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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
(SOUTHERN DIVISION)

BLUME ENGINEERING L.L.C., a  
California limited liability company,

Plaintiff,

v.

OURPLANE CORP., a New York  
corporation., et al.,

Defendants.

CASE NO. SACV09-00268JVS (RNBx)

**DEFENDANT OURPLANE CORP.'S  
NOTICE OF MOTION AND MOTION  
TO DISMISS FOR IMPROPER  
VENUE; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF; AND  
[PROPOSED] ORDER THEREON**

Date: Monday, May 18, 2009  
Time: 1:30 P.M.  
Ctm: 10C  
Judge: Hon. James V. Selna

ORAL ARGUMENT REQUESTED

1 **TO PLAINTIFF BLUME ENGINEERING L.L.C. AND ITS COUNSEL OF**  
2 **RECORD:**

3 **PLEASE TAKE NOTICE THAT** on May 18, 2009 at 1:30 p.m., or as soon  
4 thereafter as the matter may be heard before the Honorable James V. Selna, located at  
5 Courtroom 10C, United States District Court, Central District of California (Southern  
6 Division), 411 West Fourth Street, Santa Ana, California 92701-4516, Defendant  
7 OurPLANE Corp. shall, and hereby does, move this Court for an order dismissing  
8 without prejudice the First Amended Complaint ("FAC") filed by Plaintiff Blume  
9 Engineering L.L.C. on the ground that the venue in this action is improper based on the  
10 mandatory forum selection clause in the parties' Equity Use License Agreement attached  
11 as Exhibit A to the FAC.

12 This motion to dismiss is made pursuant to Federal Rules of Civil Procedure  
13 12(b)(1), 12(b)(3) and 12(b)(6) on the grounds that (i) Plaintiff's commencement of this  
14 diversity action in the United States District Court for the Central District of California  
15 breached the forum selection clause in the parties' written contract requiring this  
16 controversy be adjudicated in the Michigan Circuit Court, Kent County, Michigan, or in  
17 the United States District Court for the Western District of Michigan; and (ii) Plaintiff  
18 has not and cannot sustain its burden of showing that (a) the incorporation of the forum  
19 selection clause into the contract resulted from fraud or overreaching, (b) the selected  
20 forum of the State of Michigan is so gravely difficult and inconvenient that Plaintiff will  
21 for all practical purposes be deprived of its day in court, or (c) enforcement of the clause  
22 would contravene a strong public policy of the State of California (the forum in which  
23 the suit was improperly brought).

24 This motion is made following the conference of counsel pursuant to Local Rule  
25 7-3, which took place on Thursday, April 16, 2009, and is based upon this Notice of  
26 Motion and Motion, the accompanying Memorandum of Points and Authorities, the  
27 pleadings, records and papers filed in this action, all matters of which the Court may

28 / / /

1 take judicial notice, and such other and further evidence as may be presented at or  
2 before the hearing on this motion.

3  
4 DATED: April 23, 2009

5 **LAW OFFICES OF MARK ANCHOR ALBERT**

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7  
8 By: \_\_\_\_\_  
9 Mark Anchor Albert  
10 Attorneys for Defendant OurPLANE Corp.

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Plaintiff Blume Engineering L.L.C. has sued defendant OurPLANE Corp. in the wrong court.<sup>1</sup> The parties' Equity Use License Agreement that Wolfram Blume (Blume Engineering's President) executed on August 24, 2007 and which forms basis of Plaintiff's claims against OurPlane contains a mandatory "Situs, Jurisdiction and Venue" provision providing that:

"all actions or proceedings brought with regard to the interpretation or enforcement of this agreement, or any provision hereof, or any disputes arising under this Agreement, shall be brought in the Michigan Circuit Court, Kent County, Michigan, or the United States District Court for the Western District of Michigan."

(See First Amended Complaint ["FAC"], Exhibit A, p. 16, ¶ 45 [a true and correct copy of which is appended hereto as Exhibit 1 pursuant to Section 7 of this Court's Initial Order in this action].)

Plaintiff's commencement of this action in this Court violates the forum selection provision to which each of these sophisticated commercial enterprises agreed. Time and again, federal courts (including the Supreme Court) have held that such forum selection clauses are prima facie valid and should be enforced in all but the most exceptional circumstances. There is no allegation or suggestion of any fraud in the inducement of the contract or otherwise. Nor is there any claim that Plaintiff lacks the resources to recommence suit in Michigan if this action is dismissed, as it should be. No California-specific public policy weighs against the enforcement of the parties' forum selection clause. On the contrary: California public policy strongly supports the clause's enforceability. As such, this case represents the very opposite of the very rare

<sup>1</sup> This ordinary breach of contract action is before this Court on the basis of diversity jurisdiction; it presents no issue or question of federal law; and the operative contract is subject to a Michigan choice of law provision. (See FAC, Ex. A, p. 16, ¶ 45 (Michigan choice of law provision).)

1 circumstances in which a contractual choice of forum might be trumped.

2 For these reasons, as more fully elaborated below, Plaintiff's FAC should be  
3 dismissed for improper venue under Rules 12(b)(1), 12(b)(3) and 12(b)(6) of the Federal  
4 Rules of Civil Procedure.

5 **II. FACTUAL AND PROCEDURAL BACKGROUND**

6 **A. The Parties**

7 Plaintiff Blume Engineering is, as its name suggests, an engineering firm  
8 structured as Limited Liability Company with a sole member, Wolfram Blume. (*See*  
9 FAC ¶¶ 4 & 5.) Plaintiff is located and maintains its business facilities in Orange  
10 County, California. (*Id.*)

11 It is undisputed that: Defendant OurPLANE is a New York corporation which is  
12 located and maintains its principal place of business in Reston, Virginia; OurPLANE is  
13 a subsidiary of OurPLANE Inc., which also is a New York corporation, but which is  
14 located and maintains its principal place of business in Ontario, Canada.; and  
15 OurPLANE Inc., in turn, is a wholly-owned subsidiary of the parent company,  
16 OurPLANE Holdings, Inc., which is a Canadian corporation located and maintaining its  
17 principal place of business in Ontario, Canada. OurPLANE is a professional aircraft  
18 management and consulting company and the pioneer in general aviation, light aircraft  
19 shared ownership. (*See* overview at <http://www.ourplane.com/pilot/index.asp>.)<sup>2</sup>

20 Among its other business activities, OurPLANE leases fractional interests in  
21 airplanes through its Fractional Aircraft Program, whereby individuals and businesses  
22 may obtain affordable access to reasonably new aircraft through the purchase of  
23 fractional use licenses. (*See* FAC, Ex. A at p. 2 ("Preamble").) In its Executive  
24 Program, OurPLANE manages a group of four (4) owners per aircraft with two different

25 \_\_\_\_\_  
26 <sup>2</sup> This Memorandum sometimes refers to facts outside the FAC's four corners. *See, e.g.,*  
27 *Argueta v. Banco Mexicano, SA*, 87 F.3d 320, 324 (9th Cir. 1996) ("Analysis under Rule  
28 12(b)(3) . . . permits the district court to consider facts outside of the pleadings . . .").  
To reduce paperwork, however, supporting evidence sometimes is not supplied re:  
factual statements herein that are undisputed and which the parties' do not contest.

1 share ownership levels. All OurPLANE share owners pay a monthly fee to help cover  
2 the fixed costs of aircraft operation such as aircraft storage, insurance, and  
3 OurPLANE's management fee is included in that amount. A fixed hourly fee is charged  
4 for time flown to cover the direct operating costs of the aircraft such as fuel, oil and  
5 engine reserves. The duration of OurPLANE's fractional share program is five (5)  
6 years. Shareowners may sell their interest at any time either on their own, or through  
7 OurPLANE's Aircraft Broker Program. At the end of the five-year term, the aircraft is  
8 sold and the shareowner can exit the program or apply the sales credit to the next  
9 factory-new OurPLANE Executive aircraft. (*See* FAC, Ex. A; *see also* description of  
10 Executive Program at [http://www.ourplane.com/nonpilot/products\\_exec.asp](http://www.ourplane.com/nonpilot/products_exec.asp).)

11 **B. The Parties' Equity Use License Agreement**

12 On August 24, 2007, Plaintiff entered into an Equity Use License Agreement (the  
13 "License Agreement") with OurPLANE in order to obtain a fractional use license in an  
14 Eclipse aircraft pursuant to OurPLANE's Executive Program. Plaintiff paid a deposit of  
15 \$182,435.40 to that end (the "Deposit"). (*See* FAC ¶¶ 7 & 11 at pp. 3-4.) OurPLANE  
16 was unable to deliver the Eclipse aircraft to Plaintiff in October 2008 as promised,  
17 however, because Eclipse was on the verge of commencing bankruptcy proceedings,  
18 which occurred on or about November 25, 2008. (*See* FAC ¶ 14.) Rather than  
19 accepting a substitute aircraft, Plaintiff declared that it wished to rescind the contract  
20 and obtain the return of the Deposit which had been paid to the now-bankrupt Eclipse.  
21 (*See* FAC, Ex. C.)

22 As noted at the outset, the License Agreement contains an explicit, broad and  
23 mandatory forum selection provision requiring that all disputes or claims between the  
24 parties "*shall be* brought in the Michigan Circuit Court, Kent County, Michigan, or the  
25 United States District Court for the Western District of Michigan." (*See* FAC, Ex. A, p.  
26 16, ¶ 45 [emphasis added].) The License Agreement further provides that "the  
27 Agreement shall be interpreted in accordance with the laws of the State of Michigan."  
28

1 (*Id.*) Plaintiff's FAC appends the License Agreement as Exhibit A thereto, and  
2 incorporates it into every claim for relief. (*See* FAC ¶ 7 & Ex. A; ¶¶ 16, 20, 23 & 29  
3 [incorporating by reference ¶ 7 & Ex. A into all claims for relief].)

4 **C. The Original And First Amended Complaints**

5 Plaintiff filed its original Complaint in this action on March 4, 2009. The dispute  
6 arises from OurPLANE's alleged breach of the parties' Equity Use License Agreement  
7 by failing to deliver an airplane, for which Plaintiff had paid the Deposit, in a timely  
8 manner. In response to this Court's order to show cause re jurisdiction, Plaintiff filed its  
9 First Amended Complaint on March 9, 2009. Defendant requested and Plaintiff granted  
10 a 30-day extension of time for Defendant to respond to Plaintiff's FAC, up to an  
11 including April 23, 2009 (at which time Defendant filed the present Motion to Dismiss).

12 **III. ARGUMENT**

13 Federal law governs the validity and effect of forum selection clauses in diversity  
14 cases. *See Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 497 (9th Cir. 2000);  
15 *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 513 (9th Cir. 1988). A  
16 valid forum selection clause displaces ordinary venue rules under 28 U.S.C. § 1391:  
17 parties may, by contract, properly designate a forum in which litigation is to take place,  
18 and litigation commenced in any other forum may be dismissed for improper venue.  
19 *See TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351,  
20 1353 (9th Cir. 1990). As shown below, when a plaintiff breaches a forum selection  
21 provision in an enforceable contract by commencing suit in a forum different from the  
22 contractually-specified one, the district court properly should dismiss the action (or  
23 alternatively transfer it to the contractually-selected forum if justice so dictates), unless  
24 extraordinary circumstances -- absent here -- justify overriding the parties' contractual  
25 forum choice. *See see infra* § III.C.; *see also* 28 U.S.C. § 1406.

26 **A. The Forum Selection Clause In The Parties' License Agreement  
27 Plainly Governs This Dispute**

28 The forum selection clause contained in the License Agreement is enforceable

1 and applies to the claims before the Court. Each of Plaintiff's claims -- (#1) for breach  
2 of contract; (#2) for rescission (#3); for money had and received; and (#4) for  
3 declaratory relief -- comprise part of an "action[] or proceeding[]" brought with regard to  
4 the interpretation and enforcement of [the License Agreement]" and reflect and embody  
5 "disputes arising under this Agreement." (See FAC, Ex. A at ¶ 45.)

6 Because the forum selection clause provides that "all actions or proceedings"  
7 regarding the interpretation or enforcement of the License Agreement and "any disputes  
8 arising under this Agreement, shall be brought in the Michigan Circuit Court, Kent  
9 County, Michigan, or the United States District Court for the Western District of  
10 Michigan" (*id.* [emphasis added]), the clause's application is mandatory. See *Scherk v.*  
11 *Alberto Culver Co.*, 417 U.S. 506 (1974) (upholding as mandatory a forum selection  
12 clause using the word "shall"); *Docksider, Ltd. v. Sea Tech., Ltd.*, 875 F.2d 762, 764  
13 (9th Cir. 1989) (same); *accord Milk 'N' More, Inc., v. Beavert*, 963 F.2d 1342, 1346  
14 (10th Cir. 1992) ("The use of the word "shall" generally indicates a mandatory intent  
15 unless a convincing argument to the contrary is made") (citing cases).

16 **B. The Parties' Forum-Selection Clause Is Prima Facie Valid And**  
17 **Enforceable**

18 In *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 589-95 (1991), the Supreme  
19 Court held that forum-selection provisions that are part of standardized form contracts  
20 used in commercial transactions are prima facie valid, enforceable, and require  
21 dismissal (or transfer) of lawsuits filed in contravention of their terms. In that case, two  
22 cruise ship passengers from the State of Washington filed suit against the cruise line  
23 after one of them was injured in a cruise. *Id.* at 588. They filed suit in Washington in  
24 derogation of the forum selection clause printed on the back of their tickets, which  
25 mandated a Florida forum for all cruise-related disputes. *Id.* at 587-88. Rejecting  
26 plaintiffs' arguments that the clause was unreasonable, the Supreme Court held that the  
27 clause required dismissal.

28 The Court's reasoning and analysis are instructive. The Court noted that a

1 company with a nationwide customer base -- like OurPLANE and Carnival Cruise Lines  
2 -- has a legitimate interest in limiting the fora in which it potentially could be subject to  
3 suit. *Id.* at 594. A forum selection clause "has the salutary effect of dispelling any  
4 confusion about where suits arising from the contract must be brought and defended,  
5 sparing litigants the time and expense of pretrial motions to determine the correct forum  
6 and conserving judicial resources that otherwise would be devoted to deciding the  
7 motion." *Id.* at 593-94. Customers like Blume Engineering that enter into agreements  
8 containing forum selection clauses like the one at issue here "benefit in the form of  
9 reduced [charges] reflecting savings that the [company] enjoys by limiting the fora in  
10 which it may be sued." *Id.* at 594.

11 For these common-sense reasons, numerous courts have applied the rule that  
12 forum selection clauses should control absent a strong showing to the contrary. "[A]  
13 valid forum-selection clause [should be] given controlling weight in all but the most  
14 exceptional of cases." *Stewart Org., Inv. v. Ricoh Corp.*, 487 U.S. 22, 33 (Kennedy, J.,  
15 concurring) (1988).<sup>3</sup> Following the Supreme Court's guidance, the Ninth Circuit and  
16 district courts within the Ninth Circuit have repeatedly enforced forum selection clauses  
17 like the one present here. *See, e.g., Kukje Hwajae Ins. Co., Ltd. v. M/V Hyundai*  
18 *Liberty*, 408 F.3d 12150, 1255 (9th Cir. 2005) ("The district court abused its discretion  
19 when it failed to enforce the forum-selection clause in the bill of lading at the outset of  
20 the litigation"); *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1988) (affirming  
21 the dismissal of action based on forum selection clause); *Swensen v. T-Mobile USA,*  
22 *Inc.*, 415 F.Supp.2d 1101, 1106 (S.D. Cal. 2006) (enforcing forum selection clause and  
23 dismissing); *Koresko v. RealNetworks, Inc.*, 291 F.Supp.2d 1157 (E.D. Cal. 2003)  
24 (same); *Laurel Village Bakery LLC v. Global Payments Direct Inc.*, No. C06-01332

25 \_\_\_\_\_  
26 <sup>3</sup> As explained in BLACK'S LAW DICTIONARY 1375 (6th ed. 1990), use of the word  
27 "shall" is "generally imperative or mandatory. In common or ordinary parlance, and in  
28 its ordinary signification, the term 'shall' is a word of command, and one which has  
always or which must be given a compulsory meaning; as denoting obligation."

1 MJJ, 2006 WL 2792431, at \*7 (N.D. Cal. Sept. 25, 2006) (attached as Appendix Ex. 1)  
2 (same); and *Turner v. Thorworks Indus., INC.*, No. S05-02653 WBS KJM, 2006 WL  
3 829142 (E.D. Cal. March 28, 2006) (attached as Appendix Ex. 2) (same).

4 **C. Plaintiff Cannot Overcome The Presumptive Enforceability Of The**  
5 **License Agreement's Forum Selection Clause**

6 Because forum selection clauses are "prima facie valid" under federal law, they  
7 cannot be set aside unless the party challenging enforcement demonstrates the clause is  
8 "invalid" or that enforcement of the clause would be "unreasonable." *See The Bremen v.*  
9 *Zapata Off-Shore Company*, 407 U.S. 1, 10 & 15 (1972).

10 To establish that a forum selection clause is "unreasonable" under the *Bremen*  
11 test, it is not enough to show that the challenged clause is merely inconvenient or  
12 impracticable. Rather, Plaintiff must sustain a "heavy burden" to overcome the freely-  
13 contracted forum selection provision at issue here. *See Argueta*, 87 F.3d at 325. In  
14 particular, Plaintiff must establish under *Bremen* that (1) the forum selection clause's  
15 incorporation into the contract was the result of fraud, undue influence, or overweening  
16 bargaining power; (2) the selected forum is so "gravely difficult and inconvenient" that  
17 the complaining party will "for all practical purposes be deprived of its day in court"; or  
18 (3) enforcement of the clause would contravene a strong public policy of the forum in  
19 which the suit is brought. *Id.* In short, Plaintiff must show "that trial in the chosen  
20 forum would be so difficult and inconvenient that the party would effectively be denied  
21 a meaningful day in court." *Id.*

22 Plaintiff cannot make that showing here. This case presents none of the  
23 extremely rare circumstances that might permit a plaintiff to overcome the presumptive  
24 validity of a forum selection clause.

25 *First*, with respect to fraud, a challenging party's fraud-exception argument must  
26 fail unless he/she shows (1) the other party misled him/her as to the legal effect of the  
27 forum-selection clause, or (2) the other party fraudulently inserted the clause without  
28 his/her knowledge. *See Batchelder v. Kawamoto*, 147 F.3d 915, 919 (9th Cir. 1988);

1 *Starlight Co., Inc. v. Arlington Plastics Mach., Inc.*, No. C 0111121 SI, 2001 U.S. Dist.  
2 LEXIS 7997, at \*8 (N.D. Cal. June 8, 2001) (attached as Appendix Ex. 3) ("The party  
3 seeking to invalidate a forum-selection clause must show that the clause itself was  
4 fraudulently included in the agreement, not claim the entire agreement was a product of  
5 fraud"). Plaintiff has not made either allegation, nor could it make such a difficult  
6 showing. Plaintiff cannot reasonably dispute that it and OurPLANE had relatively equal  
7 bargaining power, and there was no fraud, undue influence, or other extenuating  
8 circumstances relating to the execution of the License Agreement Agreement. This is  
9 obvious from the fact that Plaintiff has not alleged any such facts in its FAC. And, with  
10 respect to any alleged coercion or overreaching, a forum selection clause is not invalid  
11 merely because the clause was not explicitly negotiated but instead was presented as  
12 part of a standardized commercial contract. That issue was squarely resolved in  
13 *Carnival Cruise Lines*, 499 U.S. at 593-95.

14 *Second*, it cannot seriously be argued that being required to bring its lawsuit in a  
15 state or federal court sitting in Michigan would "effectively deprive[]" Plaintiff of its  
16 day in court. The United States District Court for the Western District of Michigan is  
17 well known for its ability to handle cases fairly and efficiently, should Plaintiff decide to  
18 refile its case there following dismissal. *See 2008 Federal Court Management Statistics*  
19 for "Michigan Western," available at <http://www.uscourts.gov/cgi-bin/cmsd2008.pl>.<sup>4</sup>

20 *Third*, enforcement of the forum selection clause would not contravene California  
21 public policy. Forum selection clauses also are prima facie valid under California law.  
22 *See Smith, Valentino & Smith, Inc. v. Superior Court*, 17 Cal.3d 491, 495-496 (1976)  
23 (stating rule); *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal.4th 459, 464 (1992); *Cal-*  
24 *State Business Productions & Services, Inc. v. Ricoh*, 12 Cal.App.4th 1666, 1676-1677  
25 (1993) (same). California courts have recognized the salutary nature of forum selection

26 <sup>4</sup> The Michigan Circuit Court for Kent County also has demonstrated efficient case  
27 management and disposition rates, should Plaintiff wish to commence suit there. *See*  
28 <http://courts.michigan.gov/scao/resources/publications/statistics/2007/circuitcaseload2007b.pdf>

1 clauses and have found them enforceable for the same policy reasons articulated by the  
2 Supreme Court in *Carnival Cruise Lines*. See, e.g., *Inershop Commc'ns AG v. Superior*  
3 *Court*, 104 Cal.App.4th 191, 201 (2002).

4 Although OurPLANE is a New York corporation doing business in Virginia, and  
5 the forum selection clause provides for a Michigan forum, these same policy reasons  
6 apply fully here. Corporations based in California routinely include forum selection  
7 clauses in their agreements providing that disputes are to be litigated in California state  
8 or federal courts or in other jurisdictions, and it surely promotes California public policy  
9 for such California corporations to have their forum selection clauses honored and  
10 enforced. Yet a finding that such clauses are contrary to California public policy would  
11 redound to the detriment of such California corporations, which have been successful in  
12 enforcing their own forum selection clauses in other jurisdictions.

13 This is, therefore, far from the exceptional case in which a plaintiff can meet its  
14 heavy burden of demonstrating that it would be unreasonable to enforce the forum  
15 selection provision. The forum selection provision in OurPLANE's standard License  
16 Agreement is beneficial to courts and litigants because it limits the forums in which  
17 OurPLANE -- which provides aircraft that are used in all 50 states -- can be sued. (See  
18 <http://www.ourplane.com/nonpilot/locations.asp>.)

19 Here, as in *Carnival Cruise Lines*, the forum selection provision is "dispositive"  
20 in resolving the question whether the case should be dismissed. 499 U.S. 588-98.  
21 Because the forum selection provision in the parties' License Agreement is valid,  
22 Plaintiff's FAC should be dismissed on improper venue grounds pursuant to Federal  
23 Rule of Civil Procedure 12(b)(3).<sup>5</sup> See *King v. Russell*, 963 F.2d 1301 (9th Cir. 1992)  
24 (affirming dismissal of action based on forum selection clause); *Johnson v. Payless*

25 \_\_\_\_\_  
26 <sup>5</sup> To be safe, Defendant has moved to dismiss for improper venue under Rules 12(b)(1)  
27 & (6) in addition to 12(b)(3). See *Schwarzer & Tashima CALIFORNIA PRACTICE GUIDE:*  
28 *FEDERAL CIVIL PROCEDURE BEFORE TRIAL* § 9:130.8 at pp. 9-41 & 9.42 (The Rutter  
Group 2009) ("Defendants can (and should) move to dismiss for improper venue under  
*all* potentially applicable rules -- i.e., 12(b)(6), 12(b)(3) *and* 12(b)(1)")

1 *Drug Stores Nw., Inc.*, 950 F.2d 586 (9th Cir. 1991) (same).

2

3 **IV. CONCLUSION**

4 For all of the foregoing reasons, the Court should dismiss Plaintiff's First  
5 Amended Complaint for improper venue.

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7 DATED: April 22, 2009

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LAW OFFICES OF MARK ANCHOR ALBERT

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By: \_\_\_\_\_  
Mark Anchor Albert  
Attorneys for Defendant OurPLANE Corp.

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
(SOUTHERN DIVISION)

BLUME ENGINEERING L.L.C., a  
California limited liability company,

Plaintiff,

v.

OURPLANE CORP., a New York  
corporation., et al.,

Defendants.

CASE NO. SACV09-00268JVS (RNBx)

**[PROPOSED] ORDER  
GRANTING DEFENDANT'S  
MOTION TO DISMISS FOR  
IMPROPER VENUE**

Hearing Date: Monday, May 18, 2009  
Time: 1:30 P.M.  
Ctmm: 10C  
Judge: Hon. James V. Selna

The Court having considered Defendant OurPLANE Corp.'s Motion to Dismiss for Improper Venue (the "Motion") and the entire record herein, and the Court having found that said Motion is well grounded, the Court hereby GRANTS the Motion pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure. Plaintiff Blume Engineering LLC's commencement of this action in the United States District Court for the Central District of California (Southern Division) breached the forum selection clause in the parties' written contract, which expressly requires this controversy be adjudicated in the Michigan Circuit Court, Kent County, Michigan, or in the United

1 States District Court for the Western District of Michigan. Under federal law, forum  
2 selection clauses in commercial contracts are presumptively valid and enforceable. *See*  
3 *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 589-95 (1991); *The Bremen v. Zapata*  
4 *Off-Shore Company*, 407 U.S. 1, 10 (1972); *Manetti-Farrow, Inc. v. Gucci America,*  
5 *Inc.*, 858 F.2d 509, 514 (9th Cir. 1988). Nothing in the record suggests that Plaintiff has  
6 shouldered its "heavy burden" of establishing grounds for rejecting enforcement of the  
7 forum selection clause in the parties' written contract. *See Fireman's Fund Ins. Co. v.*  
8 *M.V. DRS Atlantic*, 131 F.3d 1336, 1338 (9th Cir. 1997).

9 As such, this Court finds the challenged forum selection clause valid and  
10 concludes it must be enforced. Because Plaintiff and Defendant agreed that "all actions  
11 or proceedings" regarding the interpretation or enforcement of their contract and "any  
12 disputes arising under" their contract "shall be brought in the Michigan Circuit Court,  
13 Kent County, Michigan, or the United States District Court for the Western District of  
14 Michigan," this Court concludes that venue in the Central District of California is  
15 improper.

16 Good cause appearing therefore, Plaintiff's First Amended Complaint is hereby  
17 DISMISSED without prejudice to the refileing of their claims in Michigan.

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19 IT IS SO ORDERED.

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21 DATED: \_\_\_\_\_, 2009

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25 THE HONORABLE JAMES V. SELNA  
26 United States District Judge  
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