IN THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
SUMMIT COUNTY, OHIO

PREFERRED CAPITAL, INC.,	)	
	)	
Appellant,	)	C.A. Nos. 22475, 22476, 22477,
	)	22478, 22485, 22486, 22487,
v.	)	22488, 22489, 22497, 22499,
	)	22506, 22513
POWER ENGINEERING GROUP,	)	
INC., et al.,	)	
	)	
Appellees.	)	

BRIEF ON APPEAL OF *AMICI CURIAE*, ATTORNEYS GENERAL OF THE STATES OF ARIZONA, CALIFORNIA, CONNECTICUT, FLORIDA, ILLINOIS, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, NEW YORK, OHIO, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA AND TEXAS IN SUPPORT OF APPELLEES

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Dated April 22, 2005

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SUMMARY OF ARGUMENT

The Attorneys General for the states of Arizona, California, Connecticut, Florida, Illinois, Louisiana, Maryland, Massachusetts, Michigan, New York, Ohio, Pennsylvania, Rhode Island, South Dakota, and Texas ("Amici"), as *amici curiae*, submit this brief in support of Appellees together with the attached Motion for Leave To File Amicus Brief. Amici urge this Court to affirm the lower courts' dismissals for lack of jurisdiction and to bar enforcement of the floating forum selection clause contained in Appellees' NorVergence contracts.

The 8th Appellate District Court of Appeals and the United States District Court, Northern District of Ohio, Eastern Division, have previously held that a floating forum selection clause is invalid since it fails to put customers on notice of where they would be required to defend an action. This Court should affirm that precedent in this appeal.[1]

This Court's decision will directly affect the Appellees and may affect more than 500 similarly situated Preferred Capital[2] customers whose cases are pending in Cuyahoga and Summit County Courts of Pleas, as well as thousands of other small businesses across the nation whose livelihoods are jeopardized by NorVergence-related collection actions that could be or have been instituted by over twenty (20) different finance companies, including Preferred Capital.

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[1] *See Copelco Capital, Inc. v. St. Mark's Presbyterian Church*, 2001 WL 106328 *3 (Ohio App. 8th Dist., Feb. 1. 2001) (unpublished) (Appendix 1); *see also Preferred Capital, Inc. v. Aegis Risk Management Insurance Services, Inc., et al.*, USDC Case No. 5:04-cv-02312-JRA, Order and Decision, Mar. 28, 2005 (N.D. Ohio); pending on appeal sub nom., *Preferred Capital v. Aegis Risk Management Insurance Services, Inc.*, USCA No. 05-3329 (6th Cir.) (Appendix 2).

[2] Beginning in March 2005, Preferred Capital began notifying its NorVergence customers that Preferred Capital had assigned some or all of its interests under the NorVergence contracts to The Huntington National Bank of Cleveland, Ohio. For simplicity in this brief, the Amici will use "Preferred Capital."

This Court should affirm the lower courts' decisions in favor of giving small businesses and non-profits fair notice in forum selection clauses and prevent Preferred Capital from using Ohio's courts as a default mill.

STATEMENT OF THE ATTORNEYS GENERAL'S INTERESTS ON APPEAL

The Amici, acting under their respective consumer protection statutes, are seeking to protect customers of Preferred Capital, NorVergence and/or other leasing companies against unfair and deceptive trade practices by these companies in their financing activities. A number of the state Attorneys General have issued subpoenas or requests for information, sent cease and desist requests, filed bankruptcy proofs of claim for damages, and/or filed suit against Preferred Capital, NorVergence, and/or the other leasing companies.[3] The decision this Court enters in this consolidated appeal will affect more than just the thirteen Appellees; this Ohio appellate court is a focal point of litigation for 500 plus Preferred Capital cases pending in Cuyahoga and Summit Counties involving the NorVergence contracts assigned to a special master in the Cuyahoga County Court of Common Pleas.[4] Furthermore, this Court's decision may be cited as legal precedent on the issue of the validity of the NorVergence floating forum selection clause as the Amici pursue their own NorVergence state investigations and litigation. Over 11,000 small businesses nationwide, including some Ohio businesses,[5] likewise may find themselves subject

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[3] Those states include, but are not limited to, California, Colorado, Connecticut, Florida, Illinois, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina, Pennsylvania, and Texas.

[4] The customers in these cases reside in the Amici States and elsewhere throughout the nation.

[5] The Ohio Attorney General's Office is aware of a number of Ohio small businesses that executed leases with NorVergence and, similar to Appellees, may find themselves haled into court in distant forums based on NorVergence contracts that contain the floating forum selection clause.

to collection actions in foreign jurisdictions due to the NorVergence floating forum selection clause.

STATEMENT OF FACTS

Amici adopt and incorporate by reference the Statement of Facts contained in Appellees' Brief on Appeal filed with this Court.

ARGUMENT

I. THE TRIAL COURTS PROPERLY DISMISSED THE ACTIONS BECAUSE THE NORVERGENCE FLOATING FORUM SELECTION CLAUSE IS UNFAIR AND UNREASONABLE.

Preferred Capital argues that the NorVergence floating forum selection clause was proper (Preferred Capital 7).[6] Forum selection clauses are enforceable unless they are unfair or unreasonable. To be reasonable and fair a forum selection clause must eliminate uncertainty by permitting the parties to agree in advance on a specific forum acceptable to both of them and be clear and conspicuous. Because the NorVergence floating forum selection clause fails these tests, it is unfair and unreasonable and was properly held to be unenforceable.

A. The Floating Forum Selection Clause Fails to Provide Appellees with Adequate Notice of Where They May be Sued.

The purpose of a forum selection clause is to permit the parties to eliminate uncertainty by agreeing in advance on a mutually agreeable forum. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13 (1972). Contracts containing floating forum selection causes (i.e., forum selection clauses that fail to specify a particular jurisdiction) do not create this certainty because those clauses fail to provide a party with notice of the location of the forum where it could be sued.

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[6] Preferred Capital's Brief on Appeal will be referred to as (Preferred Capital [page]).

For example, in *Copelco Capital, Inc. v. St. Mark's Presbyterian Church*, 2001 WL 106328 at *3 (Ohio App. 8th Dist., Feb. 1, 2001) (unpublished) (Appendix 1), the appellate court held that the floating forum selection clause was unreasonable because the lessees could not reasonably anticipate being sued in the foreign jurisdiction since the contract did not specify a jurisdiction and neither of the original contracting parties were based in the jurisdiction where suit was initiated. Similarly, in *Preferred Capital, Inc. v. Aegis Risk Management Insurance Services, Inc.*, USDC Case No. 5:04-cv-02312-JRA, Order and Decision at 5, Mar. 28, 2005 (N.D. Ohio) *pending on appeal sub nom. Preferred Capital, Inc. v. Aegis Risk Management Insurance Services, Inc.*, USCA No. 05-3329 (6th Cir.) (Appendix 2), the court held that the NorVergence floating forum selection clause was unreasonable because a defendant could not reasonably foresee the jurisdiction where he or she could be hauled off to by an assignee.[7]

In determining whether floating forum selection clauses are unfair or unreasonable, this Court should consider: (1) whether the lessees could reasonably anticipate being called into the distant forum; and (2) whether the contract named a specific jurisdiction. *See Copelco Capital, Inc., supra*, 2001 WL 106328 at *4; *Aegis Risk Management Insurance Services, Inc.* at 4-6, 9.

The NorVergence floating forum selection clause is unfair and unreasonable because the clause, printed on the back of the agreement, does not tell Appellees that they could be sued in Ohio.[8] NorVergence, in its contract, did not clearly or conspicuously name the specific

[7] The U.S. District Court in *Aegis* also found the NorVergence floating forum selection was unreasonable because the clause was the product of overreaching by NorVergence to accommodate future assignees. *Aegis*, at 5-6. This is also a valid basis for affirming the lower courts' decisions.

[8] The issue of whether the NorVergence contracts are leases as opposed to rental or service contract financing agreements, or any other legal issue except personal jurisdiction, is not presently before this Court. The Amici reserve their rights to argue those issues if and when they arise in the future.

jurisdiction where the customer could be sued. *See* NorVergence Equipment Rental Agreement of Custom Data Solutions (Appendix 3). Instead, the NorVergence contract provides that:

> This agreement shall be governed by, construed and enforced in accordance with the laws of the State in which Rentor's principal offices are located or, if this Lease is assigned by Rentor, the State in which the assignee's principal offices are located, without regard to such State's choice of law considerations and all legal actions relating to this lease shall be venued exclusively in a state or federal court located within that State, such court to be chosen at Rentor or Rentor's assignees' sole option.

(See Appendix 3). Such a provision, with no clear indication where a party might face suit, provides no certainty to the parties. Rather than setting forth a specific jurisdiction, or one reasonably likely, the forum for resolution of future disputes is left to ***any place in the country*** depending solely upon the unilateral conduct of NorVergence and its assignee **after** the parties executed the contract.

Consequently, when they entered into the agreements, Appellees had no basis to believe that they would be sued in Ohio. Ohio was not specified in the agreement and Appellees could not anticipate that NorVergence would assign the contracts to Preferred Capital. *See, e.g.*, Affidavit of David W. Orlando, dated December 10, 2004 (Appendix 4 at ¶¶ 22, 26); Affidavit of Michael L. Nudi, dated October 28, 2004 (Appendix 5 at ¶¶ 12, 18, 20). Only after Appellees executed the agreements did NorVergence, a New Jersey corporation, assign Appellees' contracts to Preferred Capital, an Ohio corporation headquartered in Cuyahoga County. *See, e.g.,* Appendix 4 at ¶¶ 25-27; Appendix 5 at ¶ 21. At the time of execution of the agreements, NorVergence did not tell Appellees that they would assign Appellees' contracts to Preferred Capital and that Appellees would be consenting to jurisdiction in Ohio. Id. NorVergence was located in New Jersey while the thirteen Appellees were located in Florida, Georgia, Michigan,

New Jersey, New York, Pennsylvania, Texas and Washington. Since neither NorVergence nor Appellees was based in Ohio, Appellees had no reasonable expectation that they would be sued in Ohio.

The Ohio appellate courts have approved the use of forum selection clauses ***only*** where the contract explicitly specifies the jurisdiction. *See Information Leasing Corp. v. Jaskot*, 151 Ohio App. 3d 546, 549, (2003) ("You consent to the jurisdiction and venue of any court located in the State of Ohio"); *D. Wallace Nicholson v. Log Systems, Inc.,* 127 Ohio App. 3d 597, 599 (1998) ("The parties hereto voluntarily consent and allow the courts of the State of North Carolina to assume jurisdiction over any disputes and controversies between the parties, arising out of or concerning this Agreement"); *Automotive Illusions, LLC v. Reflex Enterprises*, 2002 WL 1821676 (Ohio App. 10th Dist., Aug. 6, 2002) (unpublished) (Appendix 6) ("venue in the state or federal courts of San Antonio, Bexar County, Texas"); *Four Seasons Enterprises v. Tommel Finance Services, Inc.*, 2000 WL 1679456 (Ohio App. 8th Dist., Nov. 9, 2002) (unpublished) (Appendix 7) ("In the event of any litigation related to the lease or the guarantee, venue and jurisdiction shall be proper in any state or federal court in the State of Colorado"); *Kennecorp Mortgage Brokers, Inc.,* 66 Ohio St. 3d 173, 176 (1993) (forum selection clause selecting Ohio as forum was valid).

Ohio appellate courts, notably the Ohio 8th Appellate District, the United States District Court (N.D. Ohio), and others have held that "floating" (or unspecified) forum selection clauses are invalid because they lack certainty and notice. *Copelco Capital, Inc.* involved a 60-month lease for a copier where the lease provided "Lessee hereby consents to personal jurisdiction in the . . . appropriate State court in the state of assignee's corporate headquarters." The lease was assigned to a New Jersey leasing company, which sued the lessee there. When the New Jersey

judgment was brought to Ohio for enforcement, the court distinguished the floating forum selection clause from *Kennecorp* and other cases upholding the validity of forum selection clauses. While part of the basis for the distinction was that the lessee was not a business engaged in business for profit, the court also held that:

> Unlike the contract in *Kennecorp*, and other cases where Ohio courts have upheld the validity of forum selection clauses, the forum selection clause contained in appellants' contract failed to specify the jurisdiction of a particular court. . . . Consequently appellants could not reasonably anticipate being called into the courts of New Jersey to defend their contractual agreement. . . .

See Copelco, 2001 WL 106328 at *4. Thus, the court concluded that "enforcement of the forum selection clause contained in the contract would be unreasonable." *Id.* Here, the same result should follow.

Courts in other states have also refused to enforce floating forum selection clauses on the ground that their enforcement would be unreasonable. An Illinois federal court rejected the NorVergence floating forum selection clause on the ground that "the failure to specify a particular jurisdiction renders the lessee incapable of knowing where an assignee might file suit. . . . As such, the contract lacks an essential element regarding forum selection. . . . Put simply, no selected forum is identified in the agreement." *See IFC Credit Corporation* v. *Eastcom, Inc.*, 2005 WL 43159 (N.D. Ill. Jan. 7, 2005) (unpublished) (Appendix 8). *See also IFC Credit Corporation v. Century Realty Funds, Inc.*, No. 04-C-5908, (N.D. Ill. Mar. 4, 2005) (unpublished) (Appendix 9).

In an Appellate Division case of the New Jersey Superior Court, a leasing contract required that the lessee "consent to the jurisdiction of any local, state or federal court located within our or our assignee's state . . ." *Copelco Capital, Inc. v. Shapiro,* 331 N.J. Super 1, 4

(2000). The *Shapiro* court held that the floating forum selection clause was unfair and unreasonable because the lessee could not identify the jurisdiction in which an action will be brought and the assignee's identity was not known prior to signing the contract. *Id.* The court found the provision ineffective and in conflict with the very purpose of forum selection clauses:

> Enforcing a clause such as the one at issue here is also inconsistent with the doctrinal underpinnings of the majority rule that forum selection clauses should be given effect. The rule rests, at least in part, on the idea that in a realm of free contract the parties should be allowed to agree in advance to a mutually satisfactory forum, thus insuring a predictable and neutral locus for the resolution of any dispute. . . . We fail to see how the instant clause furthers these objectives. The fact that the forum selection clause before us **could easily have resulted in a "proper forum" anywhere in the entire country** - - a forum that would not be identifiable until sometimes after the agreement was entered into - - violates the notice requirement . . . and militates in favor of a finding that the clause is both unfair and unreasonable . . . .

Shapiro, 331 N. J. Super. at 6-7 (citations omitted, emphasis added). *See also Hunt* v. *Superior Court (Commercial Money Center),* 81 Cal. App. 4th 901, 908 (2000) (provision that party "Freely Consent to Personal Jurisdiction of the Applicable Jurisdiction" does not give adequate notice to the party agreeing to the jurisdiction and thus no valid contract with respect to such clause exists); *Whirlpool Corp.* v. *Certain Underwriters at Lloyd's London*, 278 Ill. App. 3d 175, 180 (1996) (contract provided party will submit to the jurisdiction of any court of competent jurisdiction within the United States was held not to create a binding forum selection clause. "Good policy dictates that a true forum selection clause should be clear and specific. This clause is not"); *Sterling National Bank, assignee of NorVergence, Inc., v. Kenneth E. Chang P.S. and Kenneth H. Chang*, NY Civil Court, NY County, No. 54751/04, Decision/Order, p. 5 (Mar. 22, 2005) ("the Court has questions as to whether a forum selection clause that does not identify a specific jurisdiction is enforceable.") (unpublished) (Appendix 10).

The NorVergence floating forum selection clause does not provide appropriate notice of

where an enforcement action could be brought and consequently it is unfair and unreasonable. This Court should uphold the lower court's ruling that it is unenforceable.

B. Enforcing the Floating Forum Selection Clause is Fundamentally Unfair Because it is Not Clear and Conspicuous.

A key provision in a contract must be clear and conspicuous in order to be fair and reasonable. When a clause that purportedly establishes the jurisdiction in which an action may be brought is buried in a contract, it does not give adequate notice to a party. Such an unclear and inconspicuous provision is not fair or reasonable.

The NorVergence contract contains two pages of small, densely packed print. The floating forum selection clause is a mere three lines in the midst of a 20 plus paragraph agreement; is on the reverse of the agreement; is in 6 point typeface. The clause is not in heavy bold type, nor is it either underlined or capitalized (Appendix 3). Enforcing such concealed language would be fundamentally unfair. *See First Federal Financial Service, Inc. v. Derrington's Chevron, Inc.*, 230 Wis. 2d 553, 561 (1999) (determining that forum selection was unconscionable where the clause was in small type on the backside of the agreement); *Leasefirst v. Hartford Rexall Drugs, Inc.*, 168 Wis. 2d 83, 90 (1992) (determining that forum selection clause was unconscionable where the clause was in small type and the lessee did not read the clause).

C. The NorVergence Floating Forum Selection Clause Imposes Undue Hardship on the Appellees.

The floating forum selection clause is unreasonable and unfair because its enforcement would also result in undue hardship to Appellees by requiring Appellees to travel or transport witnesses to Ohio, a distance that would render access to the courts economically impractical. If the clause is enforced, Appellees as a practical matter will have no meaningful access to the

courts because the likely cost of trying to defend this suit remote from Appellees' places of business quickly will equal or exceed the amount in dispute. *See, e.g.*, Affidavit of Custom Data Solutions (Appendix 3). For the other 500 plus similarly situated small business customers with cases pending in Cuyahoga and Summit County Courts of Pleas, some may not be able to afford to defend out-of-state lawsuits and, consequently, Preferred Capital will file default judgments against these customers and domesticate the judgments in Appellees' home jurisdiction. This practice is not a legitimate collection effort. This Court should affirm the lower courts' decisions and not allow Preferred Capital to use the floating forum selection clause to prevail by attrition.

II. BY AFFIRMING THE LOWER COURTS' DECISIONS, THIS COURT WILL NOT DENY PREFERRED CAPITAL DUE PROCESS.

Preferred Capital contends that disapproval of the NorVergence floating forum selection clauses will put into question all forum selection clauses and therefore disrupt the economies of the leasing industry. Preferred Capital 14. This appeal is not about valid forum selection clauses but, rather, only about the NorVergence *floating* forum selection clause, and the equipment leasing industry has prospered without utilizing such an unreasonable tool for many years.

The leasing industry has flourished for many years without the need for the one-sided, floating forum selection clause used in the NorVergence agreements. In fact, courts and governmental agencies have previously invalidated distant forum selection clauses without hindering the growth of the leasing industry. As early as 1974, the Federal Trade Commission ("FTC") challenged venue waiver contract provisions and distant forum lawsuits. *See West Coast Credit Corp.*, 84 F.T.C. 1328, 1329-30 (1974) (Appendix 11) (FTC prohibited venue provisions allowing suit in a distant county that was still in customer's state); *Spiegel, Inc. v.*

F.T.C., 540 F.2d 287, 294 (7th Cir. 1976) (FTC properly determined that Spiegel's practice of suing out-of-state consumers in its home jurisdiction of Illinois was an unfair business practice within the meaning of the F.T.C. Act). While the focus of those suits was injury to individuals as consumers, the order in *Spiegel* also addressed small businesses as consumers. *See Spiegel, Inc.*, 86 F.T.C. 425, 439 (1975) (Appendix 12). The administrative law judge and Commission opinions both expressly considered the injury caused to "small businesses" by distant forum actions and prohibited distant suits against them. *Id.* at 439 (FTC found Spiegel's practice of suing out-of-state consumers in Spiegel's home jurisdiction of Illinois to be an unfair business practice).

Courts have since applied the legal limitations on the use of distant forum selection clauses to the leasing industry. *See Central Ohio Graphics, Inc., v. Alco Capital Resource, Inc.*, 221 Ga. App. 434, 435 (1996) (holding that floating jurisdictional clause was unreasonable and therefore invalid); *Shapiro*, 331 N. J. Super. at 6-7 (same); *Derrington's Chevron, Inc.*, 230 Wis. 2d at 563-65 (holding that leasing company's forum selection clause was unconscionable); *Leasefirst*, 168 Wis. 2d at 89-90 (holding that leasing company's floating forum selection clause was unconscionable).

The significance of this legal history is twofold. First, it shows a longstanding awareness of the problem of distant forum lawsuits and the need to remedy abuses. Second, it shows that the finance and leasing industry has survived, and even thrived, in the face of limitations on distant forum lawsuits. Preferred Capital overstates its position when it suggests that a decision to invalidate the floating forum selection clauses will devastate the leasing industry. Preferred Capital 14. Despite the *Spiegel* rulings in the mid-1970s limiting the use of distant forum selection clauses and the emergence of similar case law in the leasing context, the leasing

industry continues to thrive some thirty years later and generates billions of dollars each year in leases.

Furthermore, Preferred Capital also fails to show any appreciation for the enormous costs NorVergence customers have incurred as a whole. Several state Attorneys General and the Federal Trade Commission recently filed proofs of claim in the NorVergence bankruptcy case that attempt to quantify the exposure of these customers. For example, the Massachusetts Attorney General filed a claim for more than $8 million on behalf of Massachusetts NorVergence customers (Appendix 13), the Florida Attorney General filed a claim for approximately $20 million on behalf of Florida NorVergence customers (Appendix 14), and the Federal Trade Commission has filed a claim for more than $200 million for all NorVergence customers nationwide (Appendix 15). These proofs of claim indicate the significant amount of money NorVergence customers have at stake. Thus, this Court should recognize the financial harm that may be exacted against the NorVergence customers.

Any financial harm that Preferred Capital may experience if this Court affirms the lower courts' decisions is outweighed by the harm that small businesses will face by having to choose between being defaulted or bearing the unreasonable and disproportionate costs of litigating thousands of miles from where they operate. Even if Preferred Capital cannot sue Appellees in Ohio, Preferred Capital will not be denied its day in court. Instead of allowing Preferred Capital to turn the Ohio courts into a default mill that would be a mockery of due process for small businesses located hundreds and thousands of miles away, Appellant should be afforded an opportunity to re-file its actions in the jurisdictions where Appellees reside and the agreements were executed. *See Derrington's Chevron, Inc.*, 230 Wis. 2d at 564 (noting that leasing company could litigate case in lessee's home jurisdiction without undue expense).

Thus, this Court should uphold the lower courts' decisions because they will not prevent Preferred Capital from seeking relief.

CONCLUSION

A floating forum selection clause buried in a contract is neither fair nor reasonable. Upholding the trial courts' decisions that the NorVergence floating forum selection clauses are unenforceable will not deny Preferred Capital its day in court, but instead will insure that small businesses, which lack the resources to defend themselves in a distant forum, will have their day in court. For these reasons, this Court should affirm the lower courts' decisions.

Respectfully submitted,

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APPENDIX

1. *Copelco Capital, Inc. v. St. Mark's Presbyterian Church*, 2001 WL 106328 *3 (Ohio App. 8th Dist., Feb. 1. 2001)

2. *Preferred Capital v. Aegis Risk Management Insurance Services, Inc.,* USDC Case No. 5:04-cv-02312-JRA, Order and Decision, Mar. 28, 2005 (N.D. Ohio), *pending on appeal sub nom. Preferred Capital v. Aegis Risk Management Insurance Services*, USCA No. 05-3329 (6th Cir.)

3. NorVergence Equipment Rental Agreement of Custom Data Solutions (from record)

4. Affidavit of David W. Orlando, d/b/a Home Furnishings of Clarkston, Inc., dated December 10, 2004 (from record)

5. Affidavit of Michael L. Nudi, d/b/a Custom Data Solutions, Inc., dated October 28, 2004 (from record).

6. *Automotive Illusions, LLC v. Reflex Enterprises*, 2002 WL 1821676 (Ohio App. 10th Dist., Aug. 6, 2002)

7. *Four Seasons Enterprises v. Tommel Finance Services, Inc.*, 2000 WL 1679456 (Ohio App. 8th Dist., Nov. 9, 2002)

8. *IFC Credit Corporation* v. *Eastcom, Inc.*, 2005 WL 43159 (N.D. Ill. Jan. 7, 2005)

9. *IFC Credit Corporation v. Century Realty Funds, Inc.*, No. 04-C-5908, (N.D. Ill. Mar. 4, 2005)

10. *Sterling National Bank, assignee of NorVergence, Inc., v. Kenneth E. Chang P.S. and Kenneth H. Chang*, NY Civil Court, No. 54751/04, Decision/Order, p. 5 (Mar. 22, 2005)

11. *West Coast Credit Corp.*, 84 F.T.C. 1328, 1329-30 (1974)

12. *Spiegel, Inc.*, 86 F.T.C. 425, 439 (1975)

13. Commonwealth of Massachusetts Proof of Claim, filed February 25, 2005, in NorVergence, Inc. bankruptcy, No. 04-32709, U.S. Bankruptcy Court, District of New Jersey

14. State of Florida Department of Legal Affairs and Florida Consumers Proof of Claim, filed February 26, 2005, in NorVergence, Inc. bankruptcy, No. 04-32709, U.S. Bankruptcy Court, District of New Jersey

15. Federal Trade Commission Proof of Claim, filed February 22, 2005, in NorVergence,

Inc., bankruptcy proceeding, No. 04-32709, U.S. Bankruptcy Court, District of New Jersey

Appendix 1

1 of 1 DOCUMENT

COPELCO CAPITAL, INC., Plaintiff-Appellee -vs- ST. MARK'S PRESBYTERIAN CHURCH, et al., Defendants-Appellants

NO. 77633

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY

2001 Ohio App. LEXIS 315

February 1, 2001, Date of Announcement of Decision

PRIOR HISTORY: [*1]

CHARACTER OF PROCEEDING: Civil appeal from Common Pleas Court. Case No. CV-390140.

DISPOSITION:

Reversed and Vacated.

LexisNexis(R) Headnotes

COUNSEL: For Plaintiff-Appellee: JONATHAN A. MASON, ESQ., JOSEPH M. RUWE, ESQ., Mason Slovin & Schilling, Cincinnati, Ohio.

For Defendants-Appellants: UCHE MGBARAHO, ESQ., Cleveland, Ohio.

JUDGES: PATRICIA ANN BLACKMON, JUDGE. JAMES D. SWEENEY, P.J., CONCURS. ANNE L. KILBANE, J., CONCURS IN PART AND DISSENTS IN PART WITH ATTACHED OPINION.

OPINIONBY: PATRICIA ANN BLACKMON

OPINION:

JOURNAL ENTRY and OPINION

PATRICIA ANN BLACKMON, J.:

Appellants Saint Marks Presbyterian Church and Reverend Joan Campbell (Reverend Campbell) appeal the decision of Cuyahoga County Court of Common Pleas denying appellants' motion for relief from judgment, which sought to vacate the foreign judgment filed by appellee Copelco Capital, Inc. Appellants assign the following two errors for our review:

I. *THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANTS BY GRANTING A DEFAULT JUDGMENT AGAINST APPELLANTS WHEN NEW JERSEY COURT DID NOT HAVE IN PERSONAM JURISDICTION OVER THE APPELLANTS.*

II. *THE TRIAL COURT ERRED BY NOT SCHEDULING A HEARING.*

Having reviewed the record and the legal arguments [*2] of the parties, we reverse and vacate the judgment of the trial court. The apposite facts follow.

On December 29, 1995, appellant Saint Marks Presbyterian Church entered into an equipment lease contract with American Financial. Resources (AFR), a company based in Cleveland, Ohio. Under the terms of the contract, appellants agreed to lease a Ricoh 6655 copier system for sixty months at a monthly payment of $ 1,068. The contract provided, *inter alia,* the following forum selection clause:

> **Law:** If this lease is assigned by the lessor then lessee agrees that the rights and remedies of the parties shall be interpreted construed and enforced in accordance with the laws and public policies of the State of incorporation of the assignee. In any legal action hereunder Lessee hereby consents to personal jurisdiction and venue in either the United States District Court or appropriate State court in the state of assignee's corporate headquarters.

Appellant Reverend Campbell signed the lease contract on behalf of St. Marks on December 29, 1995. On the same day, AFR assigned all its rights, title, and interests in the contract to appellee Copelco Capital, Inc., a New Jersey

[*3] based company.

Appellants made monthly payments required under the contract from March 1996 to November 1997. Appellants stopped making payments in December 1997. On or about March 25, 1998, Copelco filed suit against appellant in the Superior Court of New Jersey. n1 On April 8, 1998, appellee caused appellants to receive personal service of summons together with its complaint at the church's address in Cleveland, Ohio.

n1 The record does not contain a copy of the complaint.

Appellants failed to respond to appellee's New Jersey complaint. On March 31, 1999, Copelco filed a motion requesting the Superior Court of New Jersey to enter default judgment against appellants. On June 28, 1999, the Superior Court of New Jersey entered default judgment against appellants in the amount of $ 37,848.69.

On August 23, 1999, appellee filed a notice of foreign judgment in the Cuyahoga Court of Common Pleas pursuant to the Ohio Uniform Enforcement of Foreign Judgments Act, R.C. 2329.022. On August 30, 1999, the [*4] Cuyahoga County Clerk of Court sent notice of the filing to appellants. Nine days later, on September 8, 1999, the court granted appellee's request and entered the foreign judgment against appellants.

In response, appellants filed a motion for relief from judgment pursuant to Civ.R. 60(B) seeking to vacate the foreign judgment, together with a motion to stay execution of the New Jersey judgment. In its motion for relief of judgment, appellants alleged Copelco failed to give proper notice to appellants; and that the courts of New Jersey lacked *in personam* jurisdiction over appellants because appellants had no contact with New Jersey and did not receive service of summons in New Jersey. Additionally, appellants alleged an entitlement to relief from judgment because the trial court accepted the foreign judgment immediately without first inquiring into New Jersey's jurisdiction to enter judgment.

Appellee opposed appellants' motion. Appellee argued appellants consented to personal jurisdiction in New Jersey by virtue of the forum selection clause in the contract; that appellant received personal service in the New Jersey action; and that appellee followed all necessary procedures [*5] to establish its foreign judgment. On January 27, 2000, the trial court entered its decision, without opinion, denying appellants' request for stay of execution of foreign judgment together with appellant's Civ.R. 60(B) motion. Appellants now appeal the trial court's decision.

In their first assignment of error, appellants argue the trial court erred in accepting the foreign judgment, which was void for lack of jurisdiction and in denying their Civ.R. 60(B) motion for relief from the judgment. Appellants argue they satisfied the requirements for relief under Civ.R. 60(B), and therefore, are entitled to an order by the trial court vacating the New Jersey judgment.

We begin our analysis of appellants' first assignment of error by noting that authority to vacate a void judgment is not found in Civ.R. 60(B), but rather constitutes an inherent power possessed by Ohio courts. *Durkin v. Turismo Jaguar*, 1999 Ohio App. LEXIS 6120 (Dec. 17, 1999), Lake App. No. 98-L-101, unreported citing *Patton v. Diemer* (1988), 35 Ohio St. 3d 68, 518 N.E.2d 941, paragraph four of the syllabus. Thus, appellants need not satisfy the requirements of Civ.R. 60(B) to demonstrate an entitlement to relief. Rather, appellants [*6] must show that the New Jersey court lacked jurisdiction to enter judgment. See *Discount Bridal Servs, Inc. v. Kovacs* (1998), 127 Ohio App. 3d 373; 713 N.E.2d 30; *Waymire v. Litsakos*, 1992 Ohio App. LEXIS 5591 (Nov. 5, 1992), Montgomery App. No. 13197, unreported. We now address the merits of appellants' first assignment of error.

Appellants argue the New Jersey court lacked jurisdiction to enter judgment against them because they did not establish minimum contacts with New Jersey and did not consent to give personal jurisdiction to that state. Under these circumstances, appellants argue acceptance and enforcement of the New Jersey judgment is unreasonable and unjust. Appellee counters, arguing that the establishment of minimum contacts is not at issue in this case because the New Jersey court gained personal jurisdiction over appellants pursuant to the forum selection clause contained in the equipment lease contract.

"The requirement that a court have personal jurisdiction over a party is a waivable right and there are a variety of legal arrangements whereby litigants may consent to the personal jurisdiction of a particular court system." *Kennecorp Mortgage Brokers, Inc. v. Country Club Convalescent Hospital, Inc.* (1983), 66 Ohio St. 3d 173, 175, 610 N.E.2d 987, 989. [*7] Use of a forum selection clause by contracting parties is a recognized method of consenting to the jurisdiction of a particular court system. *M/S Bremen v. Zapata Off Shore Co.* (1972), 407 U.S. 1, 92 S. Ct. 1907, 32 L. Ed. 2d 513; *Kennecorp; Discount Bridal Servs, Inc.* As a general rule, a forum selection clause contained in a freely bargained commercial contract is valid and enforceable, unless enforcement would be unreasonable or unjust. *Id.* In cases where Ohio courts have upheld the validity of a forum selection clause, contracting parties specifically identified the state in which to resolve their legal disputes. See *Kennecorp* (upheld parties bargained for contract designation of Ohio as proper forum between California and Ohio companies); *White*

Outdoor Prods. Co. V. American Roll Stock Co. (Jun 28, 2000), Medina App. No. 3012-M, unreported (upheld litigants bargained for contract designation of Ohio as proper forum between Texas and Ohio litigants); *Valmac Indus. V. Ecotech Mach., Inc.* (Apr. 7, 2000), Montgomery App. No. 17990, unreported (upheld parties bargained for contract designation of Georgia as proper forum between Georgia and Ohio [*8] litigants, but noted Ohio may have concurrent jurisdiction to determine disputes); *Vintage Travel Servs. V. White Heron Travel* (May 22, 1998), Montgomery App. No. 16433, unreported (upheld parties bargained for contract designation of Texas proper forum for dispute between Texas and Ohio companies); *Discount Bridal Servs, Inc., supra.* (upheld parties bargained for contract designation of Maryland as proper forum for dispute between Maryland and Ohio companies); *Alpert v. Kodee Techs.*, 117 Ohio App. 3d 796, 691 N.E.2d 732 (1997) (upheld bargained stating "venue will be determined by legal residence of defendant" where dispute between the original contracting parties one with residence in California and the other in Ohio).

For example, *Kennecorp* involved a contract dispute between an Ohio based company and one based in California. In *Kennecorp,* two apparently sophisticated parties entered into a multi-million dollar financing agreement, which included the following forum selection clause:

> All laws pertaining to this agreement shall be governed [sic] by the laws of the state of Ohio, as well as jurisdiction shall be in the Ohio courts. [*9]

Kennecorp Mortgage Brokers, Inc. v. Country Club Convalescent Hospital, Inc. (Feb 21, 1992), Lucas App. No. L-91-157, unreported. In the absence of fraud, overreaching or any allegations that enforcement of this clause was unreasonable or unjust, the Ohio Supreme Court found this clause sufficient to establish consent of the parties to personal jurisdiction in the courts of Ohio. *Kennecorp* at 176, 610 N.E.2d at 989.

We conclude the instant case is distinguishable from *Kennecorp* and other cases upholding the validity of forum selection clauses. Appellants are not sophisticated commercial entities engaged in business for profit, but rather are a local church and its reverend. Unlike the contract in *Kennecorp,* and other cases where Ohio courts have upheld the validity of forum selection clauses, the forum selection clause contained in appellants' contract failed to specify the jurisdiction of a particular court. Further, unlike the other cases where the original contracting parties resided in different states when they executed the contract, appellants and AFR, the original contracting parties, were both based in the state of Ohio. Consequently, appellants [*10] could not reasonably anticipate being called into the courts of New Jersey to defend their contractual agreement with AFR. We are mindful that pursuant to their contracts with assignors, assignees like appellee are vested with the rights and remedies available to the assignor. Further, we do not by our decision express any opinion regarding the merits of appellee's underlying complaint against appellants. However, under the particular circumstances of this case, we conclude enforcement of the forum selection clause contained in the contract would be unreasonable. Therefore, we sustain appellants' first assignment of error. Accordingly, we reverse and vacate the judgment of the trial court.

Based on our resolution of appellants' first assignment of error, we conclude appellants second assignment of error is moot. See App.R. 12.

Judgment reversed and vacated.

This cause is reversed and vacated.

It is, therefore, considered that said appellant recover of said appellee its costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate [*11] Procedure.

Exceptions.

JAMES D. SWEENEY, P.J., CONCURS

ANNE L. KILBANE, J., CONCURS IN PART AND DISSENTS IN PART WITH ATTACHED OPINION.

PATRICIA ANN BLACKMON

JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S. Ct. Prac.R. II, Section 2(A)(1).

CONCURBY: ANNE L. KILBANE (In Part)

DISSENTBY: ANNE L. KILBANE (In Part)

DISSENT:

CONCURRING AND DISSENTING OPINION

DATE: FEBRUARY 1, 2001

ANNE L. KILBANE, J., CONCURS IN PART AND DISSENTS IN PART:

On this appeal from an order of Judge Ann T. Mannen that denied St. Mark's and Reverend Campbell's Civ.R. 60(B) motion, I agree that it should be reversed but, rather than vacate the foreign judgment, I would remand for consideration [*12] of the motion under R.C. 2329.022 and Civ.R. 60(B) standards of review.

In *Copelco Capital, Inc. v. Shapiro* (2000), 331 N.J. Super. 1, 750 A.2d 773, an appeal from the same Bergen County Superior Court (Law Division, Civil Part) that entered the order in the present matter, the Appellate Division of the Superior Court determined, in part, that a substantially similar clause in a copier lease did not provide notice of the forum and "militates in favor of a finding that the clause is both unfair and unreasonable as measured by Restatement standards." *Id.*, at 6, 750 A.2d at 776. Citing Restatement (Second) of Conflict of Laws Sec. 80 (1988). Under *Shapiro,* the foreign judgment at issue may be voidable but, because of the meager record before this court and the lack of a hearing below, *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St. 3d 18, 19, 665 N.E.2d 1102, I cannot conclude that the judgment is void. I would, therefore, remand for further proceedings.

Appendix 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

PREFERRED CAPITAL, INC.,	)	CASE NO.: 5:04CV2312
Plaintiff,	)	JUDGE JOHN ADAMS
v.	)	**ORDER AND DECISION**
AEGIS RISK MANAGEMENT INSURANCE SERVICES, INC., et al.,	)	
Defendants.	)	

This matter comes before the Court on Motion by the Defendants, Aegis Risk Management Insurance Services, Inc. and Yukiya Sato (collectively referred to as "Defendants") to Dismiss the Complaint for lack of personal jurisdiction, improper venue, and insufficiency of service of process pursuant to Fed. R. Civ. P. 12(b)(2),(3), and (5). (Doc.#5) Plaintiff Preferred Capital, Inc. ("Plaintiff") filed a Response in Opposition to the Motion. Thereafter Defendants filed a Reply in Support of their Motion. The Court has been advised, having reviewed the Motion, Response, Reply, pleadings and applicable law. It is hereby determined that Defendants' Motion is GRANTED.

DISCUSSION

On May 27, 2004, Defendant Aegis Risk Management Services, Inc. entered into a rental lease agreement with NorVergence, Inc. ("NorVergence") for telecommunication equipment. Defendant Yukiya Sato signed a personal guarantee on the Rental Agreement. On June 14, 2004, NorVergence assigned the lease to Plaintiff. Plaintiff sent Defendants notice of the assignment on June 15, 2004.

The Complaint alleges that Defendants defaulted on their obligations under the lease by failing to make the agreed monthly payment. Plaintiff has made a demand of judgment for the full amount due under the Rental Agreement including costs, interest, and attorney fees.

The action was filed in Summit County, Ohio, Court of Common Pleas on October 18, 2004. Defendants removed it to this Court under 28 U.S.C. §1332. Therefore, the Court has subject matter jurisdiction over this action based on diversity.

Defendants' Motion to Dismiss is based on Fed. R. Civ. P. 12(b)(2), (3), and (5). Rule 12 states in pertinent part, ". . . the following defenses may at the option of the pleader be made by motion: . . . (2) lack of jurisdiction over the person, (3) improper venue, . . . (5) insufficiency of service of process . . . ." Although Defendants appear to challenge venue, no arguments are made on this issue. Defendants state only the reasons why this venue would be inconvenient to them. Therefore, this Court will not evaluate whether a more proper venue may exist for this action. Additionally, Defendants challenge the service of process but make no further argument on this issue. If service of process is properly performed under Ohio Rule of Civil Procedure 4.3, such service is effective only when there is a valid basis for in personam jurisidiction over the out-of-state defendant. *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 224 n. 3 (6th Cir. 1972). Therefore, the Court will discuss the service of process only as it relates to Defendants' argument of lack of personal jurisdiction.

If a federal court's jurisdiction is based solely on diversity, that court may exercise personal jurisdiction over an out-of-state defendant only to the extent that a court in the forum state could. *Kerry Steel v. Paragon Indus., Inc.*, 106 F.3d 147, 148

(6th Cir. 1997). The district court must refer to the forum state's law to determine the "in personam jurisdictional reach." *LAK, Inc. v. Deer Creek Enterprises,* 885 F.2d 1293, 1298 (6th Cir. 1989) (quoting *Southern Machine Co. v. Mohasco Indus.,* 401 F.2d 374, 376 n.2 (6th Cir. 1968)).

Once a defendant has made a claim that the court lacks personal jurisdiction over him, it is the plaintiff's burden to establish such. *Nationwide Mut'l Ins. Co. v. Tryg, Int'l Ins. Co., Ltd.,* 91 F.3d 790, 793 (6th Cir. 1996). Additionally, because this Court has chosen not to conduct an evidentiary hearing on the issue of personal jurisdiction, the Plaintiff "need only make a prima facie showing of jurisdiction." *CompuServe, Inc. v. Patterson,* 89 F.3d 1257, 1262 (6th Cir. 1996). "Dismissal in this procedural posture is proper only if *all* the specific facts which the plaintiff . . . alleges collectively fail to state a prima facie case for jurisdiction." *Id.* Therefore, the Court may not look to the evidence presented by the Defendants but can look only to the Complaint and any affidavits submitted by the Plaintiff to determine whether a prima facie case has been presented. *Kerry Steel, Inc. v. Paragon Industries, Inc.,* 106 F.3d 147, 149 (6th Cir. 1997).

I. Forum Selection Clause

Plaintiff asserts that Defendant voluntarily signed the Rental Agreement which contains a valid forum selection clause for contract disputes. Defendants claim the provision is invalid and unenforceable because it contains vague language which does not advise them that they may be haled into an Ohio court.

The forum selection clause is located on page 2 of the Rental Agreement, under the heading "APPLICABLE LAW." The provision states:

> This agreement shall be governed by, construed and enforced in accordance with the laws of the State in which Renter's principal offices are located or, if this Lease is assigned by Rentor, the State in which the assignee's principal offices are located, without regard to such State's choice of law considerations and all legal actions relating to this Lease shall be venued exclusively in a state or federal court located within that State, such court to be chosen at Rentor or Rentor's assignee's sole option.

Complaint, Exhibit A, p. 2. Additionally, the personal guaranty signed by Defendant Sato states, "The same state law as the rental will govern this guaranty. You agree to jurisdiction and venue as stated in the paragraph titled Applicable Law of the Rental." Complaint, Exhibit A, p.1 (capitalization omitted).

A forum selection clause is a recognized way for contracting parties to select an agreed jurisdiction to hear disputes regarding the contract. *M/S Bremen v. Zapata Off Shore Co.*, 407 U.S. 1 (1972). Generally, if the clause is contained in a freely bargained commercial contract it is considered valid and enforceable unless to enforce such a provision would be unreasonable and unjust, or the clause was a product of fraud or overreaching. *Id.* at 15. *Bremen* articulates that even if the designated forum would be inconvenient to the challenging party, if it was clearly foreseeable at the time of contracting, the challenger would have burden of demonstrating that the chosen forum would be "so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *Id.* at 17-18. The Supreme Court stated that absent such a showing, there would be no basis to find that enforcement of the forum selection clause would be unfair, unjust, or unreasonable. *Id.* at 18.

Plaintiff points out that Ohio courts have upheld forum selection clauses where the jurisdiction is not stated with particularity, citing to *Alpert v. Kodee Technologies,* 117 Ohio App.3d 796 (1997), *General Electric Co. v. G. Siempelkamp & Co.*, 29 F.3d

1095 (6th Cir. 1994), and *Bernath v. Potato Services of Michigan,* 2002 WL 31233240 (N.D.O.H. 2002). However, in *Alpert*, the appellate court did not review the clause under *Bremen*. *Id.* at 801. Additionally, the forum selection clause at issue in *Alpert* required any action for breach be filed in the Defendants' state of residence. *Id.* at 802. Therefore the forum was clearly foreseeable at the time the contract was entered into. *Id.* In *General Electric,* the forum was also reasonably foreseeable by the parties at the time the contract was entered into, as it stated that jurisdiction would exist at the principal place of business of the supplier, who was the defendant. *General Electric*, 29 F.3d at 1099. Finally, in *Bernath,* the forum selection clause required all disputes be resolved at the "Seed State of Origin" which the parties agreed was Maine. Therefore, in *Bernath,* it was also reasonably foreseeable at the time of contracting clear which forum an action would be filed in. The main theme among all of the above cases is that the forum was *reasonably foreseeable* at the time the parties entered into the contract.

In the case at bar, the Rental Agreement states, "all legal actions relating to this Lease shall be venued exclusively in a state or federal court located within [the State in which the assignee's principal offices are located], such court to be chosen at Rentor or Rentor's assignee's sole option." Complaint, Exhibit A, p. 2. From the plain language of the Rental Agreement, the Defendants could be brought into any court across this country, state or federal, if, as occurred in this case, the contract is assigned. Based on this, at the time the contract was entered into, Defendants could **not** reasonably foresee what jurisdiction they may be brought into by an assignee. Therefore, to enforce this forum selection clause would be unreasonable and unjust. Additionally, based on the plain language of the contract, this clause appears to be a product of overreaching by

NorVergence in an attempt to accommodate future assignees. Because it is determined that the forum selection clause is invalid and unenforceable, the Court must determine whether it can exercise in personam jurisdiction over the Defendants.

II. Personal Jurisdiction

This Court's ability to exercise personal jurisdiction over a defendant must satisfy both the state's long-arm statute and the requirements of Due Process under the Fourteenth Amendment. *Reynolds v. Int'l Amateur Athletic Fed'n,* 23 F.3d 1110, 1115 (6th Cir. 1994).

Ohio's long-arm statute is O.R.C. §2307.382, which states that a court may obtain personal jurisdiction by the defendant:

> (1) Transacting any business in this state;
> (2) Contracting to supply services or goods in this state;
> (3) Causing tortuous injury by an act or omission in this state;
> (4) Causing tortuous injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
> (5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he might reasonably have expected such person to use, consume, or be affected by the goods in this state, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
> (6) Causing tortuous injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;
> (7) Causing tortuous injury to any person by a criminal act, any element of which takes place in this state, which he commits or in the commission of which he is guilty of complicity.
> (8) Having an interest in, using, or possessing real property in this state;
> (9) Contracting to insure any person, property, or risk located within this state at the time of contracting.

O.R.C. §2307.382(A). Additionally, Civ. R. 4.3(A)(1) allows for out-of-state service of process for a defendant who is "transacting any business in this state".

The Ohio Revised Code describes "transacting any business" in O.R.C. §2307.382(B) as occurring when, "a person who enters into an agreement, as a principal, with a sales representative for the solicitation of orders in this state is transacting business in this state. . . . ." The Ohio Supreme Court further describe the term "transact" to mean, "to prosecute negotiations; to carry on business; to have dealings..." *Kentucky Oats Mall Co.*, 53 Ohio St.3d 73, 75 (1990). Ohio Supreme Court rulings demonstrate that O.R.C. §2307.382 and Civ. R. 4.3 are to "reach to the full outer limits of litigation which is permissible consistent with federal due process of law limitations." *Hammill Manufacturing Co. v. Quality Rubber Products, Inc.*, 82 Ohio App.3d 369, 374 (1992).

Under a Due Process analysis, the constitutional touchstone is "whether the nonresident defendant purposefully established "minimum contacts" in the forum state; purposeful establishment exists where, *inter alia*, the defendant has created continuing obligations between himself and residents of the forum." *Goldstein v. Christiansen*, 70 Ohio St.3d 232, 237 (1994) (internal quotations omitted). The United States Supreme Court has held that a state may assert personal jurisdiction over a nonresident defendant if that person has "certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

In determining whether finding jurisdiction offends due process, the Supreme Court found, in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), that a nonresident

defendant would receive notice of being subject to jurisdiction through "contract documents and the course of dealing" with the forum state. Justice Brennan stated in the majority opinion that "the constitutional touchstone remains whether the defendant purposely established 'minimum contacts' in the forum State." *Burger King*, 471 U.S. at 475. The Supreme Court found that such minimum contacts could be found if the nonresident defendant purposely established such contacts, which created a "substantial connection" with the forum state, and "has 'deliberately' engaged in significant activities within a State ... or has created 'continuing obligations' between himself and residents of the forum, ... he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." *Id.* at 475-476.

The question of jurisdiction doesn't end here though. Once it has been determined that the nonresident defendant purposely established minimum contacts with the forum state, the contacts,

> may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' ... Thus courts in 'appropriate case[s]' may evaluate 'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies.' These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. ... On the other hand, where a defendant who purposely has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.

Id. at 475.

Defendants claim that neither has sufficient contacts with the State of Ohio to permit *in personam* jurisdiction under the Due Process Clause or Ohio's long-arm statute. Plaintiff makes no argument that personal jurisdiction exists under a Due Process/minimum contacts analysis, stating "[b]ecause the contract at issue contains a valid forum-selection clause, any analysis of the Defendant's [sic] contacts to the state of Ohio is unnecessary and irrelevant. Plaintiff's Response in Opposition to Defendant's [sic] Motion to Dismiss, p. 10. Because the Court has determined that the forum selection clause at issue in this case is not valid, it must look to the Complaint and any affidavits Plaintiff submitted with its Opposition to the Motion to Dismiss.

Nowhere in the Complaint is it alleged that Defendants have any contact with the State of Ohio. There are also no allegations made by in the Complaint that the Defendants: transacted any business in this state; contracted to supply goods or services in this state; caused tortuous injury in this state; have any interest in, are using or possessing real property in this state; or contracted to insure any person, property or risk located within this state at the time of contracting. Additionally, Plaintiff submitted no affidavits or exhibits to demonstrate the above. Based on this, the Court finds no basis for it to exercise personal jurisdiction over the Defendants based on Due Process or Ohio's long-arm statute.

CONCLUSION

Based on the discussion contained herein, this Court finds the forum selection clause contained in the contract at issue to be invalid and unenforceable. Additionally, the Court finds no basis to exercise in personum jurisdiction over the Defendants based on Due Process under the Fourteenth Amendment or Ohio's long-arm statute. Plaintiff

has therefore failed to state a prima facie case for personal jurisdiction over the Defendants. As personal jurisdiction over the Defendants is lacking, under Ohio Rule of Civil Procedure, the service of process on the Defendants is also not effective. As such, Defendants' Motion is found to be well-taken and is therefore GRANTED. There is no just cause for delay.

So ordered.

s/ Judge John R. Adams
JUDGE JOHN R. ADAMS
UNITED STATES DISTRICT COURT

Appendix 3

NorVergence

Equipment Rental Agreement

Rental Number _____

Rentor (Full Legal Name)				Renter (Full Legal Name)			
Norvergence, Inc							
Address				Address			
550 Broad St 3rd Floor				410 South Main			
City	State	County	Zip Code	City	State	County	Zip Code
Newark	NJ	Essex	07102	Romeo	Michigan		48065-0586
Telephone Number				Telephone Number	Federal Tax ID Number		State of Organization
973 - 242 -7500				586 752 9671			MI

Dear Customer: We've written this Equipment Rental Agreement (the "Rental") in simple and easy-to-read language because we want you to understand its terms. Please read this Rental carefully and feel free to ask us any questions you may have about it. We use the words you and your to mean the Renter indicated above. The we, us and our refer to the Rentor indicated herein.

Rental Agreement: We agree to rent to you and you agree to rent from us the Equipment listed below (the "Equipment"). You promise to pay us the Rental Payments shown below according to the payment schedule below.

Quantity	Equipment Model & Description	Serial Number
1	Matrix	

Equipment to be new unless otherwise noted: Used ☐ Reconditioned ☐

Equipment Location (if different from Renter address above)

Address					
City	State	County	Zip Code	Renter Contact Name	Telephone Number
					- -

RENTAL TERM 60 Months

Transaction Terms: Rental Payment **$ 635.86** (plus applicable taxes) Security Deposit $ 0

☑ If checked the first payment is due approximately 60 days after date of acceptance.

Your payments shown above may not include any applicable tax. If any taxes are due, you authorize us to pay the tax when it is due and agree to reimburse us by adding a charge to your Rental Payment. You authorize us to insert or correct missing or incorrect information on the Rental; we will send you notice of such changes. Payments will be applied first to past due balances, taxes, fees and late charges, and then to the current amount due.

You agree to all the terms and conditions shown above and the reverse side of this Rental, that those terms and conditions are a complete and exclusive statement of our agreement and that they may be modified only by written agreement between you and us. Terms or oral promises which are not contained in this written Rental may not be legally enforced. You also agree that the Equipment will not be used for personal, family or household purposes. You acknowledge receipt of a copy of this Rental. Your obligations to make all Rental Payments for the entire term are not subject to set off, with holding or deduction for any reason whatsoever.

This Rental is not binding on us until we accept it by signing below. You authorize us to record a UCC-1 financing statement or similar instrument, and appoint us as your attorney-in-fact to execute and deliver such instrument, in order to show our interest in the Equipment.

THIS RENTAL MAY NOT BE CANCELLED OR TERMINATED EARLY.

Rentor: NorVergence, Inc.

By: X _____

Accepted on behalf of Rentor on: _____

Renter _____

By: X Michael L. Nudi

Name (print) MICHAEL L. NUDI

Date/Title: 10-24-03 VICE PRES

You agree that a facsimile copy of this Rental bearing signatures may be treated as an original.

Guaranty: In this guaranty, you means the person(s) making the guaranty, and we, us and our refer to the Rentor indicated above. You will unconditionally, jointly and severally guarantee that the Renter will make all payments and pay all the other charges required under this Rental and under any other agreement now or hereafter entered into between the Renter and us (the "agreement(s)") when they are due and will perform all other obligations under the agreement(s) fully and promptly. You also agree that we may make other arrangements with the Renter and you will still be responsible for those payment and other obligations.

We do not have to notify you if the Renter is in default. If the Renter defaults, you will immediately pay in accordance with the default provisions of this Rental all sums due under the terms of this Rental and you will perform all other obligations of Renter under this Rental. It is not necessary for us to proceed first against the Renter before enforcing this guaranty. You will reimburse us for all the expenses we incur in enforcing and of our rights against the Renter or you, including attorney fees. THE SAME STATE LAW AS THE RENTAL WILL GOVERN THIS GUARANTY. YOU AGREE TO JURISDICTION AND VENUE AS STATED IN THE PARAGRAPH TITLED APPLICABLE LAW OF THE RENTAL.

Personal Guaranty:

By: X(sign)_____, Individually

Name (print)

Personal Guaranty:

By: X(sign)_____, Individually

Name (print)

09-16-2003

Equipment Rental (continued)

RENT/TERM OF RENTAL: You agree to pay us the amount specified in this Rental as the Rental Payment (plus any applicable taxes) when each payment is due. Your acceptance of the Equipment will be conclusively and irrevocably established upon the receipt by us of your confirmation (verbal or written) of such acceptance. However, if you have not provided us with confirmation of acceptance or provided us with written notice of non-acceptance of the Equipment, in either case, within 10 days after delivery of the Equipment, you will be deemed to have inspected and irrevocably accepted the Equipment and to have authorized us to pay for the Equipment. The term of this Rental begins on a date designated by us after receipt of all required documentation and acceptance by us ("Commencement Date") and continues for the number of months designated as "Rental Term" on the face of this Rental. The Rental Payments are payable in advance periodically as stated in or on any schedule to this Rental. You agree to pay an Interim Rental Payment in the amount of one-thirtieth (1/30th) of the Rental payment for each day from and including the Effective Date ("which shall be the date the Equipment is installed") until the day preceding the Commencement Date.

PAYMENT: You authorize us to change the Rental Payment by not more than 15% due to changes in the Equipment configuration, which may occur prior to our acceptance of this Rental. Restrictive endorsements on checks you send to us will not reduce your obligations to us. **Whenever any Rental Payment or other payment is not made when due, you agree to pay us, within one month, a late charge of the greater of ten percent (10%) of the payment or $20.00 for each delayed payment for our internal operating expenses arising as a result of each delayed payment, but only to the extent permitted by law.**

LOCATION AND OWNERSHIP OF EQUIPMENT: You will keep and use the Equipment only at "the Equipment location address." You agree that the Equipment will not be removed from that address unless you get our written permission in advance to move it. You agree to pay the costs incurred by us to verify installation of the Equipment prior to commencement or during the term of the Rental. We are the owner of the Equipment and have title to the Equipment.

USE, MAINTENANCE AND INSTALLATION: You are responsible for protecting the Equipment from damage except for ordinary wear and tear and from any other kind of loss while you have the Equipment. If the Equipment is damaged or lost, you agree to continue to pay rent. You will not move the Equipment from the Equipment location without our advance written consent. You will give us reasonable access to the Equipment location so that we can check the Equipment's existence, condition and proper maintenance. You will use the Equipment in the manner for which it was intended, as required by all applicable manuals and instructions and keep it eligible for any manufacturer's certification and/or standard, full service maintenance contract. At your own cost and expense, you will keep the Equipment in good repair, condition and working order, ordinary wear and tear excepted. All replacement parts and repairs will become our property. You will not make any permanent alterations to the Equipment.

REDELIVERY OF EQUIPMENT; RENEWAL: You shall provide us with written notice, by certified mail, sent not less than 120 days nor more than 180 days prior to the expiration of the Rental Term or any renewal Rental Term of your intention either to exercise any option to purchase all but not less than all of the Equipment (if we grant you such an option) or cancel the Rental and return the Equipment to us at the end of the Rental Term. If you elect to return the Equipment to us at the expiration of the original or any renewal term of the Rental, you agree to return the Equipment in accordance with the paragraph titled Return of Equipment. If we have not received written notice from you of your intention to purchase or return the Equipment, the Rental will automatically renew for succeeding one-year periods commencing at the expiration of the original Rental Term. If this Rental is renewed, the first renewal payment will be due the first day after the original Rental Term expired. Any security deposit held by us shall continue to be held to secure your performance for the renewal period.

LOSS; DAMAGE; INSURANCE: You are responsible for and accept the risk of loss or damage to the Equipment. You agree to keep the Equipment insured against all risks of loss in an amount at least equal to the replacement cost until this Rental is paid in full and will list us as loss payee. You will also carry public liability insurance with respect to the Equipment and the use thereof and name us as additional insured. You will give us written proof of this insurance before this Rental Term begins. You agree to promptly notify us in writing of any loss or destruction or damage to the Equipment and you will, at our option, (a) repair the Equipment to good condition and working order, (b) replace the Equipment with like Equipment in good repair, condition and working order, acceptable to us and transfer clear title to such replacement Equipment to us, such Equipment shall be subject to the Rental and be deemed the Equipment, or (c) pay to us the present value of the total of all unpaid Rental Payments for the full Rental term plus the estimated Fair Market Value of the Equipment at the end of the originally scheduled Rental term, all discounted at six percent (6%) per year whereupon the Rental shall terminate. All proceeds of insurance received by us as a result of such loss or damage will be applied, where applicable, toward the replacement or repair of the Equipment or the payment of your obligations. IF YOU DO NOT GIVE US PROOF OF PHYSICAL DAMAGE INSURANCE, WE MAY (BUT WILL NOT BE OBLIGATED TO) OBTAIN OTHER PHYSICAL DAMAGE INSURANCE AND CHARGE YOU A FEE FOR IT, ON WHICH WE MAY MAKE A PROFIT, OR WE MAY CHARGE YOU A MONTHLY CHARGE EQUAL TO 0.25% OF THE ORIGINAL EQUIPMENT COST DUE TO THE INCREASED CREDIT RISK TO US AS WELL AS TO COVER OUR INCREASED INTERNAL OVERHEAD COSTS OF REQUESTING PROOF OF PHYSICAL DAMAGE INSURANCE FROM YOU.

ASSIGNMENT: YOU MAY NOT SELL, PLEDGE, TRANSFER, ASSIGN OR SUBRENT THE EQUIPMENT OR THIS RENTAL. We may sell, assign or transfer all or any part of this Rental and/or the Equipment without notifying you. The new owner will have the same rights that we have, but not our obligations. You agree you will not assert against the new owner any claims, defenses or set-offs that you may have against us.

TAXES AND FEES: You agree to pay when due all sales and use taxes, personal property taxes and all other taxes and charges, license and registration fees, relating to the ownership, leasing, rental, sale, purchase, possession or use of the Equipment as part of this Rental or as billed by us. You agree to pay us any estimated taxes when we request payment. You agree that if we pay any taxes or charges on your behalf in excess of the estimated taxes previously collected, you shall reimburse us for all such payments and shall pay us a late charge (as described in the paragraph titled Payment) on such payments if applicable with the next payment. You agree to pay us a monthly fee up to one hundred and fifty thousandths of one percent (.150%) of the original Equipment cost to reimburse us for our costs of preparing, reviewing and filing any such returns. You agree, and we have the right to (i) bill monthly the estimated applicable personal property taxes together with the fees described herein and (ii) bill any remaining estimated amount due upon assessment of such taxes, without regard to any discounts we may obtain. You also agree to appoint us as your attorney-in-fact to sign your name to any document for the purpose of such filing, so long as the filing does not interfere with your right to use the Equipment. We may charge you and you shall pay to us a one time administrative fee of up to $75.00 to reimburse us for documentation and investigation costs. You also agree to pay us for any filing and releasing fees prescribed by the Uniform Commercial Code or other law including filing or other fees incurred by us.

LIABILITY: We are not responsible for any losses or injuries caused by the installation or use of the Equipment. You agree to reimburse us for and to defend us against any claims for the losses or injuries caused by the Equipment.

DEFAULT: Each of the following is a "Default" under this Rental: (a) you fail to pay any Rental Payment or any other payment when due, (b) you fail to perform any of your other obligations under this Rental or in any other agreement with us or with any of our affiliates, and this failure continues for 10 days after we have notified you of it, (c) you become insolvent, you dissolve or are dissolved, you fail to pay your debts as they mature, you assign your assets for the benefit of your creditors, or you enter (voluntarily or involuntarily) any bankruptcy or reorganization proceeding, or (d) any guarantor of this Rental dies, does not perform its obligations under the guaranty, or becomes subject to one of the events listed above.

REMEDIES: If a Default occurs, we may do one or more of the following: (a) cancel or terminate this Rental or any or all other agreements that we have entered into with you; (b) require you to immediately pay us, as compensation for loss of our bargain and not as a penalty, a sum equal to (i) all amounts then due under this Rental plus, (ii) all unpaid Rental Payments for the remainder of the term plus our anticipated residual interest in the Equipment each discounted to present value at the rate of 6% per annum; (c) deliver the Equipment to us as set forth in the paragraph titled Return of Equipment; (d) peacefully repossess the Equipment without court order and you will not make any claims against us for damages or trespass or any other reason; and (e) exercise any other right or remedy available at law or in equity. You agree to pay all of our costs of enforcing our rights against you, including reasonable attorneys' fees and costs. If we take possession of the Equipment, we may sell or otherwise dispose of it with or without notice, at a public or private sale, and apply the net proceeds (after we have deducted all costs related to the sale or disposition of the Equipment) to the amounts that you owe us. You agree that if notice of sale is required by law to be given, 10 days notice shall constitute reasonable notice. You will remain responsible for any amounts that are due after we have applied such net proceeds. All our remedies are cumulative, are in addition to any other remedies provided for by law and may be exercised either concurrently or separately. Any failure or delay by us to exercise any right shall not operate as a waiver of any right, other or future rights or to modify the terms of this Rental.

SECURITY DEPOSIT: We will retain any required security deposit to ensure your performance of your obligations. Any security deposit is non-interest bearing. We may, but are not obligated to, apply any security deposit to cure any default by you, in which event you will promptly restore any amount so applied. If you are not in default, any security deposit will be returned to you within 90 days after the end of the original or renewal Rental Term (or as otherwise required by applicable law), or at your direction we may apply the security deposit towards your purchase of the Equipment (if we grant you a purchase option).

RETURN OF EQUIPMENT: If (a) a default occurs, or (b) you do not purchase the Equipment at the end of the Rental Term, you will immediately return the Equipment to any location(s) and aboard any carrier(s) we may designate in the continental United States. The Equipment must be properly packed for shipment in accordance with the manufacturer's recommendations or specifications, freight prepaid and insured, maintained in accordance with the paragraph titled Use Maintenance and Installation, and in "average Saleable Condition". "Average Saleable Condition" means that all of the Equipment is immediately available for use by a third party buyer, user or Renter, other than yourself, without the need for any repair or refurbishment. All Equipment must be free of markings. You will pay us for any missing or defective parts or accessories, including manuals and licenses. You will continue to pay Rental Payments until the Equipment is received and accepted by us.

ARTICLE 2A STATEMENT: YOU AGREE THAT IF ARTICLE 2A OF THE UNIFORM COMMERCIAL CODE IS DEEMED TO APPLY TO THIS RENTAL, THIS RENTAL WILL BE CONSIDERED A FINANCE LEASE THEREUNDER. YOU WAIVE YOUR RIGHTS AND REMEDIES UNDER ARTICLE 2A of the UCC.

APPLICABLE LAW. You understand that the Equipment may be purchased for cash or it may be rented. By signing this Rental, you acknowledge that you have chosen to rent the Equipment from us for the term of this Rental, and that you have agreed to pay the specified Rental Payment and other fees described herein. We both intend to comply with applicable laws. If it is determined that your Rental Payment results in a payment greater than would be allowed by applicable law, then any excess collected by us will be applied to any outstanding balance due and owing under this Rental. In no event will we charge or receive or will you pay any amounts in excess of that allowed by applicable law. This agreement shall be governed by, construed and enforced in accordance with the laws of the State in which Rentor's principal offices are located or, if this Lease is assigned by Rentor, the State in which the assignee's principal offices are located, without regard to such State's choice of law considerations and all legal actions relating to this Lease shall be venued exclusively in a state or federal court located within that State, such court to be chosen at Rentor or Rentor's assignee's sole option. You hereby waive right to a trial by jury in any lawsuit in any way relating to this rental.

ADDITIONAL SERVICES: To request copies of your billing or payment history or for other information or services with respect to your Rental, please contact us. You will be charged a reasonable fee for these services.

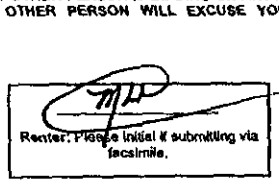
OTHER CONDITIONS: You understand and agree that:

YOUR DUTY TO MAKE THE RENTAL PAYMENTS IS UNCONDITIONAL DESPITE EQUIPMENT FAILURE, DAMAGE, LOSS OR ANY OTHER PROBLEM. RENTER IS RENTING THE EQUIPMENT "AS IS". WITHOUT ANY WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE IN CONNECTION WITH THIS AGREEMENT. If the Equipment does not work as represented by the manufacturer or supplier, or if the manufacturer or supplier or any other person fails to provide service or maintenance, or if the Equipment is unsatisfactory for any reason, you will make any such claim solely against the manufacturer or supplier or other person and will make no claim against us.

If any term of this Rental conflicts with any law in a state where the Rental is to be enforced, then the conflicting term shall be null and void to the extent of the conflict but this will not invalidate the rest of this Rental.

NO WARRANTIES: We are renting the Equipment to you "AS IS". WE MAKE NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE IN CONNECTION WITH THIS AGREEMENT. We transfer to you for the term of this Rental all warranties, if any, made by manufacturer or supplier to us. We are not liable to you for any modifications or rescission of supplier or manufacturer warranties. You agree to continue making payments to us under this Rental regardless of any claims you may have against the supplier or manufacturer. YOU WAIVE ANY RIGHTS WHICH WOULD ALLOW YOU TO: (a) cancel or repudiate the Rental; (b) reject or revoke acceptance of the Equipment; (c) grant a security interest in the Equipment; (d) accept partial delivery of the Equipment; (e) "cover" by making any purchase or Rental of substitute Equipment; and (f) seek specific performance against us.

YOU UNDERSTAND THAT ANY ASSIGNEE IS A SEPARATE AND INDEPENDENT COMPANY FROM RENTOR/MANUFACTURER AND THAT NEITHER WE NOR ANY OTHER PERSON IS THE ASSIGNEE'S AGENT. YOU AGREE THAT NO REPRESENTATION, GUARANTEE OR WARRANTY BY THE RENTOR OR ANY OTHER PERSON IS BINDING ON ANY ASSIGNEE, AND NO BREACH BY RENTOR OR ANY OTHER PERSON WILL EXCUSE YOUR OBLIGATIONS TO ANY ASSIGNEE.



Renter: Please initial if submitting via facsimile.

09-16-2003

Appendix 4

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

PREFERRED CAPITAL, INC., Plaintiff, vs. HOME FURNISHINGS OF CLARKSTON, INC. Defendant.	CASE NO. CV 2004-10-5517 JUDGE BRENDA BURNHAM-UNRUH **AFFIDAVIT OF DAVID W. ORLANDO**

I, David W. Orlando, being first duly sworn, depose and say:

1. I have personal knowledge of the facts set forth herein, and am competent to testify thereto.

2. Home Furnishings of Clarkston, Inc. ("Home Furnishings") has been named as a Defendant in a case captioned *Preferred Capital, Inc. v. Home Furnishings of Clarkston, Inc.* filed in the Ohio Summit County Court of Common Pleas, Case No. CV 2004-10-5517 ("the Lawsuit").

3. Home Furnishings of Clarkston, Inc. is a Michigan corporation, established in approximately 1995, with its principal place of business in Clarkston, Michigan.

4. I am President of Home Furnishings, a position I have held since Home Furnishings was established.

5. I am a resident of the State of Michigan.

6. Home Furnishings is not licensed to do business in the State of Ohio.

7. Home Furnishings does not have any agent appointed for service of process in the State of Ohio.

8. No one on behalf of Home Furnishings has ever been present in the State of Ohio to conduct business on behalf of Home Furnishings.

9. To the best of my knowledge, Home Furnishings has transacted business with fewer than ten (10) customers who live in the State of Ohio, out of approximately Twelve Thousand Five Hundred Eighteen (12,518) total customers since Home Furnishings was established.

10. To the best of my knowledge, Home Furnishings has never entered into any contracts to supply goods or services in the State of Ohio, except to deliver furniture to the fewer than ten (10) customers described in Paragraph 9 who purchased their furniture from the Home Furnishings store in Clarkston, Michigan.

11. Home Furnishings has never contracted to insure any person, property, or risk in the State of Ohio.

12. Home Furnishings has never taken advantage of any of the privileges or benefits of Ohio laws.

13. Home Furnishings has ever maintained any business operations or facilities in the State of Ohio.

14. Home Furnishings has never advertised its business operations in the State of Ohio.

15. Home Furnishings has never owned a bank account or telephone listing in the State of Ohio.

16. Home Furnishings has never used, possessed, or owned any interest in any real property in the State of Ohio.

17. The Lawsuit relates to a certain Equipment Rental Agreement, a copy of which is attached as Exhibit A to the Complaint of Preferred Capital, Inc. ("Preferred Capital") in the Lawsuit, which Equipment Rental Agreement was signed by me as President of Home Furnishings in Clarkston, Michigan, on or about January 7, 2004. The Equipment Rental Agreement was signed by a representative of NorVergence, Inc. ("NorVergence") on or about February 2, 2004.

18. The Equipment Rental Agreement was a form contract presented to Home Furnishings by a representative of NorVergence. Neither Home Furnishings nor I were offered any opportunity to negotiate or alter any of the Agreement's terms, including the paragraph captioned "Applicable Law" on Page 2 of the Agreement.

19. Both Home Furnishings and I were induced to sign the Equipment Rental Agreement based upon misrepresentations by a representative of NorVergence, including misrepresentations relating to installation, performance and benefit.

20. After the Equipment Rental Agreement was signed in Clarkston, Michigan, a single "Matrix box" was delivered to Home Furnishings.

21. The Matrix has never performed and has never been of any benefit, all as previously represented.

22. The Equipment Rental Agreement does not mention the State of Ohio.

23. Home Furnishings did not enter into any contract with NorVergence which required performance of any contract terms in the State of Ohio.

24. Home Furnishings never entered into any contract with Preferred Capital, Inc. whatsoever.

25. At the time the Equipment Rental Agreement was signed, neither Home Furnishings nor I was aware that NorVergence had purportedly entered into a Master Program Agreement with Preferred Capital in September, 2003, a copy of which is attached to Preferred Capital's Complaint as Exhibit B.

26. At the time Home Furnishings and I signed the Equipment Rental Agreement, neither Home Furnishings nor I was aware or anticipated that the Equipment Rental Agreement would be assigned to Preferred Capital, who would bring suit against Home Furnishings in the State of Ohio.

27. Home Furnishings never knowingly or specifically agreed to be sued in the State of Ohio.

28. The claim in the Lawsuit does not relate to any business transacted by Home Furnishings in the State of Ohio.

29. The claim in the Lawsuit does not relate to any conduct of Home Furnishings in the State of Ohio.

FURTHER AFFIANT SAYETH NAUGHT

David W. Orlando

DAVID ORLANDO

STATE OF Michigan)
) SS
COUNTY OF Oakland)

Sworn to me before and subscribed in my presence this 10 day of December 2004.

Jacqueline Boyer Miller

Notary Public

My Commission Expires:

JACQUELINE B. MILLER
Notary Public, Oakland County, MI
My Commission Expires March 18, 2007

1222809/1/000000/0772

Appendix 5

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

PREFERRED CAPITAL, INC.	)	CASE NO. 2004-CV-09-5385
	)	
Plaintiff	)	JUDGE BURNHAM UNRUH
	)	
	)	
vs.	)	
	)	Affidavit of Michael L. Nudi
CUSTOM DATA SOLUTIONS, INC.,	)	
	)	
Defendant	)	
	)	

STATE OF MICHIGAN	)	
	)ss:	
COUNTY OF MACOMB	)	

MICHAEL L. NUDI, being first duly sworn, according to law deposes and states as follows:

1. I am the Vice President of Custom Data Solutions, Inc. (the "Corporation").

2. I make this affidavit based upon facts personally known by me and in support of Defendant's Motion to Dismiss for Lack of Personal Jurisdiction.

3. The Corporation filed suit on the identical issues in this case on August 10, 2004 in Macomb County, Michigan, Case No. 04-3576-CK.

4. The Plaintiff was served with the complaint on August 13, 2004.

5. The Corporation amended the complaint on September 2, 2004.

6. Preferred Capital, Inc., the Plaintiff in this action, retained counsel and entered an appearance in the Macomb County, Michigan case on September 13, 2004.

7. Despite the pending Macomb County, Michigan lawsuit, Plaintiff Preferred

EXHIBIT
A

Capital, Inc. filed suit in Summit County, Ohio on September 28, 2004.

8. The Corporation was not served with the Complaint in this case until October 6, 2004.

9. The Corporation denies the allegations contained in paragraphs One through Eighteen of Plaintiff's Complaint.

10. The Corporation is a small business, operating in Macomb County, Michigan.

11. The Equipment Rental Agreements attached as Exhibits A and E to Plaintiff Preferred Capital, Inc.'s Complaint are by and between Norvergence, Inc., a New Jersey corporation as Rentor, and Custom Data Solutions, Inc., a Michigan corporation as Renter.

12. The property covered by the Equipment Rental Agreements is located in the State of Michigan; there is no property located in the State of Ohio.

13. All discussions concerning any possible agreements between the parties took place in Michigan; the agreements were executed in Michigan.

14. The Corporation had no opportunity to negotiate any of the terms of the Equipment Rental Agreements, as we were told by Norvergence that the Equipment Rental Agreements were their standard form contract and to "take it or leave it".

15. Further, the Corporation was required to enter into the Equipment Rental Agreements in order to receive the "guaranteed savings" offered as part of the total telecommunications and services package offered by Norvergence, Inc.

16. The Equipment Rental Agreements are worthless without the total telecommunications services supplied by Norvergence, Inc.

17. Norvergence, Inc. ceased providing telecommunication services in July of 2004, when Norvergence filed for Chapter 7 Bankruptcy liquidation.

18. The Corporation was not informed of the transfer of the Equipment Rental Agreements before or at the time that the Corporation signed them.

19. The Corporation signed the Equipment Rental Agreement October 24, 2003. See Exhibits A & E to the Complaint.

20. The purported jurisdiction clause in the Equipment Rental Agreements does not specifically refer to the State of Ohio. Rather, the clause is vague and ambiguous, and purports to assign jurisdiction to any place where any assignor conducts business.

21. The Corporation was notified of the transfer of the Equipment Rental Agreements to the Plaintiff by letters dated November 21, 2003. See Exhibits B & G to the Complaint.

22. On May 7, 2004, the Corporation notified the Plaintiff, via certified U.S. Mail, that the Equipment covered by the Equipment Rental Agreements was not installed, not operational, and Norvergence was unable to provide telecommunication services through this equipment.

23. It is extremely inconvenient for me, the Corporation, and our employee witnesses to travel to Ohio to defend this suit.

24. The Corporation contracted for telecommunication services and equipment with the Remor, Norvergence.

25. The Corporation does not own any property nor does it have any bank accounts or telephone listings in the State of Ohio.

26. The Corporation does not advertise in Ohio, nor does it distribute any flyers or use sales representatives in the State of Ohio.

27. In light of the above and foregoing, Defendant could not foresee litigating in Ohio.

28. The Corporation does not and has not carried out any significant business in Ohio.

29. Accordingly, the Corporation respectfully requests that the Court dismiss this case so that the parties can litigate these issues in the previously filed, pending Michigan Court case.

Affiant further sayeth naught.

Michael L. Nudi, Vice President
Custom Data Solutions, Inc.

SWORN TO BEFORE ME and subscribed in my presence this 21 day of October 2004.

Carole J Nelson

Notary Public

CAROLE J. NELSON
Notary Public, Monroe County, NY
My Commission Expires Jan. 1, 2004

Appendix 6

Westlaw.

2002 WL 1821676 (Ohio App. 10 Dist.), 2002-Ohio-4047

(Cite as: 2002 WL 1821676 (Ohio App. 10 Dist.))

C
CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Tenth District, Franklin County.
AUTOMOTIVE ILLUSIONS, LLC,
Plaintiff-Appellant,
v.
REFLEX ENTERPRISES, LLC,
Defendant-Appellee.
No. 01AP-1445.

Decided Aug. 6, 2002.

Plaintiff filed complaint against defendant, alleging breach of dealer agreement which contained forum selection clause providing that all disputes between the parties would be brought in state or federal courts of certain city and county in another state. The Court of Common Pleas, Franklin County, sustained in part defendant's motion to dismiss for lack of jurisdiction or venue, and denied plaintiff's motion for relief from judgment. Plaintiff appealed. The Court of Appeals, Bowman, J., held that trial court acted within its discretion in denying plaintiff's motion for relief from judgment on ground that plaintiff failed to meet its burden of showing that it could maintain meritorious claim for breach of contract in Ohio court.

Affirmed.

West Headnotes

Judgment ⇐379(2)
228k379(2) Most Cited Cases
Trial court acted within its discretion in denying plaintiff's motion for relief from judgment on ground that plaintiff failed to meet its burden of showing that it could maintain meritorious claim for breach of contract in Ohio court, in proceedings predicated on alleged breach of dealer agreement, where agreement contained forum selection clause providing that venue for all disputes would be in state or federal courts of certain city and county in Texas, and plaintiff provided no evidence of fraud or overreaching, or that enforcement of forum selection clause would be unreasonable or unjust. Rules Civ.Proc., Rule 60(B).
Appeal from the Franklin County Court of Common Pleas.

Christopher J. Minnillo, for appellant.

Chernesky, Heyman & Kress, P.L.L., and Thomas P. Whelley, II; and Corrigan & Corrigan, P.L.L.C., and Carl A. Corrigan, for appellee.

BOWMAN, J.

*1 {¶ 1} Plaintiff-appellant, Automotive Illusions, LLC, appeals from a Franklin County Court of Common Pleas entry overruling appellant's motion for relief from judgment.

{¶ 2} On July 23, 2001, appellant filed a complaint against defendant-appellee, Reflex Enterprises, LLC ("Reflex Enterprises"), alleging breach of a dealer agreement. The dealer agreement, which was attached to appellant's complaint, provided that venue for all disputes between the parties would be in the state or federal courts of San Antonio, Bexar County, Texas.

{¶ 3} On August 21, 2001, Reflex Enterprises filed a motion to dismiss, pursuant to Civ.R. 12(B), for lack of jurisdiction and venue. Appellant contends that it was not served with a copy of this motion and, accordingly, it did not file a response.

{¶ 4} By decision and entry dated September 28, 2001, the trial court noted that appellant had made no attempt to demonstrate that the forum selection

clause was invalid or unenforceable. The court therefore concluded that the cause was valid and sustained in part Reflex Enterprises' motion to dismiss.

{¶ 5} On October 9, 2001, appellant filed a motion for relief from judgment pursuant to Civ.R. 60(B). Appellant attached the affidavits of its attorney and the receptionists in his law firm, who testified that they had not received a copy of Reflex Enterprises' August 21, 2001 motion to dismiss.

{¶ 6} By decision dated November 29, 2001, the trial court overruled appellant's motion for relief from judgment. The court determined that appellant made its motion within a reasonable time and that, in light of its evidence of failure of service, appellant had demonstrated excusable neglect. The court further concluded, however, that appellant failed to demonstrate that it had a meritorious claim or defense to present if relief were granted, a required element to prevail on a Civ.R. 60(B) motion for relief from judgment. The court reasoned that appellant had provided no evidence that the forum selection clause resulted from fraud or overreaching, or that its enforcement would be unreasonable and unjust.

{¶ 7} Appellant now assigns the following error:

{¶ 8} "THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT ON THE GROUND THAT NO MERITORIOUS CLAIM OR DEFENSE EXISTED TO THE CHOICE OF FORUM PROVISION CONTAINED IN A DEALER AGREEMENT EXECUTED BETWEEN APPELLANT, APPELLEE AND AUTOMOTIVE PROTECTION."

{¶ 9} Civ.R. 60(B) provides, as follows, in pertinent part:

{¶ 10} "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect * * *; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment * * *."

*2 {¶ 11} To prevail on a motion for relief from judgment pursuant to Civ.R. 60(B), the movant must demonstrate: (1) that the party has a meritorious claim or defense to present if relief is granted; (2) that the party is entitled to relief under one of the grounds stated in Civ.R. 60(B); and (3) that the motion is made within a reasonable time. *GTE Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, paragraph two of the syllabus. To warrant Civ.R. 60(B) relief, "the movant must allege operative facts with enough specificity to allow the court to decide whether it has met" the three requisite elements. *Elyria Twp. Bd. Of Trustees v. Kerstetter* (1993), 91 Ohio App.3d 599, 601, 632 N.E.2d 1376. The trial court must overrule a Civ.R. 60(B) motion if any one of these three requirements is not met. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20, 520 N.E.2d 564. "A Civ.R. 60(B) motion for relief from judgment cannot be used as a substitute for a timely appeal or as a means to extend the time for perfecting an appeal from the original judgment." *Key v. Mitchell* (1998), 81 Ohio St.3d 89, 90-91, 689 N.E.2d 548.

{¶ 12} A Civ.R. 60(B) motion for relief from judgment is addressed to the sound discretion of the trial court, and a ruling on the motion will not be disturbed on appeal absent a showing of abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77, 514 N.E.2d 1122. " 'The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.' " *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. A trial court abuses its discretion if it denies a Civ.R. 60(B) motion when the movant has demonstrated all three factors. See *Mount Olive Baptist Church v. Pipkins Paints* (1979), 64 Ohio App.2d 285, 289, 413 N.E.2d 850. "If the material submitted by the movant in support of its motion [for relief from judgment] contains no operative facts or meager and limited facts and

conclusions of law, it will not be an abuse of discretion for the trial court to refuse to grant a hearing and overrule the motion ." *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 105, 316 N.E.2d 469.

{¶ 13} The trial court did not abuse its discretion when it overruled appellant's motion for relief from judgment, as appellant has not met its burden of showing that it can maintain a meritorious claim for breach of the dealer agreement in an Ohio court.

{¶ 14} The Dealer Agreement at issue states:

{¶ 15} "All disputes concerning the validity, interpretation, or performance of this Agreement and any of its terms or provisions, or any rights or obligations of the parties hereto, shall be governed by the laws of the State of Texas with venue in the state or federal courts of San Antonio, Bexar County, Texas."

{¶ 16} In *Kennecorp Mtge. Brokers, Inc. v. County Club Convalescent Hosp., Inc.* (1993), 66 Ohio St.3d 173, 610 N.E.2d 987, syllabus, the Ohio Supreme Court held that "[a]bsent evidence of fraud or overreaching, a forum selection clause contained in a commercial contract between business entities is valid and enforceable, unless it can be clearly shown that enforcement of the clause would be unreasonable and unjust." Appellant has not met its burden on its motion for relief of judgment because it has provided no evidence of fraud or overreaching, or that enforcement of the forum selection clause would be unreasonable or unjust.

*3 {¶ 17} Appellant contends that the trial court should conduct an evidentiary hearing or allow appellant to pursue discovery in order to ascertain whether enforcement of the forum selection clause would be unreasonable or unjust. In order to prevail on its Civ.R. 60(B) motion, however, appellant must allege operative facts to demonstrate that it has a meritorious claim.

{¶ 18} The affidavits of appellant's attorney and his office staff were directed to the issue of service of the motion to dismiss. The affidavit of Consuella Oliver, appellant's chief financial officer, states the contract with Reflex Enterprises was a negotiated contract and addresses appellee's contacts with Ohio. Neither the memorandum in support of the motion for relief from judgment nor the affidavits make any reference to fraud or overreaching, or state a reason to find enforcement of the forum selection clause would be unreasonable or unjust. Thus, appellant failed to allege operative facts to warrant relief from judgment and was not entitled to a hearing. *U.A.P. Columbus JV 326132 v. Plum* (1986), 27 Ohio App.3d 293, 500 N.E.2d 924. Appellant's speculation is inadequate to warrant relief from judgment or to require a hearing.

{¶ 19} Appellant further argues that, pursuant to Ohio's long arm statute, an Ohio court may exercise personal jurisdiction over Reflex Enterprises because Reflex Enterprises had the requisite minimum contacts in Ohio. The *Kennecorp* court noted, however, that "a minimum-contacts analysis * * * is not appropriate in determining the validity of forum selection clauses in commercial contracts." *Id.* at 175, 610 N.E.2d 987. Accordingly, appellant's argument is inapposite to the issues before this court.

{¶ 20} For the foregoing reasons, appellant's assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

TYACK, P.J., and KLATT, JJ., concur.

2002 WL 1821676 (Ohio App. 10 Dist.), 2002-Ohio-4047

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Appendix 7

Westlaw.

Not Reported in N.E.2d

2000 WL 1679456 (Ohio App. 8 Dist.)

(Cite as: 2000 WL 1679456 (Ohio App. 8 Dist.))

C

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District, Cuyahoga County.
FOUR SEASONS ENTERPRISES, Plaintiff-Appellant,
v.
TOMMEL FINANCIAL SERVICES, INC., ET AL., Defendant-Appellee.
No. 77248.

Nov. 9, 2000.

Civil appeal from Cuyahoga County Common Pleas Court, Case No. CV-387065.

James D. Romer, Esq., James R. Douglass, Esq., and Douglass & Defoy, Cleveland, OH, For Plaintiff-Appellant.

Gregory R. Glick, Esq., Chagrin Falls, OH, For Defendant-Appellee.

JOURNAL ENTRY AND OPINION

KARPINSKI.

*1 Plaintiff-appellant Four Seasons Enterprises appeals from the decision of the Cuyahoga County Court of Common Pleas granting the motion to dismiss filed by Tommel Financial Services and its officers and employees. Finding that the trial court erred in dismissing this case with prejudice, we reverse and remand.

Four Seasons operates a tanning salon in Cleveland. In 1996, it had leased tanning beds from defendant corporation Tommel Financial Services (Tommel). [FN1] In 1998, Four Seasons again negotiated with Tommel to lease different tanning beds. Following telephone, fax, and mail negotiations, the parties executed a contract on January 6, 1999. Four Seasons sent a check for advance rental payments for the tanning equipment in the amount of $2,996.24 to Tommel on January 19th, which check was deposited by Tommel on January 25th. On January 29, 1999, Tommel faxed a recission letter to Four Seasons and refused to return the $2,966.24.

FN1. The remaining defendants are all officers and/or employees of defendant Tommel.

Four Seasons filed suit in Cuyahoga County alleging breach of contract, unjust enrichment, violation of a constructive trust, violation of R.C. 1310.54, fraud, and civil conspiracy. After being granted one leave to plead, Tommel filed a motion to dismiss or, in the alternative, to stay proceedings, in order to recommence action in proper forum. The trial court granted its motion to dismiss with prejudice. [FN2] Four Seasons timely appealed.

FN2. In their motion, appellees requested dismissal without prejudice.

For its sole assignment of error, Four Seasons states THE LOWER COURT ERRED IN FINDING THAT, AS A MATTER OF LAW, IT LACKED JURISDICTION.

The standard of review on a motion to dismiss in a personal jurisdiction claim requires the court to construe the facts most favorably to the plaintiffs. *Heritage Funding v. Phee (1997),* 120 Ohio App.3d 422, 429, 698 N.E.2d 67. However, whether the court should consider evidence outside the pleadings is unsettled. For a Civ.R. 12(B)(6) motion to dismiss, the court is restricted to the pleadings.

But

> [c]ourts are split as to what evidence may be considered in ruling on Civ.R. 12(B) motions, when a Civ.R. 12(B)(6) motion is not at issue. See *Agosto v. Leisure World Travel (1973)*, 36 Ohio App.2d 213, 304 N.E.2d 910. Cf. *Jurko v. Jobs Europe Agency (1975)*, 43 Ohio App.2d 79, N.E.2d 264 (holding that the trial court is not limited to the allegations in the complaint, when ruling on a Civ.R. 12(B)(2) motion).

Central Ohio Graphics v. O'Brien Business Equipment (Mar. 28, 1996) Franklin App. No. 95APE08-1016, unreported, 1996 Ohio App. LEXIS 1315, at * 11.

It is clear, however, that the burden of proof is on the party challenging the clause; it is incumbent upon [the party seeking to avoid the forum selection clause] to show that trial in [that venue] 'will be so gravely difficult and inconvenient that [it] will for all practical purposes be deprived of its day in court.' *Interamerican Trade Corporation v. Companhia Fabricadora de Pecas* (1992), 973 F.2d 487, 489, quoting *Breman v. Zapata* (1972), 407 U.S. 1 at 18, 92 S.Ct. 1907, 32 L.Ed.2d 513.

Four Seasons lists five issues under its sole assignment of error. However, appellee Tommel disputes only one of the issues, whether or not the forum selection clause was valid and should be enforced, and, if so, whether to dismiss the case or stay the proceedings pending Plaintiff's recommencing the case in the proper jurisdiction of Colorado. (Appellee's Brief at 4.)

*2 The first question raised in this appeal is whether the forum selection clause is enforceable. At common law forum selection clauses were not favored. However, the United States Supreme Court in *Bremen v. Zapata* (1972), 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513, found that because of the increase in global trade and business transactions, enforcement of forum selection clauses is fair. This view has been followed by the Supreme Court of Ohio.

> [F]orum selection clauses in the commercial contract context should be upheld, so long as enforcement does not deprive litigants of their day in court. Therefore, we hold that absent evidence of fraud or overreaching, a forum selection clause contained in a commercial contract between business entities is valid and enforceable, unless it can be clearly shown that enforcement of the clause would be unreasonable and unjust.

Kennecorp v. Country Club Convalescent Hosp. (1993), 66 Ohio St.3d 173, 176, 610 N.E.2d 987. Thus absent any good cause to invalidate the forum selection clause, Ohio law will enforce it.

The Restatement (Second) of Conflict of Laws S 80 (1988 Revision), comment c, discusses three situations in which a court might conclude that a forum-selection clause was unenforceable. The provision may be unenforceable if (1) it was 'obtained by fraud, duress, the absence of economic power or other unconscionable means,' (2) the designated forum 'would be closed to the suit or would not handle it effectively or fairly,' or (3) the designated forum 'would be so seriously an inconvenient forum that to require the plaintiff to bring the suit there would be unjust.' *Security Watch v. Sentinel Systems* (6th Cir.1999) 176 F.3d 369, 375, citing the Restatement of Conflict of Laws.

Four Seasons alleges fraud in the contract and claims that this fraud provides adequate grounds for invalidating the forum selection clause. However, in order to invalidate the forum selection clause, the fraud alleged must relate directly to the negotiation or acceptance of the forum selection clause itself, and not just to the contract generally. It is settled law that unless there is a showing that the alleged fraud or misrepresentation induced the party opposing a forum selection clause to agree to inclusion of that clause in the contract, a general claim of fraud or misrepresentation as to the entire contract does not affect the validity of the forum selection clause. *Moses v. Business Card Express* (6th Cir.1991), 929 F.2d 1131, 1138. (Emphasis in original.) Thus even if plaintiffs were induced to enter into the agreement by fraud, deceit and misrepresentation, this would not affect the validity of the forum selection clause. *Id.* at 1135. [FN3] Where there is no contract of adhesion and a party is not somehow compelled to enter into a contract,

the fact that the forum selection clause is so important to the defendant to be non-negotiable works against the plaintiff's position, rather than for it. *Id.* at 490.

> FN3. Ohio courts treat forum selection clauses in a similar manner as the federal courts. *Interamerican Trade Corp. v. Companhia Fabricadora de Pecas* (6th Cir.1992), 973 F.2d 487, 489.

In its opposition to the motion to dismiss, Four Seasons further states it was not aware of the reverse side of the contract, which had been faxed to it, until after this suit was filed. It is not clear from the pleadings whether the two pages (which consist of a two-sided sheet in the original) were faxed at the same time. In its brief in opposition to the motion to dismiss, Four Seasons states, Plaintiff was not aware at the time it accepted the offer from Tommel that the Agreement comprised two pages, one page on the front of the agreement and a second page on the back side of the Agreement. Brief in Opposition to Defendant's Motion to Dismiss or in the Alternative, Motion to Separate Claims Pursuant to Rule 42(B) of the Ohio Rules of Civil Procedure at 2. However, an examination of the contract shows that in capital letters just above the lessee's signature line on the first page is written, SEE REVERSE FOR ADDITIONAL TERMS AND CONDITIONS WHICH ARE PART OF THIS LEASE. This sentence should have given Four Seasons notice that there was more to the lease than the first page; Four Seasons was, therefore, liable on all terms of the lease.

*3 Additionally,the first page of the lease contains a personal guaranty which Four Seasons' representative signed. This guaranty states

> [t]his Guaranty shall be governed by the laws of the State of Colorado. The undersigned acknowledges that, for the purposes of enforcement of this Guaranty, he is conducting business in the State of Colorado, and agrees that, in the event of any litigation related to the Lease or this Guaranty, venue and jurisdiction shall be proper in any State or Federal Court [obliterated in original] the State of Colorado.

Although there is no signature line on the page containing the forum selection clause, which is the subject of this appeal, to indicate that Four Seasons agreed to the terms on that page, its representative had notice that there were more terms to the contract than were contained on the face sheet he signed. Also appearing on the face of the contract was a forum selection clause which bound the individual guarantor. This clause should have given notice that a similar clause might exist to bind the company. Despite its claim that it was unaware of the second page of the contract, Four Seasons is responsible for the terms contained in the rest of the contract.

The Restatement lists a second instance that prevents enforcement of a forum selection clause: when the designated forum 'would be closed to the suit or would not handle it effectively or fairly,' Restatement of Conflicts of Laws, comment c. Four Seasons did not present any evidence that Colorado law or venue would prevent effective or fair resolution of the suit. Therefore, this exception does not apply to this suit.

A third instance in the Restatement describes a situation in which the designated forum would be so seriously an inconvenient forum that to require the plaintiff to bring the suit there would be unjust. *Id.* Similarly, this court held in *Barrett v. Picker Internat'l* (1990), 68 Ohio App.3d 820, 825, 589 N.E.2d 1372, that it is necessary to conduct

> an inquiry into reasonability in the specific factual situation of applying the forum selection clause to these particular plaintiffs. To decide the reasonability issue we are persuaded by the factors set forth in Clinton, supra, as guidelines which follow: (1) which law controls the contractual dispute; (2) what residency do the parties maintain; (3) where will the contract be executed; (4) where are the witnesses and parties to the litigation located; and (5) whether the forum's designated location is inconvenient to the parties. Clinton, supra, citing *Furbee v. Vantage Press, Inc.* (C.A.D.C.1972), 464 F.2d 835, 837.

*4 Four Seasons claims that enforcement of the forum selection clause would be unreasonable:

* * *[T]he forum selection clause is overreaching and designed to make it unreasonably difficult for Plaintiff to reclaim funds tortiously obtained by Defendants. The claim by Defendants that Colorado, a forum that neither of the parties are domiciled [sic], be the only forum Plaintiffs may redress the deceitful actions of Defendants is on the face overreaching and over burdensome given the fraudulent conduct of the Defendants and the distance of the forum jurisdiction from the party.
Brief in Opposition to Defendant's Motion to Dismiss or, in the Alternative, Motion to Separate Claims Pursuant to Rule 42(B) of the Ohio Rules of Civil Procedure at 7.

Mere distance, however, is not considered adequate inconvenience to invalidate a forum selection clause.

> As the Sixth Circuit observed in Interamerican Trade Corp., 973 F.2d at 489-490, where matters impacting upon the convenience of a particular forum were known to or foreseeable by plaintiff at the time the contract was negotiated and accepted, and where plaintiff can point to no change in circumstances which would justify relief from its contractual commitment, such matters do not justify a refusal to enforce the clause.
> *General Electric Company v. G. Siempelkamp GmbH & Co.* (S.D.Ohio 1993), 809 F.Supp 1309, 1314. Just as the Centerville, Ohio plaintiff in *Vintage Travel Services v. White Heron Travel of Cincinnati* (May 22, 1998), Montgomery App. No. 16433, unreported, 1998 Ohio App. LEXIS 2246 at *8, has not shown that a Texas forum will be so inconvenient as to deprive it of its day in court[,] so too here Four Seasons has not shown that it will be unable to pursue its case in Colorado. As Judge Brogan stated in Vintage Travel, Even if a balance of convenience between the parties favored an Ohio forum, that would not be sufficient to overcome the presumption in favor of the one named in the agreement. We have every confidence that, whatever the relative inconvenience to Vintage, a Texas court will provide the company an adequate forum in which to plead its breach of contract claims. *Id.* With only bare assertions on the part of Four Seasons claiming inconvenience and no specific evidence to support those assertions, the evidence does not support overriding the forum selection clause.

The owner of Four Seasons was on sufficient notice, as discussed above, that his personal guaranty was venued in Colorado and governed by the laws of Colorado. This notice, coupled with the clear notice that additional terms were contained on the second (reverse) page of the contract where the second forum selection clause was located, was sufficient to alert Four Seasons that it was agreeing to venue in Colorado. When parties sign a contract, they are responsible for the terms contained in the contract, and, absent fraud in the factum, they shall be held to the terms of the contract signed. If a person can read and is not prevented from reading what he signs, he alone is responsible for his omission to read what he signs. *Haller v. Borror* (1990), 50 Ohio St.3d 10, 14, 552 N.E.2d 207, quoting *Dice v. Akron, Canton & Youngstown RR. Co.* (1951), 155 Ohio St. 185, 191, 98 N.E.2d 301; See also, *McCluskey v. Budnick* (1956), 165 Ohio St. 533, 535, 138 N.E.2d 386 (A person of ordinary mind cannot say that he was misled into signing a paper which was different from what he intended to sign when he could have known the truth merely by looking when he signed.)

*5 The next question is how the trial court should respond to a valid forum selection clause. It is clear that when a forum selection clause is found to be valid, the case shall be stayed pending refiling in Colorado. Civ.R. 3(D) states

> When a court, upon motion of any party or upon its own motion, determines: (1) that the county in which the action is brought is not a proper forum; (2) that there is no other proper forum for trial within this state; and (3) that there exists a proper forum for trial in another jurisdiction outside this state, the court shall stay the action upon the condition that all defendants consent to the jurisdiction, waive venue, and agree that the date of commencement of the action in Ohio shall be the date of commencement for the application of the statute of limitations to the action in another jurisdiction which the court deems to be the proper forum. If all defendants agree to the

> conditions, the court shall not dismiss the action, but the action shall be stayed until the court receives notice by affidavit that plaintiff has recommenced the action in the out-of-state forum within sixty days after the effective date of the order staying the original action. * * * If all defendants do not agree to or comply with the conditions, the court shall hear the action. [Emphasis added.]

In its brief Tommel agreed that the case should have been stayed for sixty days per Civ.R. 3(D), pending a refiling in Colorado. Ohio courts are consistent in agreeing with this position. Since venue was improper in the state of Ohio, the trial court should have stayed the proceedings to allow appellants to recommence the action in the proper forum. Civ.R. 3(D). Dismissal is warranted only if appellants fail to recommence the action within sixty days of the entry of the stay. *Id. Alpert v. Kodee Technologies* (1997), 117 Ohio App.3d 796, 803, 691 N.E.2d 732. See also *Barrett v. Picker Internat'l* (1990), 68 Ohio App.3d 820, 827-828, 589 N.E.2d 1372.

Even if, assuming arguendo, the court lacked personal jurisdiction, the trial court erred in dismissing the case with prejudice. As this court discussed in Alpert,

> ***6** dismissal for lack of personal jurisdiction operates as a failure otherwise than on the merits. See Civ.R. 41(B)(4). If dismissal for lack of personal jurisdiction was appropriate in this case, the action would be remanded to the trial court for the purpose of issuing a journal entry that reflects a dismissal without prejudice due to lack of personal jurisdiction.

Id. at 803-804, 589 N.E.2d 1372.

Whether for lack of personal jurisdiction or because of a valid forum selection clause, the trial court erred in dismissing the case rather than staying it for sixty days as required by Civ.R. 3(D).

The trial court is, therefore, instructed to stay the case for sixty days pending refiling in the proper forum. If appellant fails to file its affidavit verifying refiling within that sixty days, the trial court is instructed to dismiss the case without prejudice. Accordingly, this cause is reversed and remanded to the trial court for proceedings consistent with this opinion.

It is, therefore, ordered that appellant recover of appellees its costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

PORTER, J., concurs; O'DONNELL, P.J., concurs in Judgment only.

2000 WL 1679456 (Ohio App. 8 Dist.)

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Appendix 8

Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois, Eastern Division.

IFC CREDIT CORPORATION, Assignee of **Norvergence**, Inc., Plaintiff,
v.
EASTCOM, INC., d/b/a Samtack USA, Defendant.

No. 04 C 6503.

Jan. 7, 2005.

Vincent Thomas Borst, Askounis & Borst, Chicago, IL, for Plaintiff.

George N. Vurdelja, Jr., John M. Heaphy, Griswold L. Ware, Vurdelja & Heaphy, Chicago, IL, for Defendant.

MEMORANDUM OPINION AND ORDER

GETTLEMAN, J.

*1 Plaintiff IFC Credit Corporation, located In Illinois has sued defendant Eastcom, Inc., located in California, seeking to collect rental payments due under an equipment lease entered into between defendant and **Norvergence** Inc. and then assigned to plaintiff. On November 17, 2004, defendant presented a motion to dismiss for lack of personal jurisdiction or in the alternative to transfer venue to the United States District Court for Central District of California. Plaintiff failed to appear and, because it appeared meritorious, the court granted the motion to transfer and ordered the case transferred to the Central District of California pursuant to 28 U.S .C. § 1404(a). On November 30, 2004, plaintiff presented a motion to vacate the transfer order and for leave to file a response to the motion to transfer. The court granted the motion to vacate, and set a briefing schedule on the motion to transfer. By the time that order was entered on the docket on December 7, 2004, however, the case had been transferred to the Central District of California pursuant to Local Rule 83.4, leaving it questionable as to where the case is now pending.

Currently before the court (assuming there is a case before the court) is defendant's motion to dismiss for lack of personal jurisdiction or, in the alternative, to transfer. In response to that motion, plaintiff relies on a forum selection clause in the original contract between defendant and **Norvergence** which provides:

> This agreement shall be governed by, construed and enforced in accordance with the laws of the State in which Rentor's [**Norvergence**, Inc.'s] principal offices are located or, if this Lease is assigned by Renter, the State in which the Assignee's principal offices are located, without regard to such State's choice of law considerations and all legal actions relating to this Lease shall be venued exclusively in a state or federal court located within that State, such court to be chosen at Rentor or Rentor's assignee's sole option. You hereby waive right to a trial by jury in any lawsuit in any way relating to this rental.

Plaintiff argues that the "forum selection clause" confers both personal jurisdiction and venue in this court. *Burger King Corp. v. Rudzewcz*, 471 U.S. 462, 472 n. 14, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). It is not at all clear, however, that Illinois would enforce any such a provision that fails to identify a specific jurisdiction. *See e.g., Whirlpool Corp. v. Certain Underwriters at Lloyd's London*, 278 Ill.App.3d 175, 180, 214 Ill.Dec. 901, 662 N.E.2d 467 (1st Dist.1996), where the court, in refusing to construe a "Service of Suit Clause" specifying "any court of competent jurisdiction" as a true forum selection clause, noted that "[g]ood policy dictates that a true forum selection clause should be clear and specific." In the instant case, the failure to specify a particular jurisdiction renders the lessee incapable of knowing where an assignee might file suit and is akin to the clause rejected by the *Whirlpool* court. As such, the contract lacks an essential element regarding forum selection. Put simply, no selected forum is identified in the agreement.

*2 Moreover, even if the clause is valid, that simply means that defendant has consented to jurisdiction and venue in Illinois and that defendant's motion to dismiss must be denied. It may, however, still be appropriate to transfer the case under § 1404(a) because, while a party may waive its "right to assert [its] own inconvenience as a reason to transfer a case, [the] district court still must consider whether the

interest of justice or the convenience of witnesses require transferring a case." *Heller Financial Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1290 (7th Cir.1989).

Pursuant to Section 1404(a), a court may transfer a civil action to another district when: (1) venue is proper in both the transferor and transferee courts; (2) transfer is for the convenience of the parties and witnesses; and (3) transfer is in the interest of justice. *Symons Corp.*, 954 F.Supp. 184, 186 (N.D.Ill.1997). The weight to be accorded each of these factors is left to the sole discretion of the court. *Coffee v. Van Dorn Iron Works*, 796 F.2d 217, 219 (7th Cir.1986).

In evaluating the convenience and fairness of transfer under § 1404(a), a court should consider both the private interests of the parties and the public interests of the court. The private interests that may warrant the transfer of venue include: plaintiff's initial choice of forum; the relative ease of access to the sources of proof; the availability of compulsory process for the attendance of unwilling witnesses and the cost of obtaining the attendance of witnesses; the situs of material events; and convenience of the parties, specifically their respective residencies and abilities to bear the expense of trial in a particular forum. *Symons*, 954 F.Supp. at 186.

The public interest factors that are relevant under a § 1404(a) analysis include: (a) the relation of the community to the occurrence at issue in the litigation and the desirability of resolving controversies in their locale; (b) the court's familiarity with applicable law; and (c) the congestion of respective court dockets and the prospect for earlier trial. *Id.*

In the instant case, the issues to be litigated are defendant's and **Norvergence's** performance of the contract, both of which were to take place in California. Plaintiff's choice of forum, which is also its home state and generally accorded great weight, is thus not entitled to such weight because the conduct and events giving rise to the cause of action did not take place in Illinois. *Dunn v. Soo Line Railroad Co.*, 864 F.Supp. 64, 65 (N.D.Ill.1995). All of the relevant witnesses are located in California or in New Jersey, **Norvergence's** home state. The equipment at issue is located in California, the majority of the evidence is located in California, and the situs of the material events is California. Aside from the fortuitous fact that the lease in question was assigned to IFC which is located in Illinois, Illinois has no connection to the lawsuit. Although the contract calls for Illinois law to apply, the issue is a simple failure to make lease payments, making this court's familiarity with Illinois law of little significance. Finally, California clearly has a far greater relationship to this dispute than does Illinois. Accordingly, the court concludes that the Central District of California is the more convenient forum and defendant's motion to transfer under § 1404(a) is granted.

CONCLUSION

***3** For the reasons set forth above, defendant's motion to dismiss is denied, and defendant's motion to transfer the case to the Central District of California is granted. Defendant's request for judicial notice is denied as moot.

2005 WL 43159 (N.D.Ill.)

Motions, Pleadings and Filings **(Back to top)**

- 2004 WL 2881470 (Trial Pleading) Complaint (Oct. 08, 2004)
- 1:04CV06503 (Docket) (Oct. 08, 2004)

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Appendix 9

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

IFC CREDIT CORPORATION, assignee of Norvergence, Inc.,	)	
Plaintiff,	)	
v.	)	No. 04 C 5908
CENTURY REALTY FUNDS, INC.,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This is one of a number of cases that have been brought in this court based on Norvergence, Inc. assigning equipment rental leases to plaintiff IFC Credit Corporation. The present case is based on two equipment rental Agreements for telephone equipment that, in February 2004, were entered into between Norvergence ("Rentor" under the Agreements) and defendant Century Realty Funds, Inc. ("Renter" under the Agreements). Both Agreements were for 60 months. Shortly after the Agreements were completed, Norvergence assigned its rights to IFC. IFC alleges that Century has defaulted on its monthly rental payments under both agreements and that IFC is therefore entitled to full payment for the remaining monthly rentals of the two Agreements.

Century has moved to dismiss on the ground of lack of personal jurisdiction and improper venue.[1] There is complete diversity of citizenship and the amount in controversy exceeds $75,000.

Century is a real estate development and management firm based in Florida. It is undisputed that Century is not doing business in Illinois and that it has no contacts with Illinois that would ordinarily permit the exercise of personal jurisdiction based on Illinois's long-arm statute. See 735 ILCS 5/2-209. Norvergence was based in New Jersey. The negotiations and executions of the Agreements occurred in Florida and/or New Jersey. IFC is located in Illinois. Subsequent to the assignments, Century sent some rental payments to IFC in Illinois. IFC does not dispute that those payments, by themselves, would not be sufficient to support personal jurisdiction in Illinois. See IFC Credit Corp. v. Aliano Brothers General Contractors, Inc., No. 04 C 6504 at 5 (N.D. Ill. Feb. 16, 2005) (Darrah, J.). Also, IFC does not dispute Century's representations that substantially more evidence and witnesses would be located in Florida, not Illinois. For the exercise of personal jurisdiction and venue in Illinois, IFC relies only on a forum selection clause contained in the Agreements. The parties are in agreement that an enforceable

[1]IFC is granted leave to file its surreply.

forum selection clause may support personal jurisdiction even if a party does not otherwise have contact with the forum. Such a clause acts as an enforceable waiver of any objections to the exercise of personal jurisdiction. See M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972); Northwestern National Insurance Co. v. Donovan, 916 F.2d 372, 375-76 (7th Cir. 1990); Aliano Brothers, No. 04 C 6504 at 3-4; IFC Credit Corp. v. Warner Robins Supply Co., No. 04 C 6093 at 5 (N.D. Ill. Feb. 3, 2005) (Manning, J.); IFC Credit Corp. v. Eastcom, Inc., 2005 WL 43159 *1 (N.D. Ill. Jan. 7, 2005) (Gettleman, J.); IFC Credit Corp. v. Kay Automotive Distributors, Inc., No. 04 C 5907 (N.D. Ill. Dec. 13, 2004) (Kennelly, J.). Century argues that the clause at issue is unenforceable because part of an adhesion contract, because it causes an undue hardship, and because it does not identify a specific forum.

The clause at issue is included in a paragraph entitled "Applicable Law, which is one of 21 paragraphs contained on the reverse side of the Agreements. The clause is in the same small print as the other paragraphs located on the reverse side of the Agreement. The clause at issue is in slightly bolder print than other print in that paragraph. The clause reads as follows:

> This agreement shall be governed by, construed, and enforced in accordance with the laws of the State in which Rentor's [Norvergence's] principal offices are located or, if this Lease is assigned by Rentor, the State in which the assignee's

> principal offices are located, without regard to such State's choice of law considerations and all legal actions relating to the Lease shall be venued exclusively in a state or federal court located within that State, such court to be choses at Rentor or Rentor's assignee's sole option. You hereby waive right to a trial by jury in any lawsuit in any way relating to this rental.

The parties agree that, for present purposes, Illinois law should be applied in construing this clause.

As previously mentioned, the present case is one of a number of cases brought by IFC based on rental agreements assigned by Norvergence. At least four other cases in this district have ruled on motions to dismiss and/or transfer based on lack of personal jurisdiction, improper venue, or inconvenience.

In Aliano Brothers, No. 04 C 6504 at 6-7, the court relied on Whirlpool Corp. v. Certain Underwriters at Lloyd's London, 278 Ill. App. 3d 175, 662 N.E.2d 467, 469-71 (1st Dist.), appeal denied, 167 Ill. 2d 571, 667 N.E.2d 1063 (1996), in holding that the clause was insufficient to confer jurisdiction because the clause's failure to specifically identify a forum prevented the clause from being specific and clear enough to be a true forum selection clause. The Aliano Brothers case was dismissed for lack of personal jurisdiction.

In Warner Robins, No. 04 C 6903, the court denied the motion to dismiss for lack of personal jurisdiction or venue. That case rejected the defendant's contention that the clause was unenforceable because included in an adhesion contract. Id. at 3-5. The defendant failed to raise contentions that would support either that the contract was an unenforceable adhesion contract or that proceeding in Illinois would cause a "grave inconvenience or unfairness." Id. at 3. In Warner Robins, the Whirlpool issue was not specifically addressed.

In Eastcom, 2005 WL 43159, the defendant moved for a transfer to the district where it was located. The motion was granted when plaintiff did not appear to oppose it. On plaintiff's motion for reconsideration, Eastcom relied on Whirlpool in holding that the clause could not be enforced as a true forum selection clause. Eastcom, 2005 WL 43159 at *1. Alternatively, the court held that the case would be transferred on convenience grounds, see 28 U.S.C. § 1404(a), regardless of the enforceability of the forum clause. Eastcom, 2005 WL 43159 at *2. For those reasons, the motion for reconsideration was denied and the case was transferred to the state where the defendant was located.

In Kay Automotive, No. 04 C 5907, the defendant's motion to dismiss was denied. The forum selection clause was found to be enforceable because defendant did not make a sufficient

showing that enforcement would contravene a strong public policy of the forum or that the forum would be seriously inconvenient. The court also rejected contentions that the clause was unenforceable because it was "small-print boilerplate" and not the subject of negotiation. There was also no showing that the defendant, which was located in California, would be effectively deprived of its day in court if the case were to stay in Illinois.

Illinois law requires that a true forum selection clause be clear and specific. Whirlpool, 662 N.E.2d at 471; In re Marriage of Walker, 287 Ill. App. 3d 634, 678 N.E.2d 705, 708 (1st Dist. 1997); Eastcom, 2005 WL 43159 at *1. A "true forum selection clause" is one that is mandatory and exclusive, that is, it requires that the suit be brought in the particular forum and the case may not be transferred elsewhere based on forum non conveniens principles. Whirlpool, 661 N.E.2d at 471. In Whirlpool, the pertinent contract language of an insurance policy required that the insurer "submit to the jurisdiction of any Court of competent jurisdiction within the United States" that was chosen by the insured. See id. The Illinois Appellate Court held that this clause lacked the clarity and specificity required of a true forum selection clause because the clause did not identify a specific forum. Id. at 470-71. Whirlpool, however, did not hold that the clause was without any effect whatsoever.

It was still a sufficient basis for exercising personal jurisdiction over the defendant in Illinois. It did not, however, prevent the defendant from moving to transfer the case elsewhere based on convenience. Id. at 471.[2]

It is unnecessary to consider whether the forum selection clause is completely unenforceable as being part of an adhesion contract and therefore personal jurisdiction was lacking. Whether or not there was personal jurisdiction over Century in Illinois, the case would be transferred to Florida pursuant to 28 U.S.C. §§ 1404(a), 1406(a), or 1631. There is no dispute that personal jurisdiction may be properly exercised over Century in Florida. IFC does not dispute that the only connection this case has to Illinois is that IFC is located here. IFC does not dispute that the contract was executed in Florida or that witnesses of Century are located in Florida. There is no contention that any witnesses are located in Illinois. There may be some Norvergence witnesses located in New Jersey.[3] Because

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[2]In Aliano, No. 04 C 6504 at 6-7, the court went further and read Whirlpool as holding that a lack of specificity makes a forum selection clause completely unenforceable and therefore prevents it from being a basis for exercising personal jurisdiction over a party. This court respectfully disagrees with that holding of Aliano as being inconsistent with Illinois state law as stated in Whirlpool.

[3]The court will not consider the applicable law as a factor for § 1404(a) transfer. It is unclear whether the choice of law provision of the forum selection clause is enforceable and, if so, whether it would require the application of New

there is no enforceable contractual provision mandating that this case be heard in Illinois and for reasons of convenience, and in the interests of justice this case will be transferred to Florida.

Issues as to applicable law and the enforceability of other provisions of the parties' Agreements will be left for the transferee court to decide. No opinion is expressed or implied as to those issues.

IT IS THEREFORE ORDERED that plaintiff's motion to file surreply [11] is granted. Defendant's motion to dismiss [4] is granted in part and denied in part. The Clerk of the Court is directed to transfer this case to the Middle District of Florida, Tampa Division.

ENTER:

William T. Hart
UNITED STATES DISTRICT JUDGE

DATED: MARCH 4, 2005

Jersey law or Illinois law or a combination of the two, that is New Jersey law for formation issues and up to the point the Agreements were assigned and Illinois law for any issues that arose upon assignment and thereafter. If that aspect of the clause is not enforceable, Florida law may be the applicable law.

(Judge Form (01/2005)

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	WILLIAM T. HART	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	04 C 5908	DATE	MARCH 4, 2005
CASE TITLE	IFC CREDIT CORPORATION, etc. v. CENTURY REALTY FUNDS, INC.		

DOCKET ENTRY TEXT:

Plaintiff's motion to file surreply [11] is granted. Defendant's motion to dismiss [4] is granted in part and denied in part. The Clerk of the Court is directed to transfer this case to the Middle District of Florida, Tampa Division.

■ [For further detail see attached Memorandum Opinion and Order.]

Notices (2) mailed by judge's staff.

	Courtroom Deputy	CW

Appendix 10

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK, PART 34

Index No: 54751/04
Motion Calendar Date: March 9, 2005
Motion Calendar No.:

STERLING NATIONAL BANK as assignee of NORVERGENCE, INC.,

Plaintiffs

-against-

KENNETH H. CHANG P.S. and KENNETH H. CHANG, INDIVIDUALLY,

Defendants

DECISION/ORDER

Present: HON. ELLEN GESMER
Judge, Civil Court

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed	1
Answering Affidavits/Affirmations	3
Reply Affidavits/Affirmations	5
Memoranda of Law	2,4
Other	

Plaintiff Sterling National Bank (Sterling) brings this action, as the assignee of NorVergence, Inc., claiming that defendants are in default in making payments on an alleged equipment rental agreement. Defendants have answered[1] and asserted three affirmative defenses: that the Court lacks personal jurisdiction over him, that proper venue of this matter is in the state of Washington; and that plaintiff is barred from recovery because any contract was procured by fraud. Before this Court is plaintiff's motion for summary judgment, and for an order striking defendant's affirmative defenses. Defendant opposes the motion. For the reasons set forth below, the Court denies plaintiff's motion in all respects.

The Parties' Factual Claims

Plaintiff is basing all of its claims against defendants on an "Equipment Rental Contract" (Contract) allegedly executed by defendant with plaintiff's assignor on March 10, 2004, a "Delivery and Acceptance Certificate," allegedly executed by defendant on April 1, 2004; and a letter from plaintiff to defendant, dated April 19, 2004, advising defendant that the Contract had

[1]Defendant Kenneth H. Chang filed an Answer and an Affidavit in Opposition to Defendant's Motion, and also appeared on this motion, on behalf of both himself and his corporation, Kenneth Chang P.S. At oral argument, defendant's counsel waived any objection, for the purpose of this motion, to the failure of the corporate defendant to appear by counsel. The Court however advised Mr. Chang that New York State law requires that the corporate defendant, Kenneth H. Chang P.S. appear by counsel. (CPLR 321[a]). In this opinion, the Court will use "defendant" to refer to both defendants.

been assigned to it. Defendant acknowledged receipt of the letter. Plaintiff's papers are devoid of any description of the item being rented (except to refer to it as "one(1) Matrix 2003"), any discussion of the nature of the Contract, and the circumstances under which it was executed. Moreover, plaintiff does not submit an affidavit by anyone who had personal knowledge of the Contract or the circumstances of the underlying transaction.

On the other hand, defendant makes detailed allegations concerning the circumstances of the making of the Contract, none of which plaintiff disputes. Specifically, defendant claims that in February 2004, he was approached by a salesman employed by NorVergence who told him that NorVergence could provide him with telecommunications services, including high speed internet access, toll-free 800 service, unlimited cellular usage and unlimited long distance calling, at a savings of 20 to 60% over his current costs. He further alleges that another NorVergence salesman, John Keith, met with him on February 27, 2004 and repeated the offer to provide him with services at a tremendous discount if he "qualified" for their services. On March 10, 2004, Mr. Chang again met with Mr. Keith who provided him with a "Cost Savings Proposal, " and told him that NorVergence would consider taking him on as a customer. On the same day, Mr. Keith asked defendant to sign a stack of documents, which he claimed were "non-binding and no-risk" and were essential to reserve the circuitry and hardware in order for NorVergence to provide service to defendant. Mr. Keith told Mr. Chang that the documents had to be signed quickly and gave him no time to review them. In reliance on Mr. Keith's statement that the documents were non-binding, Mr. Chang signed them. Mr. Keith took the signed documents with him and promised to send a copy to Mr. Chang, but Mr. Chang avers that he never received a copy. While defendant does not admit signing the Contract, the Court notes that the Contract is dated March 10, 2004.

Mr. Chang further claims that NorVergence advised him that he had been "approved," and on April 1, 2004, a "Matrix" box was installed at his office. However, the high speed internet line, the 800 number and the long distance lines were never installed or activated.

Mr. Chang further alleges that NorVergence went into bankruptcy in July 2004, and that in November 2004, the Federal Trade Commission issued a complaint against it. He further provides documentary evidence that the New York State Attorney General is investigating financial institutions to which NorVergence had assigned its contracts and that it has entered into settlement agreements with several of them, under which they agreed to forgive most of the charges due from customers as a result of their contracts with NorVergence. In particular, defendant alleges that the New York State Attorney General has an investigation pending against plaintiff.

Plaintiff's Motion for Summary Judgment

At the simplest level, the Court must deny plaintiff's motion because it has failed to set forth a prima facie case. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). CPLR § 3212(b) requires that a motion for summary judgment be supported by an affidavit of a person with requisite knowledge of the facts, together with a copy of the pleadings and by other available proof (*Spearmon v Times Square Stores Corp.*, 96 AD2d 552, 553 [2d Dept 1981]). "It is axiomatic that summary judgment is a drastic remedy which should only be granted if it is

clear that no material issues of fact have been presented . . . If there is any doubt about the existence of a triable issue of fact or if a material issue of fact is arguable, summary judgment should be denied" (*Celardo v Bell*, 222 AD2d 547 [2d Dept 1995]).

In this case, plaintiff relies on the affirmation of its attorney, Beth Herbstman, and an affidavit of Benjamin S. Katz, who identifies himself as First Vice-President and Special Asset Manager of Sterling. The Court will disregard Ms. Herbstman's affidavit, since an attorney's affirmation is of no value on a motion for summary judgment. (*Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 31 [1st Dept. 1979]). That leaves only Mr. Katz's affidavit and the three exhibits to it. Mr. Katz does not claim to have any personal knowledge of the transaction between plaintiff's assignor and defendants, or of the alleged assignment between plaintiff's assignor and plaintiff. Nonetheless, he states that plaintiff's assignor entered into a contract with defendants. While he attaches a copy of the alleged contract, he does not authenticate defendant's signature, so the copy of the alleged contract is of no probative value. Mr. Katz also claims that plaintiff's assignor assigned the contract to plaintiff. However, he does not provide any documentation of the assignment. Since the best evidence of the assignment would be the document of assignment itself, his statement to that effect is of no probative value. The only document which Mr. Katz attaches which mentions the assignment is a letter from plaintiff to defendant advising him that the assignment occurred and that defendant acknowledges receiving notice of it. That is insufficient to establish that the assignment took place. Finally, Mr. Katz swears that defendant is in default under its alleged agreement with plaintiff and that plaintiff made "numerous attempts" to collect the alleged balance due. However, he does not attach any documents to support his statements. While he claims to have familiarity with the plaintiff's books and records, that statement is of no value in the absence of the books and records on which he allegedly relies.

Consequently, plaintiff has not made out its prima facie case as to its entitlement to summary judgment, and its motion must be denied.

Plaintiff's motion to strike the affirmative defenses

Plaintiff has also moved to strike defendant's affirmative defenses.

The Court will address first plaintiff's motion to strike defendant's third affirmative defense. Defendant's third affirmative defense asserts that plaintiff's assignor fraudulently induced him to sign the Contract and that plaintiff may not recover on a contract entered into by fraud. Plaintiff asserts that defendant cannot assert this defense because of the "hell or high water" provision in the Contract. The Court rejects this argument for three reasons.

First, since plaintiff has not established that the Contract was signed by defendant, it cannot assert the Contract as a basis for striking defendant's affirmative defense.

Second, even if plaintiff had established that defendant had signed the Contract, "hell or high water" clauses have been held insufficient to bar a claim of fraudulent inducement.[2] (*Rhythm*

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[2]The Court need not reach the question of whether "hell or high water" clauses are generally valid, and therefore does not do so. The Court notes, however, that the cases cited by plaintiff for that proposition are distinguishable from the case at bar. For example, in both *Preferred Capital, Inc. v. PBK, Inc.*, (309 AD2d 1168 [4th Dept 2003]) and *Advanta Leasing Services v Rosewood Furniture of New York, Inc.*, (3 Misc.3d 139(A) [App Term, 2d Dept 2004]), the Courts did not quote the language of the leases at issue, so they are not probative of the validity of the lease clause at issue in this case.

& Hues, Inc. v Terminal Marketing Co., Inc., 2002 WL 1343759, at *7 [SD NY 2002]; *see also Manufacturers Hanover Trust Co. v Yanakas*, 7 F3d 310, 318 [2d Cir 1993]).

Third, plaintiff also argues that it takes free of defenses because it is a holder in due course. However, although plaintiff's counsel asserts that it is "uncontroverted" that plaintiff 'received the assignment for value, in good faith, and without notice of any defenses against the lessor," in fact none of those facts have been established at all, since plaintiff submitted no affidavit by anyone with personal knowledge of the assignment between plaintiff and its assignor. Moreover, even if plaintiff had established that it is a holder in due course, defendant could still assert the defense of fraud against it (UCC § 3-305; *First Nat'l Bank v Fazzari*, 10 NY2d 394, 397 [1961]; *Pioneer Credit Corp. v Bon Bon Cleaners Corp.*, 38 AD2d 743 [2d Dept 1972]). Accordingly, plaintiff's motion to dismiss the third affirmative defense is denied.

The Court now turns to plaintiff's motion to strike defendant's first and second affirmative defenses. In his first affirmative defense, defendant objects to the jurisdiction of this Court over him because he is a resident of the State of Washington, and Kenneth H. Chang P.S. is a Washington State corporation, with its principal place of business in Washington state. On this motion, defendant further explains that he has never had any contacts with the State of New York; specifically, he states, "I have never been to New York, do not own property in New York, do not transact business in New York, and have no other ties to the State of New York." In his second affirmative defense, defendant objects to venue in New York State, on the grounds that the transaction had no connection with New York, and that venue in New York would be "so gravely difficult and inconvenient" that he would be deprived of his day in Court.

Plaintiff asserts that venue and jurisdiction are proper because a provision on the back of the Contract states, in tiny type,

> This agreement shall be governed by, construed and enforced in accordance with the laws of the State in which Rentor's principal offices are located or, if this Lease is assigned by Rentor, the State in which the assignee's principal offices are located, without regard to such State's choice of law considerations and all legal actions relating to this Lease shall be venued exclusively in a state or federal court located within that State, such court to be chosen at Rentor or Rentor's assignee's sole option.

The page on which this paragraph appears is initialed on behalf of NorVergence but not on behalf of defendant.

The Court rejects plaintiff's argument for three reasons.

First, as stated above, plaintiff has failed to establish that defendant signed the Contract so it cannot rely on the Contract to strike defendant's affirmative defenses.

Second, even if plaintiff had established that defendant had signed the Contract, for the reasons set forth above, defendant has asserted a valid defense against the Contract based on fraudulent inducement. If defendant prevails on that argument, that would invalidate the entire Contract including the provisions relating to venue and jurisdiction.

Third, a forum selection clause may be set aside if the party shows "that enforcement would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his or her day in court."

(British West Indies Guaranty Trust Co. v Banque Internationale A Luxembourg, 172 AD2d 234 [1st Dept1991]; *see also Brower v Gateway 2000*, 246 AD2d 246, 255 [1st Dept 1998][choice of forum clause may be so oppressive that it is set aside as unconscionable.]). The Court finds that defendant has made a sufficient showing that enforcement of this clause would be unjust and that the contract was obtained by fraud to justify denying plaintiff's motion to strike defendant's affirmative defense. Moreover, the Court has questions as to whether a forum selection clause that does not identify a specific jurisdiction is enforceable. (*See, e.g. IFC Credit Corp v Eastcom, Inc.*, 2005 WL 43159, * 1 [ND Ill 2005]). The Court also notes that the Attorney General of the State of New York has entered into consent agreements predicated on its findings that similar provisions were unconscionable under Executive Law §63(12) and the Uniform Commercial Code (UCC) 2-302.

Accordingly, the Court is denying plaintiff's motion in full. Moreover, the Court is sending a copy of this decision to the Bureaus of Telecommunications and Energy and Consumer Frauds and Protection of the Attorney General of the State of New York State Department of Law in light of defendant's uncontroverted statement that those bureaus are conducting an investigation into plaintiff's actions as an assignee of Norvergence, Inc.

Dated: March 22, 2005

ELLEN GESMER
Judge, Civil Court

Westlaw.

Appendix II

(Publication page references are not available for this document.)

FEDERAL TRADE COMMISSION (F.T.C.)
IN THE MATTER OF
WEST COAST CREDIT CORPORATION t/a FIDELITY FINANCE CO., INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE

FEDERAL TRADE COMMISSION ACT

Docket C-2600.
Complaint, Nov. 19, 1974
Decision, Nov. 19, 1974

Consent order requiring a Seattle, Wash., money lender, among other things to cease instituting collection lawsuits except in the county where the defendant either resides or where the contract was signed, and using promissory notes, etc., containing provisions governing the choice of forum county in the event of suit.

Appearances

For the Commission: Randall H. Brook.

For the respondent: Betty B. Fletcher and Jonathan Blank, Preston, Thorgrimson, Ellis, Holman & Fletcher, Seattle, Wash.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent West Coast Credit Corporation, a corporation doing business as Fidelity Finance Co., Inc., has violated Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, issues this complaint.

PARAGRAPH 1. Respondent is a Washington corporation with its principal office located at 2005 Fifth Ave., Seattle, Wash.

PAR. 2. Respondent is engaged in the business of extending loans to consumers at various offices located throughout the State of Washington. Allegations below of respondent's present acts and practices include past acts and practices.

PAR. 3. In the course of its business, respondent extends loans to persons resident in Wash. and Idaho, and receives payments from, pursues collection activities against, and institutes legal actions against, debtors resident in Wash., Idaho, Oreg. and other states. Thus respondent maintains a course of business in commerce as 'commerce' is defined in the Federal Trade Commission Act.

PAR. 4. In the course of collecting allegedly defaulted obligations, respondent regularly resorts to use of judicial process in matters not resolved by private settlement. The defendant debtors in such cases are predominantly low-income or middle-income persons not represented by counsel. Respondent usually obtains default judgments.

(Publication page references are not available for this document.)

PAR. 5. Respondent commences collection lawsuits in the Superior Court of King County, Wash. In many such suits defendants reside, and have incurred the underlying obligations, outside of King Courty, in places up to 300 or more miles from the court. Courts located in the county where defendants reside or where they signed the contracts sued upon could be used for these suits. Through this use of distant or inconvenient forum, respondent effectively deprives defendants of a reasonable opportunity to appear, answer and defend the lawsuits. Therefore, such use of a distant or inconvenient forum is unfair.

PAR. 6. Almost all the defendants described in Paragraph Five would be entitled under state venue laws to be sued in the county of their residence and to move for a change of venue to that county, except for them having previously waived this right. Respondent elicits and causes such waiver by requiring borrowers to sign a form promissory note containing the following 'venue waiver' provision:

The undersigned agree the venue of any action instituted hereon, at election of apyee hereof, may be laid in King County.

PAR. 7. The venue waiver provision is not a bargained-for part of the promissory note and is not generally understandable to persons without legal background or experience. By requiring borrowers to waive statutory venue provisions, respondent effectively deprives them of rights otherwise available to move for a change of forum. Therefore, such use of venue waiver provisions is unfair.

PAR. 8. For its superior court lawsuits, respondent used confusingly worded summonses which give defendants inadequate and misleading directions as to the proper procedure for responding. These summonses have the tendency to mislead defendants into defaulting. Thus respondent effectively deprives defendants of a reasonable opportunity to appear, answer and defend the lawsuits. Therefore, such use of confusingly worded summonses is unfair and deceptive.

PAR. 9. The acts and practices alleged above are all to the all to the prejudice and injury of the public and constitute unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute and admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order.

1. Respondent West Coast Credit Corporation, a corporation doing business as Fidelity Finance Co., Inc., is a

(Publication page references are not available for this document.)

Washington corporation with its principal office located at 2005 Fifth Ave., Seattle, Wash.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent West Coast Credit Corporation, a corporation doing business as Fidelity Finance Co., Inc., and its successors, assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the extension or collection of credit obligations of consumers, in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Instituting suits except in the county where the defendant resides at the commencement of the action, or in the county where the defendant signed the contract sued upon. This provision shall not preempt any rule of law which further limits choice of forum or which requires, in actions involving real property of fixtures attached to real property, that suit be instituted in a particular county. The term 'county' includes the equivalent political subdivision where no county exists.

2. Using promissory notes or other contracts containing any provision which governs or purports to govern choice of forum county in the event of suit.

It is further ordered, That, where respondent learns subsequent to institution of a suit that Paragraph 1 above has not been complied with, it shall forthwith terminate the suit and vacate any default judgment entered thereunder. In lieu of such termination, respondent may effect a change of forum to a county permitted by Paragraph 1; Provided, That respondent gives defendant notice of such action and opportunity to defend equivalent to that which defendant would receive if a new suit were being instituted. In all cases respondent shall provide defendants with a clear explanation of the action taken and of defendants' rights to appear, answer and defend in the new forum.

It is further ordered, That, where respondent terminates a suit or vacates a judgment pursuant to the preceding paragraph, it shall give notice to such termination or vacation to each 'consumer reporting agency,' as such term is defined in the Fair Credit Reporting Act (15 U.S.C. Section 603), which respondent has been informed or has reason to know has recorded the suit or judgment in its files. Additionally, respondent shall furnish such notice to any other person or organization upon request of the defendant.

It is further ordered, That when respondent institutes suit in any superior court in Washington State, it shall attach, to any summons served upon defendants, a notice or explanation to defendants which gives clear and adequate directions as to the proper procedure for responding to the summons without defaulting. The notice or explanation shall use clear and unconfusing language, and shall appear clearly, conspicuously, and in type at least as large as typewriter pica type. Should superior court rules or procedures change respondent shall forthwith modify the notice accordingly. The initial form of the notice, and any modifications thereof, shall be subject to approval by the Seattle Regional Office or other authorized representative of the Federal Trade Commission.

It is further ordered, That respondent prepare and maintain a summary of Washington superior court suits instituted, pending, terminated, or acted upon subsequent to judgment. This summary shall contain each defendant's 1) name, 2) address, and 3) county of residence; 4) county where the contract sued upon was signed by the defendant, if the suit was not instituted in the residence county; 5) date served; 6) date filed; 7) docket number; 8) name and location of court in which filed; 9) amount claimed; and 10) whether a default judgment has been entered. Where a suit has been instituted in a county other than where defendant resides or signed the contract, the reason for this choice of forum shall be explained. This summary shall cover a continuous two-year period

(Publication page references are not available for this document.)

commencing with service upon respondent of this order. A summary of suits instituted in King County Superior Court shall be prepared for the year immediately prior to this service, including only items 1-4 and 10, above. A copy of this summary shall be submitted to the Federal Trade Commission on a semiannual basis except that the summary of activity for the year preceding service of this order upon respondent shall be submitted within sixty days after service.

It is further ordered, That respondent shall forthwith deliver a copy of this order to each of its branches, subsidiaries, and operating divisions.

It is further ordered, That respondent notify the Commission at least thirty days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent herein shall within sixty days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

FTC

END OF DOCUMENT

Appendix 12

(Publication page references are not available for this document.)

FEDERAL TRADE COMMISSION (F.T.C.)
IN THE MATTER OF
SPIEGEL, INC.

OPINIONS, ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF

THE FEDERAL TRADE COMMISSION ACT

Docket No. 8990.
Complaint, Aug. 7, 1974
Decision, Aug. 18, 1975

Order requiring a Chicago, Ill., catalog retailer, among other things to being collection law suits only in a court in the county were the defendant resides or the debt was incurred.

Appearances

For the Commission: Randall H. Brook and Barry E. Barnes.

For the respondent: Stein, Mitchell & Mezines, Wash., D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent Spiegel, Inc. has violated Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, issues this complaint:

PARAGRAPH 1. Spiegel, Inc. is a Delaware corporation, with its office and principal place of business located at 2511 W. 23rd St., Chicago, Ill.

PAR. 2. Respondent is a catalog retailer, engaged in the advertising, offering for sale, sale and distribution of clothing, household goods, appliances, tools, tires and various other articles of merchandise. Allegations below of respondent's present acts or practices include past acts or practices.

PAR. 3. In the course of its mail-order catalog business, respondent receives orders from purchasers in various States at its place of business in Illinois and causes its products when sold to be shipped from Illinois to purchasers located in various States of the United States. Thus, respondent maintains a substantial course of business in commerce, as 'commerce' is defined in the Federal Trade Commission Act.

PAR. 4. In the course of its business, respondent regularly extends credit (hereinafter referred to as retail credit accounts) for the purpose of facilitating consumers' purchase of respondent's products.

PAR. 5. In the course of its collection of retail credit accounts, respondent regularly sues allegedly defaulting retail mail-order purchasers who reside in States other than Illinois (hereinafter referred to as out-of-State defendants) in the Circuit Court of Cook County, Illinois. Courts Located in the State and county where

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out-of-State defendants reside or where they signed the contracts sued upon could be used for these suits. Almost all out-of-State defendants have received respondent's catalogs or other advertising material, and executed purchase orders or contracts, in their home States. Almost all out-of-State defendants have had no pertinent contact with the State of Illinois other than their dealings with respondent.

PAR. 6. The distance, cost and inconvenience of defending such suits in Illinois place a virtually insurmountable burden on out-of-State defendants. Respondent thus effectively deprives these defendants of a reasonable opportunity to appear, answer and defend. Therefore, such use of distant or inconvenient forum is unfair.

PAR. 7. The aforesaid acts and practices of respondent are all to the prejudice and injury of the public and constitute unfair acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY HARRY R. HINKES, ADMINISTRATIVE LAW JUDGE

JANUARY 31, 1975

PRELIMINARY STATEMENT

In a complaint issued by the Federal Trade Commission on Aug. 7, 1974, respondent, Spiegel, Inc., was charged with unfair acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act in suing defaulting retail mail-order purchasers who reside in States other than Illinois in the Circuit Court of Cook County, Illinois. By answer duly filed respondent admitted all of the material factual allegations of the complaint but denied any violation of law. The record was therupon closed and the parties have submitted proposed findings and briefs. Pursuant to the admitted factual allegations of the complaint, I make the following:

FINDINGS OF FACT

1. Spiegel, Inc., is a Delaware corporation, with its office and principal place of business located at 2511 W. 23rd St., Chicago, Ill.

2. Respondent is a catalog retailer, engaged in the advertising, offering for sale, sale and distribution of clothing, household goods, appliances, tools, tires and various other articles of merchandise. Allegations below of respondent's present acts or practices include past acts or practices.

3. In the course of its mail-order catalog business, respondent receives orders from purchasers in various States at its place of business in Illinois and causes its products when sold to be shipped from Illinois to purchasers located in various States of the United States. Thus, respondent maintains a substantial course of business in commerce, as 'commerce' is defined in the Federal Trade Commission Act.

4. In the course of its business, respondent regularly extends credit (hereinafter referred to as retail credit accounts) for the purpose of facilitating consumers' purchase of respondent's products.

5. In the course of its collection of retail credit accounts, respondent regularly sues allegedly defaulting retail mail-order purchasers who reside in States other than Illinois (hereinafter referred to as out-of-State defendants) in the Circuit Court of Cook County, Illinois. Courts located in the State and county where out-of-State defendants reside or where they signed the contracts used upon could be used for these suits. Almost all out-of-State defendants have received respondent's catalogs or other advertising material, and executed purchase orders or contracts, in their home States. Almost all out-of-State defendants have had no pertinent contact with the State of Illinois other than their dealings with respondent.

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6. The distance, cost and inconvenience of defending such suits in Illinois place a virtually insurmountable burden on out-of-State defendants.

COMMENT

The respondent states:

The material factual allegation charged in the complaint is that suits filed by Spiegel in Cook County, Illinois, are inconvenient to defaulting debtors who reside in another state.

This is an oversimplification of this case. In fact, the complaint alleges that respondent Spiegel, Inc., in the course of its mail-order catalog retailer business, regularly sues in the courts of Illinois allegedly defaulting retail mail-order purchasers who reside in States other than Illinois (hereinafter referred to as out-of-State defendants) and that such acts and practices are to the prejudice and injury to the public and constitute unfair acts and practices in commerce in violation of the Federal Trade Commission Act. This distinction is important as will be explained below.

In recent years the limits of permissible in personam jurisdiction over out-of-State defendants have undergone great modification and expansion. Originally physical presence within the forum State was required, Pennoyer v. Neff, 95 U.S. 714 (1877), regardless of how temporary the presence may have been. This concept of jurisdiction changed in Hess v. Pawloski, 274 U.S. 352 (1927), where a Massachusetts nonresident motorist statute was upheld and in Doherty & Co. v. Goodman, 294 U.S. 623 (1935), where jurisdiction over nonresidents was recognized for claims resulting from doing business within the State. In International Shoe Co. v. Washington, 326 U.S. 310 (1945), the Supreme Court laid down the constitutional requirements for the assertion of jurisdiction:

Due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'

The court considered relevant both an estimate of the inconveniences to each party and an estimate of the quality and nature of the activity being conducted by the nonresident defendant within the forum.

The 'minimum contacts' theory of International Shoe was further defined in later Supreme Court decisions. In McGee v. International Life Insurance Co., 355 U.S. 220 (1957), a foreign insurance company was sued in California for payment under a life insurance policy. The company had never solicited nor done any insurance business in California apart from this one policy which was transacted by mail. In personam jurisdiction of the foreign insurance company was upheld, the Court noting that the insurance contract was delivered in California, the permiums were nailed California, the premiums were mailed resident of the State and died there and that there was a substantial State interest in protecting residents from insurers who refused to pay. In Hanson v. Denckla, 357 U.S. 235 (1958), the Court held that a Florida court had no personal jurisdiction over a Delaware trustee corporation when the only connection between the trustees and Florida was some correspondence between the settlor and the trustees, holding that the act done or the transaction consummated in the forum must be one 'by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'

Respondent points to a number of statutes which have been enacted in a number of States conferring jurisdiction upon the courts of that State over persons transacting any business within the State whether or not such persons are resident or present in the State. Not only is such a jurisdictional statute in effect in the State of Illinois, (Smith-Hurd, Ill. Stat., Supp. 1967, c.110 Sec. 17) but more than one-half of the States have enacted such so-called long-arm statutes in one form or another (4 Wright & Miller Fed. Practice and Procedure, Sec. 1068). Similarly,

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the Commissioners on Uniform State Laws have promulgated and the American Bar Association has approved the Uniform Interstate and International Procedure Act containing a long-arm provision and Congress has enacted a long-arm statute for the District of Columbia (13 D.C. Code Sec. 423, 1973 ed.). Respondent argues, therefore, that the validity of long-arm jurisdiction is beyond question.

But that is not the issue before us. The validity of the Illinois statute is not involved. Its application to the persons specified in this proceeding is involved and a determination must be made whether such out-of-State defendants have contacts with the forum sufficient to comport with fair play. To this end respondent cites the fact that the out-of-State defendants purposefully and intentionally mailed to Illinois a purchase order for merchandise, instructing Spiegel to ship merchandise from Chicago. Respondent argues that, thus, the out-of-State defendants transacted business within Illinois and submitted themselves to the jurisdiction of the courts of Illinois as to causes of action arising from such business transactions. But respondent concedes, as it must, that such in personam jurisdiction over out-of-State defendants in Illinois courts is proper only if the nonresidents have contacts with the forum, Illinois, sufficient to comport with due process and where the nonresidents have committed any of the acts specifically enumerated in the long-arm statute. Stated differently, the question is whether Spiegel, a mail-order house in the State of Illinois, can sue an out-of-State retail mail-order purchaser of its merchandise in the courts of Illinois.

This practice has been decried by many commentators and assumed to be violative of due process by many courts, but, to the best of my knowledge, has never been specifically adjudicated in a litigated action. The language of some court decisions is instructive on this point.

In In-Flight Devices Corporation v. Van Dusen Air Incorporated, 466 F.2d 220, 233 (1972), it was stated:

In our economy the seller often initiates the deal, tends to set many, if not all of the terms on which it will sell, and, of course, bears the burden of producing the goods or services, in the course of which production injuries and other incidents giving rise to litigation frequently arise. The buyer, on the other hand is frequently a relatively passive party, simply placing an order, accepting the seller's price and terms as stated in his product advertisement and agreeing only to pay a sum upon receipt of the goods or services.

The court went on to note that if the buyer vigorously negotiates terms, inspects production, travels to the forum, conducts substantial interstate business and the like, then his contacts with the forum are increased and the expectation and likelihood that he may be successfully sued in a distant forum are also correspondingly increased. See, e.g., Ziegler v. Houghton-Mifflin Co., 224 N.E. 2d 12 (1967). It cannot be denied that here Spiegel initiated the contacts with the buyer through its mail-order catalog and advertisements and dictated the price and terms of the contract. Generally, the purchase is the only contact the buyer has had with Spiegel or Illinois.

The language of an Illinois court in Geneva Industries Inc. v. Copeland Construction Co., 312 F.Supp. at 188 (1970), is even more specific:

The notion that any customer of an Illinois based mail-order house such as Sears Roebuck or Montgomery Ward [or Spiegel?] would be subject to the jurisdiction of Illinois is obviously violative of the most minimal standard of minimum contacts and the fundamental structure of the Federal system. (Emphasis added.)

The court noted differences in an earlier Illinois case, Gorden v. ITT, 273 F.Supp. 164 (1967), where the out-of-State defendant was subjected to the jurisdiction of the Illinois court because it 'regularly sent its salesmen into Illinois to solicit orders * * *' and engaged in a heavy mail-order solicitation in Illinois. See also Koplin v. Thomas, Haab & Botts, 219 N.E. 2d. 646, 652 (1966), where the court upheld in personam jurisdiction over a nonresident defendant which 'affirmatively and voluntarily sought the benefit of our [Illinois] laws by initiating and soliciting the sales here.' (Emphasis added.)

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In McQuay, Inc. v. Schlosberg, Inc., 321 F.Supp. 902 (1971), the court said:

The general philosophy of long-arm statutes is to protect citizens of a state where a nonresident comes into the state directly or indirectly to sell something or solicit sales, or where, even though out-of-state, a nonresident sells a product which is brought into or comes to rest in the state. The nonresident thus receives the benefit and protection of the state laws and profits or hopes to from its adventure therein. The nonresident is the aggressor or initiator. It is appropriate that such a nonresident seller should respond to service of process in that state.

The court added that where a nonresident corporation enjoys no particular privilege or protection in purchasing products from the seller in the forum State, it would be wrong to subject the nonresident buyer to the jurisdiction of the forum State:

The rational behind this long time statutory precedent is that a defendant ought to be entitled to defend himself among people and in a community where he resides and is known, his witnesses generally will reside in or near the place of his residence, his counsel will be from his community, the goods he has purchased * * * likely will be situated in his home community. Such concepts have roots deep in common law traditions. It would seem that this is what the United States Supreme Court meant by 'traditional notions of fair play and substantial justice' in International Shoe, supra.

Courts have also distinguished between out-of-State buyers and out-of-State sellers noting that generally it would be more equitable to impose in personam jurisdiction over out-of-State sellers than out-of-State buyers. See, for example, Nordberg Div. of Rex. Chainbelt Inc. v. Hudson Engineering Corp., 361 F.Supp. 903 (1973), where the court noted that 'sellers in general have more resources to defend themselves in out-of-state litigation than do buyers.' The same case also noted that individuals and small companies may be hard put to defend themselves in a foreign forum saying:

A customer of a mail-order house, be it an individual or a small company engaged in a one-state operation, is also more likely to be unprepared to defend itself in a foreign forum than is a company * * * which transacts a substantial amount of interstate business. When almost all of its business is conducted in its home state, a customer of a mail-order house does not expect to be forced to travel to a distant forum. It thus lacks experience in out-of-state litigation. When its expectations are disappointed, it is caught unprepared pyschologically and, perhaps, financially. (Emphasis added.)

In Conn v. Whitmore, 342 P.2d 871 (1959), an Illinois horse fancier wrote to the defendant in Utah, offering to sell him several horses. The defendant had a friend inspect the horses in Illinois, accepted the offer by mail from Utah and sent a servant to Illinois to pick up his purchases. The Court refused to enforce an Illinois judgment against the buyer. 'It was not the defendant Utah resident who took the initiative by going into Illinois to transact business, nor did he engage in any activity resulting in injury or damage there. Quite the contrary, it was the plaintiff resident of Illinois who proseyted for business in Utah.' Much the same can be said of Spiegel's relationship with its out-of-State mail-order purchasers.

Thus, Spiegel's suits in Illinois courts against out-of-State retail mail-order purchasers would be deemed beyond the pale of the Illinois long-arm statute whether one considers the extent of such purchasers' activities within Illinois or whether one considers the extent of the interstate business of such purchasers or whether one considers the participation of such purchasers in the terms and conditions of the contract. In short, under the doctrine of International Shoe, supra, considering the inconveniences to each party and the quality and nature of the activity being conducted within the forum, the maintenance of a suit by Spiegel in Illinois against out-of-State retail mail-order purchasers could not but offend traditional notions of fair play and substantial justice. See Currie, The Growth of the Long Arm, 1963 U. Ill. L.F. 533, 577. Such practice is oppressive since the distance, cost and inconvenience of defending such suits in Illinois effectively deprives out-of-State defendants of a reasonable

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opportunity to appear, answer and defend.

Nor can it be denied that the practice causes substantial injury to such defendants since a default judgment may be entered in Illinois without defendants effectively being able to contest it, ultimately operating to their substantial economic detriment in the impairment of their credit standing if nothing else. As the court noted in Barquis v. Merchants Collection Association of Oakland, Inc., 496 P.2nd 817 (1972):

Knowingly filing actions in distant counties in order to gain an unconscionable advantage is not a unique or isolated practice, but instead has been continuously identified * * * as a widespread and common abuse in the debt collection field.

Respondent argues, nevertheless, that if, indeed, this practice of Spiegel is violative of due process, it cannot be acted upon without a second suit in the State of the defendant purchaser where the latter may raise the issue of due process and, if successful, prevent collection. It is unlikely, however, that such purchaser in the second suit would have an opportunity to raise any valid defenses on the merits or make counter-claims or correct the damage done to his credit rating. Moreover, such circuitous and last-ditch defense tarnishes the machinery of justice. Supreme Court Chief Justice Burger noted that there was a need to improve the machinery of justice so that the sense of confidence in the courts will not be destroyed by a belief among people 'who have long been exploited' that 'the courts cannot vindicate their legal rights from fraud and overreaching in the smaller daily transactions of life.' 69 U.S. News & World Report 68 (No. 8, Aug. 13, 1970). It is even more incumbent upon the Federal Trade Commission which is specifically charged with protecting the public from unfair trade practices to act under these circumstances. See Barquis, supra, p. 828.

The injury to such mail-order purchasers subjected to suits in distant forums was pointed out not only by the courts but by others as well. The National Commission on Consumer Finance, for example, stated in its report of December 1972:

Many states permit a suit of money judgment to be brought in a county where either the plaintiff or defendant resides. This type of venue provision can easily be abused by plaintiffs in collection matters. For example, if the plaintiff-creditor has multiple locations or a central place of business fairly distant from the county or location where most of its customers reside, it can initiate suit in a venue (location) which, though 'legally' proper, is extremely distant from or inconvenient to the debtor-defendant. The practice usually results in the entry of a default judgment and, in effect, deprives the debtor-defendant of a reasonable opportunity to defend against the underlying claim.

Similar observations are contained in the final draft of the Uniform Consumer Credit Code by the National Conference of Commissioners on Uniform State Laws (1974) and in the first final draft of the National Consumer Act (National Consumer Law Center, Boston College Law School, Brighton, Mass. (1970).

Even if the debtor's defense was totally lacking in merit, he should not have been denied his opportunity to assert it. Even the most deadbeat debtor can perceive the perversion of justice in a procedure that allows a default judgment to be entered against him in a court at the other end of Texas, (Sampson, Distant Forum Abuse in Consumer Transactions, 51 Tex. L.R. 269 (1973)).

The Commission's guidelines in ascertaining fairness or unfairness were noted by the Supreme Court in Sperry & Hutchinson v. Federal Trade Commission, 405 U.S. 233, 244-45 n. 5 (1972). Where, as here, the practice has been found to offend public policy as it has been established by statutes, common law or otherwise and where it is oppressive and causes substantial injury to consumers, such practice may be found unfair and prohibited. I have found that Spiegel's practices involved in this proceeding lack due process and do not conform to the objectives of long-arm statutes. But even if they had been valid under such statutes, it would not change the outcome of this

proceeding. What may have been lawful heretofore may, nevertheless, be found to have become an unfair trade practice under current community standards of fair dealing. See, e.g. Federal Trade Commission v. Standard Education Society, 86 F.2d 692, 696 (1936). I have found that Spiegel's use of the Illinois long-arm statute against out-of-State retail mail-order purchasers would not comport with fair play and would be deemed unfair. Under such circumstances, the Commission is authorized to act even in the absence of proof of actual injury to anyone. See Speigel, Inc. v. Federal Trade Commission, 494 F.2d 59, 62 (1974).

THE REMEDY

The Commission's authority and obligation to enter an order of sufficient breadth to ensure that a respondent will not engage in future violations of the law is well established; the Commission has widest discretion to fashion suitable order provisions, not limited to the exact nature of the specific violations, to protect the public interest. Federal Trade Commission v. Colgate-Palmolive Co., 380 U.S. 374, 392, 394-5 (1965); Federal Trade Commission v. National Lead Co., 352 U.S. 419, 428-30 (1957); Federal Trade Commission v. Ruberoid Co. 343 U.S. 470, 473 (1952); Jacob Siegel Co. v. Federal Trade Commission, 327 U.S. 608, 611-13 (1946). The only limitations set by the courts are that the order provisions must be reasonably related to the unlawful practices and must be sufficiently clear and precise in defining understandable parameters of compliance and enforcement. Colgate, 380 U.S. at 392, 394-95; National Lead, 352 U.S. at 428-30; Ruberoid, 343 U.S. at 473; Federal Trade Commission v. Cement Institute, 333 U.S. 683, 726 (1948).

Thus, Paragraph One of the order herein prohibits the institution of suits against a defendant other than where defendant resides or where the contract sued upon was signed. This will not preempt any rule of law which further limits choice of forum and is similar to the consent orders issued by the Commission in Montgomery Ward & Co., C-2602 (Nov. 1974) [84 F.T.C. 1337] and West Coast Credit Corp., C-2600 (Nov. 1974) [84 F.T.C. p. 1328].

Paragraph Two of the order herein is also akin to the consent orders in Montgomery Ward and West Coast supra. It requires Spiegel to terminate any suit instituted contrary to the provisions of Paragraph One above and vacate any default judgment entered thereunder, although a change of forum is permitted instead. Respondent opposes this paragraph as harsh and unfair. But this termination requirement is triggered only after Spiegel learns that such a suit had been instituted. Complaint counsel interprets this paragraph of the order to be prospective in effect and not disturbing existing judgments. Consequently, the burden on Spiegel should not be undue, and would insure that Spiegel did not retain the fruits of a suit and judgment improperly, but in good faith, obtained. Moreover, this paragraph permits Spiegel to seek a change of forum where permitted by State law. At the same time, defendants are to be given a reasonable opportunity to defend the new proceeding by Spiegel.

Paragraph Three of the order herein requires Spiegel to notify credit bureaus and consumer reporting agencies, as well as any others upon request of the defendant, of the termination of suits improperly filed and the vacation of default judgments obtained thereunder. This is necessary to overcome the harm done to the defendant's credit reputation by the filing of an improper suit even though the suit may have been terminated later.

Paragraph Four of the order herein concerns recordkeeping. It requires Spiegel to prepare and maintain a summary of consumer law suits filed for two years following the commencement of this order. This will enable the Commission to monitor compliance and should not constitute an undue burden to Spiegel which can comply with relatively slight clerical operations at the scene of such activity. It would be much more burdensome for the Commission to undertake such monitoring considering Spiegel's far-flung operations. This paragraph also requires Spiegel to prepare such a summary for the year preceding the issuance of the complaint herein, Aug. 7, 1974. This will enable the Commission to gauge the effectiveness of the order and is consistent with the Commission's powers. See, e.g., National Dynamics Corp. v. Federal Trade Commission, 492 F.2d 1333 (1974); Tashof v. Federal Trade Commission 437 F.2d 707, 715 (1970); Arthur Murray Studio of Washington, Inc., 78 F.T.C. 401, 436 (1971).

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Paragraphs Five, Six and Seven of the order herein are standard provisions.

ORDER

It is ordered, That respondent Spiegel, Inc., a corporation, and its successors, assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, including any collection agency, in connection with the collection of retail credit accounts in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Instituting suits except in the county where defendant resides at the commencement of the action, or in the county where the defendant signed the contract sued upon. This provision shall not preempt any rule of law which further limits choice of forum or which requires, in actions involving real property or fixtures attached to real property, that suit be instituted in a particular county.

It is further ordered, That, where respondent learns subsequent to institution of a suit that the preceding paragraph has not been complied with, it shall forthwith terminate the suit and vacate any default judgment entered thereunder. In lieu of such termination, respondent may effect a change of forum to a county permitted by the preceding paragraph, provided that respondent gives defendant notice of such action and opportunity to defend equivalent to that which defendant would receive if a new suit were being instituted. In all cases respondent shall provide defendants with a clear explanation of the action taken and of defendants' rights to appear, answer and defend in the new forum.

It is further ordered, That where respondent terminates a suit or vacates a judgment pursuant to the preceding paragraph, it shall give notice of such termination or vacation to each 'consumer reporting agency,' as such term is defined in the Fair Credit Reporting Act (15 U.S.C. § 603), which it has been informed or has reason to know has recorded the suit or judgment in its files. Additionally, respondent shall furnish such notice to any other person or organization upon request of the defendant.

It is further ordered, That respondent prepare and maintain a summary of suits instituted, pending, terminated, or acted upon subsequent to judgment. This summary shall contain each defendant's name, address, and county of residence; county where the contract was signed by the defendant, if the suit was not instituted in the residence county; county where served; date served; date filed; docket number; name and location of court in which filed; name of plaintiff (if a collection agency suing in its own name); amount claimed; and disposition (including garnishment or execution, if any). Where a suit has been instituted in a county other than where defendant resides or signed the contract, the reason for this choice of forum shall be explained. This summary shall cover cover three years, including Aug. 1, 1973 to Aug. 1, 1974, and two years immediately following effective date of this order. A copy of this summary shall be submitted to the Federal Trade Commission on a quarterly basis except that the summary of activity for the first year shall be submitted within sixty days after the effective date of this order.

It is further ordered, That respondent shall forthwith deliver a copy of this order to each of its subsidiaries and operating divisions, to each collection agency currently collecting any of respondent's retail credit accounts, and to any other collection agency prior to referral to it of any of respondent's retail credit accounts. Respondent shall obtain and preserve signed and dated statements from each collection agency, acknowledging receipt of the order and willingness to comply with it.

It is further ordered, That respondent notify the Commission at least thirty days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

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It is further ordered, That respondent shall, within sixty days and at the end of six months after the effective date of the order served upon them, file with the Commission a report, in writing, signed by respondent setting forth in detail the manner and form of its compliance with the order to cease and desist.

OPINION OF THE COMMISSION

BY DIXON, Commissioner:

Complaint in this matter was issued on Aug. 7, 1974, charging that respondent's use of an inconvenient forum in which to sue certain of its customers constituted an unfair act or practice, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Proceedings before the administrative law judge were brief. Respondent admitted all the factual allegations of the complaint but argued they did not warrant a finding of illegality, or, at least, the imposition of an order. The administrative law judge disagreed, sustained the complaint, and entered an order. Respondent has appealed.

The facts are readily summarized. Respondent is a catalog retailer, engaged in the advertising, offering for sale, sale and distribution of clothing, household goods, appliances, tools, tires and various other articles of merchandise (I.D. 2). [FN1] Respondent's principal place of business is in Chicago, Ill. (I.D. 1). In the course of its mail-order catalog business it receives orders in Illinois from purchasers domiciled throughout the country, and ships products to them in their home States (I.D. 3). Respondent regularly extends credit to consumers to facilitate their purchase of its products (I.D. 4), and in the course of collecting overdue accounts, it regularly sues purchasers who reside in States outside of Illinois (hereinafter 'out-of-State' defendants) in the Circuit Court of Cook County, Ill. Almost all out-of-State defendants have received respondent's catalogs or other advertising material, and executed purchase orders or contracts in their home States. Almost all of these defendants have had no pertinent contact with the State of Illinois other than their dealings with respondent (I.D. 5). The distance, cost, and inconvenience of defending such suits in Illinois place a virtually insurmountable burden on out-of-State defendants who might wish to defend the charges against them (I.D. 6).

I.

It is perhaps to respondent's credit that on appeal it has made less effort to defend the justness of its own prior conduct than to challenge the propriety of Commission action to change it. We agree with the administrative law judge that respondent's activities do fall squarely within Section 5's proscription of unfair acts and practices, and that remedial action is warranted. The Commission has previously described factors it will consider in determining whether a practice is 'unfair' within the statutory meaning:

(1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise--whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness;

(2) whether it is immoral, unethical, oppressive, or unscrupulous;

(3) whether it causes substantial injury to consumers. * * * [FN2]

In seeking the source of public policy with respect to questions of jurisdiction and the proper use of judicial fora for debt collection, we must begin with the guarantees of due process as they have been articulated by courts. We think there can be little question that Spiegel's use of an Illinois situs to sue its out-of-State debtors offends traditional notions of due process and denies consumers the meaningful opportunity to answer and defend charges against them which it is the purpose of the law to provide.

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Spiegel contends that it has merely made proper use of the Illinois 'Long Arm Statute,' [FN3] which confers jurisdiction over parties who are, inter alia, 'doing business' in Illinois, to the extent a suit concerns such business. The statute has been construed to confer jurisdiction as broad as that permitted by the Constitution Nelson v. Miller, 11 Ill. 2d 378, 143 N.E. 2d 673, 679 (1957). Complaint counsel reply (and the administrative law judge so found) that suit against out-of-State debtors in the circumstances defined by the complaint denies due. process, and, thus, could not come within the grant conferred by the Illinois statute (I.D. p. 8 [pp. 431, 432, herein]). [FN4]

The Supreme Court has set forth the general standard for permissible in personam jurisdiction:

[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

Subsequent decisions have made clear that a defendant need not have entered a State or have had extensive contacts with it in order to satisfy the constitutional test Travelers Health Association v. Virginia, 339 U.S. 643 (1950); McGee v. International Life Insurance Co., 355 U.S. 220 (1957).

While extending the reach of in personam jurisdiction, courts have continued to recognize the impropriety and fundamental unfairness of assuming jurisdiction over defendants whose connection with the forum State is tenuous at best, who have made no attempt to avail themselves of the benefits and protections of the laws of the forum State (e.g., Hanson v. Denckla, 357 U.S. 235, 253 (1958)), and who have no means or expectation of defending suit in a distant locale. Compare McQuay, Inc. v. Samuel Schlosberg, Inc., 321 F. Supp. 902 (D. Minn. 1971) in which the court said:

The general philosophy of long arm statutes is to protect citizens of a state where a nonresident comes into the State directly or indirectly to sell something or solicit sales, or where, even though out of state, a nonresident sells a product which is brought into or comes to rest in the State. The nonresident thus receives the benefit and protection of the state's laws and profits or hopes to from its adventure therein. The nonresident is the aggressor or initiator. It is appropriate that such a nonresident seller should respond to service of process in that state. (At 906.)

With Nordberg Div. of Rex Chainbelt Inc. v. Hudson Engineering Corp., 361 F. Supp. 903 (E.D. Wisc. 1973) in which the court reviewed underlying policy considerations militating against assertion of jurisdiction over a nonresident mail order purchaser:

A customer of a mail-order house, be it an individual or a small company engaged in a one-state operation, is also more likely to be unprepared to defend itself in a foreign forum than is a company which transacts a substantial amount of interstate business. When almost all of its business is conducted in its home state, a customer of a mail order house does not expect to be forced to travel to a distant forum * * *. When its expectations are disappointed, it is caught unprepared psychologically and, perhaps, financially. (At 907.)

It is perhaps an oversimplification to say that the courts have drawn a firm jurisdictional line between buyers and sellers, but those categories are clearly of relevance to the extent they are used 'as a short-hand means of expressing the differences between passive and active involvement in a transaction.' In Flight Devices Corporation v. Van-Dusen Air, Inc., 466 F.2d 220, 233 (6th Cir. 1972). Jurisdiction over an out-of-State purchaser may be appropriate, but only where the buyer has taken an active role in negotiation or performance of the contract, or has had other significant contacts with the forum State. Thus, in finding that a large corporate purchaser could be sued in the vendor's home State, the First Circuit distinguished its role from that of the usual long distance customer:

On this background the extent of United's participation in the economic life of Massachusetts seems clearly to rise

above that of a purchaser who simply places an order and sits by until the goods are delivered * * *. Whittaker Corporation v. United Aircraft Corporation, 482 F.2d 1079, 1084 (1973).

It is clear, however, that Spiegel's retail credit customers are the quintessential passive buyers, who do sit by until the goods are delivered. They have purchased in response to respondent's advertising or mailing of its catalog. They have had no contact with the State of Illinois other than to mail in a standardized contract signed in their home State. They have not sought the benefit and protection of Illinois laws, and they most certainly have no expectation of being required to travel to Illinois to engage in litigation should a dispute develop concerning the merchandise. Nor, undoubtedly, do most have the means to launch a cross-country defense on procedural or substantive grounds.

While neither side has cited a holding precisely on point, there appear to be numerous instances in which courts, in the course of resolving related problems, have considered situations virtually the same as that imvolved here, and concluded that jurisdiction over an out-of-State mail order customer would contravene due process. Indeed, one reason that this narrow point has never been the subject of a litigated holding may be that sellers' counsel have considered it too obvius to withstand scrutiny and have backed off if faced with a contest. [FN5] As the Illinois District Court Commented in Geneva Industries, Inc. v. Copeland Construction Co.:

The notion that any customer of an Illinois based mail order house such as Sears Roebuck or Montgomery Ward would be subject to the jurisdiction of Illinois courts is obviously violative of the most minimal standard of minimum contracts and the fundamental structure of the federal system. 312 F. Supp. 186, 188 (1970).

In McQuay, Inc. v. Samuel Schlosberg, Inc., supra, a New Yorkbased contractor was solicited by a Minnesota corporation's New York agent. It placed an order and failed to pay. In denying jurisdiction under Minnesota's long-arm statute, substantially identical to that of Illinois, the court reasoned that:

If plaintiff's position is sound, then it or any other Minnesota manufacturer can sue all of its customers wherever they may be located in the United States who for good or bad reasons have failed to pay their bills or the purchase price of goods. * * * This concept almost completely obliterates state lines. * * * (At 906.)

In Conn v. Witmore, 9 Utah 2d 250, 342 P. 2d 871 (1959), the court denied enforcement of a default judgment rendered in Illinois against a Utah purchaser who had sent his servant to Illinois to inspect and pick up the merchandise, and remitted payment by mail to the Illinois vendor. The court reasoned that:

Brief reflection will bring to mind difficulties to be encountered if the ordering of merchandise in a foreign state by mail and taking delivery through a designated carrier * * * is to be deemed 'doing business' in a foreign state which will draw one into the orbit of the jurisdiction of its courts. * * * Mail order houses, for example, accept and fill orders from all over the country. If they could sue on their own accounts in their own state where it would be highly inconvenient for out-of-state customers to defend, %j forward the judgments to the jurisdictions where the customers live, demanding full faith and credit for them, this would effectively prevent the customers from presenting a meritorious defense where one existed. The ultimate result would be to dissuade customers from doing business across state lines by mail. Thus what may seem a temporary advantage to such businesses, in all likelihood would be detrimental to them and to business generally in the long run. (At 342 p.2d 874-75.)

More recently, an Illinois District Court denied jurisdiction in a suit brought by an Illinois corporation against a Michigan corporation which had leased railroad cars from plaintiff, having been solicited by the vendor's agents in Michigan. The court concluded that:

The interpretation by state and federal courts that the Illinois Long-Arm Statute does not extend Illinois jurisdiction to such cases as the instant action rests on logic and hard fact. To grant jurisdiction in such cases

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would have an adverse effect on commerce because such a decision would subject any customer of an Illinois business, manufacturer, or mail order house to Illinois jurisdiction in the event of suit arising solely out of the acceptance by mail of an Illinois resident's offer. The ultimate result would be to dissuade customers in foreign states from doing business by mail or even telephone with Illinois businessmen. United States Railway Equipment Co. v. Port Huron and Detroit Railroad Co., 58 FRD 588 (N.D.Ill. 1973).

To the same effect are numerous other reported cases, e.g., In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220, 232-33 (6th Cir. 1972); Nordberg Div. of Rex Chainbelt Inc. v. Hudson Engineering Corp., 361 F. Supp. 903, 906-07 (E.D. Wisc. 1973); Fourth Northwestern Nat. Bank v. Hilson Industries, Inc., 264 Minn. 110, 117 N.W. 2d 732 (1962); 'Automatic' Sprinkler Corp. v. Seneca Foods Corp., 280 N.E. 2d 423, 425 (Mass. 1972); Marshall Egg Transport Co. v. Bender-Goodman Co., Inc., 275 Minn. 534, 148 N.W. 2d 161 (1967); Tiffany Records Inc. v. M. B. Krupp Distributors, Inc., 81 Cal. Rptr. 320, 327, 276 Cal. App. 2d 610 (1969); Belmont Industries, Inc. v. Superior Ct. of Stanislaus County, 107 Cal. Rptr. 237, 31 Cal. App. 3d 281 (1973). [FN6]

From the foregoing we conclude that Spiegel's practice of suing its out-of-State mail order customers in Illinois courts is patently offensive to clearly articulated public policy, intended to guarantee all citizens a meaningful opportunity to defend themselves in court.

We also find that Spiegel's practices are oppressive, and injurious to consumers. The burdens imposed on a consumer-debtor by the creditor's use of an inconvenient forum have been highlighted in a Staff Report on Debt Collection Hearings compiled by the Commission's New York Regional Office, and cited by complaint counsel:

The plaintiff, having selected a forum convenient to himself, may have at the same time imposed a hardship upon the defendant as far as travel and expenses are concerned. The defendant may have to lose a day's salary which he can ill afford. In addition, the defendant who has retained a private attorney, may have to pay additional expenses to have the attorney travel to defend. Or, if the debtor desires to be represented by a legal services agency, he may find that the local legal services office may have to refer him to the legal services office in the county of suit because the local office is not physically equipped to handle the defense properly. This, in trun, imposes other hardships; it becomes more difficult and more expensive to prepare a defense.

It may be possible for the defendant to make a motion for a change of venue * * *, but where the defendant is without counsel, he would probably be unaware of this and, is any event, technicalities of motions practice may make it too difficult for the consumer-debtor to accomplish on his own. Thus, while the plaintiff may bring the action in a forum inconvenient for the consumer with respect to venue, unless the defendant moves for a change of venue, the action may still proceed there (at pages 123-24; April 1973). [FN7]

It is not surprising that all of the cases cited by counsel in their briefs have involved well-heeled defendants and substantial sums of money, which made it economically worthwhile for the defendants to retain counsel to contest the issue of jurisdiction. If lawyers worked for free, and there were no limit to their numbers, Spiegel's practices would cause us less concern. In fact, however, it is probable that for many of Spiegel's defaulting customers, like most consumers who are sued for small debts, the only meaningful and economically viable opportunity they have to defend a suit against them is to appear in court pro se and argue their case. This opportunity is totally foreclosed by respondent's use of the Cook County forum, which forces the consumer who wishes to defend to appear in a courtroom hundreds or thousands of miles from home, at a cost in travel alone which may exceed the amount in controversy. The option of hiring a lawyer who would be able to file a motion contesting jurisdiction is likely to be equally unviable. Nor do we think it lessens the damage done to argue that judgments unfairly obtained by Spiegel would be rejected if it attempted to collect on them. Affirmative efforts to defend a collection suit can also impose costly and unaccustomed burdens on the consumer, and in any event there are many injurious uses which can be made of improper judgments short of execution, such as sullying credit records cf. Riverside & Dan River Mills v. Menefee, 237 U.S. 189, 195-97 (1915).

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Spiegel has suggested that it confined its Illinois collection suits to those involving 'undisputed balances' in which the debtor 'could not be persuaded to pay.' [FN8] It is clearly not for Spiegel, however, to decide which of its debtors have defenses so unmeritorious that they do not deserve a reasonable opportunity to defend themselves in judicial proceedings brought against them. In a society which prizes the right of everyone to a day in court, there can be little doubt that substantial injury is done whenever the meaningful opportunity to defend is foreclosed, no matter what the outcome would have been absent the foreclosure. As the Supreme Court noted more than a half century ago in Coe v. Armour Fertilizer Works.

To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense on the merits. 237 U.S. 413, 424 (1915).

Because Spiegel's practice of suing its out-of-State mail order customers in Illinois is contrary to clearly established public policy favoring a meaningful opportunity for all citizens to defend suits brought against them, and because this conduct is oppressive and injurious to consumers in denying them valuable rights which our society holds dear, we conclude that Spiegel has engaged in an unfair practice within the meaning of Section 5 of the Federal Trade Commission Act.

II

Counsel for respondent has raised a number of objections to the entry of an order, which we believe are without merit. Counsel suggests that the Commission should proceed by rulemaking rather than 'singling it out' for imposition of sanctions. While rulemaking would not necessarily be inappropriate in this circumstance, it is well settled that the Commission may proceed by adjudication against an offender without simultaneously pursuing all others. Moog Industries, Inc. v. Federal Trade Commission, 355 U.S. 411 (1958), cert. denied 356 U.S. 905 (1958) ; Ger-Ro-Mar, Inc., et al. v. Federal Trade Commission, No. 74-2343 (2d Cir., June 16, 1975). In addition, at the same time that suit was brought against Spiegel, three other firms, including Montgomery Ward, were cited for practices involving suit in inconvenient fora, and those three all consented to orders imposing the same limitations on choice of forum as are contained in the order of the administrative law judge. [FN9] In light of its holding in this matter the Commission will certainly view with care the allegedly identical practices of others which may come to its attention (though respondent has not suggested whom it has in mind), but we do not believe that imposition of an order on respondent amounts, by any standard, to an abuse of discretion Federal Trade Commission v. Universal-Rundle Corp., 387 U.S. 244 (1967).

A related contention on Spiegel's part is that the Commission should stay its hand because of the 'novelty' of the legal position asserted in the complaint. Spiegel proposes that if the Commission will not proceed by rulemaking it should issue a declaratory judgment in this proceeding, stating that the practice is unlawful but omitting a binding order. We cannot agree with Spiegel's suggestion that somehow its practice has been lawful until now. We think it is more accurate to say that Spiegel has in the past gotten away with something that its counsel ought to have recognized, in light of the numerous decisions cited hereinbefore (some of which were a matter of public record before Spiegel contends it began its practice), was at best a highly dubious activity. [FN10] There may be instances in which it would be inequitable to impose a harsh order on a respondent based upon a novel interpretation of the law. This is nowhere near such a case. The order imposed is not harsh, and not particularly difficult of compliance. And the Commission's 'novel interpretation' of law has been foreshadowed, indeed dictated, by substantial prior precedent. We do not believe that whenever the Commission resolves a point of law for the first time in an adjudication it must omit an order against the violator. Acceptance of Spiegel's argument would require no less.

Spiegel also contends that the Commission may not 'pre-empt' the laws of Illinois by limiting the reach of the Illinois long-arm statute. Relatedly, Spiegel argues that a sufficient remedy is afforded injured debtors by the

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courts of Illinois, which can determine on a case-by-case basis whether or not jurisdiction lies therein.

With respect to the pre-emption argument, the Commission does not believe that its decision in this matter is in any way inconsistent with the law of Illinois, which has necessarily been construed by the courts of that State to afford all defendants due process Nelson v. Miller, supra. As noted earlier, Spiegel has cited no precedent from Illinois or elsewhere to suggest that an Illinois court could find its use of the long-arm statute to be proper. To the contrary, more than one Illinois federal district court judge, upon considering the precise issue before us, has expressed the view that Illinois law would not favor Spiegel's behavior, e.g., United States Railway Equipment Co. v. Port Huron and Detroit Railroad Co., supra; Geneva Industries v. Copeland Construction Co., supra.

It may be argued that the baseline courts in Cook County have tacitly sanctioned Spiegel's construction of the long-arm statute by entering default judgments in its favor. It is questionable, however, whether these courts have ever really had occasion to consider the legal issues involved here. While there is authority to suggest that a court should consider on its own initiative whether it has subject matter jurisdiction before entering a judgment, there is little authority to suggest that a court, when faced with valid proof of service of process, a petition by plaintiff, and no answer by defendant, is obliged before entering a default judgment to look behind the pleadings to determine sua sponte whether it possesses in personam jurisdiction. [FN11] Particularly since Spiegel, by its own admission, has withdrawn its suit in the rare case when a defendant had the legal resources or legal acumen to challenge jurisdiction, the failure of the Cook County Circuit Court to put a spontaneous stop to respondent's practice appears to us to be of slight precedential value as a guide to the proper construction of the Illinois long-arm statute.

Moreover, assuming arguendo, and contrary to what appears to be the fact, that Illinois law could somehow be read to condone Spiegel's conduct, such conduct must nevertheless fall in the final analysis before clear Federal policy which condemns it. Respondent does not challenge the proposition that where State and Federal laws conflict, Federal policy governs Free v. Bland, 369 U.S. 663 (1962). While courts will endeavor to avoid reading a pre-emptive intention into Federal law, they will not hesitate to find pre-emption where a clear conflict exists Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963). Moreover, any conflict which exists here is minimal. This is not a situation in which State and Federal law compel two different and inconsistent courses of conduct. Rather, at most, Spiegel can argue that State law permits that which Federal policy forbids. Under these circumstances there can be no reason why clear Federal standards should be bent or ignored. [FN12]

With respect to the alleged remedy already available to individuals sued in Cook County courts, we think it is evident that such a remedy has proven illusory in the majority of cases. We strongly suspect that the tribunals of Illinois would not have hesitated to throw Spiegel out of court were there ever a case in which a defendant chose to mount a defense on the jurisdictional question, while Spiegel stayed with its suit. In fact, however, few defendants are likely to know how to challenge Spiegel's abuse of the long-arm statute by themselves, and few are likely to pay for a lawyer to mount a cross-country contest when the cost of so doing may well exceed the amount at issue. Faced with the typical default situation, the courts of Illinois have not in the past provided an adequate remedy on a case-by-case basis, and that is precisely the reason that action by the Commission is needed to protect consumers, and is in the public interest cf. Barquis v. Merchants Collection Association of Oakland, Inc., 7 C. 3rd 94, 101 Cal. Rptr. 745, 496 P. 2d 817 (1972).

In the concluding paragraph of its brief (RB 42) respondent suggests that it has abandoned the challenged practices, and for that reason an order is not required. It is well established, of course, that discontinuance of an offending practice, particularly after initiation of governmental investigation, and in circumstances where resumption is possible, does not obviate the need for, or propriety of, an order Libby-Owens-Ford Glass Co. v. Federal Trade Commission, 352 F.2d 415 (6th Cir. 1965); Cotherman v. Federal Trade Commission, 417 F.2d 587 (5th Cir. 1969); Coro, Inc. v. Federal Trade Commission, 338 F.2d 149 (1st Cir. 1964), cert. denied, 380 U.S. 954 (1965). Moreover, we have reviewed the 'Assurance of Voluntary Compliance' appended by respondent to its proposed findings of fact before the administrative law judge, and we do not believe that the promises contained

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therein, if adhered to, would be sufficient to eliminate the offending conduct. For example, the assurance would not prevent Spiegel from assigning its cases to collection agencies who could sue on Spiegel's behalf in objectionable fora, and the assurance would not prevent Spiegel from suing a consumer in counties other than those of residence or signing of the contract, a remedial standard we think is necessary to eliminate the unfairness which has occurred here.

III

Respondent has objected to portions of the order proposed by the administrative law judge, which is essentially the same as the notic order. Respondent does not quarrel with the first substantive paragraph of the order [FN13] which establishes a 'fair venue' standard for suits by respondent, requiring that it sue its consumer debtors in the county of their residence or the county in which they signed the contract sued upon.

The second substantive paragraph (III) requires that if respondent violates the preceding paragraph by suing in a distant locale, it must take steps to terminate the suit, vacate any default judgment entered as a result, or, in the alternative, transfer the proceeding to a suitable forum and provide the defendant with an opportunity to defend. The following paragraph (IV) requires that if respondent brings a suit in an unfair forum it must take steps to notify credit bureaus of the fact that the suit has been terminated or a default judgment vacated. We believe that these two paragraphs are necessary to satisfy the objective of this proceeding, which is to protect consumers from the unfair practice in which respondent has engaged. Even should Spiegel proceed, as we trust it will, with the greatest diligence and attention to the obligations imposed by Paragraph II, there is always the possibility that through an inadvertence of one sort or another the prohibited practice will be repeated. Paragraphs III and IV are intended to ensure that should such a situation occur, and the consumer be again sued in distant forum, an adequate mechanism exists to remedy the harm done thereby. If no violations of Paragraph II occur, Paragraphs III and IV will prove to be mere surplussage; if a violation of Paragraph II does occur, we are at a loss to see how respondent could quarrel with the objectives of Paragraphs III and IV.

Respondent worries that the obligations imposed by Paragraph II-IV are retroactive, and protests. There is no need for us to rule here with regard to the Commission's authority to require respondent to vacate existing judgments obtained prior to the order, in violation of Section 5. We think that Paragraphs II-IV on their face quite clearly apply only to suits brought after the effective date of the order, and respondent's concerns on that score are unwarranted.

Respondent takes most strenuous exception to those portions of the order which require recordkeeping. The order proposed by the administrative law judge would require that respondent provide the Commission with a summary of collection suits it has brought for a two-year period following the effective date of the order, and for a one-year period prior to the effective date of the order. The summary of suits shall contain each defendant's name, address, county of residence, county in which the defendant signed the contract (if the suit is not instituted in the residence county), county where service was made, date of service, date of filing, docket number of case, name and location of the court in which the action was filed, name of plaintiff (if a collection agency suing in its own name), amount sued for, and disposition of the case. Where a suit has been instituted in a county other than where defendant resides or has signed the contract, the reason for the choice of forum shall be explained.

Respondent objects that the reporting requirement is unduly 'burdensome.' With respect to the case summaries for the period following the effective date of the order, the information required is the minimum necessary to permit the Commission to monitor compliance and, therefore, the order is warranted, even though it may impose some burden National Dynamics Dynamics Corporation v. Federal Trade Commission, 492 F.2d 1333 (2d Cir. 1974), cert. denied, 43 U.S.L.W. 3280 (Nov. 12, 1974); Tashof v. Federal Trade Commission, 437 F.2d 707, 715 (D.C. Cir. 1970). In addition, we do not believe the order imposes a significant burden, and beyond its barebones assertion respondent has given no indication of the extent of the burden or how the order could be modified (as

opposed to omitted) to alleviate the alleged difficulties.

The necessity for the required infomation as a means of checking compliance during an initial post-order period is clear. Respondent suggests that the Commission can evaluate compliance any time it wishes simply by scanning the docket of the Cook County courts to determine whether Spiegel has sued any customers from out-of-State. Even assuming that it were feasible for Commission investigators to check each entry on the Cook County docket to make sure that it was not Spiegel suing in a prohibited forum, respondent ignores the fact that under this procedure it could sue anywhere else, regardless of the distance of such a forum from a consumer's residence or location of contract signing, without detection. Obviously the Commission cannot feasibly search every docket in the country to determine that respondent, or its collection agencies, is not suing in a locale prohibited by the order. [FN14] Only respondent itself can readily provide the information needed to determine whether or not it is in compliance. Moreover, the particular details required seem to us to be the fewest necessary to determine whether suit has been filed in a forum forbidden by the order.

With respect to the issue of burdensomeness, in the absence of any detailed substantiation by respondent we can only observe that it would astonish us to find that respondent does not have readily available all the information required to be reported by the order. The only possible 'burden' of which we can conceive is that of transcribing or copying this information for submission in a compliance report. The fact that respondent has made no effort to estimate the cost of such transcription makes if difficult for us to take seriously its claim that it would prove costly. [FN15]

The Commission has determined that the requirement that respondent provide a litigation summary for cases brought during the year prior to the effective date of an order is unnecessary to determine compliance with the order subsequent to its effective date, and this provision will, therefore, be deleted. Respondent argues it is unnecessary, and complaint counsel have presented no convincing reason for its retention.

We have also modified the order slightly, to reflect the Commission's authority to enjoin practices 'affecting' commerce, and to make clear (Par. I) what was implicit in the order proposed by the administrative law judge, that all provisions of the order apply to practices which Spiegel may undertake through the auspices of a collection agency or other third party.

An appropriate order is appended.

CONCURRING STATEMENT OF COMMISSIONER NYE

The Commission bases its determination that respondent has violated Section 5 of the Federal Trade Commission Act in part upon a conclusion that respondent has obtained judgments against out-of-State mail-order consumers under circumstances which fall short of the due process guarantees of the Fourteenth Amendment to the Constitution. I believe this conclusion is unnecessary and reliance upon it unwise.

It is an important principle of our jurisprudence that constitutional questions should be avoided in a case which can be resolved on statutory or common law grounds. [FN1] That principle should apply with special force to an administrative agency, which has no particular competence to address issues of constitutional dimension.

There appears to me no occasion to address constitutional issues in this case. While the Fourteenth Amendment imposes on the States certain minimal standards of justice and decency, Section 5 of the Federal Trade Commission Act requires the Commission 'to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop' [FN2] and to enforce adherence to those standards in consumer transactions. The semantic kinship between the 'fundamental fairness' standard adopted in the due process cases [FN3] and the 'unfairness' yardstick mandated by Section 5 is not at all indicative

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of a legal equivalence. Although in particular cases the two stndards may often coalesce, it would not be remarkable if a constitutional limitation on the activities of States were to diverge from a statutory limitation on the conduct of businessmen.

The Commission, quite appropriately, refers to a number of judicial decisions which express doubt about the constitutionality of State's assertion of in personam jurisdiction over out-of-State mail order consumers. [FN4] These decisions, together with others which do not involve the due process clause, [FN5] sufficiently establish that public policy disfavors the institution of collection lawsuits against consumers in courts unreasonably remote from the consumers' place of residence. That established public policy judgment, coupled with the substantial consumer injury disclosed by the record in this case, is enough to persuade me that the litigation practices of Spiegel which were challenged in this case amount to an unfair practice within the meaning of Section 5 of the Federal Trade Commission Act.

This reasoning also disposes of respondent's argument to the effect that the Commission cannot interfere with respondent's use of the Illinois long-arm statute unless the resulting judgments against out-of-State consumers were entered unconstitutionally. Again, while the Commission's opinion seems to answer this contention by concluding that the judgemtns were entered unconstitutionally, it is not necessary to decide that question. Leaving aside the fact that no Illinois court has ever held use of the long-arm statute in the manner adopted by respondent to be proper, I am perfectly content to assume arguendo that respondent's long-arm litigation does not involve the Cook County courts in a violation of due process, and that the judgements respondent obtains are entitled to full faith and credit in other States. The Federal Trade Commission Act, however, is not infrequently interpreted to prohibit unfair or deceptive acts or practices regardless of whether those acts or practices are authorized by the law of the State in which they are committed. See, e.g., FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239 n. 4 (1972); Chamber of Commerce of Minneapolis v. FTC, 13 F.2d 673, 684 (8th Cir. 1926); peerless Products, Inc. v. FTC, 384 F.2d 825, 827 (7th Cir. 1960), cert. denied 365 U.S. 844 (1961).

This case appears to illustrate the wisdom of the rule that constitutional issues should not be decided unless necessary to the result. When the Commission issued its proposed complaint in this matter on Mar. 4, 1974, it announced simultaneously its intention to institute three similar cases: Montgomery Ward & Co:, Inc., File No. 742 3102 [Dkt. C-2602, 84 F.T.C. 1337]; West Coast Credit Corp., File No. 732 3110 [84 F.T.C. 1328] and Commercial Service Co., Inc., File No. 732 3404 [p. 467, herein]. [FN6] In those three proposed complaints, the Commission stated it had reason to believe that the practice of suing a consumer in a remote location within the consumer's own State was unfair. At issue were alleged disregard of State venue provisions (Commercial Service), contractual waiver of State venue provisions (West Coast Credit), and, apparently, reliance on State venue provisions which the Commission had reason to believe did not in the particular circumstances come up to the standards of fairness embodied in Section 5 (Montgomery Ward). Of all the cases, only Spiegel raised putative constitutional issues. Taken together, the four cases signaled the Commission's intention to decide whether it is fair to force consumers to defend collection suits in distant courts, regardless of whether those courts are outside the State of the consumer's residence and, further, regardless of whether State venue rules are followed. Spiegel is the only one of these cases to be reviewed by the Commission after full administrative proceedings. The forum involved happens to be out-of-State, but that was certainly not deemed critical when the case was filed. [FN7] To the extent the Commission's opinion suggests otherwise, I believe it confuses the relevant assessment of public policy.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondent from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission for the reasons stated in the accompanying opinion, having denied the appeal in principal part:

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It is ordered, That the initial decision of the administrative law judge be, and it hereby is, adopted as the findings of fact and conclusions of law of the Commission, to the extent not inconsistent with the accompanying opinion.

Other findings of fact and conclusions of law of the Commission are contained in the accompanying opinion.

It is further ordered, That the following order to cease and desist be, and it hereby is, entered:

ORDER

I

For purposes of this order, the term 'respondent' means 'Spiegel, Inc., a corporation, and its successors, assigns, officers, agents, representatives and employees, acting directly or through any corporation, subsidiary, division, or other device, including any collection agency.'

II

It is ordered, That respondent, in connection with the collection of retail credit accounts in or affecting commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from instituting suits except in the county where the defendant resides at the commencement of the action, or in the county where the defendant signed the contract sued upon. This provision shall not preempt any rule of law which further limits choice of forum or which requires, in actions involving real property or fixtures attached to real property, that suit be instituted in a particular county.

III

It is further ordered, That where respondent learns subsequent to institution of a suit that the preceding Paragraph (II) has not been complied with, it shall forthwith terminate the suit and vacate any default judgment entered thereunder. In lieu of such termination, respondent may effect a change of forum to a county permitted by the preceding paragraph, Provided, That respondent gives defendant notice of such action and opportunity to defend equivalent to that which defendant would receive if a new suit were being instituted. In all cases respondent shall provide defendants with a clear explanation of the action taken and of the defendants' right to appear, answer and defend in the new forum.

IV

It is further ordered, That where respondent terminates a suit or vacates a judgment pursuant to the preceding Paragraph (III) it shall give notice of such termination or vacation to each 'consumer reporting agency,' as such term is defined in the Fair Credit Reporting Act (15 U.S.C. § 603), which it has been informed or has reason to know has recorded the suit or judgement in its files. Additionally, respondent shall furnish such notice to any other person or organization upon request of the defendant.

V

It is further ordered, That respondent prepare and maintain a summary of suits instituted, pending, terminated, or acted upon subsequent to judgment, involving the collection of retail credit accounts by respondent. This summary shall contain each defendant's name, address, and county of residence; county where the contract was signed by the defendant, if the suit was not instituted in the residence county; county where served; date served, date filed; docket number; name and location of court in which filed; name of plaintiff (if a collection agency suing in its own name); amount claimed; and disposition (including garnishment or execution, if any). Where a suit has been

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instituted in a county other than where defendant resides or signed the contract sued upon, the reason for this choice of forum shall be explained. This summary shall cover the two years immediately following effective date of this order. A copy of this summary shall be submitted to the Federal Trade Commission on a quarterly basis.

VI

It is further ordered, That Spiegel, Inc., shall forthwith deliver a copy of this order to each of its subsidiaries and operating divisions, to each collection agency currently collecting any of Spiegel's retail credit accounts, and to any other collection agency prior to referral to it of any of Spiegel's retail credit accounts. Spiegel, Inc., shall obtain and preserve signed and dated statements from each collection agency, acknowledging receipt of the order and willingness to comply with it.

It is further ordered, That respondent shall notify the Commission at least thirty days prior to any proposed change in the corporate responent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty days and at the end of six months after the effective date of the order served upon it, file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form of its compliance with the order to cease and desist.

1 The following abbreviations are used herein:

I.D.--Initial Decision (Finding No.)

I.D. p.--Initial Decision (Page No.)

RB--Respondent's Appeal Brief to the Commission (Page No.)

RPF--Respondent's Proposed Findings of Fact and Law

CB--Complaint Counsel's Reply Brief to the Commission (Page No.)

2 'Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hezards of Smoking,' 29 Fed. Reg. 8355 (1964), cited in FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244-45 n. 5 (1972).

3 Ill.Rev.Stat., Supp. Ch. 110 § 176, 1967.

4 Respondent's argument that the Commission in this proceeding is challenging the validity of the Illinois statute itself is patently incorrect. To the extent the Illinois statute is relevant, the question is whether its narrow and particular use by Spiegel is consistent with federal law. Respondent has pointed out no opinion by an Illinois court or any other holding that Spiegel's particular use of the long arm statute is a proper one.

5 See RPF, Appendix A, p. 2.

6 Respondent has made no effort to distinguish the extensive case law cited by complaint counsel in support of their position. We have carefully reviewed the decisions cited by respondent at pages 32-36 of its Appeal Brief, involving construction of the Illinois long-arm statute, e.g., Ziegler v. Houghton-Mifflin Co., 80 Ill. App. 210, 224 N.E. 2d 12 (App. Ct. 2d Dist. (1967); Koplin v. Thomas, Haab, and Botts, 73 Ill. App. 2d 242, 219 N.E. 2d 646

(Publication page references are not available for this document.)

(App. Ct. 1st Dist. 1966); O'Hare International Bank v. Hampton, 437 F.2d 1173 (7th Cir. 1971). None of these matters involved, nor did the courts therein discuss, the type of situation at issue here, and of concern to courts in cases cited by complaint counsel, I.e., a passive consumer mail order buyer and a large vendor who initiates and sets the terms of the transaction. Respondent's reliance on McGee v. International Life Insurance, supra, is similarly misplaced, in light of the wide difference of involvement in the transaction between the defendant vendor in that case and the defendant consumers in this, and in view of the Court's heavy reliance in that case on the state's interest in providing its citizens with an effective means of suing insurers who refuse to pay their claims 355 U.S. 223-24.

7 This passage discusses the effect of use of inconvenient venue within the debtor's home State. Spiegel's suits in an inconvenient venue outside the debtor's State can hardly be less oppressive. See also, Consumer Credit in the United States, Report of the National Commission on Consumer Finance, pages 41- 42 (Dec. 1972).

8 RPF, Appendix A, page 2.

9 Montgomery Ward & Co., C-2602 (Nov. 1974); West Coast Credit Corp., C-2600 (Nov. 1974); Commercial Service Co., Inc., File No. 732-3434 (consent order accepted and placed on public record for comment).

10 In this regard it may not be irrelevant to note that in Appendix A of respondent's 'Proposed Findings of Fact and Conclusions of Law' before the administrative law judge, respondent's vice-president/secretary states that Spiegel instituted its experimental program of suing out-of-State debtors in Cook County 'to determine what the collection results would be without recourse to execution or garnishment on the judgments obtained against delinquent debtors.' In the same affidavit it is stated that in those rare instances when a consumer objected to the Illinois venue, the suit was dropped. We wonder why, with an 'undisputed balance' at stake, Spiegel should desist from proceeding in a forum it assertedly believed to be entirely proper.

11 Neglect of uncontroverted jurisdictional issues occurs in administrative proceedings as well. As complaint counsel have pointed out in their brief (CB 22-23), the administrative law judge did not enter a conclusion of law in his initial decision stating that the Commission has jurisdiction in this case. Spiegel has not challenged the Commission's jurisdiction, and we hereby do conclude that the Federal Trade Commission has jurisdiction over the respondent and over the subject matter of this proceeding.

12 We similarly do not believe that the Tenth Amendment forbids Commission action (RB 40-42). Even if the Commission's action is viewed as imposing a limitation on State authority to authorize suits, rather than as imposing a limitation on Spiegel's ability to abuse the judicial process, it is nonetheless well-established that the Tenth Amendment does not mean that State-authorized activity may stand in the face of duly authorized Federal requirements Maryland v. Wirtz, 392 U.S. 183 (1968); United States v. Darby, 312 U.S. 100, 123-24 (1941).

13 Paragraph II of the Commission's revised order. References hereinafter are to the revised order entered by the Commission, which generally tracks the notice order.

14 Indeed, a mere docket check in most counties would be insufficient to reveal instances in which a collection agency had sued on a Spiegel account in the agency's name

15 This is particularly so in view of the fact that there other respondents, sued at the same time as Spiegel, were willing to consent to reporting requirements identical to those involved here see n. 9, supra.

1 See, e.g., Frankfurter, Law and Politics 25 (1939).

2 FTC v. Standard Education Society, 86 F.2d 692, 696 (2d. Cir. 136) (per L. Hand, J.), rev'd on other grounds,

(Publication page references are not available for this document.)

302 U.S. 112 (1937).

3 See, e.g., International Shoe Co. v. Washington, 326U.S. 310, 316 (1945) ('traditional notions of fair play').

4 No court, however, has expressly held such an application of a long-arm statute unconstitutional.

5 See, e.g., Barguis v. Merchants Collection Association of Oakland, Inc., 7 C.3d 94, 101 Cal. Rptr. 745, 496 P.2d 817 (1972); All-State Credit Corporation v. Defendants Listed in 669 Default Judgments, 61 Misc. 2d 677, 306 N.Y.S.2d 596 (Sup. Ct. App. Term 1970).

6 Respondents in all three cases have since agreed to the entry of consent orders.

7 Nor can it be critical to the relief ordered herein. Although the specific practice held unfair in this case was suing out-of-State mail-order consumers in Cook County, Ill., it is significant that the Commission's cease and desist order prohibits Spiegel from suing a consumer anywhere other than in his county of residence or the county where he signed the contract sued upon.

FTC

END OF DOCUMENT

COPY

Appendix 13

FORM B10 (Official Form 10) (04/04)

ESTIMATED

UNITED STATES BANKRUPTCY COURT _____ DISTRICT OF New Jersey

PROOF OF CLAIM

U.S. BANKRUPTCY COURT
FILED
NEWARK, NJ
05 FEB 28 PM 12:55
JAMES J. WALDRON
BY: _____
DEPUTY CLERK

Name of Debtor	Case Number
NORVERGENCE, INC.	04-32079-RG

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

Name of Creditor (The person or other entity to whom the debtor owes money or property): COMMONWEALTH OF MASSACHUSETTS

Name and address where notices should be sent:
SCOTT D SCHAFER, AAG
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MA 02108

Telephone number: 617-727-2200 X 2516

☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

☒ Check box if you have never received any notices from the bankruptcy court in this case.

☐ Check box if the address differs from the address on the envelope sent to you by the court.

THIS SPACE IS FOR COURT USE ONLY

Account or other number by which creditor identifies debtor: N/A

Check here ☐ replaces ☐ amends if this claim a previously filed claim, dated: _____

1. Basis for Claim

☐ Goods sold
☐ Services performed
☐ Money loaned
☐ Personal injury/wrongful death
☐ Taxes
☒ Other RESTITUTION, PENALTIES & COSTS

☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)
☐ Wages, salaries, and compensation (fill out below)
Last four digits of SS #: _____
Unpaid compensation for services performed
from _____ (date) to _____ (date)

2. Date debt was incurred: 2003, 2004 AND CONTINUES ACCRUING

3. If court judgment, date obtained:

4. Total Amount of Claim at Time Case Filed: $9,348,508 (unsecured) _____ (secured) _____ (priority) $9,348,508 (Total)

If all or part of your claim is secured or entitled to priority, also complete Item 5 or 7 below.

☒ Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges. SEE EXHIBIT A

5. Secured Claim.

☐ Check this box if your claim is secured by collateral (including a right of setoff)

Brief Description of Collateral
☐ Real Estate ☐ Motor Vehicle
☐ Other _____

Value of Collateral: $_____

Amount of arrearage and other charges at time case filed included in secured claim, if any: $_____

6. Unsecured Nonpriority Claim $9,348,508

☒ Check this box if: a) there is no collateral or lien securing your claim, or b) your claim exceeds the value of the property securing it, or if c) none or only part of your claim is entitled to priority.

7. Unsecured Priority Claim.

☐ Check this box if you have an unsecured priority claim

Amount entitled to priority $_____
Specify the priority of the claim:

☐ Wages, salaries, or commissions (up to $4,925),* earned within 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(3).
☐ Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(4).
☐ Up to $2,225* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6).
☐ Alimony, maintenance, or support owed to a spouse, former spouse, or child - 11 U.S.C. § 507(a)(7).
☐ Taxes or penalties owed to governmental units-11 U.S.C. § 507(a)(8).
☐ Other - Specify applicable paragraph of 11 U.S.C. § 507(a)(____).

Amounts are subject to adjustment on 4/1/07 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.

8. Credits: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

9. Supporting Documents: *Attach copies of supporting documents,* such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary.

10. Date-Stamped Copy: To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim

THIS SPACE IS FOR COURT USE ONLY

Date: 2/25/05

Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any):
SCOTT D. SCHAFER, AAG

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

EXHIBIT A

ADDENDUM TO FIRST ESTIMATED PROOF OF CLAIM OF THE COMMONWEALTH OF MASSACHUSETTS

1. The Commonwealth of Massachusetts (the "Commonwealth") is investigating complaints made by Massachusetts consumers regarding the conduct of the Debtor, NorVergence, Inc. ("NorVergence"), in connection with NorVergence's leasing of telecommunications equipment and sales of telecommunications services to these consumers.

2. From 2003 and continuing until shortly before the bankruptcy filing in June 2004, NorVergence purported to lease equipment and resell telecommunications services targeting small businesses, non-profit organizations, churches and municipalities in Massachusetts. As part of the resale of the telecommunications services, NorVergence would first enter into agreements with telecommunication companies such as Qwest Communications Corporation, Sprint Communications Company, T-Mobile USA, and Verizon Wireless (the "Suppliers") to purchase in bulk landline telephone service, wireless service, or Internet access. NorVergence would then market and resell these services to Massachusetts consumers as integrated, long-term packages, that offered landline and cellular telephone service and Internet access all in one.

3. To induce consumers to lease equipment and purchase telecommunication services, NorVergence offered reduced prices for telecommunication services. However, the reduced price was not determined by the costs NorVergence would be charged by the Suppliers. Rather, NorVergence's reduced price was arbitrary and made for the purpose of inducing sales. Ultimately, upon information and belief, NorVergence did not have the ability to purchase, for the long term, the telecommunication services from the Suppliers and resell these services to consumers while maintaining the reduced prices that NorVergence charged to consumers.

4. Additionally, upon information and belief, NorVergence required consumers to enter into equipment lease agreements, on average for a five year period, based on an intentionally inflated valuation of the equipment, resulting in lease payments that far exceeded the value of the equipment. These lease agreements were then sold or assigned to finance companies who knew or should have known that the equipment was overvalued and worthless without the delivery of the contracted for telecommunication services.

5. The Commonwealth has received 243 complaints to date from consumers and continues to receive complaints from consumers who have been injured as a result of NorVergence's conduct. Based on the complaints received by the Commonwealth to date, the restitution owed to consumers is estimated at approximately $8,133,508.

6. The primary allegations in the consumers' complaints are that NorVergence: (1) made false and/or fraudulent representations to induce consumers to sign contracts for telecommunications services and equipment; (2) failed to disclose clearly and conspicuously all material terms and conditions in their advertisements, rental agreements and related contracts; (3) failed to disclose clearly and conspicuously that the customer's obligation to pay continued regardless of the ability of NorVergence to provide telecommunications and Internet services; (4) failed to disclose clearly and

conspicuously that, under the rental agreement and related documents, the customer waived all defenses; and (5) failed to provide the consumers with promised discount prices, telecommunications and Internet services. These allegations, if true, constitute violations of the Massachusetts Consumer Protection Act MGL c. 93A, § 2(a) and 940 C.M.R. §§ 3.02(2), 3.05(1), 3.06(3), and 6.03.

7. The Attorney General is seeking restitution for the injured Massachusetts consumers, reformation or rescission of contracts and cancellation of purported debts, injunctive relief, civil penalties, and the costs of the investigation and prosecution of this case, including reasonable attorneys' fees.

8. As of June 30, 2004, NorVergence owed consumers the approximate sum of $8,133,508 representing the cost to pay off the rental agreements, and penalties in the amount of $1,215,000, for a total of $9,348,508.

9. The penalties are assessed under MGL c. 93A, §4, which provides for the recovery of civil penalties of not more than $5,000 for each violation. The Commonwealth's claim includes penalties in the amount of $1,215,000, representing $5,000 for each of the 243 consumers that NorVergence defrauded. The amount of penalties may increase if the Commonwealth determines during the course of its investigation that either: (a) NorVergence defrauded additional Massachusetts consumers; or (b) NorVergence committed additional violations.

10. The Commonwealth did not incur legal fees prior to the commencement of this bankruptcy proceeding and the Commonwealth's claim of $9,348,508 does not include attorneys' fees. However, attorneys' fees and costs are recoverable under applicable state law and have been accruing post-petition.

11. Finally, the Commonwealth expressly reserves, and does not waive, any and all rights it may have under the doctrine of sovereign immunity and the Eleventh Amendment of the United States Constitution.

Appendix 14

FORM B10 (Official Form 10) (04/04)

UNITED STATES BANKRUPTCY COURT _____ DISTRICT OF NEW JERSEY		PROOF OF CLAIM
Name of Debtor NORVERGENCE, INC.	Case Number 04-32079 (RG)	

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

Name of Creditor (The person or other entity to whom the debtor owes money or property): State of Florida Department of Legal Affairs and Florida Consumers

Name and address where notices should be sent:
John Newton
Office of the Attorney General
PL 01 The Capitol, Tallahassee, FL 32399-1050
Telephone number: 850-414-3600

☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.
☑ Check box if you have never received any notices from the bankruptcy court in this case.
☐ Check box if the address differs from the address on the envelope sent to you by the court.

THIS SPACE IS FOR COURT USE ONLY

Account or other number by which creditor identifies debtor:

Check here ☐ replaces if this claim ☐ amends a previously filed claim, dated:_____

1. Basis for Claim

☐ Goods sold
☐ Services performed
☐ Money loaned
☐ Personal injury/wrongful death
☐ Taxes
☐ Other Penalties & damages arising under Fla. Stat. §501

☐ Retiree benefits as defined in 11 U.S.C §.1114(a)
☐ Wages, salaries, and compensation (fill out below)
Last four digits of SS #: _____
Unpaid compensation for services performed
from _____ (date) to _____ (date)

2. Date debt was incurred: 2001-2004

3. If court judgment, date obtained:

4. Total Amount of Claim at Time Case Filed: $ 20,000,000.00 (unsecured) _____ (secured) _____ (priority) $20,000,000.00 (Total)

If all or part of your claim is secured or entitled to priority, also complete Item 5 or 7 below.

☐ Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.

5. Secured Claim.

☐ Check this box if your claim is secured by collateral (including a right of setoff).

Brief Description of Collateral:
☐ Real Estate ☐ Motor Vehicle
☐ Other_____

Value of Collateral: $_____

Amount of arrearage and other charges at time case filed included in secured claim, if any: $_____

6. Unsecured Nonpriority Claim $ 20,000,000.00

☐ Check this box if: a) there is no collateral or lien securing your claim, or b) your claim exceeds the value of the property securing it, or if c) none or only part of your claim is entitled to priority.

7. Unsecured Priority Claim.

☐ Check this box if you have an unsecured priority claim

Amount entitled to priority $_____

Specify the priority of the claim:

☐ Wages, salaries, or commissions (up to $4,925),* earned within 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(3).
☐ Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(4).
☐ Up to $2,225* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6).
☐ Alimony, maintenance, or support owed to a spouse, former spouse, or child - 11 U.S.C. § 507(a)(7).
☐ Taxes or penalties owed to governmental units-11 U.S.C. § 507(a)(8).
☐ Other - Specify applicable paragraph of 11 U.S.C. § 507(a)(____).

Amounts are subject to adjustment on 4/1/07 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.

8. Credits: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

9. Supporting Documents: *Attach copies of supporting documents*, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary.

10. Date-Stamped Copy: To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim

THIS SPACE IS FOR COURT USE ONLY

Date	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any):
2/26/05	

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

UNITED STATES BANKRUPTCY COURT, DISTRICT OF NEW JERSEY - Case No. 04-32079 (RG)

ADDENDUM TO STATE OF FLORIDA, DEPARTMENT OF LEGAL AFFAIRS FORM B10

Explanation and Summary for Item 9 of Form B10

Documents establishing this claim are unavailable because the claim is not based upon obligations created by documents. Rather it is a legal claim under Chapter 501, Part III, Florida Statutes. The claim arises from the debtors' perpetration of deceptive and unfair trade practices that damaged Florida consumers. The deceptive and unfair trade practices of NorVergence included defrauding thousands of Florida consumers by misrepresenting the nature, capacity, and benefits of equipment causing consumers to lease equipment and by failing to provide telephone services and other benefits that consumers had contracted and paid for both through the leasing of equipment and monthly service fees. Chapter 501, Part III, Florida Statutes, creates liability for damages, penalties, costs and fees for deceptive and unfair trade practices like those committed by NorVergence.

Appendix 15

FORM B10 (Official Form 10) (04/04)

UNITED STATES BANKRUPTCY COURT __ DISTRICT OF NEW JERSEY _____	PROOF OF CLAIM
Name of Debtor NorVergence, Inc. / Case Number 04-32079	

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

Name of Creditor (The person or other entity to whom the debtor owes money or property):
Federal Trade Commission

☐

Name and address where notices should be sent:
Randall Brook
Federal Trade Comm.
915 2nd Ave Ste 2896
Seattle, WA 98174

Telephone number: 206.220.4487

☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

☐ Check box if the address differs from the address on the envelope sent to you by the court.

Check box if you have never received any notices from the bankruptcy court in this case.

THIS SPACE IS FOR COURT USE ONLY

Account or other number by which creditor identifies debtor:

☐ replaces ☐ amends if this claim a previously filed claim, dated: _____

1. Basis for Claim

- ☐ Goods sold
- ☐ Services performed
- ☐ Money loaned
- ☐ Personal injury/wrongful death
- ☐ Taxes
- ☒ Other Restitution for violation of FTC Act, 15 U.S.C. 45(a); case pending in US District Ct., Dkt. 04-5414 (DRD) (D. NJ)
- ☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)
- ☐ Wages, salaries, and compensation (fill out below)
  Last four digits of SS #: _____
  Unpaid compensation for services performed

2. Date debt was incurred: 2002-2004

3. If court judgment, date obtained:

4. Total Amount of Claim at Time Case Filed: $ 200 million (estim.) (unsecured) _____ (secured) _____ (priority) $200 million (estim.) (Total)

If all or part of your claim is secured or entitled to priority, also complete Item 5 or 7 below.

☐ Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.

5. Secured Claim.

☐ Check this box if your claim is secured by collateral (including a right of setoff).

Brief Description of Collateral:

☐ Real Estate ☐ Motor Vehicle ☐ Other_____

Value of Collateral: $_____

Amount of arrearage and other charges at time case filed included in secured claim, if any: $_____

6. Unsecured Nonpriority Claim $ 200 million (estim.)_____

☒ Check this box if: a) there is no collateral or lien securing your claim, or b) your claim exceeds the value of the property securing it, or if c) none or only part of your claim is entitled to priority.

7. Unsecured Priority Claim.

☐ Check this box if you have an unsecured priority claim

Amount entitled to priority $_____

Specify the priority of the claim:

- ☐ Wages, salaries, or commissions (up to $4,925),* earned within 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(3).
- ☐ Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(4).
- ☐ Up to $2,225* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6).
- ☐ Alimony, maintenance, or support owed to a spouse, former spouse, or child - 11 U.S.C. § 507(a)(7).
- ☐ Taxes or penalties owed to governmental units-11 U.S.C. § 507(a)(8).
- ☐ Other - Specify applicable paragraph of 11 U.S.C. § 507(a)(____).

Amounts are subject to adjustment on 4/1/07 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment

8. Credits: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

9. Supporting Documents: *Attach copies of supporting documents*, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary.

10. Date-Stamped Copy: To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim

THIS SPACE IS FOR COURT USE ONLY

FILED
JAMES J. WALDRON, CLERK
FEB 25 2005
U.S. BANKRUPTCY COURT
NEWARK, N.J.
BY _____ DEPUTY

Date	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any):
2/22/05	Randall H. Brook, attorney for Federal Trade Comm.

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.