

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

|   |   |                           |
|---|---|---------------------------|
| <b>IFC CREDIT CORPORATION,</b>          | ) |                           |
|   | ) |                           |
| <b>Plaintiff,</b>                       | ) |                           |
|   | ) |                           |
| <b>vs.</b>                              | ) | <b>Case No. 04 C 5905</b> |
|   | ) |                           |
| <b>UNITED BUSINESS &amp; INDUSTRIAL</b> | ) |                           |
| <b>FEDERAL CREDIT UNION,</b>            | ) |                           |
|   | ) |                           |
| <b>Defendant.</b>                       | ) |                           |

**INSTRUCTIONS GIVEN TO THE JURY**

Date: August 3, 2006

Members of the jury, you have seen and heard all the evidence and arguments of the attorneys. Now I will instruct you on the law.

You have two duties as a jury. Your first duty is to decide the facts from the evidence in the case. This is your job, and yours alone.

Your second duty is to apply the law that I give you to the facts. You must follow these instructions, even if you disagree with them. Each of the instructions is important, and you must follow all of them.

Perform these duties fairly and impartially. Do not allow sympathy or prejudice to influence you.

Nothing I say now, and nothing I said or did during the trial, is meant to indicate any opinion on my part about what the facts are or about what your verdict should be.

During this trial, I have asked a witness a question myself. Do not assume that because I asked questions I hold any opinion on the matters I asked about, or on what the outcome of the case should be.

The evidence consists of the testimony of the witnesses and the exhibits admitted in evidence.

Certain things are not to be considered as evidence. I will list them for you:

First, if I told you to disregard any testimony or exhibits or struck any testimony or exhibits from the record, such testimony or exhibits are not evidence and must not be considered.

Second, anything that you may have seen or heard outside the courtroom is not evidence and must be entirely disregarded.

Third, questions and objections or comments by the lawyers are not evidence. Lawyers have a duty to object when they believe a question is improper. You should not be influenced by any objection, and you should not infer from my rulings that I have any view as to how you should decide the case.

Fourth, the lawyers' opening statements and closing arguments to you are not evidence. Their purpose is to discuss the issues and the evidence. If the evidence as you remember it differs from what the lawyers said, your memory is what counts.

Any notes you have taken during this trial are only aids to your memory. The notes are not evidence. If you have not taken notes, you should rely on your independent recollection of the evidence and not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than the recollections or impressions of each juror about the testimony.

In determining whether any fact has been proved, you should consider all of the evidence bearing on the question regardless of who introduced it.

You should use common sense in weighing the evidence and consider the evidence in light of your own observations in life.

In our lives, we sometimes look at one fact and conclude from it that another fact exists. In law we call this an “inference.” A jury is allowed to make reasonable inferences. Any inference you make must be reasonable and must be based on the evidence in the case.

You may have heard the phrases “direct evidence” and “circumstantial evidence.” Direct evidence is proof that does not require an inference, such as the testimony of someone who claims to have personal knowledge of a fact. Circumstantial evidence is proof of a fact, or a series of facts, that tends to show that some other fact is true.

As an example, direct evidence that it is raining is testimony from a witness who says, “I was outside a minute ago and I saw it raining.” Circumstantial evidence that it is raining is the observation of someone entering a room carrying a wet umbrella.

The law makes no distinction between the weight to be given to either direct or circumstantial evidence. You should decide how much weight to give to any evidence. In reaching your verdict, you should consider all the evidence in the case, including the circumstantial evidence.

You must decide whether the testimony of each of the witnesses is truthful and accurate, in part, in whole, or not at all. You also must decide what weight, if any, you give to the testimony of each witness.

In evaluating the testimony of any witness, you may consider, among other things:

- the ability and opportunity the witness had to see, hear, or know the things that the witness testified about;
- the witness's memory;
- any interest, bias, or prejudice the witness may have;
- the witness's intelligence;
- the manner of the witness while testifying;
- and the reasonableness of the witness's testimony in light of all the

evidence in the case.

It is proper for a lawyer to meet with any witness in preparation for trial.

You may find the testimony of one witness or a few witnesses more persuasive than the testimony of a larger number. You need not accept the testimony of the larger number of witnesses.

The law does not require any party to call as a witness every person who might have knowledge of the facts related to this trial. Similarly, the law does not require any party to present as exhibits all papers and things mentioned during this trial.

You must give separate consideration to each claim in this case.

When I say a particular party must prove something by “a preponderance of the evidence,” this is what I mean: When you have considered all the evidence in the case, you must be persuaded that it is more probably true than not true.

When I say that a particular party must prove something by “clear and convincing evidence,” this is what I mean: When you have considered all of the evidence, you are convinced that it is highly probable that it is true. This is a higher burden of proof than “preponderance of the evidence.”

### **The parties and the claims**

The plaintiff in this case is IFC Credit Corporation, which I will refer to as “IFC.”

The defendant in this case is United Business & Industrial Federal Credit Union, which I will refer to as “UBI.”

The claims in this case concern several equipment leases. A lease is a type of contract, so I will refer to the leases as “the contracts” throughout these instructions.

Pursuant to the contracts, UBI leased certain equipment from a company called Norvergence. IFC later acquired the contracts from Norvergence by way of a transaction called an “assignment.”

IFC has made two claims against UBI. In its first claim, IFC contends that UBI has breached its obligations under the contracts. In its second claim, IFC contends that it was fraudulently induced by UBI to acquire the contracts from Norvergence.

UBI denies both of these claims and has raised certain defenses, which I will discuss with you in a moment.

### **IFC's breach of contract claim**

IFC's first claim is a breach of contract claim. In this claim, IFC contends that UBI failed to perform its obligation to make payments due under the contracts.

UBI has raised three defenses to IFC's breach of contract claim:

- (1) UBI contends that it signed the contracts without knowledge of, or a reasonable opportunity to learn of, the character or essential terms of the contracts.
- (2) UBI contends that the equipment it received from Norvergence was defective.
- (3) UBI contends that Norvergence fraudulently induced UBI to enter into the contracts by making false representations that it would provide certain services.

The parties dispute whether UBI is legally entitled to defenses (2) and (3). One of the issues you may have to decide is whether UBI may assert those defenses.

IFC contends that UBI is not entitled to assert these defenses, based on a provision in the contracts stating that if Norvergence assigned the contracts to another party, UBI would not assert against that party any claims or defenses that UBI might have against Norvergence.

UBI contends that IFC is not entitled to enforce this contractual provision, due to the circumstances under which Norvergence assigned the contracts to IFC. I will say more about this issue shortly.

Alternatively, IFC contends that UBI is not entitled to assert the defense of defective equipment because the parties have agreed that the contracts will be considered "finance leases" and the contracts contain provisions that UBI has an unconditional obligation to make payments to IFC.

UBI contends that IFC is not entitled to enforce the provisions regarding unconditional payment obligations because it was fraudulently induced into the contracts.

### **IFC's breach of contract claim - requirements**

My instructions regarding IFC's breach of contract claim are in three parts: A, B, and C.

#### **Part A**

To succeed on its breach of contract claim, IFC must prove by a preponderance of the evidence that UBI failed to perform its obligations under the contracts.

If you find that IFC has failed to prove this, then you should find in favor of UBI in this claim, and you should not consider Parts B or C of this instruction.

If, on the other hand, you find that IFC has proven this, then you should go on to Part B.

#### **Part B**

To succeed on its first defense to this claim, UBI must prove by a preponderance of the evidence that it signed the contracts as a result of fraud that induced UBI to sign the contracts without knowledge of, or a reasonable opportunity to learn of, the character or essential terms of the contracts.

In determining whether UBI has proven this, you must take into account all of the factors regarding UBI's signing of the contracts. These factors include:

- the signer's intelligence, education, business experience, and ability to understand English;
- the nature of any representations that were made to the signer about the character or essential terms of the contracts; whether the signer had good reason to rely on those representations; whether anyone else was present who could explain the contracts; whether the signer had other possibilities to get independent information; and any apparent necessity for acting without delay.

If UBI proves by a preponderance of the evidence that it signed the contracts as a result of fraud that induced UBI to sign the contracts without knowledge of, or a reasonable opportunity to learn of, the character or essential terms of the contracts, then you should find in favor of UBI on IFC's breach of contract claim, and you should not consider part C.

If UBI fails to prove this by a preponderance of the evidence, then you should go on to part C.

### **Part C**

UBI also contends in defense of IFC's breach of contract claim that: (a) the equipment provided by Norvergence was defective, and (b) that Norvergence fraudulently induced UBI to enter into the contracts by making false representations that it would provide certain services. As I have stated, IFC contends that UBI is not entitled to raise these defenses. This part of the instruction will include three subparts.

#### **Subpart 1**

The contracts provided that if Norvergence assigned the contracts to another party, UBI would not assert against the other party - in this case, IFC - claims or defenses that it might have against Norvergence. Under the law, IFC is entitled to enforce this provision of the contracts, unless UBI proves at least one of the following three things by a preponderance of the evidence:

1. IFC did not acquire the contracts from Norvergence for "value." "Value" means either a payment or the promise of a payment which was later made.
2. IFC did not acquire the contracts in good faith. "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing. It does not require a party that acquires a contract to investigate as to the existence of possible defenses.

3. When IFC acquired the contracts, it had notice of a claim by UBI that it had been induced by fraud of Norvergence to sign the contracts without knowledge of, or a reasonable opportunity to learn of, the character or essential terms of the contracts.

If UBI fails to prove any of these three things by a preponderance of the evidence, then IFC is entitled to enforce UBI's agreement not to assert against an assignee any claims or defenses that UBI might have had against Norvergence. In that event, you may not consider UBI's defenses regarding the equipment provided by Norvergence and the alleged fraudulent inducement, and you should find in favor of IFC on its breach of contract claim, and go on to the portion of this instruction entitled "Damages."

If UBI proves any one of these three things by a preponderance of the evidence, then IFC is not entitled to enforce against UBI its agreement not to assert against IFC any claims or defenses that UBI might have had against Norvergence. In that event, you should go on to consider UBI's defenses that Norvergence provided defective equipment (see Subpart 2 of this instruction) and/or fraudulently induced UBI to enter into the contracts by making false representations that it would provide certain services (see Subpart 3 of this instruction).

### **Subpart 2**

IFC contends that UBI may not raise the defense of defective equipment, because of provisions in the contracts that provide UBI was renting the equipment "As Is," and that IFC made no warranties about the equipment, expressed or implied, including warranties of merchantability and fitness for a particular purpose. IFC also contends that in the contracts, UBI gave up its right to raise any defenses against IFC, and that under the contracts, UBI's obligation to make payments was unconditional and not subject to any counterclaim, set off or reduction,

regardless of whether the equipment was defective. If you agree with these contentions by IFC, then you may not consider UBI's defense that the equipment was defective.

Alternatively, if you find that IFC has proven by a preponderance of the evidence that UBI accepted the equipment, then under the law, you may not consider UBI's defense that the equipment was defective. UBI accepted the equipment if it acted with respect to the equipment in a way that signified to the lessor that the equipment conformed to the contracts, or that it would retain the equipment despite the fact that it did not conform to the contracts.

To succeed on its defense that the equipment was defective, UBI must prove by a preponderance of the evidence that the equipment or performance under the contracts was not in accordance with the obligations under the contracts. If UBI proves this, then you should find in favor of UBI on IFC's breach of contract claim, and you should not consider the remainder of this instruction. If UBI fails to prove this, then you should go on to Subpart 3 of this instruction.

### **Subpart 3**

To succeed on its defense of fraudulent inducement, UBI must prove the following by clear and convincing evidence:

1. Norvergence made a false statement or false statements of material fact. A material fact is one that is essential to the transaction, in that UBI would have acted differently had it known the truth.
2. Norvergence knew the statement or statements were false.
3. Norvergence made the statements with the intent to induce UBI to enter into contracts with Norvergence.
4. UBI reasonably believed Norvergence's false statements and entered into

contracts with Norvergence in justifiable reliance on the truth of the statements.

5. UBI was damaged as a result of its reliance on Norvergence's false statements.

If UBI proves all of these things, then you should find in favor of UBI on IFC's breach of contract claim, and you should not consider the remainder of this instruction. If UBI fails to prove any one of these things, then you should find in favor of IFC on its breach of contract claim, and you should go on to the "Damages" part of this instruction.

### **Damages - breach of contract claim**

If you find in favor of IFC on its breach of contract claim, you must then determine the amount of money to award to IFC on this claim. IFC is entitled to recover as damages: (1) the total amount of any payments that UBI was obligated to make on its contracts with Norvergence; (2) any interest due on those payments, discounted to present value; and (3) IFC's costs of enforcing its rights under the contracts, including reasonable attorney's fees and expenses.

### **IFC's fraud claim**

To succeed on its fraud claim, IFC must prove all of the following by clear and convincing evidence.

1. UBI made a false statement or false statements of material fact. A material fact is one that is essential to the transaction, in that IFC would have acted differently had it known the truth.

2. UBI knew the statement or statements were false.

3. UBI made the statements with the intent to induce IFC to take assignment of the contracts.

4. IFC reasonably believed UBI's false statements and took assignment of the contracts in justifiable reliance on the truth of the statements.

5. IFC was damaged as a result of its reliance on UBI's false statements.

If you find that IFC has proved all of these things, then you should find in favor of IFC on this claim, and go on to consider the question of damages on this claim.

If you find that IFC has failed to prove any one of these things, then you should find in favor of UBI on this claim, and you will have no occasion to consider the question of damages on this claim.

### **Damages - fraud claim**

If you find in favor of IFC on its fraud claim, you must then determine the amount of money to award to IFC on this claim. IFC is entitled to recover for any damages that directly resulted from its reliance on any false representations by UBI. In this case, IFC seeks to recover the same damages that it is seeking under its breach of contract claim.

Upon retiring to the jury room, you must select a presiding juror. The presiding juror will preside over your deliberations and will be your representative here in court.

A form of verdict has been prepared for you.

[Read the verdict form.]

Take this form to the jury room, and when you have reached unanimous agreement on the verdict, your presiding juror will fill in and date the form, and all of you will sign it.

I do not anticipate that you will need to communicate with me. If you do need to communicate with me, the only proper way is in writing. The writing must be signed by the presiding juror, or, if he or she is unwilling to do so, by some other juror. The writing should be given to the court security officer, who will give it to me. I will respond either in writing or by having you return to the courtroom so that I can respond orally.

If you do communicate with me, you should not indicate in your note what your numerical division is, if any.

The verdict must represent the considered judgment of each juror. Your verdict must be unanimous.

You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views, and listen to the opinions of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to reexamine your own views and change your opinion if you come to believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of other jurors or for the purpose of returning a unanimous verdict.

All of you should give fair and equal consideration to all the evidence and deliberate with the goal of reaching an agreement that is consistent with the individual judgment of each juror. You are impartial judges of the facts.

**Verdict form - IFC's breach of contract claim**

We, the jury, unanimously find as follows on IFC's breach of contract claim:

**Question A:** Did IFC Credit Corporation prove by a preponderance of the evidence that United Business breached the contracts by its failure to perform its obligations under the contracts?

YES \_\_\_\_ NO \_\_\_\_

If your answer to question A is YES, then you should go on to question B.

If your answer to question A is NO, then your deliberations on IFC's breach of contract claim are complete. You should disregard the remaining questions, and go to Verdict 2 (in favor of UBI) at the end of this verdict, and sign it.

**Question B:** Did UBI prove by a preponderance of the evidence that it signed the contracts as a result of fraud that induced it to sign the contracts without knowledge of, or a reasonable opportunity to learn of, the character or essential terms of the contracts?

YES \_\_\_\_ NO \_\_\_\_

If your answer to question B is YES, then your deliberations on IFC's breach of contract claim are complete. You should disregard the remaining questions, and go to Verdict 2 (in favor of UBI) at the end of this verdict, and sign it.

**Question C, subpart 1:** Did UBI prove by a preponderance of the evidence any of the three items listed under Part C, Subpart 1 of the instruction entitled "IFC's breach of contract claim"?

YES \_\_\_\_ NO \_\_\_\_

If you answered yes, which item or items did UBI prove? \_\_\_\_\_

If your answer to question C, subpart 1 is YES, then you should go on to question C, subpart 2.

If your answer to question C, subpart 1 is NO, then you should skip the remaining questions, and go on to the portion of this verdict form entitled “Damages,” and then go to Verdict Form 1 (in favor of IFC), and sign it.

**Question C, subpart 2:** Did IFC prove by a preponderance of the evidence that UBI may not raise the defense of defective equipment?

YES \_\_\_\_\_ NO \_\_\_\_\_

If your answer is yes, what is the basis for your finding? (check any that apply)

\_\_\_\_\_ UBI agreed to rent the equipment “As Is,” without any warranties

\_\_\_\_\_ UBI’s obligation to make payments was unconditional

\_\_\_\_\_ UBI accepted the equipment

If your answer to question C, subpart 2 is YES, then you should skip the remaining questions, and go on to the portion of this verdict form entitled “Damages,” and then go to Verdict Form 1 (in favor of IFC), and sign it.

If your answer to question C, subpart 2 is NO, then you should go on to question C, subpart 2(a):

**Question C, subpart 2(a):** Did UBI prove by a preponderance of the evidence that the equipment was defective?

YES \_\_\_\_\_ NO \_\_\_\_\_

If your answer to question C, subpart 2(a) is YES, then your deliberations on IFC’s breach of contract claim are complete. You should disregard the section entitled “Damages,”

and go to Verdict 2 (in favor of UBI) at the end of this verdict, and sign it.

If your answer to question C, subpart 2(a) is NO, then you should go on to the portion of this verdict form entitled “Damages,” and then go to Verdict Form 1 (in favor of IFC), and sign it.

**Question C, subpart 3:** Did UBI prove its defense of fraudulent inducement by clear and convincing evidence?

YES \_\_\_\_ NO \_\_\_\_

If your answer to question C, subpart 2(a) is YES, then your deliberations on IFC’s breach of contract claim are complete. You should disregard the remaining questions, and go to Verdict 2 (in favor of UBI) at the end of this verdict, and sign it.

If your answer to question C, subpart 2(a) is NO, then you should go on to question C, subpart 3.

### **Damages**

We the jury, having found in favor of IFC on its breach of contract claim, award IFC damages in the amount of \$ \_\_\_\_\_.

**Verdict form 1 - breach of contract claim**

We, the jury unanimously find in favor of IFC on its breach of contract claim, and award IFC damages in the amount of \$\_\_\_\_\_.

|                 |       |
|-----------------|-------|
| _____           | _____ |
| Presiding juror |       |
| _____           | _____ |
| _____           | _____ |
| _____           | _____ |
| _____           | _____ |
| _____           | _____ |

Date: \_\_\_\_\_, 2006

**Verdict form 2 - breach of contract claim**

We, the jury unanimously find in favor of UBI on IFC's breach of contract claim.

\_\_\_\_\_  
Presiding juror

|       |       |
|-------|-------|
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |

Date: \_\_\_\_\_, 2006

**Verdict form - IFC's fraud claim**

We, the jury unanimously find as follows on IFC's fraud claim:

For IFC \_\_\_\_\_

For UBI \_\_\_\_\_

(fill in the next line only if you find for IFC)

We award IFC damages in the amount of \$\_\_\_\_\_.

\_\_\_\_\_  
Presiding juror

\_\_\_\_\_

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Date: \_\_\_\_\_, 2006