

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

**SUPERIOR COURT
CIVIL ACTION NO. 04-5100-H**

_____)
COMMONWEALTH OF MASSACHUSETTS,)
) **Plaintiff,**)
) **v.**)
NORVERGENCE, INC.)
) **Defendant.**)
_____)

JUDGMENT BY DEFAULT

This action came on for hearing before the Court upon the motions and affidavits filed by Plaintiff, the Commonwealth of Massachusetts ("Commonwealth"), through the Office of the Attorney General, Thomas F. Reilly, in the above-entitled action, for a default judgment by the Court pursuant to Mass. R. Civ. P. 55(b)(2), and it appearing to the Court that the Commonwealth on November 3, 2004 sent the Trustee for the Defendant, NorVergence, Inc. ("NorVergence") a 5-day letter pursuant to G.L. c. 93A, § 4; that the Commonwealth on November 22, 2004 filed its Complaint in said action; that the Commonwealth on November 29, 2004, duly served the Summons and Complaint on NorVergence, as appears from the Commonwealth's Affidavit of Service dated December 7, 2004 and Notice of Service of Process dated February 9, 2005; that the Commonwealth on February 9, 2005, served a copy of the Court's Tracking Order on NorVergence; that the Commonwealth on May 3, 2005, served a copy of the Court's Notice of Scheduled Appearance for a May 19, 2005 Assessment of Damages

LC
6/9/05

GSW
MASD
KJR

JUDGEMENT ENTERED ON DOCKET *6/9/05*
PURSUANT TO THE PROVISIONS OF MASS.R.CIV.P. 55(a)
AND NOTICE SENT TO PARTIES PURSUANT TO THE PRO-
VISIONS OF MASS.R.CIV.P. 77(d) AS FOLLOWS

hearing on NorVergence; that the Commonwealth on May 17 and 27, 2005, served a copy of the Court's revised Notice of Scheduled Appearance for a June 7, 2005 Assessment of Damages hearing; that the Commonwealth on May 27, 2005, served a copy of its Supplemental Memorandum, Supplemental Affidavit, and this Proposed Default Judgment on NorVergence; and that NorVergence has filed no appearance, answer or other defense or otherwise taken any action in this proceeding;

FINDINGS OF FACT

This Court, based on the allegations in the Complaint, affidavits and testimony presented, makes the following findings of fact:

1. This Court has jurisdiction of the subject matter of this action pursuant to G. L. c. 93A, § 4, and G. L. c. 214, § 1, and venue is proper in Suffolk County pursuant to G. L. c. 93A, § 4, and G. L. c. 214, § 5.

2. The Plaintiff is the Commonwealth of Massachusetts and is represented by Attorney General Thomas F. Reilly, who is authorized to bring law enforcement actions pursuant to G.L. c. 93A. This action alleges that during the course and conduct of its business, NorVergence has committed a pattern and practice of unfair or deceptive acts in violation of G. L. c. 93A, § 2(a).

3. The Defendant, NorVergence, was a New Jersey corporation with its principal place of business located at 550 Broad Street, 3rd Floor, Newark, New Jersey 07102. NorVergence was licensed to transact business in the Commonwealth of Massachusetts from March 2003 to November 2004, and did transact business in the Commonwealth and maintained an office at Newton Executive Office Center, 233 Needham Street, Suite 200, Newton, MA

02464. NorVergence was engaged primarily in the business of providing telecommunications service and Internet access and renting telecommunications equipment, including landline and wireless phones and devices known as the MATRIX and the MATRIX Soho boxes.

4. NorVergence persuaded at least ⁸⁹ ~~27~~ Massachusetts small business customers to enter into long term (most five-year) contracts totaling between \$10,000 and \$340,000 each, by promising the customers up to 30% discounts on their existing telephone bills. *NV*

5. NorVergence set its price for the service packages without regard to its own cost of providing the service. Instead, NorVergence set a price based on a discount, usually 30%, from the amount the customer was previously paying for those services. NorVergence also typically promised unlimited free minutes for both long distance and cellular calls at no extra costs.

6. NorVergence did not, however, adequately disclose key provisions in the agreements and advertisements, such as: (1) the "hell or high water" waiver of defenses clause in fine print that requires the customer to pay the full amount regardless of any fraud or deception perpetrated by NorVergence in making the original sale or in failing to provide the promised services; (2) the "floating forum selection clause" which provided, in very fine print, that any disputes under the contract would be resolved in a forum distant from the customer's place of business and, in nearly all cases, unknown at the time the customer signed the contract; (3) the customer's waiver of all defenses against NorVergence and any assignee of NorVergence; and (4) other material facts about the transaction that would lead customers to question whether they should enter into it, including the fact that the agreements would be assigned to third party finance companies and that the finance companies would insist on payment even if NorVergence

provided no telephone or Internet services.

7. After obtaining the customers' signatures on the various applications, forms, and the rental agreement, NorVergence sold or assigned the rental agreement to third-party finance companies, either for the full five-year term or for some part of that term.

8. NorVergence could not meet its long-term obligations to its customers and pay its wholesale service providers using only the rental payments. NorVergence would have had to set aside most or all of the income it received from assigning the customer contracts to pay for the services, which NorVergence did not do.

9. By mid-2004 NorVergence had stopped installing and connecting the Matrix boxes and ceased paying its wholesale service providers and employees.

10. On June 30, 2004, several creditors of NorVergence filed an involuntary bankruptcy petition against NorVergence under Chapter 11 of the U.S. Bankruptcy Code, and the Bankruptcy Court subsequently converted the case to a Chapter 7 bankruptcy (Docket 04-32079-RG).

RULINGS OF LAW

This Court, based on the foregoing findings of fact, makes the following rulings of law:

1. NorVergence has committed a pattern and practice of unfair and deceptive acts or practices in violation of G. L. c. 93A, § 2(a) by knowingly and intentionally: (1) failing to disclose clearly and conspicuously all material terms and conditions in their advertisements, rental agreements and related contracts; (2) failing 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, and regardless of the usability of the MATRIX box; (3) failing to disclose clearly and conspicuously that, under the rental agreement and related documents, the customer waived all defenses against NorVergence and any assignee of NorVergence, and that all legal challenges would occur in the forum chosen by NorVergence or its assignee; (4) failing to disclose and provide the consumers with their promised discount prices, telecommunications and Internet services; and (5) failing to disclose that it did not create and maintain adequate reserves to meet ongoing financial obligations to its wholesale service providers, suppliers, and employees.

2. The Commonwealth has identified at least 29 ~~the~~ contracts signed by Massachusetts NorVergence customers, and each contract constitutes a violation of G.L. c. 93A, § 2. *UN*

3. Rescission is the most appropriate remedy, pursuant to G.L. ch. 93A, §4, to address the harm consumers will suffer due to their continuing obligations under the unfair and deceptive NorVergence contracts.

4. This action is not barred by the automatic stay in bankruptcy, although distribution of assets and enforcement of any monetary judgment is subject to the Bankruptcy Code unless the bankruptcy is dismissed. 11 U.S.C. § 362(b)(4).

ORDER FOR JUDGMENT

Wherefore, this Court grants the Plaintiff's demand for relief and it is ordered and adjudged that:

1. Judgment is entered under Counts I, II, III, IV, and V of the Complaint in favor of the Commonwealth and against NorVergence;

2. NorVergence is permanently enjoined and must refrain from violating the Massachusetts Consumer Protection Act, G. L. c. 93A;

3. The NorVergence customer contracts described in the Complaint are rescinded and unenforceable;

4. The NorVergence customer contracts and purported debts arising from the rescinded contracts described in the Complaint are cancelled;

5. The Commonwealth is awarded civil penalties pursuant to G. L. c. 93A, § 4, in the amount of \$5,000 for each violation of G. L. c. 93A, § 2, found against NorVergence, totaling

RM ~~\$625,000~~; *\$445,000 (\$5,000 x the 89 documented customer defaults)*

6. The Commonwealth is awarded the costs of bringing this action, including attorneys fees, in the sum of \$20,075; and

7. Although the instant proceeding was not affected by the automatic stay provisions pursuant to 11 U.S.C. § 362(b)(4), any execution efforts by the Commonwealth against NorVergence on the monetary (penalties and attorneys fees) portion of this Default Judgment must comply with the applicable bankruptcy laws and proceedings.

Dated at Boston, Massachusetts, this *29th* day of June, 2005.

Ralph D. Gantis

Justice of the Superior Court
RALPH D. GANTIS

Commonwealth of Massachusetts
SUFFOLK SUPERIOR COURT
Case Summary
Civil Docket

SUCV2004-05100
Massachusetts v Norvergence, Inc

File Date	11/22/2004	Status	Disposed: judgment after findng (djuaffin)	
Status Date	06/09/2005	Session	H - Civil H, 3 Pemberton Square, Boston	
Origin	1	Case Type	D99 - Misc equitable remedy	
Lead Case		Track	F	

Service	02/20/2005	Answer	04/21/2005	Rule12/19/20	04/21/2005
Rule 15	04/21/2005	Discovery	09/18/2005	Rule 56	10/18/2005
Final PTC	11/17/2005	Disposition	01/16/2006	Jury Trial	No

<p>Plaintiff Commonwealth of Massachusetts Active 11/22/2004</p>	<p>Private Counsel 635094 Karlen J Reed One Ashbuton Place Utilities Division Boston, MA 02108 Phone: 617-727-2200 Active 11/22/2004 Notify</p> <p>Private Counsel 641267 Geoffrey G Why Mass Atty General's Office 1 Ashburton Place 17th floor Boston, MA 02108 Phone: 617-727-2200 Fax: 617-727-3251 Active 11/22/2004 Notify</p>
<p>Defendant Norvergence, Inc Served: 11/24/2004 Suspend time stan re party 05/05/2005</p>	

Date	Paper	Text
11/22/2004	1.0	Complaint filed
11/22/2004		Origin 1, Type D99, Track F.
11/22/2004	2.0	Civil action cover sheet filed
11/22/2004	3.0	Motion of plff for the appointment of Quinton Daie as special process server, filed & allowed (White,J)
02/09/2005	4.0	SERVICE RETURNED: Norvergence, Inc (Defendant) by leaving with the registered agent on 11/24/04
02/09/2005	5.0	Affidavit of compliance with long-arm statute with proof of service on out of state defendant Norvergence, Inc by certified mail return receipt on 11/24/04

SUCV2004-05100
Massachusetts v Norvergence, Inc

Date	Paper	Text
03/08/2005		Case status changed to 'Needs review for answers' at service deadline review
04/20/2005	6.0	Motion of plff for entry of default judgment pursuant to MRCP 55(b) (w/o opposition)
04/20/2005	7.0	Affidavit of Karlen J Reed, Assistant Attorney General in support of request for default
05/05/2005		Suspend time standards re Norvergence, Inc: Motion P#6 to be acted on hearing scheduled for 5/19/05
05/05/2005		Case status changed to 'Needs status review' at answer deadline review
05/27/2005	8.0	Supplemental Affidavit of Karlen J. Reed, Ast. Atty Gen in support of the Commonwealth's request for default judgment
06/09/2005	9.0	JUDGMENT BY DEFAULT, see order (Gants,J)entered on docket pursuant to Mass R Civ P 58(a) and notice sent to parties pursuant to Mass R Civ P 77(d) noice sent 6/9/05

Date	Session	Event	Result
05/19/2005	Civil H, 3 Pemberton Square, Boston	Motion/Hearing: Assess damages	Event not held-req of Plaintiff
06/07/2005	Civil H, 3 Pemberton Square, Boston	plff to give notice to deft P#6 Motion/Hearing: Assess damages Plff is to give notice of hearing date and to bring a proposed form of judgment	Event held as scheduled