

1 WO
2
3
4
5

6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Nutrition Distribution LLC,

10 Plaintiff,

11 v.

12 Muscle Store Incorporated, et al.,

13 Defendants.
14

No. CV-17-02116-PHX-GMS

ORDER

15 Pending before the Court is Defendant's Motion to Dismiss or Transfer Based on
16 Lack of Personal Jurisdiction and Improper Venue. (Doc. 13). For the following
17 reasons, the Court grants the motion and dismisses without prejudice.

18 **BACKGROUND**

19 Plaintiff Nutrition Distribution LLC filed suit in the Southern District of California
20 alleging that Defendant Muscle Store Inc. falsely advertised its products in violation of
21 the Lanham Act. (Doc. 1). The Southern District of California transferred the case to the
22 District of Arizona *sua sponte*, likely because Nutrition Distribution is an Arizona
23 company.

24 Defendant Muscle Store Inc. is a Florida corporation with its principal place of
25 business in Bethlehem, Pennsylvania. Muscle Store operates an online retail site that
26 sells dietary supplements, and its website is accessible in any of the fifty states. Muscle
27 Store knows of only six instances when their product was shipped to Arizona. The
28 owners have no physical presence in Arizona and have never targeted Arizona.

1 On July 13, 2017, Muscle Store counsel sent an email to Nutrition Distribution
2 counsel and asked, “What grounds do you have for this case being in Arizona? If none,
3 will you stipulate to move it to Pennsylvania?” (Doc. 19-1, Exh. 1 at 1). Minutes later,
4 Nutrition Distribution counsel responded, “We are an Arizona corp so that is where the
5 damage occurred,” but the response did not otherwise reference transfer to Pennsylvania.
6 *Id.* On July 18, Muscle Store counsel again contacted Nutrition Distribution counsel
7 about stipulating to transfer to Pennsylvania. (Doc. 18-1 at 2). On July 21, Muscle Store
8 filed this motion to dismiss. (Doc. 13). Eleven days later, on August 1, Nutrition
9 Distribution counsel contacted Muscle Store counsel and stated that Nutrition
10 Distribution is amenable to transfer venue. (Doc 18-2 at 1). Given that it already filed
11 the motion to dismiss, Muscle Store chose to proceed with this motion. *Id.* Then, on
12 August 8, Muscle Store counsel asked Nutrition Distribution counsel “to just dismiss and
13 re-file in the appropriate court” as that would be the easiest resolution of the issue. (Doc.
14 19-1, Exh. 3 at 1). Nutrition Distribution counsel responded, “We will not dismiss.” *Id.*

15 DISCUSSION

16 I. Motion to Dismiss for Lack of Personal Jurisdiction

17 A court may exercise personal jurisdiction over a non-resident defendant only if
18 the defendant has sufficient minimum contacts with the forum state and the exercise of
19 jurisdiction “does not offend traditional notions of fair play and substantial justice.” *Int’l*
20 *Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted). General personal
21 jurisdiction arises when the defendant’s contacts are continuous and systematic, and
22 specific personal jurisdiction arises when the lawsuit results from issues connected with
23 the controversy that established jurisdiction. *Goodyear Dunlop Tires Operations, S.A. v.*
24 *Brown*, 564 U.S. 915, 919 (2011) (citations omitted). The plaintiff bears the burden to
25 demonstrate that the court has jurisdiction over the defendant. *Brayton Purcell LLP v.*
26 *Recordon & Recordon*, 606 F.3d 1124, 1127 (9th Cir. 2010) (citations omitted). The
27 plaintiff need only make a prima facie showing to withstand a motion to dismiss. *Id.*

28 ///

1 A website and limited sales are not enough to form general personal jurisdiction.
2 *Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000)
3 (holding that a non-resident company’s passive website and occasional, unsolicited sales
4 did not establish general personal jurisdiction). Neither does a passive website alone
5 constitute the express aiming necessary to establish specific personal jurisdiction.
6 *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1129 (9th Cir. 2010) (“It
7 is beyond dispute in this circuit that maintenance of a passive website alone cannot
8 satisfy the express aiming prong”).

9 Muscle Store has never targeted Arizona. It has never had property or agents in
10 Arizona. It has never directly advertised in Arizona. Muscle Store’s generally accessible
11 website is its most significant contact to Arizona. Accordingly, Plaintiff fails to make a
12 prima facie case that the Court has personal jurisdiction over Defendant.

13 **II. Dismissal in Lieu of Transfer**

14 When a suit is in the wrong venue, the district court “shall dismiss, or if it be in the
15 interest of justice, transfer such case.” 28 U.S.C. § 1406(a). Although the Court has
16 discretion to either dismiss the case or transfer it, any such dismissal is without prejudice.
17 Fed. R. Civ. P. 41(b); *In re Hall, Bayoutree Associates, Ltd.*, 939 F.2d 802, 804 (9th Cir.
18 1991) (citing *Costello v. United States*, 365 U.S. 265, 285–86 (1961)).

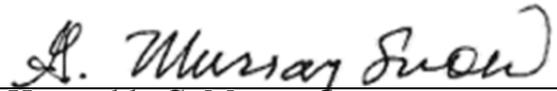
19 Transfer is normally in the interest of justice because “dismissal of an action that
20 could be brought elsewhere is ‘time-consuming and justice-defeating.’” *Miller v.*
21 *Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990) (quoting *Goldlawr, Inc. v. Heiman*, 369
22 U.S. 463, 467 (1962)). The values underlying the preference for transfer include
23 protecting uninformed plaintiffs and “removing whatever obstacles may impede an
24 expeditious and orderly adjudication of cases and controversies on their merits.”
25 *Goldlawr*, 369 U.S. at 466–67.

26 Considering these values, the Court dismisses this case in lieu of transfer. Plaintiff
27 had adequate understanding that the District of Arizona was an improper venue, and it
28 had ample and sufficient opportunity to stipulate to transfer prior to obliging Defendant

1 the unnecessary expense of writing this motion to dismiss for lack of personal
2 jurisdiction. *See supra* at 2. This unjustified expense resulted in this unnecessary motion
3 and has acted as an obstacle that impedes the expeditious and orderly adjudication of the
4 case. Therefore, the Court grants the motion to dismiss without prejudice.

5 **IT IS THEREFORE ORDERED** that Defendant's Motion to Dismiss Based on
6 Lack of Personal Jurisdiction (Doc. 13) is **GRANTED**. The Clerk of Court is directed to
7 terminate this action and enter judgment accordingly.

8 Dated this 26th day of October, 2017.

9
10 

11 Honorable G. Murray Snow
12 United States District Judge