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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS  
MUNICIPAL DEPARTMENT, FIRST DISTRICT

LINDA BARNETT,	1	/ 0 / 7 2 ~ 0
Plaintiffs,	;	c l f p P * )
v.	;	No. -94 Ml 013550
THORN AMERICAS, INC., U/b/a	i	
RRNT-A-CRNTRR, a foreign	1	
corporation doing business in	1	
Illinois,	1	
Defendant.	1	

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. Introduction

This case concerns practices engaged in by a "rent-to-own" (RTO) store. In recent years the rent-to-own industry has exploded on the national scene, especially in low-income, inner-city neighborhoods. The industry rents merchandise to low-income persons at extremely high prices. If the customer makes all the payments required by the rental-purchase agreement, they acquire ownership of the property. A \$250 television set, for example, may cost the customer 78 weekly payments of \$10--or a total of \$780. See Chicago Sun-Times Editorial attached as Exhibit A. While state law (the Rental Purchase Agreement Act) mandates that critical terms of the rent-to-own transaction are fully disclosed to the consumer in writing, this does not always occur. In this action the plaintiff has sued a rent-to-own company which "rented" her a stereo and a curio cabinet at unconscionably high prices, and which failed to disclose to her key terms of the transactions, such as the full price it would cost to gain ownership of the property.

II. Facts.

On March 16, 1993, Linda Barnett entered into a rent-to-own agreement with defendant Rent-A-Center (WACI'). On that day she executed a rental-purchase agreement with RAC for the rental-purchase of a stereo. Ex. E attached to defendant's Motion. The

rental-purchase agreement obligated her to pay 17 monthly payments; each payment consisted of \$99.99 rental fee, \$6.00 tax, and \$6.50 liability damage waiver (<sup>t</sup>ILDW<sup>VR</sup>) fee--a total of \$112.49.1 The 17 payments of \$112.49 totaled to \$1912.33. The contract signed by Barnett does not disclose that she would have to pay a total of \$1912.33; it lists "a total of \$1699.83". When Barnett signed the rental-purchase agreement she thought she would have to pay a total of \$1699.83 to acquire ownership of the stereo. Dep. of Barnett at 52 and 88 (attached to defendant's Motion as Exhibit C). Nor does the contract state that Barnett's monthly payment will be \$112.49; instead it lists a monthly payment of \$105.99. RAC! conceded in discovery that it paid \$731.21 for the stereo. Exhibit B attached hereto. Barnett made numerous payments on the stereo before this litigation arose.

On December 6, 1993, Linda Barnett entered into a second rent-to-own agreement with RAC. To rent a curio cabinet, the rental-purchase agreement called for her to pay 91 weekly payments; each payment consisted of \$12.99 rental fee, \$0.78 tax, and \$0.84 liability damage waiver fee--a total of \$14.61. Exhibit F attached to defendant's motion. There was also a processing charge of \$7.50. The 91 payments of \$14.61, and the

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<sup>1</sup> Liability Damage Waiver is offered to RAC customers for a fee of 6.5% of the rental payment amount. While RAC states that liability damage waiver is not insurance, it amounts to the same thing. Customers who purchase liability waiver are released of any obligation to RAC if the property is stolen or damaged by fire.

processing fee, totaled to \$1337.01. The contract signed by Barnett does not disclose that she would have to pay a total of \$1337.01; rather, it lists I<sup>t</sup>a total of \$1182.09<sup>tt</sup>. When Barnett signed the rental-purchase agreement on December 6, 1993, she thought she would have to pay a total of \$1182.09 to acquire ownership of the curio cabinet. Dep. of Barnett at 71. Nor does the contract state that Barnett's weekly payment will be \$14.61; instead it lists a weekly payment of \$13.77. RAC! conceded in discovery that it paid \$291.56 for the curio. Exhibit C attached hereto. Barnett made numerous payments on the curio before this litigation arose.

## II. Argument

### A. count I of the Amended Complaint, Which Presents A Claim That RAC's Bailure to Disclose Key Terms of the Transaction Violates the Rental Purchase Agreement Act, Is Not Properly Subject to Bummary Judgment.

Count I of the Amended Complaint charges that RAC violated the Rental-Purchase Agreement Act (VPAA<sup>tt</sup>), 815 LLCS 655/0.01 \$& ggg. The RPAA requires rent-to-own merchants like RAC in this case to provide seven enumerated disclosures to consumers @iin plain English". 815 ILCS 655/2(a) (g) . While no Illinois cases have interpreted the RPM, it is almost identical to laws in numerous other jurisdictions that require detailed written disclosures at the time of a rent-to-own purchase. One commentator noted the purposes of rent-to-own disclosure laws:

the peculiar circumstances of an RTO transaction may justify the detailed disclosures. The RTO transaction embodies a unique variety of rights and obligations not common to other types of buying arrangements, and the best realistic hope of apprising consumers of the salient characteristics of the arrangement may be to set them all out in the contract. At least if the consumer receives a copy of an agreement laden with information, he or she can refer to the document later if a dispute arises. Moreover, as the statutes

promote uniformity in disclosed terms and language, consumers are in a better position to shop comparatively among RTO dealers.

*J.P. Nehf, Effective Regulation of Rent-to-Own Contracts*, 52 Ohio State L. J. 751 (1991). As will be shown below, the two purposes of the law--to apprise consumers of key RTO terms and to allow the consumer to comparison shop--have been negated by the way RAC discloses information.

The RPAA provides as follows:

(g) a rental-purchase agreements must disclose:

(2) the amount...of payments;

(3) . ..the total amount to be paid to acquire ownership of the merchandise;

815 ILCS 655/2(g). The clear mandate that the rent-to-own contract provide the periodic payment amount (e.g. "your total monthly payment is \$112") and the total amount to be paid (e.g. "the total amount to be paid to acquire ownership is \$4589") was violated in this case. Both contracts executed by the plaintiff mis-stated these amounts. The March 16, 1993 contract lists a monthly payment of \$105.99 when in fact the actual payment, including tax and liability waiver fees, was \$112.49. More importantly, that contract discloses the total amount of all payments as \$1699.83. In reality, the total amount to be paid to acquire ownership<sup>t</sup>, including taxes and liability waiver fees, is \$1912.33. Similarly, the December 1993 contract specifies a weekly payment of \$13.77; in fact the payment was \$14.61. That

contract also discloses a grand total as \$1182.09 when the total to acquire ownership was actually \$1337.01.<sup>2</sup>

Defendant does not deny that it its failed to make the disclosures required by Illinois law. Instead, defendant argues that the plaintiff cannot maintain an action under the RPAA because she has suffered no damage. That contention is erroneous; the plaintiff has been damaged in this case.

It is undisputed that the March 1993 contract disclosed a total of \$1699.83 when the real I<sup>t</sup>total amount to acquire ownership of the merchandiseI<sup>t</sup> was \$1912.33. Because the contract stated the total amount as \$1699.83, Ms. Barnett walked out of the store believing that to be the amount she would have to pay:

Q And what was your understanding as to how many months this agreement was for?

A I would have 17 months to pay on this stereo, and it would cost me \$1699.83. That was my understanding.

Dep. of Barnett at 49-50; see also page 88. Defendant concedes that plaintiff's "understanding of the rental purchase agreement for the Sharp stereo was that...it would cost her \$1699.83". Defendant's Motion for Summary Judgment at 2. The difference between these two amounts--\$212.50--is damage to the plaintiff

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<sup>2</sup> The discrepancy between the Votal<sup>tt</sup> listed on the contracts and the actual total is caused by BAC's failure to include taxes, LDW fees and other fees in the contract's total figure. Deposition of Kevin Carey, Excerpts attached as Exhibit D, at 57, 60-61.

Barnett. The \$212.50 is a charge that Ms. Barnett was obligated to pay yet one which was concealed from her at the time the transaction was executed. The same scenario applies to the December 1993 transaction. The contract portrayed the total amount as \$1182.09 and the plaintiff understood that to be the total amount that she would have to pay to acquire ownership. Dep. of Barnett at 71. But the actual total of all amounts to be paid to acquire ownership was \$1337.01--\$154.92 more than what was disclosed.

Defendant argues that Barnett has not suffered damage because she has allegedly not yet paid all payments on the contracts. This contention misses the point. When the plaintiff executed these contracts she obligated herself to pay RAC \$1912.33 on the first contract and \$1337.01 on the second contract. This obligation can be enforced by the defendant--indeed defendant *is* enforcing this obligation through a counterclaim in this action! An obligation to repay a debt constitutes damages which may be recovered in an affirmative lawsuit. Rosario v. Livaditis, 963 F.2d 1013, 1021 (7th Cir. 1992) (students sued a beauty school to recover amounts equal to their unpaid student loan obligations). Since the plaintiff is obligated to pay RAC more than the contract described as the total, more than what she was led to believe she would have to pay, she has been damaged in that amount.

A case strikingly similar to the instant case is Cari Rentals v. Hall, SC 230734 (Iowa, 1993) (Attached hereto as Exhibit E). In Hall the consumer-defendant contended that a rent-to-own merchant failed to comply with the Iowa Consumer Rental Purchase Agreement Act, a statute similar to the Illinois Rental Purchase Agreement Act. Like the plaintiff in the case at bar, the consumer in Hall had ttstopped making payments..." Hall at 4. The court ruled as follows:

The Court finds the agreements used by the plaintiff [RTO merchant] do not comply with Section 537.3605(1) (disclosure provisions)... Paragraph 6 does not indicate the total dollar amount of lease payments necessary to acquire ownership if other than monthly payments are made.

Hall at 5.

Defendant's reliance on Roche v. Fireside Chrysler-Plymouth, Inc., 235 Ill.App.3d 70, 600 N.E.1d 1218 (2nd Dist. 1992), is misplaced. In Roche, a consumer argued that an extended warranty contract offered by a car dealer violated the Consumer Fraud Act because it provided no benefit to the consumer beyond the manufacturer's warranty that came with the vehicle. But unlike the case at hand, in Roche the consumer did not purchase the warranty or pay any money toward it:

Fireside contends that since plaintiff never signed

the revised purchase agreement, she never bought the extended warranty and, therefore, plaintiff failed to prove she was damaged by this allegedly deceptive act. We agree.

Roche, at 235 Ill. App. 86. In the case at bar the consumer not only executed the two contracts--and thus became obligated to comply with their terms--but she also made numerous payments. The plaintiff in Roche had no damages because she never was obligated to pay one cent for the extended warranty.

According to defendant, the plaintiff has paid \$1165.89 on the first contract and \$259.92 on the second contract. See Exhibit H attached to defendant's motion. Each payment she made also constitutes damage for two reasons: (1) each payment is greater than the payment amount disclosed in the contracts; and (2) each payment includes a portion of the final, total amount, which happens to be greater than the total amount listed in the contracts. For example, although the stereo contract disclosed a monthly payment of \$105.99, the plaintiff had to pay monthly payments of \$112.49. On March 4, 1994 she paid RAC a payment of \$112.88 for the stereo.<sup>3</sup> See Exhibit F attached hereto. Thus Ms. Barnett was damaged in the amount of \$6.89 for that payment alone.<sup>4</sup>

Reduced to its essentials, this case is one in which an RTO merchant concededly ignored the RPAA, obligated a customer to pay one amount while disclosing a lower amount, and

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<sup>3</sup> This payment includes \$99.99 rental, \$6.50 liability damage waiver fee, and \$6.39 tax. The last amount--\$6.39 tax--is puzzling because the contract calls for only \$6.00 tax.

<sup>4</sup> Another way to look at the plaintiff's damages is as follows. Since the first contract included a hidden charge of \$212.50, and since the first contract was payable in 17 payments, each payment made by the plaintiff included \$12.50 (one-seventeenth of \$212.50) damage.

then contends that no action may be brought under the PPAA because the consumer refused to pay the entire--illegal--balance of the contracts. This ~ Court must reject this curious notion which would require victims of fraud to pay every dime on an illegal contract before they could sue.<sup>5</sup>

B. Count II of the Amended Complaint, Which

Seeks Damages Under the Consumer Fraud Act  
For Defendant's Unfair and Deceptive Acts,  
Is Not Properly Subject to Summary Judgment.

Count II of the Amended Complaint alleges that the same conduct complained of in Count I constitutes an unfair and deceptive practice in violation of the Illinois Consumer Fraud and Deceptive Practices Act (<sup>tt</sup>CFA<sup>tt</sup>), 815 ILCS 505/2.

The defendant's primary argument for summary judgment on this Count is identical to the contention discussed with regard to Count I. Namely, defendant maintains that because plaintiff refused to pay the entire balance of the illegal contracts that she has suffered no damages. For the reasons set out above, this contention must fail.

Defendant also argues that summary judgment must be granted in its favor because

plaintiff has simply failed to show any reliance

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<sup>5</sup> It should also be noted that the RPAA provides for actual damages, such as those incurred by the plaintiff, and statutory damages of "25% of an amount equal to the total of payments required to obtain ownership of the merchandise..." with a minimum of \$250 and a maximum of \$1000. 815 ILCS 655/4(2). Thus the plaintiff in this case, in addition to her actual damages, will be entitled to recover statutory damages as well.

on her part...There is simply no evidence of plaintiff's relying on any untrue statement by the seller...

Def. Motion for Sum. Judgt. at 6. Two responses are in order here. First, evidence of reliance is unmistakably present. Plaintiff testified at her deposition that she thought the total due to RAC was one amount--having relied on the disclosures in the contracts--when in fact it was a higher amount. Dep. of Barnett at 52, 71, and 88. But in any event reliance is not required under the Consumer Fraud Act. As the Illinois Supreme Court most recently put it:

. . .the Consumer Fraud Act does not require actual reliance, an untrue statement regarding a material fact, or knowledge or belief by a party making a statement that the statement was untrue.

Martin v. Heinhold Commodities, Inc., 163 Ill.2d 33, 643 N.E.2d 734, 754 (1994). Given this pronouncement of the Supreme Court, defendant's suggestion that summary judgment be granted in its favor must be rejected.

C. Count III of the Amended Complaint, Which

Alleges That The Prices Charged The Plaintiff  
By RAC Were Unconscionably High, Should Not  
Be Subject to a Summary Judgment Motion.

Count III of the Amended Complaint asserts that the prices charged the plaintiff in the two rent-to-own transactions were unconscionably high, in violation of the Illinois Commercial Code and Illinois common law. The key evidence in this respect is that plaintiff was charged \$1337.01 for a curio cabinet for which the defendant paid \$291.56--a markup of 458%. The stereo for which the plaintiff was obligated to pay \$1912.33 cost Rx! \$731.21--a markup of 261%. There are two reasons that summary

judgment is inappropriate on this Count: (1) the statute requires an evidentiary hearing to adjudicate claims of unconscionability and; (2) a material issue of fact exists as to whether the contracts did impose prices which were unconscionably excessive.

1. The Parties Are Entitled To An Evidentiary

Hearing On The Issue of Unconscionability.

The law prohibiting unconscionable contract clauses states that

When it is claimed or appears to the court that the

contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

810 ILCS 5/2-302(2). This "reasonable opportunity" is a full evidentiary hearing--not a summary judgment motion. In Frank's Maintenance Inc. v. C.A. Roberts Co., 86 Ill.App.3d 980, 408 N.E.2d 403 (1st Dist. 1980) the trial court granted the defendant's motion for summary judgment, ruling that a clause of a contract was not unconscionable. The Appellate Court reversed, holding that

While under the Code the question of the

unconscionability of a clause is for the court to decide, the court before making this determination must give the parties a reasonable opportunity to present evidence as to its commercial setting, purpose and effect. Generally a full hearing on

the issue is required.

Frank's Maintenance, 408 N.E.2d at 409 (citations omitted). See also Luick v. Graybar Electric Co., 473 F.2d 1360, 1363 (8th Cir. 1973) (summary judgment against an unconscionability claim

reversed because plaintiff entitled to I<sup>t</sup>reasonable opportunity to present evidence on this issueI<sup>t</sup>).

2. Material Issues of Faat Rxiat Regarding The Unconsoionability of the Prieos Imposed.

Summary judgment I<sup>t</sup>is a drastic means of disposing of litigation and therefore should be allowed only when the right of the moving party is clear and free from doubt.l<sup>t</sup> Kuwik v. Star Mark Star Marketing, 156 111.2d 16, 619 N.E.2d 129, 136 (1993). Yet the

defendant has presented no evidence to show that the prices in this action were not unconscionable. Defendant adduced nothing whatsoever regarding the commercial setting, purpose and effect of the contracts. In the absence of such evidence the Court cannot grant their motion for summary judgment. In fact the prices charged to plaintiff were unconscionably high, in violation of the Illinois Commercial Code. For example, plaintiff demonstrated a markup of over 450% on the curio cabinet. See Facts Section above. The case of Murnhy v. McNamara, 27 UCC Rep. Serv. 911 (Conn. 1979) (attached as Exhibit g) t is very similar to that at bar. The plaintiff, a RTO customer, was charged \$1268 to rent a \$499 television set. Id. at 912. The court stated:

An excessive price charged a consumer with unequal

bargaining power can constitute a violation of S2-302 of the Uniform Commercial Code. In the case of Jones v. Star Credit Corn., 298 NYS2d 64 (1969), the plaintiffs, welfare recipients, purchased a home

freezer unit for \$900. The freezer had a retail value of approximately \$300. The court held the contract was unconscionable under S2-302 of the Uniform Commercial Code...

Id. at 919. The court then listed many other cases where high prices were deemed unconscionable in violation of the Uniform Commercial Code. Id. The court held the price in the RTO transaction to be unconscionably high.

In Cari Rentals v. Hall, suora (Ex. E attached hereto), the court found a rent-to-own transaction to be unconscionable. The court noted that the price of the RTO merchant was I<sup>t</sup> "substantially higher" than similar merchandise in other stores and that "the 'value<sup>1</sup> of the goods . . . is substantially less than the total payments defendant was required to pay under the agreement". Id. at 6-7.

In the case at bar the defendant has not argued that the prices imposed on the plaintiff were reasonable in light of the commercial setting and purpose of the transaction. Defendant has ignored its burden as a movant in a summary judgment motion. Instead defendant argues generically that all ttrent-to-own agreements are not unconscionable<sup>tt</sup>. Def. Motion for Sum. Judgt. at 8. Even the cases relied on by defendant suggest that a rent-to-own contract that imposes a high price may be unconscionable, depending on the circumstances of the case. In Remco Enterorises v. Houston, 9 Kan. App.2d 296 (Kan. 1984) the court held that the issue of price unconscionability I<sup>t</sup> is to be determined by the court upon the basis of the peculiar circumstances of each caseI<sup>t</sup>.

Remco at 302. So while that court found that a 108% markup did not strike the court as unconscionable, it did not rule that high prices could not serve to justify a finding of unconscionability. The trier of fact in this case--after a full hearing-- may find the prices imposed to constitute an unconscionable markup. Defendant's reliance on Starks v. Rent-A-Center, is also misplaced. Starks was not decided on a summary judgment motion; instead, the matter was tried to a jury and both sides had their full opportunity to show the setting and circumstances of the transaction. Moreover, in finding the contracts to be conscionable, the court relied on the fact that "the contracts disclosed to plaintiffs the nature and cost of the transaction". Starks at 12. The facts of the case at bar are different; plaintiff was not disclosed the true cost of the transactions.<sup>6</sup>

This Court must deny the defendant's motion for summary judgment on Count III. The defendant has not met its burden of showing that it is entitled to judgment and that this question is clear and free from doubt. The question of whether the agreements were unconscionable is one that will require a full hearing.

D. Count IV of the Amended Complaint, Which  
Complains of the Defendant's Concealment of

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<sup>6</sup> The final case relied on by defendant, In re Colin, 136 B.R. 856 (Bk. Ore. 1991) states the minority view that a high price in itself cannot form the basis of a claim for unconscionability. Of course plaintiff in this action is complaining of excessive prices and deceptive acts of the defendant.

The True Cost of the Merchandise and the  
Excessive Price Charged, Should Not Be  
Subject to a Summary Judgment Motion.

Count IV of the Amended Complaint charges that the defendant misrepresented the total price of the merchandise and that the prices imposed on the plaintiff were "unfair trade practices" within the meaning of the Consumer Fraud Act. Defendant's sole argument for summary judgment on this count is that plaintiff is alleged to have no damages because she did not complete all payments. This argument's defects are discussed above in Section A.

Claims similar to Count IV have been allowed in other actions. In Murnhy v. McNamara, supra (Ex. F attached hereto), the court held that a rent-to-own merchant that charged excessive prices committed an unfair act under the Connecticut Consumer Fraud Act, and noted that

the failure on the part of the defendant merchant

to advise the plaintiff of the total price she would be required to pay under the terms of the contract further compounded the unfairness of his

trade practices.

Murnhy at 919-920. In Green v. Continental Rentals, L 3182-90 (New Jersey, 1994) (attached hereto as Exhibit H), the court held that the New Jersey Consumer Fraud Act was violated when a RTO merchant charged excessive prices in rent-to-own transactions. Green at 14-17.

The courts have broadly construed the Consumer Fraud Act, stating that in order to fall within the purview of Section 2 (of the CFA), it need only be shown that Defendants are engaged in trade or commerce and in unfair or deceptive acts or practices

in the conduct of that trade or commerce.<sup>tt</sup> Peoole ex rel Hartiaan v. Knecht, 216 Ill. App. 3d 843, 159 Ill. Dec. 318, 324 (2d Dist. 1991). A practice may be unfair without being deceptive. Id., at 325, citing Federal Trade Commission v. Snerry & Hutchinson Co., 405 U.S. 233 (1972). And language in the CFA expressly provides that "This Act shall be liberally construed to effect the purposes thereof." 815 ILCS 505/11a. The First District Court of Appeals ruled that this provision

is a clear mandate from the Illinois legislature that our courts utilize the Act to the utmost degree in eradicating all forms of deceptive and unfair business practices...

Peonle v. All American Aluminum, 171 Ill. App.3d 27, 524 N.E.2d. 1067, 1070 (1st Dist. 1988).

PAC's arguments ignore the broad sweep of the Consumer Fraud Act. The issue of whether a practice is Wnfair<sup>tt</sup> under the CFA is one of fact, requiring a case-by-case determination. See Peoole ex rel Hartiaan v. Knecht, sunra, 159 Ill. Dec. at 325. As such, it is an inappropriate issue for decision on a motion for summary judgment. Ultimately it will fall to the trial court--after it reviews all the evidence from both parties--to determine whether the conduct of the defendant was ltunfair<sup>tt</sup> within the meaning of the CFA.

#### Conolusion

Plaintiff should be given her day in court. She will be able to establish that the prices she was charged were concealed

from her and, when viewed in their commercial context, were outrageously high. The motion must be denied.

Respectfully submitted,

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One Of Plaintiff's Counsel

Alop A. Alop  
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Certificate of Service

Alan A. Alop certifies that he has mailed a copy of the foregoing document to:

Michael McGowan  
Querrey C Harrow Ltd.  
180 N. Stetson Ave. #3500  
Chicago, Illinois 60601

by placing the document, postage paid and addressed as above, in the mail at 343 South Dearborn, this 30th day of March, 1995.

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Alan A. Alop

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BARNETT

v.

THORN AMERICAS

NO. 94 M1 013550

ORDER

This cause came on to be heard on the plaintiff's Motion to Dismiss, <sup>both parties'</sup> Motions to Strike Exhibits, and the defendants' Motion for Summary Judgment and the Court being fully advised in the premises, it is hereby

ORDERED:

1. Exhibit F (Lexicon Report) to Defendant's Reply Brief is stricken.
2. Exhibit A (Sun-Times editorial) to Plaintiff's responsive memorandum is stricken.
3. Defendant's Motion for Summary Judgment is denied as to all counts.
4. Plaintiff's Motion to Strike Count III of defendant's counterclaims is granted. Defendant is granted 28 days to replead.

JUDGE ROBERT L. QUINN

MAY 24 1995

CIRCUIT COURT - 1609

Atty No. 91017

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ENTERED JUDGE ROBERT L. QUINN

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