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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 Nicolle Halbur, acting for and on behalf of
10 MRS 1 Corp., f/k/a Adult Beverage
Company, Inc., a Nevada Corporation,

11 Plaintiff,

12 v.

13 Jeff Kudla and Tracy Reinhardt,

14 Defendants,

15 and

16 MRS 1 Corp., f/k/a Adult Beverage
17 Company, Inc., a Nevada Corporation,

18 Nominal Defendant.

No. CV12-01120-PHX-DGC

ORDER

19 Defendants Jeff Kudla and Tracy Reinhardt have filed a motion to dismiss this
20 corporate derivative action for lack of personal jurisdiction and improper venue, or, in the
21 alternative, to transfer the action pursuant to 28 U.S.C. § 1404. Doc. 9. Plaintiff Nicolle
22 Halbur filed a response. Doc. 12. Defendants did not file a reply, and the motion is ripe
23 for review. For the reasons set forth below, the Court will deny the motion.¹

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26 ¹ Defendants' request for oral argument is denied because the issues have been
27 fully briefed and oral argument will not aid the Court's decision. *See* Fed. R. Civ. P.
28 78(b); *Partridge v. Reich*, 141 F.3d 920, 926 (9th Cir. 1998).

1 **I. Background.**

2 The following facts are taken from the complaint and are presumed to be true for
3 purposes of the motion to dismiss. Plaintiff was at all relevant times a shareholder and
4 director of MRS 1 Corp. f/k/a Adult Beverage Company, Inc (“ABCO”), a Nevada
5 corporation authorized to do business in Arizona. *Id.*, ¶¶ 1-2. Defendants Kudla and
6 Reinhardt (collectively “Defendants”) were also directors and shareholders of ABCO.
7 *Id.*, ¶ 11. Plaintiff is a resident of Arizona, and Defendants are residents of Orange
8 County, California. *Id.*, ¶¶ 4-5.

9 Plaintiff alleges that on March 21, 2012, Defendants made several bank
10 withdrawals, totaling over \$300,000 and draining ABCO’s corporate account, without the
11 required unanimous consent and approval of the ABCO board of directors. *Id.*, ¶¶ 15-17.
12 Thereafter, Defendants held an improperly-noticed board meeting in which they
13 purportedly ratified their self-distributions, conveyed a 5% ownership interest in ABCO
14 to Reinhardt’s brother, and stripped Plaintiff of her responsibilities for maintaining
15 ABCO’s corporate finances. *Id.*, ¶¶ 19-26. Defendants then ignored repeated emails
16 from Plaintiff and ABCO’s corporate counsel questioning their actions and demanding
17 the return of the corporate funds. *Id.*, ¶¶ 27-32. ABCO continues to owe Plaintiff an
18 outstanding balance of \$137,000 for personal loans she made to the corporation that it is
19 now unable to repay due to Defendants’ misappropriations. *Id.*, ¶¶ 33-35. Plaintiff
20 makes claims for breach of fiduciary duty (per Nev. Rev. Stat. § 78.138); improper
21 distribution (per Nev. Rev. Stat. § 78.288(2)); conversion of corporate assets;
22 constructive fraud; and unjust enrichment, and requests an accounting of the
23 misappropriated funds. *Id.*, ¶¶ 37-64.

24 **II. Discussion.**

25 **A. Personal Jurisdiction.**

26 Plaintiff bears the burden of establishing personal jurisdiction. *See, e.g. Zigler v.*
27 *Indian River County*, 64 F.3d 470, 473 (9th Cir. 1995). Because the Court is resolving
28 the motion to dismiss without holding an evidentiary hearing, Plaintiff “need make only a

1 prima facie showing of jurisdictional facts to withstand the motion.” *Ballard v. Savage*,
2 65 F.3d 1495, 1498 (9th Cir. 1995). That is, Plaintiff “need only demonstrate facts that if
3 true would support jurisdiction over [Defendants].” *Id.*; see *Bancroft & Masters, Inc. v.*
4 *Augusta Nat’l Inc.*, 223 F.3d 1082, 1085 (9th Cir. 2000) (“Where . . . the district court
5 does not hold an evidentiary hearing but rather decides the jurisdictional issue on the
6 basis of the pleadings and supporting declarations, we will presume that the facts set forth
7 therein can be proven.”). Disputed facts must be decided in Plaintiff’s favor. See *Doe v.*
8 *Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001).

9 Because there is no federal statute that governs personal jurisdiction in this case,
10 Arizona’s long-arm rule applies. See *Terracom v. Valley Nat’l Bank*, 49 F.3d 555, 559
11 (9th Cir. 1995). Arizona Rule of Civil Procedure 4.2(a) “provides for personal
12 jurisdiction co-extensive with the limits of federal due process.” *Doe v. Am. Nat’l Red*
13 *Cross*, 112 F.3d 1048, 1050 (9th Cir. 1997) (citing *Batton v. Tenn. Farmers Mut. Ins.*
14 *Co.*, 736 P.2d 2, 4 (Ariz. 1987)). Federal due process requires that a defendant have
15 sufficient minimum contacts with the forum state that the exercise of personal jurisdiction
16 will not offend traditional notions of fair play and substantial justice. See *Int’l Shoe Co.*
17 *v. Washington*, 326 U.S. 310, 316 (1945).

18 The Ninth Circuit applies a three-part test for specific jurisdiction. Such
19 jurisdiction exists if (1) the defendant purposefully availed himself of the privileges of
20 conducting activities in the forum, thereby invoking the benefits and protections of its
21 laws, (2) the claim arises out of the defendant’s forum-related activities, and (3) the
22 exercise of jurisdiction is reasonable. See, e.g., *Bancroft & Masters, Inc.* 223 F.3d at
23 1086; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-76 (1985). The Court will
24 address each of these three factors.

25 **1. Purposeful Availment.**

26 In cases arising out of contractual relationships, including those involving related
27 tort claims, the Ninth Circuit applies the “purposeful availment” test enunciated in
28 *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), which “requires that the defendant engage

1 in some form of affirmative conduct allowing or promoting the transaction of business
2 within the forum state. This focus on the defendant’s affirmative conduct is designed to
3 ensure that the defendant is not haled into court as the result of random, fortuitous, or
4 attenuated contacts.” *Gray & Co. v. Firstenberg Mach. Co.*, 913 F.2d 758, 760 (9th Cir.
5 1990) (citation omitted); *see Roth v. Garcia Marquez*, 942 F.2d 617, 621 (9th Cir. 1991)
6 (applying purposeful availment test in breach of contract action); *McGlinchy v. Shell*
7 *Chem. Co.*, 845 F.2d 802, 817 (9th Cir. 1988). A defendant has engaged in affirmative
8 conduct and thereby “purposely availed himself of the benefits of a forum if he has
9 deliberately ‘engaged in significant activities within a State or has created ‘continuing
10 obligations’ between himself and the residents of the forum.” *Gray*, 913 F.2d at 760
11 (quoting *Burger King*, 471 U.S. at 475-76); *see Cybersell, Inc. v. Cybersell, Inc.*, 130
12 F.3d 414, 417 (9th Cir. 1997) (stating that “the ‘purposeful availment’ requirement is
13 satisfied if the defendant has taken deliberate action within the forum state or if he has
14 created continuing obligations to forum residents”) (citing *Ballard*, 65 F.3d at 1498).

15 Defendants argue that Plaintiff has wholly failed to allege facts to establish that
16 each defendant purposefully directed its activities at Arizona. Doc. 9 at 6. Defendants
17 cite to Defendant Kudla’s declaration, asserting that he became an investor and director
18 of ABCO based on discussions with Defendant Reinhardt that took place in California
19 where, he asserts, ABCO was headquartered. Doc. 9 at 4. Kudla attests that Plaintiff
20 handled a small amount of ABCO’s accounting from her home in Arizona, but Kudla was
21 told he would have access to all accounting records. *Id.* at 4-5. He also attests that while
22 serving as Executive Vice President of ABCO, he secured corporate counsel and a
23 trademark attorney from Irvine, California, both of whom were instructed to identify
24 Newport Beach, California, as ABCO’s principle place of business; and that, beginning
25 in 2010, ABCO began leasing an office in Newport Beach, California, later moving to a
26 larger corporate headquarters in Costa Mesa, California, at which locations ABCO
27 coordinated marketing, engaged in product development, conducted business meetings
28 with outside vendors and contractors, and housed employees, including its President and

1 Chief Executive Officer, Executive Vice President, and Vice President of Sales and
2 Marketing. *Id.*

3 Plaintiff cites to her own declaration stating that she, an Arizona resident, provided
4 the start-up capital for ABCO and began meeting with distributors and wholesalers to
5 develop a business plan based on an alcoholic drink Reinhardt concocted, and that Kudla
6 and Reinhardt flew to Arizona to meet with her about running the business and to hand-
7 deliver Kudla's initial investment check. Doc. 12 at 3; 12-1, Decl. of Nicolle Halbur, at
8 2-4, ¶¶ 5, 7-11. Plaintiff's declaration further states that ABCO opened its first Arizona
9 office in Chandler, Arizona, in 2010, while the office in California was only a mail drop
10 box, and hired two full-time employees who, together with Plaintiff, worked in the
11 Arizona office and performed 95% of ABCO's work. *Id.* at 4, ¶¶ 12-14. Due to the high
12 volume of work flowing through this office, Plaintiff attests that ABCO later leased a
13 larger office in Chandler which became its principle place of business, housing all of its
14 business records and files, and it was the address of record for ABCO's bank accounts,
15 insurance policies, cell phones, and company car. *Id.* at 4-5, ¶¶ 15-16. Plaintiff attests
16 that ABCO had a designated statutory agent authorized to accept process in Arizona, it
17 paid Arizona state taxes, and Plaintiff regularly directed, controlled, and coordinated
18 many or most of ABCO's business activities from the Arizona office. *Id.* at 5, ¶ 17; 5-6,
19 ¶ 18 (enumerating business activities conducted from the Arizona office, including
20 purchasing raw materials, managing orders, staffing promotional events, and overseeing
21 payroll and benefits). Taken as true, these allegations are sufficient to show that
22 Defendants knowingly created obligations between themselves and an Arizona resident,
23 and that as directors of ABCO they purposefully availed themselves of the privileges of
24 doing business in Arizona. At most, Defendants' contrary contentions present an issue of
25 fact about where ABCO was headquartered or had its principle place of business.

26 2. "Arising Out of."

27 The Ninth Circuit has adopted a "but for" test for determining whether a cause of
28 action arises out of a defendant's forum-related activities. *See Omeluk v. Langstein Slip*

1 & *Batbyggeri A/S*, 52 F.3d 267, 271 (9th Cir. 1995). The “arising out of” requirement is
2 met if, “but for” the contacts between the defendant and the forum state, the cause of
3 action would not have arisen. *See Terracom v. Valley Nat’l Bank*, 49 F.3d 555, 561 (9th
4 Cir. 1995). All of Plaintiff’s claims arise out of Defendants’ alleged misappropriation of
5 funds from ABCO’s Arizona-based bank account. These funds allegedly resulted from
6 activities performed principally in Arizona, the records of which were maintained in
7 ABCO’s Arizona office. Plaintiff’s causes of action would, therefore, not have arisen but
8 for the contacts between Defendants and Arizona.

9 3. Reasonableness.

10 An unreasonable exercise of jurisdiction violates the Due Process Clause even if
11 the “purposeful availment” and “arising out of” requirements are satisfied. *See Int’l*
12 *Shoe*, 326 U.S. at 316; *Ziegler*, 64 F.3d at 474-75. A district court presumes, however,
13 that its exercise of jurisdiction over a defendant is reasonable if these two requirements
14 are met. *See Ballard*, 65 F.3d at 1500. The burden then shifts to the defendant to
15 “present a compelling case that the presence of some other considerations would render
16 jurisdiction unreasonable.” *Id.* (quoting *Burger King*, 471 U.S. at 477).

17 The Ninth Circuit considers seven factors to determine whether the exercise of
18 specific jurisdiction over a defendant is reasonable: (1) the extent of the defendant’s
19 purposeful interjection into the forum state, (2) the burden on the defendant of litigating
20 in the forum, (3) the extent of conflicts with the sovereignty of the defendant’s state,
21 (4) the forum state’s interest in adjudicating the dispute, (5) the most efficient judicial
22 resolution of the dispute, (6) the importance of the forum to the plaintiff’s interest in
23 convenient and effective relief, and (7) the existence of an alternative forum. *See Ziegler*,
24 64 F.3d at 475 (citing *Terracom*, 49 F.3d at 561); *World-Wide Volkswagen Corp. v.*
25 *Woodson*, 444 U.S. 286, 292 (1980) (listing several of the seven factors).

26 Defendants do not discuss any of the above-listed factors to show that jurisdiction
27 in this Court would be unreasonable. In putting forth reasons to transfer pursuant to 28
28 U.S.C. § 1404, Defendants argue that it would be inconvenient to Defendants to litigate

1 in Arizona because Defendants and all potential non-party witnesses reside in the Central
2 District of California. Doc. 9 at 10-11. Plaintiff counters that a significant number of
3 party and non-party witnesses reside in Arizona, including Plaintiff, ABCO's two
4 Arizona employees, ABCO's vendors, banking contacts, and other third parties. Doc. 12
5 at 16-17. In light of the fact that the Court must evaluate Defendants' burden against the
6 corresponding burden to Plaintiff (*see Brand v. Menlove Dodge*, 796 F. 2d 1070, 1075
7 (9th Cir. 1986)), the Court cannot conclude that this factor weighs against jurisdiction.

8 The remaining factors weigh in favor of jurisdiction. As already discussed,
9 Plaintiff has alleged facts showing that Defendants, through their involvement as
10 directors of ABCO, engaged in extensive purposeful interjection into Arizona.
11 Defendants give no reasons why litigating this suit in Arizona would conflict with
12 California's sovereignty or lead to less judicial efficiency. Jurisdiction in this Court also
13 serves both the interest of the forum state in adjudicating an issue involving an Arizona-
14 based corporation and Plaintiff's interest in obtaining convenient and effective relief.
15 Even if an alternative forum is available in the Central District of California, Defendants
16 have failed to present a compelling case that personal jurisdiction in Arizona would be
17 unreasonable. The Court concludes that it has specific personal jurisdiction over
18 Defendants.

19 **B. Venue.**

20 Defendants argue that this case should be dismissed for improper venue. Doc. 8 at
21 14. The Court finds that venue is proper under 28 U.S.C. § 1391(b)(2), which provides
22 that a civil action may be brought in "a judicial district in which a substantial part of the
23 events or omissions giving rise to the claim occurred, or a substantial part of property that
24 is the subject of the action is situated." Both factors are met here. Although Defendants
25 allegedly conducted their improper money transfers and improperly-noticed meeting in
26 California, Plaintiff alleges that the money transfers were directed at ABCO's Arizona
27 bank account and that Defendants' misrepresentations about the meeting were directed at
28 her in Arizona. Doc. 12-1, ¶¶ 25-26. The fact that these alleged improper actions were

1 directed at Arizona, making it the “locus of the injury,” is sufficient to show that a
2 substantial part of the events giving rise to Plaintiff’s claims occurred in Arizona. *Myers*
3 *v. Bennett Law Offices*, 238 F.3d 1068, 1076 (9th Cir. 2001) (finding where one of the
4 plaintiffs’ alleged “harms” was felt in Nevada, that “a substantial part of the events
5 giving rise to the claim occurred in Nevada.”); *Xcentric Ventures LLC v. Borodkin*, No.
6 CV-11-1426-PHX-GMS, 2012 WL 692976, at *7 (D. Ariz., March 1, 2012) (citing
7 *Myers*). As discussed above, Plaintiff also alleges that the property at issue – in excess of
8 \$300,000 – was held in ABCO’s Arizona bank account and that Arizona is where the
9 business was headquartered and where all of its relevant financial records were held.
10 These facts, taken as true, are sufficient to establish proper venue.

11 **C. Transfer.**

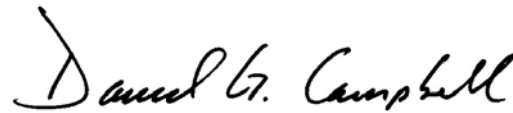
12 Defendants ask the Court to transfer this action to the Central District of California
13 because a balance of convenience to the parties strongly favors transfer. Doc. 9 at 10.
14 “For the convenience of the parties and witnesses, in the interest of justice, a district court
15 may transfer any civil action to any other district or division where it might have been
16 brought.” 28 U.S.C. § 1404(a). The district court may consider several factors in
17 determining whether to transfer venue, including the plaintiff’s choice of forum, the
18 extent of the parties’ contacts with the forum, the contacts in the forum relating to the
19 plaintiff’s cause of action, the availability of non-party witnesses, and the accessibility of
20 evidence. *See Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000).

21 Defendants argue that the location of potential witnesses, the residences of the
22 parties, and the location of the operative events all favor transfer. Doc. 9 at 10-11. As
23 previously discussed, the location of potential witness and parties neither favors nor
24 weighs against transfer because at least one party and a number of potential witnesses
25 reside in each state. To the extent that Defendants are inconvenienced by having to
26 defend claims in Arizona, they have not presented any facts, beyond the mere fact of their
27 residence, showing that the inconvenience of having to litigate in a neighboring state is
28 sufficiently onerous to override Plaintiff’s choice of forum. *See Decker Coal Co. v.*

1 *Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986) (“The defendant must
2 make a strong showing of inconvenience to warrant upsetting the plaintiff’s choice of
3 forum.”). Finally, although Defendants argue that all operative events occurred in
4 California, this argument conflicts with Plaintiff’s allegations that the Court must take as
5 true. On the whole, Defendants have failed to show that the convenience of the parties
6 and witnesses and the interest of justice will best be served by transfer to the Central
7 District of California.

8 **IT IS ORDERED** that Defendants’ motion to dismiss or, alternatively, to transfer
9 this action (Doc. 9) is **denied**.

10 Dated this 8th day of January, 2013.

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15 David G. Campbell
16 United States District Judge
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