, Group Exhibit 1. All of the ERAs' terms unambiguously provide only for the lease of equipment and state nothing about the lessor being obligated to provide services. *See id.* Through the "hell or high water" clauses (a term of art used in contract law and the equipment leasing industry), the ERAs expressly provide that the Lessees' obligation to make rental payments to NorVergence or any subsequent assignee is unconditional. *Id.* The FTC acknowledges

that NorVergence leased the Matrix equipment. *See* ERAs, Group Exhibit 1 and *generally* Complaint, ¶ 8.

Although a true finance lease contemplates a three party transaction – lessor/vendor, lessee/customer, and financing company – parties to a lease may agree to treat a lease as a "finance lease" even though the transaction would not otherwise qualify as such. 810 ILCS 5/2A-103(1)(g), Comment g (West 2007). Here, the ERAs are true leases pursuant to Section 1-203 in the sense that the Lessee has no right to own the equipment at the end of the lease term and must return the leased equipment to IFC, and the Lessees additionally agreed that, if the ERAs are deemed to be leases, the leases would be treated as "finance leases" under Article 2A. *See* ERAs, Article 2A Paragraph, Group Exhibit 1. Accordingly, UCC Article 2A governs the enforceability of the ERAs.

UCC Section 2A-407 provides that once a Lessee accepts the equipment under a finance lease, the Lessee's promise that its payments are unconditional (*i.e.*, a statutorily implied "hell or high water" clause) is fully enforceable. 810 ILCS 5/2A-407 (West 2007). Furthermore, as an Article 2A finance lease, all implied warranties are automatically excluded by operation of law. 810 ILCS 5/2A-212(a) (West 2007). In addition to these statutorily implied provisions arising under Article 2A, the ERAs also contain express "hell or high water" clauses and clear "no warranties" provisions, fully enforceable under the UCC, as quoted *supra*. *See* ERA, p. 2.

B. The FTC cannot avoid Article 2A by mischaracterizing the ERAs as service agreements after the fact.

Notwithstanding the foregoing, the FTC wrongfully attacks IFC's legitimate collection efforts by purporting to recast and recharacterize the ERAs as service agreements. *See* Complaint, ¶ 8. However, the FTC's after-the-fact fiction fails.

The documents the Lessees executed squarely contradict the FTC's claim that the ERAs should be recharacterized as services agreements. For example, the ERAs on their face state that they are equipment leases. Moreover, entirely apart from the ERAs, the Lessees executed separate Services and Hardware Applications, indicating that, though services were to be used in conjunction with the equipment, the services agreements and the equipment leases were two separate contracts. *See* NorVergence Opening Paperwork, attached hereto as Group Exhibit 3.[3] Finally, the signed, written representations in the D&As expressly state that, "There are no side agreements or cancellation clauses given outside the Equipment Rental Agreement." *See* D&As, Group Exhibit 2.

None of the terms within the cited provisions is susceptible to two or more reasonable interpretations but instead have certain, definite meanings. Thus, the ERAs are unambiguous, solely provide for the lease of equipment, and clearly state that the Lessees' payment obligations are not conditioned upon their receipt of services from NorVergence. When the exhibits contradict the allegations of the complaint, the exhibits control. *Thompson*, 300 F.3d at 754. Accordingly, because the exhibits contradict the allegations made in the FTC's Complaint, there is no basis for the FTC's Complaint on these grounds. *See FTC v. Verity International, Ltd.*, 335 F.Supp.2d 479, 498 (S.D.N.Y. 2004) ("The FTC's fourth claim for relief is that defendants failed to disclose in a clear and conspicuous manner the cost of using the Internet services provided by defendants' clients. This claim is without merit. The costs were identified plainly on a disclosure form, no more than two pages in length, that was displayed to users before they accessed

[3] The Services and Hardware Applications of the NorVergence Opening Paperwork can be found on pages 57 and 58 of Exhibit 29 to the FTC's Motion for Preliminary Injunction.

the services.") (ultimately finding that other violations of Act occurred through different practices).

C. IFC's references to its legal rights under Article 2A cannot constitute a "deceptive" or "unfair" practice.

The Complaint is premised entirely on the FTC's contention that IFC's pre-suit and in-court assertions of its contract rights under the ERAs constitute deceptive acts and practices under Section 5 of the FTC Act. However, as discussed in greater detail below,[4] a party making representations as to its legal rights cannot be held liable for deceptive or unfair conduct. *Randazzo v. Harris Bank Palatine, N.A.*, 262 F.3d 663, 671 (7th Cir. 2001); *Harris Trust & Savings Bank v. Great-West Life Assurance Co.*, 1989 WL 117984, *5 (N.D. Ill. 1989); *Notaro Homes, Inc. v. Chicago Title Insurance Company*, 309 Ill.App.3d 246, 259, 722 N.E.2d 208, 218 (Ill. App. Ct. 1999); *Hoseman v. Weinschneider*, 322 F.3d 468, 477, n. 2 (7th Cir. 2003). This is especially true here, where IFC and the Lessees each knew that they were in an adversarial position when IFC made its statements. Thus, IFC's references to its legal rights under UCC Article 2A cannot constitute a violation of the FTC Act as a matter of law.

In addition to the foregoing, each count of the Complaint also fails to state a claim upon which relief can be granted for reasons specific to each count.

4. Count I does not allege a "deceptive" act or practice.

In Count I, the FTC alleges that IFC's representations of its legal positions regarding the Lessees' waiver of defenses and enforceability of the ERAs (including a fraudulent inducement theory) constitute a deceptive practice. *See* Complaint, ¶¶ 61-63. As a matter of law, this claim fails.

[4] See pages 21-25 of IFC's Motion to Dismiss for a full discussion of this issue.

A. IFC's reiteration of its legal position is not a "deceptive practice."

A "deceptive practice" is defined as: (1) a representation, omission or practice that (2) is likely to mislead consumers acting reasonably under the circumstances, and (3) the misrepresentation, omission or practice is material. *Kraft, Inc. v. Federal Trade Commission*, 970 F.2d 311, 314 (7th Cir. 1992). IFC's pre-suit assertion of its legal position to the Lessees is not, and as a matter of law cannot be, a "deceptive practice." More importantly, the FTC fails to meet two of the three prongs required to make a finding of a "deceptive practice."

I. Asserting a legal position is not a deceptive practice.

IFC's representations to the Lessees cannot be characterized as misrepresentations because they are assertions of IFC's colorable legal position on the enforceability of the ERAs' "hell or high water," no warranties, and waiver of defenses clauses. *See* Complaint, ¶¶ 43-45. It is not a deceptive practice to reiterate a party's legal position, nor is it a deceptive practice to rely on a contract's terms. *Randazzo v. Harris Bank Palatine, N.A.*, 262 F.3d 663, 671 (7th Cir. 2001) ("Taking a position on the interpretation of legal documents, even if erroneous, is not a deceptive trade practice or act."); *see also* 815 ILCS 505/2 (West 2007) (Illinois Consumer Fraud Act shall be construed in accordance with the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act). Regardless of the correctness of a party's legal position, its interpretation of a document cannot amount to a misrepresentation, but instead is merely a personal opinion as to the effect of the document. *Harris Trust & Savings Bank v. Great-West Life Assurance Co.*, 1989 WL 117984, *5 (N.D. Ill. 1989) ("The plaintiffs cannot transfer a good-faith

business dispute over the interpretation of legal documents into a deceptive trade practice."); *Notaro Homes, Inc. v. Chicago Title Insurance Company*, 309 Ill.App.3d 246, 259, 722 N.E.2d 208, 218 (Ill. App. Ct. 1999) ("[A] deceptive representation or omission of law does not constitute a violation of the [Illinois Deceptive Trade Practices] Act because both parties are presumed to be equally capable of knowing and interpreting the law."), *reversed on other grounds in First Midwest Bank, N.A. v. Stewart Title Guaranty Co.*, 218 Ill.2d 326, 843 N.E.2d 327 (Ill. 2006); *Hoseman v. Weinschneider*, 322 F.3d 468, 477, n. 2 (7th Cir. 2003) ("A misrepresentation as to the law cannot give rise to a claim of fraudulent inducement: 'As a general rule, one is not entitled to rely upon a representation of law since both parties are presumed to be equally capable of knowing and interpreting the law.'")

IFC's legal position cannot be a "deceptive practice" as courts that have examined the "hell or high water" and waiver of defenses clauses contained in the ERAs either have upheld the same or indicated that they may be enforceable. *See Liberty Bank, F.S.B. v. Diamond Paint and Supply, Inc.*, 2006 WL 2691719 (Iowa App. Sept. 21, 2006) (enforcing ERA's "hell or high water" clause and granting summary judgment to leasing company); *F.C.V., Inc. v. Sterling National Bank*, 2006 WL 1319822, *6 (D.N.J. May 12, 2006) (in approving putative class action settlement agreement, court acknowledged that the outcome of the litigation is uncertain as "Plaintiffs [lessees] would have to prove [*sic*] overcome numerous, plausible defenses raised by Defendant [leasing company] in its Answer, including its defense that the claims are barred by the parties' contract under a provision commonly known as a "hell or high water" clause."). Thus, IFC has not made

any misrepresentations to the Lessees when it stated that the Lessees had waived all defenses against IFC pursuant to the ERAs' terms.

Moreover, as detailed above, the ERAs are enforceable under Article 2A of the UCC and contract law principles. Section 2A-407 provides that once a Lessee accepts the equipment under a finance lease, the Lessee's promise that its payments are unconditional (the statutorily implied "hell or high water" clause) is fully enforceable. 810 ILCS 5/2A-407 (West 2007).

Regardless of whether the contact is a "finance lease," just a "lease," or a contract for services – the express "hell or high water" clause contained within the ERAs remain enforceable. "Hell or high water" clauses are generally enforceable, especially in a commercial context. *See State of West Virginia v. Hassett (In re O.P.M. Leasing Services, Inc.),* 21 B.R. 993 (S.D.N.Y. 1982) ("Courts have uniformly given full force and effect to 'hell or high water' clauses"). *See also Benedictine College, Inc. v. Century Office Products*, 853 F. Supp. 1315 (D. Kan. 1994) (enforcing express "hell or high water" clause in equipment lease); *Colorado Interstate Corp. v. CIT Group/Equipment Financing, Inc.*, 993 F.2d 743 (10th Cir. 1993) (enforcing express "hell or high water" clause in equipment leasing contract); *Theodore & Theodore Assoc, Inc. v. A.I. Credit Corp.*, 569 N.Y.S.2d 194 (N.Y. App. Div. 1991) (entering summary judgment in light of express "hell or high water" clause contained in equipment lease); *Great Am. Leasing Corp. v. Star Photo Lab, Inc.*, 51 UCC Rep. Serv.2d 1133 (2003) (equipment lease enforced where it contained both an implied and express "hell or high water" clause).

The public policy underlying courts' uniform enforcement of "hell or high water" clauses is that:

> [T]hese clauses are essential to the equipment leasing industry. To deny their effect as a matter of law would seriously chill business in this industry because it is by means of these clauses that a prospective financer-assignee of rental payments is guaranteed meaningful security for his outright loan to the lessor. Without giving full effect to such clauses, if the equipment were to malfunction, the only security for this assignee would be to repossess the equipment with substantially diminished value.

See O.P.M., 21 B.R. at 1007 (*cited with approval by Siemens Credit Corp. v. Kakos*, 1995 U.S. Dist. LEXIS 788 (N.D. Ill. 1995) ("hell or high water clauses are strictly enforced"); *Business Information Group, Inc. v. Bell Atlantic Systems Leasing International, Inc.*, 1992 U.S. Dist. LEXIS 15491 *13 (N.D. Ill. 1992) (entering summary judgment in reliance upon express "hell or high water" clause set forth in equipment lease).

Further, the ERAs contain a "no warranties" clause which is enforceable against the Lessees. Reliance upon a "no warranties" clause is permitted so long as the language excluding the warranties is conspicuous. 810 ILCS 5/2-316 (West 2007). The ERAs at issue in this litigation plainly state in bold, capitalized language that the Lessees agreed to take the equipment in "**AS IS**" condition. *See* ERAs, p. 2 (emphasis in original). Under UCC Section 2-316, expressions like "as is" are sufficiently call the buyer's attention to the exclusion of warranties. 810 ILCS 5/2-316 (West 2007). Thus, IFC is entitled to rely upon this "no warranties" clause.

Finally, even if the Court concludes (contrary to the ERAs' express terms) that the ERAs are services agreements, IFC is still entitled to enforce the ERAs' waiver of defenses clause under UCC Section 9-403. 810 ILCS 5/9-403(b) (West 2007). Section 9-403 expanded former Section 9-206 in that it applies to all account debtors, not just account debtors that have bought or leased goods. 810 ILCS 5/9-403, Comment 2 (West

2007). An "account" includes "a right to payment of a monetary obligation, whether or not earned by performance . . . for services rendered or to be rendered[.]" 810 ILCS 5/9-102(a)(2)(ii) (West 2007). Accordingly, regardless of how the ERAs are characterized, IFC had several grounds for making the colorable argument that, pursuant to the ERAs' terms, the Lessees had an unconditional obligation to make payments to IFC and had waived all defenses. Therefore, IFC's statements of its rights cannot constitute a deceptive practice as a matter of law.

II. IFC did not mislead consumers acting reasonably under the circumstances.

Second, IFC's representations to the Lessees that they have no claims or defenses against IFC did not mislead consumers acting reasonably under the circumstances. As discussed at length above, the Lessees are not "consumers" within the meaning of the Act, but instead are sophisticated commercial entities, and thus the FTC cannot invoke the FTC Act on their behalf.

Assuming *arguendo* the Court allows the FTC to bring its Complaint on behalf of the Lessees, the Lessees should be held to a higher standard of "reasonableness" due to their commercial sophistication. As the FTC acknowledged, "A company is not liable for every interpretation or action by a consumer," but only a reasonable consumer's interpretation or action. FTC Deception Statement (1983) (appended to *Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174 (1984)). In examining how a consumer was impacted by the representation, "the Commission determines the effect of the practice on a reasonable member of that group." *Id.* Thus, "a practice or representation directed to a well-educated group, such as a prescription drug advertisement to doctors, would be judged in light of the knowledge and sophistication of that group." *Id.*

The Lessees here are commercial entities; thus, they are far more sophisticated than the average consumer in that they have entered into more contracts, had legal disputes over business concerns, etc. *See e.g. IFC Credit Corporation v. Aliano Brothers, et al.*, 437 F.3d 606, 610-611 (7th Cir. 2006) ("Aliano is a business firm, not a hapless consumer. . . . All we know about Aliano is that it is a corporation, that it is in the construction business, that few if any construction projects are undertaken without a written contract, that Aliano has been in the construction business for a quarter of a century, and that it works mainly for public schools and other public institutions – which are notorious for insisting on detailed contracts designed to tie contractors in knots.") Therefore, the FTC's claim that the Lessees would be misled by IFC's presentation of its legal position is without merit as a reasonable Lessee would read the ERA, come to its own conclusions as to its provisions, and defend itself in court, either via legal representation or pro se. *See Allen Neurosurgical Associates, Inc. v. Lehigh Valley Health Network*, 2001 WL 41143, *5 (E.D. Penn. 2001) ("[P]laintiff alleges that defendants asserted an incorrect legal interpretation of a public document. That interpretation, even if obviously wrong, was not a misrepresentation of fact and could not have been reasonably calculated to deceive the physicians at ANA. A person of ordinary prudence would be expected to seek independent legal counsel before relying on such an interpretation.")

In fact, very few of the Lessees have actually adopted IFC's position that they cannot assert any claims or defenses against IFC but instead, have asserted defenses to IFC's lawsuits and, in many instances, have filed suit against IFC to pursue their own claims that the ERAs are not enforceable as to them. *See Global Stone Co. v. IFC Credit*

Corporation; C&W Services, Inc v. Commerce Commercial Leasing, LLC et al.; *Global Inc. v. IFC Credit Corporation; Robert Konkel v. IFC Credit Corporation*; and *William Palumbo Ins. Agency, Inc. v. Irwin Business Finance Corp. et al*, attached to the FTC's Motion for Preliminary Injunction as Exhibit 39, p. 66-136.[5]

Because IFC's reiteration of its legal position that the Lessees have an unconditional obligation to make payments is not a "deceptive practice," Count I of the Complaint must be dismissed with prejudice.

B. Count I is an improper attack on Illinois public policy regarding commercial law.

Under the FTC Act, "[i]n determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence." 15 U.S.C. § 45(n) (West 2007). "[S]tatutes or other sources of public policy may affirmatively allow for a practice that the Commission tentatively views as unfair. The existence of such policies will then give the agency reason to reconsider its assessment of whether the practice is actually injurious in its net effects." FTC Unfairness Statement (1980) (appended to *International Harvester Co.*, 104 F.T.C. 949, 1070 (1984)).

The FTC's claim, that IFC's representations to the Lessees regarding its legal position, somehow constitutes a deceptive practice actually *attacks* Illinois public policy (and the public policy of all fifty states, for that matter) on commercial law. The statutes of a state are an expression of its public policy. *Carris v. Marriott International, Inc.*, 466 F.3d 558, 562 (7th Cir. 2006) ("[*Pancotto* was a case in which] Illinois public policy was embodied in a statute rather than in a common law principle; statutes tend to be more

[5] The Court may take judicial notice of these court decisions. *See Doherty v. City of Chicago*, 75 F.3d 318, 325, n. 4 (7th Cir. 1996); *Davis v. Bayless*, 70 F.3d 367, 372, n. 3 (5th Cir. 1995).

emphatic declarations of state policy rather than judicial decisions, being enacted by legislatures, with their superior democratic legitimacy, rather than devised by courts."); *Crosby v. Gullstrand*, 909 F.2d 1486, 1990 WL 107833, *1 (7th Cir. 1990) ("The Illinois Supreme Court has held that the public policy of Illinois is reflected in the constitution, statutes, and judicial decisions.") All fifty states have enacted UCC Sections 2A-407 and 9-403, the sections upon which IFC bases its claim that the Lessees have no defenses against it under the "hell or high water" and waiver of defenses clauses. Accordingly, the FTC's contention that IFC cannot make these representations is a misguided attack on the state public policy embodied in Articles 2A and 9. Thus, Count I must be dismissed.

5. Count II does not allege an "unfair" act or practice.

The second count of the FTC's Complaint claims that IFC's acceptance of and collection on the NorVergence ERAs through the use of demand letters, settlements, and litigation is an unfair practice. *See* Complaint, ¶¶ 10, 48, 52, 64.

A. IFC acceptance and collection of the NorVergence ERAs is not an "unfair practice."

For a practice to be deemed "unfair" under the FTC Act, the practice must: (1) cause or be likely to cause substantial injury to consumers; (2) not be reasonably avoidable by consumers themselves; and (3) not be outweighed by countervailing benefits to consumers or competitors. *See* 15 U.S.C. § 45(n); *see also infra* at p. 9 (the FTC's scope of authority with respect to allegedly unfair practices is limited to protecting "consumers," a defined term that excludes the Lessees). IFC's acceptance of and collection on the ERAs does not constitute an "unfair practice" as the FTC cannot meet the three prongs of the "unfairness" test.

First, there is no "substantial injury to consumers" as the Lessees are receiving exactly what they bargained for under the terms of the ERAs. The FTC's claim that IFC "financed fraud" because the ERAs are really agreements for services belies the plain language of the contracts. That the equipment leased under the ERAs was to be used in conjunction with services does not magically morph the ERAs into services agreements. As discussed above, the ERAs unambiguously provide that they are equipment leases, and that payment is required regardless of any problems with services; hence, the FTC cannot recharacterize them now in an attempt to bring suit against IFC.

Second, the Lessees could have reasonably avoided the "injury" involved. As discussed above, the Lessees are not "consumers" within the meaning of the Act, but instead are sophisticated commercial entities, and thus the FTC cannot bring its Complaint under the FTC Act their behalf.

However, even if the Court allows the FTC to bring its Complaint on behalf of the Lessees, they should be held to a higher standard of "reasonableness" when examining whether they could have avoided in the "injury" here due to their commercial sophistication. "Consumers may act to avoid injury before it occurs if they have reason to anticipate the impending harm and the means to avoid it, or they may seek to mitigate the damage afterward if they are aware of potential avenues toward that end." *Orkin Exterminating Co., Inc. v. Federal Trade Commission*, 849 F.2d 1354, 1365 (11th Cir. 1988). Given the vast number of companies providing telecommunications equipment and services, the Lessees had numerous choices in the marketplace; quite simply, they could have avoided the "harm" of being held to their contractual promises by simply seeking to negotiate the terms or not entering into the ERAs.

The FTC's contention that the Lessees had no reason to expect that the ERAs would be enforced if problems arose as to services and that the Lessees were entitled to rely on NorVergence's representations in this regard, contradicts the plain language of the written contract and cannot suffice as a matter of law. The clear and unambiguous language of the ERAs provide that they are non-cancellable, that the Lessees have waived all defenses against any assignee, and that the Lessees have an unconditional obligation to make payments regardless of any problems with services. *See* ERAs, Group Exhibit 1. Parties are presumed to know the contents of contracts they sign. *Heller Financial, Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1292 (7th Cir. 1989); *Rubino v. Circuit City Stores, Inc.*, 324 Ill. App. 3d 931, 937, 758 N.E.2d 1, 5 (Ill. App. Ct. 2001). Thus, the Lessees are deemed to have knowledge of the ERAs' terms.

Moreover, the Lessees' alleged lack of knowledge could have been dispelled if they simply had read the documents, and thus neither they nor the FTC can complain of fraud now:

> A party who could have discovered the fraud by reading the contract, and in fact had the opportunity to do so, cannot later be heard to complain that the contractual terms bind [him] . . . One is under a duty to learn, or know, the contents of a written contract before he signs it, and is under a duty to determine the obligations which he undertakes by execution of a written agreement . . . And the law is that a party who signs an instrument relying upon representations as to its contents when he has had an opportunity to ascertain the truth by reading the instrument and has not availed himself of the opportunity, cannot be heard to say that he was deceived by misrepresentations.

Regensburger v. China Adoption Consultants, Ltd., 138 F.3d 1201, 1207 (7th Cir. 1998); *see also Pierce v. Atchison Topeka & Santa Fe Railway Co.*, 65 F.3d 562, 569 (7th Cir. 1995) ("Fraudulent inducement is not available as a defense when one had the

opportunity to read the contract and by doing so could have discovered the misrepresentation.") Thus, the FTC cannot claim that the Lessees were entitled to rely on NorVergence's representations in order to get the Lessees out of a bad deal. *Dillman & Assoc., Inc. v. Capital Leasing Co.*, 442 N.E.2d 311, 317 (Ill. App. Ct. 1982) ("Courts should not assume an overly paternalistic attitude toward the parties to a contract by relieving one or another of them of the consequences of what is at worst a bad bargain[.]") The Lessees are sophisticated commercial entities that could have reasonably anticipated and avoided the "harm" of IFC's enforcement of the ERAs by negotiating the terms of the ERAs or not executing the ERAs at all; thus, the FTC cannot meet its burden in demonstrating that IFC's acts were "unfair."

Finally, equipment leasing provides a benefit to consumers and the economy in general by financing transactions that businesses otherwise may be unable to afford. Thus, IFC's acceptance of and collection on the NorVergence ERAs cannot be an "unfair practice," and Count II of the FTC's Complaint must be dismissed with prejudice.

6. Count III does not allege an "unfair" act or practice.

The third count of the FTC's Complaint claims that IFC's filing of suits in Illinois pursuant to the ERAs' forum selection clause is an unfair practice in that Illinois is a distant forum for many of the Lessees. *See* Complaint, ¶¶ 66-67. The FTC argues that the ERAs' forum selection clause is vague in that "no consumer could know at the time of signing what state might be the venue under the contract or what state's laws might apply to the contract." *Id.*, ¶ 57. As discussed in detail below, the forum selection clause has been upheld by numerous courts, including the Seventh Circuit. *IFC Credit Corporation v. Aliano Brothers, et al.*, 437 F.3d 606 (7th Cir. 2006).

A. IFC action of filing suits in Illinois is not an "unfair practice."

For a practice to be deemed "unfair" under the FTC Act, the practice must: (1) cause or be likely to cause substantial injury to consumers; (2) not be reasonably avoidable by consumers themselves; and (3) not be outweighed by countervailing benefits to consumers or competitors. *See* 15 U.S.C. § 45(n); *see also infra* at p. 9 (the FTC's scope of authority with respect to allegedly unfair practices is limited to protecting "consumers," a defined term that excludes the Lessees). IFC's filing of suits in Illinois pursuant to the ERAs' forum selection clause does not constitute an "unfair practice."

First, there is no "substantial injury to consumers." Whether the Lessees were sued in Illinois or in their home state, they would still have to defend the costs of suit, which presumably would be comparable in most parts of the country. The FTC insinuates that the filing of suits in Illinois, as opposed to the Lessees' home states, attributed to the entering of default judgments. *See* Complaint, ¶ 56. However, each of the Lessees, regardless of where they were sued, was served with a copy of IFC's complaint. If the Lessee chose not to respond to the complaint and protect its interests, it was defaulted; the FTC has not presented any allegation that those defaulted Lessees would have answered the complaints if the suits had been filed in their home states as opposed to Illinois.

Moreover, the FTC's contention is specious because even if the ERAs had not been assigned to IFC, NorVergence could bring all suits concerning the ERAs in New Jersey, the state of its principal place of business, pursuant to the forum selection clause. *See* ERAs, p. 2, Applicable Law paragraph. Thus, at a minimum, all non-New Jersey Lessees knew that they would have to travel to a foreign jurisdiction in the event there

was any dispute over the ERAs. Litigating in New Jersey presumably is not significantly different to a non-New Jersey Lessee as litigating in Illinois. Therefore, the assignment of the ERAs to IFC does not materially affect the Lessees' consent to foreign jurisdiction under the forum selection clause. Accordingly, the FTC cannot meet the first prong of "unfairness."

Second, the Lessees could have reasonably avoided the "injury" involved here. The "injury" the FTC identifies is solely and completely the result of the contracts being enforced as written. The Lessees – all business entities – therefore had an easy path to avoid injury. They could have negotiated either to delete the floating forum selection clause, insisted on a different price (as *ex ante* compensation), or simply dealt with any of NorVergence's many competitors. Taking the FTC's Complaint as is, apparently the Lessees did not take any action and instead simply signed the contracts. Assuming that to be true, the Lessees should not be heard to complain now, either directly or through the FTC. It is not sufficient to assert, as the FTC does, that the Lessees did not know where suit could be filed as the plain terms of the forum selection clause specify the same. *See* Complaint, ¶ 57. "[B]asic contract law establishes a duty to read the contract; it is no defense to say, 'I did not read what I was signing.'" *Heller Financial, Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1292 (7th Cir. 1989); *see also Rubino v. Circuit City Stores, Inc.*, 324 Ill. App. 3d 931, 937, 758 N.E.2d 1, 5 (Ill. App. Ct. 2001) ("A person may not enter into a transaction with his eyes closed to available information and then charge that he has been deceived by another.") Indeed, this is the very principle that animates the FTC's own policy on unfairness:

> Normally we expect the marketplace to be self-correcting, and we rely on consumer choice – the ability of individual

> consumers to make their own private purchasing decisions without regulatory intervention – to govern the market. We anticipate that consumers will survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory.

FTC Unfairness Statement (1980) (appended to *International Harvester Co.*, 104 F.T.C. 949, 1070 (1984)). Thus, in stark contrast to the FTC's claim, pursuant to the ERAs' terms, the Lessees consented to the fact that the ERAs could be assigned and suit would likely be in a foreign jurisdiction.

Most importantly, the Seventh Circuit already has considered the legality of the floating forum selection clause in an ERA assigned to IFC and ruled, as a matter of law, that the provision is enforceable under both Illinois and federal law:

> The forum selection clause is not confusing; it makes clear that the venue of any suit on the lease is the principal offices (i.e., the headquarters) of either the lessor, or, if the lease has been assigned, of the assignee. . . . Anyone reading the contract would know [that the contract contained a forum selection clause and was assignable]; and it is not fraud to fail to tell a person orally what is in the written contract that he is being asked to sign . . . The purpose of requiring that a forum selection clause be "clear and specific" is to head off disputes over where the forum selection clause directs that the suit be brought. There was no possibility of such a dispute here, because the forum selection clause designates the state of suit unequivocally: it is the headquarters state of either NorVergence or, if the contract has been assigned, of the assignee.

IFC Credit Corporation v. Aliano Brothers, et al., 437 F.3d 606, 611, 612 (7th Cir. 2006). That decision is binding here. The FTC cannot avoid its application as *Aliano* is the law in this Circuit and involved the *identical* forum selection clause at issue here. Because the forum selection clause is unambiguous and gave the Lessees notice that they would probably not be sued in their home state if a dispute arose, the Lessees could have

"anticipate[d] the impending harm" and reasonably avoided being sued in Illinois by simply seeking to negotiate that clause or not signing the ERAs. *Orkin*, 849 F.2d at 1365. Thus, filing of suit pursuant to the ERAs' forum selection clause cannot be an "unfair practice" as a matter of law.[6]

Any attempt by the FTC to distinguish *Aliano* is unavailing. The FTC may claim that, unlike the defendant in *Aliano*, the FTC has presented adequate evidence of fraud in its Complaint. However, the U.S. Supreme Court has made clear that in order for a forum selection clause to be invalidated on the ground of fraud, the party opposing enforcement must show that the inclusion of the clause *itself* was the product of fraud; general claims of fraud do not suffice. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n. 14, 94 S.Ct. 2449, 2457 n. 14 (1974). *See also American Patriot Ins. Agency, Inc. v. Mutual Risk Management, Ltd.*, 364 F.3d 884, 889 (7th Cir. 2004). Here, the FTC does not allege that the inclusion of the forum selection clause itself was a product of fraud. Accordingly, any attempt to distinguish *Aliano* is without merit.

Moreover, the FTC cannot claim that NorVergence's failure to obtain the Lessees' permission to assign is an "unfair practice" as terms or statutes requiring the consent of an account debtor or the government before assignment are ineffective under

[6] Every federal appellate court that has examined the NorVergence ERAs' forum selection clause has held that the provision is valid and enforceable. *Aliano*, 437 F.3d 606; *Pure Solutions, Inc. v. IFC Credit Corporation*, 2006 WL 1316974 (11th Cir. May 15, 2006); *Preferred Capital, Inc. v. Associates in Urology*, 453 F.3d 718 (6th Cir. 2006). State appellate courts agree. *Secure Financial Services, Inc. v. Popular Leasing USA, Inc.*, 391 Md. 274, 892 A.2d 571 (Md. 2006); *Sterling National Bank v. Eastern Shipping Worldwide, Inc.*, 2006 WL 3592323 (N.Y. App. Div. 2006). *But see Preferred Capital, Inc. v. Power Engineering Group, Inc.*, 112 Ohio St.3d 429, 860 N.E.2d 741 (Ohio 2007). The Illinois Appellate Court has not yet ruled on the enforceability of the ERAs' forum selection clause, though a consolidated appeal on the matter is fully briefed and awaiting decision under the caption *IFC Credit Corporation v. Rieker Shoe Corporation*, Case No. 06-1310. Thus, the only final, appellate decision in Illinois on the forum selection clause is *Aliano*, and it controls.

the UCC. 810 ILCS 5/9-406(d), (f) (West 2007). Thus, the FTC cannot demonstrate the second prong of "unfairness."

Finally, any injury to the Lessees in having to litigate in Illinois is outweighed by the benefit to consumers and competitors. As the Seventh Circuit recognized, the forum selection clause provided a benefit to the parties by presumably reducing transaction costs, a benefit which in turn was passed down to the Lessees:

> Potential defendants would not agree to the inclusion of such a clause in their contracts if they though it would put them at a disadvantage should the parties have a dispute that resulted in litigation, unless they were compensated for assuming that risk. If as seemed apparent in Northwestern as in the present case the clause did favor the other party to the contract, then probably "the defendants were compensated in advance," in other terms of the contract such as the price, "for bearing the burden of which they now complain," and if so they would "reap a windfall if they are permitted to repudiate the forum selection clause."
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> If Aliano's name-the-forum position (minus its lawyer's concession, which guts it) were accepted, the assignment of contracts would be impeded because the assignee would have to litigate in a state specified in the contract, and that state might be inconvenient for it. Parties to contracts are not benefited by rules that make assignment burdensome. If assignors have to compensate their assignees for having to litigate in an inconvenient forum, they will have to charge a higher price to their customers, such as Aliano.

Aliano, 437 F.3d at 610, 612-613.[7]

[7] The FTC may argue that *Spiegel, Inc. v. Federal Trade Commission*, 540 F.2d 287 (7th Cir. 1976), stands for the proposition that the FTC may prohibit the use of distant forums. However, because *Spiegel* is distinguishable from the instant case, it should not prevent the Court from finding that under *Aliano*, enforcement of the forum selection clause cannot be an "unfair" act or practice. First, *Spiegel* was decided thirty years before *Aliano* and thus is of questionable precedential value. Second, *Spiegel* predates the FTC's own Unfairness Statement, which, as discussed above, supports IFC's position here. FTC Unfairness Statement (1980) (appended to *International Harvester Co.*, 104 F.T.C. 949, 1070 (1984)). Third, as the FTC notes, *Spiegel* was decided before the standard for "unfairness" was codified by statute. *See* FTC's Motion for Preliminary Injunction, p. 27. Finally, in *Spiegel*, the allegedly injured parties were consumers, while here all parties are commercial entities. As discussed above, this distinction is crucial as

IFC's filing of suits in Illinois pursuant to the ERAs' forum selection clause is not an "unfair practice." Accordingly, Count III must be dismissed.

7. Counts I and II of the FTC's Complaint infringe on IFC's constitutional rights.

The allegations of the Complaint, taken together, seek to hold IFC liable for asserting its legitimate contractual rights. At worst, the Complaint alleges that IFC informed the Lessees that IFC had rights to collect under the written contracts, and that IFC in fact asserted those rights in court. *See* Complaint, ¶¶ 10, 43, 45, 48, 52. As a matter of law, IFC has both due process and First Amendment rights to assert arguments that have a reasonable basis in law or fact in defense or support of legal claims, as well as a due process right to protect and defend its property in the courts. *Snyder v. Nolen*, 380 F.3d 279, 291 (7th Cir. 2004); *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 785-86 (1971).

As set forth herein, IFC has more than a colorable basis for its legal claims as courts have upheld each of the provisions that the FTC now seeks to invalidate. For these independent reasons, the entire Complaint fails as a matter of law. Additionally, the FTC Act cannot be used to deny IFC its constitutional rights.

A. The FTC's claim that IFC's in-court conduct violates the FTC Act violates IFC's constitutional rights of due process under the Fifth Amendment and petitioning the courts under the First Amendment.

A statute, although facially constitutional, can be unconstitutional as applied. *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 787 (1971). Whether a constitutional right extends to a corporation depends on the "nature, history, and purpose of the particular constitutional provision." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765,

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the FTC has promulgated special rules to deal with problems unique to consumers and purposefully did not create parallel regulations for commercial entities. *See* 16 C.F.R. §433.3 (2007).

98 S.Ct. 1407, 1416 n. 14 (1978). Nonetheless, most constitutional protections extend to corporate entities, including the rights of due process and freedom of speech. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 104 S.Ct. 1868 (1984); *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817 (1976).

A party has a due process right to have access to the civil courts and the right to be heard. *Tennessee v. Lane*, 541 U.S. 509, 124 S.Ct. 1978, 1988 (2004). Whether free or incarcerated, a person's right to have "meaningful access to the courts is a fundamental constitutional right, grounded in the First Amendment right to petition and the Fifth and Fourteenth Amendment due process clauses." *Snyder v. Nolen*, 380 F.3d 279, 291 (7th Cir. 2004), quoting *Johnson v. Atkins*, 999 F.2d 99, 100 (5th Cir. 1993). A person also has the due process and First Amendment rights to make arguments with a reasonable basis in law or fact in defense or in support of his claims, as well as the due process right to defend his property in the courts. *Snyder*, 380 F.3d at 290-91; *Boddie*, 401 U.S. 371.

In the instant case, the FTC seeks to hold IFC liable for its past courtroom conduct as well as to prevent it from asserting its rights in court in the future. Since IFC has the constitutional right to access to the courts, to petition the courts, to defend its property in court, and to make colorable legal arguments, then the FTC's Complaint, as it intends to apply the FTC Act to IFC's courtroom conduct, constitutes a violation of IFC's First Amendment right to petition and Fifth Amendment substantive due process rights and, therefore, must be dismissed. *Tennessee*, 124 S.Ct. at 1988; *Snyder*, 380 F.3d at 290-91; *Boddie*, 91 S.Ct. at 785-86.

Here, as a matter of law, IFC's legal arguments regarding the meaning, interpretation, and application of its contract rights clearly are not frivolous. IFC and other NorVergence assignees have prevailed on the substantive issues claimed to be "unfair." For example, the United States Court of Appeals for the Seventh, Sixth and Eleventh Circuits, as well as the Maryland Court of Appeals and New York Court of Appeals, have upheld the ERAs' forum selection clause. *Aliano*, 437 F.3d 606; *Pure Solutions, Inc. v. IFC Credit Corporation*, 2006 WL 1316974 (11th Cir. May 15, 2006); *Preferred Capital, Inc. v. Associates in Urology*, 453 F.3d 718 (6th Cir. 2006); *Secure Financial Services, Inc. v. Popular Leasing USA, Inc.*, 391 Md. 274, 892 A.2d 571 (Md. 2006); *Sterling National Bank v. Eastern Shipping Worldwide, Inc.*, 2006 WL 3592323 (N.Y. App. Div. 2006). In *Aliano*, the Seventh Circuit explained how the forum selection clause was enforceable under both state and federal common law, highlighting the sophistication of the Lessee and the financial benefit accruing to the marketplace by enforcing the lease as written. *Aliano*, 437 F.3d 606. Similarly, the Iowa Court of Appeals entered summary judgment in favor leasing company Liberty Bank on a NorVergence lease, accepting that the lease was a "finance lease" and that "hell or high water" clause was enforceable. *Liberty Bank*, 2006 WL 2691719. Likewise, in approving a putative class action settlement agreement, a New Jersey District Court acknowledged that the leasing companies had "numerous, plausible defenses," including that the lessees' claims were barred by the "hell or high water" clauses. *F.C.V., Inc.*, 2006 WL 1319822, *6. Thus, the FTC's claim that IFC's past and future courtroom conduct violates the FTC Act infringes on IFC's rights of due process and petitioning the courts.

B. The FTC's claim that IFC's out-of-court conduct violates the FTC Act infringes on IFC's constitutional right of free speech under the First Amendment.

"The [FTC], like any governmental agency, must start from the premise that any prior restraint is suspect, and that a remedy, even for deceptive advertising, must go no further than is necessary for the elimination of the deception." *Beneficial Corp. v. Federal Trade Commission*, 542 F.2d 611, 620 (7th Cir. 1976). Deceptive or unfair commercial speech is not subject to any constitutional protections. *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 1830-31 (1976). Commercial speech is defined as speech that does no more than propose a commercial transaction, and it is protected by the First Amendment and subject to intermediate scrutiny. *Id.*; *Edenfield v. Fane*, 507 U.S. 761, 113 S.Ct. 1792 (1993). In determining whether a statute improperly limits commercial speech and fails to pass the muster of intermediate scrutiny, a court must determine: (1) whether the expression is protected by the First Amendment in that it must concern lawful activity and not be misleading; (2) whether the asserted governmental interest is substantial; (3) whether the regulation directly advances the governmental interest asserted; and (4) whether it is not more extensive than is necessary. *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343 (1980).

The FTC's application of the FTC Act to IFC's out-of-court commercial speech does not pass the four-part intermediate scrutiny test. First, IFC's speech is protected by the First Amendment and is not misleading in that the speech is an articulation of IFC's legal position, which by definition cannot be "deceptive." *Randazzo*, 262 F.3d at 671; *Harris Trust*, 1989 WL 117984, *5; *Notaro Homes*, 309 Ill.App.3d at 259; *Hoseman*, 322

F.3d at 477, n. 2. Second, the FTC's interest in prohibiting deceptive speech, though substantial, is inapplicable because here, the FTC is seeking to prohibit non-deceptive speech.

Third, the FTC's application of the FTC Act does not directly advance the governmental interest of prohibiting deceptive speech in that IFC's speech is materially different from advertising or fliers which contain false representations. Here, the dispute is already in the open. The Lessee knows that IFC's position is adversarial and so the risk of it being duped or tricked is minimal as IFC has only made the demand because the Lessee refused to make payment. The governmental interest in protecting the Lessee from IFC's demand for payment is also not advanced through the restriction in light of IFC's absolute right to file suit. In other words, the government's remedy of restricting the speech fails to protect the Lessee in any substantive way since IFC has an absolute constitutional right to sue. *Tennessee*, 124 S.Ct. at 1988; *Snyder*, 380 F.3d at 290-91.

Finally, the FTC's restrictions on IFC's speech is more extensive than necessary because it restricts IFC's articulation of its legal position without meaningfully protecting the Lessee from "deceptive" speech. Moreover, in light of IFC's actual practice of asserting its rights in court, IFC's articulation of its legal position outside of court cannot fairly be separated from its in-court conduct. Assuming for the sake of argument that the FTC is correct – that IFC is not a good faith assignee – IFC's past speech should *still* be protected as it reflects IFC's colorable legal arguments, which have been validated by several courts. Moreover, as a public policy matter, the FTC's position that IFC could not assert its legal position to the Lessees would effectively prevent litigants from discussing settlement where a bona fide dispute exists, if at some later date one of the

parties is ultimately adjudicated to be in the wrong. Accordingly, Counts I and II of the FTC's Complaint, as it intends to apply sections of the FTC Act to IFC's articulation of its legal position in and out of court, violates IFC's First Amendment right to free speech and, therefore, must be dismissed.

WHEREFORE, IFC CREDIT CORPORATION respectfully requests that this Court grant its Motion to Dismiss Plaintiff Federal Trade Commission's Complaint for Injunctive and Equitable Relief.

Respectfully Submitted,

IFC CREDIT CORPORATION

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