

IN THE SUPREME COURT OF OHIO

PREFERRED CAPITAL, INC.)	CASE NO. 2005-2134
)	
Appellee)	On Appeal from the Summit County
)	Court of Appeals, Ninth Appellate
vs.)	District
)	
POWER ENGINEERING GROUP, INC., et al.)	Court of Appeals Case Nos. 22475,
)	22476, 22477, 22478, 22485, 22486,
Appellants)	22487, 22488, 22489, 22497, 22499,
)	22506, 22513

APPELLANTS' REPLY TO APPELLEE'S MERIT BRIEF

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I. REPLY TO APPELLEE'S INTRODUCTION

A. Propositions of Law II and III are Properly before this Court

The Appellee argues that the Appellants should not be allowed to raise Proposition of Law II as the Court did not accept the appeal in its *Case Announcements and Administrative Actions* for February 22, 2006, 108 Ohio St.3d 1471, 2006-Ohio-665 (the Case Announcement). The Appellee also argues that the Appellants should not be allowed to raise Proposition of Law III as it was not raised in the Appellants' Memorandum in Jurisdiction. Neither assertion is correct.

1. Proposition of Law II is Properly before the Court

The *Case Announcement* from this Court does not limit the scope of the appeal presented by the Appellant. The language of the Judgment Entry does not indicate any limitation on the issues being accepted for review. The *Case Announcement*) states as follows: "Discretionary appeal accepted on Proposition of Law No. I. Moyer, C.J., Lundberg Stratton and Lanzinger, JJ., would also accept on all other Propositions of Law. Resnick, Pfeifer and O'Donnell, JJ., dissent." The *Case Announcement* is not a judgment entry. Appellee's condescending assertion that Appellants either did not read or ignored the case announcements is inaccurate and untrue.

Further, the wording of the *Case Announcement* suggests that the Court unanimously accepted the appeal on Proposition of Law No. I, that Justices Moyer, Lundberg Stratton and Lanzinger all accepted the entire appeal and Justices Resnick, Pfeifer and O'Donnell dissented. There is no indication as to whether Justice O'Connor participated. The dissent of Justices Resnick, Pfeifer and O'Donnell is an indication that the entire appeal is being accepted for review. It is not clear from the *Case Announcement* what issues the court will hear.

Further, a fatal flaw in Appellee's argument is that it overlooks the Court's Entry of February 22, 2006 (the Entry) that states as follows: "Upon consideration of the jurisdictional memoranda filed in this case, the Court hereby accepts the appeal." The Court did not indicate any limitations in its Entry. The Court simply accepted review of the appeal. Thus, unambiguous wording of the February 22, 2006 Entry is further indication that the appeal was accepted without limitation.

It is well settled that "a court speaks only through its journal entries." *State v. Mincy* (1983) 2 Ohio St.3d 6, citing *Schenley v. Kauth* (1953) 160 Ohio St. 109. "Mere notations on its docket do not suffice." *Id.* see also, *State v. Lee* (1976) 48 Ohio St.2d 208, 209; *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658. A court speaks as the Court only through journalized judgment entries. *William Cherry Trust v. Hoffman* (1985) 22 Ohio App.3d 100 at 103.

The Entry of February 22, 2006 is clear. The Court accepted the appeal without limitation and any indication otherwise is subject to the final entry of the Court.

2. Proposition of Law III is Properly before this Court

The Appellee argues that Proposition of Law III should not be reviewed as it was not raised in the Appellants' Memorandum in Jurisdiction. As stated in the *Merit Brief of All Appellants*, subject matter jurisdiction may not be waived and cannot be bestowed upon a court by the parties to the case. *State ex rel. White v. Cuyahoga Metro Hous. Auth.* (1997) 79 Ohio St.3d 543, *State v. Wilson* (1995) 73 Ohio St.3d 40, 46, 652 N.E.2d 196 at 200. The Appellee argues that the Appellants have waived the right to raise subject matter jurisdiction as it was not raised in the Memorandum in Jurisdiction. The Appellee's argument is misplaced as the issue of subject matter jurisdiction is never waived. The Appellee cannot distinguish or otherwise avoid the application of the controlling case law on subject matter jurisdiction.

The Appellee cites *In Re Timken Mercy Medical Ctr.* (1991) 61 Ohio St.3d 81 and *Estate of Ridley v. Hamilton County Board of Mental Retardation & Developmental Disabilities* (2004) 102 Ohio St.3d 230 in support of the contention that assignments of error not raised in a Memorandum in Jurisdiction are waived. Neither *Timken* nor *Ridley* involve issues of subject matter jurisdiction and, therefore, are not instructive. The Appellee's argument is not supported by any authority and should be rejected.

The Appellee argues that the Appellants should not be able to raise the issue of subject matter jurisdiction now as some of the same attorneys were involved in a prior appeal to this Court and argued against jurisdiction when the Appellee asked for the Court to accept jurisdiction. That some of the same attorneys involved in this appeal argued against jurisdiction in another case is not relevant in this matter. Attorneys are sworn to act for the best interest of each individual client and did so relating to the prior appeal. Actions taken on prior appeals cannot and should not be held against completely different litigants merely because their counsel argued differently in a different case.

B. The Trial Courts Found That Appellee Fraudulently Induced Appellants into the Equipment Rental Agreements

The Appellee asserts that the Trial Courts "declined to find that Appellants had proved fraud or overreaching of any kind[.]" Appellee's Merit Brief at 2. This is simply not true. Judge Stormer's opinion in *Preferred Capital v. Rick Hore*, (1/24/2005) Case No. CV 2004 09 5336, Appendix Page 35, sets forth the standard from *Kennecorp Mortgage Brokers, Inc. v. Country Club Convalescent Hosp., Inc.* (1993) 66 Ohio St. 173 which states, in part, that "absent evidence of fraud or overreaching . . . a forum selection clause contained in a commercial contract . . . is valid and enforceable [.]" *Rick Hore* at 3 (Appendix 35). Judge Stormer concluded that "the forum selection clause contained within the parties' Agreement is

unenforceable and that enforcement of the clause would be unreasonable and unjust.” *Id.* at 7 (Appendix 41). It is logical to conclude that Judge Stormer believed the contract involved fraud and overreaching as she referred to the *Kennecorp* standard forbidding fraud and overreaching and concluded that the forum selection clause was unenforceable.

Judge Spicer’s opinion in *Preferred Capital v. Plyley Enterprises, Inc.* (3/3/2005) Case No. CV 2004 10 5730, Appendix 54 also cites *Kennecorp*’s standard indicating that a forum selection clause is unenforceable if there is evidence of fraud or overreaching and also concludes that the forum selection clause is unreasonable and unjust.

Judge Burnham Unruh decided the balance of the cases. Each case referred to Judge Burnham Unruh’s initial opinion in *Preferred Capital v. Power Engineering, Inc.* (12/15/2004) Case No. CV 2004 10 5737, Appendix 59. Judge Burnham Unruh also referred to *Kennecorp*’s holding requiring a finding of fraud and overreaching to invalidate a forum selection clause. *Id.* at 3, Appendix 61. Judge Unruh then concluded that “enforcement of the clause in this case would be unreasonable and unjust.” *Id.* at 7, Appendix 65.

The Judges’ references to *Kennecorp* and subsequent findings that the forum selection clause in each case was unenforceable, is an indication that the Trial Court Judges each found that the clause was predicated on fraud and overreaching.

The Appellee further argues that the Appellants stated no facts before the trial court to support fraud. This is not true. Affidavits were provided detailing Norvergence’s fraud. See Supplement Pages 1-28. Further, the Master Program Agreement, the Equipment Rental Agreements, the Notices of Assignment and the Delivery and Acceptance Certificates, when combined with the facts alleged in the Affidavits, support a finding of fraud. See Supplement 29-108. The scheme created by Norvergence and Preferred Capital was wrought with fraud. As

indicated in *Preferred Capital v. Sarasota Kennel Club*, (7/27/2005) Case No. 1:04CV2063, 2005 U.S. Dist. LEXIS 15238, United States District Court for the Northern District of Ohio, Eastern Division, the failure to disclose the existence of the Master Program Agreements was fraudulent. The Appellee's argument that there is no fraud is disingenuous and ignores the obvious. Moreover, the Appellee's assertion that the Appellants failed to raise facts in the Trial Court to support fraud is untrue.

The Appellee argues that there is no evidence that the Equipment Rental Agreements were part of a Ponzi scheme. This ignores the plethora of evidence presented by Affidavit that shows the way the scheme was carried out. It is true there are no Affidavits using the term "Ponzi scheme" but, the facts stated support that it definitely was one.

C. The Appellants are Unsophisticated Small Businesses

The Appellee argues that there is no evidence in the record that the Appellants are unsophisticated "mom and pop" businesses but then directs the Court to the exact place to find the evidence to support the allegation. The Appellants' characterized themselves accurately and have done so from the beginning of this litigation. For the Appellee to argue that the characterization is inaccurate is disingenuous. What is not supported by the evidence is the allegations made by the Appellee regarding Home Furnishings of Clarkston, Inc. and Custom Data Solutions, Inc. in footnote 11 on pages 4 and 5 of its Brief. There is no evidence in the record anywhere to support the Appellee's allegations.

D. Aliano Brothers

The Appellee points out that on February 1, 2006, the Seventh Circuit reversed the Trial Court in *IFC Credit Corp. v. Aliano Bros.* (2006) 437 F.3d 606. A review of Judge Posner's opinion reveals that it is predicated on several facts that were specific to Aliano Bros.

relating to the Aliano Brothers' experience with contracts and its size. Further, Judge Posner admitted that the tide of the cases are running against the enforceability of the forum selection clause. Judge Posner then indicates that the cases finding the clause unenforceable are predicated on the clause failing to be specific as to the forum. Judge Posner indicates that the clause is specific but never indicates how it is specific. Judge Posner only restates the clause as proof that it is specific. There is no plausible way that a forum selection clause that points to a future event unknown to the customer is specific. The forum selection clause is misleading in its operation as the customer did not know to whom the contract would be assigned before the customer signed, but Norvergence did before it signed. The opinion is not well reasoned and should not be followed by this Court.

E. Out-of-State Actions: *Federal Trade Commission v. Norvergence* and *Florida v. Commerce Commercial Leasing, LLC*, support Appellants' Arguments

The Appellees argue that *Federal Trade Commission v. Norvergence, Inc.* (NJ June 29, 2005) Case No 2:04-CV-05414-DRD-SDW never used the words "void ab initio." This may be true, but the court did find that the leases were "void and unenforceable."

The Appellee implies that the *Federal Trade Commission* Order applies only to consumer leases. In this circumstance, consumers are not limited to those who purchased the equipment for personal use. The Order specifically states in paragraph 7 that the Order relates to "consumers who were small businesses, non-profit organizations, churches and municipalities." The Appellee further argues that there are further limiting factors relating to the *Federal Trade Commission* Order. The limits of the Order, however, do not diminish the precedential value of the Order.

The Appellees indicate the Trial Court in *State of Florida v. Commerce Commercial Leasing, et al.* (5/25/2005) Case No. 2004 CA 2515, The Second Circuit, Leon County, Florida,

found that the suit could not be entertained in Florida because it was not the home of the assignees. This is a complete and flagrant misstatement of the holding in *Florida*. The Court denied the relief requested by the Attorney General based on §501.212, Florida Statutes which allegedly barred action by the Attorney General against “Banks and savings and loan associations[.]” The case was not dismissed for want of personal jurisdiction.

F. Conflict of Law is at Issue

The Appellee argues that the case is not about what State’s substantive law applies. The Appellee ignores the factors established by *Barrett v. Picker International, Inc.* (1990) 68 Ohio App. 3d 820 which requires the Court to consider what law controls the contractual dispute. This case does concern, but does not turn on, what State’s substantive law applies as it is one of multiple factors to be considered in determining whether the forum selection clause is enforceable.

The Appellee argues that the Appellants have never raised the issue of what law applies. The Appellee also states that the Appellants have operated on the assumption that Ohio law applies. This is not correct. From the inception of the action, the Appellants have argued law from several State Courts including Ohio, New Jersey and Illinois and from the United States Supreme Court. The Appellants have not argued Ohio law exclusively and do not consent or concede that Ohio law is the substantive law that applies to this action.

II. REPLY TO ARGUMENT RELATING TO PROPOSITION OF LAW I

A. The Holding in *Kennecorp* Assists the Appellants

The Appellee heavily relies on *Kennecorp v. Country Club Hosp.* (1993) 66 Ohio St.3d 173. *Kennecorp* is admittedly insightful and probative but does not assist the Appellee’s cause. Although *Kennecorp* did enforce the forum selection clause at issue, the facts of *Kennecorp*

required the result. The facts in *Kennecorp* were as follows: 1. the forum selection clause specifically stated Ohio as the forum of choice; 2. the Defendants made “no allegation of fraud or overreaching;” 3. the Defendants drafted the contract themselves; 4. the Defendants did not argue that the forum selection clause was unfair or unreasonable and 5. the Defendants argued only that a minimum contacts analysis was required. *Id.* at 175.

The facts of the cases at issue are enormously distinct from those in *Kennecorp*. The facts in these cases are as follows: 1. the forum selection clause does not state a specific forum which could have been delineated by the Appellants at the time the Appellants signed the contract; 2. the Appellants have abundantly set forth facts evidencing fraud and overreaching; 3. the Appellants did not draft the contract; 4. the Appellants have argued that the forum selection clause is unfair and unreasonable and 5. The Appellants have gone beyond merely arguing minimum contacts as the Appellants have raised the reasonableness of the forum selection clause.

Kennecorp actually assists the Appellants as the Court indicated that a forum selection clause must be enforced “unless it is clearly shown that enforcement would be unreasonable and unjust, or that the clause was invalid as being a product of fraud or overreaching.” *Id.* Further, *Kennecorp* requires that the clause be “freely bargained for.” *Id.*

The Appellants have shown that the forum selection clause is unreasonable, unfair and the product of fraud and overreaching. The various Affidavits and Motions submitted support the allegations. For example, the Affidavit of Rick Hore establishes that the Norvergence representative indicated that the equipment rental agreement was “non-binding” and that the documents were being submitted for “pre-approval” as the price continued to be negotiated. See Hore Affidavit at ¶3, Supplement 1. Mr. Hore also indicates that the matrix box was never

“hooked up” and that he “never received any service.” See Hore Affidavit at ¶4, Supplement 1-2.

Further, the Master Program Agreement, the Equipment Rental Agreements and the Notices of Assignment reveal the fraud and underhandedness involved in the forum selection clause. The Master Program Agreement shows that Norvergence knew it was going to assign leases to Preferred Capital prior to consummating contracts with its customers. The Equipment Rental Agreements reveal that the customer would sign prior to Norvergence signing. For example, Donn Lamon signed the Equipment Rental Agreement on June 2, 2003 and Ed Lucas, a Vice President of Norvergence, signed the Agreement on November 11, 2003. See Supplement at 59. The Notice of Assignment was made on November 12, 2003. This evidences that Norvergence knew to what leasing company it was going to assign each contract prior to signing and accepting each contract, but failed to inform the Appellants until after the assignment was made. This failure to share information is fraudulent, unfair and overreaching.

The Appellee makes much of the Master Program Agreement being non-exclusive. This is quite irrelevant. What is relevant is that the Appellee did take assignment of the leases at issue, that Norvergence and the Appellee both knew everything about the Appellants, including Appellant’s place of business, prior to either Norvergence or Appellee accepting the agreement and that Appellants did not have the same opportunity to find anything out about the Appellee prior to their acceptance of the Agreements. Appellee is correct in pointing out on page 13 of its Merit Brief that “there is simply no evidence to support a finding that Norvergence or PCI knew at the time Appellants executed the Agreement that it would be assigned to PCI.” This, however, is not the relevant fact. What is relevant, is that Norvergence and PCI knew all the facts and

circumstances before they signed the Agreements and did not share those facts and circumstances with the Appellants.

B. *Barrett v. Picker International* is Relevant

The Appellee argues that *Barrett v. Picker International, Inc.* (1990) 68 Ohio App.3d 820 is “incongruous with the standard set forth in *Kennecorp* and *Bremen*” as *Barrett* can be traced to *Furbee v. Vantage Press, Inc.* (1972) 464 F.2d 835. The statement is untenable. *Barrett* was based on *M/S Bremen v. Zapata Off-Shore Co.* (1971) 407 U.S. 1. *Barrett* cites *Bremen* at least ten times. *Barrett* is good and valid law based on good and valid precedent. *Kennecorp* also cites *Bremen* throughout its opinion and based its conclusions on “the reasoning set forth in *Bremen . . .*” *Kennecorp*, 66 Ohio St.3d 137.

Along the same lines, Appellee falsely argues that Appellants failed to acknowledge and argue to this Court that the enforcement of the forum selection clause would deprive them of their day in court. To the contrary, it is clear from the record that Appellants have consistently argues this issue. See Appellants’ Merit Brief at 16 citing *Info. Leasing Corp. v. Jaskott* (2003) 151 Ohio App.3d 546. Appellants argued in their Merit Brief that their size, inexperience and locations out-side of Ohio would all factor in to irreparably harm them financially in the event that they were “forced to consistently travel to Ohio for pre-trials, settlement conferences, mediations, arbitrations, final pre-trials and trials.” *Appellants’ Merit Brief* at 17. Such burdens would act to deny Appellants their day in court.

C. *Carnival Cruise Lines*

The Appellee refers to *Carnival Cruise Lines, Inc. v. Shute* (1991) 499 U.S. 585 and makes the judgment that “*Carnival Cruise Lines*, undoubtedly, presents a more compelling case to deny the forum selection clause than is presented here – yet the United States Supreme Court

enforced that clause's application." The Appellee is completely off base. The forum selection clause in *Carnival* was very different than the forum selection clause at issue in this matter. The forum selection clause in *Carnival* was very specific. The clause named Florida as the forum for resolving disputes. Naming Florida as a forum for disputes was rational and proper in *Carnival* so as to avoid the burdensome result of allowing the forum to float with the boat to various jurisdictions. The clause related to a contract for voyage on a boat that would be traveling through many jurisdiction (similar to *Bremen*) and it behooves all parties involved to have a specific forum stated for resolving disputes so the parties are not subject to suit all over the world. It is reasonable and rational to anchor the parties to a specific forum to encourage predictability for all involved.

Unlike the contract in *Carnival*, the contacts here involve telecommunications services and equipment. Unlike *Carnival* and *Bremen*, the parties are not on a boat moving among several jurisdictions, but are stationary. Unlike the customer in *Carnival*, the Appellants did not move from their offices in order to take part in the contract. The forum selection clause in this matter creates the exact opposite result intended by *Carnival* and *Bremen*. *Carnival* and *Bremen* allowed the forum selection clauses as the clauses at issue in *Carnival* and *Bremen* created a specific anchored point for litigation. In this matter, the point of litigation is uprooted and allowed to move with the contract's assignment. Instead of certainty and predictability as to the place of litigation, uncertainty and unpredictability are achieved. The Appellee attempts to spin the holding in *Carnival* in its favor, but the attempt is unsuccessful.

D. The Forum Selection Clause is Ambiguous

The Appellee tries to argue that the forum selection clause is unambiguous. The Appellant makes baseless arguments to support the clause's clarity. The Appellee argues that "it

is fairly obvious . . . ‘state or federal court’ is speaking to the American justice system” and that State “would still mean any state in the United States, while excluding foreign states.” There is nothing to support the Appellee’s assertions that State of the United States is the only interpretation of the clause’s use of the word State. The Appellee’s argument is without merit as State could mean almost any governmental body. The Appellee argues that there is no reasonable construction that would be narrower. The Appellee, however, does not indicate why a narrow construction would be used as opposed to a broader construction. The Appellee’s forced narrow interpretation ignores that there are other federal governmental systems outside of the United States. The Appellee’s attempt to narrow the interpretation is without merit and ignores that contract language is construed against the drafter. *Central Realty Co. v. Clutter* (1980) 62 Ohio St.2d 411.

The Appellee argues that the clause’s use of venue is not ambiguous. In supporting its allegations, the Appellee cites *Info. Leasing Corp. v. Jaskot* (2003) 151 Ohio App.3d 546 as involving a forum selection clause that stated “venue will be determined by the legal residence of the defendant.” The forum selection clause in *Jaskot* actually read: “YOU CONSENT TO THE JURISDICTION AND VENUE OF ANY COURT LOCATED IN THE STATE OF OHIO.” See *Jaskot* at 549. *Jaskot* is not helpful in this matter as the forum selection clause at issue did refer to jurisdiction and venue.

Nevertheless, the forum selection clause at issue in this matter is vague in its failure to mention jurisdiction. Although some Courts have glossed over the distinctions between venue and jurisdiction, there is still a difference. Venue does not imply jurisdiction. *Blacks Law Dictionary*, Eighth Edition, 2004 states as follows under the definition of venue:

Venue must be carefully distinguished from jurisdiction. Jurisdiction deals with the power of a court to hear and dispose of a given case . . . [v]enue is

of a distinctly lower level of importance; it is simply a statutory device designed to facilitate and balance the objectives of optimum convenience for parties and witnesses and efficient allocation of judicial resources. . . [i]t is possible for jurisdiction to exist though venue in a particular district is improper, and it is possible for a suit to be brought in the appropriate venue though it must be dismissed for lack of jurisdiction.

The failure to mention jurisdiction is an ambiguity to be construed against the drafter. The forum selection clause does not address jurisdiction. There is no evidence that jurisdiction is proper in Ohio and the matters were properly dismissed by the Trial Courts.

E. The Forum Selection Clause's Lack of Notice Reveal its Fraudulent Tenor

The Appellee argues that notice is not a meritorious issue and that conspicuousness of the forum selection clause is not important. This is far from accurate. Notice is important as the lack of notice indicates that there is overreaching and fraud. As was stated in the Appellant's Merit Brief, "overreaching exists when one party, by artifice or cunning, or by significant disparity to understand the nature of the transaction, attempts to outwit or cheat the other." *Merit Brief of All Appellants* at 8 citing *Gross v. Gross* (1984) 11 Ohio St.3d 99 at 105. The lack of notice was a mechanism used to outwit or cheat the Appellants. The totality of all the circumstances, including a lack of notice through ambiguous wording and hidden language, point to overreaching and fraud.

The Appellee argues that there was a reference to the forum selection clause over the signature block for the personal guarantor. The statement, however, is also ambiguous as it does not indicate the place of jurisdiction and does not indicate where in the document the forum selection clause is located.

The Appellee cites *Commerce Commercial Leasing, LLC v. Jay's Fabric Center* (E.D. Pa. 2004) 2004 WL 2457737 for the proposition that the Appellants should have inquired as to

the assignee prior to entering into the agreement. *Appellee Merit Brief* at 25. The proposition that the Appellants should have inquired as to the identity of the assignee ignores the point that the fraud was assisted by the inability of the Appellant to know who the assignee was going to be. The transactions were organized so that the Appellants could not know the identity of the assignee prior to entering into the agreement, even if the Appellants asked. The mode of operation was for Norvergence to represent to the Appellants that the contract was a non-bidding application. See, for example, Hore Affidavit at ¶3, Supplement at 01. The misrepresentation that the contract is non-binding eliminates the need for the Appellants to inquire as to the identity of the assignee. Norvergence would then take the executed contract, which the Appellants were told was non-binding, and then shop for a leasing company to take assignment of the contract. Norvergence did not sign the contract until after it had an assignee committed to the deal. The only thing non-binding about the Rental Agreement was that Norvergence would reject it if it could not convince a leasing company to take the assignment. This all amounts to Norvergence and the leasing companies constructing a mechanism to force the Appellants into a forum selection clause to which only Norvergence and the leasing companies would know the effect of prior to final execution of the contract. Norvergence and the leasing companies had a distinct and unfair advantage at the time of the contract's final execution with relation to the applicable forum as only Norvergence and the leasing companies knew the ultimate forum. It is interesting to note that none of the counsel involved in representing any of the Appellants to this matter knows of a single Preferred Capital lease that involves an Ohio lessee. This is no mistake. It seems that Ohio lessees were sent to leasing companies in other States and lessees in other States were sent to Ohio leasing companies. It seems improbable that the lack of Ohio lessees in Preferred Capital's portfolio is a coincidence.

The Appellee argues that the Appellants should have read the contract and known its contents. This argument asserts that Norvergence could have put almost anything into the contract and that it should be enforceable as the Appellants had a duty to read it. The argument is without merit under the circumstances especially as it relates to the forum selection clause.

Prior to *Bremen*, forum selection clauses were unenforceable as they were against public policy. *Bremen* made accommodation for forum selection clauses under specific circumstances. *Bremen* and its progeny are far from a carte blanche to parties to contracts to devise any forum selection clauses they can imagine. *Bremen* and its progeny did not eliminate all scrutiny of forum selection clauses but established limits to forum selection clauses to assist courts in determining which clauses would be enforceable. *Bremen* established that a forum selection clause must be free from fraud and overreaching. The Appellee cannot deny the requirement. As has been stated with great redundancy, there was fraud and overreaching in this forum selection clause. The Appellee cannot wash its hands of the overreaching and fraud by declaring that the Appellants had a duty to read the clause as the Courts will not enforce just any forum selection clause. Courts have recently favored forum selection clauses, but that does not mean that they are to be accepted without scrutiny.

F. The Needs of the Leasing Industry

The Appellees and Amicus Curiae Equipment Leasing Association of America, Inc. (ELA) argue that the leasing industry requires a floating forum selection clause to enhance the marketability of leases. The argument is without merit and puts commercial concerns over legal merit.

The Appellee and ELA argue that the leasing industry will come to a screeching halt if the forum selection clauses are found to be unenforceable. This is far from true. In the majority

of cases relating to lease agreements prior to Norvergence, the lease agreements indicated a specific forum. See for example *Information Leasing v. Jaskot, supra*. The stipulation of a forum will not kill the leasing industry as the Appellee and ELA opine. The contrary is actually true. The requirement that a lease stipulate a forum in a forum selection clause will create greater predictability for all involved including any future assignee. The policy created by *Bremen* and *Carnival* was to encourage forum selection clauses that would allow all parties to know specifically where to go in the event of a lawsuit at the outset of the relationship. The clause at issue does not allow the parties the predictability of knowing where to go for a lawsuit at the outset, but creates greater ambiguity to the detriment of all involved.

Further, the argument that the clauses are needed for the protection of the leasing industry ignores that there are two parties to the contract that require protection. The obviously weaker party to the transaction is the lessee. First, the lessee is usually in the position of needing the lease financing and secondly, the lessee is usually not the party drafting the lease agreement. The weaker party to the transaction is in need of the Court's protection. The leasing industry will be fine whether the leasing industry is entitled to a floating forum selection clause or not.

Additionally, even if the requirement that a forum selection clause contain a specific forum does impinge upon the leasing industry, that may not be a bad thing. The Appellee's arguments presume that the leasing industry is a good thing to have. The death of the leasing industry may be a good thing if it is an industry that perpetuates fraud of the type promulgated in the Norvergence and Credit Card Center scams that have plagued small businesses throughout the country.

Finally, the leasing industry has consistently targeted and taken advantage of small businesses. The victims in the Credit Card Center cases and the Norvergence cases have

primarily been small businesses. Small businesses are the backbone of entrepreneurship and the basis of the American economy. Without small business, there would never be larger businesses as small business become larger businesses and continue to fuel the economy. The leasing industry is acting counter to their stated goals of assisting business growth. Leasing companies are actually impeding the growth of small business by assisting rogue businesses, like Norvergence and Credit Card Center, in leaching off of other businesses.

The Appellee constructs an argument that the leasing industry would have to add cost to the leases to account for the cost of litigation in other forums. This is pretext. The reality is the Appellants are already being charged the highest cost possible for the equipment leased. There is no further cost to add.

III. REPLY TO ARGUMENT RELATING TO PROPOSITION OF LAW II

The Ninth District Court of Appeals made a determination that the lease was a negotiable instrument and imposed a concession on the part of the Appellants that was not made. Nothing in the Motions before the Trial Courts or in the Merit Briefs before the Appellate Court addressed the issue of whether the lease was a negotiable instrument. For the Court to presume a concession on the issue by the Appellants was improper.

Further, the attorney arguing on behalf of the Appellants at oral argument did not make any blanket concessions relating to the nature of the leases. When asked if Preferred Capital was a holder in due course, counsel for the Appellants denied that status as it could only be determined after the merits of the case had been explored. As this matter is still in the jurisdictional phase, it is impossible to conclude that Preferred Capital is a holder in due course. Moreover, preliminary investigation with its clients revealed that Preferred Capital was, in fact, not a holder in due course. After several more similar questions from the bench, counsel for

Appellants again denied that Preferred Capital could be a holder in due course. After the Court questioned if the Appellants would be willing to make a concession, at that limited time, for the purpose of oral argument only, the attorney only made the relative concessions for the explicit purpose of oral argument only.

Additionally, this matter is a consolidated appeal involving at least fifteen Appellants with seven different attorneys. Not all Appellants were permitted to speak at oral argument. Therefore, in the unlikely event this Court does find a concession was made, the imposition of a concession by one party upon all the others is patently unfair.

IV. REPLY TO ARGUMENT RELATING TO PROPOSITION OF LAW III

The Appellees reliance on *Lantsberry v. Tilley Lamp Co., Ltd.* (1971) 27 Ohio St.2d 303 is misplaced. *Lantsberry* involved a motion to quash service of summons rather than a motion to dismiss for lack of personal jurisdiction. Further, in *Lantsberry* it appears that the dismissal of the defendants was, in effect, with prejudice as the statute of limitations had expired and Plaintiffs would be unable to pursue any additional judgment against the dismissed defendants anywhere. Additionally, no arguments were raised by the appellee and the Court did not address the issue of whether a dismissal without prejudice based upon a lack of personal jurisdiction “prevents a judgment” as required by O.R.C. §2505.02 (B)(1). For these reasons, *Lantsberry* is incongruent with the case at bar.

Finally, the Appellee argues that *Kennecorp v. Country Club Convalescent Hosp.* (1993) 66 Ohio St.3d 137 sheds light on the issue of whether the Ohio Supreme Court can consider subject matter jurisdiction issues. *Kennecorp* has nothing to do with the issue of whether subject matter jurisdiction is waived when one does not initially raise it. The term “subject matter jurisdiction” is not discussed at all in *Kennecorp*. The Appellee draws inferences from the

penumbras of *Kennecorp* to seek some support for its argument that the Appellants waived subject matter jurisdiction. A review of *Kennecorp* proves that the Appellee's reliance on *Kennecorp* to shed light on the issue of whether subject matter jurisdiction can be raised is creative, but misplaced.

The Appellee relies on *Bond v. DeLeo* (2/10/1981, 10th Dist.) unreported, Case No. 80 AP 767. *Bond* is not helpful as it does not involve the same facts or law at issue in this matter. *Bond* involved the interpretation of Appellate Rule 3(D) and not O.R.C. §2505. Similarly, each of the other cases relied upon by Appellee are irrelevant and distinguishable, because many of the cases did not involve a dismissal without prejudice based upon a lack of personal jurisdiction and none of the cases addressed the requirement in O.R.C. §2505.02 (B)(1) that a final appealable order "prevents a judgment." See *Tiffin v. Board of Review* (1982), 3 Ohio App.3d 467 (appeal of a decision dismissing a case for lack of subject matter jurisdiction where the appellee did not raise and the court did not address the issue of whether the dismissal without prejudice "prevents a judgment" as required by O.R.C. 2505.02 (B)(1)); *Clark v. Consolidated Foods Corp.* (December 13, 1978), Stark App. No. CA 4906, unreported (appeal of a decision staying a case based upon improper venue where the appellee did not raise and the court did not address the issue of whether the dismissal without prejudice "prevents a judgment" as required by O.R.C. 2505.02(B)(1)); *Overhead, Inc. v. Standen Contracting Co., Inc.*, Lucas App. No. L-01-1397, 2002-Ohio-1191 (appeal of a decision staying a case based upon improper venue where the appellee did not raise and the court did not address the issue of whether the dismissal without prejudice "prevents a judgment" as required by O.R.C. §2505.02(B)(1)).

Finally, the dismissal is other than on the merits. The Appellee can refile the cases in another forum. The Appellee could, if new facts are discovered to impose jurisdiction on the

Appellants, refile the matters in the same jurisdiction.

V. CONCLUSION

The Propositions of Law stated in the Appellants' Brief are all properly before the Court. The Propositions of Law are all supported by well founded law and the facts.

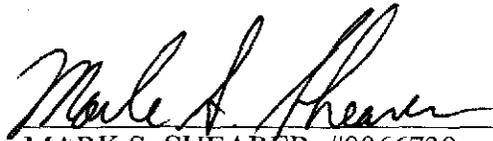
The forum selection clause at issue is counter to the policy set by *Bremen* and its progeny. The forum selection clause was promulgated by fraud and assisted in the furtherance of the fraud. The forum selection clause is counter to the policy created by *Bremen* and *Carnival* as it allows the forum to float as opposed to firmly anchoring it in one place.

The Ninth District Court of Appeals improperly relied upon an alleged concession by the Appellants which was never made. The Ninth District Court of Appeals' reliance on the alleged concession that appears nowhere in the record was inappropriate.

The Trial Court Order was not a final appealable order. The Appellee is free to refile the action in another jurisdiction.

For the reasons stated in this Reply and in the Merit Brief of All Appellants, the Appellants respectfully request that this Honorable Court reverse the Ninth District Court of Appeals and sustain the rulings of the Trial Court.

Respectfully submitted,



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A true and accurate copy of this APPELLANTS' REPLY TO APPELLEE'S MERIT

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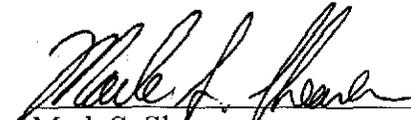
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