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

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9 Spirit Master Funding X LLC,

10 Plaintiff,

11 v.

12 BCB Holdings Incorporated, et al.,

13 Defendants.

No. CV-18-00957-PHX-DLR

ORDER

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16 Before the Court is Defendants BCB Holdings, Incorporated (“BCB”), Nicholas
17 Domenico, and Frank DeHoff’s Motion to Transfer Venue to the United States District
18 Court for the District of Colorado (Doc. 25), which is fully briefed. For the following
19 reasons, the motion is denied.¹

20 **I. Background**

21 Plaintiff Spirit Master Funding X LLC (“Spirit Master”) as landlord and BCB as
22 tenant entered into a written lease for certain property located in Denver, Colorado. The
23 lease contained a forum-selection provision that reads, in relevant part:

24 For purposes of any action or proceeding arising out of this
25 Lease, the parties hereto expressly submit to the jurisdiction
26 of all federal and state courts located in the City and County
of Denver, State of Colorado. . . . Furthermore, Tenant waives
and agrees not to assert in any such action, suit or proceeding

27 ¹ Defendants’ request for oral argument is denied because the issues are
28 adequately briefed and oral argument will not assist the Court in resolving the motion.
See Fed. R. Civ. P. 78(b); LRCiv. 7.2(f).

1 that it is not personally subject to the jurisdiction of such
2 courts, that the action, suit or proceeding is brought in an
3 inconvenient forum or that venue of the action, suit or
4 proceeding is improper. Nothing contained in this Section
5 shall limit or restrict the right of Landlord to commence any
6 proceeding in the federal or state courts located in the State of
7 Arizona to the extent Landlord deems such proceeding
8 necessary or advisable to exercise remedies available under
9 this Lease. . . .

6 Domenico and DeHoff executed a guaranty, under which they guaranteed certain
7 performance of BCB under the lease. The guaranty includes the following “Governing
8 Law” provision:

9 This Guaranty is delivered in the State of Arizona For
10 purposes of any action or proceeding involving this Guaranty,
11 Guarantor submits to the jurisdiction of all federal and state
12 courts located in the State of Arizona Guarantor waives
13 and agrees not to assert in any such action, suit or proceeding
14 that Guarantor is not personally subject to the jurisdiction of
15 such courts, that the action, suit or proceeding is brought in an
16 inconvenient forum or that venue of the action, suit or
17 proceeding is improper.

15 Spirit Master alleges that Defendants are in breach of the lease and guaranty by
16 failing to make payments. Defendants admit in their answer to the complaint that Plaintiff
17 is entitled to recover damages from BCB because of the alleged breach, and Domenico
18 and DeHoff admit the existence of the guaranty. Defendants also raise as an affirmative
19 defense Spirit Master’s alleged failure to mitigate its damages.

20 Defendants have moved to transfer this matter to the District of Colorado pursuant
21 to 28 U.S.C. § 1404(a), arguing that the factual issues in the case will involve the lease,
22 the property, and Denver-based mitigation efforts. Spirit Master’s response indicates that
23 the only witnesses likely to be called at trial are parties to the litigation or expert
24 witnesses.

25 **II. Legal Standard**

26 The court, for the convenience of the parties and witnesses, and in the interests of
27 justice, may transfer a civil action to any district in which the case originally could have
28 been brought. 28 U.S.C. § 1404(a). In determining whether a transfer of venue is

1 appropriate under this section, the court must make two findings: (1) the transferee court
2 is one in which the case could have been brought and (2) the convenience of the parties
3 and witnesses and the interests of justice favor transfer. *Hatch v. Reliance Ins. Co.*, 758
4 F.2d 409, 414 (9th Cir. 1985). The movant bears the burden of showing that a transfer is
5 warranted. *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 279 (9th Cir.
6 1979).

7 **III. Discussion**

8 The parties agree that this case could have been brought in the District of
9 Colorado. They disagree over the impact of the forum-selection provisions in the lease
10 and guaranty, and over whether the District of Colorado is a more convenient forum.

11 When determining whether the convenience of the parties and witnesses favor a
12 transfer, a court ordinarily weighs multiple factors, including:

13 (1) the location where the relevant agreements were
14 negotiated and executed, (2) the state that is most familiar
15 with the governing law, (3) the plaintiff's choice of forum, (4)
16 the respective parties' contacts with the forum, (5) the
17 contacts relating to the plaintiff's cause of action in the
18 chosen forum, (6) the differences in the costs of litigation in
19 the two forums, (7) the availability of compulsory process to
20 compel attendance of unwilling non-party witnesses, and (8)
21 the ease of access to sources of proof. Additionally, the
22 presence of a forum selection clause is a "significant factor"
23 in the court's § 1404(a) analysis.

19 *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498-99 (9th Cir. 2000).

20 In *Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court for W. Dist. of Texas*, 571
21 U.S. 49 (2013), however, the Supreme Court held that the calculus changes when the
22 parties have agreed to a contract containing a valid forum-selection clause. In such
23 circumstances, "a valid forum-selection clause [should be] given controlling weight in
24 all but the most exceptional cases." *Atlantic*, 571 U.S. at 63 (quoting *Stewart Org., Inc.,*
25 *v. Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring)). The Supreme Court
26 explained that a forum-selection clause requires district courts to adjust their usual
27 §1404(a) analysis in three ways: (1) the plaintiff's choice of forum merits no weight, (2)
28 courts should not consider arguments about the parties' private interests, but may

1 consider public-interest factors,² and (3) when a party files suit in a different forum than
2 agreed to in the forum-selection clause, a §1404(a) transfer of venue will not carry with it
3 the original venue’s choice-of-law rules. *Id.* at 63-64

4 At least with respect to Domenico and DeHoff, *Atlantic* answers the motion to
5 transfer venue. The guaranty includes a valid forum-selection clause that requires
6 submission to Arizona courts, and under which Domenico and DeHoff waived their right
7 to assert that the suit or proceeding is brought in an inconvenient forum. Defendants’
8 arguments in favor of a transfer of venue rest on the parties’ private interests; Defendants
9 do not argue that any public-interest factors favor transfer. The forum-selection clause
10 therefore controls with respect to Spirit Master’s claims against Domenico and DeHoff.

11 Whether *Atlantic* compels a similar result with respect to BCB is a thornier
12 question. The lease’s forum-selection clause gives Spirit Master the choice of a Colorado
13 or Arizona forum, but arguably precludes BCB from challenging the convenience of the
14 forum only if Spirit Master initiates the suit in Colorado. The Court, however, does not
15 need to decide whether BCB’s waiver extends to cases initiated in Arizona because BCB
16 has not shown that the enumerated convenience factors weigh in favor of a transfer.

17 The first factor is neutral. Although its principle place of business is now Texas,
18 Spirit Master’s principle place of business was in Arizona when the contracts were
19 negotiated and executed. But the Court finds that this factor is of little importance. The
20 location where the contracts were negotiated and executed might inform the analysis of
21 other factors—for example, the parties’ contacts with the forum and the ease of access to
22 proof—but it is not clear from the information offered by the parties what independent
23 significance, if any, this factor has that would make Arizona a more or less convenient
24 forum.

25 The second factor—the state that is most familiar with the governing law—also is

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27 ² “Because those factors will rarely defeat a transfer motion, the practical result is
28 that forum-selection clauses should control except in unusual cases. Although it is
conceivable in a particular case that the district court would refuse to transfer a case
notwithstanding the counterweight of a forum-selection clause, such cases will not be
common.” *Atlantic*, 571 U.S. at 64 (internal quotations and citation omitted).

1 neutral. Neither party argues or points the Court to differences in the law of the two
2 states that would impact the decision in this case. Moreover, federal courts routinely are
3 tasked with applying the laws of other states. There is no reason to believe the District of
4 Colorado is less equipped to apply Arizona law, if it is applicable, or vice versa.

5 The third factor weighs against a transfer of venue. The lease gives Spirit Master
6 the right to litigate in Arizona, and it chose to litigate here. “Courts do not lightly disturb
7 a plaintiff’s choice of forum.” *Sidi Spaces LLC v. CGS Premier Inc.*, No. CV16-01670-
8 PHX-DGC, 2016 WL 3654306, at *2 (D. Ariz. July 6, 2016). The very fact that
9 Congress created a mechanism for transferring venue, however, demonstrates that this
10 factor cannot, alone, be determinative.

11 The fourth and fifth factors pertain to the parties’ contacts with the forum,
12 generally and in connection with the specific cause of action. None of the parties have
13 substantial contacts with Arizona. Even Spirit Master, whose principle place of business
14 had been in Arizona, has since moved to Texas. The lack of contact with Arizona, by any
15 party, weighs in favor of a transfer.

16 The sixth through eighth factors pertain to costs and availability of witnesses and
17 evidence. “The convenience of witnesses is often the most important factor in
18 determining whether a transfer . . . is appropriate.” *Double J Inv., LLC v. Automation*
19 *Control and Info. Sys. Corp.*, No. CV-13-00773-PHX-SRB, 2013 WL 12237668, at *7
20 (D. Ariz. July 9, 2013) (internal quotation and citation omitted). Spirit Master contends
21 that there are no witnesses who cannot be compelled to appear in Arizona because there
22 are no Colorado-resident fact witnesses and all witnesses will be either experts or parties
23 to the case. BCB, on the other hand, argues that its failure-to-mitigate-damages
24 affirmative defense will require the testimony of real estate agents selling the properties,
25 prospective tenants, evicted tenants, potential purchasers, real estate agents previously
26 involved in leasing the properties, and witnesses knowledgeable of BCB’s performance
27 under the lease.

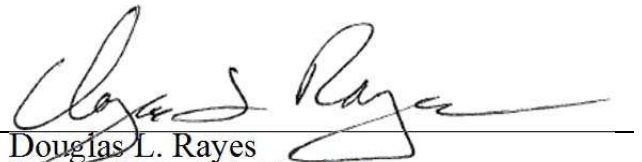
28 The Court finds that this factor is either neutral or weighs minimally in favor of

1 transfer. Other than real estate agents involved in efforts to sell or lease the properties,
2 there is no indication that any of these other potential witnesses exist. With regard to
3 BCB's performance under the lease, it is not disputed that it did not pay its rent. Even if
4 there were issues as to its performance, the witnesses to address that issue likely are the
5 parties to the lease agreement, who are parties to this suit. Moreover, consideration of
6 this factor is complicated by the fact that Domenico and DeHoff have contractually
7 agreed to submit to Arizona's courts and to waive convenience-based venue objections.
8 It certainly would not be cost-effective or convenient to force Spirit Master to litigate
9 claims against the tenant in a different forum than its claims against the guarantors.

10 On balance, the Court finds that the convenience factors do not weigh in favor of a
11 transferring venue. Accordingly,

12 **IT IS ORDERED** that Defendants' Motion to Transfer Venue to the United States
13 District Court for the District of Colorado (Doc. 25) is **DENIED**.

14 Dated this 5th day of September, 2018.

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19 Douglas L. Rayes
United States District Judge