

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION NO. 04-5100-H

_____)
COMMONWEALTH OF MASSACHUSETTS,)
)
Plaintiff,)
)
v.) COMPLAINT
)
NORVERGENCE, INC.)
)
Defendant.)
_____)

I. INTRODUCTION

1. The Attorney General brings this civil action in the public interest and on behalf of the Commonwealth of Massachusetts pursuant to G. L. c. 93A, § 4, the Massachusetts Consumer Protection Act. The Defendant, NorVergence, Inc. (“NorVergence”) in this action is a New Jersey corporation engaged primarily in the business of providing telecommunications service and Internet access and renting telecommunications equipment. This action alleges that during the course and conduct of their business, the Defendant has committed a pattern and practice of unfair or deceptive acts in violation of G. L. c. 93A, § 2(a).

2. As alleged in greater detail below, the Defendant has committed a pattern and practice of unfair and deceptive acts or practices in violation of G. L. c. 93A, § 2(a) by knowingly: (1) failing to disclose clearly and conspicuously all material terms and conditions in their advertisements, rental agreements and related contracts; (2) failing to disclose clearly and conspicuously that the customer’s obligation to pay continued regardless of the ability of the

Defendant to provide telecommunications and Internet services, and regardless of the usability of the Matrix box; (3) failing to disclose clearly and conspicuously that, under the rental agreement and related documents, the customer waived all defenses against the Defendant and any assignee of the Defendant, and that all legal challenges would occur in the forum of the Defendant's or Defendant-assignee's choice; and (4) failing to provide the consumers with their promised discount prices, telecommunications and Internet services.

3. The Commonwealth requests that this Court enter preliminary and permanent injunctions to prevent the Defendant from committing such acts or practices, order the Defendant to pay restitution to aggrieved consumers, and assess civil penalties and costs against the Defendant pursuant to G. L. c. 93A, § 4.

II. JURISDICTION AND VENUE

4. This Court has jurisdiction of the subject matter of this action pursuant to G. L. c. 93A, § 4, and G. L. c. 214, § 1.

5. Venue is proper in Suffolk County pursuant to G. L. c. 93A, § 4, and G. L. c. 214, § 5.

III. PARTIES

6. The Plaintiff is the Commonwealth of Massachusetts, represented by Attorney General Thomas F. Reilly. The Attorney General is authorized to bring law enforcement actions pursuant to G.L. c. 93A. This action is not barred by the automatic stay in bankruptcy, although distribution of assets and enforcement of any monetary judgment would be subject to the Bankruptcy Code unless the bankruptcy is dismissed. 11 U.S.C. § 362(b)(4).

7. The Defendant, NorVergence, Inc. ("NorVergence"), is a New Jersey corporation with its principal place of business located at 550 Broad Street, 3rd Floor, Newark, New Jersey

07102. NorVergence transacts or has transacted business in the Commonwealth of Massachusetts and maintained an office at Newton Executive Office Center, 233 Needham Street, Suite 200, Newton, MA 02464. NorVergence is in Chapter 7 bankruptcy in New Jersey (Docket 04-32079-RG).

IV. FACTS

8. NorVergence's principal business since at least 2002, and continuing until shortly before its bankruptcy filing in July 2004, has been reselling telecommunications services, purchased from common carriers or others, principally to small businesses, non-profit organizations, churches, and municipalities. NorVergence marketed its services as integrated, long-term packages, including landline and cellular telephone service and Internet access.

9. NorVergence filed a Statement of Business Operations ("SBO") for Telecommunications Service Providers and tariff provisions on or about February 21, 2003 with the Massachusetts Department of Telecommunications and Energy ("DTE"), located at One South Station, Boston, Massachusetts. In its SBO, NorVergence proposed to provide an integrated offering consisting of local exchange services, interexchange (long distance) services, Internet service, and voice and data services to Massachusetts business customers statewide via resale of Verizon (formerly NYNEX) and other local exchange carrier services. The NorVergence SBO and tariff took effect on March 22, 2003. Peter J. Salzano, CEO of NorVergence, executed an affidavit on March 7, 2003 as part of the SBO in which he, on behalf of NorVergence, agreed to comply with all applicable Massachusetts laws and rules and acknowledged that failure to do so could result in the DTE cancelling the NorVergence SBO and tariffs, thus preventing NorVergence from providing telecommunications service in Massachusetts. To date, the DTE has not cancelled the NorVergence

SBO registration and tariffs, but the DTE did issue a consumer advisory on July 16, 2004, urging NorVergence business customers to find alternate service since NorVergence filed for Chapter 7 bankruptcy protection. At least 180 Massachusetts business consumers executed NorVergence agreements.

10. Upon information and belief, NorVergence set its price for the service packages without regard to its own cost of providing the services, which was likely to be much higher. Instead, it set a price based on a discount, usually 30%, from the amount the customer was previously paying for those services. It also typically promised unlimited free minutes for both long distance and cellular calls at no extra cost. The promised savings were laid out in writing so the customer could see what they would be paying and saving on a monthly and annual basis.

11. NorVergence explained to the customers that NorVergence could produce the dramatic savings and free minutes by installing a “black box” on the customer’s premises. The most commonly offered black box was called the Matrix (or Matrix 850), and would supposedly route telecommunications in a manner to provide the savings. NorVergence’s contract with its principal supplier of the Matrix set a price of \$1,500 for the box, although reports indicate that the typical market price may have been as low as \$500.

12. Upon information and belief, the Matrix was a standard integrated access device, or IAD, commonly used to connect telephone equipment to a long-distance provider’s T-1 or similar data line. The Matrix is wholly unrelated to cellular phone access and does not establish or change the costs of the long distance service significantly, if at all. The Matrix cannot provide unlimited minutes, and NorVergence was actually obligated to pay its own suppliers, Qwest Communications Corporation, Sprint Communications Company, and T-Mobile, USA, on a per minute basis.

13. Upon information and belief, some NorVergence customers were offered a Matrix Soho, a smaller device that is a standard firewall/router used to access Internet services. This Matrix box did not provide access to telephone or cell phone services. NorVergence typically paid under \$350 for each Matrix Soho it provided to its customers.

14. NorVergence procured customers' signatures on a set of forms, including “non-binding applications” for services and a “rental agreement.” The NorVergence sales pitch told customers they were signing up for long-term telecommunications services. What the customer usually received, however, was a cancellable, price-variable service agreement or commitment, and a purportedly non-cancellable “rental agreement.” The rental agreement purported to cover only the Matrix box.

15. Upon information and belief, most of the customer’s payment was allocated to the rental agreement for the Matrix (or similar product). Service applications or agreements signed at the same time as the rental agreement were for a small fraction of the rental amount and were unrelated to the actual costs of providing the telecommunications services.

16. Upon information and belief, while the price of the Matrix has been reported to be between \$500 and \$1,500, NorVergence rental agreements for the Matrix varied from \$400 to \$5,700 per month for the Matrix. Most rental agreements were for five years. They were titled simply “Rental Agreement,” with the only indication that they were non-cancellable appearing in the fine print. The total cost to the customer was \$24,000 to \$340,000 for “renting” the \$500-\$1,500 Matrix box. Rental agreements for the \$350 Matrix Soho were lower priced, but could still total \$10,000 to \$30,000.

17. Upon information and belief, the price of the rental agreement had nothing to do with

the cost of the Matrix. NorVergence calculated the amount so the total charge for telecommunications services NorVergence promised to provide would add up to 30% less than the customers' previous bills.

18. Upon information and belief, after obtaining the customer's signature on the various "non-binding" applications, forms, and the rental agreement, NorVergence sold or assigned the rental agreement to a third-party finance company, either for the full five-year term or for some part of that term. The finance company paid NorVergence a substantial portion of the total rental price. Upon information and belief, NorVergence received over \$200 million in upfront payments for the rental agreements it sold or assigned to various finance companies.

19. Upon information and belief, NorVergence included in the rental agreements various provisions that would make them more readily saleable and assignable. For example, the agreements contained so-called "hell or high water" waiver of defenses clauses in fine print that require the customer to pay the full amount regardless of any fraud or deception perpetrated by NorVergence in making the original sale or in failing to provide the promised services:

Your duty to make the rental payments is unconditional despite equipment failure, damage, loss or any other problem. If the equipment does not work as represented by the vendor, or if the vendor or any other person fails to provide any service, or if the equipment is unsatisfactory for any other reason, you will make any such claim solely against the vendor or other person and will make no claim against us. [emphasis added]

In the example language above, the word "us" refers to the rentor, which could be NorVergence, a

designated finance company, or an assignee not designated at the time of signing. These clauses were printed in very fine print.

20. Upon information and belief, NorVergence also failed to explain that the contract provided, in very fine print, that any disputes under the contract would be resolved in a forum distant from the customer's place of business and, in many cases, unknown at the time the customer signed the contract:

This agreement shall be governed by, construed and enforced in accordance with the laws of the State in which the Rentor's principal offices are located or, if the lease is assigned by Rentor, the laws of 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 in that State, such court to be chosen exclusively at Rentor or Rentor's assignee's sole option.

In some cases, NorVergence may have made multiple assignments of the same contract, adding to the ambiguity of what forum might apply.

21. Upon information and belief, NorVergence also failed to disclose to customers material facts about the transaction that would lead them to question whether they should enter into it. For example, it did not tell customers that they were entering into a financing transaction that would be assigned to a third party finance company and that the finance company would insist on payment even if NorVergence provided no services.

22. Upon information and belief, in selling the rental agreements, NorVergence was left

with its only ongoing income being payments on telecommunications service agreements with its customers. That income was only a small fraction of the cost of providing the promised services. NorVergence could not meet its long term obligations to customers from this income, but would instead have had to set aside most or all of the income from the assignment or sale of the rental agreements to do so, and even that would likely have been insufficient. Based on the Chapter 7 case, it appears that NorVergence did not set aside any substantial portion of the rental contract income to cover promised services.

23. Upon information and belief, initially, NorVergence did provide those below cost services to some of its early customers. For others the Matrix installation or connection was never completed and functional. Delays or problems in installation or connection began as early as fall 2003. By mid-2004, NorVergence had stopped installing or connecting the black boxes it had sold and ceased paying the common carriers or other service providers and its employees. Several creditors placed NorVergence into involuntary Chapter 11 bankruptcy in New Jersey, and the Court later converted the case to a Chapter 7 bankruptcy. Initial filings from the Chapter 7 Trustee indicate that virtually none of the hundreds of millions of dollars in up-front payments received by NorVergence can be found and that there are no other substantial assets.

24. Upon information and belief, NorVergence's customers are no longer receiving any services from NorVergence. Many of the finance company assignees are insisting on full payment under the rental agreements despite the fact that they know or should know that the black Matrix boxes are essentially worthless without the promised services, and that customers are receiving no services. Some of the finance companies have filed collection suits in forums distant from the customer in hopes of collecting all or part of the customers' payments.

25. Upon information and belief, NorVergence currently has more than 1,000 rental agreements not yet assigned to any finance company. NorVergence is providing none of the promised services associated with those agreements. If these contracts are assigned or sold, either by the Chapter 7 Trustee or by NorVergence if the bankruptcy action is dismissed, the customers could be subject to the same type of collection actions by assignees as for the contracts already assigned. These customers could be forced to pay tens or hundreds of thousands of dollars for a worthless black box and services they will never receive.

26. Upon information and belief, NorVergence also has a residual interest in an unknown number of rental agreements that were assigned to finance companies for limited terms. These finance companies would be expected to return the rental agreements to NorVergence, who theoretically could then begin collecting on the contracts or resell the contracts to other third parties who might attempt collection while still providing none of the promised services.

27. On or about November 3, 2004, more than five days prior to filing this action, the Attorney General provided notice to the Defendant of his intent to bring suit under G.L. c. 93A and provided an opportunity to discuss resolution of the claim, pursuant to G.L. c. 93A, § 4.

VIOLATIONS OF THE MASSACHUSETTS CONSUMER PROTECTION ACT

COUNT I

28. The Commonwealth re-alleges all preceding paragraphs of this Complaint and incorporates them herein.

29. In numerous instances, in connection with the sale and financing of telecommunications services and related products, NorVergence represented, expressly or by implication, directly or indirectly:

- a. That NorVergence offered and treated the “non-binding” applications, forms, and rental agreement each customer signed as integral parts of NorVergence’s contract and commitment to provide telecommunications services;
- b. That payment on the rental agreement and associated service agreements would result in the customer receiving the promised discounted telecommunications services for a long term; and
- c. That the equipment listed in the rental agreement would be functional and would create the promised substantial savings in the customer’s total cost of telecommunications services.

In truth and in fact:

- d. NorVergence did not offer and treat the “non-binding” applications, forms, and rental agreement each customer signed as integral parts of its contract and commitment to provide telecommunications services. Rather, NorVergence treated the rental agreement as a separate hardware financing document so it could sell that agreement as an Article 2A transaction under the Uniform Commercial Code and receive the rental income up front regardless of whether it actually delivered the promised telecommunications services.
- e. Payment on the rental agreement and associated service agreements would not and did not result in the customer receiving the promised discounted telecommunications services for a long term.

f. The equipment listed in the rental agreement would not and did not function as promised and did not create the promised substantial savings in the customer's total cost of telecommunications services.

30. Therefore, the representations set forth in Paragraph 29 above are misleading and constitute a deceptive act or practice in violation of 940 C.M.R. § 3.02(2) (A business cannot make statements or advertisements that create a false impression of the grade, quality, value, or usability of the product offered, or which may otherwise misrepresent the product in such a manner that later, on disclosure of the true facts, there is a likelihood that the buyer may be switched from the advertised product to another), 940 C.M.R. § 3.05(1) (A seller has committed an unfair and deceptive act or practice where it fails to adequately disclose additional relevant information in a manner which has the capacity or tendency or effect of deceiving buyers or prospective buyers in any material respect); and 940 C.M.R. § 6.03 (A seller cannot use advertisements which are untrue, misleading, deceptive, fraudulent, falsely disparaging of competitors, or insincere offers to sell. An unfair or deceptive representation may result not only from direct representations and the reasonable inferences they create, but from the seller's omitting or obscuring a material fact), which constitute violations of G. L. c. 93A, § 2(a).

COUNT II

31. The Commonwealth re-alleges all preceding paragraphs of this Complaint and incorporates them herein.

32. In numerous instances, in connection with the sale and financing of telecommunications services and related products, NorVergence represented, expressly or by implication, directly or indirectly, that customers have waived all defenses, or are precluded from

raising any defenses or counterclaims, including defenses of fraud in the inducement or that material provisions of the financing contract are unenforceable. In numerous instances, however, customers have and can raise defenses and counterclaims, including defenses of fraud, fraud in the inducement, unconscionability, single integration of the contracts, rejection of contract, breach of contract, or that material provisions of the financing contract are unenforceable.

33. Therefore, the representations set forth in Paragraph 32 above are misleading and constitute a deceptive act or practice in violation of 940 C.M.R. § 3.05(1) (no claim shall be made concerning a product which has the tendency to deceive buyers as to the product being offered for sale), 940 C.M.R. § 3.06(3) (no plan or scheme of inducing purchases, or entering into obligations, may conceal or disguise the obligation or contract involved), and 940 C.M.R. § 6.03 (Sellers shall not use advertisements which are untrue, misleading, deceptive, fraudulent, falsely disparaging of competitors, or insincere offers to sell. An unfair or deceptive representation may result not only from direct representations and the reasonable inferences they create, but from the seller's omitting or obscuring a material fact), which constitute violations of G. L. c. 93A, § 2(a).

COUNT III

34. The Commonwealth re-alleges all preceding paragraphs of this Complaint and incorporates them herein.

35. In numerous instances, in connection with the sale and financing of telecommunications services and related products, NorVergence represented, expressly or by implication, directly or indirectly, that it would provide substantially discounted telecommunications services for a long term. NorVergence failed to disclose:

- a. That it had no long-term commitment from any service provider for the

services it was promising to provide to its customers.

- b. That third-party finance companies would insist on full payment on the rental agreements regardless of whether NorVergence provided the promised telecommunications services.
- c. That the equipment covered by the rental agreement would be of little or no value to the customer if NorVergence failed to provide the promised telecommunications services.
- d. That the rental agreement purported to make the customer's obligation to pay absolute and unrelated to the terms, conditions, or performance of any other agreement, including the agreement to provide telecommunications services.
- e. That the rental agreement purported to require or have the effect of requiring that customers waive all defenses that they might have, including, but not limited to, fraud in the inducement of the contract.
- f. That any disputes concerning the financing agreement could be resolved in a forum distant from the customer's location and, in many cases, that the forum was not even identified at the time the customer signed the contract.

36. Therefore, the representations set forth in Paragraph 35 above are misleading and constitute a deceptive act in violation of 940 C.M.R. § 3.06(3) (no plan or scheme of inducing purchases, or entering into obligations, may conceal or disguise the obligation or contract involved) and 940 C.M.R. § 6.03 (Sellers shall not use advertisements which are untrue, misleading, deceptive, fraudulent, falsely disparaging of competitors, or insincere offers to sell. An unfair or deceptive representation may result not only from direct representations and the reasonable inferences they

create, but from the seller's omitting or obscuring a material fact), which constitute violations of G. L. c. 93A, § 2(a).

COUNT IV

37. The Commonwealth re-alleges all preceding paragraphs of this Complaint and incorporates them herein.

38. In numerous instances, in connection with the sale and financing of telecommunications services and related products as described in Paragraphs 8-26 above, NorVergence included in its finance contracts provisions authorizing it or its assignees to file lawsuits in specified or unspecified venues other than the customer's location or the location where the customer executed the contract. NorVergence failed to disclose this provision in a clear and conspicuous manner. This practice was likely to cause substantial injury that could not have been reasonably avoided and was not outweighed by countervailing benefits to consumers or competition.

39. Therefore, the representations set forth in Paragraph 38 above are misleading and constitute a deceptive act in violation of 940 C.M.R. § 3.06(3) (no plan or scheme of inducing purchases, or entering into obligations, may conceal or disguise the obligation or contract involved), and 940 C.M.R. § 6.03 (A seller cannot use advertisements which are untrue, misleading, deceptive, fraudulent, falsely disparaging of competitors, or insincere offers to sell. An unfair or deceptive representation may result not only from direct representations and the reasonable inferences they create, but from the seller's omitting or obscuring a material fact), which constitute violations of G. L. c. 93A, § 2(a).

COUNT V

40. The Commonwealth re-alleges all preceding paragraphs of this Complaint and

incorporates them herein.

41. By furnishing third party finance companies with rental agreements that further the deception of purporting to separate consumers' obligation to pay substantial amounts of money from NorVergence's obligation to provide the promised telecommunication services, that further the deception that consumers are precluded from raising any defenses to the rental agreements, and that facilitate finance companies' filing collection suits in distant forums, NorVergence provided others with the means and instrumentalities for the commission of deceptive and unfair acts or practices.

42. Therefore, the representations set forth in Paragraph 41 above are misleading and constitute a deceptive act in violation of 940 C.M.R. § 3.06(3) (no plan or scheme of inducing purchases, or entering into obligations, may conceal or disguise the obligation or contract involved), which constitutes a violation of G. L. c. 93A, § 2(a).

CONSUMER INJURY

43. Consumers throughout Massachusetts have suffered monetary loss as a result of the Defendant's unlawful acts or practices. In addition, the Defendant has been unjustly enriched as a result of its unlawful practices. Absent injunctive relief by this Court, the Defendant is likely to continue to injure consumers and to harm the public interest.

44. The Court, in the exercise of its equitable jurisdiction, may award other ancillary relief to remedy injury caused by Defendant's violations.

PRAYER FOR RELIEF

The Commonwealth requests that this Court grant the following relief:

45. Enter judgment against Defendant and in favor of the Commonwealth for each violation alleged in this complaint.

46. Permanently enjoin and restrain Defendant from violating the Massachusetts Consumer Protection Act, G. L. c. 93A.

47. Award such relief as this Court finds necessary to redress injury to consumers resulting from the Defendant's violations of the Massachusetts Consumer Protection Act, G. L. c. 93A, including but not limited to, restitution, reformation or rescission of contracts, and the cancellation of purported debts.

48. Impose a civil penalty pursuant to G. L. c. 93A, § 4, in the amount of \$5,000 for each violation of G. L. c. 93A, § 2, found against the Defendant.

49. Award the Commonwealth the costs of bringing this action, as well as such other and additional equitable relief as this Court may determine to be just and proper.

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