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12 EXQUISITE CATERERS, LLC,
13 ET AL., on behalf of themselves
And all others similarly situated,

14 Plaintiff,

15 vs.

16
17 POPULAR LEASING USA, INC.,
18 ET AL. AND DOE CORPS 1-40,

19 Defendant.
20
21

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MONMOUTH COUNTY
DOCKET NO. MON-L-3686-04

CIVIL ACTION

**FEDERAL TRADE COMMISSION'S
MEMORANDUM IN SUPPORT OF
MOTION TO INTERVENE AND
OBJECT TO PROPOSED
SETTLEMENT AGREEMENT
OR, IN THE ALTERNATIVE, TO
PARTICIPATE AS AMICUS CURIAE**

22
23 Pursuant to N.J. Court Rule, 1969, 4:33, the Federal Trade Commission ("FTC" or
24 "Commission") respectfully moves for leave to intervene in the above-captioned action, solely
25 for purposes of objecting to the proposed settlement agreement ("proposed settlement") between
26 plaintiffs and defendant IFC Credit Corporation ("IFC"), which the court preliminarily approved
27

28 *FTC's Memo re: Motion to Intervene*

-1-

EXHIBIT

8

1 on February 26, 2008. The FTC is lodging with this motion its Objection to the Proposed
2 Settlement Agreement ("Objection").

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4 As explained below, the FTC fully satisfies the standard for intervention as of right, as
5 set forth in N.J. Court Rule, 1969, 4:33-1. In the alternative, the FTC should be permitted to
6 intervene under N.J. Court Rule, 1969, 4:33-2. If the Court does not agree that intervention is
7 proper, the FTC respectfully requests that this Court grant the FTC leave to participate as amicus
8 curiae and consider the FTC's Objection as an amicus brief. In addition, the FTC respectfully
9 moves this Court for permission to speak at the fairness hearing scheduled in this matter on April
10 18, 2008.

11 **I. BACKGROUND**

12 The FTC is the nation's principal consumer protection agency, with a broad mandate to
13 prevent "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C.A. § 45(a)(2).
14 As set forth in the attached brief outlining the FTC's objections to the proposed settlement in this
15 matter, the FTC has extensive experience challenging allegedly unfair or deceptive practices,
16 through federal court actions and administrative proceedings that provide injunctive and other
17 equitable relief for consumers injured by such practices as well as also through filing amicus
18 briefs in or otherwise commenting upon class action settlements that, in the Commission's view,
19 inadequately remedy consumer harm.¹

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21 In addition, as the FTC's Objection explains, the FTC has particular knowledge of the
22 facts underlying this case and a compelling interest in ensuring that the settlement approved in
23 this matter fairly and reasonably protects consumers subject to its terms. On June 6, 2007, the
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26 ¹ See, e.g., Chavez v. Netflix, Inc., 2005 WL 3048041 (Cal. Super. Ct. Jan. 5, 2006)
27 (amicus brief objecting to, inter alia, the requirement that the settlement benefits be provided to
28 class member via a negative option plan).

1 FTC filed a complaint against IFC in the United States District Court for the Northern District of
2 Illinois, alleging that IFC purchased and collected on NorVergence rental agreements, with
3 knowledge that the rental agreements were procured by deceiving relatively unsophisticated
4 small businesses and non-profit organizations. FTC v. IFC Credit Corp., No. 1:07-cv-03155
5 (N.D. Ill. filed June 6, 2007). The FTC alleged that this conduct caused substantial injury to
6 consumers, which was not reasonably avoidable by the consumers themselves, and is not
7 outweighed by countervailing benefits to consumers or competition; thus the practice is unfair in
8 violation of Section 5 of the FTC Act, 15 U.S.C.A. §§ 45(a) and (n). The FTC's complaint was
9 brought pursuant to Section 13(b) of the FTC Act, 15 U.S.C.A. § 53(b), which authorizes the
10 Commission to seek, inter alia, permanent injunctive relief to remedy violations of Section 5 of
11 the FTC Act, reformation or rescission of contracts, disgorgement of ill-gotten gains, and
12 restitution for injured consumers.
13

14 **II. THE COMMISSION'S REQUEST TO INTERVENE SHOULD BE GRANTED**

15 Pursuant to N.J. Court Rule, 1969, 4:33-1, an absentee may intervene as a matter of right
16 if the applicant "claims an interest relating to the property or transaction which is the subject of
17 the action and is so situated that the disposition of the action may as a practical matter impair or
18 impede the ability to protect that interest, unless the applicant's interest is adequately represented
19 by existing parties." As explained below, the FTC satisfies the standard for intervention as of
20 right. In the alternative, the FTC's application meets the criteria for permissive intervention
21 under N.J. Court Rule, 1969, 4:33-2.
22

23 In New Jersey, an absentee is entitled to intervene if four conditions are met. First, the
24 absentee must claim an interest relating to the property or transaction which is the subject of the
25 litigation. Second, the absentee must show he is so situated that the disposition of the litigation
26 may impair or impede his ability to protect that interest. Third, the absentee must demonstrate
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1 that the absentee's interest is not adequately represented by existing parties. Fourth, the absentee
2 must make a timely application to intervene. See, e.g., Builders League of South Jersey, Inc. v.
3 Gloucester County Utils. Auth., 386 N.J. Super. 462, 468 (App. Div. 2006). Because the rule is
4 not discretionary, the court must approve intervention if these four criteria are satisfied. Ibid.;
5 see also Meehan v. K.D. Partners, L.P., 317 N.J. Super. 563, 568 (App. Div. 1998). Further, the
6 rule is to be liberally construed by the court. Builders League of South Jersey, 386 N.J. Super. at
7 469; see also American Civil Liberties Union of N.J., Inc. v. County of Hudson, 352 N.J. Super.
8 44, 67 (App. Div. 2002), certif. denied, 174 N.J. 190 (2002).

10 First, the Commission's interest in this matter, as set forth in its complaint against IFC
11 and in the attached Objection, has a clear connection to the subject matter of the proposed
12 settlement. The FTC's litigation against IFC involves the underlying conduct at issue in the
13 class action. Further, the FTC's position is that consumers are not obligated to make payments
14 on the rental agreements to IFC. If approved, the settlement will provide IFC with what is
15 tantamount to a default judgment against class members who have not paid what IFC asserts
16 they owe on the rental agreements. The FTC objects to vesting IFC with this authority when it is
17 accomplished in a manner that denies class members due process. At a minimum, class
18 members should be provided sufficient notice and the opportunity to be heard, so that they may
19 make an informed decision about whether to opt out of the proposed settlement.

21 The proposed settlement does not comport with these basic constitutional guarantees, a
22 procedural defect that risks significant consumer harm. This concern also bears on the second
23 factor of the intervention standard, since the Commission's objective of protecting consumers
24 will be impaired by the due process deficiencies of the proposed settlement. If consumers do not
25 have a meaningful choice as to whether to settle their claims against IFC and cannot make an
26 educated decision about whether it is in their individual interest to pay IFC, then consumer

1 interests as a whole are not being served. That result directly conflicts with the Commission's
2 mission to protect consumers.

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4 However, although the FTC acts to protect consumers, its mission is distinguished from
5 that of a private party. E.g., Elmo Co. v. FTC, 389 F.2d 550, 552 (D.C. Cir. 1967). The FTC is
6 "a body charged with protection of the public," ibid., and does not act in a representative
7 capacity for consumers. See, e.g., FTC v. Security Rare Coin & Bullion Corp., 931 F.2d 1312,
8 1316 (8th Cir. 1991) (the Commission brings "not a private fraud action, but a government
9 action brought to deter unfair and deceptive trade practices and obtain restitution").
10 Accordingly, the FTC's interests in this matter are not adequately represented by class members,
11 who are individuals seeking to protect their private interests. The FTC, in contrast, serves a
12 broader role and has legal objectives that may diverge even from those of the individuals whose
13 interests it seeks to protect.² The private, independent decisions of individual class members to
14 subject themselves to the terms of the proposed settlement would thus not reflect or further the
15 Commission's responsibility and authority under the FTC Act to protect the public interest and
16 deter unlawful conduct.

17
18 Finally, the FTC's action is also timely. Under the terms of the Order of Apparent Merit
19 and Other Relief concerning the proposed settlement agreement ("Order"), "no person shall be
20 heard in opposition to the proposed settlement, the request for fees and costs, or any other matter
21 unless that person has filed written objections with the Clerk of the Court, Superior Court of
22 New Jersey . . . postmarked no later than March 31, 2008." Order ¶ 11. The FTC's Objection
23 has been lodged in a timely manner, prior to the March 31, 2008, deadline for submission of
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25 ² For example, the FTC's interest may properly include deterring future unlawful
26 behavior, by both defendants and others who might engage in the same illegal activities. See,
27 e.g., FTC v. Gem Merch. Corp., 87 F.3d 466, 470 (11th Cir. 1996) (describing the "deterrence
function of [S]ection 13(b)").

1 such objections, and sufficiently in advance of the fairness hearing scheduled for April 18, 2008.
2 See Order ¶ 5. Accordingly, consideration of the FTC's objections will not adversely impact the
3 interests of the parties in this matter or this Court's ability to determine the fairness and
4 reasonableness of the proposed settlement agreement.
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6 Even if the Court does not find that the FTC is entitled to intervene in this matter, the
7 FTC should be allowed to intervene pursuant to N.J. Court Rule, 1969, 4:33-2, which provides
8 that an absentee may be may be permitted to intervene so long as two conditions are met. First,
9 the absentee's "claim or defense" and the main action must have a question of law or fact in
10 common. Second, the application must be timely and should not "unduly delay or prejudice the
11 rights of the original parties." See, e.g., Vicendese v. J-Fad, Inc., 160 N.J.Super. 373, 381 (Ch.
12 Div. 1978). The trial court is vested with considerable discretion in ruling on permissive
13 intervention. Evesham Twp. Zoning Bd. v. Evesham Twp. Council, 86 N.J. 295, 299 (1981).
14

15 As already discussed, the FTC's application is timely. Further, the FTC's action against
16 IFC involves the same conduct that is the subject of the class action. In addition, the due process
17 concerns presented by the proposed settlement clearly implicate the consumer protection issues
18 that are the basis of the FTC's litigation against IFC. Accordingly, this Court should permit the
19 FTC to intervene exclusively for purposes of submitting its Objection.

20 **III. IN THE ALTERNATIVE, THE COMMISSION SHOULD BE PERMITTED TO**
21 **PARTICIPATE AS AMICUS CURIAE**

22 Under N.J. Court Rule, 1969, 1:13-9, an application for leave to appear as amicus curiae
23 "shall" be granted if "the motion is timely, the applicant's participation will assist in the
24 resolution of an issue of public importance, and no party to the litigation will be unduly
25 prejudiced thereby." Accordingly, amicus curiae have been granted leave to appear in cases of
26 general public interest. Casey v. Male, 63 N.J.Super. 255, 259 (Cty. Ct. 1960). The FTC has
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1 been granted amicus status by other courts to comment on whether proposed consumer class
2 action settlements were fair, reasonable, or adequate. See, e.g., Erikson v. Ameritech Corp., No.
3 CH 18873 (Ill. Cir. Ct. Sept. 18, 2002); Carter v. ICR Serv. Inc., No. 00-C-2666-W (N.D. Ala.
4 Sept. 6, 2002).

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6 The same factors that demonstrate why the FTC is entitled to intervene in this matter
7 support permitting the FTC to participate as an amicus. As noted above, the FTC's motion is
8 timely, and its objection to the proposed settlement implicates issues of public importance
9 related to the protection of consumer, as well as constitutional, rights. In light of the FTC's
10 pending action against IFC and familiarity with the issues raised by the proposed settlement, the
11 FTC respectfully submits that consideration of its views on this matter would likely be useful to
12 the Court in evaluating whether the proposed settlement is fair, reasonable, and adequate.

13 **IV. CONCLUSION**

14 For the foregoing reasons, the FTC respectfully moves for leave to intervene or, in the
15 alternative, to participate as amicus curiae for purposes of filing the Objection to Proposed
16 Settlement Agreement being lodged with this motion. The FTC respectfully requests that if its
17 motion to intervene or participate as amicus is granted, its Objection be timely filed, on or before
18 March 31, 2008. The FTC also respectfully requests permission to speak at the fairness hearing
19 in this matter on April 18, 2008.
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1 Dated: March 25, 2008

Respectfully submitted,

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