

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 09-CV-21192 – HUCK/O’SULLIVAN

NCMIC FINANCE CORPORATION, d/b/a
PROFESSIONAL SOLUTIONS FINANCIAL
SERVICES,

Plaintiff,

v.

BRICAN AMERICA, INC.,

Defendant.

**DEFENDANT’S ANSWER, AFFIRMATIVE
DEFENSES AND COUNTERCLAIM**

Defendant, BRICAN AMERICA, INC., by and through its undersigned counsel hereby files its Answer, Affirmative Defenses and Counterclaim in response to the complaint of Plaintiff, NCMIC FINANCE CORPORATION, d/b/a PROFESSIONAL SOLUTIONS FINANCIAL SERVICES, and says:

1. Defendant admits the allegations contained in sentence one of paragraph 1 of Plaintiff’s complaint. Defendant appends hereto as Exhibit “A” the “General Vendor Agreement” referred to by Plaintiff in sentence one of paragraph 1 of Plaintiff’s complaint. Defendant admits the allegations contained in sentence two of paragraph 1 of Plaintiff’s complaint. Defendant admits that Plaintiff has entered into leases with customers of Defendant as alleged in sentence three of paragraph 1 of Plaintiff’s complaint, but denies for want of knowledge or information sufficient to form a belief as

to the truth thereof the remaining allegations contained in sentence three of paragraph 1 of Plaintiff's complaint. Defendant admits the allegations contained in sentence four of paragraph 1 of Plaintiff's complaint. Defendant denies the allegations contained in sentences five, six and seven of paragraph 1 of Plaintiff's complaint. Defendant denies each and every, all and singular, the allegations contained in paragraph 1 of Plaintiff's complaint not otherwise admitted herein to be true.

2. Defendant denies for want of knowledge or information sufficient to determine the truth thereof the allegations contained in paragraph 2 of Plaintiff's complaint.

3. Defendant admits the allegations contained in paragraph 3 of Plaintiff's complaint.

4. For the sole and only purpose of admitting that this Court has jurisdiction over the subject matter set forth in Plaintiff's complaint and that venue of this matter is proper in this Court, Defendant admits the allegations contained in paragraphs 4 and 5 of Plaintiff's complaint.

5. Defendant admits the allegations contained in paragraph 6 of Plaintiff's complaint.

6. Defendant denies the allegations contained in paragraph 7 of Plaintiff's complaint. Defendant avers affirmatively that it is Plaintiff that is in the business of leasing combined television/computer systems.

7. Defendant denies the allegations contained in paragraph 8 of Plaintiff's complaint. Defendant avers affirmatively that it would, pursuant to the terms of Exhibit "A", submit information concerning potential customers of Defendant's equipment and

that upon Plaintiff's approval the equipment would be sold to Plaintiff by Defendant and Plaintiff would lease the equipment to the ultimate user. Defendant avers affirmatively that Exhibit "A" does not restrict the potential customers to "medical providers" as alleged by Plaintiff in paragraph 8 of the complaint.

8. To the extent that the allegations contained in paragraph 9 of Plaintiff's complaint are intended to be representative of a sale of goods from Defendant to Plaintiff and the lease of the goods sold to a customer of Plaintiff, Defendant admits same. Defendant denies the apparent allegation that all lessees of the goods sold were required to be "medical providers" unless Plaintiff had made that a condition of the purchase of the goods from Defendant without including same as a part of Exhibit "A". Further, Defendant alleges affirmatively that the terms of the lease between Plaintiff and its lessees set forth in paragraph 9 of Plaintiff's complaint is not a condition of Exhibit "A" and is only reflected in agreements that may exist between Plaintiff and its lessees.

9. Defendant admits the allegations contained in paragraph 10 of Plaintiff's complaint. Defendant avers affirmatively that the allegations contained in paragraph 10 of Plaintiff's complaint do not contain all of the covenants and conditions between Plaintiff and Defendant found in section 3 of Exhibit "A" and that the agreement speaks for itself.

10. To the extent that the allegations of paragraph 11 of Plaintiff's complaint are intended to be representative of the process of the purchase of goods by Plaintiff from Defendant, Defendant admits same. Defendant avers affirmatively that each purchase of goods by Plaintiff from Defendant was a separate deal and that Exhibit "A" does not require a specific purchase price to be applied to each sale.

11. Defendant denies the allegations contained in paragraph 12 of Plaintiff's complaint. Defendant avers affirmatively that to the extent that Plaintiff was no longer the purchaser and lessor of goods sold to it by Defendant that any leases under which it became lessor by assignment are not covered by the terms and condition contained in Exhibit "A".

12. Defendant denies for want of knowledge or information sufficient to form a belief as to the truth thereof the allegations contained in paragraph 13 of Plaintiff's complaint. Defendant denies that Plaintiff has entered into leases with Defendant's customers as alleged in paragraph 13 of Plaintiff's complaint and alleges affirmatively that the lessees of the goods purchased by Plaintiff from Defendant were customers of Plaintiff.

13. To the extent that the allegations contained in paragraph 14 of Plaintiff complaint are intended to refer to Exhibit "A", Defendant admits same.

14. Defendant denies the allegations contained in paragraph 15 of Plaintiff's complaint and demands strict proof thereof. Defendant avers affirmatively that there are and were no agreements between it and Plaintiff's lessees and further that Plaintiff was aware at all times of any agreements between third parties and its lessees concerning the goods purchased from Defendant and leased to Plaintiff's lessees.

15. Defendant denies the allegations contained in paragraph 16 of Plaintiff's complaint.

16. Defendant denies for want of knowledge or information sufficient to form a belief as to the truth thereof the allegations contained in paragraph 17 of Plaintiff's complaint. Defendant avers affirmatively that to the extent Plaintiff relied on agreements

between third parties and its lessees in reaching its decision to enter into any of the leases, the allegations of paragraph 17 make clear that it was fully cognizant of such agreements between its lessees and third parties and therefore the allegations of paragraphs 15, 16 and 17 are inconsistent with one another.

17. Defendant denies the allegations contained in paragraph 18 of Plaintiff's complaint and demands strict proof thereof.

18. Defendant admits that paragraph 5(a) of Exhibit "A" states that it is a corporation validly existing and in good standing under the laws of Nebraska as alleged in paragraph 19 of Plaintiff's complaint. Defendant avers affirmatively that Exhibit "A" was drafted and prepared by Plaintiff. Defendant further avers affirmatively that Plaintiff knew at all times that Defendant was a Florida corporation. Defendant avers affirmatively that it failed to note the scrivener's error in Exhibit "A". Defendant further avers affirmatively that to the extent that the representation of its corporate status is a material breach of Exhibit "A" that Plaintiff deliberately and intentionally inserted that representation with the hope that Defendant would not notice same and that it could later take advantage of its intentional and knowing action in drafting the agreement.

19. Defendant admits that it has always been a Florida corporation as alleged in paragraph 20 of Plaintiff's complaint. Defendant denies each and every, all and singular, the allegations contained in paragraph 20 of Plaintiff's complaint not otherwise specifically admitted herein to be true.

20. Defendant admits the allegations contained in paragraph 21 of Plaintiff's complaint.

21. Defendant denies the allegations contained in paragraph 22 of Plaintiff's

complaint. Defendant alleges affirmatively that Plaintiff knowingly and willfully paid the proceeds of the equipment purchase to Brican America, LLC as the vendor of the leased equipment over a long period of time. The allegations contained in paragraphs 21 and 22 constitute a sham.

22. Defendant admits the allegations contained in paragraph 23 of Plaintiff's complaint.

23. Defendant denies the allegations contained in paragraphs 24, 25 and 26 of Plaintiff's complaint.

24. To the extent required, Defendant incorporates all of the admissions, denials and affirmative averments contained in paragraphs 1 through 23 inclusive as its response to paragraph 27 of Plaintiff's complaint.

25. Defendant denies the allegations contained in paragraph 28 of Plaintiff's complaint.

26. Defendant denies the allegations contained in paragraph 29 of Plaintiff's complaint. Defendant alleges that because Plaintiff intentionally inserted the language relied on in paragraph 5(a) of Exhibit "A" with full knowledge at all time that Defendant was a Florida corporation that the allegations of paragraph 29 of Plaintiff's complaint should be stricken as a sham.

27. Defendant denies the allegations contained in paragraph 30 of Plaintiff's complaint.

28. Defendant denies the allegations contained in paragraphs 31, 32 and 33 of Plaintiff's complaint.

FIRST AFFIRMATIVE DEFENSE

29. For its first and separate affirmative defense Defendant says that Plaintiff complaint fails to allege facts sufficient to state a cause of action upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

30. For its second and separate affirmative defense Defendant says that Plaintiff is barred in whole or in part from recovery to the extent that it was the scrivener of the agreement between Plaintiff and Defendant appended hereto as Exhibit "A" and that any error therein, whether inadvertent or deliberate, made by Plaintiff estops it from recovery herein.

THIRD AFFIRMATIVE DEFENSE

31. As and for its third and separate affirmative defense Defendant alleges that Plaintiff has failed to name, serve, and join all indispensable parties to this action.

FOURTH AFFIRMATIVE DEFENSE

32. As and for its fourth and separate affirmative defense Defendant says that Plaintiff's claims are barred, in whole or in part, by the doctrine of unclean hands. Plaintiff's prior breach of its contractual and legal obligations and its wrongful and illegal conduct preclude Plaintiff from seeking to invoke this Court's equitable jurisdiction.

FIFTH AFFIRMATIVE DEFENSE

33. For its fifth and separate affirmative defense Defendant says that beginning in 2006 Plaintiff and Defendant engaged in a "course of dealing" as same is contemplated in Florida Statutes § 671.205 which supplements and gives meaning to Exhibit "A". In particular, their course of conduct was that Defendant became the lessor

of the equipment and Plaintiff, upon its approval, accepted assignment of the leases from Defendant. Further, at that time Brican America, LLC became the vendor of the leased equipment and thereafter Plaintiff knowingly and willingly made payment to Brican America, LLC.

WHEREFORE, Defendant, BRICAN AMERICA, INC. prays that Plaintiff's complaint be dismissed and that it go hence without cost.

COUNTERCLAIM

34. Defendant/Counterclaimant, BRICAN AMERICA, INC. hereby sues Plaintiff/Counter-defendant NCMIC FINANCE CORPORATION, d/b/a PROFESSIONAL SOLUTIONS FINANCIAL SERVICES, and says:

35. Defendant/Counterclaimant incorporates herein each of the jurisdictional and venue allegations contained in Plaintiff/Counter-defendant's complaint and in the answer thereto.

36. Pursuant to Exhibit "A" appended hereto Plaintiff/Counter-defendant agreed to purchase certain goods or equipment from Defendant/Counterclaimant for the purpose of leasing such goods or equipment to persons or entities identified by Defendant/Counterclaimant.

37. Further pursuant to Exhibit "A" Plaintiff/Counter-defendant agreed that upon submission to it of certain information and upon approval by it of the lease transaction that it would purchase the goods or equipment from Defendant/Counterclaimant that was the subject of the lease between itself and the lessee.

38. In 2006 Plaintiff/Counter-defendant and Defendant/Counterclaimant

mutually agreed to alter or modify the manner in which they conducted business. By agreement of the parties Defendant/Counterclaimant would become the lessor of the equipment and would enter into a lease agreement with the lessees. Further, the parties agreed that upon submission of information concerning the credibility of the lessees that Plaintiff/Counter-defendant would purchase the leases entered into by Defendant/Counterclaimant with its lessees and accept assignment of those leases. Plaintiff/Counter-defendant further agreed with Defendant/Counterclaimant in 2006 that Brican America, LLC would be the vendor of the equipment and that Brican America, Inc. would be the purchaser thereof as this would be necessary in order for it to be the lessor. Plaintiff/ Counter-defendant and Defendant/Counterclaimant further agreed that the amount to be paid by Plaintiff/Counter-defendant to Defendant/Counterclaimant for assignment of the leases would be the amount of the purchase price of the equipment to be paid by Defendant/Counterclaimant to Brican America, LLC as the vendor thereof. Plaintiff/Counter-defendant also agreed that it would pay the consideration for the lease assignments to Brican America, LLC in lieu of paying Defendant/Counterclaimant and then having it pay that sum to its vendor, Brican America, LLC.

39. This course of conduct continued without alteration or abatement from 2006 until early in 2009.

40. As of April 14, 2009 Defendant/Counterclaimant had received from Plaintiff/Counter-defendant written approval and the agreement to accept assignment of leases entered into by Defendant/Counterclaimant with lessees. The agreed amount of consideration to be paid by Plaintiff/Counter-defendant to Defendant/Counterclaimant for the assignment of the leases for which Plaintiff/Counter-defendant had agreed to accept

assignment was \$2,601,593.03. Pursuant to the approval and agreement of Plaintiff/Counter-defendant to accept assignment of the leases and to pay the agreed amount for such assignments, Defendant/Counterclaimant proceeded to deliver the goods or equipment to the lessees and to install same. Since the delivery and installation of the goods and equipment at the premises of Defendant/Counterclaimant's lessees and delivery of the assigned leases, Plaintiff/Counter-defendant has failed and refused to pay Defendant/Counterclaimant the agreed amount.

41. The amount due Defendant/Counterclaimant for goods and equipment and delivered to the lessees and for the assignment of the leases from Defendant/Counterclaimant to Plaintiff/Counter-defendant is \$2,601,593.03 which amount Defendant/Counterclaimant has demanded from Plaintiff/Counter-defendant.

42. Plaintiff/Counter-defendant is indebted to Defendant/Counterclaimant in the amount of \$2,601,593.03 together with interest thereon from the date payment was due.

WHEREFORE, Defendant/Counterclaimant, BRICAN AMERICA, INC. requests judgment against Plaintiff/Counter-defendant, NCMIC FINANCIAL CORPORATION d/b/a PROFESSIONAL SOLUTIONS FINANCIAL SERVICES for:

- a. The sum of \$2,601,593,03;
- b. Interest thereon at the highest rate allowable by law from the date payment was due; and
- c. For such other and further relief as the Court deems just and proper.

Dated this 3rd day of June, 2009.

Respectfully submitted,

s/Barbara H. Schreibman
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Attorney for Defendant
Brican America, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 3, 2009, I electronically filed the foregoing Answer, Affirmative Defenses and Counterclaim with the Clerk of Court, using CM/ECF.

By: s/Barbara H. Schreibman
Barbara H. Schreibman, Esq.
Attorney for Defendant

EXHIBIT "A"



General Vendor Agreement

This agreement dated July 15, 2006 is by and between Brican America, Inc., (herein after Brican), with a principle place of business at 5301 Blue Lagoon Dr. Suite 520, Miami, FL 33126, and NCMIC Finance Corporation d/b/a Professional Solutions Financial Services (herein after PSFS) with a principle place of business at 14001 University Ave, Clive, IA 50325.

Recitals. PSFS proposes to purchase certain goods from Brican from time to time for the purpose of leasing or financing such goods to customers of Brican and Brican proposes to sell such goods to PSFS. In consideration of such proposals and for other valuable consideration, PSFS and Brican agree as follows:

1. **Definitions.** As used herein:
 - a. "Goods" means the personal property purchased by PSFS hereunder, together with any accessories, attachments, parts and repairs now or hereafter incorporated in or affixed to or used in connection with any such Goods, and includes Goods substituted for the original Goods leased, financed or sold under a Lease and Goods that may be added to a lease.
 - b. "Lease" means any Lease, Rental Agreement, Services Agreement or other agreement of which Goods are a subject thereof.
 - c. "Lessee" means the Lessee or Lessees under a Lease.
2. **Purchase of Goods.** Goods purchased by PSFS from Brican shall be purchased subject to the terms and conditions of this Agreement. The purchase price of any Goods shall be the amount agreed upon by the parties at the time of purchase ("Purchase Price").
3. **Documents.** PSFS shall pay the Purchase Price upon the delivery and acceptance of the Goods by the Lessee provided PSFS has also received the following properly executed documents and has been able to verbally verify delivery and installation with the person signing the Lease or another authorized person.
 - a. PSFS's then current Lease, Rental or other agreement, an application and requested financial information;
 - b. PSFS's delivery and acceptance certificate;
 - c. Brican's invoice to PSFS;
 - d. Such additional support documents (i.e. guaranties, etc.) from Lessee as PSFS may reasonable require; and,
 - e. Lessees check or other instrument for the advance payment.
4. **Leases.** From time to time seller shall submit to PSFS the names of prospective Lessees together with proposal for the purchase of Goods by PSFS to such prospective Lessees. Brican shall supply the financial data and other credit information pertaining to each prospective Lessee, which is necessary to render a fair judgment of the credit standing of such prospective Lessee. In addition, with Brican's consent, PSFS may directly contact prospective Lessees to obtain whatever additional credit and financial information is needed. PSFS agrees to accept or reject each sale and leasing proposal submitted by Brican within one (1) business days after receipt of all credit and financial data and other information deemed necessary by PSFS.
5. **Representation and Warranties: Brican.** Brican represents and warrants that:
 - a. Brican is a corporation, partnership or individual validly existing and in good standing under the laws of Nebraska and has the corporate power or other authority to execute, deliver and perform its obligations under this Agreement;
 - b. Brican is duly qualified to do business in such states in the United States where qualification is reasonably believed necessary for its business operations; and,
 - c. The individual signing this agreement has been duly authorized by the corporate bylaws to sign on its behalf.
6. **Representations and Warranties: Goods.** With respect to Goods sold hereunder, Brican warrants that:
 - a. Title to any Goods purchased under this Agreement shall be free of all liens and other encumbrances;
 - b. All signatures, names, addresses, amounts and descriptions of Goods contained in the documents submitted to PSFS by Brican are true and correct;
 - c. There are no other agreements or warranties given to Lessee relating to the Goods or Leases written or verbal that are not included in the documents given to PSFS;
 - d. Brican has and will continue to perform all of its obligations under the warranties given by Brican relating to the Goods; and,
 - e. Brican will make available a complete maintenance and service operation for the Goods, and furnish all supplies for which PSFS is collecting payments from Lessee.
7. **Brican's Breach of Representations and Warranties.** If Brican breaches any representation or warranty herein with respect to a Lease entered into by PSFS, Brican shall repurchase such Lease and /or Goods from PSFS on demand for the

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unpaid balance due thereon. PSFS may, upon notice to Brican, offset any indebtedness or monies PSFS owes to Brican against any obligation owed to PSFS by Brican. After Brican repurchases a Lease and/or Goods, PSFS will reconvey all of its rights, title and interest in and to the Lease and/or Goods to Brican. Brican's repurchase obligations are not contingent upon Brican recovering the Goods from the Lessee.

8. **Assignment of Agreement.** Brican may not assign this Agreement or any of its obligations or rights under this Agreement without PSFS's prior written consent.

9. **Brican Default.**

a. The following events will constitute Events of Default under this Agreement:

- i. Brican's breach of or failure to perform any of its obligations under this Agreement;
- ii. Brican's insolvency or dissolution, institution by or against Brican of bankruptcy, reorganization, receivership, conservatorship or insolvency proceedings, Brican's making an assignment for the benefit of creditors, or Brican's ceasing to do business as a going concern.

b. Upon the occurrence of any Event of Default, PSFS may do either or both of the following:

- i. Immediately terminate this Agreement, without prior notice to Brican; and,
- ii. exercise any other rights it has under this Agreement, the Uniform Commercial Code or any other law.

Brican will be liable for all costs and expenses incurred by PSFS because of the occurrence of any Event of Default, including repossession cost, court cost and reasonable attorneys' fees.

10. **Customer Default.** In the event of a default by the customer (lessee), and at the request of PSFS, or its assigns, Seller agrees to repossess within 14 days of notification and remarket the equipment on a best efforts basis. Seller will remit the amount equal to the proceeds, less its refurbishing costs, of the sales of the equipment to PSFS, or its assigns after the equipment is sold. Seller will consult with PSFS, or its assigns, prior to selling the equipment if the expected sale price is below the current outstanding book value of the transaction. If Seller cannot remarket the equipment within 60 days after repossession PSFS may assume remarketing efforts on their own accord if desired.

11. **Miscellaneous.** Brican waives notice of acceptance hereof. PSFS's knowledge of any breach of or noncompliance with any of the provisions of this Agreement shall not constitute any waiver by PSFS. Except for certain supplemental and supporting documents, which may be required by PSFS, this Agreement constitutes the entire agreement between the parties and any change or modification to this Agreement must be in writing and signed by the parties. Brican agrees that PSFS may directly provide lease applicants with any written notices required by the Equal Credit Opportunity Act or other law.

12. **Law:** This Agreement shall be deemed to have been made in and shall be construed and governed in accordance with the laws of the State of Iowa.

13. **Term:** This Agreement shall remain in effect from the date above until for a period of twenty-four (24) months and thereafter will automatically renew for consecutive 12 month terms. This Agreement may be terminated either by written agreement or after 30 days written notice by either party to the other. During the term of the agreement Brican will use its best efforts to give PSFS first right of refusal on all financed transactions submitted to Brican. Notwithstanding such termination, the provisions hereof shall continue in force as to all Finance Agreements financed by PSFS.

<p><small>PSFS</small> Professional Solutions Financial Services</p> <p>By <i>[Signature]</i></p> <p><small>its</small> Business Development Manager</p>	<p><small>Brican</small> Brican America, Inc.</p> <p>By <i>[Signature]</i></p> <p><small>its</small> Vice President</p>
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