

COURT OF APPEALS  
DIANA ZALESKI

2005 APR 27 PM 3: 33

**IN THE COURT OF APPEALS  
NINTH APPELLATE DISTRICT  
SUMMIT COUNTY, OHIO**

SUMMIT COUNTY  
CLERK OF COURTS

PREFERRED CAPITAL, INC, )  
)  
Appellant, )  
)  
v. )  
)  
POWER ENGINEERING GROUP, )  
INC., et al., )  
)  
Appellees. )

C.A. Nos. 22475, 22476, 22477,  
22478, 22485, 22486, 22487,  
22488, 22489, 22497, 22499,  
22506, 22513

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**MOTION OF MASSACHUSETTS ASSISTANT ATTORNEY GENERAL  
KARLEN J. REED FOR LEAVE TO FILE ATTORNEYS GENERAL AMICI BRIEF**

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Karlen J. Reed, Assistant Attorney General, Massachusetts Office of the Attorney General, One Ashburton Place, Boston, MA 02108, moves this Honorable Court for leave to file the attached Attorneys General Amici Brief in the above-captioned consolidated appeal pursuant to Appellate Rule 17 and Local Appellate Rule 14. In support of this motion, AAG Karlen J. Reed states as follows:

1. The Amici Attorneys General, identified in the attached amici brief, are acting under their respective consumer protection statutes to protect customers of Preferred Capital, NorVergence and/or other financing companies against unfair trade and deceptive practices committed by these companies in their financing and collection activities. The Amici Attorneys General are concerned about the impact of the Court's decision on their residents, especially in light of the recent appointment of a Receiver for Preferred Capital (see attached Exhibit "A" - Order for Appointment of Receiver, dated April 14, 2005, *Champaign National Bank v.*

*Preferred Capital*, Summit County, Ohio, Court of Common Pleas, case no. CV 2005-03-1651).

2. A number of state Attorneys General have issued subpoenas or requests for information, sent cease and desist requests, filed bankruptcy proofs of claim for damages, and/or filed suit against Preferred Capital, NorVergence, and/or other financing companies regarding identical or nearly-identical contracts as those involved in this appeal.<sup>1</sup>

3. The Amici Attorneys General file this brief to highlight the impact that this Court will have in this consolidated appeal, as over 500 Preferred Capital cases are pending in Cuyahoga and Summit Counties involving the NorVergence contracts.<sup>2</sup> Furthermore, this Court's decision may be cited as legal precedent on the issue of the validity of the NorVergence floating forum selection clause as the Amici pursue their own NorVergence state investigations and litigation against Preferred Capital and other financing companies.

4. Of the 11,000 small businesses nationwide who were NorVergence customers, many now find themselves subject to collection actions in foreign jurisdictions, and faced with execution actions upon foreign judgments, as a result of enforcement of the NorVergence floating forum selection clause which is at issue in this appeal.

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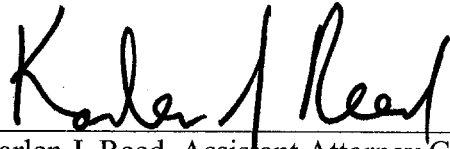
<sup>1</sup> Those states include, but are not limited to, California, Colorado, Connecticut, Florida, Illinois, Massachusetts, Michigan, Missouri, New Jersey, New York, North Carolina, Pennsylvania, and Texas.

<sup>2</sup> The customers in these cases reside in the Amici States and elsewhere throughout the nation.

For these reasons, and pursuant to Appellate Rule 17 and Local Appellate Rule 14, AAG Karlen J. Reed moves this Court for leave to file the attached Attorneys General Amici Brief.

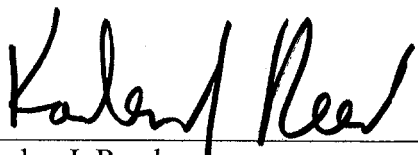
Respectfully submitted,

THOMAS F. REILLY  
MASSACHUSETTS ATTORNEY GENERAL

By:   
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**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing Motion for Leave to File Attorneys General Amici Brief was sent by regular U.S. Mail, postage prepaid, to the following parties this 25th day of April, 2005.

  
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Amici Curiae States

COPY

Exhibit A

DIANA ZALESKI  
IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO  
2005 APR 14 AM 11:30

CHAMPAIGN NATIONAL BANK, COUNTY )  
CLERK OF COURTS )  
Plaintiff, )  
vs. )  
PREFERRED CAPITAL, INC., )  
Defendant. )

CASE NO CV 2005-03-1651  
JUDGE BOND

ORDER FOR APPOINTMENT  
OF RECEIVER

This matter is before the Court upon the Motion of Plaintiff for the appointment of a receiver. The Court has met in conference with counsel for the parties as well as representatives of certain other secured creditors of defendant Preferred Capital, Inc. ("PCI"). The Court is further informed that, in addition to the Plaintiff, various other banks and financial institutions have judgments against, and/or are secured creditors of, PCI (each individually, a "Secured Creditor"; and, collectively, including the Plaintiff, the "Secured Creditors"). The Plaintiff and PCI have stipulated to the appointment of a receiver, both parties being satisfied that a receiver is the best and most appropriate way to effectuate the orderly administration and disposition of its assets in accordance with applicable law.

It is therefore ORDERED that:

1. **Appointment.** Kathryn A. Belfance (the "Receiver") is hereby appointed the Receiver for all assets of PCI, including, but not limited to, all real and personal property, general intangibles, and other assets of PCI of whatever kind or nature (collectively, the "Assets"), and the Receiver shall have all authority and power of a Receiver under Ohio law and as ordered by this Court.

2. **Bond and Oath.** Before entering upon the duties of such trust, the Receiver shall obtain and file a bond payable to the Clerk of this Court in the sum of One Hundred Dollars (\$100.00) with a corporate surety to be approved by this Court, conditioned upon the faithful discharge of her duties as Receiver, and the Receiver thereupon shall take an oath faithfully to perform her duties as Receiver. The cost of such bond should be reimbursable to the Receiver from any Assets collected by the Receiver.

3. **Powers and Duties.** The Receiver shall have exclusive control over all Assets with the power and authority to preserve, protect and liquidate them for the benefit of whomever the Court may determine to be entitled to such Assets or their proceeds (after giving proper notice to all Secured Creditors and other affected persons, whether or not they are parties to this action, and after opportunity for a hearing). Except as otherwise limited by this Order or rules of Court, the Receiver may do all things that can be done by PCI. The Receiver is vested with all of the powers, rights and duties of Receivers appointed under Ohio law, including, without limitation, the following rights, powers and duties:

3.1 **Possession of Books and Records.** The Receiver shall take immediate possession, control, management and charge of any and all of PCI's books and records, including, but not limited to, PCI's master lease files, the "Infolease" data tape (plus the predecessor system tape) and accounting books and records of whatever nature and wherever located, including all information regarding the assets, liabilities, equity, income and expenses of PCI. The Receiver shall take immediate possession, control, management and charge of all of PCI's financial statements, ledgers and journals, balance

sheets, trial balances, statements of cash flows, income statements, statements of retaining earnings, accounting journals and books of original entry, including, but not limited to: (1) accounts receivable agings and any other documentation which indicate the amounts owing from customers or lessees on accounts receivable and from whom such amounts are or were owing and when any amounts were collected and deposited; (2) fixed asset ledgers, schedules or records documentation and/or appraisals of PCI's equipment, motor vehicles, accessories, furniture inventory, furnishings, and supplies; (3) inventory listings or other detail; (4) all lists, schedules or records pertaining to PCI's stocks, bonds, shares or interests in any mutual fund, proprietorship, general or limited partnership, or corporation, all notes or other instruments owing to PCI, and information regarding any other intangible of PCI; (5) all information and documentation which relates or pertains to any checking, saving, banking and money management accounts of any kind or nature of PCI or into which any proceeds of the collection or sale of any asset of PCI have been deposited; (6) all accounts payable documentation and information and all correspondence or written documents regarding negotiations with current accounts or proposed accounts; (7) all information, of whatever type of nature, regarding the payroll and benefits of the employees of PCI, including wage or salary information, medical insurance information, child support payments or other employee deductions withheld or to be withheld, and all information regarding trust fund or withholding taxes, whether federal, state or local, and any information regarding any and all of the employer matching obligations or the employer payroll tax obligations; (8) all information and documentation regarding the federal, state and local tax liabilities of PCI, including any and all federal, state and local tax returns filed or unfiled, and any documents generated



during the preparation and filing of tax returns; (9) all contracts and leases to which PCI is a party; (10) all information and documentation of any other financial transaction or interest in and to any Assets of PCI which may be necessary or pertinent to the Receiver's liquidation of PCI's Assets; and (11) any documentation that relates or pertains to PCI and is or was kept in the ordinary course of its business in connection with the record-keeping or accounting. The documents and information described in this subparagraph shall hereinafter be referred to as the "Books and Records."

3.2 **Possession of Assets.** The Receiver shall have the right to take and keep possession of all Assets, during the pendency of the above-captioned action, subject to further Order of the Court. The Receiver is further authorized to collect any and all rent, issues, profits, income, revenues, accounts, and lease payments now due and hereafter becoming due for, or on account of, PCI; subject however, to any claims, liens or security interests therein of any Secured Creditors. The Receiver may open PCI's mail, negotiate and endorse checks and instruments, and cause the proceeds of such checks and instruments to be deposited into accounts maintained by the Receiver for the benefit of the Secured Creditors asserting liens or security interests in such proceeds. Notwithstanding the foregoing, the Receiver shall have no obligation to collect or preserve Assets which have been surrendered by PCI to a Secured Creditor prior to the Receiver's appointment, provided that the Receiver has reviewed the circumstances of that surrender and is satisfied that the Secured Creditor to which such Assets (or their proceeds) were surrendered was entitled to them and that such Assets or proceeds are not claimed by another Secured Creditor holding a prior and superior lien or security interest therein. The Receiver's determinations in regard to any such surrender(s) shall be subject

to review and approval of the Court (after giving proper notice to all affected Secured Creditors, whether or not they are parties to this action, and after opportunity for a hearing).

**3.3 Collection of Accounts.** The Receiver shall immediately begin collection of PCI's accounts receivable, lease payments and any other amounts payable to PCI. If the Receiver deems it appropriate, the Receiver may commence legal action to pursue collection of any account receivable or lease payments owed to PCI without prior Court approval.

**3.4 Asset Sales.** Notwithstanding Local Rule 9.02, the Receiver may sell, liquidate or otherwise dispose of the Assets owned by PCI, for the fair value thereof, only after first obtaining the express consent and authorization of the Secured Creditors who have or may have liens or security interests therein and further Order of the Court. The Receiver shall promptly provide to the Secured Creditors and to other persons entitled to notice under this Order written summaries of all communications by or to the Receiver regarding potential sales of Assets for more than \$1,000. Each summary shall include a description of the subject Assets, the price offered and the proposed time of closing. Any Order approving a sale of any Assets shall provide that the proceeds of such sale shall be impressed with any and all liens or security interests encumbering such Assets to the same extent, validity and priority as such liens or security interests attached to the Assets sold. Without further Order of the Court, all such proceeds shall be segregated in a federally insured bank account and shall not be used without the express consent and authorization of the Secured Creditors who have or may have liens or security interests therein and further Order of the Court. Subject to further Order of the

Court, the Receiver's rights, powers and authority, including its rights and custody, control and sale of Assets, shall not impair, diminish, or otherwise prejudice valid and enforceable liens, security interests or claims in or to PCI's Assets (or any of them).

**3.5 Application of Revenues and Proceeds of Receivership.** The Receiver shall pay all collections, income, revenues, profits and proceeds derived from the Assets to the holders of valid and enforceable secured obligations, liens, and claims, encumbering such Assets and proceeds thereof, including the Secured Creditors, in order of the priority and amount of such security interests, liens and claims and then, if and to extent any excess remains, on a pro rata basis to pay the unsecured obligations of PCI. Except as provided in the preceding sentence, the Receiver may not pay any pre-receivership unsecured debts to any creditor without first obtaining a further Order of this Court (after giving notice to all Secured Creditors, whether or not they are parties to this action, and after opportunity for a hearing). Any such payment of pre-receivership unsecured debts shall be made only if the Receiver, in its reasonable business judgment, determines that such payment is necessary to preserve the Assets or their value and the Court approves. The Receiver may apply to the Court for further orders relating to claims procedures, distribution of Assets, and related issues.

**3.6 Contracts and Employees.** The Receiver may employ such persons as the Receiver reasonably deems appropriate to assist in the liquidation of the Assets. The Receiver shall be free at all times to discharge any such person from the Receiver's employ, with or without cause. The Receiver shall charge for no more than 40 hours per week of any such person's time, unless notice is provided to all Secured Creditors in advance.

**3.7 No Obligation to Complete Tax Returns.** Notwithstanding any other provision hereof, the Receiver shall be under no obligation to complete or file tax returns on behalf of PCI for income or other taxes arising before the date of this Order. While acting as receiver, the Receiver shall comply with all applicable laws and regulations relating to tax reporting requirements. The Receiver shall furnish officers of PCI with such access to Books and Records within the Receiver's custody or control as reasonably may be necessary in order for PCI to complete and file tax returns on its own behalf.

**3.8 Prosecution of Collection Actions.** The Receiver is authorized to continue to prosecute, and to institute, prosecute, or intervene in, any lawsuit or proceeding against any other person(s) or entity(ies) to collect preserve and/or maximize the value of the Assets or the receivership estate or to obtain possession of any of the Assets unlawfully in the possession of third parties. The Receiver may not abandon, settle, compromise, dismiss, assign or otherwise dispose of any claims that now or hereafter are the subject of lawsuits or proceedings in the name of PCI (or the Receiver) unless: (a) the Receiver first gives written notice of intended action (a "Notice of Intended Action") to all Secured Creditors claiming any interest in such affected claims, lawsuits or proceedings, which Notice of Intended Action sets forth in reasonable detail the action(s) the Receiver proposes with respect to such claim(s), lawsuit(s), or proceeding(s), and none of those Secured Creditors delivers to the Receiver a written objection to (or a request for a hearing on) the Notice of Intended Action within five (5) business days after such Notice of Intended Action is received; or (b), if a written objection or a request for a hearing is delivered to the Receiver within such five (5)

business days, the Court so orders after an actual hearing (after giving proper notice of such hearing to all affected Secured Creditors, whether or not they are parties to this action).

**3.9 Defense of Actions.** The Receiver is authorized, but not required, to defend actions against PCI and may incur expenses to defend such actions to the extent that she believes, in her reasonable discretion, that it will protect and preserve the Assets or the receivership estate.

**3.10 Pre-Receivership Taxes and Utilities.** Notwithstanding Section 3.7, the Receiver and the receivership estate shall not be liable for the payment of taxes, assessments or utility charges pre-dating the date of this Order. Any individual or entity receiving a copy of this Order is hereby enjoined and restrained from discontinuing service to the Receiver or the receivership estate based upon the non-payment of such taxes or utilities prior to the date of this Order and from attempting to collect taxes and utility charges from the Receiver pre-dating the date of this Order.

**3.11 No Appraisal Required.** Unless the Receiver determines in its reasonable business judgment that it is necessary or desirable to do so, and notwithstanding Local Rule 9.02, the Receiver is excused from seeking or obtaining an appraisal of the Assets. The Receiver may rely on appraisals provided by PCI or any other party, or other means of valuation where the Receiver determines in its reasonable judgment that the appraisal or other means of valuation contains adequate indicia of reliability to be used.

3.12 **Care of Property.** The Receiver shall maintain real and tangible personal property owned by PCI in the condition similar to that at the time received, ordinary wear and tear excepted, during the pendency of this action.

3.13 **Standard of Care.** The Receiver shall at all times exercise ordinary care in employing its business judgment to liquidate and administer the Assets.

3.14 **Licenses and Permits.** The Receiver may acquire or renew all governmental licenses, permits or other authorizations, either in the Receiver's name or in the name of PCI, pertaining to the Assets or any business associated therewith and to do all other things necessary or appropriate to liquidate or sell the Assets in accordance with the provisions and limitations in this Order.

3.15 **Cooperation With Receiver.** PCI, its attorneys, and all of the officers, directors, shareholders, managers, agents and employees of PCI (a) shall cooperate with the Receiver in connection with its liquidation of the Assets, (b) shall relinquish and deliver possession of the Assets to the Receiver upon demand, (c) shall turn over to the Receiver all Books and Records as the Receiver upon demand, and (d) are enjoined from interfering with the possession, control and liquidation of the Assets by the Receiver.

4. **Turnover of Cash.** PCI, its attorneys, and all of the officers, directors, shareholders, managers, agents and employees of PCI, shall turn over to the Receiver, within three (3) days from the date of this Order, all sums in existence on the date hereof that are related or pertain to, or derived from, the Assets, including, but not limited to: (a) all cash on hand; (b) all cash equivalents and negotiable instruments (such as checks, notes, drafts or other related documents or instruments); and (c) all sums held in accounts

in any financial institutions, including, but not limited to, all sums of any kind relating to the use, enjoyment, possession, improvement or occupancy of all or any portion of the Assets (collectively, the "Funds"). **[The Receiver shall account to the Court and to the Secured Creditors for all Funds, and for all rent, issues, profits, income, revenues, accounts and lease payments collected or received by the Receiver during the pendency of this action.]**

5. **Receiver Compensation.** The Receiver and her agents, including any counsel and accountants that are appointed by the Court, shall be entitled to reasonable compensation for services rendered and reimbursement for expenses incurred which are: (a) related to the Receiver's duties, rights and obligations under this Order or any future Orders of the Court and applicable law; (b) related to the administration, management, protection or liquidation of the Assets; or (c) related to the defense or prosecution of any claim, lawsuit or proceeding brought by or against PCI or by or against the Receiver. The Receiver and her agents, counsel and accountants shall apply to the Court for approval of compensation. All such applications shall conform to, and shall contain the information required by, Local Rule 9.02(f), and such applications (and notice of the hearings thereon) shall be given to all Secured Creditors (whether or not they are parties to this action) and all other persons as required by Local Rule 9.02(f). The compensation of the Receiver and her agents, counsel and accountants that is approved by the Court shall be paid from rents, issues, profits, income, revenues, accounts and lease payments collected or received by the Receiver, and the apportionment of such approved compensation among the Secured Creditors shall be subject to further agreement among the Secured Creditors or, if they do not agree, further Order of this Court (after giving

proper notice to all Secured Creditors, whether or not they are parties to this action, and after opportunity for a hearing).

6. **Hourly Rate.** The Receiver shall be compensated at a billing rate of \$260.00 per hour, and the Receiver shall be reimbursed for all reasonable and necessary out of pocket costs and expenses.

7. **Access to Assets.** The Receiver shall have full and unrestricted access to all of the Assets, and PCI and its officers, directors, shareholders, managers, employees and agents, and any other parties, are directed to take all steps necessary to give the Receiver access to PCI's premises and to give the Receiver all keys to PCI's premises.

8. **Administration.** The Receiver is authorized to employ the following procedures and case administration:

8.1 **Bank Accounts.** The Receiver may establish bank accounts with any federally insured financial institution with offices in Cleveland or Akron, Ohio, for the purpose of receiving and disbursing funds derived from the collection or liquidation of the Assets, or may continue to use PCI's existing accounts.

8.2 **Professional Services.** The Receiver may contract for professional services, including, but not limited to, such legal and accounting services as are reasonably required for the Receiver to discharge her duties in relation to PCI. Employment of professionals shall require approval of this Court. The Receiver also shall cooperate reasonably with any accountant, forensic accountant, or appraiser who is retained by any Secured Creditor. Such cooperation shall include access to all of PCI's Books and Records at reasonable times and on such terms and conditions as the Receiver reasonably may require.



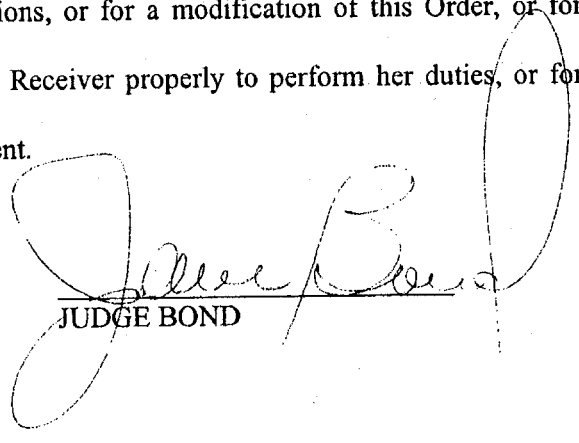
8.3 **Court Approval; Procedure.** Any motion by the Receiver for Court approval of any act of the Receiver requiring Court approval (including any proposed sale of Assets, disposition of claims, lawsuits or proceedings, modification of this Order, or requests for instructions) shall be served on each party hereto, all of the Secured Creditors, and all other persons who have filed and served on the Receiver a request for special notice; provided, however, that such requests filed by any person shall not be deemed as a consent by such person to the jurisdiction of this Court. In addition to service by mail or personal service, service may be made by telefacsimile.

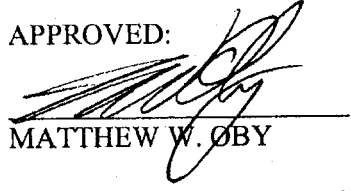
8.4 **Notice.** The Receiver shall provide notice by mail or personal service or confirmed by telefacsimile not less than five (5) days in advance of any hearing or as otherwise may be approved by the Court. The Receiver shall be deemed to have provided adequate notice if she complies with Section 8.3 and 8.4.

8.5 **Reporting.** As provided in the Local Rules of this Court, the Receiver shall give notice of her appointment to all known creditors of PCI and, within sixty days of the date of this Order, the Receiver shall file a report with the Court with respect to the Assets under the Receiver's control and her determination as to any and all claims, liens, and security interests of PCI's Secured Creditors. Thereafter, the Receiver shall submit to the Court each month an accounting as to all of the Receiver's receipts and expenditures.

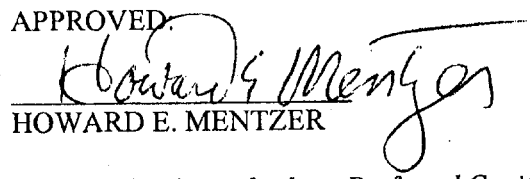
8.6 **Further Instructions.** The Receiver may at any time apply to this Court for further or other instructions, or for a modification of this Order, or for further powers necessary to enable the Receiver properly to perform her duties, or for termination of the Receiver's appointment.

SO ORDERED.

  
JUDGE BOND

APPROVED:  
  
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*Attorney for the Plaintiff, Champaign National Bank*

APPROVED:  
  
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*Attorney for the Defendant, Preferred Capital, Inc.*

Per telephone approval 4/13/05  
KATHRYN BELFANCE