

1 **WO**

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT

7

FOR THE DISTRICT OF ARIZONA

8

9

Phoenix Pumps, Inc.,

)

No. CV 09-01158-PHX-MHM

10

Plaintiff,

)

**AMENDED ORDER**

11

vs.

)

12

Moyno, Inc., an Ohio corporation;  
Robbins & Myers, Inc., an Ohio  
corporation; John Does I-X; Jane Does I-  
X; ABC Partnerships I-X; and XYZ)  
Corporations or other entities I-X,

)

15

Defendants.

)

16

)

17

18 Currently pending before the Court is Defendants Moyno, Inc. and Robbins & Myers,  
19 Inc.’s’ (“Defendants”) Motion to Dismiss or in the Alternative, to Transfer. (Dkt. #6). After  
20 reviewing the pleadings, and determining that oral argument is unnecessary, the Court issues  
21 the following Order.

22

**I. Factual and Procedural Background**

23

24 Phoenix Pumps, Inc. (“PPI”) is a family-owned Arizona-based corporation that  
25 primarily sells industrial, construction, and municipal pump equipment and provides pump-  
26 repair services. Moyno, Inc. (“Moyno”) is a pump manufacturer located on Ohio. In 1996,  
27 PPI contracted with Moyno to become a distributor of Moyno industrial progressive-cavity  
28 pumps (“the Agreement”). The contract included a forum selection clause requiring that  
“[a]ny action or proceeding by either party against the other may (and if against

1 Manufacturer may only) be brought in the Court of Common Pleas of Clark County, Ohio,  
2 or the United States District Court for the Southern District of Ohio at Dayton, Ohio.”

3 PPI alleges that On July 30, 2008, Robbins & Meyers, Inc. (“R&M”) notified PPI of  
4 its intention to terminate PPI as a distributor of Moyno pumps, but did not give cause for its  
5 termination decision. In response, PPI states that it referred R&M to provisions of the  
6 Arizona Equipment Dealer Statute (“AEDS”), requesting that Defendants reconsider their  
7 decision. It is further alleged that on August 30, 2008, R&M responded by denying that the  
8 AEDS applied and confirming that PPI would no longer be a distributor of Moyno pumps.

9 On May 12, 2009, PPI brought this action in Arizona state court stating two causes  
10 of action. In its first count, Plaintiff seeks declaratory relief, praying that this Court declare:  
11 (1) whether industrial pumps constitute “equipment” under the AEDS; (2) whether the AEDS  
12 applies to the Agreement; (3) whether pursuant to the AEDS it was unlawful for Moyno to  
13 terminate the Agreement; and (4) whether the Agreement’s provision requiring jurisdiction  
14 in Ohio is void with regard to claims enforceable under AEDS. In its second count, Plaintiff  
15 alleges violation of the AEDS by Defendants. On May 29, 2009, Defendants removed this  
16 case to federal court. (Dkt. #1).

## 17 **II. Discussion**

### 18 **A. Motion to Dismiss**

#### 19 **I. Legal Standard**

20 Defendants have moved to dismiss this action pursuant to 28. U.S.C. § 1406, arguing  
21 the forum selection clause in the Agreement must be enforced. In the Ninth Circuit, “[a]  
22 motion to enforce a forum selection clause is treated as a motion to dismiss pursuant to Rule  
23 12(b)(3).” Doe 1 v. AOL LLC, 552 F.3d 1077, 1081 (9th Cir. 2009). Under rule 12(b)(3),  
24 the pleadings need not be accepted as true, and facts outside of the pleadings may also be  
25 considered.. Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 324(9th Cir.1996). The Court  
26 must “draw all reasonable inferences in favor of the non-moving party and resolve all factual  
27 conflicts in favor of the non-moving party.” Murphy v. Schneider National, Inc. 362 F.3d  
28 1133, 1138 (9th Cir. 2004).

1           As a general rule, forum selection clauses are presumptively valid and should be  
2 upheld “absent some compelling reason and countervailing reason.” Bremen v. Zapata Off-  
3 Shore Co., 407 U.S. 1, 10 (1972). The party challenging the clause bears a “heavy burden  
4 of proof” Id. Despite this presumption, three circumstances render the enforcement of such  
5 clauses unreasonable: “first, if the inclusion of the clause in the agreement was the product  
6 of fraud or overreaching; second, if the party wishing to repudiate the clause would  
7 effectively be deprived of his day in court were the clause enforced; and third, if enforcement  
8 would contravene a strong public policy of the forum in which suit is brought.” Richards v.  
9 Lloyd's of London, 135 F.3d 1289, 1294 (9th Cir. 1998) (citing and quoting Bremen, 407  
10 U.S. at 12–13, 15, 18).

## 11                           **II. Discussion**

12           The forum selection clause in the Agreement requires that “[a]ny action or proceeding  
13 by either party against the other may (and if against Manufacturer may only) be brought in  
14 the Court of Common Pleas of Clark County, Ohio, or the United States District Court for  
15 the Southern District of Ohio at Dayton, Ohio.” In opposing Defendants’ motion, PPI does  
16 not substantively challenge the forum selection clause by arguing its application would be  
17 unreasonable. Instead, PPI contends that AEDS section 44-6709(B) renders the forum  
18 selection clause void.

19           Section 44-6709(B) states that, “[a] provision in any contract or agreement with  
20 respect to a supplier that requires jurisdiction or venue outside of this state . . . is void with  
21 respect to a claim otherwise enforceable under this chapter.” The AEDS regulates conduct  
22 between suppliers and dealers of certain types of equipment, providing an independent cause  
23 of action for violation of its provisions. A.R.S. § 44-6702(A). The statute defines  
24 “equipment” as “machines designed for or adapted and used for agriculture, livestock,  
25 grazing, light industrial and utility purposes.” Id. at 44-6701(2). The Parties agree “that  
26 there are no published opinions interpreting whether pumps are equipment under the  
27 [AEDS],” (Dkt. #7, p.3), and, based on their papers, clearly disagree about how the questions  
28

1 should be answered. The plain language of section 44-6709(B), however, is clear; if a claim  
2 is enforceable under AEDS, a forum selection clause between the parties is unenforceable.

3 In the specific context of this case, however, making such a determination is  
4 problematic. In arguing, that section 44-6709(B) precludes enforcement of the forum  
5 selection clause, Plaintiff has put the cart before the horse, admitting that Arizona courts have  
6 not yet determined if its claim is enforceable under AEDS, but asking this Court to refuse to  
7 apply what appears to be an otherwise valid forum selection clause based on the  
8 enforceability of its claim. By challenging the forum selection clause in this manner,  
9 Plaintiff would require this Court to decide what Plaintiff has labeled as “the fundamental  
10 question in this declaratory action;” whether pumps are equipment such that AEDS applies  
11 to the Agreement. (Dkt. #7, p.9). This it will not do.

12 Instead, the Court finds that Plaintiff has not met its “heavy burden of proof” to show  
13 why the forum selection clause should not be enforced. Bremen, 407 U.S. at 10. While it  
14 is true that Arizona has expressed a public policy desire that forum selection clauses are void  
15 in claims enforceable under AEDS, the parties admit that it is an open question concerning  
16 whether pumps fall within the definition of equipment under AEDS; indeed, it is the very  
17 subject of this lawsuit. Until that question is answered, Defendants should receive the benefit  
18 of the forum selection clause for which they bargained. If a court later determines that  
19 pumps are not equipment and AEDS does not apply, then Defendants will have received that  
20 benefit; an outcome which comports with Arizona’s longstanding public policy in favor of  
21 the enforcement of forum selection clauses. See Societe Jean Nicolas Et Fils v. Mousseux,  
22 123 Ariz. 59, 61 (1979) (noting that “a forum selection clause that is fairly bargained for and  
23 not the result of fraud will be enforced so long as to do so is reasonable at the time of  
24 litigation and does not deprive a litigant of his day in court.”). Should, however, an Ohio  
25 court determine that pumps are equipment under AEDS, nothing would prevent Plaintiff  
26 from filing a motion to transfer and taking advantage of the protections afforded by section  
27 44-6709(B). Additionally, Plaintiff’s concern that an Arizona court, not an Ohio court,  
28 should interpret Arizona law is unfounded. An Ohio federal district court is equally capable

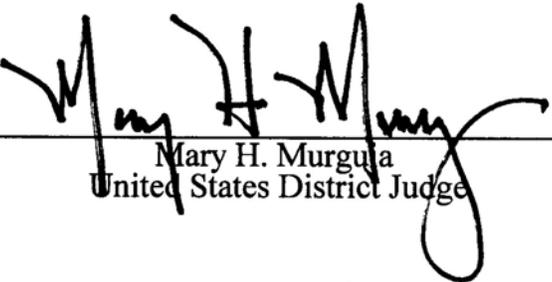
1 as this Court of interpreting an Arizona statute. Federal courts are routinely called upon to  
2 interpret and apply the law of states besides the ones in which they sit.

3 **Accordingly,**

4 **IT IS HEREBY ORDERED** granting Defendants' Motion to Dismiss without  
5 prejudice. (Dkt. #6)

6 **IT IS FURTHER ORDERED** directing the Clerk of the Court to enter judgment  
7 accordingly.

8 DATED this 10<sup>th</sup> day of February, 2010.

9  
10  
11   
12 \_\_\_\_\_  
13 Mary H. Murgula  
14 United States District Judge  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28