IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MORTGAGE PLUS, INC.,

Plaintiff,

v. No. 03-2582-GTV-DJW

DOCMAGIC, INC.
d/b/a Document Systems, Inc.,

Defendant.

MEMORANDUM AND ORDER

Pending before the Court is Defendant's Motion to Transfer (doc. 9) this action to the Central District of California. Also pending is Plaintiff's Motion for Leave to File Surreply to Defendant's Reply Memorandum (doc. 23). The Court will grant Plaintiff's Motion to Leave to File Surreply and, upon consideration of the briefing before the Court, including the referenced Surreply,[1] will grant Defendant's Motion to Transfer.

Background

Plaintiff Mortgage Plus, Inc. is a mortgage lender engaged in the business of originating mortgage loans in the State of Kansas, its principal place of business. In the Fall of 1997, Mortgage Plus began looking for computer software and related services to assist in preparation and management of loan closing documents. Mortgage Plus asserts it subsequently negotiated and entered into a contract with Defendant DocMagic, Inc. – a California corporation – whereby Mortgage Plus agreed to pay specific amounts to

[1]The Surreply is attached as an exhibit to Plaintiff's Motion (doc. 23).

DocMagic in exchange for access and use of software as well as for document preparation services. Mortgage Plus maintains that neither during these negotiations nor in the resulting contractual agreement did the parties discuss a venue where a potential dispute between the parties would have to be filed and resolved. Although no documentation of this contractual agreement has been submitted to the Court, Mortgage Plus asserts in its pleadings that the terms of this original agreement included the following price structure:

- Standard Draw w/ email transfer: $40
- Standard Draw w/o email transfer: $35
- 1st Re-Draw w/ email transfer: $25
- 1st Re-Draw w/o email transfer: $20
- 2nd Re-Draw w/ email transfer: $25
- 2nd Re-Draw w/o email transfer: $20
- 3+ Re-Draws w/ email transfer: $5 each
- 3+ Re-Draws w/o email transfer: N/C
- Additional Software User Fee $95

DocMagic disputes the existence of any informal or formal agreement regarding the use of its software and services at this stage of the parties' discussion regarding prices. The parties do agree, however, that DocMagic ultimately shipped to Mortgage Plus a CD-ROM containing the software required to begin using DocMagic's loan document preparation services. The parties further agree that in order to begin using DocMagic's services, a customer must load the software from the CD-ROM onto a designated computer. Before the software is installed on the customer's computer, a window displaying a Software License and User Agreement ("Agreement") appears on the screen. At the end of the Agreement, the following text is displayed: "Do you accept all terms of the preceding License Agreement? If you choose No, Setup will close." Notably, the Licensing Agreement contains a forum selection clause stating: "Both

you and [DocMagic] submit to jurisdiction in California and further agree that any cause of action arising under this Agreement shall be brought in the appropriate court in Los Angeles, California."

After installing the software, Mortgage Plus regularly began utilizing the software and DocMagic's document preparation services. Preparation of loan documents with DocMagic involved a three-step process. The first step required a Mortgage Plus representative to use the DocMagic software to enter the specific loan information, which then created a user worksheet. The Mortgage Plus representative then electronically sent the user worksheet to DocMagic for processing and, after such processing, final loan documents that incorporated the information previously submitted in the worksheet were electronically transferred to Mortgage Plus via e-mail for printing.

On October 23, 2003, Mortgage Plus filed a lawsuit against DocMagic in the District Court of Johnson County, Kansas alleging that in various loan transactions, DocMagic's software failed to produce documents in the manner required by the federal Truth In Lending Act ("TILA"). Mortgage Plus claims that these errors or omissions resulted in borrowers bringing claims against it for such violations and that the claims ultimately cost Mortgage Plus $150,000 to resolve. The lawsuit, which consists of both contract and tort claims, subsequently was removed to this Court.

After removal, Defendant filed the pending Motion to Transfer this action to the Central District of California on grounds that the terms of the Licensing Agreement require all claims arising out of the Agreement to be brought in Los Angeles, California. Plaintiff opposes transfer of any and all of its claims and asserts that the forum selection clause should not be enforced on several grounds. First, Plaintiff disputes the validity of the Software Licensing Agreement as a contractual agreement between the parties. Second, Plaintiff challenges the enforceability of the forum selection clause. Next, Plaintiff argues that its

tort law claims are not transferable because they did not arise under the Software Licensing Agreement. Finally, Plaintiff argues it would be in the interest of justice to keep the entire case in the District of Kansas because it is a more convenient forum.

Discussion

Upon review of the parties' arguments and the applicable law, the Court finds there are two primary issues to be determined. The first issue is whether the Software Licensing Agreement is a valid contract. The second issue is whether this case should be transferred pursuant to 28 U.S.C. § 1404(a) and, within that issue, the extent to which the forum selection clause is enforceable. The Court will address each issue accordingly.

A. Is the Software Licensing Agreement a Valid Contract?

1. Choice of Law

To determine whether an agreement exists and, if so, the terms of such an agreement, a federal court must apply state law.[2] When exercising diversity jurisdiction, the court must apply the forum state's choice of law rules to determine which state's substantive law applies.[3] Thus, in this case, Kansas choice of law rules govern whether the Licensing Agreement is to be construed under Kansas or California law.

Under Kansas choice of law rules, "[t]he law of the forum applies unless it is expressly shown that a different law governs, and in case of doubt, the law of the forum is preferred."[4] "Generally, the party

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[2]*M.K.C. Equip. Co. v. M.A.I.L. Code, Inc.*, 843 F. Supp. 679 (D. Kan.1994).

[3]*Boyd Rosene & Assoc. v. Kan. Mun. Gas Agency*, 123 F.3d 1351, 1352-53 (10th Cir. 1997) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 495-97 (1941)).

[4]*Philippine Am. Life Ins. v. Raytheon Aircraft Co.*, 252 F. Supp.2d 1138, 1142 (D. Kan.2003) (citing *Sys. Design & Mgmt. Info. Inc. v. Kansas City Post Office Employees Credit Union*, 14

seeking to apply the law of a jurisdiction other than the forum has the burden to present sufficient facts to show that other law should apply."[5]

As a preliminary matter, this Court notes that Kansas choice of law rules honor an effective choice of law provision made by contracting parties.[6] In the absence of such a choice of law provision, Kansas choice of law rules alternatively provide the law of the jurisdiction where the last act necessary to form a contract occurs that governs the contract's interpretation.[7]

The Court, however, finds neither of these Kansas choice of law rules applies to the facts presented, because both rules assume the existence of a contract in the first place.[8] Where, as here, the parties dispute the very existence of the alleged contract, a choice of law analysis that considers the formation of and/or the terms and conditions of such a contract is inherently defective. In the absence of a contract, "[t]he law of the forum applies unless it is expressly shown that a different law governs, and in case of doubt, the law of the forum is preferred."[9] Thus, the Court concludes Kansas law is the preferred

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Kan.App.2d 266, 788 P.2d 878, 881 (Kan.App.2d 1990)).

[5]*Miller v. Dorr*, 262 F. Supp.2d 1233, 1237 (D. Kan.2003) (citing *Layne Christensen Co. v. Zurich Canada*, 30 Kan.App.2d 128, 38 P.3d 757, 767 (Kan. App. 2002)).

[6]*Equifax Servs. Inc. v. Hitz*, 905 F.2d 1355, 1360 (10th Cir.1990).

[7]*Hall-Kimbrell Envtl. Servs., Inc. v. Archdiocese of Detroit*, 878 F. Supp. 1409, 1414 n.3 (D. Kan. 1995) (citing *Neumer v. Yellow Freight Sys., Inc.*, 220 Kan. 607, Syl. ¶ 2, 556 P.2d 202 (1976)) (Kansas follows "lex loci contractus" theory of contract interpretation; law of place contract was made governs construction of contract).

[8]See *Excel Laminates, Inc. v. Lear Corp.*, No. 01-2172-GTV, 2003 WL 22466192, *3 (D. Kan. Oct. 28, 2003) (rejecting claimant's argument that a contract's choice of law provision was binding where the parties disputed the existence of the contract) (citation omitted).

[9]*Philippine Am. Life Ins. v. Raytheon Aircraft Co.*, 252 F. Supp.2d at 1142.

law to apply to determine whether the Software Licensing Agreement is a valid contract. This conclusion is supported by the fact that in their briefing, both parties primarily rely on Kansas and Tenth Circuit law.

2. The Validity of the Software Licensing Agreement

Mortgage Plus argues the purported license agreement is invalid, as it improperly attempts to supplement and/or modify the terms of the parties' original contractual agreement. In support of this argument, Mortgage Plus maintains that prior to the subject license agreement, Mortgage Plus and DocMagic negotiated and entered into a contract whereby Mortgage Plus agreed to pay specific amounts to DocMagic in exchange for document preparation services. Mortgage Plus submits that when DocMagic shipped the software necessary to utilize these services, the parties entered into a binding contract and that neither during these negotiations nor in the resulting agreement did the parties discuss a venue where a potential dispute between the parties would have to be filed and resolved.

a. Analysis under the Uniform Commercial Code

Relying first on Section 2-207 of the Uniform Commercial Code (U.C.C.),[10] Mortgage Plus argues that DocMagic's attempt to modify and/or supplement the terms of the alleged original contractual agreement through the licensing agreement was a mere proposal and, in the absence of additional consideration and the express agreement of Mortgage Plus, does not alter the terms of the original contractual agreement.

The Court finds this reasoning critically flawed, as Mortgage Plus improperly relies on the Uniform Commercial Code to support its argument. The U.C.C. applies only to the sale of goods and is not

[10]Codified by Kansas at K.S.A. 84-2-102.

applicable to the sale of services.[11] Even if the contract here is construed to include both services and goods, Kansas law dictates the U.C.C. will apply only when the "predominant" purpose of the contract is a sale of goods.[12] In this case, the *service* provided by DocMagic in preparing documents for Mortgage Plus and other lender customers clearly is the predominant purpose of the Agreement. The software provided to DocMagic customers is worthless without the actual loan preparation services; thus, the software is wholly incidental to the agreement. This is supported by the fact that although Mortgage Plus continued to possess the referenced software after DocMagic discontinued its loan preparation services, Mortgage Plus immediately sought to restore its access to the loan preparation services, claiming such services were critical to close outstanding loans.

In sum, the Court is persuaded that the predominant purpose of the agreement between the parties here was providing loan preparation services; thus, any agreement between the parties is not covered by the Uniform Commercial Code.

b. Analysis under Traditional Contract Principles

i. Validity of the Software Licensing Agreement as a Modification to the Original Contractual Agreement

Notwithstanding inapplicability of the U.C.C., Mortgage Plus argues it is not bound by the Software Licensing Agreement because the license was not an "agreed-to" modification of the original agreement between the parties. The Court is not persuaded by this argument.

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[11]U.C.C. § 2-102 (1998).

[12]*M.K.C. Equipment Co., Inc. v. M.A.I.L. Code, Inc.*, 843 F. Supp. 679, 684 (D. Kan. 1994); *Hope's Architectural Prods., Inc. v. Lundy's Constr., Inc.*, 781 F. Supp. 711, 713 (D. Kan. 1991); *Systems Design and Mgmt Information Inc. v. Kansas City Post Office Employees Credit Union*, 14 Kan. App. 2d 266, 271 (1990).

First, Mortgage Plus has failed to present evidence to establish existence of the phantom "original contract," including but not limited to the date the contract was formed, the terms and conditions of the contract (other than pricing) or documents memorializing the agreement. The Court cannot find the software licensing agreement improperly altered the terms and conditions of the original contractual agreement when there is no evidence that an original contractual agreement ever existed.

ii. Validity of the Software Licensing Agreement as the Primary Agreement

Mortgage Plus next contends that even in the absence of an original agreement, it simply was not aware of and never accepted any version of the Software Licensing Agreement. In support of its contention, Mortgage Plus states (1) a clickwrap agreement consisting of a window entitled "Software Licensing Agreement" appearing prior to installation of software cannot be construed as a legally binding contract; (2) the Software Licensing Agreement is not supported by consideration; and (3) the Software Licensing Agreement was not agreed to by an employee with the authority to bind the company.

(1) Validity of "Clickwrap" License Agreements

A license is a form of contract and is objectionable on grounds applicable to contracts in general.[13] By the terms of the license here, installation and use of the software with the license attached constituted acceptance of the license terms. The license was "bundled" with the DocMagic software, meaning that the software required users to accept the terms by clicking through a series of screens before they could access and subsequently install the software. This type of license is known as a "clickwrap" license agreement. Such agreements are common on websites that sell or distribute software programs.[14] The

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[13]*ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996).

[14]*Stomp, Inc. v. NeatO, LLC*, 61 F. Supp.2d 1074, 1081 (C.D. Cal.,1999).

term "clickwrap" agreement is borrowed from the idea of "shrinkwrap agreements," which are generally license agreements placed inside the cellophane "shrinkwrap" of computer software boxes that, by their terms, become effective once the "shrinkwrap" is opened. Courts have found both types of licenses valid and enforceable.[15] And, although it appears no Kansas court has considered the validity of a "clickwrap" license agreement, this Court recently was confronted with, and refused to enforce, a "shrinkwrap" license agreement.[16]

In *Klocek v. Gateway*, the Court considered a standard "shrinkwrap" license agreement that was included in the box containing the computer ordered by the plaintiff. Relying on Section 2-207 of the UniformCommercialCode applicable to the sale of goods, the Court held that the computer purchaser was the offeror, and that the vendor accepted the purchaser's offer by shipping the computer in response to the offer. Given the purchaser was not a merchant, the Court held the vendor's enclosure of the license agreement in the computer box did not become part of the parties' agreement unless the purchaser expressly agreed to them.[17] More specifically, the Court found the vendor had not made acceptance of

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[15]*See ProCD*, 86 F.3d at 1449 (shrinkwrap); *Adobe Sys., Inc. v. Stargate Software, Inc.*, 216 F.Supp.2d 1051 (N.D.Cal.2002) (shrinkwrap); *I.Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F.Supp.2d 328, 338 (D.Mass.2002) (click-wrap); *Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc.*, 85 F.Supp.2d 519, 527 (W.D.Pa.2000) (shrinkwrap); *Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007 (D.C.2002) (click-wrap); *Caspi v. Microsoft Network, LLC*, 732 A.2d 528 (N.J.App.Div.1999) (click-wrap); *but, see, Specht v. Netscape Communications, Corp.*, 306 F.3d 17 (2d Cir.2002) (rejecting click-wrap); *Comb v. Paypal, Inc.*, 218 F.Supp.2d 1165, 1169 (N.D.Cal.2002) (click-wrap invalid contract of adhesion).

[16]*Klocek v. Gateway, Inc.*, 104 F. Supp.2d 1332 (D. Kan. 2000).

[17]*Id.* (citing K.S.A. 84-2-207,Kansas Comment 2) (if either party is not a merchant, additional terms are proposals for addition to the contract that do not become part of the contract unless the original offeror expressly agrees)).

the license agreement a condition of the purchaser's acceptance of the computer, and that "the mere fact that Gateway shipped the goods with the terms attached did not communicate to the purchaser any unwillingness to proceed without the purchaser's agreement to the [license terms.]"[18] In concluding that the purchaser did not agree to the license terms, the Court held the purchaser could not be compelled to arbitrate as set forth in the license agreement.[19]

The facts presented in this case differ fundamentally from the facts in *Klocek*. First, and as discussed above, the U.C.C. is inapplicable because the transaction here primarily involves the sale of services, not the sale of goods. Moreover, it is undisputed between the parties in this case that Mortgage Plus had to affirmatively click the "Yes" button in assenting to the Software Licensing Agreement as a prerequisite to installing the DocMagic software.[20] It further is undisputed that the software would not be installed if Mortgage Plus did not accept the terms and conditions of the Software Licensing Agreement. Plaintiff had a choice as to whether to download the software and utilize the related services; thus, under the specific facts presented here, installation and use of the software with the attached license constituted an affirmative acceptance of the license terms by Mortgage Plus and the licensing agreement became effective upon this affirmative assent. The Court finds the clickwrap agreement here is a valid contract.

(2) Consideration

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[18]*Id.* at 1340.

[19]*Id.* at 1341.

[20]*See I.Lan Sys. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 338 (D. Mass. 2002) (holding that clicking the "I Agree" button was an explicit acceptance of clickwrap license agreement); *Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585, 595 (S.D.N.Y. 2001) ("clicking on an icon stating 'I assent' has no meaning or purpose other than to indicate . . . assent").

Next, Mortgage Plus argues the Software Licensing Agreement is not a valid contract between the parties because it is not supported by consideration. The Court is not persuaded by this agreement and finds sufficient consideration to enforce the parties' mutual obligations, *i.e.*, Mortgage Plus agreed to pay DocMagic a fee in exchange for DocMagic's permission (a) to install the loan preparation computer software program; and (b) to use the loan document preparation and delivery services provided by DocMagic in conjunction with such software.

(3) Authority to Bind

Finally, Mortgage Plus argues that the person who clicked the "yes" button indicating affirmative acceptance of the terms and conditions of the Software Licensing Agreement lacked authority to contractually bind the company. The Court again is unpersuaded by Plaintiff's argument. First, Mortgage Plus fails to identify by name, title or job description the individual(s) who accepted the terms of the Software Licensing Agreement by downloading the software. Moreover, even if such individual was not authorized to contractually bind the company, the undisputed facts establish that Mortgage Plus thereafter ratified its acceptance of the Software Licensing Agreement.

It is well-settled that a party with knowledge of the facts can ratify an unauthorized act through conduct. Ratification is the adoption or confirmation by a principal of an unauthorized act performed on its behalf by an agent.[21] One example of such ratification is election by the principal to treat the act as authorized, which includes attempting to enforce the contract or retain the benefits of the contract.[22] Under

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[21] *Theis v. duPont, Glore Forgan Inc.*, 212 Kan. 301, 304-05, 510 P.2d 1212 (1973).

[22] *Dearborn Motors Credit Corp. v. Neel*, 184 Kan. 437, 337 P.2d 992, 1001 (Kan. 1959) (by retaining benefits of contract, a party is charged with knowledge of the unauthorized act and "is presumed to have affirmed and ratified the contract, and is estopped to deny the agency.").

agency law, once a principal acquires knowledge of an agent's unauthorized actions, it cannot sit back and wait to see if it will benefit or suffer from the agent's actions. Instead, a principal who receives notice of an unauthorized act of an agent must promptly repudiate the agent's actions or it is presumed that the principal ratified the act.

Here, on at least three occasions over the course of six years, an individual within the Mortgage Plus organization installed the DocMagic software and each time was required to assent to the Software Licensing Agreement in order to complete such installation. While Mortgage Plus fails to identify the individual who accepted the terms and conditions of the Software Licensing Agreement before downloading the software, there is no dispute that for six years after such acceptance Mortgage Plus consistently utilized the loan document preparation services associated with the software. The undisputed facts establish Mortgage Plus utilized the software to create and electronically submit literally hundreds of user worksheets to DocMagic for processing and preparation of final loan documents. By doing so, Mortgage Plus obtained the benefits of the Agreement, and thereby ratified any unauthorized acceptance of its terms.

Based on this discussion, the Court finds the Software Licensing Agreement is a valid contract. Accordingly, the Court will now address whether the forum selection clause within the Licensing Agreement is enforceable.

B. Enforceability of the Parties' Forum Selection Clause Under 28 U.S.C. § 1404(a)

The determination of whether to enforce a forum selection clause in a diversity action is governed by federal law.[23] Thus, it is 28 U.S.C. § 1404(a) that governs the court's decision whether to give effect to the parties' forum selection clause and transfer the case to the Central District of California.[24] Section 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

As a preliminary mater, DocMagic contends, and Mortgage Plus does not dispute, that venue in California is appropriate for this lawsuit under 28 U.S.C. § 1391(a)(1). Given that the threshold requirement for transfer set forth in section 1404(a) has been met,[25] the Court now must consider the following factors in determining whether to transfer this case pursuant to section 1404(a): (1) Plaintiff's choice of forum; (2) the convenience for witnesses; (3) the accessibility of witnesses and other sources of proof; (4) the possibility of obtaining a fair trial; and (5) all other practical considerations that make trial expeditious and economical.[26]

Although technically the balancing of these section 1404(a) factors remains unchanged when there also exists a forum selection clause, the United States Supreme Court specifically has noted that "the presence of a forum selection clause such as the parties entered into in this case will be a significant factor

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[23]*Stewart Organization, Inc., v. Ricoh Corp.*, 487 U.S. 22, 32 (1988).

[24]*Id.* at 29.

[25]*Mid Kansas Federal Sav. and Loan Ass'n of Wichita v. Orpheum Theater Co., Ltd.*, 810 F. Supp. 1184, 1189 (D. Kan. 1992).

[26]*See Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516 (10th Cir. 1991).

While it appears Kansas has not yet addressed the issue, several courts have held that a forum provision in a contract may not only apply to litigation of the contract in which it is contained, but also to tort claims arising out of or relating to the contract, particularly when those tort claims involve the same operative facts as a parallel claim for breach of contract.[28]

In this case, Plaintiff brings four contract claims and one claim of negligent misrepresentation, a tort claim that appears to be closely related to the contract claims. The tort claim focuses on whether the representations Defendant made about the capabilities of its software were false. This issue is also present in the breach of contract, breach of express warranty and breach of implied warranty claims. The same operative facts surround each claim and, in fact, the tort claim appears to arise out of the contractual relationship to implicate the very terms of the Software Licensing Agreement at issue. Whether cast in tort or contract, the crux of Plaintiff's claim is the allegation that the software did not perform as DocMagic stated it would. Both of these claims depend on resolution of the same factual issue: whether DocMagic's software operated properly. The Court finds the forum selection clause is valid and enforceable with respect to Plaintiff's negligent misrepresentation claim.

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[28]See *Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585 (1991) (broad forum selection clause in form ticket contract enforceable with respect to passenger's negligence action); *Hitachi Credit America Corp. v. Signet Bank*, 166 F.3d 614, 628 (4th Cir.1999) (contractual choice of law provision sufficiently broad to indicate that parties intended "to cover more than merely contract claims"); *Marinechance Shipping, Ltd. v.. Sebastian*, 143 F.3d 216, 222-23 (5th Cir.1998) (district court did not err in applying forum selection clause to tort claims where nothing in clause justified limiting application to contract claims); *Terra Int'l, Inc. v. Mississippi Chemical Corp.*, 119 F.3d 688, 693-95 (8th Cir.1997) (forum selection clause applied to tort claims where tort claims involved same operative facts as parallel claim for breach of contract); *Turtur v. Rothschild Registry Int'l, Inc.*, 26 F.3d 304, 309-10 (2d Cir.1994) (applying contractual choice-of-law provision to tort claim because, by its terms, provision applied to disputes "arising out of or relating to" to the contract); *Hugel v. Corporation of Lloyd's,* 999 F.2d 206, 209 (7th Cir.1993) (holding that if the duty arises from contract, forum selection clause governs action.).

Conclusion

The Court finds the Software Licensing Agreement is a valid contract and the 28 U.S.C. § 1404(a) factors, including but not limited to the forum selection clause, weigh in favor of transfer to California with respect to both contract and tort claims asserted by Plaintiff.

Accordingly, it is hereby ordered that

(1) Plaintiff's Motion for Leave to File Surreply to Defendant's Reply Memorandum (doc. 23); and

(2) Defendant's Motion to Transfer (doc. 9) is granted and, pursuant to 28 U.S.C. § 1404(a), this case and all orders and matters therein, shall be and are transferred to the United States District Court for the Central District of California.

IT IS SO ORDERED.

Dated in Kansas City, Kansas on this 23rd day of August, 2004.

s/ David J. Waxse
David J. Waxse
United States Magistrate Judge

cc: All counsel and *pro se* parties