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Hearing: November 9, 2004 at 10:00 am

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In the Matter of:

NORVERGENCE, INC.,

Debtor.

Chapter 7

Case No. 04-32079 (RG)

Judge: Hon. Rosemary Gambardella,
Chief U.S.B.J.

**OBJECTION OF FEDERAL TRADE COMMISSION TO
IFC'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY**

The Federal Trade Commission ("FTC"), a party in interest, by its undersigned counsel, files this response to the IFC Credit Corp. ("IFC") motion for relief from automatic stay ("Stay Motion"), dated July 23, 2004.¹ The FTC's interest in this matter comes from its filing today,

¹The FTC intends that neither this response nor any later appearance, pleading, claim, or suit shall waive: (1) the FTC's right to have final orders in noncore matters entered only after *de novo* review by a District Court Judge; (2) the FTC's right to have the District Court withdraw

November 4, 2004, of a law enforcement suit against the debtor in the District Court for the District of New Jersey (Docket No. 04-cv- 05414-DRD). A copy of the FTC's complaint is attached as Exh. 1.²

The FTC believes that this Court has been well informed by letters filed in this bankruptcy by small businesses, nonprofit agencies, and others stating that they were victimized or defrauded by NorVergence. These allegations are also reflected in the Objection of Fraud Victims to IFC's Motion for Relief from the Automatic Stay filed October 14, 2004 ("Fraud Victims' Objection"). Similar factual allegations also appear in an adversary complaint against IFC filed November 1, 2004 and in the FTC's complaint.

The FTC district court complaint charges NorVergence with various unfair or deceptive practices in violation of the FTC Act, 15 U.S.C. § 45(a). Among others, it alleges that the NorVergence "rental agreements," including those at issue here, were part of a unified agreement with each customer, including various applications and forms, that together formed an agreement under which NorVergence would provide telecommunications services in exchange for consumers' payments. The Trustee here has already rejected parts of that unified agreement, those specifically designated as service contracts, as executory. He has designated the rental agreements as executory leases but not yet taken a position on whether to accept or reject them,

the reference in any matter subject to mandatory or discretionary withdrawal; or (3) any other rights, claims, actions, defenses, setoffs, recoupments, or remedies to which the FTC is or may be entitled.

²As can be seen in ¶¶ 4-5 of the attached Complaint, the FTC has notified the District Court of this pending bankruptcy action. It also noted that FTC suits under the FTC Act are law enforcement actions 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).

pending a decision by this Court on the motion for relief from stay.³

At issue in this motion are only the rental agreements that are still in the estate because they have not been transferred to finance companies. We do not seek any action or ruling from this Court regarding rental agreements already transferred. Among the FTC charges most immediately relevant to the Stay Motion is that transferring the NorVergence rental agreements to finance companies could provide the means and instrumentalities for those finance companies to commit unlawful acts:

COUNT IV

34. By furnishing third-party finance companies with rental agreements that may allow the finance companies to:
- a. Misrepresent that consumers owe money regardless of whether NorVergence provides the promised telecommunications services; and
 - b. File collection suits in distant forums,

NorVergence provided others with the means and instrumentalities for the commission of deceptive or unfair acts or practices.

35. Therefore, defendant's practices, as set forth in paragraph 34, constitute deceptive or unfair acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

By allowing IFC relief from stay to take possession of or foreclose on these rental agreements, IFC would be provided with the means and instrumentalities to commit further deceptive or unfair acts and add millions of dollars to the potential consumer injury from NorVergence's practices, as alleged in the FTC complaint. There is no question of IFC providing

³On motion of the Trustee, this Court on October 5, 2004 extended the time until 12/31/2004 for the trustee to assume or reject certain executory contracts, *i.e.*, the rental agreements still held by NorVergence.

the promised services to consumers. All IFC can or will do is collect their money while they receive nothing of value in return.

This Court does not need to rule on the allegations in the FTC complaint. This may appropriately be left to the District Court. Similar charges may also be decided in the adversary proceedings. What the FTC does ask is that this Court not foreclose those decisions and potentially create significant consumer injury in the context of a motion for relief from stay.

The FTC agrees with the argument in the Fraud Victims' Objection that the lien asserted by IFC is preferential and voidable, and therefore cannot form the basis for relief from the automatic stay. At this point, all the Court need do is deny relief from stay on this basis. Subsequent proceedings in this Court or the District Court will be more appropriate for determining the disposition of the rental agreements still held by NorVergence.

Finally, the FTC states that this pleading should not be taken as any criticism of the Trustee. To the contrary, we believe the Trustee has acted appropriately and responsibly with regard to the rental agreements at issue here.

Dated: November 4, 2004

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading and Exhibit 1 was served by delivering to Fedex, on 11/4/04, for overnight delivery to:

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