CAUSE NO. 04-04187-C

SPECIALTY OPTICAL d/b/a SOS	§	IN THE COUNTY COURT
	§	
VS.	§	AT LAW NO. 3
	§	
IFC CREDIT CORP.	§	DALLAS COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

TO THE HONORABLE JUDGE OF SAID COURT:

The Court, having been requested to prepare findings of fact and conclusions of law, finds the following:

1. IFC Credit Corporation ("IFC") entered into a Master Program Agreement ("Master Agreement") with NorVergence, Inc. ("NorVergence") on or about October 10, 2003. NorVergence was engaged in the business of selling telecommunications services and promising discounts to small businesses.

2. As part of the arrangement that NorVergence reached with its small business customers, it supplied a piece of equipment called a Matrix box ("Box" or "Matrix Box") that was to be connected to a telephone or T-1 service line to provide discounted telecommunications services. NorVergence combined the charges for service and the use of the Box in the form of an Equipment Rental Agreement. It was not possible for NorVergence customers to obtain the promised discounted telecommunications cost savings without the telephone or T-1 service.

3. Specialty Optical ("SOS") was induced into the Lease with NorVergence (the "Lease") by, among other things, the promise of telephone service savings. SOS was not interested in leasing the Box alone, but wanted the savings on telephone service. Without the service, the Box served no function.

4. It was NorVergence's practice to sell the leases (such as the SOS Lease) to equipment leasing companies, such as IFC, with which it had extensive relationships.

5. The Master Agreement between NorVergence and IFC set forth the terms under which IFC would purchase the leases from NorVergence. IFC approved all of the NorVergence lease forms, including the SOS form. IFC also worked in conjunction with NorVergence to prepare the confirmation script that was eventually read by an IFC employee to SOS confirming that SOS would receive the NorVergence telephone service savings that NorVergence had promised.

6. On June 30, 2004, NorVergence was forced into an involuntary bankruptcy. This ended the IFC/NorVergence relationship. By the end of their relationship, IFC had purchased between 700 and 800 leases from NorVergence. IFC, through its "hold-backs" and modifications, created a lending relationship between itself and NorVergence. This existed prior to the execution of the SOS Lease. IFC was inextricably intertwined with NorVergence, had a close connection to NorVergence and had a substantial voice in its dealings with NorVergence. IFC worked in conjunction with NorVergence.

7. IFC read the confirmation script to SOS prior to the expiration of the 60-day period, and reaffirmed that SOS would receive the telephone service savings originally promised by NorVergence to SOS. At the time IFC read the script promising these savings, it knew that NorVergence customers were not receiving service and therefore were not receiving the promised savings.

8. About the same time that the first lessees IFC was to start receiving payments from the first group of leases sold to it by NorVergence, instead of payments, IFC started receiving telephone calls and letters from customers complaining that they were not getting service, and thus not receiving the promised savings, from NorVergence, but yet were receiving bills from IFC. IFC was aware that

NorVergence was not providing the service and savings that both IFC and NorVergence had promised to its customers, including SOS.

9. IFC also knew that the Box would not have any value to SOS without the promised service, a telephone line or T-1 line that was to be provided by NorVergence. Nonetheless, IFC reassured SOS that it would receive "NorVergence savings."

10. Under the initial Master Agreement, IFC did not have any protection in the event NorVergence filed for bankruptcy. Additionally, the Master Agreement provided for full payment for the leases that IFC purchased from NorVergence. In March of 2004, after receiving months of telephone calls and letters from customers complaining that they had not received the service and savings promised by IFC and NorVergence, the companies agreed to an amendment to the Master Agreement on March 16, 2004 ("First Amendment"). The First Amendment provided IFC with greater financial protections than the original Master Agreement. It added provisions dealing with the potential insolvency of NorVergence and also added provisions designed to protect IFC financially. This was added because customers were not paying the lease payments because they were not getting the promised service or savings, and IFC knew the Box that was the subject of the leases was totally useless without this service. Thus, when customers refused to pay because they were not receiving the promised savings, IFC's losses were reduced as a result of this amendment.

11. By late April or early May, IFC had decided to provide notice that it would stop funding new leases due to the high rate of customer defaults, as well as the steady stream of complaints by customers to IFC. IFC had become very concerned about the situation regarding the lack of promised service and savings and did not want to have any more exposure for potential losses. However, it eventually decided to continue doing business with NorVergence after it further modified its arrangement with NorVergence to give IFC even greater financial protection in the event

customers defaulted due to lack of service or savings. On or about May of 2004, IFC entered into a second amendment ("Second Amendment") to the Master Agreement, where it increased its holdback by 25 percent, providing itself even greater financial protection. The Second Amendment "holdback" allowed IFC to acquire the leases at steep discounts and excused IFC from funding the balance of the purchase price unless NorVergence started to provide an acceptable level of service that would allow customers to receive the promised savings. Eventually, IFC and NorVergence agreed to two 25 percent holdbacks along with the initial holdback from the First Amendment.

12. In the April and May of 2004 timeframe, IFC had knowledge of the fact that NorVergence was making promises of savings with no intention of delivering such savings. IFC had knowledge of this fraud. NorVergence had promised savings to customers without any intention of providing such savings. IFC participated in deceiving customers through its confirmation script. IFC participated in this fraud by calling customers to reassure them that they would receive service and by continuing to purchase the leases even after it learned that the service and savings were not provided. At the time of the SOS Lease, IFC was aware of this fraud and was obtaining benefits by its discounted lease acquisition costs.

13. On or about May 18, 2004, the final signature was provided on the equipment rental agreement for the SOS Lease (the "Lease"). Also on May 18, 2004, IFC promised SOS that it would receive the savings on its telephone service as promised by NorVergence. At this point in time, IFC had knowledge of the fact that customers were not receiving service and were complaining about the fact that service was not being provided, and IFC had knowledge of the fraud regarding the lack of service or savings.

14. Shortly before NorVergence representatives visited the office of SOS, SOS had signed a two-year agreement for telephone service with a company called Logix. This agreement obligated

SOS to a two-year term for telephone service starting April 5, 2004. NorVergence promised SOS that if it signed the NorVergence agreement, the NorVergence agreement would not be signed or finalized by NorVergence and would not be enforced unless the Logix contract was terminated. SOS was told to fill out paperwork and NorVergence would take care of the Logix agreement. The primary purpose of the arrangement with NorVergence was to purchase lower-cost telephone service and not the Box. SOS had no intention or need to have two telecommunication contracts in force with different providers.

15. On or about May 12, 2004, the Box was delivered to SOS. SOS was not able to inspect the Box for functionality because the service connection necessary for that inspection was not provided. It was only able to determine if there was any physical damage to the exterior of the Box. SOS signed a delivery and acceptance certificate. At the time it signed this certificate, it had not had a reasonable opportunity to inspect the equipment

16. After the Box was delivered, IFC contacted SOS and informed it that it was working in conjunction with NorVergence and reassured SOS that it would receive savings on its telephone service.

17. After SOS was not able to receive service, and not able to inspect the Box for functionality, it sent notice to NorVergence that, if it did not receive service, the Lease would be cancelled. Thereafter, SOS returned the Box in good condition to IFC. There was no evidence that IFC utilized the Box to mitigate its damages either through sale or rent.

18. At the time the Lease was signed, IFC was aware, or reasonably should have been aware, of the fact that NorVergence was engaging in fraud with the lessees and was in poor financial condition and was either unable or not planning to provide the promised service. IFC participated in

the fraud and ratified the conduct of NorVergence. SOS never received service through NorVergence or through IFC. IFC did not act in good faith with regarding to SOS.

19. Due to the fact that service was not provided, SOS did not have a reasonable opportunity to inspect the Box prior to signing the delivery and acceptance form. As a result, there was no acceptance of the equipment under the Uniform Commercial Code. SOS timely rejected the Lease and the Box. The Box was a non-conforming good in that it failed to provide the savings promised and did not function as promised. SOS properly cancelled the Lease.

20. NorVergence and SOS agreed to an oral modification prior to any conduct that could be considered acceptance by making the effectiveness of the agreement subject to cancellation of the Logix agreement. The Logix agreement was never cancelled.

21. The Lease is not a finance lease. The original lessor was NorVergence, which selected the equipment. The purpose of the Lease was not to finance the acquisition of the Box but to obtain telephone service savings.

22. IFC does not qualify as a holder in due course. It was aware of NorVergence' fraud at the time it purchased the Lease. In addition, it participated in its own fraud on SOS in connection with the Lease. IFC was also aware that the Lease was invalid for a failure of consideration at the time of the assignment.

23. The entire Lease and the delivery and acceptance certificate are unconscionable due to the circumstances under which they were entered, the manner in which the terms of the Lease and delivery and acceptance were reached, and the unfairness of the Lease and delivery and acceptance. IFC grossly over-charged for the Box.

24. SOS effectively rejected the Lease. Even if its conduct could be considered acceptance, it properly revoked and timely revoked the acceptance. Its revocation, to the extent

applicable, was proper under TEX. BUS. & COM. CODE § 2A.517. SOS is entitled to cancellation of the Lease under section 2A.508.

25. The Lease fails for a lack of consideration. IFC failed to mitigate its damages.

26. IFC ratified and participated in the fraud of NorVergence. IFC had knowledge of the fraudulent conduct of NorVergence at the time SOS signed the Lease. IFC continued to attempt to enforce the Lease despite its knowledge of the fraudulent scheme. SOS was induced to enter the Lease by the fraud of NorVergence. SOS was induced to enter the Lease by the fraud of IFC. The Lease is vitiated by the fraud of IFC and NorVergence.

27. Under Texas choice of law rules, the floating choice of law clause contained in the Lease is unenforceable, and Texas law governs this transaction. The Lease does not bear a reasonable relationship to the State of Illinois. The State of Texas has a more significant relationship to the transaction and has a materially greater interest in the application of its laws to the transaction. The Lease was solicited and signed in Texas, the Box was delivered to SOS in Texas and was intended to be used in Texas. NorVergence was a New Jersey company with no ties to Illinois. Prior to signing the Lease, SOS did not know that NorVergence would assign the Lease to an Illinois company. All acts regarding the execution of the NorVergence agreement took place in the State of Texas. There was no connection between this transaction and the State of Illinois with regard to the transaction.

28. The choice of law provision contained in the Lease was not conspicuously set forth. Therefore, it does not comply with the TEX. BUS. & COM. CODE § 35.53(b). The Lease is a contract that is for less than $50,000.00.

29. IFC has failed to take the necessary procedural steps to request the application of the laws of a different state. It has failed to file any preliminary motion to ask the Court to apply the laws of the State of Illinois.

30. SOS signed the delivery and acceptance certificate before it had any opportunity to inspect the working order of the Box. This is because service was not provided and the Box was not functional in the absence of T-1 service or telephone service. As a result, SOS never had the opportunity to inspect the Box to determine if the Box worked as represented.

31. Based upon the assurances of IFC of promised savings on service, and the fact that under the Lease, service would not be provided for at least 60 days, IFC participated in the fraud upon SOS. The lessor defaulted and the default substantially impaired the value of the Box. The Box was not in conformity with representations. That non-conformity was not discovered prior to any purported acceptance and any purported acceptance was induced by the lessor's assurances, or by the difficulty of discovery before acceptance to the extent that any acceptance occurred.

32. As of the time that SOS signed the Lease, IFC had received telephone calls and letters for several months regarding lack of service. There were defaults on many leases due to this lack of service. This had become so severe, that IFC decided to stop doing business with NorVergence, but continued only because NorVergence provided it with additional collateral and agreed to allow IFC to have increased holdbacks.

33. The Lease acquisition from NorVergence was not an isolated occurrence. IFC acquired between 700 and 800 leases from NorVergence. It is currently in litigation on more than 500 of those leases.

34. IFC did not act in good faith in connection with the Lease. IFC ratified the conduct of NorVergence.

35. IFC's decision to progressively increase its protections against defaults and obtain additional collateral, as well as its knowledge of the fact that service was not being provided by NorVergence, and that NorVergence customers did not receive the savings that both IFC and NorVergence promised, leads to the inevitable conclusion that IFC had knowledge of the underlying fraud. IFC's testimony to the contrary is not credible. This additional protection was only needed because customers refused to pay their rental payments because the promised savings and service had not been provided. Additionally, IFC purchased the Lease for $11,743.67, which is a dramatic reduction in the purchase price and further signifies that it had knowledge of the declining state of NorVergence, that there were numerous lessee defaults due to lack of service, and the fact that NorVergence was not providing the necessary service. At the time IFC purchased the Lease, it had knowledge of SOS's defenses of failure of consideration and fraud.

36. The attorneys' fees awarded in the judgment were stipulated to by the parties and have been awarded in accordance with the parties' stipulation and pursuant to TEX. CIV. PRAC. & REM. CODE § 37.009. The court approves of the parties' stipulation and finds that the fees awards are equitable and just. The Court finds costs should be taxed against IFC. Based on the parties' pleadings, both parties have agreed that fees may be awarded under TEX. CIV. PRAC. & REM. CODE § 37.009.

37. The acceleration provision in the Lease is not enforceable because it is an unenforceable penalty. The Lease permitted acceleration for any breach regardless of how small or insignificant that breach was. As a result, the acceleration provision is unenforceable and IFC failed to present any evidence of damages.

38. SOS did not breach the Lease because the Lease was properly canceled, the Box was timely and properly rejected, and the Lease was induced by fraud or fails for want of consideration.

39. IFC cannot enforce any waiver of defense provision in the Lease because it does not meet the requirements of a holder in due course. IFC also cannot enforce the waiver of defense provision because the Lease was induced by fraud and because the Lease was unconscionable. IFC also cannot enforce the waiver of defense provision because the Lease is not a finance lease.

SIGNED this 5 day of June, 2006.

JUDGE PRESIDING