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9 UNITED STATES DISTRICT COURT  
10 CENTRAL DISTRICT OF CALIFORNIA  
11 (SOUTHERN DIVISION)

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

14 Plaintiff,

15 v.

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

18 Defendants.

CASE NO. SACV09-00268JVS (RNBx)

**REPLY IN SUPPORT OF  
DEFENDANT OURPLANE CORP.'S  
MOTION TO DISMISS FOR  
IMPROPER VENUE**

[Fed. R. Civ. Proc. 12(b)(3)]

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

ORAL ARGUMENT REQUESTED

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1 **I. INTRODUCTION**

2 To preserve its improper venue choice, plaintiff Blume Engineering invites legal  
3 error by proposing an erroneous standard for "unreasonableness" and "injustice" when  
4 assessing the propriety of defendant OurPLANE 's motion to dismiss under Fed. R. Civ.  
5 Proc. 12(b)(3). Blume recites a litany of complaints appealing to traditional forum non  
6 conveniens jurisprudence: (i) OurPLANE's representatives never explained to Wolfram  
7 Blume, Blume's eponymous President, that claims arising under the parties' Equity Use  
8 License Agreement ("License Agreement") would have to be filed in Michigan, rather  
9 than in California or some other state; (ii) litigating in Michigan will be expensive and  
10 inconvenient; (iii) this dispute is centered here and has nothing to do with Michigan;  
11 (iv) the parties' choice-of-forum provision is designed to discourage legitimate suits in  
12 the various states where OurPLANE does business; and (v) that OurPLANE's outside  
13 general counsel is located in Michigan does not support Michigan's reasonableness as a  
14 forum. While in some hypothetical case Blume's complaints and arguments  
15 conceivably might have satisfied the "injustice" and "unreasonableness" standard for  
16 traditional forum non conveniens purposes, they are unavailing here. This is not a  
17 forum non conveniens case, and that is the wrong standard.

18 As the Supreme Court and the Ninth Circuit have made clear, the standard for  
19 establishing "unreasonableness" and "injustice" sufficient to overcome a valid  
20 contractual forum provision is quite high indeed -- a threshold that Blume has not and  
21 cannot surmount in this case. None of Blume's quibbles suggests the slightest taint of  
22 fraud or bad faith of any kind here; and none suggests that litigating in Michigan would  
23 contravene California public policy. Taking all of Blume's arguments and evidence in  
24 the light most favorable to it, they fall far short of meeting Blume's "heavy burden" of  
25 showing Michigan litigation would be so "gravely difficult and inconvenient" that  
26 Blume would "for all practical purposes be deprived of its day in court." *Argueta v.*  
27 *Banco Mexicano, SA*, 87 F.3d 320, 324 (9th Cir. 1996).

1 **II. ARGUMENT**

2 **A. When Viewed Against The Correct Legal Standard, Blume Has Failed**  
3 **To Demonstrate That The License Agreement's Forum Selection**  
4 **Clause Is Either "Invalid," "Unreasonable," Or "Unjust."**

5 Blume neither alleges in its First Amended Complaint nor argues now that  
6 OurPLANE engaged in fraud infecting the forum selection clause's validity. Apart from  
7 arguing that Mr. Blume was unaware of the clause's existence because it was not  
8 explained to him and he evidently did not read it (addressed at § II.A.1. below), Blume  
9 makes no claim that either the Agreement or its forum selection clause are somehow  
10 "invalid." *See The Bremen v. Zapata Off-Shore Company*, 407 U.S. 1, 10 & 15 (1972)  
11 (a "valid" forum selection clause is presumptively enforceable); *Stewart Org., Inv. v.*  
12 *Ricoh Corp.*, 487 U.S. 22, 33 (Kennedy, J., concurring) (1988) ("a valid forum-  
13 selection clause [should be] given controlling weight in all but the most exceptional of  
14 cases." ). Rather, Blume 's attack on the forum selection clause is premised on its  
15 "unreasonableness" and "inconvenience."

16 It is true that a valid, a mandatory forum selection clause in rare cases might be  
17 avoided if the party challenging it demonstrates that its application would be  
18 "unreasonable" as defined by *Bremen*, 407 U.S. at 10 & 15, *Carnival Cruise Lines v.*  
19 *Shute*, 499 U.S. 585, 594 (1991), and their progeny. But the forum non conveniends  
20 standard of "unreasonableness" is not the same as the forum selection clause standard of  
21 "unreasonableness."

22 Blume fails to appreciate the critical, substantive difference between "the  
23 inconvenience necessary to establish unreasonableness of a forum selection clause and  
24 the balancing of convenience appropriate in a change of venue or forum non conveniens  
25 motion." *Pelleport Investors, Inc. v. Budco Quality Theatres*, 741 F.2d 273, 281 (9th  
26 Cir. 1984). When analyzing a forum selection clause's "unreasonableness" or  
27 "inconvenience," the Ninth Circuit has expressly rejected reliance on the traditional  
28 forum non conveniens balancing test. *See, e.g., Mahoney v. DePuy Orthopaedics, Inc.*,

1 No. CIV F 07-1321 AWI SMS, 2007 U.S. Dist. LEXIS 85856, 2007 WL 3341389, at \*9  
2 (E.D. Cal. Nov. 8, 2007) (describing two different standards). Instead, where a forum  
3 selection clause is at issue, the challenging party must satisfy a "heavy burden," and  
4 show that it would be "so difficult and inconvenient that the party would effectively be  
5 denied a meaningful day in court." *Mahoney, supra* (citing *Bremen*, 407 U.S. at 18).

6 As shown in OurPLANE's opening brief and below, measured against the correct  
7 legal standard, Blume has not met its burden of showing that the forum selection clause  
8 here is "invalid," "unreasonable," or somehow "unjust."

9 **1. Blume's Alleged Ignorance Of The License Agreement's Forum  
10 Selection Clause Is Irrelevant**

11 In his declaration (at ¶ 6)<sup>1</sup> and opposition brief (at 3:11-20), Blume argues that it  
12 would be unreasonable and unjust to enforce the forum selection clause here because  
13 OurPLANE's representatives did not explain the clause to Mr. Blume (and he evidently  
14 did not read it himself). The argument is erroneous: not reading the contract is Blume's  
15 fault.

16 Basic contract law establishes a duty to read the contract; it is no defense to say,  
17 "I did not read what I was signing." *See, e.g., Upton v. Tribilcock*, 91 U.S. 45, 50  
18 (1875) ("It will not do for a man to enter into a contract, and, when called upon to  
19 respond to its obligations, to say that he did not read it when he signed it, or did not  
20 know what it contained. If this were permitted, contracts would not be worth the paper  
21 on which they are written. But such is not the law."); J. Calamari & J. Perillo,  
22 *CONTRACTS*, § 9-44, p. 418-21 (3d ed. 1987) (stating rule and citing cases nationwide) ;  
23 *REST.2D CONTRACTS*, § 157, com. b, p. 417( "Generally, one who assents to a writing is  
24 presumed to know its contents and cannot escape being bound by its terms merely by

25 <sup>1</sup> For this brief's purposes, OurPLANE assumes the correctness of Blume's factual  
26 submissions, and the reasonable inferences derived from them, only because this Court  
27 is required to do the same when ruling on Rule 12(b)(3) motions. *See Murphy v.*  
28 *Schneider Nat'l Inc.*, 362 F.3d 1133, 1139 (9th Cir. 2004) (stating rule). For that reason,  
OurPLANE has not made evidentiary objections to Mr. Blume's Declaration submitted  
in support of Blume's opposition. OurPLANE by its silence, however, does not  
concede the entire accuracy of Mr. Blume's factual recitations.

1 contending that he did not read them; his assent is deemed to cover unknown as well as  
2 known terms.”).

3       There is no evidence or even argument that OurPLANE representatives asked  
4 Blume not to read the Lease Agreement, or somehow misled, lulled, or otherwise  
5 prevented him from doing so. *Cf. Marine Bank, National Association v. The Meat*  
6 *Counter, Inc.*, 826 F.2d 1577, 1582 (7th Cir. 1987) (summary judgment reversed  
7 because genuine issues of fact still existed regarding whether signing a document  
8 without having read it was justifiable because, among other things, bank had not asked  
9 guarantor not to read the loan document). Nothing indicates that the Lease Agreement  
10 was presented as a take-it-or-leave-it proposition. *See Pelleport Investors, Inc.*, 741  
11 F.2d at 281. Moreover, the reluctance to enforce the duty to read usually is reserved for  
12 rare situations where to enforce the duty would be "unfair under the circumstances,"  
13 Calamari & Perillo, *CONTRACTS*, § 9-44, at 421, or would cause "great hardship, *id.* at  
14 419. Neither evil is present here.

15       "A forum selection clause stated in clear and unambiguous language . . . is  
16 considered reasonably communicated to the plaintiff in determining its enforceability."  
17 *Vitricon, Inc. v. Midwest Elastomers, Inc.*, 148 F. Supp. 2d 245, 247 (E.D.N.Y. 2001)  
18 (citing *Effron*, 67 F.3d at 9). Even if the License Agreement were deemed to be an  
19 adhesion contract -- which it is not -- it cannot reasonably be maintained that the "Situs,  
20 Jurisdiction and Venue" provision at Paragraph 45 of the License Agreement  
21 (capitalization and underlining in the original) was not "reasonably communicated" to  
22 any person of average intelligence and sophistication who actually read the contract.  
23 *See Carnival Cruise Lines*, 499 U.S. at 595 (forum selection clause printed on back of  
24 cruise line ticket was "reasonably communicated" to customers); *Effron*, 67 F.3d at 9  
25 (same).

26       Here, Mr. Blume obviously is an educated and successful professional and  
27 businessman: he is an electrical engineer who runs a company sufficiently successful to  
28

1 support a \$500,000 investment in a fractional interest in a jet plane. Even Mr. Blume  
2 does not suggest that he lacks the resources necessary to litigate this action in Michigan.

3 To bind a sophisticated commercial entity to the provisions of its contracts, it  
4 usually is not necessary to demonstrate the entity's authorized representative actually  
5 read and understood the contract and its terms. "The opportunity to read [whether or  
6 not he/she actually reads] a clearly identified and intelligible forum selection clause  
7 before accepting the contract provides sufficient notice to plaintiff." *Roberson v.*  
8 *Norwegian Cruise Line*, 897 F. Supp. 1285, 1289 (C.D. Cal. 1995). It is, therefore, the  
9 reasonable opportunity to read it, not whether the contract was actually read that  
10 imposes constructive knowledge of its terms on the contracting party, or estops them the  
11 avoiding their contractual obligations. Someone of Mr. Blume's background,  
12 intelligence and experience is duty-bound to read important commercial contracts (or  
13 have them read or explained to him) before signing them on behalf of his company. As  
14 stated by the Ninth Circuit: "We see no unfairness in expecting parties to read contracts  
15 before they sign them." *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 287 (9th  
16 Cir. Cal. 1988).

17 The forum selection clause, and the License Agreement containing it, are valid  
18 and enforceable even if Mr. Blume did not read them.

19 **2. The Alleged Expense, Inconvenience And Annoyance That May**  
20 **Be Occasioned By Litigating In Michigan Do Not Justify**  
21 **Abrogating The Parties' Contractually-Chosen Forum**

22 Almost invariably it will be more convenient, less expensive and less annoying  
23 for a plaintiff to litigate in its home forum. But that provides no justification for the  
24 plaintiff to breach its contractual promise to litigate in another forum. Pursuing a  
25 lawsuit in another state is not per se unreasonable; indeed, Blume's inconvenience of  
26 litigating in Michigan pales in comparison to the inconvenience of physically-injured  
27 individual consumers having to sue cruise lines in the home-state jurisdictions. But  
28 forum selection clauses in small print on the back of cruise line tickets have been

1 enforced against injured vacationers by our Supreme Court and lower federal courts  
2 cases after case. *See Carnival Cruise Lines*, 499 U.S. at 594. Whatever "injustice" this  
3 reasoning might entail as a practical matter, it has been adopted and implemented  
4 consistently by the Ninth Circuit and District Courts sitting in California. *See, e.g.,*  
5 *Fireman's Fund Ins. Co. v. M.V. DSR Atl.*, 131 F.3d 1336, 1338 (9th Cir. 1998)  
6 ("serious inconvenience" of litigating in Korea did not render clause "unreasonable");  
7 *Flake v. Medline Industries, Inc.*, 882 F. Supp. 947, 949-950 (E.D. Cal. 1995) (J. Levi)  
8 (clause requiring California plaintiff to litigate in Illinois upheld); *Koresko v.*  
9 *RealNetworks, Inc.* 291 F. Supp. 2d 1157, 1158 (E.D. Cal. 2003) (J. Wanger)  
10 (upholding clause requiring California plaintiff to file suit in Washington state).

11 "A forum is not necessarily inconvenient because of its distance from pertinent  
12 parties or places if it is readily accessible in a few hours of air travel." *See, e.g., Calavo*  
13 *Growers of California v. Generali Belgium*, 632 F.2d 963, 969 (2d Cir. 1980), *cert.*  
14 *denied*, 449 U.S. 1084 (1981). This is so because, with the advent of modern  
15 communication and transportation facilities, a party may "have its day in court" without  
16 ever stepping foot in a courtroom. *See Effron v. Sun Line Cruises, Inc.*, 67 F.3d 7, 11  
17 (2d Cir. 1995) (holding that while plaintiff claimed that he was physically disabled and  
18 that travel to a foreign venue was so expensive and difficult as to deprive him of his day  
19 in court). As stated by Judge Susan Illston,

20 To meet the heavy burden required to overcome the presumption that a  
21 forum selection clause is valid, **plaintiff must show that it is an**  
22 **impossibility for her to try her case, not simply a less convenient or**  
23 **effective means of doing so.** Financial stability enables a plaintiff to  
24 secure appropriate means of travel and medical assistance unavailable to  
25 those facing extreme poverty. Likewise, the availability of electronic filing  
and video and teleconferencing technology limits the need for travel.

26 *Pratt v. Silversea Cruises, Ltd.*, No. C 05-0693 SI , 2005 U.S. Dist. LEXIS 14339, at  
27 \*\*11-12 (N.D. Cal. July 12, 2005) (emphasis added).

1 By agreeing to a forum selection clause, the parties already have voiced a  
2 preference as to which forum is more convenient. *See Pelleport*, 741 F.2d at 281  
3 (enforcing forum selection clause specifying the L.A. Superior Court even though  
4 plaintiff and all his witnesses resided in the East Coast). Blume has not shown that it is  
5 impracticable, much less impossible, to litigate its claims in Michigan.

6 **3. That The Dispute Did Not Arise In Michigan Does Not**  
7 **Undermine The Forum Selection Clause's Enforceability**

8 Blume's assertion that the transactions and occurrences giving rise to this action  
9 occurred almost entirely in California, and did not occur at all in Michigan -- even if  
10 incontestably true -- does not alter the conclusion that the Michigan forum selection  
11 clause is both valid and enforceable. Where, as here, the contracting parties are  
12 sophisticated business entities, it is not unreasonable to designate a neutral forum for  
13 their disputes even if that forum has *no* relation to either of them or their dispute. *See,*  
14 *e.g., Contraves Inc. v. McDonnell Douglas Corp.*, 889 F. Supp. 470, 474 (M.D. Fl.  
15 1995) (enforcing New York forum selection clause in contract between Pennsylvania  
16 and Missouri corporations calling for performance in Florida, Missouri and China). To  
17 the extent Blume is required to go from California to Michigan to litigate its claims,  
18 OurPLANE by the same token will have to travel to Michigan from Virginia and  
19 Canada to defend against those claims. There is nothing unfair about sophisticated  
20 parties choosing a neutral forum to which each party must travel to litigate their  
21 disputes.

22 **4. Choosing A Single, Neutral Forum To Litigate Disputes Arising**  
23 **From A Standard Contract Involving Potential Claims**  
24 **Nationwide Promotes Judicial And Economic Efficiencies**

25 Blume asserts that the Michigan forum selection clause is designed to discourage  
26 the commencement and prosecution of legitimate contractual claims in the venues in  
27 which the claims arise. This assertion proves too much.

28 Of course forum selection clauses are designed to "discourage" the institution of  
litigation in fora outside the specific venue chosen by the parties in their contract: that

1 is their purpose and intended effect. Such clauses provide a degree of certainty, both for  
2 businesses and their customers, that contractual disputes will be resolved in a particular  
3 forum. *Carnival Cruise Lines*, 499 U.S. at 593–594. If businesses, like OurPLANE,  
4 which conduct business in multiple states in which claims may and do arise in scores of  
5 potential judicial districts, cannot employ contractual forum selection clauses to localize  
6 all litigation in a single forum (and thereby "discourage" litigation in other fora), the  
7 increased cost and uncertainty of doing business and responding to litigation challenges  
8 would harm both businesses and their customers (who may face higher costs to defray  
9 increased, geographically-dispersed litigation costs). *Id.* The forum selection clause  
10 here is no more objectionable, on any grounds, than the clause upheld as "reasonable" in  
11 *Carnival Cruise Lines*. *Id.*

12 **5. The Location Of OurPLANE's Outside General Counsel In**  
13 **Michigan Provides A Reasonable Basis For Choosing Michigan**  
14 **As A Forum For Contract Disputes Involving OurPLANE**

15 There is nothing unreasonable, much less nefarious, in OurPLANE's choice of  
16 Michigan as the forum for its business disputes given that its outside general counsel  
17 (which drafts its contracts) is located in Michigan. Litigants can expect to receive just  
18 treatment by federal and state courts sitting in Michigan, which have fine reputations for  
19 effective and fair judicial administration. Blume does not suggest otherwise. If it is  
20 prima facie reasonable for a corporation to select its headquarters state, where its  
21 internal legal department is located, as the situs for litigation under its standard  
22 contracts, there is no principled reason why it should be any less reasonable for another  
23 corporation to choose as its preferred forum for litigation where its outside general  
24 counsel maintains its office, from which its legal affairs are conducted. In all events,  
25 OurPLANE does not have the burden of establishing that its choice of forum, Michigan,  
26 is reasonable; Blume has the "heavy burden" of establishing that Michigan is a  
27 manifestly *unreasonable* forum. It has not done so. *See Argueta*, 87 F.3d at 324.

1           **B.     The Court Should Dismiss This Action For Improper Venue Without**  
2           **Prejudice, And Not Exercise Its Discretion To Transfer It To Michigan**

3           In the final sentence of its opposition brief, Blume requests that that, if the Court  
4 is inclined to grant OurPLANE's motion, it should not dismiss the action but instead  
5 transfer it to the Southern Division (Lansing) of the United States District Court for the  
6 Western District of Michigan (citing *Panetta v. SAP Am., Inc.*, Case No.C-05-01696  
7 RMW, 2005 U.S. Dist. LEXIS 36813, \*\*10-11 (N.D. Cal. July 20, 2005)). Putting  
8 aside the fact that the parties' forum selection clause dictates venue in the Western  
9 District of Michigan, but not in any particular division of that District, the interests of  
10 justice would not be served by transferring the action rather than dismissing it.

11           First, OurPLANE did not move for transfer in the alternative to dismissal. *See*  
12 *Panetta, supra* ("When a party brings a motion to dismiss for improper venue, *or in the*  
13 *alternative to transfer venue*, the "usual procedure should be transfer rather than  
14 dismissal." (citing 15 C. Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE § 3827, p.  
15 274 (2d ed. 1986) [emphasis added].).

16           Second, while courts have held that a transfer is in the interest of justice when an  
17 applicable statute of limitations has run after the plaintiff's initial filing (*see, e.g.*,  
18 *Minnette v. Time Warner*, 997 F.2d 1023, 1026-1027 (2d Cir. 1993); *U.S. v. Miller-*  
19 *Stauch*, 904 F. Supp. 1209, 1214 (D. Kan. 1995)), no statute of limitations problems are  
20 present here.

21           Finally, while transfer instead of dismissal may be warranted when a plaintiff  
22 "merely . . . had made an erroneous guess with regard to the existence of some elusive  
23 fact upon which venue provisions often turn" (*Goldlawr, Inc. v. Heiman*, 369 U.S. 463,  
24 466 (1962)), that is not the case here. Filing in this venue was not the result of an  
25 "erroneous guess." Blume is a sophisticated commercial enterprise that had the ability  
26 and wherewithal to retain highly-skilled counsel -- Alan Gordee of Gordee, Nowicki &  
27 Arnold LLP -- to prosecute its contract claims. Instead, for their own apparent  
28 convenience, they made a calculated decision to file their claims in an improper district

1 in breach of the forum selection clause in the License Agreement.

2 Accordingly, the First Amended Complaint should be dismissed, not transferred.

3 **III. CONCLUSION**

4 For all of the foregoing reasons, the Court should dismiss Plaintiff's First  
5 Amended Complaint for improper venue under Fed. R. Civ. Proc. 12(b)(3).

6  
7 DATED: May 11, 2009

8 LAW OFFICES OF MARK ANCHOR ALBERT

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11 By: \_\_\_\_\_  
12 Mark Anchor Albert  
13 Attorneys for Defendant OurPLANE Corp.  
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**PROOF OF SERVICE**

I, Mark Anchor Albert, declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 333 S. Grand Avenue, 25th Floor, Los Angeles, California 90071. I served the foregoing document described as

**REPLY IN SUPPORT OF DEFENDANT OURPLANE CORP'S MOTION TO DISMISS FOR IMPROPER VENUE**

on the interested parties in this action on the dates and in the manner that follow:

- by transmitting via facsimile the documents listed above to the fax number set forth below on this date. This transmission was reported as complete without error by a transmission report issued by the facsimile machine upon which the said transmission was made immediately following the transmission. A true and correct copy of the said transmission is attached hereto and incorporated herein by this reference.
- by placing the document listed above Mary 6, 2009 in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.
- by electronic transmission. I caused the document(s) listed above to be transmitted on May 11, 2009 in accordance with the parties' agreement by electronic mail in PDF format to the individuals on the service list as set forth below.
- by placing the document listed above in a sealed envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a \_\_\_\_\_ agent for Delivery.
- by personally delivering the document listed above to the persons at the address set forth below.

**Alan J. Gordee**  
**Gordee, Nowicki & Arnold**  
**8105 Irvine Center Drive, Suite 550**  
**Irvine, California 92618**  
**Email: agordee@gna-law.com**

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postal meter date is more than one day after date of deposit for mailing in affidavit.

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Executed on May 11, 2009 at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.



A handwritten signature in black ink, appearing to read 'M. Albert', is written above a horizontal line.