

IN THE SUPREME COURT OF OHIO

PREFERRED CAPITAL, INC.

Appellee

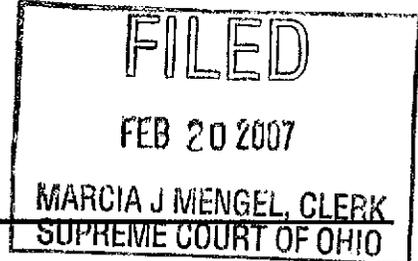
-vs-

POWER ENGINEERING GROUP, Inc., et al.,

Appellants.

CASE NO. 2005-2134
On Appeal from the Summit County Court of
Appeals, Ninth Appellate District

Court of Appeals Case Nos. 22475, 22476,
22477, 22478, 22485, 22487, 22488, 22489,
22497, 22499, 22506, 22513



APPELLEE'S MOTION FOR RECONSIDERATION OF MERIT DECISION

Now comes Appellee, Preferred Capital, Inc. ("PCI"), pursuant to S.Ct.R. Prac. XI, § 2(A)(1), and respectfully requests this honorable Court to reconsider its merit decision issued in *Preferred Capital, Inc. v. Power Engineering Group, Inc.*, 112 Ohio St.3d 429, 2007-Ohio-257 on February 7, 2007.

I. INTRODUCTION.

PCI respectfully submits that, as currently constituted, the majority's opinion in *Power Engineering* is self-contradictory in many key points of analysis and ultimately leaves the inferior courts without appropriate guidance to determine when and under what circumstances the court may enforce a floating forum selection clause.¹

¹ At a minimum, there are currently in excess of 700 cases pending in Cuyahoga County and approximately 175 cases in Butler County where the identical forum selection clause is at issue.

The majority opinion, on one hand, appears to hold that floating forum selection clauses are afforded the *prima facie* validity that this Court deemed proper in *Kennecorp Mtge. Brokers, Inc. v. Country Club Convalescent Hosp., Inc.* (1993), 66 Ohio St. 3d 173, syllabus, 175 (*Power Engineering* at ¶ 7), but on the other hand, the Court appears to require a *per se* invalidation of forum selection clauses that do not specifically identify the precise location where a future dispute will be litigated. See, *Power Engineering* at ¶ 12 (holding the forum selection clause unreasonable because “even a careful reading of the clause by a signatory would not answer the question of *where he may be forced to defend or assert his contractual rights.*”) Because all floating forum selection clauses share this characteristic – a signatory cannot determine where suit must ultimately be brought or defended at the agreement’s inception – these statements simply cannot be reconciled.

This is not the only enigmatic point in the majority’s opinion, however. The opinion also sets up a test for enforcement of floating forum selection clauses at its sixteenth paragraph that it identifies as a “holding.” The specific elements of that test, however, are nowhere analyzed in the majority opinion with respect to the specific facts of the twelve consolidated cases of the *Power Engineering* appeal. If applied, the test would, it seems, have resulted in enforcement of the forum selection clause at issue and affirmance of the Ninth District Court of Appeals’ decision. Moreover, the majority’s analysis, while stating that it follows *Kennecorp* in its syllabus, substantially departs from that case and its syllabus by invalidating a forum selection clause on the sole basis that it is “unreasonable,” without regard to the impact of its actual enforcement to require suit in Ohio or whether such “unreasonableness” rises to the level of essentially depriving the lessees their day in court. Finally, the majority, without discussion or analysis, departs from its long-standing statements regarding the limited situations in which a

party to a business transaction has imposed upon him an affirmative obligation to disclose information. Any and all of these points warrant a reconsideration of the majority's opinion.

Even if the Court is not inclined to reconsider the majority opinion, it should, at a minimum, offer some clarification of the standard it announced for enforcement of a floating forum selection clause, revise its order to remand the cases, and require the lower court to permit PCI to produce evidence to meet the new standard it has announced.

II. LAW AND ANALYSIS.

A. **Contrary to its Syllabus Law, the Majority Opinion has the Effect of Rendering Floating Forum Selection Clauses Presumptively Unenforceable.**

The majority opinion, in sequence: 1) defines the clause at issue as a “floating forum clause”, because, rather than naming a specific forum such as Ohio or New Jersey, “it allows the forum to change depending on the state in which the entity that holds an interest in the lease payments are located” (*Id.* at ¶ 7); 2) determines that such a clause is subject to the rule of *Kennecorp* and can only be held unenforceable in a contract between commercial entities if the lessees clearly demonstrate fraud or overreaching or that enforcement of the clause would be unjust or unreasonable (*Id.* at ¶¶ 6 & 7); 3) determines the contract is between commercial entities (*Id.* at ¶ 7); 4) determines that there was no fraud or overreaching (*Id.* at ¶ 9); but, nevertheless, 5) ultimately determines that the clause is “unreasonable” *because* the clause at issue did not specify, at the time of the lessees’ execution of the agreement, a definite forum for future litigation, but instead is designed to follow future assignees. *Id.* at ¶ 12. As the Court itself recognized, however, the fact that a litigation forum is not fixed at the outset of a contractual agreement is the essence of a “floating forum clause” (*Id.* at ¶ 7). In other words, the majority has set up the proverbial exception that swallows the rule – it has held that a floating forum selection clause is valid but for the fact that it allows the forum to float.

It does not seem that the *Power Engineering* majority actually intended to rule that floating forum selection clauses are *per se* invalid or even bear a presumption of invalidity. That would be directly contrary to the Court's statement of law at the first paragraph of its syllabus that, despite the "floating" nature of a forum selection clause analyzed in this case, the syllabus of *Kennecorp Mtge. Brokers, Inc. v. Country Club Convalescent Hosp., Inc.* (1993), 66 Ohio St. 3d 173 nevertheless applies. See, also, *Power Engineering* at ¶ 7. Yet, the majority's determination that the forum selection clause at issue is "unreasonable because even a careful reading of the clause by a signatory would not answer the question of where he may be forced to defend or assert his contractual rights" (*Id.* at ¶ 12) would necessarily invalidate every floating forum selection clause. By definition, the floating forum selection clause allows the jurisdiction to float – in this case with assignment (*Id.* at ¶ 7). This means that a party agreeing to the clause could never be certain at the time of affixing his signature to the agreement where he ultimately "may be forced to defend or assert his contractual rights."

The Court should revisit the majority's opinion and scrutinize the statement at paragraph twelve upon which its conclusion apparently hinges. That statement directly conflicts with the Court's syllabus law, which itself is sound. Given that syllabus law, it should not matter whether a party upon reading the forum selection clause could ascertain precisely "where he may be forced to defend or assert his contractual rights." The only inquiry should be whether the clause is the product of fraud or overreaching, which the majority found that it was not (*Id.* at ¶ 9), and whether the clause's enforcement would be unreasonable and unjust, which, given the syllabus and paragraph 7 of the majority's opinion, should not be dictated by the fact that the clause permits jurisdiction to float. As discussed below, the majority made no valid finding in its opinion that enforcement of the clause was otherwise unjust and unreasonable.

B. The Majority's Opinion Departs from *Kennecorp* and *Bremen* by Holding a Forum Selection Clause Unenforceable Without Regard to the Impact of its Actual Enforcement.

The majority, at its syllabus, properly cites the standard of *Kennecorp* to require that enforcement of a forum selection clause is “unjust *and* unreasonable”; yet, it holds the clause unenforceable on a mere determination that it is unreasonable – presumably anchored by its determination that NorVergence and/or PCI (or some unknown assignee) knew of and did not disclose a future intent to respectively make and take assignment of the lease. Presuming these statements valid for purposes of this discussion² and to color the clause as “unreasonable” in the abstract, it would not make *enforcement of that clause* “unjust” or “unreasonable”, let alone “unjust and unreasonable” as the test requires.

The test announced in *Kennecorp* specifically employs the conjunctive “and”, and focuses on the clause’s actual enforcement, requiring the party seeking to avoid a forum selection clause to demonstrate that its *enforcement* would be “unreasonable *and* unjust”. The emphasis is on the *enforcement of the clause* and the terms “unreasonable” and “unjust” are not synonymous. If the *Kennecorp* court had intended them to mean the same thing, or one to determine the other, that court would need only have stated one or the other. Instead, it included both, and required a party seeking to avoid a forum selection clause to demonstrate that enforcement of the forum selection clause would, in fact, prove unreasonable and unjust.

A finding of “unreasonableness” would connote that enforcement of the clause exceeds reason. Courts have typically judged the reasonableness of enforcement by looking at the

² In fact, a careful review of the record of each of the twelve cases reveals that there is no evidence upon which the trial courts could have, without so much as an evidentiary hearing, made a determination that NorVergence, PCI, or any other entity knew where or even that a lease would be assigned at the time the lessee’s representative bound the lessee by signing the lease. See Discussion in Section II(E), below.

hardships its enforcement would visit upon a litigant and not by viewing any aspect of contract formation, which the fraud and overreaching elements are designed to cover. See, e.g., *Carnival Cruise Lines, Inc. v. Shute* (1991), 499 U.S. 585 (holding enforceable, in a consumer context, a forum selection clause appearing on the reverse side of a passenger ticket, determining that there was no “fraud or overreaching”, and judging the “unreasonableness” of the clause only with respect to the effect of its actual enforcement). Likewise, a finding that enforcement of the clause is “unjust” would suggest that its enforcement violates principles of justice or fairness. Again, the test as announced in *Kennecorp* focuses on the clause’s *actual enforcement* and not in abstract principles.

The majority specifically acknowledged at the eleventh and twelfth paragraphs of its opinion that enforcing the forum selection clause would not deprive any lessee of its day in court. *Id.* at ¶¶ 11 & 12. In fact, after noting that New Jersey would be the contractual forum state but for the eventual assignment that the majority ultimately faulted Norvergence and/or PCI for not disclosing, the majority specifically determined that it was not “persuaded that litigating a claim in Ohio would be any more burdensome for [lessees] than litigating a claim in New Jersey” and that “for some [lessees], litigating a dispute in Ohio would be less onerous than litigating in New Jersey.” The question, then, is if litigating in Ohio would cause no greater hardship than litigating the case in New Jersey (the forum that lessees should have expected to be required to defend suit absent the undisclosed assignment), how can enforcing the clause to require suit in Ohio rise to the level of being both “unjust” and “unreasonable”? PCI respectfully submits that it cannot.

There is no indication in the majority’s opinion that it seeks to depart from the standard set forth in *Kennecorp*. Its syllabus law, in fact, uses the proper language from *Kennecorp* to

focus on the clause's *actual enforcement* and requires a showing by lessees (and therefore a finding by courts) that enforcement of the clause is both unreasonable *and* unjust before such a clause is held unenforceable. But there are markers in the majority's decision that shows that it lost its way in the analysis.

The caption for paragraph 10 reads "Unreasonable or Unjust", suggesting that the majority applied the test as a disjunctive one, despite its use of the conjunctive in the first paragraph of its syllabus. The problem becomes more evident when the majority acknowledges that enforcement in Ohio creates no greater a burden to lessees than would enforcement in New Jersey, but nevertheless concludes that the clause is "unreasonable" (because of a failure to disclose that it acknowledges did not cause any greater hardship to lessees in its enforcement) and simply states that it "would be unjust to enforce it" -- apparently based solely on the court's finding that the clause (and not necessarily its enforcement) was unreasonable due to a claimed failure to disclose that the majority concedes ultimately did not increase the litigation burden on the lessees.

Another sign that the majority lost its way is that it conceptually split the question of whether a litigant was "deprived its day in court" and the factors required to invalidate a forum selection clause under *Kennecorp*. Specifically, the majority determined that the lessees would not be deprived their day in court if forced to defend suit in Ohio (*Power Engineering* at 11 & 12), but held the agreement unenforceable on the "unreasonable and unjust" prong of the *Kennecorp* test. *Id.* at ¶¶ 14. As is clear from the *Kennecorp* court's decision, however, the factors set out in that case (i.e., fraud or overreaching, and whether enforcement of the clause would be unreasonable and unjust) delimit the grounds upon which a party seeking to avoid a forum selection clause may demonstrate the ultimate required showing -- that enforcement of the

clause would deprive a litigant his day in court: the two have not been employed as alternative grounds to invalidate a forum selection clause as the majority appears to suggest. This is best understood by reading the *Kennecorp* court's following explanation of how the two concepts are tied:

Based on the reasoning set forth in *The Bremen, supra*, and *Burger King, supra*, we believe it is clear that forum selection clauses in the commercial contract context should be upheld so long as enforcement does not deprive litigants of their day in court. Therefore, we hold that absent evidence of fraud or overreaching, a forum selection clause contained in a commercial contract between business entities is valid and enforceable, unless it can be clearly shown that enforcement of the clause would be unreasonable and unjust.

Kennecorp at 176. *M/S Bremen v. Zapta Off-Shore Co.* (1971), 407 U.S. 1, also clearly reveals that the decision of whether to enforce a forum selection clause against arguments that it is unjust and unreasonable is ultimately grounded in the impact of the clause's actual enforcement, and is judged by whether the litigant is deprived his day in court. The United States Supreme Court explained "it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain." 407 U.S. at 18.

By divorcing the *Kennecorp* elements from what they are intended to prove, the majority has unintentionally altered the focus of the test originally set forth in *Kennecorp*. Fraud and overreaching are conditions of contract formation that would permit invalidation of a forum selection clause: the "unjust and unreasonable" test examines the hardships of litigation in the contract forum against the commercial backdrop. "Unreasonableness" should not be viewed in the abstract, but with an eye toward whether a litigant is deprived his day in court. It should not be leveraged to invalidate a forum selection clause (floating or otherwise) based on conduct in

contract formation that does not rise to the level of fraud or overreaching – especially where, as here, the Court has determined that the claimed failure to speak did not result in a greater litigation burden than that which the Appellants already expected.

C. Without Analysis, the Majority Opinion Departs from Established Precedent by Imposing a Duty to Affirmatively Disclose Future Intentions at the Consummation of a Business Transaction Where there is Neither a Fiduciary Relationship between the Parties nor a Prior Statement that the Omission would Render Misleading.

In its opinion, the majority appears to have imposed a duty to speak on a party consummating a business transaction that is contrary to the prior holdings of this Court. It faulted NorVergence (and to some extent PCI) by stating “Norvergence knew that it would assign its interest in appellants’ leases to Preferred Capital or some other entity, but withheld that information from appellants.” *Power Engineering* at ¶ 14. The majority, indeed, appears to have based its refusal to enforce the forum selection clause, at least in part, on this presumed failure to disclose. First, it should be noted that the *Power Engineering* appeal involved twelve separate Defendants and, as discussed in Section II(E) of this Motion, many of the Defendants did not argue this theory in their motions to dismiss, and no Defendant offered evidence that would support the majority’s finding. Appellants were the parties bearing the burden under both the standard for granting motions to dismiss and under *Kennecorp* in challenging the *prima facie* validity of the forum selection clause. The syllabus of *Kalish v. Trans World Airlines* (1977), 50 Ohio St.2d 73, establishes that an appellate court will not consider questions not presented, considered or decided by a lower court. As discussed below, this should present grounds for the Court to reconsider its opinion, or at least to remand all of the cases for the trial courts to sort out this issue. Even overlooking this problem for the moment, however, the majority’s conclusion conflicts with earlier holdings that are nowhere discussed in its opinion.

Prior to the majority opinion in *Power Engineering*, the Court had confined the duty to speak on matters that may affect a business transaction at its consummation to situations where:

- 1) the party fails to exercise reasonable care to disclose a material fact which may justifiably induce another party to act or refrain from acting, *and* the non-disclosing party knows that the failure to disclose such information to the other party will render a prior statement or representation untrue or misleading. *Miles v. McSwegin* (1979), 58 Ohio St. 2d 97, 100, or
- 2) one party has information that the other party is entitled to know because of a fiduciary or other similar relation of trust and confidence between them. *State v. Warner* (1990), 55 Ohio St. 3d 31, 40.³

There are no facts of record upon which the majority could have determined the existence of a fiduciary relationship between NorVergence and any lessee or that any lessee was told or given information that the lease would not be assigned to a finance company with foreign headquarters.

It is unclear whether the majority was mindful of its previous holdings regarding when a party has an affirmative obligation to disclose facts known only to it prior to consummating a business transaction, but its holding in this case appears to undermine the principles under which those important limitations were crafted. The consequences of this ruling are all the more troubling, considering its subject. While the majority recognized the important business purpose for including floating forum selection clauses – undoubtedly to permit the free flow of commercial paper and to help support interstate financial markets, which are aims stressed in the Uniform Commercial Code and codified by most states – application of its ruling will have a chilling effect on these important policies. Specifically, by imposing duties and requiring proof

³ While both *Miles* and *Warner* are fraud cases, they deal generally with the duty to affirmatively disclose information in the context of consummation of a business transaction. The existence of a “duty to disclose” was said to be a predicate to a finding of fraud. Outside of the situations discussed in *Miles* and *Warner*, it is the other party’s duty to ask questions and apprise himself of the facts underlying the transaction and if he fails to do so, he is charged with the consequences.

that will make floating forum selection clauses all but impossible to enforce in Ohio⁴, the Court's decision will serve to inhibit financial transactions and, ultimately, will impact the ability of commercial customers (both inside and outside of Ohio) to access competitive terms for leases and other financial transactions. Moreover, the Court's decision will ultimately serve to disadvantage financial institutions doing business in Ohio, by making it more costly for these institutions to finance out-of-state transactions. Such a holding, while said to be grounded in the "public policy" of the state, imposes discriminatory barriers affecting financial institutions that have chosen to locate their businesses in Ohio. Compare *Aliano Bros.*, *supra* (permitting an Illinois financing institution to enforce the identical clause and noting that federal law also would dictate its enforcement).

The other problem with the majority's opinion is that the question is left open: outside of clear and specific language in the floating forum selection clause itself of the clause's effect, what additional information needs to be given and how must it be communicated? Where, as here, the language of the forum selection clause itself has not been declared ambiguous and the agreement itself contains numerous other clauses alerting a signatory to the potential for assignment, is there any contract language that will ever suffice, or has the Court adopted a requirement that some additional notice will be required outside of the contract? If so, what would this notice be? As the majority seems to have understood, the purpose of the clause was to permit NorVergence to assign the lease to any number of potential financing companies and none were committed to accept assignment at the time that the lessees signed the agreement.

⁴ It should be noted that such clauses are necessarily made with a view toward assignment. Requiring an assignee, who was not a party to the lease negotiation, to offer evidence outside of the unambiguous floating forum selection clause itself that a lessee was "fully apprised of the potential for a truly floating forum" (*Power Engineering* at ¶ 12) is a formidable evidentiary burden to meet.

Power Engineering at ¶ 14. Moreover, even had NorVergence or PCI come back to the lessees and given them some form of notice prior to the assignment itself⁵ (which typically occurred long after the lessee signed lease), the majority noted that, under the clause, PCI could still further assign the agreement and the effect would be another change in the litigation forum. *Id.* at ¶ 12. So what must a lessee including a floating forum selection clause in the lease inform a lessee – and if it is only that they may be required to assert or defend their contractual rights in any state where a future assignee may reside, why doesn't the unambiguous language of the forum selection clause itself provide adequate notice? The question of whether contract language can ever suffice is particularly placed in question here, where, as acknowledged by the majority, in six of the twelve cases the officer who signed the lease on behalf of the business entity also signed as a personal guarantor (*Id.* at ¶ 12),⁶ and right above the signature block for the personal guaranty, was printed in all capital letters “THE SAME STATE LAW AS THE RENTAL WILL GOVERN THIS GUARANTY. YOU AGREE TO JURISDICTION AND VENUE AS STATED IN THE PARAGRAPH TITLED APPLICABLE LAW OF THE RENTAL.”

The majority also acknowledged that there is a valid business reason for including floating forum clauses in a contract (*Id.* at ¶ 9). It is important to the leasing industry and other similar industries that may deal in commercial paper to gain a better understanding of precisely what must be done to ensure that such clauses are enforced. If the Court does not reconsider its opinion on these points, it should at least provide some guidance regarding how lessors are to

⁵ The record shows that PCI gave the lessees notice of the assignment within a day or two of its occurrence and the Appellants produced no evidence that they ever objected.

⁶ Supplement to Appellants' Merit Brief at pp. 48, 59, 75, 85, 89, 104.

meet the new and extraordinary disclosure requirements that the majority's opinion appears to impose under Ohio law.

D. The Majority does not Appear to have Applied the Test Set forth in its Sixteenth Paragraph to the Facts of the Twelve individual cases; Application of that Test would Necessarily Render the Forum Selection Clauses Enforceable.

Another apparently enigmatic aspect of the majority's decision, and one that independently warrants reconsideration, is that it provides a holding at its sixteenth paragraph that, if applied, should have dictated that the forum selection clause at issue be enforced and that the decision of the Ninth District Court of Appeals be affirmed.

The sixteenth paragraph of the majority's opinion expressly states: "We hold that when one party to a contract containing a floating forum selection clause *possesses undisclosed information* of its intent to assign its interest in the contract almost immediately to a company in a foreign jurisdiction, the forum selection clause is unreasonable and against public policy *absent a clear showing that the [lessee] knowingly waived personal jurisdiction and assented to litigate in any forum.*" *Id.* at ¶ 16 (Emphasis added.)

Initially, it should be understood that paragraph sixteen presupposes that intention of a future assignment has not been disclosed to the lessee, so the majority obviously did not intend to say that the analysis ends at the fact of non-disclosure. Under that paragraph, the two questions to be answered affirmatively for the forum selection clause to be enforced are: 1) did lessees knowingly waive personal jurisdiction, and 2) did they assent to litigate in any forum?

Turning to the second question first, the answer is clearly "yes" – the lessees did assent to litigate in any forum. While the majority holds that "even a careful reading of the clause by a signatory would not answer the question of *where he may be forced to defend or assert his contractual rights*" (*Id.* at ¶ 12), that statement apparently addresses only the lessees' knowledge

of the *specific jurisdiction* where the contract would ultimately be enforced – Summit County, Ohio, in this case. This is in contrast to the Court’s holding at paragraph 16 that alternatively requires a showing that the “lessee assented to litigate in *any* forum.”

The *Power Engineering* majority stressed in its opinion “the long-held principle that parties to contracts are presumed to have read and understood them and that a signatory is bound by a contract that he or she willingly signed. [citations omitted].” *Power Engineering* at ¶ 10. The majority also recognized that the lessees are for-profit business entities and that they are therefore “presumed to have some experience in contractual and business matters.” *Id.* at ¶ 8. Here, the lessees, who are presumed to know and understand the contract that they signed, agreed to litigate in any location where a future assignee could be found. It is difficult to understand how the Appellants’ assent to the forum selection clause is anything other than an assent to litigate in “any forum” as required by paragraph sixteen.

It does not appear that the majority addressed this question at all in its opinion and, if it did, it would have had to conclude that PCI met the requirements. In addressing an argument concerning the “clear and specific” nature in which such a clause must be written in order to be enforceable under Illinois law, renowned jurist, Judge Richard Posner, noted:

Aliano argues that to be “clear and specific” the forum selection clause must name the state in which the suit must be brought. The district judge agreed, as have the other first-instance judges who have held the clause invalid. But the argument ignores the fact that naming names is not the only method of dispelling ambiguity. Aliano’s lawyer acknowledged at argument that if the contract had said that suit could be brought in New York or Vermont, or in a federal district court in the First Circuit, or in a federal district court in either the First or Second Circuit, or in any state that George W. Bush carried in the 2004 presidential election, the forum selection clause would be valid because it would be clear and specific. Yet in none of those hypothetical cases would Aliano have known when it signed the contract with NorVergence where suit would be brought against it. The purpose of requiring that a forum selection clause be “clear and specific” is to head off disputes over where the forum selection clause directs that the suit be brought. There was no possibility of such a dispute here, because

the forum selection clause designates the state of suit unequivocally: it is the headquarters state of either NorVergence or, if the contract has been assigned, of the assignee.

If Aliano's name-the-forum position (minus its lawyer's concession, which guts it) were accepted, the assignment of contracts would be impeded because the assignee would have to litigate in a state specified in the contract, and that state might be inconvenient for it. Parties to contracts are not benefited by rules that make assignment burdensome. If assignors have to compensate their assignees for having to litigate in an inconvenient forum, they will have to charge a higher price to their customers, such as Aliano.

Aliano Bros. General Contractors, Inc., (7th Cir. 2006), 437 F.3d 606, 611. The same clause is at issue here, and the answer is the same: assent to the forum selection clause as written, given its clear meaning, and further understanding that parties to a commercial agreement are presumed to have read and understood what they have signed, must equal the Appellants' assent to litigate in any forum.

The majority's second precondition to enforcement of the forum selection clause in its sixteenth paragraph – that the lessees knowingly waived personal jurisdiction – is likewise necessarily met in this case. The forum selection clause unequivocally provides that the Agreement:

shall be governed by, construed and enforced in accordance with the laws of, * *
* if this Lease is assigned by Rentor [NorVergence], the State in which the assignee's [PCI's] principal offices are located, without regard to such State's choice of law considerations and all legal actions relating to this Lease shall be venued exclusively in a state or federal court located within that State, such court to be chosen at * * * Rentor's assignee's sole option.

Courts have determined that this identical clause constitutes a valid consent to personal jurisdiction. In *Preferred Capital, Inc. v. New Tech Engineering, LP* (N.D. Ohio March 8, 2005), 2005 U.S. Dist. LEXIS 32619, unreported (copy attached), the court cited numerous cases finding that the consent to venue in a forum selection clause necessarily implies a consent to

personal jurisdiction and found that a consent to venue would be meaningless if it did not also mean a consent to jurisdiction:

Despite the lack of a specific express waiver of personal jurisdiction, this Court agrees with the line of cases holding that a consent to venue implies a waiver of or consent to personal jurisdiction because “a waiver of objection to venue would be meaningless ... if it did not also contemplate a concomitant waiver of objection to personal jurisdiction.” *Inso Corp. [v. Dekotec Handelsges]*, 999 F.Supp. 165, 167 (D.Mass. 1998),] quoting *Richardson Greenshields Secs. Inc. v. Metz*, 566 F.Supp.131, 133 (SDNY 1983) and citing *Intermountain Systems, Inc. v. Edsall Constr. Co., Inc.*, 575 F.Supp. 1195, 1198 (D.Colo. 1983) and *Mutual Fire Marine and Inland Ins. Co. v. Armour*, Civ.A.No. 86-3562, 1987 WL 9658, *1 (E.D. Pa. April 19, 1987). Hence, this Court finds that Defendants consented to personal jurisdiction by assenting to the Applicable Law paragraph of the contract.

Similar to what was discussed in concluding that lessees assented to litigate in any forum, it would make no sense to infect the analysis of whether a waiver of personal jurisdiction is valid with the forum selection clause’s failure to specifically designate at the outset the precise contract forum for future litigation. The consent to the jurisdiction of the courts of any state where a future assignee may reside necessarily includes a consent to the jurisdiction of Ohio’s courts in addition to other undoubtedly less convenient forums.

Again, it must be stressed that neither the majority’s determination in paragraphs 12 through 14 that NorVergence had superior knowledge that it should have disclosed nor its finding in paragraph 12 that the face of the forum selection clause did not “answer the question of *where* he may be forced to defend or assert his contractual rights” addresses the questions posed in paragraph 16. The questions posed in paragraph sixteen: 1) presuppose that a future intent to assign is never disclosed, 2) ask whether the lessee assented to litigate in *any* jurisdiction (as opposed to a jurisdiction that can be specifically identified at the outset of the agreement), and 3) ask whether the lessee knowingly waived personal jurisdiction. Under the

clear terms of the forum selection clause itself, lessees assented to litigate in any jurisdiction and knowingly waived personal jurisdiction.

The majority determined that the forum selection clause was “clearly and legibly printed” in the agreement (*Id.* at ¶ 9) and made no finding that the clause was ambiguous. Reviewing the exact same clause, Judge Posner commented that while the lessee’s “co-owner did submit an affidavit attesting that NorVergence did not tell him that the contract contained a forum selection clause and was assignable[,] [a]nyone reading the contract would know both things. . . .” *Aliano Bros.* at 611. Taking all these factors into consideration, the question remains: where in the *Power Engineering* majority’s analysis is it explained why PCI failed to meet its standard announced at the opinion’s sixteenth paragraph for holding a forum selection clause enforceable?

E. Because the Majority’s Rationale for Holding the Forum Selection Clauses Unenforceable has Diverged Substantially from the Arguments Presented to the Trial Courts in the Twelve Consolidated Cases, and Announces New Standards and Burdens, the Court Should either Limit its Holding after Review of the Original Records to the Cases where Appellant actually Argued the Issue below, or Remand all of the Cases for Further Arguments on its Findings.

Two principles are at play here. First, Ohio courts have recognized that it is “fundamentally unfair to determine the sufficiency of the parties’ presentments without affording them the opportunity to make such presentments with knowledge of the standard to be applied.” See, e.g., *Robison v. Porter* (2001), 141 Ohio App. 3d 372, 377. As discussed above in Sections C and D, the majority imposed new obligations and announced new standards of proof in its opinion that PCI had no way of knowing, when submitting its opposition. Second, in many of the twelve individual cases that have been consolidated into this appeal, the theory argued by the Appellant in support of its motion to dismiss did not approximate the decisional basis upon which the majority directed its opinion. By way of example, Appellant Pro Temps merely

argued that the Master Program Agreement established an assignment from NorVergence to PCI that occurred before the lease became effective between Pro Temps and NorVergence and that, therefore, the assignment was invalid. It explicitly stated in its Motion to Dismiss that it was *not* moving the court for dismissal upon issues of jurisdiction or venue. It is settled law that an appellate court will not consider questions not presented, considered or decided by a lower court. *Kalish. v. Trans World Airlines* (1977), 50 Ohio St.2d 73, syllabus.

Finally, a review of the record of each of the twelve cases that have been consolidated for purposes of this appeal reveals that there is no evidence upon which the trial courts could have, without so much as an evidentiary hearing, determined that Norvergence or PCI or any other entity knew where or even that a lease would be assigned at the time the lessee's representative signed the lease. The majority does not point to the evidence of record that supports this conclusion – it simply states that it is so without elaboration. *Power Engineering* at ¶ 14. The only “evidence” of record that a few of the lessees mentioned in their motions to dismiss – and not even in making an argument that meets up with the rationale for the majority's holdings⁷ – is that the Master Program Agreement (“MPA”) entered into between PCI and NorVergence prior to the lease transaction contemplated an assignment. The clear terms of the MPA *did not*,

⁷ Houston Chapter Association General Contractors of America, Tiny's Tire Center, Inc. et al., Appellants, Home Furnishings of Clarkston, Inc. and Pro Temps, Inc. are the only parties that raised the MPA in their motions to dismiss. Pro Temps argued that the MPA established an assignment from NorVergence to PCI that occurred before the lease became effective between Pro Temps and NorVergence and that, therefore the assignment was invalid. It explicitly stated that it was *not* moving the court for dismissal upon issues of jurisdiction or venue. The Houston Chapter Association General Contractors of America and Tiny's Tire Center both mentioned in the statement of facts of their motions to dismiss that they were not “advised that NorVergence had already signed a Master Program Agreement with [PCI] regarding the assignment of rights under the Rental Agreement”, however, that is their only reference to the MPA. Home Furnishings of Clarkston also mentioned the MPA, but it was discussed only for purposes of stating that the MPA's forum selection clause (specifically identifying Ohio by name) did not bind Home Furnishings, who was not a party to the MPA.

however, require NorVergence to tender any particular lease to PCI, nor did it require PCI to accept any lease tendered by NorVergence. Section II(A) of the ordering clause of the New Jersey District Court's decision in *FTC v. Norvergence, Inc.* (D.N.J. June 29, 2005), 2005 U.S. Dist. LEXIS 40699 (attached), in fact demonstrates that NorVergence did not assign some portion of the leases it acquired.

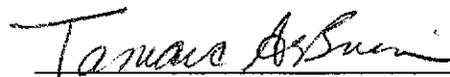
No lessee produced any evidence as to NorVergence's predetermined intent to assign any lease to PCI, specifically, or even to a financing institution, generally. Based on the evidence before the trial courts, and considering that none of them conducted an evidentiary hearing, the judges would have been required to view the allegations in the pleadings and the documentary evidence in a light most favorable to PCI, resolving all reasonable competing inferences in its favor. *Goldstein v. Christiansen* (1994), 70 Ohio St. 3d 232, 236. Under this standard, there is simply no way to justify the majority's finding of NorVergence's intent to assign, which formed the basis for its opinion. Accordingly, this Court should reconsider the majority opinion and, after review of the twelve individual records, limit its holding to cases where the theory upon which it relies was actually raised by an Appellant or should remand and assign that task to the trial courts. Moreover, even if the Court were to find that the issue was raised and evidence submitted to support it in a motion to dismiss filed by an individual Appellant, PCI should, nonetheless, be given the chance to produce evidence to show that it met the new standards and burdens imposed by the majority discussed in Sections C and D in this Motion for Reconsideration, as PCI could not have anticipated under existing law that it would bear the burden of making those showing for the forums selection clause to be held enforceable.

III. CONCLUSION.

For these reasons, the Court should reconsider its opinion and uphold the Ninth District Court of Appeals' ruling or, at the very least, should change its disposition of this case to order a remand that would permit PCI to produce evidence that would meet the newly-developed burdens and standards that it has placed on PCI under these circumstances. Finally, with or without such a reconsideration or remand, it is particularly important that the Court reconcile the apparently contradictory portions of the majority opinion. In excess of 700 cases are pending in Cuyahoga County in addition to the approximately 175 cases pending in Butler County. Those cases have been stayed, awaiting this Court's announcement on this very issue – i.e., whether this very forum selection clause at issue is enforceable. In fact, these cases have been halted at the stage where motions to dismiss have been filed upon arguments that the forum selection clauses are unenforceable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this **Appellee's Motion for Reconsideration of Merit Decision** was sent by ordinary U.S. mail to the following, on this 16th day of February, 2007:

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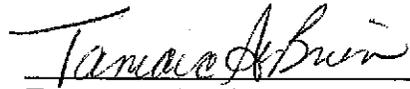
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1 of 1 DOCUMENT



Analysis

As of: Feb 15, 2007

PREFERRED CAPITAL, INC., Plaintiff, v. NEW TECH ENGINEERING, LP, et al., Defendants

CASE NO. 5:04CV2301

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

2005 U.S. Dist. LEXIS 32619

March 8, 2005, Decided

March 8, 2005, Filed

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff assignee sued defendants, a Texas business and a general partner, alleging breach of a rental lease agreement. Defendants removed the action to federal court and moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(2) and (3).

OVERVIEW: The assignee was an Ohio company that assumed a rental agreement entered into by the assignor and defendants for the lease of telecommunications equipment. The agreement contained a forum selection clause which stated that the agreement would be enforce under the laws of the assignor or of any of its assignees. Defendants asserted that the court lacked personal jurisdiction because the forum and venue selection clauses in the rental agreement were legally unenforceable under New Jersey law. The court found that New Jersey law did not apply because the assignee's principle place of business was in Ohio, thus under the terms of the agreement the laws of Ohio applied. Defendants failed to assert fraud with regard to the forum selection clause. Despite the lack of a specific express waiver of personal jurisdiction, a consent to venue implied a waiver of or consent to personal jurisdiction because a waiver of objection to venue would be meaningless if it did not also contemplate a concomitant waiver of objection to personal jurisdiction. *28 U.S.C.S. § 1441* governed venue in this removed action, and venue was proper because the removed action was first filed in Ohio state courts.

OUTCOME: The motion to dismiss was denied.

LexisNexis(R) Headnotes

Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

[HN1] With regard to an action brought in Ohio, the United States Court of Appeals for the Sixth Circuit holds that federal courts sitting in diversity may apply either Ohio law or federal law in determining the enforceability of the forum selection clause, since each treat clauses in a similar manner. Federal courts generally uphold forum selection clauses that have been freely bargained for as prima facie valid and enforceable. Forum selection clauses are presumptively enforceable and the party seeking to invalidate such a clause bears a heavy burden of showing that it is unenforceable. Indeed, courts accord forum selection clauses deference in general unless a party can show fraud, undue influence or overweening bargaining power.

Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

[HN2] Ohio law upholds forum selection clauses in a commercial contract unless a party shows evidence of fraud or overreaching. The Ohio Supreme Court holds that absent evidence of fraud or overreaching, a forum selection clause contained in a commercial contract between business entities is valid and enforceable, unless it

can be clearly shown that enforcement of the clause would be unreasonable and unjust.

Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

[HN3] In determining whether fraud should invalidate a forum selection clause, it is settled that unless there is a showing that the alleged fraud or misrepresentation induced the party opposing the forum selection clause to agree to inclusion of that clause in the contract, a general claim of fraud or misrepresentation as to the entire contract does not affect the validity of the forum selection clause. Thus, a party must allege and show that fraud in the inducement of the forum selection clause itself occurred rather than fraud in the inducement or inception of the whole agreement in order to invalidate the forum selection clause.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Constitutional Limits

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Long-Arm Jurisdiction

[HN4] In determining if in personam jurisdiction exists over a defendant, a court typically considers two factors. First, the court must decide whether state law confers jurisdiction over the parties. Next, the court decides whether jurisdiction comports with due process--that is, whether the court's exercise of jurisdiction abides with "traditional notions of fair play and substantial justice. Thus, applying these factors to the case, the court will determine whether a plaintiff can show that (1) the defendants are amenable to suit under the forum state's long-arm statute; and (2) due process requirements of the Constitution are met. A plaintiff shoulders the burden of showing by a preponderance of evidence that jurisdiction exists. If a court determines a defendant's motion to dismiss due to lack of personal jurisdiction without an evidentiary hearing, the plaintiff must establish a prima facie case of jurisdiction and a court must consider the pleadings and affidavits in a light most favorable to the plaintiff.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions

Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

[HN5] A party may waive its right to challenge personal jurisdiction by consenting to personal jurisdiction in a forum selection clause. Commercial parties to a contract in particular may waive their rights to challenge personal jurisdiction by negotiating and consenting to such a pro-

vision in a forum selection clause. Additionally, a party may impliedly waive or consent to personal jurisdiction.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions

Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

[HN6] An express waiver or consent to venue in a forum selection clause necessarily implies a waiver of or consent to personal jurisdiction.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions

Civil Procedure > Venue

[HN7] A consent to venue implies a waiver of or consent to personal jurisdiction because a waiver of objection to venue would be meaningless if it did not also contemplate a concomitant waiver of objection to personal jurisdiction.

Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions

Civil Procedure > Venue

Contracts Law > Contract Conditions & Provisions > Forum Selection Clauses

[HN8] There is no need to conduct a due process/minimum contacts analysis where a party has impliedly waived objection to venue and personal jurisdiction by virtue of a valid forum selection clause.

Civil Procedure > Removal > Elements > Federal Venue

[HN9] 28 U.S.C.S. § 1441 is the statute that governs the venue of removed actions.

Civil Procedure > Removal > Elements > Federal Venue

[HN10] Venue in removed cases is governed solely by 28 U.S.C.S. § 1441 and there is only one federal venue into which a state court action may be removed, and that is in the statutorily dictated district court for the district and division embracing the place where the state court action was pending.

Civil Procedure > Removal > Elements > Federal Venue

Civil Procedure > Venue > Federal Venue Transfers

[HN11] An action may be removed to only one forum but it may thereafter be transferred to any venue permitted by federal law.

COUNSEL: [*1] For Thomas Massey, Kayce Lee Massey, Rave Enterprises, Inc., doing business as The Rave, Plaintiffs: Brice C. Simon, Olson & Simon, Stowe, VT.

For Peter Deslauriers, Joshua B Tate, Roland Webb, Clifford Patterson, Jason Stoddard, St. Albans Police Department, City of St. Albans, VT, Defendants: Pietro J. Lynn, Lynn, Thomas & Mihalich, P.C., Burlington, VT.

For ENE Evaluator, ENE Evaluator: Glen Luke Yates, Jr, Pierson, Wadhams, Quinn & Yates, Burlington, VT; James W. Spink, Spink & Miller, PLC, Burlington, VT.

JUDGES: GEORGE J. LIMBERT, United States Magistrate Judge.

OPINION BY: GEORGE J. LIMBERT

OPINION:

MEMORANDUM OPINION AND ORDER

The above case comes before the Court on a motion to dismiss filed by Defendants New Tech Engineering, LP, (Defendant New Tech) and Larry Cress (Defendant Cress). Electronic Court Filing (hereinafter "ECF") Dkt. # 10. Defendants New Tech and Cress move to dismiss this case pursuant to *Rule 12(b)(2)* and *12(b)(3)* of the Federal Rules of Civil Procedure. *Id.* Defendants also assert that venue of this case is improper in Ohio and is proper in Texas. *Id.*

For the following reasons, the undersigned DENIES Defendants' [*2] motion to dismiss the instant case pursuant to *Rules 12(b)(2)* and *12(b)(3)* of the Federal Rules of Civil Procedure. ECF Dkt. # 10.

I. PROCEDURAL HISTORY

Plaintiff is a company licensed to do business in Ohio and has its principal office and place of business in Brecksville, Ohio. ECF Dkt. # 1, ECF Dkt. # 10 at 2. Defendant New Tech is a limited partnership in which its general partner is a Texas limited liability company with each having its principal office and place of business in Harris County, Texas. ECF Dkt. # 1 at 1-2; ECF Dkt. # 10 at 2. Defendant Cress is a Texas resident who signed the rental lease agreement in question as a General Partner for Defendant New Tech. ECF Dkt. # 17, Attachment # 1. He also signed a personal guaranty. *Id.*

On October 7, 2003, Defendant New Tech entered into a rental lease agreement with NorVergence, a corporation with its principal office and place of business located in New Jersey. ECF Dkt. # 1 at 2; ECF Dkt. # 10 at 2. The rental lease agreement covered the rental of telecommunications equipment known as the Matrix and also included an equipment rental agreement. *Id.* Defendant New [*3] Tech signed the agreement in which it agreed to pay monthly rental payments in the amount of \$ 1,515.64 for sixty months. ECF Dkt. # 1, Part 2 at 2. Defendant Cress signed a personal guaranty on the rental lease agreement in which he jointly and severally agreed that he would make all payments and other charges under the rental lease agreement when they became due. *Id.* at 3. The rental lease agreement also contained a provision which stated that a default would occur if Defendants failed to "pay any Rental Payment or any other payment when due." ECF Dkt. # 1, Part 2 at 3. A further contract provision stated that:

YOUR DUTY TO MAKE THE RENTAL PAYMENTS IS UNCONDITIONAL DESPITE EQUIPMENT FAILURE, DAMAGE, LOSS OR ANY OTHER PROBLEM. RENTER IS RENTING THE EQUIPMENT "AS IS", WITHOUT ANY WARRANTIES, EXPRESS OR IMPLIED, INCLUDING WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE IN CONNECTION WITH THIS AGREEMENT. If the Equipment does not work as represented by the manufacturer or supplier, or if the manufacturer or supplier or any other person fails to provide service or maintenance, or if the Equipment is unsatisfactory for any reason, you will make any such claim [*4] solely against the manufacturer or supplier or other person and will make no claim against us.

ECF Dkt. # 17, Attachment # 1. The rental lease agreement also contained a provision stating the following in pertinent part:

APPLICABLE LAW: This agreement shall be governed by, construed and enforced in accordance with the laws of the State in which Renter's principal offices are located or, *if this Lease is assigned by Renter, the State in which the assignee's*

principal offices are located, without regard to such State's choice of law considerations and all legal actions relating to this Lease shall be venued exclusively in a state or federal court located within the State, such court to be chosen at Rentor or Rentor's assignee's sole option. You hereby waive right to a trial by jury in any lawsuit in any way relating to this rental.

ECF Dkt. # 17, Attachment # 1 (emphasis added). Defendants also submitted a credit application, an application for the Matrix hardware and a services application on that same date. *Id.*

On or about November 14, 2003, NorVergence assigned its rights under the rental lease agreement to Plaintiff, whose principal office and place [*5] of business is in Ohio. ECF Dkt. # 1, Part 2, Exhibit B. On or about November 17, 2003, NorVergence sent Defendants a notice of this assignment. *Id.* In the letter, NorVergence informed Defendants that its rental lease agreement had been transferred to Plaintiff and all contract terms and conditions remained unchanged, except that the first rental payment and all future payments due under the contract would be made to Plaintiff in Brecksville, Ohio. *Id.*

On October 18, 2004, Plaintiff filed a complaint against Defendants in the Summit County Court of Common Pleas in Ohio alleging that Defendants breached the rental lease agreement. ECF Dkt. # 1, Part 2. On November 19, 2004, Defendants removed Plaintiff's complaint to this Court based upon the existence of diversity jurisdiction. ECF Dkt. # 1.

On January 8, 2005, Defendants filed the instant motion to dismiss Plaintiff's complaint pursuant to *Rules 12(b)(2) and 12(b)(3)* of the Federal Rules of Civil Procedure. ECF Dkt. # 10. On February 7, 2005, Plaintiff filed a response in opposition to Defendants' motion to dismiss. ECF Dkt. # 22. On February 10, 2005, the parties consented to the [*6] jurisdiction of the undersigned. ECF Dkt. # 26.

II. LAW AND ANALYSIS

A. FORUM AND VENUE SELECTION CLAUSES

Defendants first assert that this Court lacks personal jurisdiction over them because the forum and venue selections clauses in the original contract between Defendants and NorVergence are legally unenforceable. ECF Dkt. # 11 at 11-13. Defendants contend that the clauses are legally unenforceable because they violate the laws of New Jersey, the principal place of business of the ren-

tor/assignor NorVergence. *Id.* Defendants also contend that the clauses are unenforceable because they are unconscionable under New Jersey's Uniform Commercial Code. *Id.* at 13-14.

In making such assertions, Defendants presume that New Jersey is the choice of law for determining the validity of the forum and venue selection clauses of the contract that they entered into with NorVergence. ECF Dkt. # 11 at 11. Defendants assert that the law of New Jersey applies because NorVergence's principal place of business is in New Jersey and the contract contained an "Applicable Law" paragraph which stated that the lease was to be construed, governed and enforced under the laws [*7] of the principal place of business of NorVergence, the Rentor, which was New Jersey. ECF Dkt. # 11 at 11.

[HN1] The Sixth Circuit Court of Appeals has held that federal courts sitting in diversity "may apply either Ohio law or federal law in determining the enforceability of the forum selection clause, since each treat clauses in a similar manner." *GE v. G. Siempelkamp GmbH & Co.*, 29 F.3d 1095, 1098, n.3 (6th Cir. 1994). Federal courts generally uphold forum selection clauses that have been freely bargained for as *prima facie* valid and enforceable. *Diebold, Inc. v. Firstcard Financial Servs.*, 104 F.Supp.2d 758, 763 (N.D. Ohio 2000), citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-594, 111 S. Ct. 1522, 113 L. Ed. 2d 622 (1991). Forum selection clauses are presumptively enforceable and the party seeking to invalidate such a clause bears a heavy burden of showing that it is unenforceable. *Carnival Cruise Lines*, 499 U.S. at 585. Indeed, courts accord forum selection clauses deference in general unless a party can show fraud, undue influence or overweening bargaining power. *Id.*, quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-13, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972). [*8]

[HN2] Ohio law also upholds forum selection clauses in a commercial contract unless a party shows evidence of fraud or overreaching. *Kennecorp Mtge. Brokers, Inc. v. County Club Convalescent Hosp., Inc.*, 66 Ohio St.3d 173, 1993 Ohio 203, 610 N.E.2d 987 (1993). The Ohio Supreme Court holds that "absent evidence of fraud or overreaching, a forum selection clause contained in a commercial contract between business entities is valid and enforceable, unless it can be clearly shown that enforcement of the clause would be unreasonable and unjust." 610 N.E.2d at 989.

As support for their conclusion that New Jersey law applies to the forum and venue selection clauses, Defendants merely point to the contractual language of the forum and venue selection clauses which state that the governing law for the agreement shall be that of the prin-

principal place of business of the Rentor, which was NorVergence. But Defendants' assertion is without merit because the same provision from which they quote also contains additional forum and venue selection clauses should NorVergence assign its rights to another party. That assignment clause stated:

APPLICABLE LAW: This agreement shall be governed [*9] by, construed and enforced in accordance with the laws of the State in which Rentor's principal offices are located *or, if this Lease is assigned by Rentor, the State in which the assignee's principal offices are located, without regard to such State's choice of law considerations and all legal actions relating to this Lease shall be venued exclusively in a state or federal court located within the State, such court to be chosen at Rentor or Rentor's assignee's sole option.*

ECF Dkt. # 17, Attachment # 1 (emphasis added). NorVergence mailed and Defendants received a notice of assignment letter in which NorVergence informed them that NorVergence had assigned the parties' rental lease agreement to Plaintiff Preferred Capital and all of the terms and conditions of the original contract remained unchanged, except that payment should be directed to Plaintiff Preferred Capital in Brecksville, Ohio, the principal place of business of Plaintiff, the assignee. ECF Dkt. # 1, Part 2, Exhibit C.

NorVergence assigned its rights in the subject matter of this case to Plaintiff and therefore the mandatory provisions relating to the forum selection and venue clauses at the assignee's principal [*10] place of business should apply absent fraud, undue influence or overweening bargaining power. Plaintiff's principal place of business is in Ohio. Defendants do not contend that undue influence or unequal bargaining power existed. But Defendants do contend that the forum selection and venue clauses are unenforceable because fraud in the inception of the contract occurred as "the transaction which is the subject of this suit was made within the general scope of nationwide consumer and commercial fraudulent conduct of NorVergence, Inc." ECF Dkt. # 11 at 14. Defendants go on to assert that because the transaction in this case was made in violation of both Texas and New Jersey criminal law and consumer fraud acts, "the Equipment Rental Agreement in its entirety is void or alternatively voidable and otherwise without legal force or effect." *Id.*

However, [HN3] in determining whether fraud should invalidate a forum selection clause, it is "settled that unless there is a showing that the alleged fraud or misrepresentation induced the party opposing the forum selection clause to *agree to inclusion of that clause* in the contract, a general claim of fraud or misrepresentation as to the entire [*11] contract does not affect the validity of the forum selection clause." *Moses v. Business Card Exp., Inc.*, 929 F.2d 1131, 1138 (6th Cir. 1991) (emphasis in original). Thus, a party must allege and show that fraud in the inducement of the forum selection clause itself occurred rather than fraud in the inducement or inception of the whole agreement in order to invalidate the forum selection clause. *Id.*

Defendants have not asserted that fraud in the inducement occurred in regard to either of the forum and venue selection clauses in this case and they fail to show that enforcement of the assignment clause would be otherwise unreasonable or unjust. Accordingly, the Court finds that the forum and venue selection clauses are enforceable. Thus, Ohio is the choice of law to guide this case because the assignment clause stated that the forum of Plaintiff, the assignee, governs, which is Ohio.

B. PERSONAL JURISDICTION

Defendants also assert that this Court lacks personal jurisdiction over them under the Ohio long arm statute and/or federal law because the Ohio long arm statute does not reach them as Plaintiff cannot show that Defendants transacted any business in [*12] Ohio. ECF Dkt. # 11 at 14-16. Defendants further contend that they lack minimum contacts with Ohio in order to satisfy the minimum contacts requirements of due process under federal law. *Id.* at 16-17. Plaintiff responds that a due process/minimum contacts analysis suggested by Defendants on this issue is not required because the contract contains valid forum and venue selection clauses. ECF Dkt. # 22 at 7-8.

[HN4] In determining if *in personam* jurisdiction exists over a defendant, the Court typically considers two factors. "First, the Court must decide whether state law confers jurisdiction over the parties. Next, the court decides whether jurisdiction comports with due process--that is, whether the court's exercise of jurisdiction abides with 'traditional notions of fair play and substantial justice.'" *Diebold*, 104 F.Supp.2d at 763. Thus, if applying these factors to the instant case, the Court would determine whether Plaintiff could show that "(1) the defendant[s] [are] amenable to suit under the forum state's long-arm statute; and (2) due process requirements of the Constitution are met." *Walker v. Concohy*, 79 F.Supp.2d 827, 829 (N.D. Ohio, [*13] 1999) *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir. 1996) and *National Can Corp. v. K Beverage Co.* 674 F.2d 1134, 1136

(6th Cir.1982). Plaintiff shoulders the burden of showing by a preponderance of evidence that jurisdiction exists. *Id.* at 761, citing *Dean v. Motel 6 Operating, L.P.*, 134 F.3d 1269, 1272 (6th Cir. 1998), *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1261-62 (6th Cir. 1996). If a court determines a defendant's motion to dismiss due to lack of personal jurisdiction without an evidentiary hearing, the plaintiff must establish a *prima facie* case of jurisdiction and this Court must consider the pleadings and affidavits in a light most favorable to the plaintiff. *Id.* at 1269, citing *CompuServe*, 89 F.3d at 1262.

Plaintiff cites *Kennecorp Mtge. Brokers, Inc. v. County Club Convalescent Hosp., Inc.*, 66 Ohio St.3d 173, 1993 Ohio 203, 610 N.E.2d 987 (1993) and *Information Leasing Corp. v. Jaskot*, 151 Ohio App.3d 546, 2003 Ohio 566, 784 N.E.2d 1192 (Cuyahoga App. 1998) in support of its assertion that a due process/minimum contacts analysis is not necessary when a valid forum selection [*14] clause exists. *Id.* at 8. But the cases cited by Plaintiff are distinguishable from the case *sub judice*. In *Kennecorp* and *Jaskot*, the forum selection clauses specifically stated that the parties consented to the *jurisdiction* of Ohio courts. In the instant case, no such consent to or waiver of jurisdiction exists in the forum selection and venue clauses. Rather, the clauses contain a consent to choice of law and venue only, stating that the contract is governed, construed and enforced in accordance with Plaintiff's principal place of business in Ohio and all legal actions relating to the contract shall be venued exclusively in a state or federal court in Ohio. ECF Dkt. # 17, Attachment # 1.

[HN5] A party may waive its right to challenge personal jurisdiction by consenting to personal jurisdiction in a forum selection clause. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982). Commercial parties to a contract in particular may waive their rights to challenge personal jurisdiction by negotiating and consenting to such a provision in a forum selection clause. See *National Equipment Rental, Ltd., v. Szukhent*, 375 U.S. 311, 84 S. Ct. 411, 11 L. Ed. 2d 354 (1964). [*15] Additionally, a party may impliedly waive or consent to personal jurisdiction. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. at 703.

In this case, a valid forum selection clause exists that contains a consent to choice of law and venue. ECF Dkt. # 17, Attachment # 1. Numerous courts have held that [HN6] an express waiver or consent to venue in a forum selection clause necessarily implies a waiver of or consent to personal jurisdiction. In *Hanson Engineers, Inc. v. UNECO, Inc.*, 64 F.Supp.2d 797 (C.D. Ill. 1999), the court held that a party impliedly waived any objection to venue and personal jurisdiction by virtue of a valid forum selection clause which stated that "i]f the parties

cannot agree upon an amicable settlement, then all disputes and differences are to be submitted to the United States District Court of that District, where plaintiff is located" and contained a choice of law provision that stipulated that Utah law would govern the contract. In *MCNIC Oil & Gas Co. v. IBEX Resources Co., L.L.C.*, 23 F.Supp.2d 729, 732 (E.D.Mich., 1998), the court held that a party impliedly waived personal jurisdiction [*16] by consenting to forum selection clauses in numerous agreements which provided that Michigan law would govern said agreements and that all litigation related to the agreements would be brought in a court located in Michigan. In *Inso Corp. v. Dekotec Handelsges*, 999 F.Supp. 165, 167 (D.Mass.,1998), the court held that a party impliedly waived personal jurisdiction when the forum selection clause did not contain an explicit waiver of personal jurisdiction but did contain a stipulation to a particular forum.

The forum selection and venue clauses in this case do not explicitly address the issue of personal jurisdiction. The forum selection clause simply states that "this agreement shall be governed by, construed and enforced in accordance with the laws of the State in which Rentor's principal offices are located or, if this Lease is assigned by Rentor, the State in which the assignee's principal offices are located, without regard to such State's choice of law considerations and all legal actions relating to this Lease shall be venued exclusively in a state or federal court located within that State..." ECF Dkt. # 17, Attachment # 1. Despite the lack of a specific express [*17] waiver of personal jurisdiction, this Court agrees with the line of cases holding that a [HN7] consent to venue implies a waiver of or consent to personal jurisdiction because "a waiver of objection to venue would be meaningless ... if it did not also contemplate a concomitant waiver of objection to personal jurisdiction." *Inso Corp.*, 999 F. Supp. at 167, quoting *Richardson Green-shields Secs. Inc. v. Metz*, 566 F.Supp. 131, 133 (S.D.N.Y. 1983) and citing *Intermountain Systems, Inc. v. Edsall Constr. Co., Inc.*, 575 F. Supp. 1195, 1198 (D. Colo. 1983) and *Mutual Fire, Marine & Inland Ins. Co. v. Armour*, 1987 U.S. Dist. LEXIS 3012, Civ. A. No. 86-3562, 1987 WL 9658, *1 (E.D. Pa. Apr. 16, 1987). Hence, this Court finds that Defendants consented to personal jurisdiction by assenting to the Applicable Law paragraph of the contract.

Accordingly, the undersigned need not engage in the routine analysis of applying Ohio's long-arm statute or conducting a due process/minimum contacts analysis for determining personal jurisdiction. See *Hanson Engineers, Inc. v. UNECO, Inc.*, 64 F.Supp.2d 797 (C.D. Ill. 1999)([HN8] no need to conduct due process/minimum [*18] contacts analysis where party impliedly waived

objection to venue and personal jurisdiction by virtue of valid forum selection clause).

C. VENUE

Defendants also move this Court pursuant to *Rule 12(b)(3) of the Federal Rules of Civil Procedure* to dismiss this case based upon improper venue in this District. ECF Dkt. # 11 at 17-18. They assert that they are domiciled in and residents of the State of Texas, the Northern District of Ohio lacks substantial connection to Plaintiff's claim, and the State of Texas encompasses a substantial part of this lawsuit. *Id.* Defendants conclude that venue lies exclusively in Texas and, in particular, Harris County, Texas.

Defendants improperly rely on *28 U.S.C. § 1391* as the statute governing venue in this case. ECF Dkt. # 11 at 17. This statute does not apply to the instant case as it applies only to cases brought directly to federal court, not to those removed to federal court as Defendants had removed this action. *See Bacik v. Peek*, 888 *F.Supp.* 1405, 1413 (*N.D. Ohio* 1993), quoting *Polizzi v. Cowles Magazines, Inc.*, 345 *U.S.* 663, 665, 73 *S. Ct.* 900, 97 *L. Ed.* 1331 (1953) [*19] ("But even on the question of venue, § 1391 has no application to this case because it is a removed action."). [HN9] *28 U.S.C. § 1441* is the statute that governs the venue of removed actions and in this case. *See Kerobo v. Southwestern Clean Fuels, Corp.*, 285 *F.3d* 531, 534 (6th *Cir.* 2002). ([HN10] "Venue in removed cases is governed solely by § 1441" and "there is only one federal venue into which a state court action may be removed, and that is in the statutorily dictated "district court ... for the district and division embracing the place where [the state court] action [was] pending." *Section 1441* states that the proper venue of a removed

action is in "the district court of the United States for the district and division embracing the place where such action is pending." *28 U.S.C. § 1441*. The instant complaint was pending before the Summit County Court of Common Pleas in Akron, Ohio and this federal court in the Northern District of Ohio is the district and division embracing the place where the complaint was pending. ECF Dkt. # 1. Accordingly, Plaintiff's action is properly venued in this District.

The Court acknowledges [*20] that [HN11] "an action may be removed to only one forum but it may thereafter be transferred to any venue permitted by federal law," *Heft v. AAI Corp.*, 355 *F. Supp. 2d* 757, 2005 *WL* 159451 (*M.D. Pa.* 2005)(citations omitted). However, Defendants have moved only under *Rule 12(b)(3) of the Federal Rules of Civil Procedure* to dismiss this case based upon improper venue. For the foregoing reasons, the Court finds that venue is proper in this District and thus DENIES Defendants' motion to dismiss pursuant to *Rule 12(b)(3)*.

III. CONCLUSION

For the foregoing reasons, this Court DENIES Defendants' motion to dismiss pursuant to *Rules 12(b)(2)* and *12(b)(3)*. ECF Dkt. # 10.

IT IS SO ORDERED.

SIGNED and ENTERED on this 8th day of March, 2005.

GEORGE J. LIMBERT

United States Magistrate Judge

3 of 3 DOCUMENTS



Analysis

As of: Feb 15, 2007

FEDERAL TRADE COMMISSION, Plaintiff, v. NORVERGENCE, INC., Defendant

CIVIL ACTION NO. 04-5414 (DRD)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2005 U.S. Dist. LEXIS 40699

**July 18, 2005, Heard
June 29, 2005, Decided**

COUNSEL: [*1] FEDERAL TRADE COMMISSION, Seattle, WA, Randall H. Brook (RB9033), Robert J. Schroeder (RS0528), Nadine S. Samter (NS5444).

UNITED STATES ATTORNEY, (Designated local counsel), Newark, NJ, Susan C. Cassell (SC8081).

JUDGES: HON. DICKINSON R. DEBEVOISE, UNITED STATES DISTRICT JUDGE.

OPINION BY: DICKINSON R. DEBEVOISE

OPINION:

(PROPOSED)

DEFAULT JUDGMENT AND ORDER FOR PERMANENT INJUNCTION AND MONETARY RELIEF

Plaintiff, the Federal Trade Commission (hereinafter "Commission" or "FTC"), having filed a Complaint under *Section 13(b)* of the Federal Trade Commission Act ("FTC Act"), *15 U.S.C. § 53(b)*, to obtain permanent injunctive relief, rescission of contracts, restitution, disgorgement, and other equitable relief for defendant NorVergence, Inc.'s ("NorVergence") deceptive acts and practices in violation of *Section 5(a)* of the FTC Act, *15 U.S.C. § 45(a)*, and the Clerk of the Court having entered a default against defendant NorVergence and this Court having considered the pleadings, declarations, exhibits, and memoranda filed by the Commission and now, being advised in the premises, makes the following findings and enters the following Default Judgment [*2] and Order for Permanent Injunction and Monetary Relief:

FINDINGS

1. This Court has jurisdiction of the subject matter of this action and of the parties hereto.
2. The Commission is charged, *inter alia*, with responsibility for administering and enforcing *Section 5* of the FTC Act, *15 U.S.C. § 45*, which prohibits unfair or deceptive acts or practices in or affecting commerce.
3. The activities of defendant NorVergence are in or affecting commerce, as "commerce" is defined in *15 U.S.C. § 44*.
4. This action was instituted by the Commission under *Sections 5* and *13(b)* of the FTC Act, *15 U.S.C. §§ 45* and *53(b)*. The Commission seeks permanent injunctive relief, monetary relief, rescission of contracts, and other equitable relief for the alleged deceptive acts or practices by defendant NorVergence in connection with the sale and financing of telecommunications services and related products. Pursuant to *Section 13(b)* of the FTC Act, the Commission has the authority to seek the relief it has requested.
5. The Complaint states a claim upon which relief may be granted against defendant NorVergence [*3] under *Sections 5* and *13(b)* of the FTC Act, *15 U.S.C. §§ 45* and *53(b)*.
6. NorVergence is a debtor in a liquidation case under Chapter 7 of the Bankruptcy Code pending in this district (Docket 04-32079-RG). Charles Forman is the duly ap-

pointed Chapter 7 trustee for NorVergence. The Commission's action against NorVergence, including the enforcement of a judgment obtained in this action other than a money judgment against NorVergence, is not stayed by 11 U.S.C. § 362(a)(1), (2), (3), or (6) because it is an exercise of the Commission's police or regulatory power as a governmental unit pursuant to 11 U.S.C. § 362(b)(4) and, thus, falls within an exemption from the automatic stay.

7. NorVergence's principal business since at least 2002, and continuing until shortly before its bankruptcy filing in July 2004, has been reselling telecommunications services, purchased from common carriers or others, principally to consumers who were small businesses, non-profit organizations, churches, and municipalities. NorVergence marketed its services as integrated, long-term packages, including landline and cellular telephone service [*4] and Internet access.

8. NorVergence promised to provide to consumers heavily discounted telecommunications services for a long term, typically five years, in exchange for consumers' payments. Consumers signed a set of applications and agreements at the outset with a total price equal to the promised monthly payments over five years. Most of the total payments were allocated to a rental agreement for a "Matrix" or "Matrix Soho" (or similar product), which were standard routers or firewalls that cost between \$ 200 and \$ 1,550. The total cost to the customer was \$ 7,000 to \$ 340,000, with an average cost of \$ 29,291. The price of the rental agreement had nothing to do with the cost of the Matrix, which itself was an incidental part of the promised services. The rental agreements on their face, however, purported to cover only the Matrix box.

9. The telecommunication services NorVergence promised to consumers have not been provided at least since August 2004, and, in some cases, have never been provided. At the same time, various finance companies who took assignments from NorVergence of the majority of the rental agreements have insisted that consumers continue to pay on those [*5] agreements.

10. Defendant NorVergence, through its Chapter 7 bankruptcy trustee, was served with the Complaint and Summons as required by *Rule 4 of the Federal Rules of Civil Procedure*.

11. Defendant NorVergence has failed to file an answer with the Clerk of the Court within the time set forth by *Rule 12(a) of the Federal Rules of Civil Procedure* or otherwise defend this action.

12. The Clerk of this Court, pursuant to *Rule 55(a) of the Federal Rules of Civil Procedure*, entered a Certificate of Default against defendant NorVergence on May 20, 2005. The FTC is therefore entitled to a default judgment pursuant to *Rule 55(b) of the Federal Rules of Civil Procedure*.

13. The Court now finds that, in connection with the sale and financing of telecommunications services and related products, defendant NorVergence violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), by falsely representing, directly or by implication, that:

(A) consumers' payments on NorVergence's rental agreement [*6] and associated service agreements would result in consumers receiving promised discounted telecommunications services for a long term;

(B) NorVergence would treat the applications, forms, and rental agreement consumers signed as a unified agreement under which NorVergence would provide telecommunications services in exchange for consumers' payments; and

(C) the equipment listed in NorVergence's rental agreement would create the promised substantial savings in consumers' total cost of telecommunications services.

14. The Court further finds that, in connection with the sale and financing of telecommunications services and related products, defendant NorVergence violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), by (1) representing, directly or by implication, that NorVergence would provide substantially discounted telecommunications services to consumers for a long term; and (2) failing to disclose the following facts that would have been material to consumers when they contracted with NorVergence:

(A) that NorVergence did not have a long-term commitment from any service provider for the services it was promising to provide to consumers; [*7]

(B) that the equipment covered by the rental agreement would be of little or no value to the consumer if NorVergence

failed to provide the promised telecommunications services.

15. The Court further finds that, in connection with the sale and financing of telecommunications services and related products, defendant NorVergence's practice of including in its rental agreements provisions authorizing it or its assignees to file lawsuits in specified or unspecified venues other than consumers' locations or the locations where consumers executed the contracts with NorVergence was likely to cause substantial injury to consumers that could not have been reasonably avoided and that was not outweighed by any countervailing benefits to consumers or to competition. The Court therefore finds that this practice was unfair in violation of Section 5(a) of the FTC Act, *15 U.S.C. § 45(a)*.

16. The Court further finds that NorVergence provided others with the means and instrumentalities for the commission of deceptive and unfair acts or practices in violation of Section 5(a) of the FTC Act, *15 U.S.C. § 45(a)*, by furnishing third-party finance [*8] companies with rental agreements from consumers that allowed the finance companies to:

(A) Misrepresent that consumers owe money on the rental agreements regardless of whether NorVergence provided the promised telecommunications services; and

(B) File collection suits against consumers in distant forums.

17. By its unfair and deceptive acts or practices in violation of Section 5(a) of the FTC Act, *15 U.S.C. § 45(a)*, defendant NorVergence caused injury to consumers in the amount of at least \$ 172,997,758. This is a good faith, conservative estimate by the FTC of consumer injury using the limited documentation and information currently available.

18. Plaintiff is entitled to permanent injunctive and equitable relief, including consumer restitution, disgorgement, and rescission of contracts, from defendant NorVergence in the form and amounts set forth below.

19. Entry of this Order is in the public interest.

DEFINITIONS

For purposes of this Order, the following definitions shall apply:

1. "Consumer" means any natural person, business, non-profit organization, government agency, or other entity.

2. "Consumer financing agreement" [*9] means any financing arrangement, whether styled as a rental agreement, contract, lease, or otherwise, made with a consumer in conjunction with offering or sale of telecommunications services or equipment.

3. "Bankruptcy Case" means the bankruptcy case of NorVergence filed and pending in the United States Bankruptcy Court for the District of New Jersey, Case No. 04-32079-RG.

ORDER

I. CESSATION OF TELECOMMUNICATIONS BUSINESS ACTIVITIES

IT IS ORDERED that NorVergence shall not engage in any telecommunications-related business.

II. CANCELLATION OF NORVERGENCE FINANCING OF MATRIX BOXES AND SIMILAR AGREEMENTS

IT IS FURTHER ORDERED that:

A. Any consumer financing agreement owned or held in whole or part by NorVergence is void and unenforceable by any person or entity.

B. Any NorVergence consumer financing agreement transferred or assigned to, or taken by, any third party after those contracts were rejected in the Bankruptcy Case pursuant to *11 U.S.C. § 365* is void and unenforceable by any person or entity.

C. To the extent that NorVergence has a residual, contingent, or similar right to any consumer financing agreements not currently owned [*10] or held by NorVergence, those agreements shall be void and unenforceable by any person or entity as of the time that NorVergence's residual, contingent, or similar right matures or otherwise becomes effective.

D. NorVergence shall notify all consumers affected by Paragraphs II.A-B above within 90 days after entry of this Order that their consumer financing agreements have been deemed unenforceable and void or, alternatively, provide access to the FTC to information and documents necessary for the FTC to provide this notification.

E. The FTC shall be authorized to give any additional notice to consumers potentially affected by this Section and to holders or assignees of consumer financing agreements that may be affected by Paragraph II.C above.

III. LIQUIDATION OF MONETARY CLAIM

IT IS FURTHER ORDERED that Judgment in the amount of \$ 181,721,914 is entered against NorVergence as restitution for consumer injury. This amount takes into account a good faith, conservative estimate by the FTC of the value of the cancellation of indebtedness pursuant to Section II of this Order and of the services that some consumers may have received for a short period.

IV. COMPLIANCE REPORT [*11]

IT IS FURTHER ORDERED that 90 days after the date of entry of this Order, NorVergence shall provide a written report to the FTC, setting forth the manner in which it has complied with Section II of this Order, including copies of the form of notice sent to any consumers and a list of consumers to whom the notices were sent. For the purposes of this Order, NorVergence shall, unless otherwise directed by the Commission's authorized representatives, mail all written notifications or other communications to the Commission to:

Director, Northwest Region
Federal Trade Commission
915 2nd Avenue, Room 2896
Seattle, WA 98174

V. RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for all purposes, including construction, modification, and enforcement of this Order.

SO ORDERED, this 29th day of June, 2005.

HON. DICKINSON R. DEBEVOISE,
UNITED STATES DISTRICT JUDGE

Presented by PLAINTIFF FTC:

Dated: June 8, 2005

/s/ Randall H. Brook
RANDALL H. BROOK
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