

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL O'GRADY, an individual;  
ALLEN SMOOT, an individual; PRO-  
SURGICAL ASSOCIATES, LLC, a  
California Limited Liability  
Company;

Plaintiffs,

v.

CONMED CORPORATION, a  
corporation; LINVATEC  
CORPORATION, a corporation; ROB  
CHRISTENSEN, an individual;

Defendants.

No. C 13-5242 CW  
  
ORDER REGARDING  
DEFENDANTS'  
MOTION TO DISMISS  
AND PLAINTIFFS'  
MOTION TO REMAND  
(Docket Nos. 6,  
18)

United States District Court  
For the Northern District of California

On October 16, 2013, Plaintiffs Michael O'Grady, Allen Smoot,  
and Pro-Surgical Associates, LLC (PSA) filed this action against  
Defendants CONMED Corporation, Linvatec Corporation, and Rob  
Christensen in Superior Court in California. On November 12,  
2013, Defendants removed this action based on diversity of  
citizenship. Defendants now move to dismiss based on improper  
venue or, in the alternative, to transfer the action to the  
Northern District of New York; Plaintiffs move to remand the  
action back to Superior Court. The Court finds these motions  
suitable for disposition without oral argument pursuant to Civil  
Local Rule 7-1(b). Having considered the papers submitted, the  
Court GRANTS Plaintiffs' motion to remand and DENIES AS MOOT  
Defendants' motion to dismiss or, in the alternative, to transfer  
venue.

1 FACTUAL BACKGROUND

2 Unless otherwise noted, the following facts are taken from  
3 Plaintiffs' complaint. See Docket No. 1, Ex. A.

4 CONMED is the parent corporation of Linvatec, a wholly-owned  
5 subsidiary through which CONMED manufactures medical and  
6 orthopedic products and accessories. Docket No. 1, Ex. C. CONMED  
7 and Linvatec are both foreign corporations doing business in  
8 California. Christensen is the Vice President of CONMED and  
9 resides in California.

10 Plaintiffs O'Grady and Smoot reside in California. O'Grady  
11 started working for CONMED in 1976, while Smoot began working with  
12 CONMED in or about 2005. Around 2005, CONMED required O'Grady to  
13 create a separate entity, PSA, and execute a Manufacturer's  
14 Representative Agreement (MRA) with Linvatec on a "take it or  
15 leave it basis." PSA is a California limited liability company  
16 located in Fremont. Both O'Grady and Smoot worked under the PSA  
17 entity. CONMED purported to establish a distributorship model,  
18 whereby it contracted with distributors such as PSA as independent  
19 contractors. In reality, CONMED acted as a franchisor by exerting  
20 substantial control over the distributors' operations and  
21 employees, even referring internally to the distributors as  
22 franchisees. CONMED allegedly categorized PSA as a contracted  
23 distributor in order to avoid paying employee-associated labor  
24 costs.

25 CONMED/Linvatec terminated the contract on December 31, 2012.  
26 Docket No. 1, Ex. D. Shortly before termination, Christensen  
27 approached several PSA representatives, who later began working  
28 for CONMED directly.

1 Plaintiffs filed their first action against CONMED and  
2 Linvatec regarding these events on August 30, 2013, in Alameda  
3 County Superior Court. See Case No. 13-CV-4453. Plaintiffs  
4 alleged that PSA employees were in fact employees of CONMED and  
5 Linvatec under California law. If they were not employees,  
6 Plaintiffs argue in the alternative that PSA was a franchise of  
7 CONMED and Linvatec because they exerted substantial control over  
8 PSA. Plaintiffs contend that Defendants violated their duties as  
9 either an employer or franchisor of PSA, asserting a number of  
10 common law and California statutory claims against Defendants.  
11 Additionally, Plaintiffs charge that the MRA was unenforceable  
12 because it was a contract of adhesion. On September 25, 2013,  
13 Defendants removed the first action on diversity grounds and then  
14 moved to dismiss, or in the alternative, to transfer the action.  
15 Plaintiffs did not oppose the motions, but instead voluntarily  
16 dismissed the action pursuant to Rule 41(a). See Case No. 13-CV-  
17 4453, Docket No. 15.

18 On October 16, 2013, Plaintiffs commenced a second action  
19 against Defendants, asserting a similar set of claims but adding  
20 three additional causes of action against Christensen: (21)  
21 interference with prospective economic advantage; (24) defamation  
22 per se; and (25) defamation per quod. All three of these causes  
23 of action arise from Plaintiffs' allegation that Christensen told  
24 a number of PSA sales representatives that Plaintiffs "had  
25 mismanaged the business as it related to open territory, thereby  
26 not distributing PSA sales representatives actual commissions or  
27 other monies earned." See, e.g., Complaint ¶ 208. Plaintiffs  
28 allege that Christensen knew his statements were false but made

1 them anyway with the intent to injure Plaintiffs' business. Id.  
2 ¶ 209. His discussions with various PSA sales representatives  
3 caused them to leave their employment with PSA. See generally  
4 Docket No. 30, Exs. 1, 2, 3.

5 On November 12, 2013, Defendants removed this action based on  
6 diversity of citizenship and moved to transfer the action to the  
7 Northern District of New York based on the forum selection clause  
8 in the MRA. Docket Nos. 1, 6.

#### 9 LEGAL STANDARDS

##### 10 I. Motion to remand

11 Title 28 U.S.C. § 1441(a) permits a defendant to remove to  
12 federal court "any civil action brought in a State court of which  
13 the district courts of the United States have original  
14 jurisdiction." Removal is therefore only appropriate if the state  
15 court action could have been filed in federal court in the first  
16 instance. Caterpillar, Inc. v. Williams, 482 U.S. 386, 392  
17 (1987). Upon notice of removal, the defendant bears the burden of  
18 establishing federal jurisdiction. Ethridge v. Harbor House  
19 Rest., 861 F.2d 1389, 1393 (9th Cir. 1988). The removal statute  
20 is strictly construed, with any uncertainty resolved in favor of  
21 remand. Provincial Gov't of Marinduque v. Placer Dome, Inc., 582  
22 F.3d 1083, 1087 (9th Cir. 2009).

##### 23 II. Motion to dismiss for improper venue

24 Under Federal Rule of Civil Procedure 12(b)(3), a defendant  
25 may move to dismiss for improper venue based on a governing forum  
26 selection clause. Murphy v. Schneider Nat'l, Inc., 362 F.3d 1133,  
27 1137 (9th Cir. 2004). For purposes of such a motion, "the  
28 pleadings need not be accepted as true, and the court may consider

1 facts outside of the pleadings." Id. However, the court must  
2 "draw all reasonable inferences in favor of the non-moving party  
3 and resolve all factual conflicts in favor of the non-moving  
4 party." Id. at 1138.

5 III. Motion to transfer

6 Title 28 U.S.C. § 1404(a) provides, "For the convenience of  
7 the parties and witnesses, in the interest of justice, a district  
8 court may transfer any civil action to any other district or  
9 division where it might have been brought." A district court has  
10 broad discretion to adjudicate motions for transfer on a case-by-  
11 case basis, considering factors of convenience and fairness. See  
12 Stewart Org. Inc. v. Ricoh Corp., 487 U.S. 22, 29 (1988); Sparling  
13 v. Hoffman Constr. Co., 864 F.2d 635, 639 (9th Cir. 1988). Under  
14 § 1404(a), the district court may consider: (1) the location where  
15 the relevant agreements were negotiated and executed, (2) the  
16 state that is most familiar with the governing law, (3) the  
17 plaintiff's choice of forum, (4) the respective parties' contacts  
18 with the forum, (5) the contacts relating to the plaintiff's cause  
19 of action in the chosen forum, (6) the differences in the costs of  
20 litigation in the two fora, (7) the availability of compulsory  
21 process to compel attendance of unwilling non-party witnesses, and  
22 (8) the ease of access to sources of proof. Jones v. GNC  
23 Franchising, Inc., 211 F.3d 495, 498 (9th Cir. 2000). In  
24 addition, "the presence of a forum selection clause is a  
25 'significant factor' in the court's § 1404(a) analysis." Id. at  
26 499. However, the relevant public policy of the forum state,  
27 although not dispositive, "is at least as significant a factor in  
28 § 1404(a) balancing" as the presence of the forum selection

1 clause. Id. at 499, 499 n.21. The movant bears the burden of  
2 justifying the transfer by a strong showing of inconvenience.  
3 Decker Coal v. Commonwealth Edison Co., 805 F.2d 834, 843 (9th  
4 Cir. 1986).

5 DISCUSSION

6 The Court first considers Plaintiffs' motion to remand.  
7 Defendants removed this case on the basis of diversity  
8 jurisdiction. Federal courts have original jurisdiction over  
9 civil actions where the value of the matter in controversy exceeds  
10 \$75,000, exclusive of interest and costs, and is between citizens  
11 of different states. 28 U.S.C. § 1332. Section 1332 requires  
12 complete diversity: where a case involves multiple plaintiffs and  
13 defendants, no plaintiff may have the same citizenship as any  
14 defendant. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S.  
15 546, 553 (2005). Because Plaintiffs are residents of California,  
16 and one Defendant, Christensen, is also a resident of California,  
17 Christensen's presence in the suit destroys complete diversity.

18 Defendants argue that diversity jurisdiction nevertheless  
19 exists because Christensen was fraudulently joined. "If the  
20 plaintiff fails to state a cause of action against a resident  
21 defendant, and the failure is obvious according to the settled  
22 rules of the state, the joinder of the resident defendant is  
23 fraudulent." McCabe v. Gen. Foods, Corp., 811 F.2d 1336, 1339  
24 (9th Cir. 1987). A defendant is entitled to present facts that  
25 prove fraudulent joinder. Morris v. Princess Cruises, Inc., 236  
26 F.3d 1061, 1067 (9th Cir. 2001). However, to show fraudulent  
27 joinder a defendant must establish that, "after all disputed  
28 questions of fact and all ambiguities in the controlling state law

1 are resolved in the plaintiff's favor, the plaintiff could not  
2 possibly recover against the party whose joinder is questioned."  
3 Nasrawi v. Buck Consultants, LLC, 776 F. Supp. 2d 1166, 1169-70  
4 (E.D. Cal. 2011). "Accordingly, a defendant seeking removal based  
5 on an alleged fraudulent joinder must do more than show that the  
6 complaint at the time of removal fails to state a claim against  
7 the non-diverse defendant," but must show that the plaintiff  
8 "would not be afforded leave to amend his complaint" to cure the  
9 deficiency. Id. at 1170 (quoting Burris v. AT&T Wireless, Inc.,  
10 2006 WL 2038040, at \*2 (N.D. Cal.)). Unless a defendant  
11 demonstrates that a plaintiff cannot prevail on any of the claims  
12 asserted against the non-diverse defendant, remand must be  
13 granted. Id. The question before the Court, then, is whether  
14 Defendants demonstrate that Plaintiffs cannot recover against  
15 Christensen on any claim.

16 As a preliminary matter, there is an issue of which state's  
17 law applies. Defendants argue that New York law governs  
18 Plaintiffs' claims against Christensen because of the MRA's forum  
19 selection clause:

20 Any controversy arising under, or otherwise relating to, this  
21 Agreement shall be governed by, and construed exclusively in  
22 accordance with, the laws of the State of New York. The  
23 federal or state courts in Oneida County, New York (including  
24 the United States District Court for the Northern District of  
25 New York, if and to the extent that it shall have subject  
26 matter jurisdiction over any claims) shall have exclusive  
27 jurisdiction in the event of any dispute arising under or  
28 related to the Agreement.

25 Docket No. 1, Ex. B. It is ambiguous whether the language of  
26 this Agreement would apply to Christensen's independent, allegedly  
27 tortious actions. Although the language of the forum selection  
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1 clause is broad, the contract governs the sales representative  
2 relationship between CONMED/Linvatec and PSA. Even if the Court  
3 were to find that Christensen's individual tortious actions fall  
4 within the purview of this clause, Plaintiffs argue the forum  
5 selection clause is unenforceable because it contravenes the  
6 strong public policy of California. See Argueta v. Banco  
7 Mexicano, S.A., 87 F.3d 320, 325 (9th Cir. 1996). Specifically,  
8 California has expressed a strong public policy of "protect[ing]  
9 California franchisees from the expense, inconvenience, and  
10 possible prejudice of litigating in a non-California venue."  
11 Jones, 211 F.3d at 498. Plaintiffs' complaint, which lists a  
12 number of regulatory actions by Defendants, raises a non-fanciful  
13 possibility that PSA was a franchise under California law. Viewed  
14 with all favorable inferences in favor of Plaintiffs, the forum  
15 selection clause would either not apply or would be unenforceable  
16 in light of public policy.

17 In any event, defamation in either California or New York  
18 requires generally similar elements: (1) publication of a  
19 statement, (2) which is false, (3) defamatory, (4) unprivileged,  
20 and (5) either has a natural tendency to injure or causes special  
21 damages. See Sanders v. Walsh, 219 Cal. App. 4th 855, 862 (2013);  
22 Thompson v. Bosswick, 855 F. Supp. 2d 67, 76 (S.D.N.Y. 2012).  
23 Regarding the last element, defamation in either state can be per  
24 se (arising from a list of categorically defamatory statements,  
25 such as charging an individual with a serious crime or injuring  
26 him in his business or trade) or per quod (requiring proof of  
27 special damages). See id.; see also Cal. Civ. Code section 46;  
28 Smith v. Maldonado, 72 Cal. App. 4th 637, 647 (1999).

1 Defendants contend that the statement that Plaintiffs had  
2 "mismanaged the business as it related to open territory" was a  
3 protected opinion because it is not provably false. Plaintiffs  
4 respond that the statement that Plaintiffs had mismanaged their  
5 business, and had not paid their sales representatives actual  
6 commissions earned, is not an opinion but a statement that  
7 insinuates Plaintiffs acted illegally. Defendants also find fault  
8 in the way Plaintiffs plead their defamation claims, such as that  
9 Plaintiffs did not "allege the time when, place where, and manner  
10 in which the false statement was made, and specify to whom it was  
11 made." Epifani v. Johnson, 65 A.D.3d 224, 233 (2009). Both sides  
12 additionally present declarations contesting whether Christensen  
13 made these statements or not. See, e.g., Docket No. 30, Ex. 2 ¶¶  
14 7-8 and Docket No. 29, Ex. 2 ¶ 6.

15 The alleged deficiencies raised by Defendants only serve to  
16 point out ways in which Plaintiffs could improve their complaint.  
17 At the complaint's core, however, nothing prevents Plaintiffs from  
18 prevailing against Christensen on these claims. A statement that  
19 Plaintiffs mismanaged their business by wrongfully withholding  
20 commissions is provably false because Plaintiffs could show that  
21 they never did so. Such a statement would appear to be injurious  
22 to Plaintiffs' business because it accuses them of incompetence  
23 or, at worse, engaging in illegal activity. Although Christensen  
24 has filed a declaration denying he made these statements, at least  
25 one PSA representative has stated that Christensen did make a  
26 similar statement and also offered an employment contract with  
27 CONMED directly. Docket No. 30, Ex. 2. In sum, if Plaintiffs  
28 clarify their complaint with details of how the statement was

1 made, then they may have defamation claims against Christensen.  
2 For the deficiencies Defendants have pointed out, a court would  
3 allow Plaintiffs leave to amend.

4 Further, Defendants have not addressed Plaintiffs' claim  
5 against Christensen for interference with contractual advantage.  
6 If that claim survives but the defamation claims fail, Plaintiffs  
7 will still have at least one valid claim to join Christensen, and  
8 there would be no diversity. See Nasrawi, 776 F. Supp. 2d at  
9 1169-70. Where Defendants have not shown why all of Plaintiffs'  
10 claims against Christensen were fraudulent, the Court is hard-  
11 pressed to declare them fraudulent on its own accord.

12 The only defense raised by Defendants that could eliminate  
13 all of Plaintiffs' claims against Christensen is one arising from  
14 agency principles. Defendants contend that the manager's  
15 privilege shields Christensen's activities from liability because  
16 the complaint never alleges that Christensen acted outside the  
17 scope of his agency for CONMED.

18 Generally, an agent is liable for his own tortious actions,  
19 even if committed by him pursuant to his agency. Restatement  
20 (Second) of Agency § 343 (1958) (generally, an agent "who does an  
21 act otherwise a tort is not relieved from liability by the fact  
22 that he acted at the command of the principal or on account of the  
23 principal"); Kurtin v. Elieff, 215 Cal. App. 4th 455, 480 (2013)  
24 (citing Cal. Civ. Code § 2343) ("agents are responsible for their  
25 own independent torts and breaches of contract in connection with  
26 acts in the course of their agency"). However, the manager's  
27 privilege protects a company's manager from liability to a third  
28 party for advising or inducing his company to breach its contract

1 with the third party. Klein v. Oakland Raiders, Ltd., 211 Cal.  
2 App. 3d 67, 80 (1989); Los Angeles Airways, Inc. v. Davis, 687  
3 F.2d 321, 326 (9th Cir. 1982). This privilege is designed to  
4 protect a manager's ability to advise his principal without fear  
5 of individual liability. Klein, 211 Cal. App. 3d at 80. The  
6 rationale of this privilege is heavily based on preserving a  
7 fiduciary relationship. Id. The privilege may be lost if the  
8 manager acts with improper intent. Id. The managerial privilege  
9 does not apply where the manager interferes with contracts to  
10 which the employer is not a party, "[e]ven where the employee acts  
11 on behalf of his employer." Id. at 81 (holding that managerial  
12 privilege does not apply where manager individually induced breach  
13 of relationship between two outside parties, neither of which was  
14 the manager's principal). Cf. McCabe, 811 F.2d at 1339 (managers  
15 were protected from liability for terminating employer principal's  
16 contractual relationships with employee); Los Angeles Airways,  
17 Inc., 687 F.2d at 328 (manager could not be liable to third party  
18 for inducing his company to breach its contract with a third  
19 party).

20 Here, Christensen did not allegedly induce CONMED to breach  
21 its contract with a third party. He is alleged to have acted, as  
22 an agent of CONMED, to interfere with the existing contract  
23 between PSA and its sales representatives. Christensen was not  
24 advising or acting on behalf of his employer regarding his  
25 employer's own contracts, but interfering with contracts to which  
26 his employer was not a party. "It is one thing for an employee to  
27 deal with his employer's contracts but quite another for him to  
28 reach out and meddle with contracts to which his employer has no

1 rightful interest." Klein, 211 Cal. App. 3d at 81 (quoting Gamer,  
2 "The Agent's Privilege to Interfere Intentionally with Contractual  
3 Relations: A Reappraisal of California Law," 12 Cal. Western L.  
4 Rev. 475, 484 (1976)). Accordingly, the managerial privilege does  
5 not apply.

6 Because Defendants have not satisfied their heavy burden of  
7 proving that joinder of Christensen was fraudulent and as a result  
8 that removal was appropriate, the Court must remand the case to  
9 state court.

10 CONCLUSION

11 The Court GRANTS Plaintiffs' motion to remand and DENIES  
12 Defendants' motion to dismiss or, in the alternative, to transfer  
13 venue, as MOOT.

14 IT IS SO ORDERED.

15 Dated: 2/26/2014

16   
17 CLAUDIA WILKEN  
18 United States District Judge  
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