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

IFC CREDIT CORPORATION, assignee of Norvergence, Inc.	)	
Plaintiff,	)	
v.	)	04 C 5905
UNITED BUSINESS & INDUSTRIAL FEDERAL CREDIT UNION,	)	Judge Kennelly
Defendant.	)	

COMMENTS UPON CERTAIN ISSUES RAISED
DURING THE FINAL PRETRIAL CONFERENCE

This memorandum comments upon certain issues raised during the final pretrial conference on July 20, 2006.

I. THE MOTION TO DISQUALIFY ATTORNEYS

UBI learned for the first time last week that Vincent Borst and members of his law firm may have actual, personal knowledge concerning Norvergence's fraudulent activity. UBI sought this information in its interrogatories filed on November 4, 2004. It requested the identification of all persons known to IFC to have knowledge of the claims or defenses raised in this action. Specifically, UBI requested the identity of "each person who has or claims to have knowledge concerning the various subject matters, allegations, averments, or claims of this lawsuit." Mr. Borst should have identified himself and his law firm because they were persons with knowledge of UBI's defenses:

namely that the underlying fraud of Norvergence rendered the contracts void ab initio.

At the time that this interrogatory was filed, Moo & Oink already filed their counterclaim alleging fraud on the part of Norvergence. Mr. Borst was aware of this allegation, which was part of the public record and which involved no confidential information, and should have disclosed himself and his law firm. IFC did not object to this interrogatory, but instead identified Lee Herndon, Vice President of Collections, and Angela Thomas, Collector.

On November 4, 2004, UBI requested “each document relating to the various subject matters, allegations, averments, or claims of this lawsuit.” IFC should have disclosed the Moo & Oink counterclaim and third party complaint because these pleadings clearly related to the various subject matters, allegations, averments, and claims of this lawsuit. Even though the document is in the public record, IFC still has a duty to disclose it when it is asked for as part of a valid interrogatory.

There are many instances where information or documents are requested in discovery that may be found in the public domain (e.g. contact information, financial statements or balance sheets of public corporations, and so

on). Parties are still required to answer such discovery so long as it is relevant to the claims and defenses asserted in the case at issue. The Moo & Oink pleading and circumstances should have been disclosed despite the fact that they were part of the public record because they are directly relevant to the claims and defenses in this case.

Parties are not required to go on wild goose chases to find public information they have specifically requested and that is available to the other party. That is not how discovery works.

II. CONFLICT OF INTERESTS

Mr. Borst represented parties with a presumptive conflict of interest. Because it previously had no notice and took no discovery of this issue, UBI's knowledge about the presumptive conflict is limited. Pursuant to the Illinois rules of professional conduct, Mr. Borst's law firm should have advised IFC and Norvergence about the presumptive conflict. IFC should have been aware that Askounis & Borst represented Norvergence. At the very time that Mr. Borst represented both parties, IFC was about to enter into a multimillion dollar corporate transaction with Norvergence.

III. IMPUTED KNOWLEDGE

Further, regardless of IFC's actual knowledge, constructive knowledge is imputed to them through well-settled principles of agency law. With such knowledge, IFC cannot be a holder in due course because it did not accept the agreements in good faith.

Section 381 of the Restatement (Second) of Agency states that:

> An agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have and which can be communicated without violating a superior duty to a third person.

When he began his representation of IFC, Mr. Borst entered into a principal/agent relationship with them. UBI is aware of a relationship between Mr. Borst and IFC dating back at least to 1994, including representation before this court since at least 1996.

UBI has to assume that Mr. Borst, acting as an agent to IFC, informed IFC that fraud allegations by Moo & Oink were made against Norvergence and the finance companies involved in the Moo & Oink transaction. As the Court noted, this information was in the public record. It was not privileged and should have been communicated by Mr. Borst to IFC without violating a superior duty to Norvergence.

Certainly, if IFC was about to enter into a large-scale agreement with Norvergence and purchase millions of dollars of commercial paper from Norvergence, it would be proper for its attorney, even if he was not involved in drafting the Master Program Agreement, to inform his client that allegations of fraud had been made against Norvergence. Even the most cursory due diligence would require such disclosure.

Further, under settled principles of agency law, Mr. Borst's knowledge can be imputed to IFC, even if he never told them what he knew. The Illinois rule relating to "imputed knowledge" was set forth in Booker v. Booker, 208 Ill. 529, 541-42 (1904):

> It is also true, as a general proposition, that notice to the agent of facts learned by him while actually engaged in the business of his principal is notice to the principal. Notice to the agent to be notice to the principal must, as a general rule, be given to the former while acting in the course of his employment.

Kuska v. Folkes, 73 Ill.App.3d 540 (2d Dist. 1979)("a principal is deemed to have knowledge of all material facts of which his agent receives notice or acquires knowledge, while acting in the course of his employment and the scope of his authority.").

This rule is based upon two presumptions: "that the agent has acquired knowledge which he has a duty to impart

to his principal" and that "the agent performed that duty." Metro. Sanitary Dist. of Greater Chicago v. Pontarelli & Sons, Inc., 7 Ill.App.3d 829, 840 (1st Dist. 1972). At the very least, Mr. Borst had actual knowledge of the claims made by Moo & Oink and had a duty, under §381 of the Restatement, to impart that knowledge to IFC.

The Illinois rule, also echoed by federal law, clearly recognizes that knowledge of an attorney is imputable to his client. Smith v. Ayer, 101 U.S. 320 (1880); Mutual Life Ins. Co. v. Hilton-Green, 241 U.S. 613, 622-23 (1916); Link v. Wabash Railroad Co., 370 U.S. 626 (1962); Krumholz v. Goff, 315 F.2d 575, 583 (6th Cir. 1963); rehearing denied, 318 F.2d 911 (1963); Cent. Bank & Trust Co. v. Lee C. Nelson, Inc., 221 F.Supp. 721, 723 (D.C. Mont. 1963); Ingalls Iron Works Co. v. Ingalls, 177 F.Supp. 151 (N.D.Ala. 1959), aff'd, 280 F.2d 423 (1960); Land v. Acadian Prod. Corp. of La., 57 F.Supp. 338, 351 (W.D.La. 1944), reversed on other grounds, 153 F.2d 151 (1946); Breaux v. Aetna Casualty & Surety Co., 272 F.Supp. 668, 674 (D. La. 1967); In re Alodex Corp. Sec. Litig., 392 F. Supp. 672, 684 (D. Iowa 1975)("At the time of the Alodex dealings, Mr. Belin had been Cole's attorney for over ten years. This relationship itself may be sufficient to impute plaintiff Belin's knowledge to plaintiff Cole").

In Armstrong v. Ashley, 204 U.S. 272 (1907), the Supreme Court reviewed a case where a company was made aware, through its attorney, that a suit in equity had been commenced where one party alleged its ownership of certain real estate. Even though the suit was dismissed for want of prosecution and without prejudice, the real estate company had imputed knowledge of the suit through its attorney. Id. at 282-83 ("The company asserts... knowledge by the company should not be imputed to it because of the knowledge of its agents....We think the position cannot be maintained").

Further, the Court held that existence of the lawsuit, even though it had been dismissed, "was a warning of the existence of a question as to the title, and it was, at any rate, notice enough to start the company upon some investigation of the facts as to the actual condition of the controversy respecting it." Id. at 281.

Further, "even if it be assumed that the company had no more than a knowledge of the equity suit and its dismissal without prejudice, it simply shows that the company was willing to take the risk of the title, although confessedly questionable." Id. at 283.

This strongly mirrors UBI's contention about IFC's knowledge of the Norvergence fraud: even if IFC "had no

more than a knowledge" of the Moo & Oink allegations, it "was a warning of the existence of a question" as to the enforceability of the Norvergence agreements and "shows that the company was willing to take the risk of the [enforceability of the agreements], although confessedly questionable."

III. THE PREVIOUS JUDGMENTS ARE ADMISSIBLE.

In Greycas v. Proud, 826 F.2d 1560 (7th Cir. 1987), the Seventh Circuit addressed the admissibility of civil judgments in subsequent proceedings. While noting as an initial matter that such judgments are usually inadmissible hearsay, the Court stated that:

> Since judgments are often given conclusive effect in subsequent litigation, through doctrines of res judicata and collateral estoppel, it is a little hard to understand why they should not be allowed to have merely evidentiary effect, if for some reason not all the requirements of res judicata or collateral estoppel are fulfilled.

Id. at 1567. The Court affirmed the admissibility of a prior civil judgment, noting that nothing prevented the party opposing admitting the evidence "from proving, if he could, that the judgment...was erroneous." Id.

That reasoning was subsequently followed by Judge Plunkett in Ullman-Briggs, Inc. v. Salton/Maxim Housewares, Inc., 1996 U.S. Dist. LEXIS 13621 (N.D. Ill. 1996). The District Court held that a motion relying upon Greycas for

the proposition that previous civil judgments were inadmissible in subsequent proceedings "read Greycas too broadly" and noted that the Court "merely acknowledged that such a rule had been stated, citing no cases but only treatises on evidence." Id. at 22. The District Court further held that, because of the "widespread acknowledgment...that prior judgments may be admitted as prima facie evidence," there was little reason to exclude the judgment entirely.

The judgments are also admissible under the Federal Rules of Evidence. Rule 807 covers evidence "not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness" that

> is offered as evidence of a material fact;...is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and...the general purposes of these rules and the interests of justice will best be served by admission of the statement.

Fed.R.Evid. 807(A)-(C). The judgments are reliable and fit within the three requirements of 807.

As an initial matter, the judgments offer "circumstantial guarantees of trustworthiness" because they all verify each other. Every court that has addressed this issue, including courts where IFC was a party to the

litigation, found the contracts entered into by Norvergence were fraudulently induced. That not one court has found differently is strong evidence of the trustworthiness of the statements underlying the judgments.

First, the judgments are offered as evidence of a material fact. If UBI can prove fraudulent inducement, the contracts are void ab initio regardless of whether IFC is a holder in due course. Fraudulent inducement is thus central to UBI's defense.

Second, the judgments are more probative on the issue of the underlying fraud than other issues UBI could procure through reasonable efforts. The contracts at issue here are worth approximately $120,000. This is no small sum but is not enough for UBI to undertake a full scale investigation of the fraudulent actions of Norvergence. Parties with more resources and a greater interest have investigated and brought their claims before various courts of law, all of which have been unanimous in their findings.

Third, the purposes of the rules and the interests of justice would be served by admitting the judgments over a hearsay objection. UBI is merely asking the Court to admit the judgments, as the Ullman-Briggs Court did, as prima facie evidence of the underlying fraud. There will be significant other evidence of Norvergence's fraud.

IFC will have ample opportunity to rebut the evidence and will not be prejudiced by its admittance. Further, given the reliability of the judgments and the relative inability of UBI to obtain the information independently, the interests of justice would best be served by admitting evidence of the judgments.

s/ Gregory A. Adamski_____
Attorney for United Business &
Industrial Federal Credit Union

Gregory A. Adamski
Karen Conti
Samantha R. Engel
Adamski & Conti
100 N. LaSalle Street
Chicago, Illinois 60602
312.332-7800