NO. 01-05-00001-CV

IN THE COURT OF APPEALS
FIRST DISTRICT OF TEXAS
HOUSTON, TEXAS

IN RE POPULAR LEASING U.S.A., INC.
Relator

MANDAMUS ACTION FROM 280TH JUDICIAL DISTRICT COURT
HARRIS COUNTY, TEXAS
THE HONORABLE TONY LINDSEY, PRESIDING

AMICUS CURIAE BRIEF OF THE TEXAS ATTORNEY GENERAL

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The Office of the Texas Attorney General respectfully submits this brief as amicus curiae in opposition to the writ of mandamus filed by the Defendant, Popular Leasing U.S.A., Inc. ("Popular Leasing"). The issues raised in this mandamus action are vitally important to Texas Business Consumers. The Attorney General files this brief to illustrate the effect a negative ruling would have on Texas consumers, and on consumers nation-wide, in present and future actions.

ISSUE PRESENTED

Did the District Court abuse its discretion when it denied Popular Leasing's Motion to Dismiss Gary V. Travis and Travis Services, Inc.'s action filed in Texas against Popular Leasing, or did the Court correctly decide that the "floating forum selection clause" from the equipment rental agreement at issue in this case did not support venue outside of Texas?

SUMMARY OF ARGUMENT

NorVergence, Inc. ("NorVergence") assigned to Popular Leasing a number of equipment rental agreements ("ERA") throughout the country, including many here in Texas. These agreements specify that the equipment being rented is a "matrix box." The agreement contains a provision that purports to establish venue for a suit to collect on the agreement anywhere the Rentor of the equipment is located or anywhere the finance company that is assigned the agreement is located ("floating forum selection clause"). NorVergence is currently in Chapter 7 bankruptcy in New Jersey and many states and the Federal Trade Commission are investigating whether its sales of low cost telecommunications services, including the rental agreements for the matrix boxes, were fraudulent, and whether the small

businesses and non profits that signed up for these services and ended up on the hook for thousands of dollars in payments for the matrix boxes, were fraudulently induced to enter into the agreements.

Popular Leasing argues that the floating forum selection clause gives it the clear and simple right to sue Travis where Popular Leasing is located (Missouri) and that Texas courts do not have the ability to hear claims related to the equipment rental agreement. Travis argues that Section 35.53 of the Texas Business and Commerce Code requires certain clear and conspicuous information for a forum selection clause to be valid in Texas for agreements where the value of the goods or services in question is $50,000 or less, or the clause is void. Travis also argued that it did not agree to the forum selected by Popular Leasing.

In denying Popular Leasing's Motion To Dismiss [Travis's claims against Popular related to the equipment rental agreement], the Honorable Judge Tony Lindsey noted her findings (italics from Judge Lindsey's handwriting) on the order as follows:

> This court finds that §35.53 of the Texas Business and Commerce Code applies to this case; *and that the parties did not agree to venue in any other particular state.*

(Order Den. Mot. to Dismiss)(emphasis added). The Consumer Protection Division submits that Judge Lindsey ruled correctly that the parties failed to agree to venue in any other jurisdiction, and urges this Court to rule that Judge Lindsey's decision should not be disturbed by this mandamus action. Many of the approximately 1,000 ERAs signed by Texas businesses are, on their very face, under the amount of $50,000. Given the inconspicuous

placement and font of the forum selection clause at issue, TEX. BUS. & COM. CODE §35.53 does apply for many of the Texas contracts in question. Moreover, as discussed more fully below, there are due process and public policy grounds that the Consumer Division submits supports maintaining litigation regarding these leases here where the businesses and witnesses are located.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Consumer Protection and Public Health Division of the Office of the Attorney General of Texas ("Consumer Protection Division") files this brief to alert this Court that this case has the potential to impact many law suits and many consumers beyond the parties involved in the instant case.

At least 20 different State Attorneys General and the Federal Trade Commission ("FTC") are investigating over 30 different finance companies, like Popular Leasing in this case, that paid for an assignment of equipment rental agreements entered into between a now-bankruptcy company called NorVergence and small businesses and non-profits throughout the United States.[1] Some of the State Attorneys General have settled with certain finance companies, resulting in millions of dollars in relief for affected business consumers.[2] One state has filed suit against certain finance companies, while other states, including Texas, and

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1 http://www.nj.gov/lps/newsreleases05/pr20050112a.html

2 Florida A.G. News Release-http://leasingnews.org/PDF/Crist_announces_settlement.pdf; New York A.G. Press Release - http://www.oag.state.ny.us/press/2004/dec/dec23b_04.html; Texas A.G. Press Release - http://www.oag.state.tx.us/oagnews/release.php?id=687

the FTC have sued NorVergence for violating their respective consumer protection statutes.[3]

As set out more particularly in the Texas Attorney General's Original Petition against NorVergence (attached as Appendix A), approximately 1,000 small businesses and non-profits in Texas were fraudulently induced into signing NorVergence Equipment Rental Agreements ("ERA") as part of NorVergence's sale of telecommunications services to these businesses at supposedly "drastically reduced" prices. NorVergence had a large office in Houston, Texas, sending its local employees throughout the state, but primarily in the Houston and Dallas areas, to meet and sign up Texas consumers.[4] The ERAs were fraudulently presented to consumers in this state, signed in this state, and the matrix boxes, purportedly the equipment rented to the small businesses, were placed at businesses located throughout this state.[5] The fraudulent scheme, as it relates to Texas consumers, was perpetrated entirely in Texas.[6]

Over 20 different finance companies located throughout the United States are assignees of NorVergence leases involving Texas consumers.[7] Most of these finance

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[3] Florida A.G.- http://www.myfloridalegal.com/NorVergenceComplaint.pdf; Texas A.G.- http://www.oag.state.tx.us/newspubs/releases/2004/111804norvergence.pdf; Federal Trade Comm'n - www.ftc.gov/opa/2004/11/norvergence.htm

[4] Texas A.G. Press Release with link to Texas A.G. suit against NorVergence- http://www.oag.state.tx.us/newspubs/releases/2004/111804norvergence.pdf; also see affidavits by former NorVergence employees attached to the Texas Attorney General's Original Petition against NorVergence, attached hereto as Exhibit "A".

[5] *Id.*

[6] *Id.*

[7] Texas' Civil Investigative Demands and Cease & Desist Letters to Finance Companies- http://www.oag.state.tx.us/consumer/norvergence.shtml

companies are insisting that Texas businesses pay the entire lease amount (despite receiving no services) or be sued in a distant forum.[8] Many Texas consumers have been sued in Ohio, Missouri, Utah, Pennsylvania, Illinois, as well as other distant forums. Relator, Popular Leasing, is one such finance company being investigated by the Consumer Protection Division for violations of the Texas Deceptive Trade Practices Act.[9] Popular Leasing has sued hundreds of small businesses in Missouri, including many such businesses located in Texas.

ARGUMENT AND AUTHORITIES

I. The "Floating" Forum Selection Clause At Issue Fails To Confer Personal Jurisdiction or Venue in Distant Forums Over Texas Consumers

A. Venue

Relator argues that the forum selection clause at issue, which fails to identify a specific forum in which suit is to be brought, confers both personal jurisdiction and venue over Plaintiffs in the courts of Missouri (despite the facts that the agreement was signed in Texas, the witnesses regarding any matters at issue relating to the inducement to sign the agreements are in Texas, Relator clearly has counsel in Texas, and is clearly able to defend itself and sue in Texas). This forum selection clause purports to allow any assignee to establish exclusive venue where the assignee's principal business happens to be located.

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[8] *Id.*

[9] Texas A.G. Civil Investigative Demand and Cease and Desist to Popular Leasing- http://www.oag.state.tx.us/consumer/norvergence/cid_popular.pdf; http://www.oag.state.tx.us/consumer/norvergence/popular.pdf

In January 2005, a Federal District Court in Illinois construed an identical [NorVergence] floating forum selection clause imposed upon a California small business by IFC Credit Corporation, another finance company assignee of NorVergence based in Illinois. The Federal court, in refusing to allow IFC Credit Corporation to sue the California business in Illinois, stated:

> good policy dictates that a true forum selection clause should be clear and specific. In the instant case, the failure to specify a particular jurisdiction renders the lessee incapable of knowing where an assignee might file suit. . . . . As such, the contract lacks an essential element regarding forum selection. *Put simply, no selected forum is identified in the agreement.*

IFC Credit Corp. v. Eastcom, Inc., 2005 WL 43159 (N.D. Ill.)(emphasis added)(citing *Whirlpool Corp. v. Certain Underwriters at Lloyd's London*, 662 N.E.2d 467, 471 (1st Dist. 1996). The Texas consumers who were fraudulently induced into signing the NorVergence ERAs did not know, at the time they were signed, which finance company would be assigned all or part of the agreement, much less where such assignee might sue them based upon the location of its principal place of business. From the four corners of the [NorVergence] form ERAs, a prospective lessee cannot identify the jurisdiction in which an action may be brought, as the contract states in the most general terms that the proper forum is contingent upon the location of an unnamed assignee's principal office. Upon the face of the agreements themselves, it is reasonable to assume that the assignees' identity was unknown even to the lessor [NorVergence] at the time the various contracts were executed. In the instant case, Travis could not have identified that an action would be brought against it in

Missouri. Travis had no notice that NorVergence would assign the ERA to Popular Leasing and subject itself to the jurisdiction of a Missouri court. Therefore, Judge Lindsey's determination that the parties did not agree to the distant forum of Missouri is supported by the facts of this case.

Even though a forum selection clause in a non-negotiated form contract is generally valid, enforcement of the clause is subject to judicial scrutiny for fundamental fairness. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991); *Stobaugh v. Norwegian Cruise Line Ltd.*, 5 S.W.3d 232, 236 (Tex. App.–Houston [14th Dist.] 1999, pet. denied). In reaching its conclusion, the court will exercise judicial scrutiny to determine whether enforcement of the clause would be fundamentally unfair. *Id.* There are various factors in making this determination. A trial court is not bound by a forum selection clause if the interests of the witnesses and the public strongly favor a different forum. *Accelerated Christian Educ., Inc. v. Oracle Corp.*, 925 S.W.2d 66, 70 (Tex. App.–Dallas 1996, no writ). Courts may also consider whether the forum was selected to discourage legitimate claims, whether there was fraud or over-reaching[10], whether there was adequate notice, and whether the party retained the option of rejecting the contract with impunity following notice of the forum selection clause. *Stobaugh*, 5 S.W.3d at 234. NorVergence's 'form' ERA specifically

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[10] A number of Texas consumers have sued (assignee) finance companies alleging they were complicit [with NorVergence] in the fraudulent inducement of these agreements. It is clear in Texas that forum selection clauses do not apply to tort type actions alleging fraudulent inducement to enter into an agreement because such does not "arise under" the agreement. This applies to both fraud and violations of the DTPA. *Busse v. Pac. Cattle Feeding Fund #1*, 896 S.W.2d 807, 813 (Tex. App.–Texarkana 1995, writ denied); *Decision Control Sys., Inc. v. Personnel Cost Control, Inc.*, 787 S.W.2d 98, 100 (Tex. App.–Dallas 1990, no pet.).

discourages legitimate claims of lessees against it (and its assignees) from being filed anywhere but where the assignee happens to be located. According to affidavits provided to this Office, NorVergence salespeople misrepresented its services and typically buried the ERA in a stack of non-binding documents the customer was asked to sign, making it clear that consumers were defrauded into signing the *binding* ERA which contained the inconspicuous floating forum clause at issue in this case. Appendix A, affidavits of former NorVergence employees attached to Original Petition. The Fifth Circuit has defined "over-reaching" as "that which results from an inequality of bargaining power or other circumstances in which there is an absence of meaningful choice on the part of one of the parties." *Haynsworth v. The Corporation*, 121 F.3d 956, 965 (5th Cir. 1997). Consumers did not have the option to reject the contract once they found out the identity of the assignee finance company and the finance company's principal place of business. There was clearly an absence of meaningful choice on the part of the lessees to these agreements. To uphold the floating forum selection clause would effectively deprive Texas consumers of their day in court. *Mitsui & Co., Inc. v. Mira M/V*, 111 F.3d 33, 35 (5th Cir. 1997).

In *Stobaugh,* the Houston Fourteenth District Court of Appeals held that the forum selection clause at issue was fundamentally unfair because it was printed on the back page of a passenger cruise line ticket that was delivered to the passengers over 2 months after they paid for the cruise. Even had the passengers read the forum clause on the ticket the day they received it in the mail, they would have been subject to a cancellation penalty of $400 to

cancel the cruise, which they wanted to do because of an impending hurricane. When the passengers were in fact later injured by the hurricane, they filed suit in Texas, notwithstanding that the forum selection clause specifically designated Florida as the proper forum. The court held that the forum clause deprived the passengers of their day in court and was fundamentally unfair because it did not give them proper notice. *Stobaugh*, 5 S.W.3d at 236. An analogy should be drawn to the facts of this case, as the present clause did not give any notice to Texas consumers, nor did they have any opportunity to negotiate and agree to the forum chosen by the finance company to which NorVergence transferred their agreements without any notice beforehand to the consumers.

B. Due Process

But for this floating forum selection clause, it is doubtful there is personal jurisdiction in Missouri over Travis, or any other consumer facing suit by Popular Leasing over the form ERA at issue. Similarly, it is doubtful that there is personal jurisdiction in other distant forums over other Texas businesses facing suit by other finance companies who were assigned a NorVergence ERA.

The Due Process clause of the 14th Amendment to the U.S. Constitution requires that a non-resident defendant have certain minimum contacts with the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). In determining whether a Defendant reasonably anticipates being sued in a distant forum, there must be "some act by which the

defendant purposefully avails itself of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Id.* at 320.

The focus is on whether a Defendant should reasonably anticipate "being hauled into court" in the forum state. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980). Individuals must have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign." *Shaffer v. Heitner*, 433 U.S. 186 (1977)(Stevens, J., concurring). Thus the Due Process Clause "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen,* 444 U.S. at 297.

Applying these principles, the U.S. Supreme Court has held that the Due Process clause forbids the exercise of personal jurisdiction over an out-of-state auto distributor whose only ties to the forum resulted from a consumer's decision to drive there (*Worldwide Volkswagen,* 444 U.S. 286); over a divorced husband sued for child-support payments whose only ties to the forum were created by his former wife's decision to move there (*Kulko v. Cal. Sup. Ct.*, 436 U.S. 84 (1978)); and over a trustee whose only connection with the forum resulted from the settlor's decision to exercise her power of appointment there (*Hanson v. Denckla*, 357 U.S. 235 (1958)).

As in the present case, these defendants had no "clear notice that [they were] subject to suit" in the forum and no opportunity to "alleviate the risk of burdensome litigation" there.

Worldwide Volkswagen, 444 U.S. at 297. To dismiss this suit and allow the Missouri suit against these same parties to continue unfettered would offend traditional notions of fair play and substantial justice. The U.S. Supreme Court has held that the unilateral activity of an opposing party or third person is not an appropriate consideration when determining that a defendant has sufficient contacts with a foreign state to justify an assertion of jurisdiction. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 416-18 (1984). Put simply, the random act of assigning this agreement to Popular Leasing, coupled with the unilateral acts of Popular Leasing in trying to enforce it, should not subject a Texas consumer to defending an action in a Missouri court.

This Court of Appeals has pointed to *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) as being instructive for challenges to forum selection clauses. *Abacan Technical Servs. Ltd., v. Global Marine Int'l Servs. Corp.*, 994 S.W.2d 839, 843-844, (Tex. App.–Houston [1st Dist.] 1999, no pet.)(citing *M/S Bremen*, 407 U.S. at 15-19). In *M/S Bremen*, the District court was instructed to enforce the forum selection clause on remand unless: (1) there was a strongly contravening precedent or statute in the forum selected; (2) a presentation of clear evidence that enforcement would be unreasonable or unjust, to the extent [defendant] was effectively denied its day in court because of grave difficulty and inconvenience; or (3) the defendant demonstrated that the clause was invalid because of fraud or overreaching. *M/S Bremen*, 407 U.S. at 15-19. In *M/S Bremen* the forum selection clause was freely negotiated, which is not the case here. Texas does have a contravening

statute in TEX. BUS. & COM. CODE ANN. § 35.53 (Vernon 2002), which provides in contracts of $50,000 or less, which are executed in Texas by parties residing in or having their principal place of business in Texas, that any forum selection clause "must be set out conspicuously in print, type or other form of writing that is bold-faced, capitalized, underlined, or otherwise set out in such a manner that a reasonable person against whom the provision may operate would notice." *Id.* The forum selection clauses at issue do not meet these statutory notice requirements and are thus voidable by the parties against whom they are sought to be enforced. *Id.* All (3) prongs of the *M/S Bremen* test are met[11], even though none of the NorVergence ERAs had "freely negotiated" forum selection clauses in them. *M/S Bremen*, 407 U.S. at 10-11.

CONCLUSION

The Consumer Division submits this amicus brief to alert the Court that the issues involved in Judge Lindsey's decision, namely, in what forum is it proper and just to hear these disputes regarding whether small businesses and non-profits must pay on agreements they were scammed into signing, is one of significance for many Texas consumers and many consumers nationwide. We respectfully urge this Court to uphold Judge Lindsey's sensible decision concluding that this is not an agreed-to forum selection clause and therefore it is appropriate to keep this dispute in the forum where the transaction occurred and the witnesses are located.

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[11] Meeting any one of the (3) prongs of *M/S Bremen* will support the non-enforceability of a forum selection clause.

For the reasons stated herein, the mandamus action filed by Popular Leasing should be in all things be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this amicus brief was sent via first class mail to the parties and counsel in this action as indicated below on this the 16th day of March, 2005.

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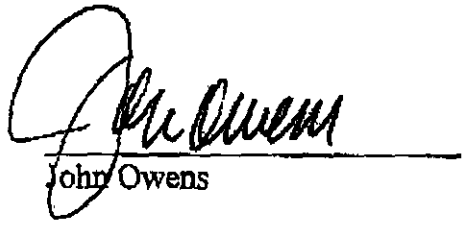

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