

**In the Circuit Court of the 17th Judicial Circuit  
In and for Broward County, Florida**

Case No: CACE 04-20081 (14)

Popular Leasing U.S.A., Inc., a Delaware  
corporation,

Plaintiff,

vs.

Yizhac Arvilli, doing business as Ike's  
Electronics, a Florida sole proprietorship,  
and Yizhac Arvilli, individually,

Defendants.

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**Answer, Affirmative Defenses, and Counterclaim**

Defendant, Yizhac Arvilli, doing business as Ike's Electronics, a Florida sole proprietorship, and Yizhac Arvilli, individually, by and through their undersigned attorneys, answers the complaint filed by Popular Leasing U.S.A., Inc., a Delaware corporation, ("Popular") and states:

1. Without knowledge, and therefore, denied.
2. Without knowledge, and therefore, denied.
3. Admitted.
4. Plaintiff's belief is unknown to Defendants, but Defendants admit that Yizhac Arvilli is a resident of, and domiciled in, Broward County, Florida.
5. Admitted.
6. Defendants admit that they entered into a contract with NorVergence, Inc., a New Jersey

corporation, (“NorVergence”) on or about April 27, 2004, but deny the balance of the allegation. Defendants affirmatively aver that the contract entered into between them and NorVergence is attached hereto as Defendant’s Exhibit 1, and by reference is made a part hereof<sup>1</sup>. The “predominant feature<sup>2</sup>” of the contract between them and NorVergence was for the delivery of telephone services (to-wit: local and unlimited long-distance by land-line phones, and unlimited nationwide calling by cellular phones without roaming charges), incidental to which NorVergence was to install an integrated access device, a common piece of telephone networking equipment, whose purpose is to apportion bandwidth of a tier one (T1) telephone line between voice signals and data signals. The NorVergence contract was able to be canceled by Defendants should NorVergence fail to provide those telephone services (see Defendant’s Exhibit 1.) Further, by virtue of a business presentation made by NorVergence to Popular prior to

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<sup>1</sup>See *Mnemonics, Inc. v. Max Davis Assoc., Inc.* 808 So.2d 1278, 1280 (Fla. 5th DCA 2002):

When an agreement between the parties consists of several instruments executed by them at or near the same time and concern the same transaction or subject matter, they are generally construed together as a single contract. See *Quix Snaxx, Inc. v. Sorensen*, 710 So.2d 152, 154 (Fla. 3d DCA 1998). ...

<sup>2</sup>See *Birwelco-Montenay, Inc., v. Infilco Degremont, Inc.*, 827 So.2d 255 (Fla. 3d DCA 2002):

We note that *BMC Indus., Inc. v. Barth Indus., Inc.*, 160 F.3d 1322, 1331 (11th Cir.1998), *cert. denied*, 526 U.S. 1132, 119 S.Ct. 1807, 143 L.Ed.2d 1010 (1999), on which the parties rely as dispositive of this matter, states that “[t]he question whether a contract is predominantly for goods or services is generally one of fact.”

*BMC Indus., Inc. v. Barth Indus., Inc.*, 160 F.3d 1322, 1331 (11th Cir.1998), *cert. denied*, 526 U.S. 1132, 119 S.Ct. 1807, 143 L.Ed.2d 1010 (1999) likewise states that contracts whose predominant feature is the delivery of services are not covered by the UCC.

Popular agreeing to become a “leasing partner” of NorVergence, which presentation included a PowerPoint presentation (a copy of which is attached hereto as Defendant’s Exhibit 2, and by reference, made a part hereof), Popular was fully aware that the predominant feature of all contracts to be entered into by NorVergence was the delivery of the above described telephone services, and that the contracts were able to be canceled (see reference in PowerPoint to Service Level Agreement posted on the web site of NorVergence, at Defendant’s Exhibit 2, p. 17). Popular knew before this suit was filed that the subject contract was canceled due to the involuntary bankruptcy petition filed by Plaintiff against NorVergence<sup>3</sup>. A true and correct copy of the

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<sup>3</sup> Popular’s attorney in the Bankruptcy, Peter Deeb, served as attorney for a steering committee of leasing company partners, including Popular. Popular learned that NorVergence owed millions of dollars to telephone service providers, including Qwest, and that the providers, including Qwest, were threatening to stop providing telephone service to NorVergence and its customers.

On June 30, 2004, Mr. Deeb had a telephone conversation with Andrew H. Sherman of the law firm of Sills Cummis Epstein & Gross, P.C., who represented Qwest, concerning money owed by NorVergence to Qwest. It is clear from the content of the conversation that Mr. Deeb, as attorney for Popular, knew that if telephone services were not provided to NorVergence’s customers, no payments would be collected on the assigned contracts.

Mr. Sherman filed an affidavit in the NorVergence bankruptcy matter which stated:

8. Mr. Deeb introduced himself as counsel to a “steering committee” of lessors who had an interest in a stream of income between \$200 million and \$250 million.

9. Mr. Deeb indicated that he was aware of the \$7.5 million payment which was due from the Debtor [NorVergence] on June 30, 2004, and advised me that he wanted to prevent Qwest from terminating the Agreement.

10. Mr. Deeb said, in sum and substance, that if Qwest terminated the Agreement his clients would lose their rights to a stream of income of between \$200 million and \$250 million. He then advised me that he would file an involuntary bankruptcy petition to protect that income stream. He further stated that by operation of the automatic stay and Section 366 of the Bankruptcy Code, Qwest would be forced to

involuntary bankruptcy petition is attached hereto as Defendant's Exhibit 3, and by reference is made a part hereof. The telephone services nature of the contract was confirmed to Popular during the pendency of this suit (on February 18, 2005) by the deposition of Steven Liebrock, a former technological employee of NorVergence, who testified in the presence of Mr. Deeb, and two attorneys from two offices of Plaintiff's lawyers in the present case, Akerman Senterfitt:

Q. What was NorVergence selling customers?

A. Services.

Q. And what were those services?

A. Voice calling and internet access.

7. Defendants admit that they entered into a contract with NorVergence, Inc., a New Jersey corporation, ("NorVergence") on or about April 27, 2004, but deny the balance of the allegation. Further, Defendants incorporate herein the affirmative averments contained in their answer to ¶ 6 above.
8. Defendants admit that they entered into a contract with NorVergence, Inc., a New Jersey corporation, ("NorVergence") on or about April 27, 2004, but deny the balance of the allegation. Further, Defendants incorporate herein the affirmative averments contained in their answer to ¶ 6 above.
9. Defendants admit that they entered into a contract with NorVergence, Inc., a New Jersey

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continue to provide service to Norvergence to protect the stream of income which he claimed was due to his clients. Through these statements, it was apparent that the lenders and lessors were trying to force Qwest to provide services to protect their interests.

A true and correct copy of the affidavit is attached hereto as Defendant's Exhibit 4, and by reference, is made a part hereof.

corporation, (“NorVergence”) on or about April 27, 2004, but deny the balance of the allegation. Further, Defendants incorporate herein the affirmative averments contained in their answer to ¶ 6 above.

10. Without knowledge, and therefore, denied.
11. Defendants are without knowledge of any assignment, and therefore, deny the allegation. Further, Defendants incorporate herein the affirmative averments contained in their answer to ¶ 6 above.
12. Denied, further, Defendants incorporate herein the affirmative averments contained in their answer to ¶ 6 above.
13. Denied.
14. Defendants incorporate by reference all previous answers and affirmative averments.
15. Denied.
16. Denied.
17. Defendants incorporate by reference all previous answers and affirmative averments.
18. Denied.
19. Admitted.
20. Denied.
21. Defendants deny all allegations not previously addressed.

# **Allegations of Facts Common to Affirmative Defenses, Counterclaim, and Third Party Claim**

## **Parties**

### **Defendant Yizhac Arvilli**

1. Defendant Yizhac Arvilli is a resident of and domiciled in Broward County, Florida, and is *sui juris*.

### **NorVergence**

2. At all times material hereto, non-party NorVergence, Inc., (“NorVergence”) was a corporation, organized and existing pursuant to the laws of the State of New Jersey. It was incorporated September 10, 2001, and maintained a place of business at 550 Broad St, Newark, NJ, until an involuntary petition under Chapter 11 of the Bankruptcy Code was filed against it in the District of New Jersey by Popular and two other similarly situated leasing company partners of NorVergence. Until such time, it was capable of suing and being sued.
3. The Chapter 11 proceeding has been voluntarily converted to a Chapter 7 proceeding when it became apparent that NorVergence could not make sufficient post-petition contract payments to telephone service providers such as Qwest Communications Corporation (“Qwest”), Sprint Communications Company, L.P., (“Sprint”) and T-Mobile USA, Inc., (“T-Mobile”), for telephone services which NorVergence resold to Yizhac Arvilli and other similarly situated companies. The automatic stay is still in effect in said case.

### **Popular Leasing USA, Inc.**

4. Popular is a corporation organized and existing under the laws of the State of Delaware, and is authorized to sue and be sued in the State of Florida.

## **Employees or Agents of NorVergence**

5. Non-party Donald May (“May”) is a resident of and domiciled in Broward County, Florida, and is *sui juris*.
6. At all times material hereto, May was an employee or agent of NorVergence.
7. Non-party Matthew Krac (“Krac”) is a resident of and domiciled in Broward County, Florida, and is *sui juris*.
8. At all times material hereto, Krac was an employee or agent of NorVergence.

## **Jurisdiction and Venue**

9. This court has subject matter jurisdiction over the counterclaim contained hereinafter by virtue of the allegations of the complaint.
10. Venue is properly placed in Broward County, Florida, because the contract sued upon was entered into, and was to be performed, in Broward County, Florida. Additionally, Defendant Yizhac Arvilli, is domiciled in Broward County, Florida.

## **The Fraudulent Scheme of NorVergence Begins:**

### **NorVergence Enters Into Telephone Services Contract with Qwest, Verizon, Sprint, T-Mobile, and Others**

#### **Qwest Contract**

11. On November 20, 2001, NorVergence entered into a Wholesale Service Agreement with Qwest whereby Qwest would sell to NorVergence, and NorVergence would buy from Qwest, Telecommunications Services as described in the contract, solely for resale by NorVergence to non-residential customers. For such telecommunication services, NorVergence was to pay Qwest the applicable tariffs for which Qwest was required by the Act to provide a wholesale

discount to NorVergence. (*See* § 251(c)(4) of the Act.)

12. On August 28, 2003, NorVergence entered into a substitute Wholesale Service Agreement whereby Qwest would sell to NorVergence, and NorVergence would buy from Qwest, Telecommunications Services as described in the contract, solely for resale by NorVergence to non-residential customers. For such telecommunication services, NorVergence was to pay Qwest the applicable tariffs for which Qwest was required by the Act to provide a wholesale discount to NorVergence. (*See* § 251(c)(4) of the Act.)

### **Verizon Contract**

13. On December 30, 2002, NorVergence entered into a contract with Verizon New England Inc., d/b/a Verizon Maine (“Verizon”), whereby Verizon would sell to NorVergence, and NorVergence would buy from Verizon, Verizon Telecommunications Services as described in the contract, solely for resale by NorVergence to non-residential customers. For such telecommunication services, NorVergence was to pay Verizon the applicable tariffs for which Verizon was required by the Communications Act of 1934 (47 U.S.C. § 151, *et seq.*) as from time to time amended, including but not limited to, by the Telecommunications Act of 1996, (the “Act”) to provide a wholesale discount to NorVergence. (*See* § 251(c)(4) of the Act.)
14. The wholesale discount for resale of Verizon Telecommunications Services contained in said contract was either 23.76% or 25.74% depending upon whether NorVergence provided its own operator services platform.
15. Said contract was available to the public in general, and Plaintiff in particular, through the internet prior to September 10, 2003.
16. A review of said contract, and the web site of NorVergence, reveals that NorVergence was



a reseller of wholesale telecommunications services similar to other telephone service providers, such as XO Communications, Inc., but with cellular services added thereto.

## **Sprint Contract**

17. In April, 2003, NorVergence entered into a contract with Sprint Communications Company, L.P., (“Sprint”), entitled “Sprint Advantage Agreement for Business,” whereby Sprint would sell to NorVergence, and NorVergence would buy from Sprint, Personal Communication Services (“PCS”) and PCS handset devices and accessories, as described in the contract, solely for resale by NorVergence to non-residential customers. For such telecommunication services, NorVergence was to pay Sprint the applicable tariffs for which Sprint was required by the Act to provide a wholesale discount to NorVergence. (*See* § 251(c)(4) of the Act.)
18. Upon information and belief, Defendants assert that NorVergence entered into similar contracts with T-Mobile USA, Inc., (“T-Mobile”) and AT&T, prior to September 10, 2003.

## **NorVergence Gains Authority to do Business in Various States and Licenses as Telecommunication Service Provider by Various States—All Public Records**

### **Authority to do Business**

19. On or about December 5, 2002, NorVergence obtained a Certificate of Authority from the Pennsylvania Department of State to conduct business within the Commonwealth of Pennsylvania as a foreign business corporation and in so doing, notified the Commonwealth that its primary business purpose was to offer telecommunication services.
20. The documents related to the above filing with the Commonwealth of Pennsylvania were and are public records, available to Plaintiff at all times.
21. On or about December 9, 2002, NorVergence filed an Application for a Foreign Corporation

to Transact Business in Florida, and other documents, thereby obtaining authority to conduct business within the State of Florida as a foreign business corporation and in so doing, notified the State of Florida that its primary business purpose was to offer telecommunication services.

22. The documents related to the above filing with the State of Florida were and are public records, available to Plaintiff at all times.

### **Licenses as Telecommunication Service Provider—New Jersey**

23. On April 15, 2003, NorVergence filed a Petition with the New Jersey Board of Public Utilities (“Board”) requesting authority to provide competitive facilities-based local exchange and interexchange telecommunications services in the State of New Jersey. A portion of the Order of the State of New Jersey Board of Public Utilities, approving the application, states:

In its Petition, the Company [NorVergence] seeks authority to provide competitive facilities-based local exchange and interexchange *telecommunications services* to commercial subscribers. According to the Petitioner, NorVergence initially plans to offer services to small and medium business customers located in the Verizon – New Jersey territory within New Jersey. Petitioner states that its facilities will consist of Unbundled Network Elements leased or purchased from a facilities-based New Jersey certificated provider. Petitioner further states that it initially expects to utilize the Unbundled Network Element Platform and as economic and regulatory conditions permit or require, it anticipates migrating customers to Unbundled Network Elements Loops. *NorVergence expects to offer local services, both as a stand-alone product and as part of a bundle, with resold long distance, internet access and other telecommunications services.* According to the Petitioner, all complaints and customer service issues will be referred to the NorVergence's Customer Service Department and its customer service representatives are available Monday-Friday 8:30 AM – 5:30 PM. Petitioner has also provided a toll-free number for its customer service office.

24. The documents related to the above filing with the State of New Jersey were and are public records, available to Plaintiff at all times.

## **Pennsylvania**

25. On April 16, 2003, NorVergence filed an Application for Approval to Offer, Render, Furnish or Supply Resale/Facilities-Based Interexchange Telecommunications Services to the Public in the Commonwealth of Pennsylvania (hereinafter the “Application for Approval”) with the Secretary of the Pennsylvania Public Utility Commission (hereinafter the “Commission”). The Commission gave NorVergence provisional approval to provide telecommunication services to the public in Pennsylvania; however, the Commission has since denied the NorVergence Application for Approval.
26. The documents related to the above filing with the Commonwealth of Pennsylvania were and are public records, available to Plaintiff at all times.

## **California**

27. On May 9, 2003, NorVergence filed with the State of California, Public Utilities Commission, a application seeking registration and authorization to provide inter- and intra-local access and transport area services in California as a non-dominant interexchange carrier. Said application was accepted and approved by the State of California on September 4, 2003, effective as of September 4, 2003.
28. The documents related to the above filing with the State of California were and are public records, available to Plaintiff at all times.

## **Florida**

29. On September 25, 2003, NorVergence filed with the State of Florida, Public Service Commission, a “tariff” (as defined in § 364.02, FLA. STAT. (2003)) seeking registration and authorization as an Intrastate Interexchange Telecommunications Company. Said application

was accepted and approved by the State of Florida on December 3, 2003, effective as of September 25, 2003. The tariff establishes the rates at which NorVergence proposes to resell telephone calls on a per minute basis, and establishes monthly recurring charges for telephone service.

30. The documents related to the above filing with the State of Florida were and are public records, available to Plaintiff at all times.
31. Pursuant to the enabling legislation embodied in Chapter 364, FLA. STAT. (2003), the Florida Public Service Commission enacted regulations governing telephone companies such as NorVergence, providing telephone and telecommunication services within the State of Florida, which regulations are codified in Chapter 25-4, FLA. ADMIN. CODE (2003).
32. Yizhac Arvilli has information and belief, and therefore alleges, that NorVergence filed similar applications for approval with other states, in all instances advising public utility authorities that its business was to provide telecommunication services to the public.
33. The documents related to the above filings with all states were and are public records, available to Plaintiff at all times.
34. On December 12, 2003, the State of Florida, Public Service Commission, mailed a Regulatory Assessment Fee for 2003, to NorVergence. NorVergence failed and refused to pay said fee to the State of Florida. Failing to pay said fee can result in the authority given to NorVergence to operate as an Intrastate Interexchange Telecommunications Company in the State of Florida to be rescinded or canceled.
35. At no time did the States of Florida, California or New Jersey, or the Commonwealth of Pennsylvania, require any business to obtain authority from the applicable public utility regulatory body therein to simply sell or lease integrated access devices for profit.

## NorVergence Contracts to Buy Integrated Access Devices from Adtran

36. On February 1, 2003, NorVergence entered into a contract, entitled an OEM Sales Agreement, with Adtran, Inc., (“Adtran”) the manufacturer of certain telephone equipment necessary to provide voice and data communication over a T1 telephone line, which equipment in the telephone service industry is known as an integrated access device<sup>4</sup>.
37. Said OEM Sales Agreement provided, in pertinent part:
3. Product
- \* \* \*
- (c) NorVergence is authorized sell the Product(s) *only as part of a bundled service offering* to its customers, and not as a stand-alone product offering. Any such stand-alone sale of Product by NorVergence shall be a material breach of this Agreement.
38. On November 14, 2003, NorVergence and Adtran entered into Amendment Number 1 to the OEM Sales Agreement, with prices quoted as of October 31, 2003.
39. It appears to Yizhac Arvilli, and therefore, on knowledge, information and belief, Yizhac

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<sup>4</sup>Adtran describes the integrated access device sold to NorVergence as:

Part of ADTRAN's Total Access System, The Total Access 850 is modular carrier-class Integrated Access Device (IAD). The Total Access 850 offers a wide variety of features and interface options for T1 TDM and packet networks such as T1 ATM and DSL. Scalable and economical, this IAD allows users to select from a wide variety of voice and data options for flexibility and ease of configuration. This platform offers an integral router, V.35, and DSX-1 interface port, and it can support up to 24 analog FXS ports by utilizing the six access module slots. With the Total Access 850 users can easily migrate from TDM to packet circuits, as network requirements change. An optional 8-hour battery backup system is available to protect uptime in case of a power outage. Additionally, all Total Access IADs provide an industry-leading 10 year warranty.

Arvilli alleges that the purchase price to NorVergence from Adtran of the OEM Integrated Access Device product was less than \$1,550 each.

40. The NorVergence / Adtran contract was in writing, and available to Plaintiff during any and all phases of either due diligence or risk management processes.

## **Plaintiff Becomes Partner with NorVergence In Fraudulent Scheme**

41. Prior to March 11, 2003, representatives from NorVergence met with representatives of Popular to discuss the proposal of NorVergence that Popular become a “leasing company partner”<sup>5</sup> of NorVergence in the distribution of “hardware ... that enables companies to drastically reduce telephone expenses by consolidating voice and data T1 lines into one combined line.”
42. Said proposal included a disclosure that the hardware was manufactured by Adtran, and that a “residual value study” (a term of art in the equipment leasing business) needed to be completed.
43. At said meeting, NorVergence made a PowerPoint presentation to Popular, a copy of which is attached hereto as Defendant’s Exhibit 2, and by reference, is made a part hereof.
44. The PowerPoint presentation advised Popular that:
  - a. NorVergence was proposing to prospective customers that NorVergence provide telephone services to those customers through a T1 telephone line, whose signal would be apportioned by an integrated access device (IAD), manufactured for

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<sup>5</sup>The term “leasing company partner” was used by NorVergence in describing each leasing company NorVergence brought into its scheme. In return, Popular described itself as a business partner of NorVergence.

NorVergence under a private label agreement by Adtran, Inc., which IAD would be called a “MATRIX™ Hardware” device;

- b. That customers would be attracted to NorVergence’s proposal because it would result in a flat monthly charge for all telephone services, fixed for 5 years;
- c. There would be “two major forms of revenue” for NorVergence, the selling of telephone services, and “selling MATRIX™ units,” with “other revenue streams” being, among others, cellular services;
- d. The Service Level Agreement (“SLA”) for Customers was available for review at NorVergence’s web site (which SLA provided that the contract between NorVergence and its customers could be canceled if NorVergence failed to deliver telephone services);
- e. At the same web site, and linked to the same page, was NorVergence’s “General Terms and Conditions;”
- f. The General Terms and Conditions provides, among other things:

11. This Agreement supersedes all previous and contemporaneous written and oral representations, understandings or agreements related to the subject matter herein and shall prevail notwithstanding any variance with terms and conditions of any order submitted. Acceptance of this Agreement by NorVergence may be subject, in NorVergence's absolute discretion, to satisfactory completion of a credit check and hardware and facilities Engineering Review. Activation of service shall indicate both customer's and NorVergence's acceptance of this Agreement. Use of the NorVergence Network constitutes acceptance of this Agreement and all related agreements.

- 45. On March 8, 2003, in performing due diligence, Popular examined the web site of NorVergence.
- 46. During said examination, Popular found a page on the web site entitled “Customer Documents.”

47. Popular followed the link from the web page entitled “Customer Documents” to several documents, among them “Equipment Warranty,” “General Terms and Conditions,” and “Service Level Agreement.”
48. On March 8, 2003, by reviewing the above identified web pages, Popular learned:
- a. That the General Terms and Conditions contained a super-superiority clause (¶ 11 cited above) which provided that all of the terms and conditions of the “General Terms and Conditions” took precedence over any other provision in any agreement between NorVergence and its customer;
  - b. That the Service Level Agreement was made a part of the “General Terms and Conditions” by virtue of the specific incorporation thereof found at ¶ 7 of the General Terms and Conditions, and “applies to all customers<sup>6</sup>;

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<sup>6</sup>Paragraph 7 of the SLA provides:

7. The Service Level Agreement (“SLA”) for this service, which is made a part of this Agreement, is set forth at [www.NorVergence.com](http://www.NorVergence.com) and ***applies to all customers***. NorVergence reserves the right to amend the SLA from time to time effective upon posting of the revised SLA to the URL or other notice to Customer, provided, that in the event of any amendment resulting in a material reduction of the SLA’s service levels or credits, Customer may terminate this Agreement without penalty by providing NorVergence written notice of termination during the 30 days following notice of such amendment. The SLA sets forth Customer’s sole remedies for any claim relating to this service or the NorVergence Network, including any failure to meet any guarantee set forth in the SLA. NorVergence’s records and data shall be the basis for all SLA calculations and determinations. Notwithstanding anything to the contrary, the maximum amount of credit in any calendar month under the SLA shall not exceed the Monthly Service Fee which, absent the credit, would have been charged for NorVergence service that month (collectively the “NorVergence Fees”); provided, that the maximum amount of credit for failure to meet the Availability Guarantee shall not exceed the sum of (a) the NorVergence Fees, plus (b) the telephone company line charge which, absent the credit, would have been charged for such month.



- c. That the Service Level Agreement permitted each NorVergence customer to terminate the contract with NorVergence should NorVergence fail to provide telephone service to the customer<sup>7</sup>.
49. The above pages from NorVergence's web site were significant enough to Popular to cause Popular to print them and keep them with all other documents gathered during its due diligence review of NorVergence.

## **Contracts Intended to be Acquired by Plaintiff as Partner of NorVergence**

50. On May 16, 2003, NorVergence entered into the vendor lease program partnership with Popular.
51. Attached hereto as Defendant's Exhibit 5, and made a part hereof by reference, is a true and correct copy of a the contract referred to above, which contract is entitled "Master Program Agreement."
52. The Master Program Agreement defines the Contract Documentation assigned to Popular, in Exhibit A thereto, as including "all documentation related to such Rental Agreement ... ."
53. The documents attached hereto as Defendant's Exhibit 1, alleged by Yizhac Arvilli to constitute the contract between Yizhac Arvilli and NorVergence (the "NorVergence / Arvilli Contract") certainly constitute part or all of the "documentation related to such Rental

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<sup>7</sup>As we shall see, this is why Popular agreed to loan \$400,000 (out of a total of over \$2,000,000 to be loaned by leasing company partners of NorVergence) to NorVergence at a time when NorVergence was not financially viable, in an effort to avoid telephone service cut-off and the loss of what its attorney, Peter Deeb, described as an income stream of between \$200 and \$250 million dollars (collectively for all leasing partners).

Agreement.”

54. The Master Program Agreement was prepared, and entered into by Popular, agreeing that “Contract Documentation” included “all documentation related to such Rental Agreement ...” at a time when Popular knew that the General Terms and Conditions and Service Level Agreement described above related to “all contracts” between NorVergence and its customers, and “all contracts” would include the Equipment Rental Agreement between NorVergence and Yizhac Arvilli.

### **Fraudulent Scheme Brought to Yizhac Arvilli**

55. Prior to April 27, 2004, NorVergence contacted Yizhac Arvilli by telephone, requesting a meeting to discuss how Yizhac Arvilli could save money on his business phone bills. The telephone contact was confirmed by letter dated the same date.
56. The confirmation letter is replete with representations about saving money on telephone bills.
57. At all times material hereto, NorVergence held itself out to the public in general and Yizhac Arvilli in particular as a provider of “low-cost” telecommunication services to small and medium size businesses throughout the United States.
58. NorVergence represented to Yizhac Arvilli that it offered deeply discounted telecommunication services to selective business customers, including Yizhac Arvilli.
59. On April 27, 2004, Donald May and Matthew Krac appeared for the preset appointment, and presented Yizhac Arvilli’s owners with business cards which contained the business logos of NorVergence, Qwest and Nortel.
60. Donald May and Matthew Krac requested that Yizhac Arvilli provide them with copies of the telephone bills for Yizhac Arvilli, including personal cellular phone bills, for the last

three months, so that the bills could be analyzed to see if NorVergence could save Yizhac Arvilli money on telephone costs.

61. Krac stated that NorVergence would pay all cancellation charges for both cellular and land-line accounts, would replace all cellular hand sets annually with hand sets comparable to those presently in use by Yizhac Arvilli, and would provide the first two months of telephone service free of charge.
62. Yizhac Arvilli complied with the request of May and Krac.
63. On April 27, 2004, May and Krac presented Yizhac Arvilli with a written proposal showing a savings on telephone service.
64. Yizhac Arvilli accepted NorVergence's offer to reduce Yizhac Arvilli's telephone costs, and Krac presented Yizhac Arvilli with many forms to sign.
65. Krac made clear to Yizhac Arvilli that he was unable to negotiate the terms of any of the documents, and they were being presented on a take-it-or-leave-it basis.
66. Yizhac Arvilli then signed the documents and delivered them to Krac as agent for NorVergence.
67. The documents so signed are attached as the Contract (Defendant's Exhibit 1), and by reference, are made a part hereof.
68. On or about May 3, 2004, Yizhac Arvilli received confirmation from NorVergence sent by wire and by the mail, that NorVergence received Yizhac Arvilli's application, and repeated in said letter that NorVergence would "drastically cut telecommunication costs."
69. NorVergence, through its advertising, marketing and form letters sent to each prospective customer, including Yizhac Arvilli, engaged in high pressure, misleading, and deceptive sales tactics.

70. NorVergence represented that only the most qualified applicants would be accepted as NorVergence customers because of the extremely high demand for the NorVergence system.
71. NorVergence refused to negotiate any of the terms of any of the documents, including the NorVergence telecommunication services agreement, offering them only on a take-it-or-leave-it basis.
72. NorVergence represented that it was able to offer such deeply discounted telecommunication services because of the engineering technology associated with the MATRIX™ Hardware devices.
73. NorVergence represented that the engineering “advances” associated with the MATRIX™ Hardware devices allowed for “free unlimited calling circuitry” and the “voice as fast as data” solution, which *permitted* the elimination of per-minute telecommunication charges.
74. Norvergence made material misrepresentations to its small business customers, including Yizhac Arvilli, about the MATRIX™ Solutions, including that the MATRIX™ Solutions provided a 30% - 60% savings on free unlimited local and long distance calls, high speed internet service and unlimited cell phone service.
75. Moreover, Norvergence misrepresented that the MATRIX™ Hardware provided to its small business customers, including Yizhac Arvilli, contained proprietary software and hardware of patents-pending designs.
76. The foregoing representations were made by NorVergence to Yizhac Arvilli through May and Krac, who held themselves out to be officers, employees and agents of NorVergence.
77. None of the foregoing representations were true when made, all were known by NorVergence, May and Krac, to be false when they were made, and were made for the specific purpose of inducing NorVergence’s prospective customers, including Yizhac Arvilli,

to rely thereon to their detriment.

78. Yizhac Arvilli relied upon the false representations to its detriment.
79. Despite Norvergence's representations to its small business customers, including Yizhac Arvilli, regarding the MATRIX™ Hardware, it is not proprietary to Norvergence but is in fact an Adtran 850 that functions to allocate up to 24 access channels for a T-1 line.
80. Norvergence further misrepresented to its small business customers, including Yizhac Arvilli, that the MATRIX™ Hardware provided Voice Over Internet Protocol ("VoIP") that allows analog voice on phone lines to be converted to digital information which is then transmitted over the internet presumably at a savings from regular analog voice transmitted over phone lines because no long distance tolls are imposed, and no state and federal telecommunication taxes are imposed.
81. Not only did the MATRIX™ Hardware not provide VoIP at a savings, it did not provide VoIP at all.
82. Yizhac Arvilli is informed, believes and therefore alleges, that NorVergence directed, or otherwise approved its sales staff, including May and Krac, in the course of sales presentations, to represent, directly or by implication, orally or in written and printed materials, that:
  - a. NorVergence would provide Yizhac Arvilli with unlimited long distance, cellular phone and high speed Internet access at greatly reduced prices.
  - b. Yizhac Arvilli would continue to receive the services for which they contracted regardless of whether anything would ever happen to NorVergence.
  - c. NorVergence was a business partner with Nortel Networks and Qwest Communications, companies who were recognized as leaders in the

telecommunication industry.

- d. In order to obtain the NorVergence telecommunication package, it was necessary for the consumer to sign many documents, including an “Equipment Rental Agreement” (hereinafter the “ERA”) as well as a “MATRIX™ T1 Non-Binding Service Application,” and “MATRIX™ T1 Non-Binding Hardware Application.”
83. Yizhac Arvilli is informed, believes and therefore alleges, that NorVergence directed its sales staff, including May and Krac, in the course of the sales and approval process, to obtain consumers’ signatures, including Yizhac Arvilli’s, on numerous forms including, but not limited to: A “Customer Qualifying Questionnaire,” an “Accurate Bill Receipt and Proposal Request,” a “Receipt of Savings Guarantee Subject to Mutual Due Diligence & Acceptance by Engineering,” a “Credit Application,” a “Letter of Agency,” a “No-Risk Reservation Agreement,” an “Equipment Rental Agreement,” and a “Service Application” all of which was purported to be non-binding until accepted by NorVergence.
84. Consumers including Yizhac Arvilli were led to believe that unless said forms were completed and executed, they could not be considered for the NorVergence telecommunication package offer.
85. In the process of securing said forms from consumers, NorVergence’s sales staff routinely obtained copies of the consumer’s recent telecommunication bills including bills for land-line and cellular telephone service and Internet access.
86. May and Krac, on behalf of NorVergence, obtained said documents from Yizhac Arvilli.
87. Yizhac Arvilli is informed, believes and therefore alleges, that NorVergence directed, or otherwise approved, its sales staff, including May and Krac, to notify the consumers who had applied for the telecommunications package, including Yizhac Arvilli, that they had

qualified for the offer and would be able to realize a savings on their phone bills of approximately 30%.

88. In addition to the aforementioned misrepresentations, NorVergence inconsistently used the term “MATRIX™” throughout the documents presented to consumers, including Yizhac Arvilli, to describe, at various times, MATRIX™ Hardware, MATRIX™ Services, and MATRIX™ Solutions, in a concerted effort to create confusion on behalf of the consumers, including Yizhac Arvilli.
89. The ERA, which Plaintiff seeks to enforce separately from the other parts of the NorVergence / Arvilli Contract, is written simply for “MATRIX™,” leading Yizhac Arvilli to believe and understand that the term “MATRIX™” as so used, referred to the combination of MATRIX™ Hardware and MATRIX™ Services.
90. The definition of MATRIX™ is found in the NorVergence / Arvilli Contract (Defendant’s Exhibit 1) at page 2 as:

Merged Access Transport Intelligent Exchange (“MATRIX”) Hardware or Services  
(The “Solutions”)

Thus, “MATRIX™ Hardware” would mean the integrated access device; “MATRIX™ Services” would mean the telephone services to be provided by NorVergence to Defendant, and “MATRIX™” alone would be the combination of the two.

## **Installation of MATRIX™ Hardware**

91. On or about May 27, 2004, NorVergence caused a MATRIX™ Hardware device and an RJ21 jack to be attached to a wall in Yizhac Arvilli’s offices.
92. The installer presented Yizhac Arvilli with a document, requesting that Yizhac Arvilli sign the document so that the installer could be paid by NorVergence for the installation.

93. The document was entitled “Delivery and Acceptance Certificate.”
94. The document contained a representation that Yizhac Arvilli had a reasonable opportunity to inspect the MATRIX™ Hardware and that the MATRIX™ Hardware conforms to the requirements of Yizhac Arvilli.
95. Because these statements were not true, Yizhac Arvilli hesitated to sign the document; however, the installer insisted that unless it was signed, the installer would not be paid for his services.
96. Knowing that the NorVergence / Arvilli Contract was subject to cancellation by Yizhac Arvilli, without penalty, should NorVergence fail to provide the services required by the contract, Yizhac Arvilli signed the delivery and acceptance certificate.

### **Plaintiff’s Knowledge of Services as “Predominant Feature” of NorVergence / Arvilli Contract Before Purchase**

97. At all times material hereto, Plaintiff knew, or with the exercise of reasonable care should have known, that the predominant feature of the NorVergence / Arvilli Contract was the delivery of telephone services.

### **NorVergence / Arvilli Contract**

98. The predominant feature of the NorVergence / Arvilli Contract was the supply by NorVergence of telephone services, both through a T1 land-line and cellular phones.
99. Telephone “services” are mentioned over 100 times in the many pages of the NorVergence / Arvilli Contract.
100. Providing MATRIX™ Hardware is only incidental to providing telephone services.
101. Accordingly, the NorVergence / Arvilli Contract is not a “Lease” as defined in the Uniform



Commercial Code, and does not fall within the ambit of the UCC. *BMC Industries, Inc., v. Barth Industries, Inc.*, 160 F.3d 1322 (11<sup>th</sup> Cir. 1998) and *Quality Guaranteed Roofing, Inc., v. Hoffman-LaRoche, Inc.*, 302 N.J.Super. 163, 694 A.2d 1077, 32 UCC Rep.Serv.2d 1072 (1997).

102. At the time that NorVergence and Yizhac Arvilli entered into the Contract, there was no company offering a competing product similar to that offered by NorVergence.
103. At the time that NorVergence and Yizhac Arvilli entered into the Contract, Yizhac Arvilli did not have equal or comparable bargaining power with NorVergence.
104. NorVergence prepared all of the documents submitted to Yizhac Arvilli on a take-it-or-leave-it basis, with at least some of said documents reviewed and approved by Popular prior to them being submitted to Defendant.

## **NorVergence / Arvilli Contract Subject to Cancellation**

105. The NorVergence / Arvilli Contract was subject to cancellation without any financial penalty:

**CUSTOMER TERMINATION RIGHTS.** Customer may terminate the Affected Services<sup>8</sup> without penalty if, in any single calendar month: (i) Network Downtime exists for at least ninety-six (96) hours in the aggregate; or (ii) any single event entitling Customer to credits under Network Availability exists for a period of at least thirty-six (36) consecutive hours. Such termination must be conducted by written notice to the NorVergence, with a courtesy copy to the attention of the Norvergence Chief Managing Officer, sent by certified US Mail return receipt requested within five (5) business days following the end of the relevant calendar month. Such termination will be effective forty -five (45) days after receipt of written notice by

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<sup>8</sup>This term is undefined in the General Terms and Conditions, and in the Equipment Rental Agreement. The fact that this term is undefined in both documents was known to Popular (who insisted that NorVergence change certain terms of the Equipment Rental Agreement and NorVergence complied with such request) before Popular entered into the Master Program Agreement with NorVergence.

Norvergence. The provisions of this SLA state Customer's sole and exclusive remedies for Service interruptions or Service deficiencies of any kind whatsoever.

Defendant's Exhibit 1, p. 6.

106. When Popular and other leasing company partners filed an involuntary Chapter 11 proceeding against NorVergence, Popular knew that NorVergence would stop providing telephone services under the Contract.
107. With the filing of the Chapter 11 proceeding, and with the conversion to Chapter 7, NorVergence stopped<sup>9</sup> providing telephone services to Yizhac Arvilli.
108. At the time NorVergence stopped providing telephone services to Yizhac Arvilli, he was no longer obligated to provide contractual notice to NorVergence that he was cancelling the Contract because NorVergence had, by its action, cancelled it.

**Popular Knew that the NorVergence / Arvilli Contract was  
Able to be Canceled, and Anticipated that Yizhac Arvilli  
would Cancel the Contract**

109. Prior to filing suit, Popular knew that the NorVergence / Arvilli Contract was subject to cancellation if NorVergence failed to provide telephone services, as is evidenced by:
  - a. Popular and other leasing company partners formed a Lessor Steering Committee by June 25, 2004, chaired by Donald P. Campbell, the Chairman and Chief Executive Officer of Partners Equity Capital Company, LLC;
  - b. The primary concern of the Lessor Steering Committee was the continuation of telephone service being supplied by NorVergence to its customers;

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<sup>9</sup>In fact, NorVergence never provided telephone service to Yizhac Arvilli. No connection was ever made between the MATRIX™ Hardware device delivered to the business premises of Yizhac Arvilli, and the T1 line servicing said premises.

- c. The Lessor Steering Committee attempted to raise millions of dollars of loans and investment capital to keep NorVergence in the business of providing telephone services to its customers;
  - d. Popular agreed to invest \$400,000 in the effort to keep NorVergence financially viable;
  - e. If Popular truly believed that Defendant was responsible to pay Popular for MATRIX™ Hardware regardless of receiving MATRIX™ Services from NorVergence, then Popular would have no interest in being occupied with trying to raise loans and capital for NorVergence. The “lessees” would be obligated to pay regardless of the breach by NorVergence of the Contracts assigned to Popular.
110. The Lessor Steering Committee was represented by the same law firm and lawyer which represented Popular in the filing of the involuntary Chapter 11 proceeding, Peter Deeb.
111. As of May 7, 2004, NorVergence owed Sprint alone approximately \$7,800,000, and because NorVergence had failed to pay delinquent invoices in April, 2004, of approximately \$5,000,000, Sprint suspended all new orders.
112. Prior to cutting off service, a conference call was scheduled among NorVergence, Sprint and Mr. Deeb on behalf of the steering committee and its members. When Mr. Deeb failed to attend, the call was rescheduled. When Mr. Deeb failed to attend again, on July 1, 2004, Sprint sent out a notice that it would terminate service effective July 2, 2004. At the time, Sprint was owed almost \$10,000,000.
113. On June 30, 2004, Qwest (which was owed approximately \$18,000,000 by NorVergence) and its counsel had a conference call with Mr. Deeb as counsel for Lessor Steering Committee, during which call the creditors, including Popular, requested that Qwest forebear

from exercising its contractual right to terminate the NorVergence / Qwest contract in anticipation of NorVergence failing to make two payments which were due that day in the amount of approximately \$8,500,000.

114. As Andrew H. Sherman, attorney for Qwest testified by affidavit in the NorVergence bankruptcy matter concerning the call:

II. The Rouse By Counsel for the Petitioning Creditors

5. On June 30, 2004, at approximately 3:30 p.m., I conducted a telephone conference with Peter Deeb, Esq. (“Deeb”); Daniel Dunn of Wells Fargo; Mike Witt, counsel for Wells Fargo; Mike Rizzo from US Bank and various representatives of Qwest.

6. The purpose of the call was to understand the positions of the various parties in light of the fact that Norvergence was unable to make the two (2) payments which were required to be made under the Agreement on June 30,2004 in the amount of \$1 million and \$7.5 million.

7. There was no representative of the Debtor [NorVergence] on the call.

8. Mr. Deeb introduced himself as counsel to a “steering committee” of lessors who had an interest in a stream of income between \$200 million and \$250 million.

9. Mr. Deeb indicated that he was aware of the \$7.5 million payment which was due from the Debtor on June 30,2004, and advised me that he wanted to prevent Qwest from terminating the Agreement.

10. Mr. Deeb said, in sum and substance, that if Qwest terminated the Agreement his clients *would lose their rights to a stream of income of between \$200 million and \$250 million*. He then advised me that he would file an involuntary bankruptcy petition to protect that income stream. He further stated that by operation of the automatic stay and Section 366 of the Bankruptcy Code, Qwest would be forced to continue to provide service to Norvergence to protect the stream of income which he claimed was due to his clients. Through these statements, it was apparent that the lenders and lessors were trying to force Qwest to provide services to protect their interests.

11. Because the payment by Norvergence was in due within hours of the phone call, Mr. Deeb proposed a financial accommodation whereby Qwest would be paid a sum certain for “going forward services” to maintain the telecommunications services which were subject to the Agreement. Qwest rejected that proposal, and demanded payments consistent with those required by the Agreement, i. e., \$7,500,000, and

\$1,000,000 per week as a prepayment for ongoing services.

12. Mr. Deeb stated that he did not have the authority or ability to raise those sums prior to the deadline for payment. Mr. Deeb then proposed a forbearance period whereby the parties would hold off exercising their rights for a short period of time. At that point, the call concluded to enable Qwest to consider the request for a forbearance period.

13. Shortly before 5:00 p.m., I called Mr. Deeb to agree to a one (1) day forbearance period, but Mr. Deeb rejected that offer. Mr. Deeb countered by proposing the parties agree to a forbearance period which would be one (1) hour longer to enable his clients to file a bankruptcy petition, if they deemed it necessary. At that point the call concluded to enable me to discuss Mr. Deeb's counter-offer with Qwest.

14. During the period from approximately 5:00 p.m. to 5:40 p.m., Qwest discussed Mr. Deeb's counter-offer. Mr. Deeb tried to reach me during this period, but I was still discussing his counter-offer and the implications thereof with Qwest.

15. At approximately 5:40 p.m., I called Mr. Deeb and advised him that Qwest would agree to a one day forbearance, but it could not agree to the staggered approach he proposed. Mr. Deeb rejected Qwest's offer, and I advised Mr. Deeb that Qwest would take action to protect its rights.

16. What Mr. Deeb failed to tell me was that at the same time that he was negotiating a forbearance period with Qwest, Mr. Deeb had already caused the filing of an involuntary chapter 11 petition against the Debtor. At approximately 5:26 p.m., while Qwest was still considering Mr. Deeb's counter-offer, Mr. Deeb had an involuntary chapter 11 petition delivered to the United States District Court in Camden, New Jersey, where it was time stamped and deposited in the night box. When I spoke with Mr. Deeb at approximately 5:40 p.m., he failed to mention the filing, and in fact, accused me of trying to machinate the same scheme which he himself had already perpetrated.

17. By deliberately delaying Qwest from exercising its remedies under the Agreement, under guise of negotiating a forbearance period, Mr. Deeb was able to file an involuntary bankruptcy petition to protect the interests of his clients and effectively stop Qwest from terminating the Agreement. By so doing, Qwest is now compelled to provide services at a time when there may be insufficient funds to pay for those services.

18. I have also been informed that within 48 hours of the filing of the involuntary petition by Mr. Deeb and the Petitioning Creditors, the Debtor itself laid off almost one thousand members of its workforce, apparently impairing the Debtor's ability to function as a going concern.

19. Through the scheme engineered by Mr. Deeb and the Petitioning Creditors, Qwest has been forced to continue to provide service and incur debt which may never be paid when the Debtor itself lacks the ability to continue as a going concern.
115. Popular and two other leasing company partners of NorVergence filed the involuntary Chapter 11 proceeding to keep the telephone service providers from cutting off service, knowing that if service were cut off, the Contracts, including Yizhac Arvilli's could be canceled without penalty, and Popular and the other leasing company partners would lose their rights to a stream of income of between \$200 million and \$250 million.
116. After Popular filed the involuntary Chapter 11 proceeding, the Lessor Steering Committee, through Mr. Deeb, offered to loan NorVergence \$2,839,500, from its constituents, including \$400,000 from Popular.

### **Unreasonable, Unconscionable and Unenforceable Provisions**

117. Each Contract, including Yizhac Arvilli's contains unfair, unreasonable, and unconscionable language that would render it void, including misrepresentations that the "lessee" is waiving all rights and remedies under Article 2A of the Uniform Commercial Code ("UCC Art. 2A"). Such a waiver is unfair, unreasonable, and unconscionable because the Contract is not subject to the "hell and high water clause" of UCC Art. 2A. It is neither a finance lease or a lease. N.J.S.A. § 12A:2A-103(1)(g); § 680.1031(1)(g), FLA. STAT. (2003).
118. The NorVergence / Arvilli Contract (Defendant's Exhibit 1) also contains an unreasonable and unconscionable "floating jurisdictional clause" which purports to state that the agreement is governed by the law of any state in which the assignee's principal office is located (or New Jersey, where NorVergence was principally located) not where the "lessee" resides. This is a substantially onerous clause when the "lessee" is not informed to whom the lease may be

assigned and, therefore, has no knowledge at the time of signing the agreement what law may govern the enforcement of the agreement or in what distant foreign jurisdiction they may be hauled into Court. The courts of NorVergence's home state refuse to enforce such provisions. *See Copelco Capital, Inc., v. Shapiro*, 331 N.J.Super. 1, 750 A.2d 773 (2001).

119. Further, the contract sought to be enforced contains conflicting choice of law and choice of venue clauses. The Equipment Rental Agreement (Defendant's Exhibit 1, pp. 16 and 17) contains a floating jurisdiction clause, while the General Terms and Conditions (which contains the super-superiority clause) provides that New Jersey law will be applied. Defendant's Exhibit 1, p. 4, ¶ 12.
120. The NorVergence / Arvilli Contract (Defendant's Exhibit 1) is not a finance lease under Article 2A of the Uniform Commercial Code because Yizhac Arvilli is informed, believes and therefore alleges that:
  - a. NorVergence selected and supplied the MATRIX™ Hardware equipment to its consumers.
  - b. NorVergence supplied the MATRIX™ Hardware equipment to its consumers from its existing inventory of such devices and did not acquire devices in connection with the individual Contracts entered into with the consumers, including Defendant.
  - c. Prior to signing the Contracts, the consumers, including Yizhac Arvilli, did not receive a copy of the contract by which NorVergence acquired the MATRIX™ Hardware equipment that was the subject of the Contract.
  - d. It was not a condition of the effectiveness of the Contracts that the consumers, including Yizhac Arvilli, approve the contracts by which NorVergence acquired the MATRIX™ Hardware or the right to possess and use said devices.

- e. Prior to signing the Contracts, the consumers, including Yizhac Arvilli, did not receive a statement designating the promises and warranties, and any disclaimers of warranties, limitations or modifications of remedies, or liquidated damages, provided to NorVergence by the supplier of the MATRIX™ Hardware as part of the contract by which NorVergence had acquired them.
- f. Prior to the consumers, including Yizhac Arvilli, signing the Contracts, NorVergence did not inform the consumers in writing of the identity of the person supplying the MATRIX™ Hardware to NorVergence; did not inform the consumers in writing that the consumers are entitled to the promises and warranties provided to NorVergence by the supplier of the MATRIX™ Hardware in connection with the contract by which NorVergence acquired the MATRIX™ Hardware; or that the consumers may communicate with the supplier of the MATRIX™ Hardware and receive an accurate and complete record of the goods supplied and a complete statement of the promises and warranties, including any disclaimers and limitations of them or of remedies.

### **Plaintiff's Participation as Leasing Partner**

- 121. In many transactions, including that between NorVergence and Yizhac Arvilli, Popular reviewed the credit application, made a credit decision, suspending its own normal credit procedures, and transferred money to NorVergence.
- 122. Popular holds itself out as having expertise in the field of telecommunication equipment leasing or equipment leasing in general. Contrary to the standard practice of the trade, however, Popular purchased the Contracts, including that of Yizhac Arvilli, and the MATRIX™ Hardware it covered knowing that the actual cost or replacement value of the



MATRIX™ Hardware which were being purchased was a very small part of the value of the entire Contract.

123. Although Popular denies determining the value of the MATRIX™ Hardware device prior to entering into the Master Program Agreement with NorVergence, and affirmatively asserted that it did not rely upon the value of the “equipment leased” when making a credit decision, its actions reasonably infer otherwise:
  - a. It caused its staff to prepare, and incurred the fees to record, UCC financing statements for the MATRIX™ Hardware device installed in the premises of Yizhac Arvilli; and,
  - b. It required all of the NorVergence customers whose contracts it obtained, including Yizhac Arvilli, to provide insurance against the loss or destruction of the MATRIX™ Hardware, insisting that it would force place said insurance if it was not otherwise provided by the customer.
124. One can not insure an article of personal property without providing the insurer with a value of the property to be insured, and commits insurance fraud if he overstates the value so insured, and attempts to collect on the full value so insured under the policy when there is a loss.
125. Popular worked in close cooperation with NorVergence to maximize profits for both at the unfair expense of the customers, including Yizhac Arvilli.
126. As a result, many of the Contracts were assigned to and/or purchased by Popular from NorVergence simultaneously, or very nearly thereto, with the acceptance of the Contracts by NorVergence.
127. Many Contracts were actually accepted on behalf of NorVergence by Popular’s

- representatives.
128. Many Contracts were assigned to Popular before or at the time they were accepted by NorVergence.
  129. In addition, certain of the leasing companies extended direct loans to NorVergence in exchange for a collateral assignment of Contracts held and administered by NorVergence.
  130. Pursuant to the various agreements between NorVergence and Popular, Popular purchased and/or took an assignment of all of NorVergence's right, title, and interest in and to the associated Contracts and the MATRIX™ Hardware associated with each such Contract.
  131. Popular, in consideration of the assignment or purchase aforesaid, paid to NorVergence an amount equal to the monthly payment divided by the Lease Rate, as stated in the Master Program Agreement, representing the entire payment which NorVergence would receive on the Contract, plus a commission of 1½%, although it was obligated to provide MATRIX™ Services for five years.
  132. In acquiring the NorVergence / Arvilli Contract, Popular intended to step into the shoes of NorVergence. (Depo. of Popular Leasing, with Dan Kinealy, Vice President of Risk Management appearing as Popular Leasing's designated representative, taken January 19, 2005, in *State of Florida v. Commerce Commercial Leasing, LLC, et al.*, p. 110.)
  133. The existence of Popular and its participation in this scheme wasn't revealed to the customers, including Yizhac Arvilli, until *after* the Contracts were accepted by the customers and then subsequently sold and/or assigned to Popular.
  134. Popular's payment to NorVergence in this fashion enabled and permitted NorVergence to continue to carry out its fraudulent scheme and to further its misrepresentations to additional prospective customers.

135. As a direct result of NorVergence's unfair and deceptive practices, and that of its leasing company partners, including Popular, Yizhac Arvilli has sustained economic and non-economic damages. Therefore, Yizhac Arvilli seeks compensatory damages for the costs incurred by it as a result of the attempted enforcement of the Contract by Popular. Further, Yizhac Arvilli seeks an injunction prohibiting Popular from the continued enforcement of the Contract and/or a declaratory judgment that the Contract is unenforceable.
136. Popular knew or should have known of NorVergence's deceptive and fraudulent practices and of NorVergence's uniform misrepresentations made to all customers, including Yizhac Arvilli. A review of NorVergence's own website discloses some of the uniform, written misrepresentations made to the public in general and Yizhac Arvilli in particular, including:
- a. "The MATRIX™ CCS, combined with the MATRIX™ Gateway, allows businesses to acquire a state-of-the-art phone system enabling unlimited calling nationwide, high-speed Internet access, unlimited cellular connectivity - with no per-minute charges."
  - b. "The NorVergence MATRIX™ Phone System was engineered and designed based on the latest Next Generation Networking from the fortune 500 in early 2000. NorVergence was then founded after a year of Research and Development in 2001."
  - c. "The NorVergence Patent Pending Phone System design, based on its Merged Access Transport Intelligent Xchange Hardware Access system, is the Long Awaited 'Killer Application' of Voice and Data."
  - d. "What Does The NorVergence MATRIX™ Systems Offer? Drastic Reductions up to 60% off all calling costs including current Local, Wireless, Long Distance and Internet Access...Revolutionary New Packetized Telephony Circuitry and Next

Generation Private Data Networking Equipment including: NorVergence Free, Unlimited Calling to Any Phone Number in the USA Inbound and Outbound! NorVergence High-speed Internet Access!!! NO Risk - NO Disruption -Current Carriers Remain Resident for Redundancy!”

- e. “How Does NorVergence Accomplish this? NorVergence Toll Quality ‘Voice as Unlimited Data Phone System’, NorVergence State-of-the-Art compression firmware and Advanced Software Engineering, NorVergence Dynamically converged Voice and Data Internet Access on One High Speed Circuit, NorVergence Strategic Carrier relationships with Major Telcos!”
- f. “We’ve developed a suite of applications and hardware starting with the MATRIX™ CCS, designed to help our customers achieve their business goals and significantly reduce their bottom line. “
- g. “All NorVergence products are designed, engineered and manufactured according to the highest scientific standards set forth by FCC and applicable laboratory manufacturing regulations.”
- h. “The MATRIX™ CCS product line helps growing businesses save money across a multitude of business applications. The CCS provides cost-cutting technology that enhances business, increases productivity, and irons the bottom line. The MATRIX™ CCS, combined with the MATRIX™ Gateway, allows businesses to acquire a state-of-the-art phone system enabling unlimited calling nationwide, high-speed Internet access, unlimited cellular connectivity - with no per-minute charges.”
- i. “INSTALLATION: Once installed, the MATRIX™ CCS Solution maintains a continuous management connection for remote monitoring, provisioning, testing,

troubleshooting and upgrades as required.”

- j. “DYNAMIC ALLOCATION: NorVergence has patent-pending technology that allows an incredible amount of convergence on T-1 service. NorVergence is able to provide 32 simultaneous phone calls on a single T-1 (compared to the normal limit of 24), and also provides up...speed of Internet access. MATRIX™ dynamic allocation and ATM/IP compr... algorithms create the most efficient use of T-1 loops ever.”
- k. “COST-REDUCTION: Our MATRIX™ technology and patent-pending convergence functionality creates...opportunity for customers to clear away antiquated expenses, obsolete security features and time-consuming productivity problems. The MATRIX™(TM) CCS allows for unlimited 800 calling and cellular usage with no per-minute charges; free, unlimited local and long distance calling, and other needed solutions such as unlimited audio, video and Web conferencing, managed LAN, ASIC chip-based managed firewall and disaster recovery/back-up services.”
- l. “CELLULAR PHONES: With NorVergence cellular, customers are able to talk for as long as they want without watching the clock or counting minutes. There are no roaming costs, per minute charges or hidden fees to worry about. Customers receive unlimited cellular without restrictions.”
- m. “VoATM/VoIP : Voice over Internet Protocol (VoIP) allows a voice call to be transformed into data ...then sent out over the Internet. Voice over Asynchronous Transfer Mode (VoATM) acts on those packets further and makes sure there is sufficient bandwidth for the calls across the Internet or to a next-generation network carrier without an(y loss)of clarity over the public phone network. With an ATM

enhancement, companies combine their voice and data applications to travel on a single network platform. VoATM is a mature technology at the core of the worldwide telephone network... “

n. “Toll Quality Voice: NorVergence guarantees unlimited toll-quality voice on all MATRIX™ (TM) voice... No other competitor can offer the true toll quality that MATRIX™ (TM) CCS convergence...technology provides, including no per-minute costs. NorVergence voice and data protocols are not experimental, new, or untested...NorVergence toll quality voice is possible because of the stable, reliable, hardened.... Voice over ATM backbone utilized on every call. This is the same backbone and ...technology inherent in every major telephone network. VoIP is merely a custom..”

o. “Frequently Asked Questions (FAQs) :

1. What is NorVergence Capital and what does it do? NorVergence Capital ensures that each NorVergence customer has access to...complete line of MATRIX™ (TM) products. NorVergence Capital provides seamless...financing for all NorVergence products, allowing customers to rent equipment...necessary for their customized technology solution.

2. Why is my only option to rent equipment??

Savvy customers want to avoid large capital outlays for equipment and avoid...”

p. “...Choosing EZ SAVE (TM)...We care About Customer Satisfaction and Prove it with a 30 Day Money Back Guarantee! We are so sure of your satisfaction that we offer a 30 day complete money back guarantee. If you are not completely satisfied, we will refund your money, no questions asked. GUARANTEED!”

- q. “Innovation... NorVergence has pioneered the most advanced communications cost cutting technology available. The MATRIX™ is breakthrough in design...”
- r. “Drastic Savings in Telecommunications Costs. Integrated with the MATRIX™ Gateway Solution enabling removal of all per minute charges, eliminating 95% of line charges, and SLASHING Internet and Wireless costs - today!”
- s. “The integrated MATRIX™ T-1 “Voice As Unlimited Data” Gateway removing all toll charges from your Telecommunications Structures!”
- t. “NorVergence Equipment Warranty, WARRANTY PERIOD: Except as noted below, supplied under Purchaser orders for use in the United States is five (5) years.”
- u. “The Company’s Managed Care/Total Care philosophy and engineering products (including the MATRIX™ SOHO and MATRIX™ Enterprise CCS) are drastically reducing Technology costs for the small to medium sized Enterprise.”

## **The Scheme Comes to an End**

- 137. Ultimately, NorVergence was apparently unable to sell enough Contracts to Popular and the other leasing company partners as was necessary to meet the ever increasing demands for payment from Qwest, T-Mobile, and Sprint, for the telecommunications charges these vendors were assessing against NorVergence.
- 138. Charges from these three vendors combined are alleged to approximate \$2,000,000 per week by July 2004. While the scheme continued to generate large sums of cash, NorVergence stopped paying its employees (whose payroll checks bounced and whose benefits plans went unfunded), and its other trade creditors.
- 139. As a result, for an extended period which ended on June 30, 2004, when an involuntary

petition under Chapter 11 of the Bankruptcy Code was filed against NorVergence, NorVergence continued to sell its services and assign the Contracts in order to obtain cash from Popular and/or other leasing company partners who continued to purchase the Contracts, but did not pay its bills. That cash has “disappeared.”

140. At a hearing held on July 14, 2004, the Bankruptcy Court entered an order converting the NorVergence Case from an involuntary Chapter 11 proceeding to a voluntary Chapter 7 liquidation. A trustee was appointed that day.
141. At the same time, the Bankruptcy Court entered an order authorizing Qwest Communications to terminate its T1 service to NorVergence’s approximately 10,000 customers.
142. At the same time, the Bankruptcy Court entered an order authorizing Sprint and T-Mobile to terminate cellular telephone service to NorVergence’s approximately 10,000 customers.
143. NorVergence effectively ceased all operations at or about that time.
144. The customers, including Yizhac Arvilli, effectively ceased to receive any services from NorVergence at or about that time.
145. The customers, including Yizhac Arvilli, effectively ceased to receive the benefit of their contracts with NorVergence at or about that time.
146. Unfortunately, many of the the customers, including Yizhac Arvilli, made initial and, thereafter, monthly payments to NorVergence and/or the Plaintiff on the Contracts not realizing that they had been the victim of a fraud.
147. Qwest terminated its T1 service to all NorVergence customers within days of the Bankruptcy Court’s conversion order, thereby disconnecting all long-distance telephone and internet service to NorVergence’s customers, including Yizhac Arvilli.
148. The customers, including Yizhac Arvilli, were forced to try to obtain alternate sources for



their telecommunication services at substantial cost and expense all of which are claims against the NorVergence Estate.

149. Since NorVergence ceased operations, the MATRIX™ Hardware was of no use whatsoever to the vast majority of NorVergence customers, including Yizhac Arvilli, because the vast majority of telecommunication carriers require the use of their own equipment (the relatively minimal cost of which is factored into the total cost of telephone service and internet access), and in any event, no substitute carriers were offering any “comparable” services utilizing the MATRIX™ Hardware.
150. Since NorVergence ceased operations, many of the customers, including Yizhac Arvilli, stopped or desired to stop making payments under the Contracts to Popular which would reduce Popular’s claims against the NorVergence Estate.
151. It is clear that NorVergence was engaged in a fraudulent scheme in concert with, or well known by, Popular to generate cash by means of converting its promise to provide reduced rate telecommunication services into Discounted Payments from Popular for the long term rental of a MATRIX™ Hardware device pursuant to the Contracts, and that NorVergence never intended to nor could it provide the promised telecommunication services.
152. As a result, *every* NorVergence Contract, including Yizhac Arvilli’s, were fraudulently induced by NorVergence, which was, at all times intent upon operating its fraudulent scheme, and that fraud permeates every Contract from inception forward.

## **NorVergence Interest in Contracts Held Unenforceable**

153. The Trustee appointed by the bankruptcy court to liquidate NorVergence rejected all executory contracts, including the NorVergence / Arvilli Contract.

154. The Federal Trade Commission sued NorVergence in the United States District Court for the District of New Jersey, seeking a judicial determination that the customer Contracts, including the NorVergence / Arvilli Contract, violated federal law and were unenforceable.
155. On June 29, 2005, the court in *FTC v. NorVergence, Inc.*, case number 04-5414 (D.N.J.), entered a final judgment based upon a default, which included the following findings:
7. 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 consumers who were 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.
  8. NorVergence promised to provide to consumers **heavily discounted telecommunications services** for a long term, typically five years, in exchange for consumers' payments. Consumers signed a set of applications and agreements at the outset with a total price equal to the promised monthly payments over five years. Most of the total payments were allocated to a rental agreement for a "Matrix" or "Matrix Soho" (or similar product), which were standard routers or firewalls that cost between \$200 and \$1,550. The total cost to the customer was \$7,000 to \$340,000, with an average cost of \$29,291. The price of the rental agreement had nothing to do with the cost of the Matrix, which itself was an incidental part of the **promised services**. The rental agreements on their face, however, purported to cover only the Matrix box.
  9. The **telecommunication services** NorVergence promised to consumers have not been provided at least since August 2004, and, in some cases, have never been provided. At the same time, various finance companies who took assignments from NorVergence of the majority of the rental agreements have insisted that consumers continue to pay on those agreements.

\* \* \*

13. The Court now finds that, in connection with the **sale and financing of telecommunications services** and related products, defendant NorVergence violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), by falsely representing, directly or by implication, that:
  - (A) consumers' payments on NorVergence's rental agreement and

associated service agreements would result in consumers receiving promised discounted telecommunications services for a long term;

- (B) NorVergence would treat the applications, forms, and rental agreement consumers signed as a unified agreement under which *NorVergence would provide telecommunications services* in exchange for consumers' payments; and
- (C) the equipment listed in NorVergence's rental agreement would create the promised substantial savings in consumers' total cost of *telecommunications services*.

14. The Court further finds that, in connection with the *sale and financing of telecommunications services* and related products, defendant NorVergence violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), by (1) representing, directly or by implication, that NorVergence would provide substantially discounted telecommunications services to consumers for a long term; and (2) failing to disclose the following facts that would have been material to consumers when they contracted with NorVergence:

- (A) that NorVergence did not have a long- term commitment from any service provider for the *services* it was promising to provide to consumers;
- (B) that the equipment covered by the rental agreement would be of little or no value to the consumer if NorVergence failed to provide the promised *telecommunications services*.

15. The Court further finds that, in connection with the *sale and financing of telecommunications services* and related products, defendant NorVergence's practice of including in its rental agreements provisions authorizing it or its assignees to file lawsuits in specified or unspecified venues other than consumers' locations or the locations where consumers executed the contracts with NorVergence was likely to cause substantial injury to consumers that could not have been reasonably avoided and that was not outweighed by any countervailing benefits to consumers or to competition. The Court therefore finds that this practice was unfair in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

16. The Court further finds that NorVergence provided others with the means and instrumentalities for the commission of deceptive and unfair acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), by furnishing third-party finance companies with rental agreements from consumers that allowed the finance companies to:

- (A) Misrepresent that consumers owe money on the rental agreements regardless of whether NorVergence provided the *promised telecommunications services*; and
  - (B) File collection suits against consumers in distant forums.
17. By its unfair and deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), defendant NorVergence caused injury to consumers in the amount of at least \$172,997,758. This is a good faith, conservative estimate by the FTC of consumer injury using the limited documentation and information currently available.

\* \* \*

Based upon those findings, the court ordered that:

- A. Any consumer financing agreement owned or held in whole or part by NorVergence is void and unenforceable by any person or entity.
  - B. Any NorVergence consumer financing agreement transferred or assigned to, or taken by, any third party after those contracts were rejected in the Bankruptcy Case pursuant to 11 U.S.C. § 365 is void and unenforceable by any person or entity.
  - C. To the extent that NorVergence has a residual, contingent, or similar right to any consumer financing agreements not currently owned or held by NorVergence, those agreements shall be void and unenforceable by any person or entity as of the time that NorVergence's residual, contingent, or similar right matures or otherwise becomes effective.
156. Accordingly, the NorVergence / Arvilli Contract was determined by the United States District Court for the District of New Jersey to be unenforceable.

## **Criminal Usury**

157. Plaintiff should have determined before filing suit that the maximum cost of the MATRIX™ Hardware was \$1,550.
158. By filing suit, and seeking to recover the full monthly payment of \$1,139.54 Plaintiff is attempting to recover the \$1,550 cost of the MATRIX™ Hardware at an interest rate of

882%.

### **New Jersey**

159. Under New Jersey statutory law, any attempt to collect a debt with interest exceeding 50% is criminal usury.
160. Collecting or attempting to collect a debt involving criminal usury is a violation of New Jersey's Consumer Fraud Act.
161. One who successfully defends the collection of a debt which violates New Jersey's Consumer Fraud Act is entitled to recover a reasonable attorneys' fee.

### **Florida**

162. Under Florida statutory law, any attempt to collect a debt with interest exceeding 25% is criminal usury, with varying degrees of criminality depending upon how much above 25%.
163. One who successfully defends the collection of a debt which violates Florida's usury statutes is entitled to recover a reasonable attorneys' fee.

### **Both States**

164. Under the law of both states, one can not enforce an illegal contract.
165. A contract which requires payment of a usurious rate of interest is illegal.

## **Attorneys' Fee Claim**

166. Yizhac Arvilli has retained the undersigned attorneys to represent it in this action, and is obligated to pay said attorneys a reasonable fee for their services.
167. Yizhac Arvilli, as most victims of NorVergence and its leasing company partners, can not afford to defend this suit brought by a company with vastly superior wealth and resources.
168. Gossett & Gossett, P.A., whose principals were also victims of the fraud of NorVergence and

its leasing company partners, has agreed to represent Yizhac Arvilli on a modified contingency contract, accepting as compensation whatever amount this court awards to Yizhac Arvilli as reimbursement for its reasonable attorneys' fees.

## **New Jersey**

169. Yizhac Arvilli is entitled to recover its fees and costs for the defense of this matter pursuant to N.J.S.A. § 2A:15-59.1.
170. Plaintiff knew, or should have known, that the complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.
171. In short, the NorVergence / Arvilli Contract was for telephone services, and was able to be canceled without penalty to Yizhac Arvilli should those services not be provided for an accumulation of 96 hours in any one month.
172. Yizhac Arvilli canceled the contract when telephone services were cut off pursuant to the involuntary proceeding against NorVergence filed by Popular and two other leasing company partners.
173. Accordingly, Yizhac Arvilli owed nothing on the contract.
174. Plaintiff's claim that money was justly due and owing from Yizhac Arvilli to Plaintiff is false.
175. Plaintiff's claim was not some novel position with a plausible foundation for which a good faith argument could be made. It was an aberrant and legally groundless claim. *Khoudary v. Salem County Board of Social Services*, 260 N.J.Super. 79, 615 A.2d 281 (1992).

## Florida

176. Under Florida statutory law, specifically § 57.105(7), FLA. STAT. (2003)<sup>10</sup>, a contract which provides that one party may recover a reasonable attorneys' fee upon enforcing its obligations under the contract may be made reciprocal by the court, awarding attorneys' fees to the other party who was successful in an action relating to the contract.
177. The NorVergence / Arvilli Contract provides that NorVergence or its assignee may recover its fees from Yizhac Arvilli.
178. Therefore, by virtue of the reciprocal provision of the Florida statute, Yizhac Arvilli should be recover its attorneys' fees from Plaintiff.
179. Under Florida statutory law, specifically § 57.105(1), FLA. STAT. (2003), Yizhac Arvilli should recover his attorneys' fees from Popular because Popular and its attorney knew or should have known that its claim, when initially presented to the court or at any time before trial: (a) was not supported by the material facts necessary to establish the claim or defense; or (b) would not be supported by the application of then-existing law to those material facts, and the claim was not initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.
180. While this case was pending, but stayed, on February 18, 2005, Popular through two of

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<sup>10</sup>(7) If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. This subsection applies to any contract entered into on or after October 1, 1988.

its attorneys, attended a deposition of Steven Liebrock, who was one of the lead technology people employed by NorVergence from its inception.

181. Mr. Liebrock had been hired to “lead and design and build a technology platform and a team, to implement and support it.” It is Mr. Liebrock who was responsible to make certain that the telephone and internet services purchased by NorVergence from Qwest could be supplied to the customers.

182. Mr. Liebrock was asked, in the presence of Popular’s attorneys, what was being sold to NorVergence’s customers. Specifically:

Q. What was NorVergence selling customers?

A. Services.

Q. And what were those services?

A. Voice calling and internet access.

183. In spite of having this knowledge—that the NorVergence / Arvilli Contract was a contract for telephone services, for voice calling and internet access, Popular has attempted to move forward with the prosecution of this suit seeking to collect money from Yizhac Arvilli for services that are not, and will not, be delivered, and in no uncertain terms, attempting to deceive this court about the nature of the contract it seeks to enforce.

184. Under those circumstances, Yizhac Arvilli should recover attorneys’ fees from Popular.

### **United States Supreme Court**

185. The courts have inherent authority to award attorneys’ fees against a party which has litigated in bad faith, abused the litigation process, or violated court orders.

186. Plaintiff filing suit under the facts of this case, especially with the cancellation of the



NorVergence / Arvilli Contract as a result of the bankruptcy petition filed by Plaintiff against NorVergence, is the epitome of being in bad faith.

## **Affirmative Defenses**

187. ***First Defense: Illegal or unlawful contract not enforceable.*** Yizhac Arvilli adopts the allegations contained in paragraphs 1 through 186 as though said allegations were more particularly set forth herein. The contract sought to be enforced was the result of illegal or unlawful activity on the part of NorVergence, which illegal or unlawful activity was known to Popular at all times material hereto. Accordingly, the contract can not be enforced.
188. ***Second Defense—First Breach.*** Yizhac Arvilli adopts the allegations contained in paragraphs 1 through 186 as though said allegations were more particularly set forth herein. Plaintiff's assignor first breached the contract sought by Plaintiff to be enforced. Accordingly, Plaintiff can not enforce it.

## **Counterclaim**

Defendant, Yizhac Arvilli, by and through its undersigned counsel, files its Counterclaim and in support thereof alleges:

### **Count I Violation of Florida Deceptive and Unfair Trade Practices Act**

189. Yizhac Arvilli incorporates by reference paragraphs 1 through 186 as if same were set forth at length herein.
190. This is an action for relief under particular Florida Statutes, collectively referred to as Florida's Deceptive and Unfair Trade Practices Act, ("FDUTPA"), contained in §§ 501.201

*et seq.*, FLA. STAT. (2003).

191. Yizhac Arvilli is a “consumer” as defined in § 501.203(7), FLA. STAT. (2003).
192. NorVergence and Popular have engaged in trade or commerce in the State of Florida as defined in § 501.203(8), FLA. STAT. (2003), and are therefore subject to the proscriptions of §§ 501.201 *et seq.*, FLA. STAT. (2003), the FDUTPA.
193. The federal administrative agency created to enforce the Federal Trade Commission Act, 15 U.S.C. § 53(b), (“FTC Act”) has determined that NorVergence violated said Act by the conduct set forth above, and has sued NorVergence for injunctive and monetary relief in *Federal Trade Commission v. NorVergence*, 04-5414-CDRD, (D.NJ).
194. The district court in that case has entered a default final judgment, finding that NorVergence violated the FTC Act in several ways.
195. A violation of a consumer protection statute such as the FTC Act is a *per se* violation of the FDUTPA.
196. NorVergence and Popular have violated the FDUTPA by engaging in the above described pattern and practice of unfair, unconscionable and deceptive acts and practices in their businesses.
197. The Contract between NorVergence and Yizhac Arvilli (Defendant’s Exhibit 1), which includes as a part thereof the ERA allegedly assigned to Popular, is in violation of the FDUTPA and therefore, unenforceable and void.
198. Yizhac Arvilli has suffered an ascertainable loss in its payments of the illegal and fraudulently induced ERA, and in the improper debt or lien of the illegal and fraudulently induced ERA.
199. As a result of the violations of the FDUTPA by NorVergence and Popular, Yizhac Arvilli

has retained the services of the undersigned attorneys, and has agreed to pay said attorneys a reasonable fee for their services.

WHEREFORE, Yizhac Arvilli requests that this court grant the following relief:

- a. Award Yizhac Arvilli money damages against Popular, for violation of the FDUTPA, including prejudgment and post-judgment interest on said sums;
- b. Enter a permanent injunction enjoining Popular from further violations of the FDUTPA;
- c. Enter a declaratory judgment that Popular has violated Florida and federal law;
- d. Grant Yizhac Arvilli leave to amend this complaint in order to seek punitive damages against Popular, together with such other and further relief as this court deems just and proper; and,
- e. Award Yizhac Arvilli a reasonable attorneys' fee against Popular.

## **Count II**

### **Violation of New Jersey Consumer Fraud Act**

200. Yizhac Arvilli incorporates by reference paragraphs 1 through 186 as if same were set forth at length herein.
201. This is an action for relief under particular New Jersey Statutes, collectively referred to as New Jersey's Consumer Fraud Act, ("CFA"), contained in N.J.S.A. 56:8-1 *et seq.*
202. Yizhac Arvilli is a "person" as defined in N.J.S.A. 56:8-1(d).
203. By their actions alleged above, NorVergence and Popular have violated the New Jersey CFA.
204. The federal administrative agency created to enforce the Federal Trade Commission Act, 15 U.S.C. § 53(b), ("FTC Act") has determined that NorVergence violated said Act by the conduct set forth above, and has sued NorVergence for injunctive and monetary relief in

*Federal Trade Commission v. NorVergence*, 04-5414-CDRD, (D.NJ).

205. The district court in that case has entered a default final judgment, finding that NorVergence violated the FTC Act in several ways.
206. A violation of a consumer protection statute such as the FTC Act is a *per se* violation of the New Jersey CFA.
207. The Contract between NorVergence and Yizhac Arvilli, which includes as a part thereof the ERA allegedly assigned to Popular, is in violation of the New Jersey CFA and therefore, unenforceable and void.
208. The conduct of NorVergence and Popular as set forth above, including without limitation, the continued demand for and/or collection of monthly payments when they knew or should have known that it was participating in and were the means and instrumentality for the commission of the scheme to represent that services and technology would be provided to Yizhac Arvilli even though there was never any intention to provide such services and technology over the term of the ERA, which is in violation of the New Jersey Consumer Fraud Law, because this scheme:
  - a. is an unconscionable consumer practice pursuant to N.J.S. § 56:8-2;
  - b. is deceptive pursuant to N.J.S. § 56:8-2;
  - c. is fraudulent pursuant to N.J.S. § 56:8-2;
  - d. is a false pretense pursuant to N.J.S. § 56:8-2;
  - e. constitutes a false promise pursuant to N.J.S. § 56:8-2;
  - f. is a misrepresentation pursuant to N.J.S. § 56:8-2; and
  - g. is a knowing concealment, suppression, or omission of material fact with the intent that Plaintiffs rely on such concealment, suppression, or omission pursuant to N.J.S.

§ 56:8-2.

209. Yizhac Arvilli has suffered an ascertainable loss in its payments of the illegal and fraudulently induced ERA, and in the improper debt or lien of the illegal and fraudulently induced ERA.
210. As a result of the violations of the New Jersey CFA by NorVergence and Popular, Yizhac Arvilli has retained the services of the undersigned attorneys, and has agreed to pay said attorneys a reasonable fee for their services.

WHEREFORE, Yizhac Arvilli requests that this court grant the following relief:

- a. Award Yizhac Arvilli money damages against Popular, for violation of the New Jersey CFA, including prejudgment and post-judgment interest on said sums;
- b. Enter a permanent injunction enjoining Popular from further violations of the New Jersey CFA;
- c. Enter a declaratory judgment that Popular has violated New Jersey and federal law;
- d. Grant Yizhac Arvilli leave to amend this complaint in order to seek punitive damages against Popular, together with such other and further relief as this court deems just and proper; and,
- e. Award Yizhac Arvilli a reasonable attorneys' fee against Popular.

### **Count III Declaratory Judgment**

211. Yizhac Arvilli incorporates by reference paragraphs 1 through 186 as if same were set forth at length herein.
212. This is an action for declaratory relief against Popular.
213. The ERA does not, in actuality, document or evidence the rental or lease of MATRIX™

Hardware.

214. There is no connection whatsoever between the actual cost of the MATRIX™ Hardware and the charge reflected in the ERA.
215. In fact, the total amount required to be paid under the ERA *exceeds* fifty-six times the price of the associated MATRIX™ Hardware, in other words, the cost of the device is paid in full by the second out of sixty payments.
216. The ERA actually serves as a mechanism whereby NorVergence fraudulently induced Yizhac Arvilli to finance the cost of telecommunication services that NorVergence had no present intention of providing, and does not evidence a bona fide rental, lease or sale of equipment.
217. The ERA does not evidence a bona fide lease or rental of equipment, but rather, evidences a contract on prepaid telecommunication services entered by NorVergence for the express purpose of obtaining Discounted Payments from their sale to Popular.
218. Popular holds itself out as a lessor or financier of equipment lease transactions in the normal course of business.
219. Popular knew or should have known that the “leased” MATRIX™ Hardware which was the subject of the “lease” had a value wholly unrelated to and substantially less than the value of the stream of rental payments required to be paid by the Yizhac Arvilli under the ERA.
220. As NorVergence knew at the time it entered into each transaction that it could not and, in fact, had no present intention of fulfilling the terms of the telecommunication service agreement and related ERA, NorVergence was engaged in actual fraud when it entered into each and every transaction.
221. Popular fueled NorVergence’s fraudulent scheme with the up-front payment to NorVergence of the entirety of NorVergence’s income stream for future telephone services, and aided,

abetted, and enabled NorVergence in the commission of this fraud, through its purchase of the NorVergence / Arvilli Contract, what contains what purports to be the equivalent of a UCC Article 2A finance lease that it knew contained unfair, unconscionable and deceptive provisions, so as to cut off the otherwise valid claims and defenses of Yizhac Arvilli and all similarly situated NorVergence customers.

222. Popular was the means and instrumentality of NorVergence to perpetrate its fraud on the Plaintiffs.

WHEREFORE, Yizhac Arvilli respectfully requests that the Court:

- a. enter judgment in its favor on this Count;
- b. declare the NorVergence / Arvilli Contract to be void from inception and rescinded;
- c. award to Yizhac Arvilli and against the Popular damages plus interest from the date of the first payment to Popular made pursuant to the NorVergence / Arvilli Contract;
- d. award to Yizhac Arvilli and against Popular the costs of prosecuting this action, including counsel fees;
- e. award to Yizhac Arvilli and against Popular the costs of defending any action brought to enforce the ERA, including counsel fees from Plaintiff; and
- f. award to Yizhac Arvilli and against Popular such other equitable relief as deemed appropriate by the Court.

## **Count IV**

### **Declaratory Judgment: New Jersey UCC**

223. Yizhac Arvilli incorporates by reference paragraphs 1 through 186 as if same were set forth at length herein.
224. This is an action for declaratory relief against Popular.

225. The provision of the MATRIX™ Hardware Device by NorVergence to Yizhac Arvilli does not qualify as a “lease” under New Jersey’s enactment of the Uniform Commercial Code (“NJ UCC”).
226. The provision of the MATRIX™ Hardware Device by NorVergence to Yizhac Arvilli does not qualify as a “finance lease” under NJ UCC.
227. The entire ERA is unconscionable under NJ UCC.
228. The ERA is void because it is a contract of adhesion that unconscionably attempt to divorce the duty to provide telecommunication services from the obligation to pay for the ERA.
229. Popular is subject to all claims and defenses that Yizhac Arvilli might have had as against NorVergence.
230. The ERA is otherwise void because it is usurious.
231. The ERA is otherwise void because it violates the several provisions of NJ UCC.

WHEREFORE, Yizhac Arvilli respectfully request that the Court:

- a. enter judgment in their favor on this Count;
- b. declare the Contracts to be void from inception and rescinded;
- c. award to Yizhac Arvilli and against Popular damages plus interest from the date of the first payment made pursuant to the NorVergence / Arvilli Contract;
- d. award to Yizhac Arvilli and against Popular the cost of prosecuting this action, including counsel fees;
- e. award to Yizhac Arvilli and against Popular the cost of defending any action brought to enforce the ERA, including counsel fees;
- f. award Yizhac Arvilli punitive damages against the Popular; and
- g. award to Yizhac Arvilli and against Popular such other equitable relief as deemed



appropriate by the Court.

## **Count V Breach of Contract**

232. Yizhac Arvilli incorporates by reference paragraphs 1 through 186 as if same were set forth at length herein.
233. This is an action for money damages against Popular sounding in breach of contract.
234. Popular knowingly and willingly stepped into the shoes of NorVergence as assignee.
235. NorVergence and Popular breached the Contract with Yizhac Arvilli.
236. Yizhac Arvilli has been damaged as a direct and proximate result of said breach in the following ways, which are not intended to be all inclusive:
- a. Yizhac Arvilli has paid money for services not rendered;
  - b. Yizhac Arvilli has incurred costs and fees in an effort to obtain contract performance; and,
  - c. Yizhac Arvilli has incurred, and will incur in the future, damages in obtaining from another provider the telephone services which were to be provided by NorVergence (and by assignment, Popular) under the Contract.
237. Said damages are on-going.

WHEREFORE, Yizhac Arvilli respectfully requests that the Court:

- a. enter judgment in their favor on this Count;
- b. award to Yizhac Arvilli and against Popular, damages plus interest from the date of the first payment made on the NorVergence / Arvilli Contract;
- c. award to Yizhac Arvilli and against Popular, the cost of prosecuting this action, including counsel fees;

- d. award Yizhac Arvilli money damages against Popular, jointly and severally, for the cost of obtaining the services which were to be performed by NorVergence (and by assignment, Popular) under the Contract; and,
- e. award to Yizhac Arvilli and against Popular such other equitable relief as deemed appropriate by the Court.

## **Count VI Rescission**

- 238. Yizhac Arvilli incorporates by reference paragraphs 1 through 186 as if same were set forth at length herein.
- 239. This is an action for rescission of a written contract and other relief.
- 240. By virtue of the actions and inactions described in the foregoing paragraphs of this Complaint, Popular has been and would continue to be unjustly enriched in an amount equal to the monthly payments already made and to be made as required by the NorVergence / Arvilli Contract because such payments arise from the purported lease of equipment which does not perform the represented function and which Popular knew or should have known was fraudulently, knowingly and unjustifiably represented as performing a technological service integral to receiving the services to be provided by NorVergence.
- 241. Popular's actions in concert with those of NorVergence in inducing Yizhac Arvilli to contract for and to rent the MATRIX™ Hardware Devices, which Popular knew or should have known were fraudulent, is outrageous and unconscionable conduct.
- 242. Yizhac Arvilli has possession of the MATRIX™ Hardware (IAD) which NorVergence installed or had installed in Yizhac Arvilli's office, and agrees to return it to NorVergence or Popular.

243. The return of the MATRIX™ Hardware will return the parties to the position they were in before the fraud perpetrated by NorVergence in complicity with Popular as alleged above.

WHEREFORE, Yizhac Arvilli respectfully requests that the Court:

- a. enter judgment in its favor on this Count;
- b. award to Yizhac Arvilli and against Popular, the remedy of rescission of the Contract between NorVergence and Yizhac Arvilli as assigned to Popular, and;
- c. award to Yizhac Arvilli and against Popular, such other equitable relief as deemed appropriate by the Court.

**Count VII**  
**Debts or Obligations Fraudulently Contracted or Incurred**  
**Pursuant to N.J.S.A. § 2A:32-1**

244. Yizhac Arvilli incorporates by reference paragraphs 1 through 186 as if same were set forth at length herein.

245. This is a statutory action under N.J.S.A. § 2A:32-1.

246. NorVergence represented to Yizhac Arvilli that it would provide certain services at substantial savings over the prices charged by other providers of said services.

247. NorVergence further represented to Yizhac Arvilli that in order to obtain the savings so represented, Yizhac Arvilli was required to rent a MATRIX™ Hardware Device, which contained special technology that made such savings possible.

248. NorVergence represented that the MATRIX™ Hardware Devices were of special and significant value, when in fact the MATRIX™ Hardware Devices were ordinary routers of minimal value.

249. Such fraudulent representations were made by NorVergence in order to induce Yizhac Arvilli

to execute the ERA to rent the MATRIX™ Hardware Devices.

250. The MATRIX™ Hardware Devices provided by NorVergence as consideration for the execution of such ERA was fraudulent and inadequate.

WHEREFORE, Yizhac Arvilli respectfully request that the Court:

- a. enter judgment in their favor on this Count;
- b. declare the ERA rescinded;
- c. award to Yizhac Arvilli and against Popular damages plus interest from the date of the first payment made pursuant to the ERA;
- d. award to Yizhac Arvilli and against Popular the costs of prosecuting this action, including counsel fees; and,
- e. award to Yizhac Arvilli and against Popular such other equitable relief as deemed appropriate by the Court.

## **Count VIII**

### **Breach of Implied Warranty of Merchantability**

251. Yizhac Arvilli incorporates by reference paragraphs 1 through 186 as if same were set forth at length herein.
252. This is an for money damages against Popular, sounding in breach of implied warranty of merchantability, and for other relief.
253. Popular has knowingly stepped into the shoes of NorVergence as lease assignee and, as previously stated herein, it is not a holder-in-due-course on these claims.
254. Yizhac Arvilli leased equipment from NorVergence which then allegedly assigned and/or sold its lease to Popular.
255. An implied warranty that the goods were merchantable arose by operation of law as part of

the leasing of the equipment.

256. NorVergence and Popular, its lease assignee, breached the implied warranty of merchantability in that the equipment was not in merchantable condition when leased or anytime thereafter and not fit for the ordinary purposes for which the equipment was sold.
257. Yizhac Arvilli notified NorVergence and Popular of the defective condition of the goods within a reasonable time after discovering the breach.
258. NorVergence and Popular knew or should have known of the defective condition of the goods.
259. As a direct result of the breach of implied warranty of merchantability, Yizhac Arvilli has sustained economic and non-economic damages.

WHEREFORE, Yizhac Arvilli respectfully requests that the Court:

- a. enter judgment in their favor on this Count;
- b. award to Yizhac Arvilli and against Popular damages plus interest from the date of the first payment made pursuant to the ERA;
- c. award to Yizhac Arvilli and against Popular the costs of prosecuting this action, including counsel fees; and,
- d. award to Yizhac Arvilli and against Popular such other equitable relief as deemed appropriate by the Court.

## **Count IX**

### **Breach of Implied Warranty of Fitness for a Particular Purpose**

260. Yizhac Arvilli incorporates by reference paragraphs 1 through 186 as if same were set forth at length herein.

261. This is an for money damages against Popular, sounding in breach of implied warranty of fitness for a particular purpose and for other relief.
262. Popular has knowingly stepped into the shoes of NorVergence as lease assignee and, as previously stated herein, it is not a holder-in-due-course on these claims.
263. Yizhac Arvilli leased equipment from NorVergence which then assigned and/or sold its lease to Popular.
264. At the time of entering into the Equipment Rental Agreement, NorVergence, the original owner of the Equipment Rental Agreement, had reason to know that Yizhac Arvilli required the equipment for a particular purpose and that Yizhac Arvilli reasonably relied upon NorVergence's skill or judgment to select or furnish suitable equipment.
265. An implied warranty that the goods were fit for a particular purpose arose by operation of law as part of the leasing of the equipment.
266. The equipment was not fit for the purposes required by Yizhac Arvilli in that the equipment did not reduce the cost of local and long distance phone calls and internet access, was unable to access the Internet, unable to provide VoIP, and unable to provide other telecommunication functions that were unreasonably misrepresented by NorVergence.
267. NorVergence and Popular, its lease assignee, breached the implied warranty of fitness for a particular purpose.
268. Yizhac Arvilli notified NorVergence and Popular of the defective condition of the goods within a reasonable time after discovering the breach.
269. NorVergence and Popular knew or should have known of the defective condition of the goods.
270. As a direct result of the breach of implied warranty of fitness for a particular purpose, Yizhac

Arvilli has sustained economic and non-economic damages.

WHEREFORE, Yizhac Arvilli respectfully requests that the Court:

- a. enter judgment in their favor on this Count;
- b. award to Yizhac Arvilli and against Popular damages plus interest from the date of the first payment made pursuant to the ERA;
- c. award to Yizhac Arvilli and against Popular the costs of prosecuting this action, including counsel fees; and,
- d. award to Yizhac Arvilli and against Popular such other equitable relief as deemed appropriate by the Court.

## **Count X**

### **Breach of Express Warranty**

271. Yizhac Arvilli incorporates by reference paragraphs 1 through 186 as if same were set forth at length herein.
272. This is an for money damages against Popular, sounding in breach of express warranty and for other relief.
273. Popular has knowingly stepped into the shoes of NorVergence as lease assignee and, as previously stated herein, it is not a holder-in-due-course on these claims.
274. Yizhac Arvilli leased equipment from NorVergence which then assigned and/or sold its lease to Popular.
275. NorVergence and Popular expressly warranted the equipment leased for five years and expressly warranted through misrepresentations that the equipment reduced the cost of local and long distance phone calls, and Internet access, was able to access the Internet, and to provide VoIP.

276. NorVergence and Popular breached this express warranty in that the equipment could not, and did not, reduce the cost of local and long distance phone calls and Internet access, was unable to access the Internet, and was unable to provide VoIP, amongst other things.
277. NorVergence and Popular, its lease assignee, breached the express warranty.
278. Yizhac Arvilli notified NorVergence and Popular of the defective condition of the goods within a reasonable time after discovering the breach.
279. NorVergence and Popular knew or should have known of the defective condition of the goods.
280. As a direct result of the breach of express warranty, Yizhac Arvilli has sustained economic and non-economic damages.

WHEREFORE, Yizhac Arvilli respectfully requests that the Court:

- a. enter judgment in their favor on this Count;
- b. award to Yizhac Arvilli and against Popular damages plus interest from the date of the first payment made pursuant to the ERA;
- c. award to Yizhac Arvilli and against Popular the costs of prosecuting this action, including counsel fees; and,
- d. award to Yizhac Arvilli and against Popular such other equitable relief as deemed appropriate by the Court.

## **Demand for Jury Trial**

Yizhac Arvilli demands trial by jury of all issues so triable.

## **Certificate of Mailing**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed by



United States mail, postage prepaid, this \_\_\_\_\_ day of February, 2006, to: William C. Turner, Esq., of the law firm of Akerman Senterfitt, Attorneys for Plaintiff, P. O. Box 231, Orlando, FL 32802-0231.

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For the Firm

RPG/ms

C:\Clients\Arvilli\Pleadings\Complaint and Answer\Answer, Affirmative Defenses, and Counterclaim.wpd