

2007 - 34280

CAUSE NO. 2007 - 34280

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| <p>STATE OF TEXAS,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>IFC CREDIT CORPORATION,</p> <p style="text-align: center;">Defendant.</p> |
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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

129  
~~151~~ JUDICIAL DISTRICT

BY DEPUTY

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FILED  
 CHARLES BACARISSE  
 DISTRICT CLERK  
 HARRIS COUNTY, TEXAS

**PLAINTIFF'S ORIGINAL PETITION  
AND REQUEST FOR INJUNCTIVE RELIEF**

Plaintiff, STATE OF TEXAS, acting by and through the Attorney General of Texas, Greg Abbott's Consumer Protection Division, complains of IFC CREDIT CORPORATION ("Defendant" or "IFC") and for cause of action would respectfully show as follows:

**DISCOVERY CONTROL PLAN**

1. The discovery in this case is intended to be conducted under Level 2 pursuant to Tex. R. Civ. Proc. 190.2(b)(3); 190.3(a).

**JURISDICTION AND VENUE**

2. This action is brought by Attorney General Greg Abbott, through his Consumer Protection Division, in the name of the State of Texas and in the public interest under the authority granted him by Section 17.47 of the Texas Deceptive Trade Practices - Consumer Protection Act, Tex. Bus. & Com. Code Ann. Section 17.41 *et seq.* (Vernon 2002 and Supp 2006) ("DTPA") upon the ground that the Defendant has engaged in false, deceptive and misleading acts and practices in the course of trade and commerce as defined in, and declared unlawful by Sections 17.46(a) and (b) of the DTPA.

3. Venue is proper in Harris County, because, although Defendant is headquartered in Illinois,

it has been taking collection actions on agreements entered into in Harris County. The allegations in this complaint arise in the course of defendant's financing the sales of telecommunications services by NorVergence, Inc. ("NorVergence"), a New Jersey company. A default judgment was entered against NorVergence in the 270<sup>th</sup> District Court of Harris County Texas in Cause No. 2004-65357 April 29<sup>th</sup> 2005. The Court found that NorVergence had violated the DTPA because it materially misrepresented the nature of its telecommunications services to all Texas consumers who contracted for same. Also, that all equipment rental agreements or other contracts procured between NorVergence and Texas consumers or between finance companies and Texas consumers as a result of NorVergence solicitation directed to any Texas consumer are the result of deceptive and unfair practices and fraud on the part of NorVergence and, therefore, are declared void *ab initio* and are unenforceable.

4. Defendant IFC Credit Corporation ("IFC") is an Illinois corporation with its principal place of business located at 8700 Waukegan Rd., Morton Grove, IL 60053. It transacts business in Harris County. IFC Credit Corporation may be served by serving its registered agent CT Corporation Systems, 350 North St. Paul St., Dallas, Texas 75201.

#### **DEFINITIONS AND PREREQUISITES TO SUIT**

5. The DTPA (Section 17.45(1)) defines "goods" as meaning tangible chattels or real property purchased or leased for use.

6. The DTPA (Section 17.45(2)) defines "services" as work, labor or service, purchased or leased for use, including services furnished in connection with the sale or repair of goods.

7. The DTPA (Section 17.45(3)) defines "person" as an individual, partnership, corporation, association, or other group, however organized.

8. The DTPA (Section 17.45(6)) defines "trade and commerce" as meaning the advertising,

offering for sale, sale, lease, or distribution of any good or service . . . tangible or intangible. . . wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this State.

9. The DTPA (Section 17.47) authorizes the Consumer Protection Division to seek injunctive relief and civil penalties as well as obtain restitution for identifiable persons. It also has a provision for informing potential Defendants of the allegations against them.

### **TRADE AND COMMERCE**

10. Defendant has at all times described below engaged in conduct which constitutes trade and commerce as those terms are defined in the DTPA Section 17.45(6).

### **ACTS OF AGENTS**

11. Whenever in this Petition it is alleged that Defendant did any act, it is meant that:
- a. Defendant performed or participated in the act, or
  - b. Defendant's officers, agents, or employees, performed or participated in the act on behalf of and under the authority of the Defendant.

### **NOTICE BEFORE SUIT**

12. The Consumer Protection Division informed Defendant of the alleged unlawful conduct described below at least 7 days before filing suit as required by DTPA Section 17.47(a).

### **BACKGROUND STATEMENT OF FACTS**

13. IFC helped finance a massive, fraudulent scheme by NorVergence, a reseller of telecommunications services. The victims of this fraud were small businesses and religious and other non-profit organizations, and individuals who personally guaranteed the obligations of these organizations (collectively, "persons" or "consumers"). The consumers agreed to five-year, price-guaranteed, contracts for greatly discounted telecommunications services. The written

contracts, however, concealed their predominant purpose - the financing of telecommunications services - by using the title "Equipment Rental Agreement," referencing a minor piece of equipment, and omitting any mention of the services that were being financed. This made it easier for IFC and other finance companies who purchased the contracts to enforce them even if the promised services were never delivered, because it appeared that NorVergence had fulfilled its obligation simply by delivering the equipment.

14. IFC and NorVergence entered into a contract (called the "Master Program Agreement"), and IFC subsequently purchased \$21 million of NorVergence Rental Agreements. NorVergence told consumers that payment on the Rental Agreements would ensure all the savings promised by NorVergence on telecommunications services. IFC repeated that promise to its customers.

15. In fact, despite making payments, none of these consumers received more than a small period of services, and many consumers never received any of the promised services. Nonetheless, IFC has demanded payment in full on Rental Agreements ranging from \$4,439 to \$160,672. IFC falsely claims that consumers have no defenses because the minor piece of equipment mentioned in the contracts, which typically costs less than \$1,300 and, in some cases, as little as \$272, was delivered to the consumers' premises. IFC has enforced its payment demands by filing suits and executions of judgments in courts far distant from where the consumers reside.

### **The Underlying Scheme That IFC Financed**

16. NorVergence resold telecommunications services it purchased from common carriers or others. NorVergence marketed its services as integrated, long-term packages, including landline and cellular telephone service and Internet access.

17. NorVergence promised substantial savings to consumers and priced its service packages at a discount, typically 30% less than the amount the consumer was currently paying for those services.

NorVergence salespeople communicated the promised savings to prospective customers in writing in the form of a "Cost Savings Proposal" so customers could see what they would be paying and saving on a monthly and annual basis. The "Cost Savings Proposal" was prepared without regard to the cost NorVergence would incur in providing the services and related equipment. NorVergence also typically promised unlimited minutes for both long distance and cellular calls for a fixed charge, although NorVergence was obligated to pay its telecommunications service providers on a usage basis for the services it provided to consumers. NorVergence also represented that, if anything happened to NorVergence, the consumer would continue to receive the services for which they had contracted.

18. In its sales presentations, NorVergence represented that it could produce the dramatic savings and unlimited minutes through the installation of a "black box," with proprietary technology, on the customers' premises. NorVergence called the box the Matrix, an acronym for "Merged Access Transport Intelligent Xchange." It would supposedly route telecommunications in a manner to provide the promised savings. The Matrix came in two versions, the Matrix 850 and the Matrix SOHO.

19. The Matrix 850 is a standard integrated access device, or IAD, commonly used to connect telephone equipment to a long-distance provider's T-1 (high bandwidth data line) or similar data line. The Matrix Soho is a standard firewall/router typically used to access Internet services.

20. The Matrix boxes do not establish or change the costs of long distance service at all. They do nothing to provide unlimited minutes on landlines and cannot affect cellular services at all (the Soho does not even provide access to telephone or cellular phone services). In fact, the Matrix boxes alone have virtually no value. They are not directly compatible with other telecommunications service providers and, in any event, the finance company, such as IFC, owns the Matrix, so the

consumer can neither alter nor sell it. Thus, receipt of services was absolutely contingent upon the continued availability of service from NorVergence.

21. NorVergence procured customers' signatures on a large set of documents, including a "Customer Qualifying Questionnaire," an "Accurate Bill Receipt and Proposal Request," a "Receipt of Savings Guarantee Subject to Mutual Due Diligence & Acceptance by Engineering," a "Credit Application," a "Letter of Agency," a "No-Risk Reservation Agreement," a "Hardware Application," and a "Service Application," all of which were represented to be "non-binding." The "non-binding" nature of the hardware and service applications were stated in bold print capital letters at the top of the documents.

22. A document entitled "Equipment Rental Agreement" (or "Rental Agreement") was included with other documents that NorVergence had consumers sign. This was the contract NorVergence assigned to IFC. Salespeople simply included the Rental Agreement in the pile of documents, or told customers they needed to sign it before the equipment was installed so they could get the promised services. On the back page and in small print, the Rental Agreement provided that it was not subject to cancellation for any reason.

23. The Rental Agreement listed a monthly payment to be made to NorVergence for 60 months or, rarely, a shorter term. Most of the total price for services and equipment quoted to the consumer was allocated to the Rental Agreement. The Rental Agreement, however, did not list the services to be provided. It listed only the Matrix box and, occasionally, some related equipment. The remaining balance of the quoted price for services was allocated to the service applications or agreements, but it was only a small fraction of the rental amount and was unrelated to the actual costs of providing telecommunication services. In many cases, the owners of the small businesses or managers of the non-profit organizations were required to personally guarantee payment of the

Rental Agreement.

24. NorVergence paid its principal supplier \$1,278 for each Matrix 850 pre-equipped with two "cards" (with each card servicing four lines), or \$1,224 with no cards. NorVergence's cost for the Matrix 850 could increase if extra cards (which increased the number of outgoing lines the box could service), costing approximately \$78 each, were installed. The maximum number of cards that could be installed in a Matrix 850 was six. According to IFC records, only 19 Matrix Rental Agreements assigned to IFC had more than two cards and only five of those had more than three cards. NorVergence paid \$272 for each Matrix Soho it provided to its customers. There were no "cards" associated with Soho boxes.

25. Payments specified in the Rental Agreements were not based on the cost or value of the Matrix boxes. Instead, over the life of the Rental Agreements, they dramatically exceeded NorVergence's cost for the Matrix boxes and the Matrix boxes' fair market value. The total "rental" payments for the \$1,278 Matrix 850 ranged from \$4,439 to \$160,672. The total rental payments for the \$272 SOHO totaled from \$7,217 to \$34,631.

### **The Close Relationship Between IFC and NorVergence**

26. On or about October 10, 2003, IFC entered into a Master Program Agreement with NorVergence to provide financing for NorVergence's sales. IFC internally referred to the arrangement as the "IFC Credit/NorVergence Partnership." Prior to entering into this relationship, IFC reviewed NorVergence's proposed operations and its marketing approach to consumers, including the five-year price guarantee on telecommunications services.

27. The Master Program Agreement provided that, in the event of a default on a consumer's first payment, IFC could require NorVergence to repurchase the Rental Agreement. It also provided that consumers would be liable for Rental Agreement payments even if NorVergence failed to provide

the promised telecommunications services.

28. NorVergence sold or assigned Rental Agreements to IFC, usually for the full five-year term, or occasionally for some part of that term. IFC paid NorVergence a discounted portion of the total rental price. For example, in one instance IFC paid NorVergence \$49,000 for a Rental Agreement for a Matrix box with a single card, where the consumer's total rental payments were nearly \$65,000. In another instance, IFC paid \$93,000 for a Rental Agreement calling for over \$160,000 in consumer payments for a Matrix with four cards.

29. By early 2004, many consumers told IFC that the equipment NorVergence had delivered to them had not been hooked up or was not providing the promised service. In addition, many consumers who might otherwise have refused to make their first or subsequent payments to IFC, which would have triggered IFC's right of recourse under the Master Program Agreement, indicated to IFC that they were making the payments because NorVergence was secretly reimbursing them. Instead of exercising its remedies against NorVergence under the Master Program Agreement, however, IFC chose not only to keep the Rental Agreements and seek its remedies against the consumer victims, but also to purchase additional NorVergence Rental Agreements. Despite receiving ever-increasing reports of NorVergence's failure to provide promised services to consumers, IFC maintained its close relationship with NorVergence up to the date of NorVergence's bankruptcy filing.

### **Collapse of NorVergence and IFC's Response**

30. After selling or assigning the Rental Agreements, NorVergence's only ongoing income came from the small amounts consumers were paying under the written telecommunications services agreements. That income was only a small fraction of the cost of providing these services. Much of the proceeds NorVergence received from the assignment of the Rental Agreements was used for



other purposes and what remained was insufficient to pay for the five years of telecommunications services it had promised consumers.

31. IFC continued to finance NorVergence's fraudulent sales scheme by accepting new assignments of NorVergence Rental Agreements, despite NorVergence's failure to provide promised services and the resulting high rate of default among the IFC consumers.

32. IFC's response to information that consumers were not receiving the promised services was to change the Master Program Agreement with NorVergence several times. Each change further limited IFC's risk of financial losses due to the increasing customer defaults caused by NorVergence's failure to deliver the promised telecommunications services. For example, IFC increased the "holdback" or reserve amount it was entitled to retain pursuant to the Master Program Agreement. The holdback amount was a percentage of the payoff IFC owed NorVergence for assignment of contracts, initially 10% or less. As NorVergence declined and consumer problems mounted, however, the holdbacks IFC demanded reached at least 50% of the payoff price. Other changes to the Master Program Agreement improved IFC's position in the event of a NorVergence bankruptcy.

33. On June 16, 2004, just two weeks before NorVergence's involuntary Chapter 11 filing, IFC and NorVergence entered into agreements that gave IFC security interests in over \$15 million of Rental Agreements still owned by NorVergence. IFC paid nothing for this additional security. After the bankruptcy filing, it was obvious from NorVergence's financial condition that no consumers who were party to these Rental Agreements would ever receive any of the promised services. Nevertheless, IFC sought relief from the automatic bankruptcy stay in order to take possession of these Rental Agreements and begin collections. After the FTC and other parties filed objections to lifting the stay, IFC withdrew its petition for relief from stay. The NorVergence Judgment

subsequently determined that those unassigned Rental Agreements were void and unenforceable.

34. Even today, long after the NorVergence bankruptcy, IFC continues to represent to consumers that they are still obligated on the Rental Agreements held by IFC because the payments called for by the Agreements are rental payments for the Matrix box, and not payment for services as NorVergence had promised. IFC also continues to insist on payment of the full balance remaining on NorVergence Rental Agreements, based on an acceleration clause. In some lawsuits, IFC has discounted this payment stream to a present value but added interest back in. In other suits, IFC has claimed that it was damaged in the amount of its payoff to NorVergence. In some or all of these suits, IFC claimed it had paid the full payoff amount, while it had actually paid thousands of dollars less because of the holdback amount it kept as a reserve against losses.

35. Paying for up to five years of unreceived phone services places a severe financial burden on many small business consumers and non-profit organizations, all of whom also have to pay for actual phone services to maintain their businesses or organizations.

**The NorVergence Rental Agreements Acquired by IFC and Other Information  
Alerted IFC to the Likelihood that NorVergence Was Engaged in Deception**

36. The NorVergence Rental Agreements and other information available to IFC when it acquired the Agreements demonstrated that the predominant purpose of the transaction between consumers and NorVergence was the purchase of a long-term package of telecommunications services. This raised clear facts that consumers were deceived into signing the Rental Agreements, which purported to bind them to make substantial monthly payments over a lengthy term just to rent a simple piece of telecommunications equipment, with no mention of telecommunications services. The likelihood of deception by NorVergence was apparent not only from the Agreements themselves, but also from materials describing NorVergence's sales pitch to consumers, from widely

varying contract prices, and from continuing consumer complaints. Finally, if IFC had analyzed the value of the Matrix box as required by provisions of the Rental Agreements and applicable laws, the clear deception of consumers would have been apparent.

37. Before IFC purchased Rental Agreements, NorVergence provided materials to IFC that demonstrated that NorVergence was primarily selling to consumers a savings package on telecommunications services. For example, NorVergence described to IFC the focus of its sales presentations, which heavily emphasized to consumers the savings on telecommunications that NorVergence could provide. One of these descriptions was in a NorVergence PowerPoint for potential financiers (including IFC), which demonstrated the "cost savings strategy" it would use to attract customers:

**Cost Savings Strategy**

- Cost Savings Strategy
  - Customer establishes Current Expenditures with NorV Rep– OLD MONTHLY AMOUNT
  - NorV Engineering determines Monthly Rental Amount for New MATRIX and Monthly Amount for New Resold Access Facilities – NEW MONTHLY AMOUNT
  
- Savings is Presented to Customer as difference between OLD and NEW. When Cost Savings are established, the deal is signed 60.33% of the time!

38. IFC itself made statements to consumers consistent with NorVergence's representations of telecommunications cost savings that were guaranteed for five years, and reinforced the impression that payments on the Rental Agreements were for telecommunications services. A "Confirmation Script" that IFC used for calling consumers before accepting assignment of their Rental Agreements

included the following passage: "[the] flat monthly cost is protected for a 60-month term, producing the NorVergence savings you were promised." The promised 5-year savings could only result if NorVergence provided the promised telecommunications services.

39. NorVergence never offered to sell Matrix boxes and never quoted a sales price to consumers. As NorVergence explained to IFC when demonstrating its business plan: "We do not sell, we require the customer to submit an application for cost savings solution."

40. IFC accepted the form of the NorVergence Rental Agreement even though it differed significantly from IFC's normal form contracts for equipment leases. For example, IFC's typical equipment leases contain language stating an unequivocal intent to be governed by Uniform Commercial Code Article 2A ("UCC Art. 2A"). Some provisions of UCC Art. 2A are significantly more favorable to creditors than the laws relating to non-lease finance contracts or service agreements.

41. NorVergence Rental Agreements did not state an unequivocal intent to be covered by UCC Art. 2A. UCC Art. 2A applies only to *bona fide* equipment lease financing and it does not apply to the financing of services, the predominant purpose of the IFC financing of NorVergence. The NorVergence Rental Agreements refer only to a possibility that some future interpretation might determine that UCC Art. 2A applied to the agreement:

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.

It was clear, however, that these were not "finance leases" as defined in Article 2A for various reasons. Among others, § 2A-103(1)(g) requires that "the lessor [rentor] does not select, manufacture, or supply the goods." Here, the original "rentor," NorVergence, selected and supplied the Matrix box, as well as the telecommunications services. Therefore, Article 2A would not apply.

42. It was obvious that the "rental" payments in the NorVergence Rental Agreements were unrelated to the value of the Matrix box and were instead intended by NorVergence and the consumer to cover services. That was evident in part because of the great disparity in "rental" prices. During its first two weeks of purchases, IFC accepted Rental Agreements from NorVergence, that called for widely varying consumer payments for identical equipment. Further, rental payments for Matrix boxes with more cards were often for substantially less than the payments for boxes with fewer cards.

43. It was or should have been obvious to IFC that the payments were for services, not just equipment, had it complied with various obligations it had to analyze the value of the Matrix box. Because IFC treated the NorVergence Rental Agreements as leases for accounting and tax purposes, it was required, under generally accepted accounting principles, to determine the actual value of the equipment furnished and its likely value at the end of the rental term. Had IFC followed these principles, it would have determined that the value of the Matrix box was only a tiny fraction of the rental amount and that the tremendous range of rental amounts bore no relationship to the value of the Matrix supposedly rented.

44. IFC also should have determined the actual value of the Matrix box in order to determine an appropriate amount of business personal property tax to collect in the many jurisdictions where this applies. These taxes are typically due on the fair market value (or some equivalent) of the business equipment, with depreciation sometimes taken into account. Had IFC ascertained the fair market value of the Matrix box, it would have determined that the rental amounts bore no relationship to the value of the Matrix supposedly rented. While IFC may only have collected property taxes on a few occasions, in some state(s) IFC collected 5 to 65 times the amount of property taxes actually due.

45. Further, IFC should have determined the Matrix Box replacement cost to determine how

much insurance consumers should be required to carry pursuant to the Rental Agreements. Those agreements provided that the consumer must carry loss and damage insurance on the Matrix box or, in the alternative, that IFC could obtain that insurance and pass the cost of premiums on to the consumer ("force placed insurance"). However, IFC based its insurance demands on the full amount it paid, or was obligated to pay, NorVergence for the Rental Agreement. Had IFC ascertained an actual cost to replace the Matrix box, it would have determined that the rental amounts bore no relationship to the value of the Matrix supposedly rented.

46. As a result of IFC requiring insurance coverage based on its payoff amount to NorVergence, consumers paid premiums for loss and damage coverage based on an amount that was 5 to 65 times higher than the amount of coverage that IFC was entitled to require. The consumer's opportunity to learn of this deception was extremely limited because the policies were in IFC's name and for IFC's benefit. Because the consumer was not the insured party, he or she could not make any inquiry of the insurance company regarding the policy, coverage, or actual premium amounts.

47. Finally, IFC's payoff amount to NorVergence could vary depending on the consumer's credit rating, but the credit rating could not have affected the cost to replace the Matrix box, another strong indication that the rental amounts bore no relationship to the value of the Matrix box and, thus, that NorVergence consumers were clear victims of deception.

### **Deceptive Rental Agreement Language**

48. Several contractual provisions in the NorVergence Rental Agreements were the basis for misrepresentations by IFC concerning consumers' rights and obligations. These included various provisions that appeared to allow IFC to enforce the Rental Agreements in the event of a NorVergence default, or that created an ambiguity regarding IFC's ability to enforce.

49. Among the provisions that IFC has claimed prevent consumers from ever raising any

defenses are the Rental Agreement's "Assignment" provisions, which appear in tiny type on the back of the agreement:

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.

YOU UNDERSTAND THAT 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 OBLIGATION TO ANY ASSIGNEE.

50. Another tiny-type provision relied on by IFC, also on the back of the agreement, purports to waive all defenses against the original "Rentor," which was NorVergence, while preserving claims against the "manufacturer or supplier," which was also NorVergence:

YOUR DUTY TO MAKE THE RENTAL PAYMENTS IS UNCONDITIONAL DESPITE EQUIPMENT FAILURE, DAMAGE, LOSS OR ANY OTHER PROBLEM. . . . If the equipment does not work as represented by the manufacturer or supplier or any other person fails to provide service or maintenance, or if the Equipment is unsatisfactory for any other reason, you will make any such claim solely against the manufacturer or supplier or other person and will make no claim against us.

This confusing provision creates the false impression that the consumer's duty to pay would survive a complete failure of consideration. This and the assignment provisions, among others, have been cited by IFC to support its misleading claims that consumers had no defenses to IFC demands for payment in full, regardless of any fraud or deception perpetrated by NorVergence or participated in by IFC.

51. IFC also used the NorVergence Rental Agreement's ambiguous reference to a purported

possibility that UCC Art. 2A might apply to mislead consumers about their ability to raise defenses. IFC misrepresents that consumers have automatically waived defenses by application of UCC Art. 2A, which provides lessees under UCC Art. 2A "finance leases" with fewer rights to assert defenses than other lessees or renters.

52. IFC was in a much better position than consumers to understand that the ambiguous UCC Art. 2A paragraph could not render the Rental Agreement an Article 2A finance lease. It was also in a much better position to understand that other ambiguities or false statements in the Rental Agreement could give rise to consumers' defenses against IFC. Indeed, a May 2004 internal circulation included the following comment made by IFC's general counsel:

[T]o the extent that the Customer has not received any consideration in the form of working equipment in exchange for the rental payments due under the contract - we may be hard pressed to show how we have a valid and enforceable contract - and some of these unfair business statutes provide for treble damages and attorneys fees if we lose.

#### **Deceptive Claims Regarding Other Theories of Consumers' Liability to IFC**

53. IFC regularly claimed in debt collection letters and elsewhere that consumers could be liable to IFC for "Fraud in the Inducement" and "Misrepresentation" and for intentionally deceiving IFC into paying NorVergence for the Rental Agreements. These claims were supposedly based on oral and written acknowledgments from consumers that Matrix boxes had been delivered.

54. One of these acknowledgments was obtained within a few days or weeks after the Matrix box was delivered to the consumer's business premises. At that time, IFC obtained from the consumer a signature to a boilerplate acceptance form. The acceptance form IFC used for NorVergence consumers was markedly different from IFC's standard acceptance form for equipment financing. In IFC's standard acceptance form, the consumer acknowledges that the equipment is "in good order and condition," in other words, that it is working. At this point in time, however, the NorVergence



consumer could not possibly know whether the Matrix box would work, and would not know so for months, and thus could not "accept" in the legal sense. Nevertheless, IFC attempted to create a binding obligation by using an acceptance form reciting that the consumer "has received and accepted all the Equipment described in the . . . Rental Agreement" and that the "Equipment conforms with our requirements." The form also provided that the consumer agreed that the rental payment will begin in 60 days, but said nothing further about the equipment, including whether it was operational.

55. Another acknowledgment was obtained by telephone. The script for that call was also markedly different from IFC's standard telephone script for equipment financing. In IFC's standard script, consumers are asked if they have any agreements other than the lease, and if they authorized IFC to pay the vendor. However IFC's Matrix script (discussed in Paragraph 33 above), did not ask these questions. While it sought confirmation of the rental price, it asked only the following regarding the Matrix equipment:

I also have your company's billing address as [street address]. Is that the same address where the Matrix equipment was delivered and mounted?

56. Thus, neither the acceptance form nor the script IFC used in the phone calls made any reference to whether the Matrix box was operating or even connected, let alone providing the promised performance. IFC was regularly receiving reports that delivery of the Matrix box occurred weeks or months before the Matrix was likely to be installed and become operational, if it ever was, and thus that the consumer was signing or verbally agreeing to no more than the equivalent of a delivery receipt. Nonetheless, IFC still treated the consumer's delivery acceptance as if it were an agreement that rental payments should begin even if the Matrix was not connected.

57. Starting some time in 2005, after some consumers had refused to pay IFC and mounted

defenses to lawsuits, IFC began threatening to raise, or raised, counterclaims based on the consumers' so-called "acceptance" of the Matrix boxes. IFC asserts that, when consumers accepted or acknowledged delivery, this was a false representation to IFC that the consumers had actually "accepted" the Matrix boxes in a technical legal sense, creating a binding obligation. IFC further claims the consumers intended to mislead IFC into paying NorVergence for the assignment of the Rental Agreement.

58. IFC's standard acceptance form and telephone scripts may, in fact, alert renters/lessees that "[standard script:] the lessor is relying upon this certificate of acceptance in making payment to the supplier" or that the renter/lessee "[standard script:] authorize[s] IFC to Pay the Vendor and start the lease." However, IFC avoided using any equivalent language with the NorVergence consumers.

59. Acknowledgment of the box's delivery is not equivalent to a representation by the consumer that the Matrix was working or that NorVergence was providing any telecommunications services. Nonetheless, IFC continues to claim that consumers who only acknowledged delivery actually "accepted" the Matrix boxes and misled IFC. These additional theories of liability add further burden and costs of defense for the consumers.

### **Unfair Distant Forum Lawsuits and Collection Actions**

60. IFC has filed nearly 500 collection suits in forums distant from the consumers' business location and that of the personal guarantors. Most or all of these suits were filed after the NorVergence bankruptcy, when it was obvious that none of the consumers would ever receive the services and savings that NorVergence and IFC promised. Some consumers have challenged the jurisdiction or venue of the distant forum, with varying results. In every case, however, even a successful challenge in the distant forum adds substantially to the consumers' costs.

61. In some cases, IFC has obtained default judgments in the distant forum and domesticated or

executed the judgments locally. In other cases, IFC has domesticated or executed the distant forum judgment in a distant forum. For example, IFC obtained a default judgment in Illinois against a California consumer and then executed the judgment in Florida. Although the consumer had no property in Florida, the consumer's California bank had a branch in Florida. IFC was therefore able to seize the California consumer's business bank account funds through the Florida execution action.

62. IFC purported to base the jurisdiction of the distant courts on a "floating venue" provision in the NorVergence Rental Agreement. It provides that any suit under the contract would be brought in the state of any future assignee, and interpreted under the laws of that state, if the assignee chose to do so:

This agreement shall be governed by, construed and enforced in accordance with the laws of the State in which the Rentor's principal offices are located or, if the lease is assigned by Rentor, the laws of 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 in that State, such court to be chosen exclusively at Rentor or Rentor's assignee's sole option.

Based on this language, no consumer could know at the time of signing what state might be the venue under the contract or what state's laws might apply to the contract. Indeed, the potential venue and applicable laws could change from time to time if the contract were reassigned, which occurred in some cases. Many courts have refused to enforce this provision when challenged by the consumer, but IFC has continued to file new distant forum suits.

63. In some instances, IFC has sued Texas consumers in Illinois when the amount of the agreement is less than \$50,000.

### **VIOLATIONS OF THE DTPA**

64. The State adopts by reference the information contained in paragraphs 1-63 above. The

actions of IFC violate the following provisions of the DTPA: Sections 17.46(a); (b)(1)-(b)(5); (b)(7); (b)(9); (b)(11)-(12); (b)(14); (b)(24).

### **SUITS IN VIOLATION OF THE TEXAS BUSINESS & COMM. CODE**

65. Section 35.53 of the Texas Business & Commerce Code requires distant forum provisions in contracts or lease agreements of \$50,000 or less to be clear and conspicuous. It states: “the provisions must be set out conspicuously in print, type, or other form of writing that is bold-faced, capitalized, underlined, or otherwise set out in such a manner that a reasonable person against whom the provision may operate would notice. . .”

66. The State adopts by reference the information contained in paragraphs 1-63 above. IFC has sued consumers in a distant forum even though the notice of law provision in the NorVergence Equipment Rental Agreement does not comply with the requirements of 35.53. Moreover, this statute states that provisions not set out as required by law are voidable by a party against whom they are sought to be applied. By representing that consumers have no defenses to the distant forums suits, IFC has made misrepresentations to Texas consumers.

### **PRAYER FOR RELIEF**

67. Plaintiff requests that the Court, grant the following relief:

- a) Enter judgment against Defendant and in favor of the State of Texas for each violation alleged in this petition.
- b) Permanently enjoin and restrain Defendant from violating the Texas Deceptive Trade Practices Act Sections 17.46(a) and (b).
- c) Award such relief as this Court finds necessary to redress injury to consumers resulting from Defendant’s violations of the DTPA, including but not limited to reformation or rescission of contracts, disgorgement of ill-gotten gains, and

cancellation of purported debts..

- d) impose a civil penalty pursuant to Section 17.47(c) of the DTPA of not more than \$20,000 per violation.
- e) award the State of Texas attorney's fees and costs pursuant to TEX. GOVT. CODE §402.006(c) for bringing this action, as well as such other and additional equitable relief as this Court may determine to be just and proper.

Respectfully submitted,

GREG ABBOTT  
Attorney General of Texas

KENT C. SULLIVAN  
First Assistant Attorney General

JEFF ROSE  
Deputy First Assistant Attorney General

PAUL CARMONA  
Chief, Consumer Protection & Public Health Division

*John Owens*  
\_\_\_\_\_  
JOHN OWENS  
SBN 15379200

*w/p Sal Clinton*  
*SBN 24045667*  
Assistant Attorney General  
LEELA R. FIRESIDE  
SBN 07038750  
Assistant Attorney General  
Consumer Protection & Public Health Division  
Post Office Box 12548  
Austin, Texas 78711-2548  
Telephone 512-463-2185  
Facsimile 512-473-8301

**ATTORNEYS FOR PLAINTIFF,  
THE STATE OF TEXAS**