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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Harry D Dalton,

10 Plaintiff,

11 v.

12 Wade Atchison, et al.,

13 Defendants.
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No. CV-16-08014-PCT-JZB

ORDER

15 Pending before the Court is Defendant's Motion to Dismiss Plaintiff's Complaint
16 on Improper Venue Grounds or, in the Alternative, to Transfer Venue pursuant to 28
17 U.S.C. § 1406(a). (Doc. 7.) Defendant requests the Court dismiss this matter because
18 venue is not proper in the United States District Court for the District of Arizona pursuant
19 to 28 U.S.C. § 1391(b). Alternatively, Defendant requests the Court transfer this case to
20 the United States District Court for the Eastern District of Arkansas. As detailed below,
21 none of the requirements of § 1391(b) are met here and, therefore, venue is not proper in
22 this Court. In the interests of justice, the Court will transfer this case to the United States
23 District Court for the Eastern District of Arkansas, where the case could have been
24 brought.

25 **I. Background**

26 On December 21, 2015, Plaintiff, proceeding *pro se*, filed his Complaint in
27 Arizona state court, asserting claims against Defendant for breach of contract and
28 intentional infliction of emotional distress. (Doc. 1-1 at 4-12.) Specifically, Plaintiff

1 asserts that Defendant breached the parties' insurance contract when Defendant, an agent
2 of Allstate, failed to notify Plaintiff of the possible risks in changing Plaintiff's "Builder's
3 Risk Policy" to a home owner's policy, and subsequently allowed Plaintiff's policy to
4 lapse. (*Id.* ¶¶ 12, 15-16, 22, 25.) Plaintiff asserts that he obtained the Builder's Risk
5 Policy to insure a construction project at his property located in Dover, Arkansas. (*Id.* ¶
6 21.) According to Plaintiff, on May 24, 2013, Plaintiff suffered a neck injury on the
7 property while operating a piece of heavy equipment, and was transported to a hospital in
8 Littlerock, Arkansas. (*Id.* ¶ 24.) During Plaintiff's three-day stay at the hospital,
9 electrical wire was stolen from the construction site. (*Id.* ¶ 25.) Plaintiff claims that
10 Allstate adjusters denied Plaintiff's claim for theft. Plaintiff asserts Defendant offered to
11 personally pay half of the cost to replace the wire, but never paid Plaintiff that amount.
12 (*Id.*) Plaintiff further asserts that Defendant failed to assist Plaintiff in reporting the theft
13 to the police. (*Id.*) On December 18, 2013, Plaintiff, on a recommendation by his doctor
14 in Arkansas, underwent surgery in Los Angeles, California for his injury. (*Id.* ¶¶ 25-26.)

15 On January 27, 2016, Defendant removed the action to this Court based on
16 diversity jurisdiction.¹ (Doc. 1.) On February 4, 2016, Defendant filed his Motion to
17 Dismiss on Improper Venue Grounds or, in the Alternative, Motion to Change Venue to
18 the Eastern District of Arkansas, pursuant to 28 U.S.C. §1406(a). (Doc. 7.) Plaintiff
19 opposes the Motion and asserts that, due to his medical condition and financial status, and
20 his domicile in Arizona, venue is proper in the United State District Court for the District
21 of Arizona. (Doc. 13 at 2.) Below, the Court addresses the parties' arguments.

22 **II. Discussion**

23 **a. Legal Standards**

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25 ¹ The parties do not dispute that the Court has diversity jurisdiction over this
26 matter. 28 U.S.C. § 1332 ("The district courts shall have original jurisdiction of all civil
27 actions where the matter in controversy exceeds the sum or value of \$ 75,000, exclusive
28 of interest and costs, and is between . . . [c]itizens of different States."). In his
Complaint, Plaintiff asserts that he resides in Arizona and Defendant resides in Arkansas.
(Doc. 1-1 at 4, ¶¶ 1-2.) Plaintiff further seeks over \$75,000 in damages. (*Id.* at 11-12.)
Defendant asserts in his Notice of Removal that all of the requirements of diversity
jurisdiction have been met. (Doc. 1 at 1-2.)

1 A defendant may challenge venue pursuant to Rule 12(b)(3) of the Federal Rules
2 of Civil Procedure and 28 U.S.C. § 1391. If venue is improper, the Court must either
3 dismiss the case or, “if it be in the interest of justice, transfer [the] case to any district or
4 division in which it could have been brought.” *See* 28 U.S.C. § 1406(a). The decision
5 whether to dismiss the case or transfer it is within the Court’s discretion. *In re Hall,*
6 *Bayoutree Associates, Ltd.*, 939 F.2d 802, 804 (9th Cir. 1991). However, “the general
7 preference . . . is for the case to be transferred instead of dismissed altogether.”
8 *Kewlmetal Inc. v. Bike Builders Bible, Inc.*, 2:15-cv-01008 JWS, 2015 U.S. Dist. LEXIS
9 168362, at *2 (D. Ariz. Dec. 15, 2015) (citing *See Brodt v. Cty. of Harford*, 10 F. Supp.
10 3d 198, 203 (D.D.C. 2014), and *Abrams Shell v. Shell Oil Co.*, 165 F. Supp. 2d 1096,
11 1103 (C.D. Cal. 2001)).

12 **b. Venue in the District of Arizona is improper.**

13 Defendant argues that the Court should dismiss this case because venue in the
14 District of Arizona is not proper pursuant to 28 U.S.C. § 1391(b). Section 1391(b)
15 provides the following:

- 16 (b) Venue in general. A civil action may be brought in—
17 (1) a judicial district in which any defendant resides, if all
18 defendants are residents of the State in which the district is
19 located;
20 (2) a judicial district in which a substantial part of the
21 events or omissions giving rise to the claim occurred, or a
22 substantial part of property that is the subject of the action is
23 situated; or
24 (3) if there is no district in which an action may otherwise
25 be brought as provided in this section, any judicial district in
26 which any defendant is subject to the court’s personal
27 jurisdiction with respect to such action.

23 “The venue statutes are generally intended to protect a defendant from being forced to
24 defend in an unfair or inconvenient forum.” *Shell v. Shell Oil Co.*, 165 F. Supp. 2d 1096,
25 1106 (C.D. Cal. 2001). The “[p]laintiff has the burden of proving that venue is proper in
26 the district in which the suit was initiated.” *Hope v. Otis Elevator Co.*, 389 F. Supp. 2d
27 1235, 1243 (E.D. Cal. 2005) (citing *Airola v. King*, 505 F. Supp. 30, 31 (D. Ariz. 1980)).
28 When deciding a challenge to venue, the pleadings need not be accepted as true, and the

1 district court may consider facts outside of the pleadings. *Argueta v. Banco Mexicano,*
2 *S.A.*, 87 F.3d 320, 324 (9th Cir. 1996).

3 Here, the Court finds that venue is not proper in this Court pursuant to 28 U.S.C.
4 § 1391(b). First, venue is improper under § 1391(b)(1) because Defendant resides in
5 Arkansas. (Doc. 1-1 at 4, ¶¶ 1-2; Doc. 7-1 ¶¶ 2-3.) Second, venue is improper under §
6 1391(b)(2) because, as the parties agree, the events giving rise to Plaintiff’s claims took
7 place in Arkansas, not Arizona. (Doc. 1-1 ¶¶ 21, 24; Doc. 7 at 4.)

8 Finally, § 1391(b)(3) does not apply because this case could have been brought in
9 the Eastern District of Arkansas. Defendant resides in the Eastern District of Arkansas,
10 and a substantial part of the alleged events giving rise to Plaintiff’s claims occurred in
11 that District. (Doc. 1-1 at 4, ¶¶ 1-2; Doc. 7-1 ¶ 2.) Further, based on Plaintiff’s
12 Complaint and the parties’ briefing, it appears the United States District Court for the
13 District of Arkansas would have subject matter jurisdiction over this case and personal
14 jurisdiction over both parties. (*Id.*) Importantly, Plaintiff does not contest that this action
15 could have been brought in that District Court.

16 Instead, Plaintiff requests that this case proceed in the District of Arizona because
17 his medical condition, which resulted from the accident in Arkansas, hinders his ability to
18 travel and prosecute his claims in Arkansas. (Doc. 13 at 2.) However, Plaintiff does not
19 assert any argument that this case meets any of the requirements of § 1391(b).²

20 Because none of the provisions of § 1391(b) are met in this case, venue is not
21 proper in the District of Arizona. Therefore, the Court must now determine whether to
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23 ² In a Sur-Reply, Plaintiff also asserts that “[o]riginally this suit was filed in
24 Mojave County Court, but the defense lawyer moved the case to the U.S. Federal Court,
25 District of Arizona. Why did the defense lawyer move the case if she did not intend for it
26 to be heard in that court?” (Doc. 15 at 2.) First, Plaintiff did not seek leave to file his
27 Sur-Reply in violation of the Local Rules of Civil Procedure. *See* LRCiv. 7.2. Second,
28 even considering Plaintiff’s Sur-Reply, Defendant’s removal did not waive his right to
challenge venue in Arizona. *See Crumrine v. NEG Micon USA, Inc.*, 104 F. Supp. 2d
1123, 1128 (N.D. Iowa 2000) (holding that when a “defendant removes an action from a
state court in which he has been sued, he consents to nothing and ‘waives’ nothing; he is
exercising a privilege unconditionally conferred by statute, and, since the district court to
which he must remove it is fixed by law, he has no choice.”) (quoting *Greenberg v.*
Giannini, 140 F.2d 550, 553 (2d Cir. 1944)).

1 dismiss this case or transfer it to the Eastern District of Arkansas.

2 **c. Transferring this case to the Eastern District of Arkansas is**
3 **appropriate.**

4 Pursuant to 28 U.S.C. § 1406(a), “[t]he district court of a district in which is filed a
5 case laying venue in the wrong division or district shall dismiss, or if it be in the interest
6 of justice, transfer such case to any district or division in which it could have been
7 brought.” *See Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466 (1962) (holding that “[t]he
8 language of § 1406(a) is amply broad enough to authorize the transfer of cases, however
9 wrong the plaintiff may have been in filing his case as to venue, whether the court in
10 which it was filed had personal jurisdiction over the defendants or not.”).

11 As stated above, Plaintiff’s claim could have been brought in the Eastern District
12 of Arkansas. Defendant resides in the Eastern District of Arkansas. (Doc. 7-1 ¶¶ 2-3.)
13 Further, a substantial part of the alleged events giving rise to this litigation occurred in
14 the Eastern District of Arkansas: the insurance contract was negotiated in Dover,
15 Arkansas³ (Doc. 1-1 at 8, ¶ 21); Plaintiff was on property located in Arkansas when his
16 injury occurred, and the theft occurred on the same property (*id.* at 8-9, ¶¶ 21-25); and all
17 of the relevant communications and transactions between the two parties occurred in
18 Arkansas (*id.* at 6-7, ¶¶ 12, 14-16). Transferring this case to a new venue would serve the
19 interests of justice because it would allow Plaintiff to continue the litigation in the correct
20 forum.

21 Plaintiff asserts that the District of Arizona is the correct venue due to his health
22 problems, as well as the need to be close to his doctor. (Doc. 13 at 2.) However, Plaintiff
23 fails to identify a court other than the District Court for the Eastern District of Arkansas
24 where this case could have been brought. And, although Plaintiff states that “[a]ll . . .
25 witnesses can have depositions taken in place of them appearing in person in Arizona,”
26 (Doc. 13 at 2), the Court assumes that Plaintiff would be able to telephonically depose

27 ³ Dover is an incorporated city situated in Pope County, Arkansas. POPE COUNTY
28 ARK., <http://www.popecounty.ar.com/index.html> (last visited June 16, 2016). Under 28
U.S.C. § 83(a)(2), Pope County resides in the Eastern Division of the Eastern District of
Arkansas.

1 Defendant and other witnesses who reside in Arkansas.

2 Additionally, it appears that Plaintiff's claims may be time-barred if dismissed.
3 *See* Ark. Code. Ann. § 16-56-105 (2015);⁴ *McQuay v. Guntharp*, 331 Ark. 466, 474-76
4 (1998) (holding that the tort of outrage is governed by a three-year statute of limitations).
5 Plaintiff filed his Complaint on December 21, 2015, alleging at least some unlawful
6 conduct that occurred in May 2013. (Doc. 1-1 ¶ 21.) Therefore, the Court favors
7 transferring, rather than dismissing, this case in the interests of justice. *See Westphal v.*
8 *Mace*, 671 F. Supp. 665, 668 (D. Ariz. 1987) (holding that transferring the case from
9 Arizona to Nevada would be in the interests of justice when the injury to Plaintiff
10 occurred in Nevada and the only connection Defendant had to Arizona was advertising in
11 Arizona); *Mach 1 Air Servs. Inc. v. Bustillos*, No. CV-12-02617-PHX-GMS, 2013 U.S.
12 Dist. Lexis 41501, *31-32 (D. Ariz. March 25, 2013) (ruling that "the interests of justice
13 warrant transfer of the entire case to the Western District of Texas" because "[t]hat court
14 would have jurisdiction over all the [p]arties. . . . [and the plaintiff] would likely be
15 severely prejudiced by dismissal."). Accordingly, the Court will transfer the case to the
16 Eastern District of Arkansas.

17 **III. Conclusion**

18 Although Plaintiff claims Arizona is an easier and more financially feasible venue
19 to adjudicate his case, venue in this Court is improper pursuant to 28 U.S.C. § 1391(b).
20 Rather than dismissing the case, in the interests of justice, the Court will transfer this
21 action to the Eastern District of Arkansas.

22 Accordingly,

23 **IT IS ORDERED** that Defendant's Motion to Dismiss Plaintiff's Complaint on

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25 ⁴ Ark. Code Ann. § 16-56-105 provides, in relevant part:

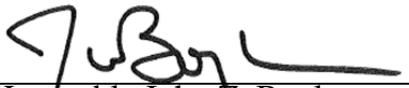
26 The following actions shall be commenced within three (3) years
after the cause of action accrues:

- 27 (1) All actions founded upon any contract, obligation, or
28 liability not under seal and not in writing, excepting such as
are brought upon the judgment or decree of some court of
record of the United States or of this or some other state

1 Improper Venue Grounds or, in the Alternative, to Transfer Venue (Doc. 7) is granted as
2 provided in this Order.

3 **IT IS FURTHER ORDERED** that this case be transferred to the United States
4 District Court for the Eastern District of Arkansas.

5 Dated this 23rd day of June, 2016.

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9 Honorable John Z. Boyle
10 United States Magistrate Judge
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