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

9 Henrietta Mine LLC,
10 Plaintiff,

11 v.

12 A.M. King Industries Incorporated,
13 Defendant.
14

No. CV-20-01106-PHX-SMB

ORDER

15 Pending before the Court is Defendant A.M. King Industries Incorporated's
16 ("King") Motion to Dismiss. (Doc. 18.) Plaintiff Henrietta Mine LLC ("Henrietta") has
17 filed a response, (Doc. 21), and King has filed its reply. (Doc. 22.) King's Motion seeks
18 dismissal of the case "pursuant to Federal Rule of Civil Procedure 12(b)(1)-(3) and (6)."¹
19 (Doc. 18 at 1.) While not indicated in the motion's caption, King also seeks, in the
20 alternative, an order transferring the case to the Eastern District of California under 28
21 U.S.C. § 1404(a). (Doc. 18 at 16.) Pursuant to LRCiv. 7.2(f), the Court elects to rule
22 without oral argument.

23 **I. Factual Background**

24 This dispute concerns an alleged agreement between King and Henrietta regarding
25 the sale of certain mining equipment currently located in British Columbia. Henrietta is an

26 _____
27 ¹While the motion states that it seeks dismissal pursuant to Rule 12(b)(1)-(3) and (6),
28 Defendant does not actually make any argument for dismissal based on improper venue
under rule 12(b)(3) nor any argument for dismissal based on Plaintiff's failure to state a
claim under Rule 12(b)(6).

1 Arizona LLC with its principle operations in Arizona. King is a Nevada corporation with
2 its principle place of business in California. Henrietta’s complaint alleges the parties’
3 business relationship began on or around September 5, 2019. The complaint further alleges
4 that from September 2019, until April 2020, King sent various communications to
5 Henrietta in Arizona concerning King’s ability to assist Henrietta with the acquisition of
6 certain mining equipment for use at Henrietta’s mining operations in Arizona. (Doc. 1-1 at
7 3.) These communications included solicitations by King for Henrietta to purchase
8 equipment located in Australia and to purchase other mills located in Arizona. (*Id.*) While
9 Henrietta declined to pursue most of these opportunities, it did express interest in King’s
10 offer to assist it with the purchase of a “ball mill, rod mill, and regrind mill” located in
11 British Columbia, Canada (“the BC Equipment”). (*Id.*)

12 The complaint further alleges that “King was aware that Henrietta is based in
13 Arizona and planned to transport [the BC equipment] to...Arizona.” (*Id.*) Henrietta alleges
14 King undertook to communicate and negotiate with Henrietta personnel in Arizona
15 regarding the purchase disassembly and removal of the BC equipment for use at Henrietta’s
16 operations. (*Id.*) Henrietta alleges King arranged for its personnel to travel and view the
17 BC equipment, sent documentation concerning the BC equipment to Henrietta’s Arizona
18 personnel including installation instructions, plans, and equipment specifications, and
19 otherwise made numerous communications regarding the purchase of the BC equipment.
20 (*Id.*)

21 The parties’ negotiations came to fruition during December of 2019. (*Id.* at 5.)
22 Henrietta’s complaint alleges on December 9, 2019, King sent Henrietta an invoice “to get
23 things moving forward.” (*Id.*) The invoice listed the BC equipment in some detail and gave
24 a total price of \$500,000. (*Id.* at 6.) Henrietta alleges that under the terms of the invoice it
25 was to be given “title and possession” of the BC equipment upon wiring the purchase price
26 to King. (*Id.*) Henrietta alleges that it wired the purchase price to King but was
27 subsequently informed that the Canadian mining company where the equipment was
28 located would not allow Henrietta to remove the equipment unless certain additional

1 conditions were met. Henrietta was informed it must agree to cover the cost of additional
2 safety and regulatory requirements as well as the cost of fabricating certain structural
3 reinforcements to replace the BC mills being removed prior to moving the BC equipment.
4 (*Id.*; Doc. 18 at 4.)

5 Henrietta alleges the additional requirements impose additional costs of \$250,000
6 upon it as a prerequisite to obtaining the equipment. Henriette further alleges the additional
7 requirements were not included in the invoice sent by King, the additional requirements
8 were unforeseeable, and that because delivery of the BC equipment was conditioned upon
9 Henrietta’s compliance with additional conditions, King failed to tender delivery in
10 accordance with the contract terms. (Doc. 1-1 at 6.) After informing King of its alleged
11 failure, on April 6, 2020, Henrietta demanded the return of its \$500,000 purchase price.
12 (*Id.*) King refused. (*Id.*)

13 On May 11, 2020, Henrietta filed suit against King in Arizona Superior Court for
14 Maricopa County. (Doc. 1-1.) Henrietta’s complaint sought declaratory relief that King had
15 breached its contractual obligations bringing claims for breach of contract and unjust
16 enrichment based on King’s refusal to return the purchase money. (*Id.*) On June 4, 2020,
17 King removed the case to this Court under 28 U.S.C. § 1446(b)(1). (Doc. 1.) King has since
18 answered the complaint and filed this motion. (Doc. 18.)

19 **II. Legal Analysis**

20 **A. Waiver**

21 As a preliminary matter, the Court will address Plaintiff’s argument that certain
22 defenses have been waived by the Defendant. Plaintiff alleges that King’s argument based
23 on a lack of personal jurisdiction has been waived by King’s active participation in the
24 case. Plaintiff also argues King’s argument for transfer to California was waived by King’s
25 failure to raise the argument in a timely manner. Under Federal Rule of Civil Procedure
26 12(h), “[a] party waives any defense listed in Rule 12(b)(2)–(5) by...failing to...include it
27 in a responsive pleading...” *See also American Ass’n of Naturopathic Physicians v.*
28 *Hayhurst*, 227 F.3d 1104, 1106 (9th Cir. 2000) (“certain defenses...must be raised at the

1 first available opportunity or, if they are not, they are forever waived.”); *Liberty Life Ins.*
2 *Co. v. Myers*, No. CV 10-2024-PHX-JAT, 2011 U.S. Dist. LEXIS 39334 (D. Ariz. Apr.
3 11, 2011). Thus “[d]efects in personal jurisdiction, venue, or service of process are waived
4 unless asserted in a party's initial pleading.” *Hill v. Blind Indus. & Servs.*, 179 F.3d 754,
5 757 (1999) (citing Fed. R. Civ. P. 12(h)(1)).

6 Even if a party properly and timely raises such defenses, the defenses can still be
7 waived by the party’s subsequent conduct. *Peterson v. Highland Music*, 140 F.3d 1313,
8 1318 (9th Cir. 1998) (citing *Continental Bank, N.A. v. Meyer*, 10 F.3d 1293, 1296-97 (7th
9 Cir. 1993); *Yeldell v. Tutt*, 913 F.2d 533, 538-39 (8th Cir. 1990)). However, the Ninth
10 Circuit has indicated where the defense was properly raised, waiver should not be found
11 “[i]n the absence of other factors militating in favor of a finding of waiver.” *Peterson*, 140
12 F.3d at 1318-19 (noting the purpose of “waiver by conduct” is to prevent a party from
13 “sandbagging” by raising the defense without vigorously pursuing it “in the hopes of
14 receiving a favorable disposition...and then raising [it] on appeal only if he were unhappy
15 with the district court's ultimate decision.”); *see also R. Prasad Indus. v. Flat Irons Envtl.*
16 *Sols. Corp.*, No. CV-12-08261-PCT-JAT, 2017 U.S. Dist. LEXIS 164541, at *5-6 (D. Ariz.
17 Oct. 4, 2017) (finding a defense asserted in defendant’s answer to be waived when
18 defendants vigorously litigated the case for multiple years “through dozens of motions and
19 pleadings” before asserting it again.)

20 Notably, waiver of defenses under Rule 12(h) applies to the defense of “improper
21 venue” under Rule 12(b)(3) but does not apply to a motion to transfer venue under 28
22 U.S.C. 1404(a). *See, e.g., Rui Chen v. Premier Fin. All., Inc.*, No. 18-CV-3771 YGR, 2019
23 U.S. Dist. LEXIS 219257, at *4 n.2 (N.D. Cal. Dec. 19, 2019) (“[A] motion to
24 transfer...under section 1404(a) ‘technically can be made at any time. i.e., there is no risk
25 of waiver by delay as there is with improper venue.’” (quoting *Turnage v. Old Dominion*
26 *Freight Line, Inc.*, No. C 13-1409-PJH, 2013 U.S. Dist. LEXIS 84277, 2013 WL 2950836,
27 at *6 (N.D. Cal. June 14, 2013)); *Weber v. Saladworks, LLC*, No. SA CV 13-01049-MWF
28 (PJWx), 2014 U.S. Dist. LEXIS 195654, at *3 (C.D. Cal. Jan. 27, 2014) (finding waiver

1 inapplicable “because the Motion does not raise a 12(b)(3) defense.”).

2 King’s conduct has not waived its jurisdictional defense. In the present action, King
3 raised the issue of personal jurisdiction when it first answered Plaintiff’s complaint on June
4 11, 2020, less than three months prior to bringing this motion. (Doc. 7 at 13.) While
5 Defendant has engaged in the preliminary proceedings of this case since raising the
6 argument, such conduct is perfectly allowable. It has long been the case that a defendant
7 need not risk a judgement on the merits in order to preserve their jurisdictional defense.
8 *See, e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 n.10 (1980)
9 (citing *Kulko v. Superior Court of Cal.*, 436 U.S. 84, 90 n.5 (1978)). There do not appear
10 to be any factors militating in favor of waiver in this case. Defendant does not appear to be
11 “sandbagging” the litigation or attempting to gain two bites at the apple. King has not let
12 its jurisdictional defense gather dust in the background only to be suddenly reasserted after
13 the orders or rulings of the case turn against it.

14 Henrietta’s caselaw to the contrary is unpersuasive. Plaintiff cites *R. Prasad Indus.*
15 for the proposition that King’s behavior merits waiver. However, the Court in *R. Prasad*
16 *Indus.* found waiver in the context of vigorous multi-year litigation where the defendant
17 filed “dozens of motions and pleadings” without reasserting its jurisdictional defense. *Id.*
18 at 5-6. This is a far cry from the present case’s mere three-month lifespan in which King
19 has filed no other substantive motion with the Court since first asserting his defense.
20 Similarly, Plaintiff’s cite to *New Net Inc. v. Lavasoft*, 356 F. Supp. 2d 1071, 1074 (C.D.
21 Cal. 2003), is inapposite to the present circumstances. In *New Net*, the court affirmatively
22 ordered the defendant to brief their jurisdictional argument prior to addressing the merits,
23 and the defendant declined to do so. King has received no such mandate in this case, nor
24 has King affirmatively declined any prior opportunity in which it could have briefed its
25 jurisdictional issue. As such King has not waived its jurisdictional argument by its conduct.

26 King has also not waived its argument to transfer venue under 1404(a) but has
27 waived any argument based on improper venue. Unlike the defense of improper venue
28 under Rule 12(b)(3), a motion to transfer venue under 1404(a) cannot be waived under

1 Rule 12(h). King’s motion makes it clear that it seeks transfer based on 1404(a) rather than
2 under Rule 12(b)(3). (Doc. 18 at 16). As such, Henrietta’s contention that King’s transfer
3 is barred as untimely must fail.²

4 **B. The “Local Action” Doctrine**

5 King argues this Court lacks subject matter jurisdiction based on the “local action”
6 doctrine. Under Federal Rule of Civil Procedure 12(b)(1), a party may move to dismiss a
7 claim for lack of subject-matter jurisdiction. “Federal courts are courts of limited
8 jurisdiction” and may only hear cases as authorized by the Constitution or Congress.
9 *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A court has subject-
10 matter jurisdiction over claims that “aris[e] under the Constitution, laws, or treaties of the
11 United States” and over “civil actions where the matter in controversy exceeds the sum or
12 value of \$75,000, exclusive of interest and costs, and is between” diverse parties. 28 U.S.C.
13 §§ 1331, 1332. Because our jurisdiction is limited, it is to be presumed that a cause lies
14 outside of it, and the burden of establishing jurisdiction is on the party asserting it.
15 *Kokkonen*, 511 U.S. at 377.

16 The Ninth Circuit has confirmed the “local action” doctrine is a constraint on the
17 subject matter jurisdiction of the federal courts. *Eldee-K Rental Props., Ltd. Liab. Co. v.*
18 *DIRECTV, Inc.*, 748 F.3d 943, 947-48 (9th Cir. 2014). The local action doctrine holds that
19 certain suits “directly operating on real estate or personal actions closely connected with
20 real property” are so connected to real property that such actions must be brought where
21 the real property is located. *Eldee-K*, 748 F.3d at 946; *see also Casey v. Adams*, 102 U.S.
22 66, 67-68, 26 L. Ed. 52 (1880) (noting local actions must be brought “where the thing on
23 which they are founded is situated.”) *United States v. Byrne*, 291 F.3d 1056, 1060 (9th Cir.
24 2002) (holding that the court's jurisdiction was “properly exercised in the state where the
25 land is situated” because the action was local). However, “The Supreme Court...applie[s]

26
27 ² Henrietta’s confusion is understandable given that King’s motion also asserts “the only
28 proper place for jurisdiction over King is in...California.” (*Id.*) To the extent that King
intends this statement to be an assertion that venue in Arizona is improper, Henrietta is
correct that the argument has been waived under Federal Rule of Civil Procedure 12(h).

1 this doctrine narrowly,” and only to actions that are “local” in character as opposed to
2 “transitory.” *Eldee-K*, 748 F.3d 947. Transitory actions are cases which “might have taken
3 place anywhere,” and generally encompass causes of action and requests for relief that are
4 personal in nature rather than tied to land. *Eldee-K*, 748 F.3d at 747 (quoting *Livingston v.*
5 *Jefferson*, 15 F. Cas. 660, 664-65 (1811)); *see also Stone v. United States*, 167 U.S. 178,
6 183 (1897); *Ellenwood v. Marietta Chair Co.*, 158 U.S. 105, 108 (1895). The Court
7 “look[s] to state law...for a determination of which types of actions are...local in nature”
8 and which are transitory, but the jurisdictional limitation imposed on local actions is a
9 matter of federal law. *Eldee-K*, 748 F.3d at 951 (noting that the court should look to
10 California law to determine which causes of action were treated as local actions but that
11 “state law does not control the effect...on our jurisdiction.”).

12 King argues that, essentially, this is a case about Henrietta’s “loss of use of fixtures,”
13 and for King’s alleged “failure to deliver title and right of possession” of the BC equipment.
14 (Doc. 18 at 7.) King alleges that because the case deals with fixtures, it directly operates
15 on real estate; as such, it is local in nature. (*Id.*) In support of this contention, King cites to
16 A.R.S. § 47-2107(A) in conjunction with UCC § 2-107 Comment 1. Together King argues
17 these provisions indicate that agreements in which the buyer must sever goods from land
18 are considered contracts effecting land, at least for the purposes of the statute of frauds.³

19 ³ A.R.S. § 47-2107(A) deals with the sale of good to be severed from realty and states in
20 pertinent part that:

21 A contract for the sale of minerals or the like (including oil and gas) or a
22 structure or its materials to be removed from realty is a contract for the sale
23 of goods within this chapter *if they are to be severed by the seller* but until
24 severance a purported present sale thereof which is not effective as a transfer
of an interest in land is effective only as a contract to sell.

25 This statutory provision is modeled verbatim off of U.C.C. § 2-107(1). The first comment
26 to U.C.C. § 2-107 states in pertinent part that:

27 this subsection applies only if the minerals or structures ‘are to be severed by
28 the seller.’ If the buyer is to sever, such transactions are considered contracts
affecting land and all problems of the Statute of Frauds and of the recording

1 However, it does not appear that Arizona courts treat King’s cited provisions as
2 triggering the “local action” doctrine in all such cases. Arizona courts seem more than
3 willing to allow their courts to adjudicate disputes governing property in foreign
4 jurisdictions when causes of action are based on equity and the judgment is a result of *in*
5 *personam* jurisdiction. *TWE Retirement Fund Trust v. Ream*, 198 Ariz. 268, 272 (Ct. App.
6 2000) (“An *in personam* proceeding, brought in equity to determine the rights of
7 individuals, may be filed in any court that has personal jurisdiction...even if the proceeding
8 involves realty located in another state.”) Other cases distinguish between actions affecting
9 or adjudicating ownership of property *in rem* through the court’s direct authority, and those
10 which affect real estate or fixtures as the ancillary result of an *in personam* judgement.
11 *TWE*, 198 Ariz. at 272; *see also Amparano v. ASARCO, Inc.*, 208 Ariz. 370, 374 (2004)
12 (noting the “‘local’ rule” is both a rule of convenience, and “prevents more than one court
13 from *acting on title* to real property.”). The Arizona courts also take a functional approach
14 to determine what actions are truly local, asking whether the end result of the case is
15 intended to effect interests in land. *See Nielson v. Hicks*, 225 Ariz. 451, 453 (Ct. App. 2010)
16 (noting “‘...actions concerning real property’ necessarily refers to actions in which real
17 property is the subject matter, or the basis of, the actions, and not merely peripheral[,]” and
18 holding action was not concerning real property because “the relief sought...is personal,
19 sounds in tort, and does not concern real property.”).

20 King attempts to show this action directly affects real estate by alleging that
21 paragraph 54(c) of Henrietta’s complaint requests “a declaratory judgement...to deliver
22 title and right of possession.” However, King’s allegation blatantly misconstrues the
23 language of complaint. The relevant paragraph does not in fact seek a judgement delivering
24 Henrietta “title and right of possession,” nor does any request for relief ask this Court to

25
26 of land rights apply to them. Therefore, the Statute of Frauds section of this
27 Article does not apply to such contracts though they must conform to the
28 Statute of Frauds affecting the transfer of interests in land.

1 determine the present title to the land. Instead, the paragraph requests the court declare
2 King *was contractually obligated* to deliver title and possession. (Doc. 1-1 at 7.)

3 The Court is more persuaded by Henrietta’s characterization of the case. Henrietta
4 contends the central issue of this case is not to determine title to the property but one
5 seeking damages for breach of contract. It is Arizona’s practice to “look to the allegations
6 of the complaint” and the “nature of the relief sought” to determine whether an action is
7 one tied to real property. *Nielson*, 225 Ariz. at 453. Here, the allegations of the complaint
8 show that Henrietta is not seeking any decree affecting real property, but for money
9 damages. Henrietta did not seek to buy real property in Canada, but it only sought the
10 purchase of equipment it could transport for use in Arizona. Both parties understood the
11 equipment was intended for use in Arizona, and the only reason it remains in Canada is
12 due to King’s alleged breach which prevented Henrietta from moving it. The gravamen of
13 Henrietta’s damage is thus not the denial of title for an interest in land, but its inability to
14 gain the benefit of its bargain in purchased equipment. The relief sought does not affect
15 real property but seeks only return of Henrietta’s purchase price. As such, this is not the
16 type of case that Arizona treats as a “local action.”

17 **C. Personal Jurisdiction**

18 King next alleged that the Court lacks personal jurisdiction over it, but declines to
19 argue their position in detail. Instead King alleges the issue is “obviously not presently ripe
20 for full briefing” because the United States Supreme Court granted cert in *Ford Motor Co.*
21 *v. Mont. Eighth Judicial Dist. Court*, 140 S. Ct. 917 (2020) on a question of personal
22 jurisdiction but has not yet rendered a ruling. (Doc. 18 at 15.) King has presented no
23 authority to the Court explaining how a pending appeal of similar issues in a different case
24 effects the ripeness of a dispute. The Court will instead interpret Defendant’s request as a
25 request that the Court stay ruling on the issue pending resolution of the Supreme Court
26 case.

27 “[T]he power to stay proceedings is incidental to the power inherent in every court
28 to control the disposition of the causes on its docket with economy of time and effort for

1 itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254, 57 S.Ct. 163
2 (1936). Accordingly, “[a] trial court may...enter a stay of an action before it, pending
3 resolution of independent proceedings which bear upon the case.” *Leyva v. Certified*
4 *Grocers of California, Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). The decision whether to
5 stay an action is committed to the “sound discretion” of the district court and is based on
6 weighing “the competing interests which will be affected by the granting or refusal to grant
7 a stay...” *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). Among these competing
8 interests are (1) “the possible damage which may result from the granting of the stay,” (2)
9 “the hardship or inequity which a party may suffer in being required to go forward,” and
10 (3) “the orderly course of justice measured in terms of the simplifying or complicating of
11 issues, proof, and questions of law which could be expected to result from a stay.” *Lockyer*
12 *v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005) (quoting *CMAX, Inc.*, 398 F.3d at
13 268). “[T]he proponent of a stay bears the burden of establishing its need.” *Clinton v. Jones*,
14 520 U.S. 681, 708 (1997).

15 The Court declines to delay its ruling on the personal jurisdiction issue. Defendant
16 has made no effort to meet the burden of showing its need for a stay, and the Court is well
17 satisfied that the parties are capable of briefing the issue of personal jurisdiction without
18 hardship. It is also far from clear whether any decision by the Supreme Court would have
19 an effect on this case. The consolidated cases before the Supreme Court are matters
20 involving a tort action based on products liability and not based on breach of contract. The
21 question upon which the Supreme Court granted cert is not clearly analogous to the present
22 case. *See Ford Motor Co.*, 140 S. Ct. 917 (listing the question presented as “[w]hether the
23 ‘arise out of or relate to’ requirement is met *when none of the defendant's forum contacts*
24 *caused the plaintiff's claims*, such that the plaintiff’s claims would be the same even if the
25 defendant had no forum contacts.”). King’s contacts with Arizona as alleged by Henrietta
26 do relate to the Plaintiff’s claims. While it remains an open question whether those contacts
27 are sufficient to support personal jurisdiction, either way the theory of personal jurisdiction
28 asserted by Henrietta is tied to alleged case-based contracts.

1 The Court will not stay its decision pending the result of *Ford Motor Co. v. Mont.*
2 *Eighth Judicial Dist. Court*, 140 S. Ct. 917 (2020), but it will give King a chance to brief
3 the issue more fully now that King’s request has been denied. As such King is instructed
4 that it will be permitted, if it so chooses, to submit supplemental briefing on the issue of
5 personal jurisdiction. King’s supplemental briefing must be submitted to the Court within
6 five (5) days of the entry of this order. The supplemental briefing is not to exceed four
7 pages. Henrietta may, if it finds it necessary, file a response with the Court within five (5)
8 days after the supplemental briefing is submitted. The response is also not to exceed four
9 pages. If the defendant declines to brief the issue, the court will count the defense waived.
10 *Lavasoft*, 356 F. Supp. 2d, 1074.

11 **D. *Forum Non Conveniens***

12 Under the doctrine of *forum non conveniens*, “[a] district court has discretion to
13 decline to exercise jurisdiction in a case where litigation in a foreign forum would be more
14 convenient for the parties.” *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947). The
15 purpose of the doctrine is to “root out cases in which the ‘open door’ of broad jurisdiction
16 and venue laws ‘may admit those who seek not simply justice but perhaps justice blended
17 with some harassment,’” particularly in cases where the plaintiff’s apparent strategy is to
18 “forc[e] the trial at a most inconvenient place for an adversary.” *Carijano v. Occidental*
19 *Petroleum Corp.*, 643 F.3d 1216, 1224 (9th Cir. 2011) (citing *Gulf*, 330 U.S. at 507; *Piper*
20 *Aircraft Co. v. Reyno*, 454 U.S. 235, 249 n.15 (1981). The doctrine “is based on the inherent
21 power of the courts to decline jurisdiction in exceptional circumstances.” *Carijano*, 943
22 F.3d at 1224 (quoting *Paper Operations Consultants Int’l, Ltd. v. S.S. Hong Kong Amber*,
23 513 F.2d 667, 670 (9th Cir. 1975)). *Forum non conveniens* is a “drastic exercise” of the
24 court’s power because, unlike a mere transfer, it results in the dismissal of a plaintiff’s case.
25 *Carijano*, 943 F.3d at 1224. As such, the Ninth Circuit has called *forum non conveniens*
26 “an exceptional tool to be employed sparingly.” *Id.* (citing *Dole Food Co. v. Watts*, 303
27 F.3d 1104, 1118 (9th Cir. 2002)). The “plaintiff’s choice of forum is entitled to greater
28 deference when the plaintiff has chosen the home forum.” *Lueck v. Sundstrand Corp.*, 236

1 F.3d 1137, 1143 (9th Cir. 2001) (quoting *Piper Aircraft*, 454 U.S. at 256).

2 To prevail on a motion to dismiss for *forum non conveniens*, the Defendant bears
3 the burden of demonstrating (1) an adequate alternative forum, and (2) that the balance of
4 private and public interests favor dismissal. *Carijano*, 943 F.3d at 1224 (citing *Dole Food*
5 *Co.*, 303 F.3d at 1118). The mere fact that a case involves conduct or plaintiffs from
6 overseas is not enough for dismissal. *See Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d
7 1163, 1181-82 (9th Cir. 2006) (“Juries routinely address subjects that are totally foreign to
8 them, ranging from the foreign language of patent disputes to cases involving foreign
9 companies, foreign cultures and foreign languages.”). Dismissal under *forum non*
10 *conveniens* is merited only when private and public factors together “strongly favor trial in
11 the foreign country.” *Dole Food*, 303 F.3d at 1118; *see also Piper*, 454 U.S. at 241 (finding
12 transfer is merited “when trial in the chosen forum would ‘establish . . . oppressiveness and
13 vexation to a defendant . . . out of all proportion to plaintiff’s convenience,’ or when the
14 ‘chosen forum [is] inappropriate because of considerations affecting the court’s own
15 administrative and legal problems.”).

16 1. *Adequate Alternative Forum*

17 An alternative forum is deemed adequate if: (1) the defendant is amenable to process
18 there; and (2) the other jurisdiction offers a satisfactory remedy. *Carijano*, 643 F.3d at 1225
19 (citing *Piper*, 454 U.S. at 254 n.22; *Leetsch v. Freedman*, 260 F.3d 1100, 1103 (9th Cir.
20 2001)). “‘Voluntary submission to service of process’ suffices to meet the first requirement
21 for establishing an adequate alternative forum.” *Carijano*, 643 F.3d at 1225 (quoting
22 *Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1178 (9th Cir. 2006)). The burden
23 is on the defendant to show the alternative forum offers an adequate remedy. *Tuazon*, 433
24 F.3d at 1178. However, courts will only rarely find a foreign court’s remedy lacking. *Lueck*
25 *v. Sundstrand Corp.*, 236 F.3d 1137, 1143 (9th Cir. 2001) (“it is only in rare
26 circumstances...where the remedy provided by the alternative forum...is so clearly
27 inadequate or unsatisfactory, that it is no remedy at all[.]” (internal citations omitted)); *see*
28 *also Tuazon*, 433 F.3d at 1179; *Carijano*, 643 F.3d at 1226-27.

1 Here, King has met its burden of showing Canada is an adequate alternative forum.
2 King has asserted it will submit to Canadian jurisdiction if the case is sent to Canada, which
3 establishes it is amenable to service of process. King notes generally, though with little
4 support, the contention that Canada follows the common law in contract cases, a position
5 it further evidences by citation to the case of *Hodgkinson v Simms* wherein the Supreme
6 Court of Canada consistently applies the common law to contractual disputes. 3 SCR 377
7 (S.C.C. 1994). As such the Court is confident that Canadian law could provide an adequate
8 remedy.

9 2. Private Interests

10 The Ninth Circuit has enumerated several sub-factors to guide district courts in their
11 decisions regarding *forum non conveniens*. In examining the “private interests” of the
12 litigants, the Court should consider:

13
14 (1) the residence of the parties and the witnesses; (2) the forum's convenience
15 to the litigants; (3) access to physical evidence and other sources of proof;
16 (4) whether unwilling witnesses can be compelled to testify; (5) the cost of
17 bringing witnesses to trial; (6) the enforceability of the judgment; and (7) all
other practical problems that make trial of a case easy, expeditious and
inexpensive.

18 *Carijano*, 643 F.3d at 1229 (quoting *Bos. Telecomms. Grp., Inc. v. Wood*, 588 F.3d 1201,
19 1206-07 (9th Cir. 2009). When looking at the access to evidence and location of witnesses
20 “the focus...should not rest on the number of witnesses . . . in each locale' but rather the
21 court should evaluate the materiality and importance of the anticipated...witnesses’
22 testimony and then determine their accessibility and convenience to the forum.” *Carijano*,
23 643 F.3d at 1231. When looking to whether unwilling witnesses can be compelled to
24 testify, “the initial question is not whether the witnesses are beyond the reach of
25 compulsory process, but *whether it has been alleged or shown that witnesses would be*
26 *unwilling.*” *Id.* (citing *Duha v. Agrium, Inc.*, 448 F.3d 867, 877 (6th Cir. 2006); *Peregrine*
27 *Myanmar Ltd. v. Segal*, 89 F.3d 41, 47 (2d Cir. 1996)) (emphasis added).

28 i. *The Residence of the Parties and the Witnesses*

1 In the present case the balance of private interests counsels against dismissal of the
2 case. The Court notes that both parties to the action are residents of the United States. While
3 King argues “the only common forum” between the parties is Canada because they are
4 citizens of different states, that is an inevitable feature of this Court’s diversity jurisdiction,
5 and is not itself a credible reason to invoke the “drastic exercise” of *forum non conveniens*.
6 *Carijano*, 943 F.3d at 1224. Also, while King alleges that witnesses and interested parties
7 reside in Arizona, Texas, California, and Utah, the Court struggles to understand why
8 Canada would be a *more convenient forum* to those witnesses than Arizona. King’s motion
9 notes only three specific non-party witnesses that live in Canada which the Court finds
10 insufficient to overcome the common residency of both current parties in the United States
11 as well as the residency of all party witnesses and staff. King generally alleges without any
12 detail that a “host of minor witnesses” will likely reside in British Columbia but declines
13 to list these witnesses for the Court’s consideration. In any case, the Court notes that in
14 considering the location of witnesses “the focus...should not rest on the number of
15 witnesses” but on “the materiality and importance of the anticipated [testimony].”
16 *Carijano*, 643 F.3d at 1231. Thus, a general allegation that “minor witnesses” may live in
17 Canada, without greater detail, will not sway the Court’s analysis. Additionally, the Court
18 notes that King has not designated these witnesses in their MDIP responses. In the absence
19 of any more detailed evidence, the Court finds the residency of parties and witnesses favors
20 retention of the case in the United States.

21 *ii. The Forum's Convenience to the Litigants*

22 Defendant asserts that “[Arizona] is no more convenient to the Kings than British
23 Columbia.” However, Defendant makes this statement without any explanation or evidence
24 as to why a California company finds Canada to be an equally convenient forum. Arizona
25 borders both California and Utah making this venue within a long day’s drive (or a short
26 flight) of witnesses present in those states. King further alleges without further argument
27 that “[i]f Endako Mine becomes a party, British Columbia is convenient, Arizona is not.”
28 However, the Court notes that Endako Mine is not a party and *forum non conveniens* is not

1 a tool for weighing the alleged convenience of hypotheticals. As such, the Court finds that
2 the most convenient forum to the actual litigants is in the United States.

3 *iii. Access to Physical Evidence and Other Sources of Proof*

4 With regards to the physical evidence in this case, the equipment's location in
5 Canada seems to weigh in favor of transfer, though the Court notes evidence is likely found
6 in several localities including Arizona and California. While the location of the machinery
7 is relevant, the Court is not convinced the factor overwhelms other factors given the
8 gravamen of the dispute. This is essentially a dispute over whether the "additional
9 requirements" imposed on Henrietta support a finding that King breached its duty. While
10 some evidence may be required to show the exact scope of the additional requirements, the
11 main dispute of the case seems to be over whether the additional requirements were
12 disclosed in the contract, not over their exact scope. Even with this, the physical evidence
13 located in Canada does not outweigh the other factors of convenience in this case given the
14 location of both parties and the majority of central witnesses. *See Boston Telecomms.*
15 *Group, Inc. v. Wood*, 588 F.3d 1201, 1208 (9th Cir. 2009) ("Any court...will necessarily
16 face some difficulty in securing evidence from abroad,' but these complications do not
17 necessarily justify dismissal." (quoting *Tuazon* 433 F.3d, at 1181)).

18 *iv. Whether Unwilling Witnesses can be Compelled to Testify*

19 King has not satisfied its burden of showing foreign witnesses are unwilling to
20 testify. The initial question for this factor "is not whether the witnesses are beyond the
21 reach of compulsory process, but whether it has been alleged or shown that witnesses
22 would be unwilling to testify." *Carijano*, 643 F.3d at 1231. King, without referencing any
23 substantive support, makes the bare assertion that "[w]itnesses from Centerra Gold will not
24 be testifying voluntarily in Arizona given the inflammatory allegations of plaintiffs...[and]
25 [o]ne doubts Brad Addison can be brought to Arizona from his house in British Columbia."
26 The burden was on King to show there were witnesses unwilling to testify, yet they have
27 offered only two purely speculative sentences on the point. Additionally, as Henrietta
28 points out, Canada allows United States courts to issue letters rogatory to obtain non-party

1 discovery over foreign entities. *Softwind Capital, LLC v. Glob. Project Sols., LLC*, No.
2 2:11-cv-02057-JCM-GWF, 2013 U.S. Dist. LEXIS 62999 (D. Nev. May 2, 2013). As such
3 the presence of foreign witnesses in Canada does not itself weight against retention of the
4 case in an Arizona forum.

5 v. *The Cost of Bringing Witnesses to Trial and Enforceability of the Judgment*

6 The cost of bringing witnesses to trial weighs in favor of keeping the case in
7 Arizona. The vast majority of presently known witnesses are located in the United States.
8 Indeed, the vast majority of witnesses appear to be either in Arizona or in states directly
9 bordering Arizona. King has identified only three “potential” witnesses living in Canada.
10 As such it seems to the Court that the cost of bringing witnesses to trial weighs in favor of
11 retaining the case in the United States. There is also no issue with the enforceability of the
12 judgement sought. Kings assertion to the contrary rests on a blatant misquotation of
13 Henrietta’s complaint. Henrietta does not request a judgement as to who has “title and right
14 of possession,” it asks for a judgement that King breached a contractual obligation. The
15 Court is not being called to decide title but to decide whether King must reimburse the
16 equipment’s purchase price. Any judgement to that effect is enforceable as long as the
17 Court has personal jurisdiction over the parties.

18 3. Public Interests

19 In examining the public interests of the relevant forums, the Court considers: (1) the
20 local interest in the lawsuit, (2) the court's familiarity with the governing law,⁴ (3) the
21 burden on local courts and juries, (4) congestion in the court, and (5) the costs of resolving
22 a dispute unrelated to a particular forum.” *Carijano*, 643 F.3d, at 1232 (quoting *Bos.*
23 *Telecomms.*, 588 F.3d at 1211). The local interest factor has the aim of determining “if the
24 forum *in which the lawsuit was filed* has its own identifiable interest in the litigation” which
25 justifies proceeding in spite of other burdens. *Id.* (citing *Piper*, 454 U.S. at 261); *see also*
26 *Tuazon*, 433 F.3d at 1182 (the relevant query is “if there is an identifiable local interest in
27

28 ⁴ The Court will assume without deciding for the purposes of this motion that Canadian
Law applies to the issues of law surrounding contract performance.

1 the controversy, not whether another forum also has an interest”).

2 *i. Local Interest*

3 In regards the local interest analysis, King misunderstands the scope of this factor.
4 The Ninth Circuit has explained that in considering local interests, the Court is only looking
5 to whether Arizona has any interest in the action, “not whether another forum also has an
6 interest.” *Tuazon*, 433 F.3d 1182. Thus, to the extent King argues that Canada has a local
7 interest, the argument is inapplicable to the Court’s analysis. The Court believes that, in
8 the absence of evidence to the contrary, Arizona does have a local interest in the dispute.
9 The Plaintiff is an Arizona resident and Defendant routinely and continually solicited
10 Plaintiff’s business by offering to help them acquire equipment for Plaintiff’s operations
11 in that forum. In any event, King fails to address the actual issue of this factor in detail,
12 merely asserting in a single sentence that “there is no Arizona local interest because the
13 equipment was never...brought to Arizona.” The Court finds this alone is not sufficient to
14 establish the lack of a local interest. After all, it would be rather anomalous to claim
15 Arizona loses any interest in ensuring its resident’s contract is honored simply because a
16 foreign defendant breached the contract and prevented delivery to Arizona. *See Tuazon*,
17 433 F.3d at 1181.

18 *ii. Cost of Resolving the Dispute*

19 King argues the costs of resolving this dispute are lower in Canada because Canada
20 does not follow the American rule and instead employs a “loser pays” rule. The court notes
21 that simply alleging the costs of litigation will be shifted to another party is not the same
22 as showing litigation will cost less overall. Even were this the case, as Henrietta points out,
23 the parties’ contractual agreement has an attorney’s fees provision that addresses King’s
24 concern. King also asserts the majority of witnesses are local to Canada, but as has been
25 discussed above, Kings evidence on the point is lacking.

26 *iii. Administrative Burden and Efficiency*

27 The remaining factors “all relate to the effects of hearing the case on the respective
28 judicial systems.” *Carijano*, 643 F.3d 1233. King argues that this case ought to be tried in

1 Canada because an Arizona jury will not be able to adequately weigh the local issues such
2 as the true burden of removing snow. Yet, as the Ninth Circuit has previously stated, a
3 “backhanded indictment of the jury system is not compelling. Juries routinely address
4 subjects that are totally foreign to them, ranging from the foreign language of patent
5 disputes to cases involving foreign companies, foreign cultures and foreign languages.”
6 *Tuazon*, 433 F.3d at 1181. King has also failed to present any evidence on the relative
7 congestion of Canadian courts compared to this district, and simply asserts in a single
8 sentence that “Local British Columbia juries and judges will be more familiar with local
9 conditions” when discussing the burden on the Court. As such, the Court finds that none
10 of the listed factors weigh in favor of dismissal.

11 4. Weighing all factors.

12 In deciding whether to dismiss a case for *forum non conveniens*, the Court must hold
13 King to its burden of “making a clear showing of facts which establish such oppression and
14 vexation of a defendant as to be out of proportion to plaintiff’s convenience.” *Carijano*,
15 643 F.3d 1236. Here King has failed to meet that burden. On one side of the scale sits the
16 presence of some physical evidence in Canada, the assumed application of Canadian law,
17 the presence of three witnesses specifically identified by King along with alleged “minor
18 witnesses.” This alone is not sufficient to trigger the “drastic exercise” of what the Ninth
19 Circuit has labeled “an exceptional tool.” *Carijano*, 943 F.3d at 1224. This is particularly
20 true given Henrietta’s selection of its home forum is entitled to substantial deference in its
21 own right. Other factors also weigh in favor of retaining the case including the fact that
22 both parties and the majority of identified witnesses live in or adjacent to Arizona, and the
23 relative cost of travel to Arizona compared to the cost of travel to British Columbia. Both
24 companies are United States-based with their offices in Arizona and California which
25 supports the inference that evidence of their negotiations and understanding of the contract
26 will be located in the United States. Based on this and other stated factors, the Court finds
27 that the “oppression or vexation” to King is far lower than the convenience of going
28 forward with this dispute between two United States companies in the United States.

1 **E. Transfer of Venue under 28 U.S.C. 1404(a)**

2 King’s final argument asserts that “if it is subject to jurisdiction in the U.S.A. for
3 any actions performed for Henrietta Mine...” then “the only proper place” jurisdiction
4 exists is in California. Because of this King requests this Court transfer the case to
5 California under 28 U.S.C. 1404(a). However, aside from a general citation to the statute
6 and an assertion that Arizona lacks personal jurisdiction, King makes no effort to meet
7 their burden of proof for transfer under 1404(a). The Court also notes that the purpose of
8 28 U.S.C. 1404(a) is not to provide for transfer to a court with personal jurisdiction, but to
9 allow transfer for the convenience of parties and witnesses when the interests of justice
10 require it. *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 495-98 (9th Cir. 2000). King
11 undertakes no analysis of why the convenience of the parties, or the interests of justice
12 allow transfer to California. As such the request for transfer under 28 U.S.C. 1404(a) is
13 denied.

14 **III. CONCLUSION**

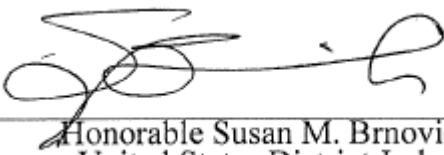
15 Accordingly,

16 **IT IS ORDERED** that Defendant’s motion to dismiss the case for lack of subject-
17 matter jurisdiction and under the doctrine of *forum non conveniens* **is denied**;

18 **IT IS FURTHER ORDERED** that Defendant’s request to transfer the case to the
19 Eastern District of California under 28 U.S.C. § 1404(a) **is denied**;

20 **IT IS FURTHER ORDERED** that Defendant is permitted to submit supplemental
21 briefing, not to exceed four pages, on the issue of this Court’s personal jurisdiction within
22 five (5) days of the entry of this order and that Plaintiff is permitted to file a response of
23 equal length to the Court within five (5) days after the supplemental briefing is submitted.

24 Dated this 6th day of January, 2021.

25
26
27 
28 _____
 Honorable Susan M. Brnovich
 United States District Judge