

IN THE SUPREME COURT OF OHIO

PREFERRD CAPITAL, INC. )  
 )  
Appellee )  
 )  
vs. )  
 )  
POWER ENGINEERING, INC., et al. )  
 )  
Appellants )

CASE NO. 2005-2134

APPEAL FROM THE NINTH DISTRICT  
COURT OF APPEALS

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**MEMORANDUM OPPOSING MOTION FOR RECONSIDERATION**

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Mark S. Shearer, Esquire (0066739)  
8193 Avery Road, #201  
Broadview Heights, Ohio 44147  
Telephone: 440-717-1580  
Facsimile: 440-717-1583  
E-mail: [markshearer@ohiocoxmail.com](mailto:markshearer@ohiocoxmail.com)  
**ATTORNEY FOR APPELLANTS**  
*PAC Heating, Inc., et al.*  
*Hambergs Dr. BM Tru-Site Optical Co., et al.*  
*Donn C. Lamon dba Lamon Associates, et al.*

Matthew C. O'Connell, Esquire (0029043)  
Victoria Barto, Esquire (0071554)  
Sutter, O'Connell & Farchione  
1301 East 9<sup>th</sup> Street, Suite 3600  
Cleveland, Ohio 44114  
Telephone: 216-928-2200  
Facsimile: 216-928-4400  
E-mail: [moconnell@sutter-law.com](mailto:moconnell@sutter-law.com)  
[vbarto@sutter-law.com](mailto:vbarto@sutter-law.com)  
**ATTORNEY FOR APPELLANTS**  
*Houston Chapter Association General Contractors of America, Inc.*  
*Tiny's Tire Center, Inc., et al.*  
*Richard Oscar & Associates, et al.*

Tamara O'Brien, Esquire  
Jason Hickman, Esquire  
Roderick Linton  
1500 One Cascade Plaza  
Akron, Ohio 44308  
**ATTORNEYS FOR APPELLEES**  
*Preferred Capital, Inc.*

Julius P. Amourgis, Esquire (0069140)  
The First Akron Building  
611 West Market Street, Suite 5  
Akron, Ohio 44303-1406  
Telephone: 330-535-6650  
Facsimile: 330-535-2205  
E-mail: [Julius@amourgisreilly.com](mailto:Julius@amourgisreilly.com)  
**ATTORNEY FOR APPELLANT**  
*Pro Temps, Inc.*

Gary Brown, Esquire  
Florida Bar ID 0054585, *Pro Hac Vice*  
8201 Peters Road, Suite 4000  
Fort Lauderdale, Florida 33028  
Telephone: 954-370-9970  
Facsimile: 954-382-1988  
E-mail: [gbrown@kelleykronenberg.com](mailto:gbrown@kelleykronenberg.com)  
**ATTORNEY FOR APPELLANTS**  
*Doug Johnson & Associates, Inc., et al.*

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MARCIA J. MENGEL, CLERK  
SUPREME COURT OF OHIO

Hamilton DeSaussure, Jr., Esquire  
(0023516)  
Oldham & Dowling  
195 South Main Street, Suite 300  
Akron, Ohio 44308  
Telephone: 330-762-7377  
Facsimile: 330-762-7390  
E-mail: [hd@oldham-dowling.com](mailto:hd@oldham-dowling.com)  
**ATTORNEY FOR APPELLANT**  
*Rick Hore*  
*Location Real Estate, et al.*

Gregory Glick, Esquire (0000769)  
Gregory Glick, LLC  
147 Bell Street, Suite 302  
Chagrin Falls, Ohio 44022  
Telephone: 216-292-8108  
Facsimile: 440-893-0316  
E-mail: [glickllc@sbcglobal.net](mailto:glickllc@sbcglobal.net)  
**ATTORNEY FOR APPELLANTS**  
*Power Engineering Group, Inc., et al.*  
*Plyley Enterprises, Inc.*  
*Custom Data Solutions, Inc.*

Bradley A. Wright, Esquire (0047090)  
Jerome G. Wyss, Esquire (0074337)  
Roetzel & Andress  
222 South Main Street  
Akron, Ohio 44308  
Telephone: 330-376-2700  
Facsimile: 330-376-4577  
E-mail: [bwright@ralaw.com](mailto:bwright@ralaw.com)  
[jwyss@ralaw.com](mailto:jwyss@ralaw.com)  
**ATTORNEYS FOR APPELLANT**  
*Home Furnishings of Clarkston, Inc.*

Now come the Appellants and respectfully oppose the Appellee's Motion for Reconsideration of Merit Decision. The Appellants assert that there is no reason for reconsideration and respectfully request that the Honorable Court deny the Appellee's Motion for Reconsideration of Merit Decision.

PCI's Motion for Reconsideration should be denied as the Court's Decision is grounded in law and fact and is well reasoned. The Appellee (PCI) has not demonstrated that the Court's opinion is "self-contradictory." Any ambiguities charged by PCI stem from PCI's misreading of the Decision.

The Court properly and clearly applied the test established in *Kennecorp Mtge. Brokers, Inc. v. Country Club Convalescent Hosp., Inc.* (1993) 66 Ohio St.3d 173 and *M/S Bremen v. Zapata Off-Shore Co.* (1971) 407 U.S. 1 to the facts presented and came to a proper result. See 112 Ohio St.3d 429 at ¶7. PCI simply cannot accept the reality that the test created by *Kennecorp* and *Bremen* does not always mandate the enforcement of every forum selection clause. PCI's Motion is based on its disbelief that the facts presented mandate that the clause be deemed unenforceable.

*Kennecorp* allows the invalidation of a forum selection clause if it can be shown that the clause is unreasonable and unjust. The Court properly determined that the forum selection clause is unreasonable and unjust as it is against public policy. See ¶¶14 and 15. The Court, in applying the *Kennecorp* test, specifically found that the clause at issue is unreasonable and unjust as the Master Program Agreement gave PCI and Norvergence superior information regarding the forum. Further, the Court found that Norvergence knew that it would likely assign its interest to PCI or some other entity. See ¶13. The Court simply applied the facts to the law and came to a well reasoned result.

PCI would have the Court issue a decision that would render all forum selection clauses enforceable under any circumstance. PCI's desired interpretation of *Kennecorp* and *Bremen* pushes too far. PCI would rather the Court interpret *Kennecorp* and *Bremen* to set such a high standard for the invalidation of a forum selection clause that invalidation would be impossible. PCI would have the *Kennecorp* standard act as a meaningless exercise in futility.

Page 10 of PCI's Motion reveals PCI's real intent behind its Motion. PCI feels that its business interests are so important that it should be exempted from the *Kennecorp* and *Bremen* standards. PCI would rather not have to disclose information regarding possible forums so that it can unduly burden its customers with surprise unjust and unreasonable forums. The Court's decision is proper and will prevent the kind of unconscionable activity that occurred in these cases from happening again.

PCI argues that the 12 consolidated cases should be reviewed on their individual merits. PCI objects to the consolidation for the first time in its Motion for Reconsideration. If PCI thought the cases were factually distinct, PCI should have objected to the consolidation in the Court of Appeals. It is too late for PCI to object to the consolidation now.

For these reasons, and the reasons stated in the Appellant's Briefs previously filed with this Court and the arguments made at oral argument, the Court's decision should stand and the Appellee's Motion for Reconsideration should be denied.

Respectfully submitted,



MARK S. SHEARER, #0066739  
8193 Avery Road, #201  
Broadview Heights, Ohio 44147  
Telephone: 440-717-1580  
Facsimile: 440-717-1583  
e-mail: [markshearer@ohiocoxmail.com](mailto:markshearer@ohiocoxmail.com)

SERVICE

A copy of this Opposition to Appellee's Motion for Reconsideration of Merit Decision  
has been sent by regular U.S. Mail on February 24, 2007 to:

Tamara A. O'Brien, Esquire  
Roderick Linton, LLP  
One Cascade Plaza, 15<sup>th</sup> Floor  
Akron OH 44308-1108

  
MARK S. SHEARER