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

FEDERAL TRADE COMMISSION, Plaintiff, v. IFC CREDIT CORPORATION, Defendant.	**CIV. NO. 07 C 3155** **FTC REPLY TO IFC OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

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Appendix A FTC's Memorandum in Support of Motion for Preliminary Injunction (Redacted) (original filed June 6, 2006)

Appendix B *IFC Credit Corp. v. United Business & Industrial Federal Credit Union,* No. 04-C-5905 (N.D. Ill., Memorandum Opinion and Order Dec. 12, 2006).

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I. INTRODUCTION

Plaintiff Federal Trade Commission ("FTC" or "Commission") files this reply in support of its Motion for Preliminary Injunction.

The FTC asks this court to issue a preliminary injunction as soon as possible to stop the ongoing harm to the consumer victims of IFC's practices. The FTC's motion was filed on June 6, 2007.[1] IFC has sought delays, a tactic the FTC assumes will continue, but which the FTC hopes this court will not entertain. First, IFC asked the court to postpone consideration of the FTC's motion so that IFC could file a motion to dismiss. On June 21, the court ruled that both motions should be briefed at the same time. Now IFC says the FTC's motion for preliminary injunction cannot be considered yet because first, IFC needs to depose the FTC's dozens of declarants and conduct other unspecified discovery, and then file yet another response to the motion for preliminary injunction,[2] this time based on facts it obtains in discovery.

IFC claims it needs an evidentiary hearing before the court can rule.[3] In the meantime, IFC will continue to collect hundreds of dollars a month each from many victims of IFC's practices, and if the stay of state court litigation is dissolved, which could happen at any time, IFC can resume litigating in Cook County, Illinois, to collect tens of thousands of dollars from each of several hundred more consumers, even though most of them are located far from Illinois.

Although IFC asserts repeatedly that it needs an evidentiary hearing, and concedes that to be entitled to one it has to demonstrate genuine issues of material fact, IFC files virtually no evidence to contravene the FTC's evidence. This, despite IFC having litigated similar or identical

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[1] The parties are negotiating to resolve a privilege issue. While this issue remains unresolved, the FTC requests that the court disregard, for purposes of this motion for preliminary injunction, pages 100-01 of PX 40, and parts of the FTC's Memorandum in Support of Preliminary Injunction ("PI Memo"). To facilitate this process, the FTC has attached a redacted version of that memo, with items on pages 16, 19, and 21 blocked out (Appendix A, attached). The FTC made a related request regarding the complaint in response to IFC's Motion to Dismiss, asking that the court disregard the sentence in Complaint ¶ 47 that begins, "Indeed, a May 2004 internal circulation" and the entire quotation that follows. We repeat that request here.

[2] IFC indicates it may also seek leave to reply to this brief, possibly in addition to the brief it would submit after discovery. IFC Credit Corporation's Brief Regarding the Need for an Evidentiary Hearing on the Federal Trade Commission's Motion for Preliminary Injunction ("IFC PI Opp."), p. 2.

[3] IFC PI Opp., pp. 7, 37-38.

facts for years with other parties, and having had 42 days after the FTC filed and served its motion (June 6) before IFC's response was due (July 18). Instead of filing contravening evidence, IFC launches unsubstantiated attacks on the FTC's evidence, not one of which, when examined, creates a genuine issue regarding any fact that matters. For example, IFC states, without basis, that two of the FTC's declarants are untruthful, so it needs to take all of the dozens of declarants' depositions and then let the court see their faces to judge credibility. IFC ignores the corroboration of each piece of evidence by other evidence, including NorVergence sales materials, IFC emails, financial summaries, and other witnesses' statements.[4]

IFC knows there is no real dispute about what happened here, only about how to characterize it and what to do about it. Nothing in IFC's response justifies any further delay in entry of the preliminary injunction.

II. LEGAL STANDARDS FOR MOTION FOR PRELIMINARY INJUNCTION

A. For the FTC to Obtain Preliminary Relief

To obtain preliminary relief, the FTC must demonstrate that the injunction requested is in the public interest, based on: (1) a likelihood of success on the merits, and (2) the balance of the equities. *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1025, 1029 (7th Cir. 1988) (citing Section 13(b) of the FTC Act, 15 U.S.C. § 53(b)). In the Seventh Circuit, to show a likelihood of success, the plaintiff must merely show a better than negligible chance of success on the merits. *See Cooper v. Salazaar*, 196 F.3d 809, 813 (7th Cir. 1999); *FTC v. Windermere Big Win Int'l, Inc.,* No. 98 C 8066, 1999 U.S. Dist. LEXIS 12259, at *17 (N.D. Ill. Aug. 5, 1999). In balancing the equities, the public interest "must receive far greater weight" than the defendants' private concerns. *World Travel*, 861 F.2d at 1029. "The public interest in enforcing the . . . laws is, in the main, the sum of the private interests of consumers." *FTC v. Elders Grain, Inc.,* 868 F.2d 901, 904 (7th Cir. 1989). The FTC need not prove "irreparable injury" to obtain a

[4] IFC accuses former NorVergence salesperson David Rodriguez of bias because he was a whistleblower and NorVergence retaliated with a lawsuit against him that ended in a default judgment. IFC PI Opp., pp. 17-18. IFC ignores the documentation offered by Rodriguez to support much of his sworn statement, PX 29. His statement is further corroborated by statements of other ex-employees and consumers. IFC also claims Rodriguez's testimony about "strikes" is contradicted by the sales manual, but there is no contradiction; the rule about strikes is simply omitted from the manual, which is not surprising. PX 27, ¶ 8, pp. 4-5; PX 28, ¶ 8, pp. 4-5, *cited in* PI Memo, pp. 3-6, 8.

preliminary injunction. *Kinney v. Int'l Union of Operating Eng'rs*, 994 F.2d 1271, 1277 (7th Cir. 1993).

B. For IFC to Demonstrate It Needs an Evidentiary Hearing

While the court may, of course, exercise its discretion to grant IFC an evidentiary hearing on the FTC's motion for preliminary injunction, IFC has not shown it is entitled to such a hearing. To do so, its response would have had to raise genuine issues of material fact sufficient to affect the court's decision:

> If genuine issues of material fact are created by the response to a motion for a preliminary injunction, an evidentiary hearing is indeed required. [citations omitted.] But as in any case in which a party seeks an evidentiary hearing, he must be able to persuade the court that the issue is indeed genuine and material and so a hearing would be productive–he must show in other words that he has and intends to introduce evidence that if believed will so weaken the moving party's case as to affect the judge's decision on whether to issue an injunction.

Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167, 1171 (7th Cir. 1997). *Accord*, *In re Aimster Copyright Litig.*, 334 F.3d 643, 653-54 (7th Cir. 2003); *Promatek Industries, Ltd. v. Equitrac Corp.*, 300 F.3d 808 (7th Cir. 2002); *Allied Signal, Inc., v. B.F. Goodrich*, 183 F.3d 568 (7th Cir. 1999) (no right to evidentiary hearing without showing "what a live witness would have added").

After quoting this standard, IFC abandons it in favor of other standards: whether there are "serious disputes on questions of fact," whether the parties "seriously dispute" questions of fact, or whether there are "highly contested factual issues." IFC PI Opp., pp. 6-8. But under *Ty,* IFC is entitled to an evidentiary hearing only if it shows that it "has and intends to introduce evidence that if believed will so weaken the [FTC's] case as to affect the judge's decision." As further discussed below, IFC has not shown this, nor provided any reason for this court to further delay entry of a preliminary injunction.

C. For the Court to Consider Declarations

Mistakenly, IFC maintains that the court may not resolve a motion for preliminary injunction on the basis of declarations, citing a 1956 case as well as *Medeco Security Locks, Inc. v. Swiderek*, 680 F.2d 37, 38, 39 (7th Cir. 1981). At this point, however, affidavits are "fully admissible in summary proceedings, including preliminary-injunction proceedings." *Ty,* 132 F.3d at 1171; *accord, Goodman v. Illinois Dep't of Fin. and Prof'l Regulation*, 430 F.3d 432,

439 (7th Cir. 2005). In *Ty,* the court discusses whether the district judge might have been "laboring under the misapprehension that affidavits are inadmissible in preliminary-injunction proceedings." 132 F.3d at 1171-72. Even at trial, consumer declarations may be admitted into evidence under the residual hearsay exception. *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 576 (7th Cir. 1989). Plainly, this court may rule on the FTC's preliminary injunction motion based on declarations.

III. IFC HAS NOT CAST DOUBT ON THE FTC'S LIKELY SUCCESS ON THE MERITS, OR SHOWN A NEED FOR AN EVIDENTIARY HEARING

A. IFC's Practice of Accepting and Collecting on NorVergence Rental Agreements Was Unfair (Count II)

IFC argues that the FTC's Motion for Preliminary Injunction "is premised on a crucial presumption - that NorVergence committed fraud."[5] However, while NorVergence may have committed fraud, and IFC may have known that, the FTC does not have to prove either to demonstrate likely success on the merits.

The core of the FTC's case is Count II, alleging that IFC's acceptance and collection on the Rental Agreements, under the circumstances described in Complaint ¶¶ 8-57, is unfair. The circumstances include the fact that IFC knew or should have known that the deal between the consumers and NorVergence was for telecommunications services and that the Rental Agreements misstated what was actually being financed. The elements of this unfairness violation are: (a) that defendant's actions cause or are likely to cause substantial injury (b) that is not reasonably avoidable by consumers and (c) not outweighed by countervailing benefits to consumers or competition.[6] The FTC's proof of these elements is described at pp. 3-17 and 24-25 of the FTC's Memorandum in Support of Motion for Preliminary Injunction ("PI Memo"). IFC

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[5] IFC PI Opp., p. 8. *See id.* at 9-19 (arguing insufficiency of proof of fraud).

[6] IFC argues that there are material issues of fact with respect to whether consumers "were acquiring goods for business use only and thus are not 'consumers' under the FTC Act." IFC PI Opp., pp. 26-29. As the FTC made clear in its Opposition to Defendant IFC's Motion to Dismiss, incorporated here by reference, the FTC agrees that the consumers here acquired goods and services for business purposes, so there is no factual dispute. The dispute is legal, and IFC is wrong on the law. FTC Opposition to IFC's Motion to Dismiss, pp. 5-15.

has done nothing to cast doubt on the FTC's likelihood of success on the merits of Count II; it merely concocts its own "straw man" elements and knocks them down.

1. IFC Accepted and Collected on NorVergence Rental Agreements With Knowledge that the Predominant Purpose Was Telecommunications Services and the Agreements Misstated This

IFC does not dispute the FTC's allegation that IFC purchased, accepted, and collected on NorVergence Rental Agreements.[7] Nor is there any *factual* dispute regarding the language or significance of the Rental Agreements, or related documents signed by consumers; IFC merely says the FTC mischaracterizes them. IFC relies either on the FTC's PI exhibits or its own identical ones.[8] The evidence demonstrates that while the Rental Agreements purport to be for equipment, in fact, they misstate the primary consideration for the consumer's agreement to pay, which was five years of telecommunications services.[9] None of the "disputes" or "issues" IFC raises actually go to the transaction's predominant purpose; certainly none of them undercuts the FTC's evidence, or likelihood of success, on this issue.

There is no factual dispute that NorVergence offered, and consumers accepted, a long-term package of telecommunications services at a discount.[10] Three former NorVergence

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[7] Complaint, ¶¶ 21, 23-24, and 26-27 lay out these facts; PI Memo, pp. 3, 8-9, 12, and 16 identifies the evidence supporting the allegations.

[8] *E.g.*, IFC PI Opp., pp. 29-32.

[9] Complaint, ¶¶ 8-9, 11-22, 24, 26-27, 31-37, 49-50, 53; evidence *cited in* PI Memo, pp. 4-17.

[10] IFC claims that the Delivery & Acceptance ("D&A") forms (*e.g.,* PX 3, p. 19) affect the analysis, IFC PI Opp., pp. 4, 26, 30, but the evidence shows that these forms were typically signed long before the Matrix was installed or connected, if it ever was. *See* PX 10, p. 3, ¶ 7, p. 34 (D&A form signed May 4, 2004, but Matrix never hooked up and consumer never received all the necessary equipment); PX 12, pp. 2-3, ¶¶ 9-10, p. 28 (form signed May 6, 2004, but equipment never connected or programmed); PX 15, p. 3, ¶ 12, p. 16 (form signed April 13, 2004, but equipment not installed or operational until months later, when declarant received "brief" services). The fact that consumers were asked to sign the D&A boilerplate form before the Matrix was connected for service is confirmed by former IFC Collections VP Herndon, and admitted by IFC. IFC PI Opp., p. 26 (Herndon thought 60 day window between the D&A signing and first payment due date was "legitimate" because of NorVergence's "installation issues"). Further, IFC's claim that the integration clause in the D&A form somehow establishes that there were "no side agreements," IFC PI Opp., p. 30, is completely contrary to the evidence that services were the predominant purpose of the transaction, as described herein, pp. 5-10,

(continued...)

salespeople described or attached copies of their sales pitch discussing a “savings solution” for telecommunications services, including a before-and-after cost comparison.[11] They and a former NorVergence vice president also testified that the “rental” price depended on the amount of services the customer was currently using, with most of the service costs rolled into the lease.[12] This testimony regarding the transaction’s predominant purpose is corroborated and expanded upon by voluminous consumer testimony.[13] Consumers were given a bottom line price for their monthly telecommunications costs; this price was integral to the sales pitch.[14] The fact that consumers then signed multiple documents and were sent separate bills does not change this.[15]

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[10] (...continued)
notes 7-34.

[11] PX 27-29, *cited in* PI Memo, pp. 4-6, notes. 9-14, 16-22.

[12] PX 27-28, 31-32, *cited in* PI Memo, p. 6, note 21. IFC claims that the testimony of these former NorVergence employees raises issues whether NorVergence perpetrated a fraud on consumers or engaged in wrongdoing. But none of the “issues” identified pertains to whether the deal was essentially for telecommunications services. The issues IFC describes are simply irrelevant (*e.g.,* whether the salespeople are qualified to determine the value of the Matrix box, or why a co-worker was terminated). IFC PI Opp., pp. 15-19. Although IFC claims that the NorVergence VP’s testimony is not based on personal knowledge or expertise, IFC PI Opp., p. 24, his testimony that he was a VP and “personally participated in the sales meeting” justifies considering his testimony. PX 32, ¶¶ 1-3, 9.

[13] PX 1-10, 12, and 21-22, *cited in* PI Memo pp. 4-5, notes 10, 12-13, and 16.

[14] *E.g.*, PX 39, p. 211, which IFC also offers in its Exh. Group 11 (a sales chart of various before and after costs with a bottom line “Cost Savings” of $5,380 per year).

[15] IFC PI Opp., pp. 31-32. It is ironic that in making this argument, IFC devotes so much attention to documents involving United Business & Industrial Federal Credit Union (“UBI”). In IFC’s suit against UBI for breach of contract and fraud, a federal jury ruled in UBI’s favor on both counts. *IFC Credit Corp. v. United Business & Industrial Federal Credit Union,* No. 04-C-5905 (N.D. Ill., Memorandum Opinion and Order Dec. 12, 2006 (Appendix B, attached) (IFC notice of appeal, Jan. 5, 2007). The jury found that UBI had proved the defense of *fraud in factum* by showing that “fraud . . . induced it to sign the contracts without knowledge of, or a reasonable opportunity to learn of, the character or essential terms of the contracts.” *Id., slip op.* at 5 (quoting verdict form). The testimony of UBI’s Chief Information Officer was held sufficient to support this defense. He “understood that he was signing an application for telecommunications services, the title on the cover of the papers he was given” and “would be able to terminate the leases if the equipment did not work.” *Id., slip op.* at 17.

Most importantly, however, documents from IFC's files and testimony from IFC officials prove both the purpose of the transaction and IFC's knowledge of it.[16] IFC cannot dispute this evidence without disavowing its own documents and its own officials.[17] Documents NorVergence gave to IFC (including its business plan and consumer sales materials) made it plain that services were the core of the NorVergence transaction with consumers.[18] Statements by IFC's Chief Operating Officer, Vice President for Collections, and Vice President for Credit make IFC's understanding of that point very clear.[19] IFC confirmed its understanding of the NorVergence program when it used the "Confirmation Script" provided by NorVergence to tell consumers that their "monthly cost" under the Rental Agreements was "protected for a 60-month term, producing the NorVergence savings you were promised."[20]

This evidence is corroborated by many other indicia of IFC's knowledge that the consumers' predominant purpose was to get telecommunications services and that any equipment

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[16] PI Memo, pp. 4-5, 7-17 (especially 10-17).

[17] IFC does attempt to challenge the testimony of its own former vice president for collections, mainly on the ground that the FTC did not attach the entire transcript and there might have been statements useful to IFC in some of that testimony. The FTC is not here presenting Mr. Herndon's statements at trial in lieu of his testimony. Indeed, for purposes of a preliminary injunction, the FTC could simply have presented a declaration that was far more selective. IFC knew in advance about Mr. Herndon's June 26, 2006, hearing, since Mr. Herndon informed IFC's CEO, John Estok, that he had been called to testify. IFC says it tried to get a copy (without saying how long ago) from the court reporter but was told it would have to ask permission from the FTC. Yet IFC has never asked the FTC for permission or for a copy of the transcript.

[18] IFC boasts that it did extensive due diligence before deciding to do business with the firm, including reviewing NorVergence's business plan. IFC PI Opp., p. 21.This supports our point regarding IFC's knowledge that services were the purpose of the transaction.

[19] PI Memo at 10-11, notes 36-41, including sales materials, PX 39, Att. D, pp. 29-20, 28-29, 36-37; business plan, PX 40, pp. 26-27, 33-34, 55; testimony of IFC's COO on IFC's understanding, PX 34, pp. 49-50 (NorVergence presented a total solution based on the overall cost of the service), and PX 35, p. 56 (IFC knew that service component was required for equipment to be of value); testimony of IFC's VP for Collections, PX 30 (IFC knew NorVergence consumers expected future services); email from IFC's VP for Credit, PX 40, p. 73 ("if they don't pay we can turn off their phone and internet service"); amendment of Master Program Agreement to include service cut-off for non-payment, PX 40, pp. 69-72 and PX 43, p. 18, ¶ 5 (at insistence of IFC's COO).

[20] IFC attached the script to its claims against NorVergence victims. Complaint ¶¶ 9, 33; PI Memo, p. 11, n. 40 (discussing script's significance). As discussed in the FTC's PI Memo, the promised savings could accrue only if NorVergence provided the promised services. PI Memo, p. 11.

was incidental. These include the tremendous price variations between Rental Agreements covering the same equipment, which only make sense if the contract price was based on something other than the equipment.[21] IFC claims there is an issue as to the price variations because "IFC has maintained that it believed the price differential . . . was due to the addition of certain network cards" and says it needs to analyze "Mr. Bosque's data" showing that the number of cards did not determine the payment amount.[22] The data, however, is IFC's, not Mr. Bosque's.[23] All he did was summarize it.

IFC's COO has testified that IFC noticed the price disparities "[r]ight away. . . . from day one" and asked for an explanation.[24] While he says IFC was told that variances in the number of cards explained the disparities, IFC's own records (summarized by Mr. Bosque) prove they did not. IFC presents no evidence that they did, despite the years it has had to look at its own evidence. IFC could verify that the price variations could not have been explained by the number of cards, either by examining its Excel database (which is not complex) for a few minutes, or by looking at a sample of the NorVergence invoices in its files.

The Rental Agreements purported to require consumers to pay $4,400 to $160,000 for a Matrix or Matrix Soho box.[25] IFC claims it thought each Matrix was worth the price, no matter what. Yet the FTC has shown that IFC did nothing to determine the value of the Matrix box, its

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[21] PI Memo, pp. 12-13, notes 48-53 (relying on PX 38, Declaration of Gil Bosque, and testimony of IFC's Chief Operating Officer, John Estok, *Florida v. Commerce Commercial Leasing, LLC*, No. 2004 CA 002515 (F. Leon County Cir. Ct. 2nd Jud. Cir. Jan. 5, 2005), Transcript, PX 34, pp. 59-60.

[22] IFC's PI Opp., p. 23. IFC mistakenly states that the FTC quotes the testimony of Steve Csar, IFC's Vice President of Credit, in support of the FTC argument regarding price variations between Rental Agreements, and claims Csar's testimony proves that IFC did not know there were large price differences for identical products. The FTC actually cited Csar's testimony, that he would have sounded alarms if *he* had known of a gross disparity between actual equipment cost and rental payments, to show the importance of that disparity. PI Memo, 13-14, n. 55 (citing PX 37). The FTC used other evidence to prove that IFC disregarded the value of equipment covered by the NorVergence Rental Agreements and to prove that the equipment has no value without services. PI Memo, p. 14, notes 56-60.

[23] Mr. Bosque's price disparity summary relies on IFC data of September 2004. PX 38, pp. 1-4, ¶¶ 4-15, pp. 6-10; PX 39, p. 2, ¶ 6 (attached to PI Memo).

[24] PX 34, pp. 59-60, *cited in* PI Memo, pp. 12-13.

[25] Bosque Dec., PX 38, ¶¶ 10-11.

collateral on the Rental Agreements, and knew that this collateral had virtually no value without the services.[26] Also, IFC has not commented at all regarding the dramatic price variations in the Matrix Soho boxes, which took no cards and were not even connected to the phones, just the Internet.[27]

IFC disputes none of this testimony, instead arguing against "straw men," contentions the FTC is not actually trying to prove.[28] The Matrix boxes are not on trial. They are just standard, off the shelf pieces of relatively inexpensive telecommunications equipment with NorVergence labels.[29] The issue of the value of the Matrix or Matrix Soho without services goes to IFC's knowledge of the predominant purpose of the deal. Even if the value were in dispute, IFC is offering nothing more factual than vague, conclusory testimony of former NorVergence employee Stephen Leibrock to refute what IFC calls "the FTC's claim that the equipment was worthless or incapable of producing the savings NorVergence allegedly promised."[30] IFC does not offer any evidence from the manufacturer of the Matrix and Matrix Soho to support any savings claims. IFC cannot overcome the FTC's evidence and has not even suggested it can show the Matrix was ever worth more than a small fraction of the amount IFC is demanding consumers pay for it.

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[26] This is demonstrated by the testimony of IFC's President, Rudolph Trebels (never thought about repossessing the Matrix), COO Estok (matrix of no value now; IFC knew at the beginning that service was required for equipment to be of value), Sales VP Lee Herndon (knew in December 2003 that IFC would not get its money out of the hardware in the event of default), and Credit VP Steve Csar (IFC did nothing to determine value of Matrix and its value was not part of IFC's decision to take assignment of NorVergence contracts). PI Memo, pp. 13-14, notes 55-60 (and referencing p. 11, note 41). See also PI Memo, p. 13, note 50 (evidence of Matrix cost from Adtran, which supplied the Matrix and Matrix Soho to NorVergence).

[27] PI Memo, pp. 5 and 13, notes 15 and 51.

[28] IFC PI Opp., pp. 18 (arguing failure to prove NorVergence perpetrated a fraud on consumers) and 24 (arguing the FTC has not shown IFC took contracts in bad faith for purposes of holder in due course analysis).

[29] PI Memo, pp. 5 and 13, notes 15 and 51.

[30] IFC PI Opp., pp. 18-19. It is even unclear whether Mr. Leibrock thinks it is the Matrix or the NorVergence business plan that could have theoretically created the savings. In any case, he says nothing about the how the Matrix Soho, which does not connect phones at all, PI Memo, p. 5, n. 15, could produce a 30% savings in telecommunications costs.

The FTC's PI Memo also identifies several significant differences between IFC's standard practices and those used with NorVergence customers regarding confirmation scripts, customer interviews, and "acceptance" forms. These differences provide further evidence that IFC knew the NorVergence Rental Agreements were not standard equipment leases. IFC responds by quoting a former employee's testimony that IFC often had differences in its forms, but IFC provides not one example of this, and cites no evidence to refute the FTC's evidence of the significance of the NorVergence changes.[31] Moreover, even if IFC could come up with some innocuous explanation for all the differences between IFC's NorVergence financing and its other financing, it would not disprove the rest of the FTC's evidence that IFC knew NorVergence was mainly selling services, contrary to the wording of the Rental Agreement. Further, it would not create a factual dispute likely to be resolved by an evidentiary hearing.

Finally, the FTC has established that IFC purchased a large percentage of the Rental Agreements after consumer complaints and defaults had shown that consumers understood the transaction as one for services - and that consumers had refused to pay when services were not provided. IFC dealt with the problem by increasing its "holdbacks" (payments withheld from NorVergence to protect against the risk of non-payment by consumers).[32] Complaints and defaults began in January 2004, and massive defaults were occurring in February. IFC knew failure to provide promised service triggered the defaults, but IFC nevertheless purchased 468 NorVergence Rental Agreements, worth almost $13.3 million, after February 2004.[33] Complaints escalated as described in emails between IFC officials, and still IFC kept buying NorVergence contracts.[34] IFC disputes none of this evidence, merely pointing out that a few consumers did get services for a short time, something the FTC has always acknowledged.

With nothing of material importance to attack, IFC turns to secondary matters. It devotes a major part of its argument to attacking the FTC's default judgment against NorVergence as not

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[31] IFC PI Opp., pp. 25-26.

[32] Complaint ¶¶ 22, 24, 26-27; PI Memo, pp. 14-17

[33] PI Memo, pp. 14-15.

[34] PI Memo, pp. 15-17.

being *res judicata* or collateral estoppel against IFC.[35] The FTC agrees that it is not binding on this court - and has never contended otherwise.

IFC also attacks the FTC's citation of factual statements from the NorVergence Chapter 7 trustee simply because those statements appear in a complaint. IFC relies entirely on inapposite legal precedent.[36] If anything, the trustee's statements about NorVergence (not IFC) should be considered more reliable than any declaration, as they were made by the trustee directly to the court that appointed him, using his years of professional expertise and reporting on his examination of NorVergence's books and records. No one could be more knowledgeable about NorVergence's finances and how they led to the NorVergence bankruptcy.[37] Given its indicia of reliability, the trustee's complaint could reasonably be considered by this court even at trial. Fed. R. Ev. 803(8)(C).

The FTC has never disputed that NorVergence and IFC created paperwork to further the fiction that the Rental Agreements were simply equipment. rentals.[38] But the other evidence overwhelmingly establishes that the financing was fundamentally for services. All parties – NorVergence, the consumers, and IFC – knew this much. But only IFC and NorVergence knew that IFC would aggressively pursue consumers for payment even if no services were provided.

Thus, IFC has raised no genuine issue of material fact as to whether IFC accepted and collected on NorVergence rental agreements while it knew or should have known that the predominant purpose of the rental agreements was to finance telecommunication services and

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[35] IFC PI Opp., pp. 14-15.

[36] For example, in IFC's first citation, the moving party was relying exclusively on conclusory allegations of fraud made in a complaint in a separate action, and also had a heavy burden of proof of fraud under Fed. R. Civ. P. 60(b)(3) ("clear and convincing evidence"). *In re Brand Name Prescription Drugs Antitrust Litigation*, 1997 WL 201614 (N.D. Ill.,1997). Here the FTC does not rely on, or even cite, the trustee's complaint allegations or conclusions about IFC's wrongdoing, which might be closer to this case. It only cites the trustee's factual statements and conclusions about NorVergence, in whose shoes he stands. *Beverly Gravel* merely affirms denial of Rule 11 sanctions. It has nothing to do with relying on some other case's complaint.

[37] Most of the trustee's statements cited by the FTC, other than those directly related to NorVergence's financial condition, are corroborated by voluminous evidence. PI memo, pp. 3-7.

[38] See note 8 and accompanying text *supra* (no dispute regarding contract language).

that the "Equipment Rental Agreements" misstated the consideration. Rather than dispute material facts, IFC only argues that the contract language and billing documents support its position, essentially as a matter of law.[39]

2. IFC Has Raised No Factual Issue Disputing That IFC's Practices Caused Substantial Injury

IFC has presented no evidence, nor even any argument, disputing that NorVergence consumers are injured when they make payments on the NorVergence Rental Agreements while also having to pay an actual telecommunications service provider.[40] Therefore, there is no need for discovery or an evidentiary hearing on this issue before this court rules on the Motion for Preliminary Injunction.

3. IFC Has Raised No Factual Issue Regarding Whether the Injury Was Reasonably Avoidable By Consumers

IFC contends that there are material issues of fact as to whether consumers could have reasonably avoided the injury alleged in Count II.[41] However, it has raised no genuine issue of material fact, but rather a legal dispute about what "reasonably avoidable" means in Section 5(n) of the FTC Act. IFC again is wrong on the law.

IFC contends that consumers could have reasonably avoided harm by opting not to sign the contracts.[42] Noting that the consumers had telecommunication providers before NorVergence, IFC contends it is entitled to depose all the consumers "to determine whether they had access to and communicated with other telecommunications providers, whether they negotiated the ERAs' terms, etc." IFC further contends that an evidentiary hearing is needed to evaluate the consumers' demeanor and credibility.

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[39] IFC PI Opp., pp. 29-32. IFC made the same argument in its Motion to Dismiss, pp. 17-19.

[40] The FTC's allegations regarding substantial injury to consumers are in the Complaint, ¶ 30, and PI Memo, p. 3, notes 3, 6-7. The degree of injury sufficient to be "substantial" is discussed in FTC's Response to Motion to Dismiss, p. 24.

[41] IFC PI Opp., pp. 34-35.

[42] IFC PI Opp., p. 35.

Neither discovery nor an evidentiary hearing, however, is needed. Whether consumers had access to other providers, which in all likelihood they did, is irrelevant. This prong of the unfairness test focuses on whether the consumers had a free and *informed* choice that would have enabled them to avoid the unfair practice. *FTC v. J.K. Publ'ns., Inc.*, 99 F. Supp. 2d 1176, 1201 (C.D. Cal. 2000).[43] The FTC has submitted more than enough evidence to establish likelihood of success in proving that consumers did not have a free and *informed* choice enabling them to avoid the unfair practice. Consumers were told they would save 20%-30% on telecommunications services over a 5-year period. Salespeople were instructed to assure them that if anything happened to NorVergence, services would continue without any problem. Not being experts themselves, they were entitled to rely on the express representations of salespersons. *FTC v. World Media Brokers, Inc.,* No. 02-C-6985, 2004 U.S. District LEXIS 3227 (N.D. Ill. March 2, 2004), at *24; *World Travel*, 861 F.2d at 1029.

Moreover, the likelihood that consumers would read the NorVergence Rental Agreement, let alone understand that it would require them to pay even if NorVergence did not provide service, was greatly diminished by the number and format of documents consumers were required to sign; the Rental Agreement's ambiguous and confusing language; the assurance of NorVergence salespeople that the documents were not binding contracts, along with the "NON-BINDING" label on some of these documents; and the way salespeople discouraged consumers from reading the documents or asking questions.[44] Thus, consumers did not reasonably anticipate that a finance company would try to enforce the Rental Agreements if the promised services were not provided.

Even had consumers thought they might want protection against a NorVergence failure to deliver services, it is unlikely they could have negotiated changes in the Rental Agreements. IFC suggests that they could, but provides no evidence to suggest that NorVergence would have

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[43] FTC Opp. To Motion to Dismiss, p. 24.

[44] Complaint, ¶¶ 16-17, 36, 43-46; PI Memo, pp. 4-6 (citing, for these points, written consumer testimony, NorVergence documents attached to consumer testimony or provided by IFC, written testimony by former NorVergence salespeople, and the NorVergence Trustee Complaint).

accepted any changes.[45] The record contains no examples of materially changed boilerplate from the nearly 800 Rental Agreements IFC has in its files. In fact, the terms of the Rental Agreements, including the "hell or high water" clauses, were part of the NorVergence business plan and part of what attracted IFC.[46] Numerous consumers testified that they did not negotiate any terms of the contract. IFC has done nothing to overcome the evidence that signing the boilerplate contract language was a "take it or leave it" proposition.[47] By the time consumers realized IFC would insist on payment even without services being delivered, it was too late to refuse to pay, or so IFC told them. Thus, consumers could not reasonably avoid the injury.[48]

4. IFC Has Raised No Factual Issue Showing Any Countervailing Benefits That Outweigh the Injury to Consumers

There is no factual issue regarding whether there are countervailing benefits to consumers or competition that outweigh the injury to consumers. As we have noted previously,[49] legitimate equipment lease financing does benefit small businesses and non-profit organizations. But when the finance company knows, or should know, that the purported lease or rental agreement document falsely describes the document's and the transaction's primary purpose, and where this results in consumers paying tens of thousands of dollars for nothing, there are no countervailing benefits sufficient to outweigh the injury.

B. IFC's Practice of Suing and Executing on Judgments in Distant Forums Is Unfair (Count III)

Count III alleges IFC has unfairly sued consumers in distant forums. The elements are that IFC's practice of suing and executing on judgments in distant forums, as described in

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[45] IFC PI Opp., p. 35.

[46] PI Memo, p. 8.

[47] *E.g.,* PX 13, p. 2, ¶ 10; PX 10, pp. 1-2, ¶ 4; PX 26, ¶¶ 7, 9.

[48] Only IFC could reasonably have avoided injury. IFC could have returned these contracts to NorVergence under their recourse agreement when consumers missed their first payments, when IFC learned NorVergence was secretly making first payments for consumers, or when consumers complained or stopped paying. But the worse the problems became, the more contracts IFC bought. Complaint, ¶¶ 22, 24, 26; PI Memo, p.17.

[49] PI Memo, p. 25.

Complaint ¶¶ 8-57: (a) causes or is likely to cause substantial injury (b) that is not reasonably avoidable by consumers and (c) not outweighed by countervailing benefits to consumers or competition.[50]

IFC responds almost exclusively with the same legal arguments it raised in its Motion to Dismiss, not factual disputes based on any evidence.[51] Essentially, it argues that contract law regarding waiver of venue provisions trumps the FTC Act. The FTC has fully answered this legal argument, and demonstrated how the elements of unfairness are met in this violation, in its response to IFC's motion to dismiss and incorporates that answer by reference here.[52] IFC creates a new legal argument, that the FTC must prove that defaulting consumers would have defended if sued in a local forum.[53] Given the evidence that the distant suits were a great burden on all consumers, proving how many might have acted differently if sued locally goes beyond what the FTC needs to prove to show injury. Consumers have spent thousands defending against IFC's collection actions in Illinois and, in some cases, contributing to class actions against IFC.[54] Also, while a *pro se* defense might be possible in a local forum, it would be nearly impossible in a distant forum.

IFC makes one new factual argument, but without evidence: that the costs of defense are no higher in Illinois than elsewhere across the country.[55] Even if true, this misses the point. The

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[50] The bases for this charge are fully described in the PI Memo, pp. 17-19 and 25-28.

[51] IFC PI Opp., pp.35-37; Motion to Dismiss, pp. 31-36.

[52] FTC Opp. to Motion to Dismiss, pp. 26-30.

[53] IFC PI Opp., p. 36.

[54] See, *e.g.*, PX 22, p. 4 (nonprofit Girl Scouts council from Texas does not have resources to defend in Illinois and "would be at a grave disadvantage" having to call NorVergence sales personnel or its own staff to testify in Illinois); PX 21, ¶ 21 ("the lawsuit by IFC in Illinois is especially burdensome for our small business" located in Island Park, New York); PX 19, ¶ 13 ("extreme inconvenience" if Florida business has to litigate in Illinois); PX 14, ¶ 16 ("Litigating this suit in Illinois would require me to essentially stop business at Monroe Staffing Services, LLC for several days to travel to Illinois [from Connecticut] to defend this action"); *accord*, PX 20, ¶ 14 (Georgia). *See also* note 67 below.

[55] IFC PI Opp., p. 36.

issue is the added burden and cost of defending in a distant forum, whether it is Illinois or New Jersey (where NorVergence was located), regardless of which distant forum IFC uses.[56]

C. IFC Has Misrepresented Consumers' Obligations (Count I)

Complaint Count I, ¶ 61.a, alleges that IFC has misrepresented that consumers have absolutely no defenses to payment on the worthless Rental Agreements and no counterclaims they can raise. Complaint Count I, ¶ 61.b alleges that IFC misrepresented that consumers themselves committed fraud on IFC. IFC made these false and misleading claims to coerce payments from consumers, as described at pp. 24-25 of the PI memo.

IFC responds only to ¶ 61.a, and almost exclusively with the holder in due course legal arguments it raised in its Motion to Dismiss, not factual arguments based on any evidence.[57] The FTC has fully answered these legal arguments in its Opposition to IFC's Motion to Dismiss, pp. 17-24, showing that consumers do have, and have successfully asserted, numerous defenses, so IFC's debt collection claims were false. The FTC incorporates that discussion by reference.

To the extent IFC's good faith is relevant to its claims that consumers had no defenses, the FTC has presented overwhelming evidence that IFC knew or should have known that there were serious problems with the NorVergence scheme and thus that IFC was not acting in good faith.[58] IFC does not even attempt to controvert the bulk of evidence on this issue, rather limiting itself to minor criticisms of individual pieces of evidence. For example, in response to FTC evidence that IFC sought amendments to its Master Program Agreement as a result of consumer complaints, IFC notes that one of the amendments was entered into before any consumer complaints could have reached it.[59] Even if true,[60] this is only one in a series of amendments IFC

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[56] See PI Memo, pp. 3, 18, notes 7, 90 (citing consumer declarations and additional evidence).

[57] IFC PI Opp., pp. 19-26.

[58] See evidence cited above, pp. 5-12.

[59] IFC PI Opp., p. 22.

[60] The first amendment's purpose was different, but it still supports the FTC's case. It was to further tie the Rental Agreements to the delivery of telecommunications services by requiring that NorVergence cut off services if a consumer did not pay IFC on the Rental Agreements. PI Memo, note 39.

demanded from NorVergence. IFC raises no issue and makes no argument as to any of the others, such as the one signed on March 16, 2004, which dramatically increased the "holdbacks" on IFC payments to NorVergence, made NorVergence responsible to IFC for consumer delinquencies, and provided additional protections to IFC in the event of a NorVergence insolvency.[61]

IFC raises a new argument not in its Motion to Dismiss. IFC contends that if it failed to fool or intimidate some consumers, there can be no proof of deception.[62] Even assuming it is true that some consumers were not fooled, at least after paying to consult a lawyer, it still is purely a legal issue whether this is a defense to a charge of deception under the FTC Act. IFC provides no legal support for this novel contention, and again is wrong on the law.[63]

Finally, IFC does not respond at all to the second part of Complaint Count I, ¶ 61.b, which alleges IFC's own, post-assignment deception in insisting that consumers themselves have intentionally deceived IFC and are subject to punitive damages.[64] These groundless threats dispel any notion of IFC's innocence in this matter.

IV. WEIGHING THE EQUITIES, THE PUBLIC INTEREST REQUIRES HALTING THE CONSUMER HARM

The equities favor preliminary relief. By law, the public interest in stopping the ongoing harm and in effective law enforcement receives far greater weight than any private concerns. *World Travel*, 861 F.2d at 1029. Here, especially, the private equities are not compelling.

IFC bought and continued buying equipment rental agreements from NorVergence in spite of knowing that the purpose of the consumers signing them was to obtain telecommunications services, and that those services were, by and large, not being delivered. In other words, IFC knew, or should have known, that the consumers had not received the benefit of their bargain, and that the rental agreements were worthless. But knowing this, IFC chose to

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[61] FTC Memo p. 17 and text of amendment at PX 43, p. 18. See pp. 5-10, notes 7-34, above.

[62] IFC PI Opp., pp. 32-33.

[63] See FTC Memo, pp. 23, 28-29, for a discussion of the legal standards for finding deception.

[64] See PI Memo, pp. 21-22 and 29, and notes 106-11.

gamble that it might be able to enforce them anyway, if it lied to the consumers about their rights, threatened them with groundless counterclaims of fraud, and ultimately sued them in Cook County, Illinois, a forum far from where most of the consumers lived and worked.

The only equity that favors IFC is this: It lost some money on the deal and wants to recoup its losses now. But these losses were IFC's own doing. As problems with NorVergence got worse, it did not exercise its recourse right to return all the contracts to NorVergence. Instead, it continued to sink more money into NorVergence.[65]

The equities that favor the consumers are these:[66] They thought they were entering a routine agreement to get telecommunications services and now they owe tens of thousands of dollars for absolutely nothing. Many are being sued by IFC with dogged intent to make them pay those thousands. Some consumers, scattered about the country, are paying thousands of dollars to lawyers in Chicago to seek a change of venue, and more to defend them substantively there or elsewhere.[67] Others have had default judgments entered against them there. Many are paying twice for telecommunications services: once to the carrier who actually provides their service,

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[65] IFC apparently attempts to create sympathy for itself by claiming it is a "small" company. IFC PI Opp., p. 2. To the contrary, on the Internet IFC states: "IFC ranked sixteenth among independent leasing companies with 2005 leasing volume of $105 million," adding that IFC is "one of the top independent leasing companies in the United States." It has subsidiaries or offices in California, Texas, Oregon, Georgia, New York, Florida, and Illinois, and does business in every state. http://www.ifccredit.com/news/IFCNews062306.htm (July 30, 2007) and PX 39, p. 12. It was, however, small businesses, non-profit organizations, and churches that were targeted by NorVergence and are victims here. PI Memo, p. 3, note 4 (citing the NorVergence Bankruptcy Trustee's Complaint and sworn testimony by former NorVergence salespeople and consumers).

[66] The public interest is the aggregation of these consumers' interests. *Elders Grain,* 868 F.2d at 904.

[67] In one case where the consumer was successful when it proactively sued IFC in a local forum and won, the judge found that attorney fees of $45,000, stipulated by the parties, was "equitable and just." *Specialty Optical d/b/a SOS v. IFC Credit Corp*, Cause No. 04-04187-C (Tex. Dallas County Ct. At Law No. 3, Findings of Fact and Conclusions of Law), PX 58, p. 9, ¶ 36. *See Specialty Optical* Final Judgment (entered April 17, 2006 (Appendix C, attached) (amount of the attorney fees award). *See also,* PX 1, ¶ 12 (paid $6731.26 in attorneys fees to participate in class action); PX 2, ¶ 10 (cost about $4,000 to defend in Illinois); PX 3, ¶ 13 ($3385.84 in attorneys fees to Cook County attorney and regular business attorney to defend litigation and additional demands for payment); PX 5, ¶ 9 ("about $4000"); PX 6, ¶ 14 (paid initial retainer of $2500 to attorney in Chicago); PX 7, ¶ 8 ("about $3,000" to be part of class action against IFC); PX 8, ¶ 11 ($3,600 in legal fees to defend in Illinois); PX 9, ¶ 8 (paying unspecified amount to be part of a class action); PX 10, ¶ 11 ($2537 to defend in Illinois).

and again to IFC for the NorVergence services they never got. They have been lied to and mistreated. Their businesses have been harmed. Their personal assets and credit ratings have suffered. Thus, the harm continues to this day and will immediately get worse whenever the Illinois Court of Appeals rules in the case where suits have been temporarily stayed, regardless of whether it upholds the trial court's decision that the floating forum provision of the Rental Agreement is not enforceable to create jurisdiction in Illinois courts.[68]

IFC's response does not say much about one category of consumers: those who bowed to IFC's threats and have been dutifully making their monthly payments all along. Consumer Winnifred A. Bonslett states, "I have continued to pay IFC on the lease for fear of being sued. As the personal guarantor and a widow, I cannot stop paying on the lease because my home is my major asset and I cannot take a chance on losing it."[69] Although this consumer recently stopped making payments, IFC has not denied that it continues to collect from hundreds of others.[70]

IFC's requests for discovery followed by an evidentiary hearing will be satisfied by a trial on the merits. An evidentiary hearing before a ruling on the preliminary injunction, which IFC has not demonstrated is necessary, would cause (1) significant delay in relief for consumers and (2) tremendous inconvenience to consumer witnesses who might have to travel twice to Chicago, once for the preliminary injunction hearing and again for the trial.

With respect to delays, IFC argues that the FTC has delayed for three years and that this alone proves there is no ongoing harm that needs relief. This supposed past history is irrelevant. What matters is the situation today and the immediate risk of harm facing victims now. In any event, any delays have not prejudiced IFC. IFC has been on notice for quite some time of the

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[68] Upholding the trial court would allow IFC to refile the 500 suits elsewhere. Overturning it would allow those suits to proceed in Illinois.

[69] PX 3, p. 1. Once she was informed of the FTC lawsuit, Ms. Bonslett wrote to IFC to say she had been advised, apparently by her attorney, to stop making payments on her rental agreement, IFC PI Opp., Ex. 15. (IFC's argument that her letter proves that her declaration, PX 1, is "false" and "misleading" is ridiculous).

[70] During the FTC's investigation, IFC produced a database about the rental agreements it purchased from NorVergence. There were 822 agreements, 782 listed as "active." Only 528 of those were listed as "NorVergence collections." That would seem to leave nearly 300 agreements, or 254 "active" agreements, on which there had been no collection action filed.

FTC's position and likely action against it. If there were delays, the parties prejudiced are the consumers, not IFC. It is the consumers who continue to pay IFC or to litigate, while IFC has continued collecting.

V. CONCLUSION

The FTC has shown that a preliminary injunction is in the public interest because it is likely to prevail on the merits of this action and that the balance of the equities favors consumers.

Accordingly, the FTC seeks an order preliminarily enjoining IFC from: (1) continuing any collection activities related to the Rental Agreements; (2) contesting any effort by a consumer to transfer venue of an IFC lawsuit filed against the consumer in a distant forum; (3) making

material misrepresentations about the Rental Agreements and potential defenses; and (4) failing to take remedial steps to limit ongoing harm to consumers' credit ratings.

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Respectfully submitted,

s/Randall H. Brook

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