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February 17, 2005

VIA FEDERAL EXPRESS

Mr. Gerald E. Fuerst
Clerk of the Courts
Court of Common Pleas – Cuyahoga County, Ohio
1200 Ontario Street
Cleveland, Ohio 44113-1678

Re: *Preferred Capital, Inc. v. Thomas E. Strellec, Jr.*, COA Nos. 85706,
85707, 85723, 85731, 85732, 85733, 85743, 85744, 85745, 85775, 85776
and 85777

Dear Mr. Fuerst:

Enclosed for filing in the above captioned appeal, pursuant to the Court's February 2, 2005 order, are an original and four copies of the Brief on Appeal of *Amicus Curiae* Equipment Leasing Association of America, Inc.

A motion to admit attorneys Edward A. Groobert and Judy P. Jenkins *pro hac vice* for purposes of submitting the enclosed Brief will be filed by attorneys with the law firm of Roderick Linton, LLP (counsel to Appellant, Preferred Capital, Inc.) by no later than February 22, 2005.

Thank you.

Very truly yours,

DYKEMA GOSSETT PLLC



Judy P. Jenkins

Enclosures

cc: Counsel on Service List

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

PREFERRED CAPITAL, INC.

Appellant	COA NO.	LOWER COURT NO.
	85706	CP CV-542500
	85707	CP CV-544485
	85723	CP CV-542159
	85731	CP CV-540119
	85732	CP CV-543000
	85733	CP CV-542329
	85743	CP CV-542101
	85744	CP CV-540101
	85745	CP CV-544566
	85775	CP CV-542878
	85776	CP CV-542102
	85777	CP CV-538120

-vs-

THOMAS E. STRELLEC, JR., ET AL.

Appellee

**BRIEF ON APPEAL OF *AMICUS CURIAE* EQUIPMENT
LEASING ASSOCIATION OF AMERICA, INC.**

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INTRODUCTION

The Equipment Leasing Association of America, Inc. (“ELA” or the “Association”), as *amicus curiae*, submits this Brief in support of Appellant Preferred Capital, Inc.’s (“Appellant”) request that this Court reverse orders of dismissal for lack of jurisdiction in the above-captioned cases (hereinafter referred to as the “orders of dismissal”). The orders were issued by three trial judges in the Court of Common Pleas for Cuyahoga County Ohio. Permission to file this Brief was granted by this Court by order entered on February 2, 2005.

In ELA’s view, the orders of dismissal for lack of jurisdiction are premised on erroneous holdings that the forum selection clause contained in certain equipment lease agreements between NorVergence, Inc., a New Jersey-based company, and the Defendants, certain commercial lessees of telephone and internet equipment and services, are invalid and unenforceable.¹ If the orders of dismissal are not reversed, they will generate substantial uncertainty and instability in the equipment leasing and finance industry and cause an injustice to be visited upon Appellant and others similarly situated. The merits of the appeal, particularly the application of Ohio common law to the forum selection clause at issue here, will be ably addressed in the Appellant’s Brief on Appeal. ELA seeks in its *Amicus Curiae* Brief to inform the Court about general practices in the leasing industry and the vital importance of forum selection clauses in commercial equipment leasing and other finance transactions.

STATEMENT OF ELA’S INTEREST IN APPEAL

ELA is the national trade association in the equipment leasing industry, an industry that generates billions of dollars each year in leases of productive assets vital to the effective and

¹It is ELA's understanding that other trial judges in the Court of Common Pleas for Cuyahoga County have issued orders, not on appeal here, accepting jurisdiction in numerous cases involving the same forum selection clause.

efficient functioning of our economy. ELA presently has some 791 members located throughout the United States and in foreign countries that are engaged in every aspect of leasing equipment to private businesses and government agencies.²

The equipment leasing industry forms a large and expanding sector of the American and world economy. It is estimated that the total annual volume of equipment leased, as measured by the original cost of equipment, was \$218 billion in 2004. It is estimated that equipment acquired through leases constitutes more than thirty percent (30%) of all capital investment made in the United States every year.

A large number of ELA's members, including those located in Ohio, enter into agreements with equipment lessees that include forum selection clauses similar or identical to the forum selection clause at issue in the orders of dismissal. If the orders of dismissal are not reversed by this Court, these existing equipment leasing transactions and many others involving similar forum selection clauses may be placed in jeopardy or become the subject of unnecessary and costly litigation. In addition, unless reversed, the dismissal orders are likely to have a chilling effect on future equipment lease and financing transactions in our national, interstate economy.

As the national trade association for equipment leasing companies, ELA is vitally concerned about legal issues that impact upon the industry. From its national perspective, ELA is in a unique position to assist this Court in its review of the validity of the dismissal orders.

STATEMENT OF FACTS

ELA hereby adopts and incorporates by reference herein the Statement of Facts contained in Appellant's Brief on Appeal filed with this Court.

²Preferred Capital, Inc. is a member of the Equipment Leasing Association of America, Inc.

ARGUMENT

I.

FORUM SELECTION CLAUSES ARE AN IMPORTANT ELEMENT OF LEASE AGREEMENTS THAT ARE VITAL TO U.S. BUSINESSES

Each business day, it is estimated that 20,000 lease transactions involving equipment from fax machines to commercial aircraft are completed. The increasing dependency of U.S. businesses on equipment leasing is driven by the fact that the equipment's value derives from its use, rather than from ownership. Leasing leverages the ability of businesses, particularly small, new or fast growing enterprises, to acquire equipment they would not otherwise be in a position to acquire, allowing for increased growth, productivity and profits.

As the official comments to the Uniform Commercial Code ("UCC") recognize³, it is commonplace for lessors of equipment (including equipment manufacturers or vendors) to finance rental transactions with commercial lessees by assigning lease agreements to another entity, including a lease financing company like the Appellant in this appeal. Equipment rental agreements, like the agreements which are the subject of this appeal, commonly include a provision notifying the lessee that the lessor may sell, assign or transfer the agreement to another entity that will have the same rights under the agreement as the lessor upon assignment, including the right to payment. Assignments of leases help make it possible for lessors to obtain capital and to offer attractive leasing rates to lessees, often small businesses, to finance the purchase and use of equipment necessary for the lessees' business operations. Assignments also enable a lessor to diversify its credit or industry exposure, while increasing the capital available to the lessor to engage in new transactions beneficial to other lessees. For example, if a leasing

³ See Official Comment 2 to Article 9-403 of the UCC (Comment recognizes that assignments containing waiver of defense clauses are typical in installment sales agreements and leases).

company has an undue concentration of credit risk in leases of certain telecommunications products, it can assign some of the leases to other institutions for capital which it may then invest in the purchase of assets for new leases with other lessees.

The growth of leased equipment and its corresponding value to the U.S. economy is directly tied to the enactment of commercial credit statutes and court decisions making the repayment of leases a relative certainty. An important reason that equipment leasing and financing companies are able to provide equipment financing to businesses is that there is a relatively low rate of delinquency or loss associated with such leases. The orders of dismissal impinge on the longstanding right of commercial parties to agree upon the terms of a forum selection clause.

As previously indicated, the lease agreements also commonly contain a forum selection clause. In *The Bremen et al. v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the United States Supreme Court recognized the significance of forum-selection clauses to the promotion of commercial activities when it held that such clauses, previously viewed with disfavor, should be enforced as between commercial parties unless shown to be unreasonable by the objecting party. According to the Court, advance agreements about the appropriate forum for resolving disputes avoid uncertainty, “an indispensable element in . . . trade, commerce, and contracting.” *Id.* at 523. The Court emphasized that forum selection clauses are “a vital part” of agreements between commercial parties and that such clauses figure “prominently in their calculations.” *Id.* The overwhelming trend of state courts, including Ohio state courts, is to follow the Supreme Court’s holding in *Bremen v. Zapata, supra*. See, e.g., *D. Wallace Nicholson v. Log Systems, Inc.*, 127 Ohio App. 3d 597, 601, 713 N.E. 2d 510 (1998) (Ohio Court of Appeals upheld validity of forum selection clause in commercial contracting stating “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 Mortgage Brokers, Inc. v. Country Club Convalescent Hospital*, 66 Ohio St. 3d 173, 176, 610 N.W. 2d 987 (1993) (forum selection clause contained in contract between two commercial entities is prima facie valid and enforceable in the absence of evidence of fraud or overreaching “unless it can be clearly shown that enforcement of the clause would be unreasonable and unjust”).

II.

THE ORDERS OF DISMISSAL WILL HAVE A CHILLING EFFECT ON THE EQUIPMENT LEASING MARKETPLACE AND IMPEDE LIQUIDITY IN THE U.S. ECONOMY

If the orders of dismissal are not reversed, current and future lease equipment transactions that are favorable to lessees and the economy generally will be in jeopardy, particularly “small ticket” transactions. The ELA estimates that approximately thirty percent (30%) of the annual new leasing business is attributable to “small ticket” transactions, *i.e.*, those involving transactions below \$250,000 and, on average, involving less than \$100,000. There are many reasons that such leasing transactions are favorable to lessees. For example, they minimize the time involved in completing a transaction, in contrast to traditional financing such as loans from banks. In many instances, only a simplified credit application is required and credit decisions are made within a very short time frame. The lease document itself, like the rental agreement at issue in the instant appeal, is relatively simple allowing lessees to devote often limited resources to their core business. Lessees derive other vital benefits from equipment leases such as flexible payment schedules, the ability to obtain equipment with no down payment obligation, preservation of vital working capital, competitive rates and other financing terms and the use of equipment for a defined period of time with limited risks.

Lessors that enter into small ticket transactions generate less revenue per transaction but incur many of the same administrative fixed costs as in larger transactions, as well as the risks associated with the residual value and technological obsolescence of equipment. The value of such leases to lessors therefore turns to a significant degree on certain critical business practices that permit a high volume of transactions to be administered quickly and cost effectively, including the ability to collect on delinquent leases in a streamlined manner. Although delinquency and loss rates for the industry are generally low, high loss levels would not only threaten a lessor's financial viability, but also its ability to offer competitive rates, to the ultimate detriment of lessees. Because of these factors, small ticket lessors carefully determine how they employ their resources to collect past due payments. Litigation expenses can be substantial, especially litigation in a foreign forum. Thus, many small ticket leases include forum selection clauses that allow lessors or their assignees to litigate in their home forum, reducing costs such as witness travel expenses. This approach to lease enforcement helps small ticket lessors continue to provide competitive rates to the great majority of lessees that do not default on their payment obligations.

As noted above, an essential aspect of the equipment leasing and financing industry is the ability of the lessor to assign the lease. At the time a lease agreement is executed, the lessor often does not know the identity of the particular lease financing company to whom the lease will be assigned. Indeed, some manufacturers or vendors who lease equipment prefer to work with and assign leases to numerous lease financing companies so as to be able to obtain the most competitive financing rates which then may be passed on to lessees. Thus, like the lease agreement in the instant appeal, lessees frequently agree that disputes arising out of rental

agreements will be adjudicated in the forum of the lessor or, in the event the agreement is assigned, the forum of the lessor's future assignee.

The forum selection clause at issue in the instant appeal provides lessees with specific notice that the lessor may assign the lease to another commercial party and that the courts of the assignee's principal place of business will be the forum for any disputes arising out of the agreement. Assignees, like the equipment lessors, are amenable to financing lease agreements vital to businesses based on their expectation that they will not experience unacceptable losses or costs, including those associated with having to appear and defend in distant forums located throughout the country.

In the instant appeal, Appellees signed agreements that included a forum selection clause they knew with certainty would require them to litigate any disputes in the courts of the lessor's or assignee's principal place of business. Appellant undoubtedly relied upon the fact that any disputes arising out of the agreements would be decided in the courts of the state where its principal offices are located, Ohio, in deciding whether to accept assignment of the lease agreements and at what price. Appellees *ex post facto* effort to invalidate the forum selection clause is prejudicial to Appellant and poses a substantial threat to thousands of other lessees who depend upon leasing to finance their equipment needs.

The knowledge by assignees that any disputes arising out of the agreements may be litigated in the state of the assignee's principal place of business is an important incentive to finance equipment leases. Conversely, court decisions refusing to uphold forum selection clauses freely entered into between commercial parties have a "chilling effect" on lease financing companies and thereby endanger liquidity in the capital markets.

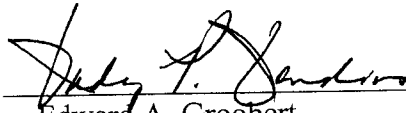
CONCLUSION

On the grounds set forth by the Appellant, reinforced by the reasons stated herein, The Equipment Leasing Association of America, Inc., as *amicus curiae*, respectfully requests this Court to reverse the orders of dismissal.

Respectfully submitted,

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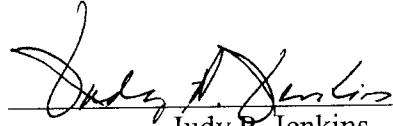
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Dated: February 17, 2005

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by **U.S. Mail or Federal Express**, to those on the following list, on this 17th day of February, 2005.



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