

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

GARY KREMEN,)	Case No.: 5:11-cv-05411-LHK
)	
Plaintiff,)	ORDER DENYING DEFENDANTS'
)	MOTION TO DISMISS FOR LACK OF
v.)	PERSONAL JURISDICTION AND
)	IMPROPER VENUE; AND DENYING
MICHAEL JOSEPH COHEN, an individual; and)	PLAINTIFF'S MOTION FOR
FNBPAY CORPORATION, an Arizona)	PRELIMINARY INJUNCTION
corporation,)	
)	
Defendants.)	

Plaintiff Gary Kremen ("Kremen" or "Plaintiff") filed this action on November 8, 2011 under California's Uniform Fraudulent Transfer Act ("CUFTA"), Cal. Civ. Code §§ 3439.04, 3439.07, 3440, against Defendants Michael Joseph Cohen ("M. Cohen") and FNBPay Corporation ("FNBPay"), a corporation incorporated under the laws of the State of Arizona (collectively "Defendants"), upon information and belief that Defendants are the transferees of certain property, including money, fraudulently transferred to each of them by Stephen Michael Cohen ("S. Cohen" or "Judgment-Debtor"), an individual against whom Plaintiff has an enforceable and unpaid money judgment, obtained for \$65,000,000 on April 3, 2001 in the U.S. District Court for the Northern District of California, and renewed on March 22, 2011 by the same court in the amount of \$67,867,053.36 (the "Renewed Judgment"). On December 2, 2011, Plaintiff filed an *ex parte* motion seeking a temporary restraining order ("TRO") freezing certain assets "to prevent the

1 dissipation of more than \$109,000 that is currently being held at Wells Fargo Bank (Account No.
2 2806354318) [(the “Wells Fargo Account”)] under the name FNBPAY.” *Ex Parte* Motion for
3 Temporary Restraining Order (“TRO Mot.”) at 2. The Wells Fargo Account held in Defendants’
4 possession is alleged to be the vehicle for the alleged fraudulent transfers from S. Cohen.

5 For good cause shown, the Court granted the TRO on December 7, 2011, granted Plaintiff’s
6 request for limited expedited discovery, and issued an Order to Show Cause (“OSC”) setting a
7 briefing schedule and hearing date on Plaintiff’s motion for preliminary injunction enjoining
8 Defendants from disposing of funds held in the Wells Fargo Account.¹ *See* ECF No. 16. However,
9 the Court also requested supplemental briefing on whether this Court has personal jurisdiction over
10 Defendants and whether venue in this district is proper. Defendants answered the OSC on
11 December 20, 2011, *see* ECF No. 38,² and both sides submitted supplemental briefing on personal
12 jurisdiction and venue, *see* ECF Nos. 21, 40, 58. In addition, Defendants filed a Motion to Dismiss
13 for Lack of Jurisdiction and Improper Venue, or, in the alternative, a Motion to Transfer to the
14 District of Arizona pursuant to 28 U.S.C. § 1404.³ *See* ECF No. 31. Plaintiff filed an opposition to
15 the motion to dismiss, *see* ECF No. 46, and Defendants filed a reply, *see* ECF No. 62.

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17 ¹ The Court revised this briefing schedule on December 15, 2011 to allow Defendants additional
time for briefing. *See* ECF No. 30.

18 ² On December 27, 2011, Defendants also filed, without the Court’s permission, a “Supplemental
19 Brief in Opposition to Ex Parte Motion for Temporary Restraining Order, Order to Show Cause re:
20 Preliminary Injunction and for an Order Expediting Discovery; Motion to Quash Service on Both
the Subpoena and the Request for Production of Documents and His Request for Sanctions; Motion
21 for Referral to the Court’s Standing Committee of Professional Conduct and His Request for Court
Ordered Sanctions; and Motion Requiring Plaintiff Gary Kremen’s [sic] to Post a Five Million
22 Dollar Bond Pursuant to the California Civil Code of Procedures Section 1030.” ECF No. 59.
This unauthorized sur-reply does not comply with Civil Local Rule 7-3(d) and is therefore
23 STRICKEN.

24 ³ Although Defendants’ motion is titled “Motion Under Federal Rules of Civil Procedures Rule
25 12(b)2, 3, 5, and 6 to Dismiss for Lack of Jurisdiction, Improper Venue and Insufficient Service of
Process or, in the Alternative, to Transfer Pursuant to 28 U.S.C. § 1404 to the District of Arizona,”
26 Defendants do not discuss the basis for their purported motions to dismiss pursuant to Rules
12(b)(5) (insufficient service of process) or 12(b)(6) (failure to state a claim upon which relief can
27 be granted) anywhere in the body of their memorandum of points and authorities. *See* ECF No. 32.
Accordingly, the Court has no basis on which to adjudicate the merits of these asserted grounds for
28 dismissal and therefore deems those motions waived.

1 The Court held a hearing on the motion for preliminary injunction on January 5, 2012, at
2 which only Plaintiff appeared. Pursuant to Civil Local Rule 7-1(b), the Court finds Defendants'
3 motion to dismiss or transfer appropriate for determination without oral argument and accordingly
4 VACATES the hearing scheduled for April 5, 2012.⁴ Having considered the parties' submissions
5 and the relevant law, the Court hereby DENIES Defendants' motion to dismiss or to transfer, and
6 DENIES Plaintiff's motion for a preliminary injunction. The TRO previously granted expires
7 effective upon the date of this Order.⁵

8 I. BACKGROUND⁶

9 Plaintiff is an internet entrepreneur who obtained a \$65 million judgment (the "Judgment")
10 in the United States District Court for the Northern District of California against S. Cohen and S.
11 Cohen's alter ego entities on April 3, 2001, for fraudulently converting the internet domain name,
12 www.sex.com. See Pl.'s Request for Judicial Notice (ECF No. 5-6) ("RJN") Ex. 1; Declaration of
13 Timothy P. Dillon in Support of Motion for TRO ("Dillon Decl.") ¶ 4; see also *Kremen v. Stephen*
14 *Michael Cohen*, 337 F.3d 1024, 1026-27 (9th Cir. 2003) (describing the factual background
15
16

17 ⁴ Defendants' *Ex Parte* Motion to Shorten Time for Defendants' Motion to Dismiss or Transfer
(ECF No. 47) is accordingly DENIED as moot.

18 ⁵ Defendants' Emergency *Ex Parte* Motion to Cancel the Temporary Restraining Order Pending
19 Hearing on Defendants' Motion to Dismiss or Transfer (ECF No. 52) is accordingly DENIED as
moot.

20 ⁶ Defendants have filed multiple requests for judicial notice. Although Defendants do not submit
21 these requests in connection with any particular motion, see ECF Nos. 42, 53, 54, 55, 56, the Court
22 construes them as requests for judicial notice of documents in connection with Defendants' motion
23 to dismiss. A matter may be judicially noticed if it is either "generally known within the territorial
24 jurisdiction of the trial court" or "capable of accurate and ready determination by resort to sources
25 whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Requests for Judicial
26 Notice Dkt No. 53 and Dkt No. 42 are identical and seek judicial notice of documents filed and an
27 order issued in another case in this district, *Kremen v. Stephen Michael Cohen*, No. C98-20718-
28 JW. Because judicial notice may be taken of court records, the Court GRANTS Defendants'
request as to ECF No. 53. However, Requests for Judicial Notice Dkt Nos. 54, 55, and 56 seek
judicial notice of declarations of various individuals. These declarations are not "capable of
accurate and ready determination by resort to sources whose accuracy cannot reasonably be
questioned," Fed. R. Evid. 201(b), and therefore the Court DENIES Defendants' requests as to
ECF Nos. 54, 55, and 56.

1 between Kremen and S. Cohen common to this case); *Kremen v. Jhuliana Aramis Cohen*, No. 05-
2 cv-01319-JM (POR), 2007 WL 1875779 (S.D. Cal. June 28, 2007) (same).

3 Plaintiff filed his underlying suit against S. Cohen in July 1998. On November 27, 2000,
4 the district court granted Plaintiff's motion for a preliminary injunction and ordered S. Cohen to
5 transfer the www.sex.com domain name back to Kremen, repatriate \$25,000,000.00 that S. Cohen
6 had sent to offshore accounts, sign waivers for the release of tax returns and bank account records,
7 and sign FOIA waivers. *See* RJN Ex. 2. After S. Cohen failed to comply with the preliminary
8 injunction order, the district court issued an Order Requiring Defendants to Appear and Sign
9 Waivers on February 7, 2001. RJN Ex. 15. S. Cohen did not comply with the February 7, 2001
10 order and was subsequently held in civil contempt on February 12, 2001. RJN Ex. 3 at 2. The civil
11 contempt order was followed by an arrest warrant on March 2, 2001 for S. Cohen's continued
12 refusal to comply with the court's prior orders. *See* RJN Ex. 4 at 4. S. Cohen fled to Mexico until
13 October 27, 2005, when he was detained by the Mexican authorities and deported into the custody
14 of the United States Marshal. Dillon Decl. ¶ 16; RJN Ex. 6. S. Cohen remained in custody for
15 almost 14 months for civil contempt of the court's prior orders. Dillon Decl. ¶ 17.

16 Since the Judgment was entered in April 2001, S. Cohen has never made a single voluntary
17 payment on Plaintiff's Judgment. S. Cohen currently resides in Tijuana, Mexico. Compl. ¶¶ 18,
18 22. Plaintiff has made various previous efforts to collect on his Judgment. In September 2005,
19 Plaintiff brought an enforcement application for a TRO and turnover order. In a September 28,
20 2005 Order, the United States District Court for the Northern District of California found that
21 seven individuals and twelve companies were acting in concert with S. Cohen to evade
22 enforcement of the Judgment and enjoined them from doing anything to interfere with Plaintiff's
23 rights thereunder. Compl. ¶ 18(a); RJN Ex. 5. One of the companies identified in the September
24 2005 Order was Pacnet, S.A. de C.V. ("Pacnet"), and one of the individuals was Jhuliana Cohen, S.
25 Cohen's step-daughter. RJN Ex. 5. On June 28, 2005, Plaintiff filed an action in the Southern
26 District of California and obtained a judgment and permanent injunction on November 18, 2009
27 against S. Cohen's step-daughter (Jhuliana Cohen) in the amount of \$4,931,781.13, his ex-wife

1 (Rosa Cohen) in the amount of \$1,094,579.45, and his former attorney (Gustavo Cortez) in the
2 amount of \$802,620, based on their participation in fraudulent transfers to assist S. Cohen in
3 concealing and transferring his assets with the intent of avoiding the Judgment. Compl. ¶ 18(b);
4 RJN Exs. 6, 7. On March 22, 2011, the United States District Court for the Northern District of
5 California renewed the Judgment against S. Cohen in the renewed amount of \$67,867,053.36
6 (“Renewed Judgment”). Compl. Ex. A.

7 The instant action is Plaintiff’s most recent endeavor to collect on his Renewed Judgment.
8 Plaintiff filed this action on November 8, 2011, seeking relief against M. Cohen, S. Cohen’s
9 cousin, and against FNBPay, a corporation created by M. Cohen on July 15, 2010, and of which M.
10 Cohen is listed as the sole officer, director, incorporator, and 100% shareholder. Compl. ¶¶ 14, 19;
11 Dillon Decl. ¶ 49. Plaintiff brings this action on information and belief that M. Cohen has formed
12 FNBPay Corporation to assist S. Cohen in funneling money through various websites with intent to
13 conceal S. Cohen’s assets from Plaintiff. Plaintiff alleges that S. Cohen has used M. Cohen to
14 conduct business through FNBPay on S. Cohen’s behalf, and to open bank accounts in M. Cohen’s
15 and/or FNBPay’s name at S. Cohen’s behest in order to transfer money and conduct business for
16 the benefit of S. Cohen and/or S. Cohen’s related entities. Compl. ¶ 20. Plaintiff further alleges on
17 information and belief that M. Cohen and FNBPay knowingly conspired and agreed with S. Cohen
18 to cause monies to be transferred and deposited into the bank account held in FNBPay’s name, and
19 to cause payments of money to M. Cohen personally to pay his mortgage, among other things, with
20 the actual intent to hinder, delay, or defraud Plaintiff in exercising his rights as a creditor of S.
21 Cohen. Compl. ¶¶ 27-28. Plaintiff alleges that the deposit payments at the FNBPay bank account
22 and payments toward M. Cohen’s mortgage were for no consideration and were simply a device to
23 place these assets beyond Plaintiff’s reach, as evidenced by the fact that they were re-transferred to
24 S. Cohen at S. Cohen’s request. Compl. ¶¶ 29, 47-51.

25 Specifically at issue in this motion for a preliminary injunction is Wells Fargo Account No.
26 2806354318 opened by M. Cohen under the name FNBPay (“Wells Fargo Account”) that holds
27 funds alleged to be directly controlled by S. Cohen. TRO Mot. at 7, 10; Dillon Decl. ¶¶ 46-47.

1 Plaintiff alleges that S. Cohen’s revenue-generating business dealings relate to a Mexican online
2 payment processing corporation, First National Bank S.A. de C.V., SOFOM ENR (“FNB
3 Mexico”), which is registered with the California Secretary of State as a Mexican corporation
4 authorized to do business in California. Dillon Decl. ¶¶ 21-22 & Ex. 2. S. Cohen admits to having
5 formed FNB Mexico and appears to be Chairman of the Board of Directors, Senior Vice President,
6 and beneficial owner of FNB Mexico. Dillon Decl. ¶¶ 24-26.

7 Based on other evidence gathered by Plaintiff’s attorney, it appears that FNBPay is wholly
8 owned by FNB Mexico. See Dillon Decl. ¶¶ 31-46. During a judgment debtor examination of S.
9 Cohen conducted by Plaintiff’s attorney on July 12, 2011, S. Cohen explained that FNBPay.com
10 operates as the credit card payment processing arm of FNB Mexico. See Dillon Decl. Ex. 1 at
11 71:5-10. FNB Mexico earns money by charging fees for facilitating wire transfers through the
12 website www.fnbpay.com. See Dillon Decl. ¶¶ 42-45. The FNBPay.com website instructs persons
13 in the United States who wish to wire or deposit funds to FNBPay.com to wire their money to the
14 Wells Fargo Account. See Dillon Decl. ¶¶ 45-50 & Ex. 14. FNB Mexico customers are directed to
15 deposit money directly into the Wells Fargo Account. *Id.*

16 Plaintiff also argues that S. Cohen owns, operates, and generates revenue through several
17 affiliated websites, all with the assistance of M. Cohen. M. Cohen is listed as the contact person on
18 the following websites: www.newmerchantnow.com, www.fnbpay.com, and
19 www.rxpill.com. Dillon Decl. ¶¶ 61-62 & Ex. 18. The contact information on each of these three
20 websites for the “Mexican Office” lists an address that matches the address for FNB Mexico, and
21 lists a telephone number that matches S. Cohen’s cell phone number, as stated during his judgment
22 debtor examination. Dillon Decl. ¶¶ 62-64 & Ex. 18. The contact information for the “United
23 States” office lists “4492 Camino de la Plaza, Suite 2097, San Ysidro, CA 92173,” which is a P.O.
24 Box opened by S. Cohen, as stated during his judgment debtor examination. Dillon Decl. ¶ 62.
25 Allegedly, these websites are also engaged in credit card processing. See Dillon Decl. Ex. 18. A
26 fourth website at issue is www.fnbpay.net. The website’s “About Us” page lists the same San
27 Ysidro address as its “Main Office,” with the “Corporate Office” located in Chandler, Arizona, at

1 the same address on file with the Arizona Secretary of State for FNBPay Corporation. Dillon Decl.
2 ¶¶ 52-57. Plaintiff contends that any funds in the Wells Fargo Account traceable to sales, transfers,
3 or deposits related to these various websites were also fraudulently conveyed and are properly
4 subject to execution by Plaintiff in enforcement of the Renewed Judgment against S. Cohen. TRO
5 Mot. at 13.

6 According to the report of a private investigator hired by Plaintiff, the subject Wells Fargo
7 Account, opened with Wells Fargo Bank at 1004 W. Chandler Blvd., has a “business checking
8 account balance of \$109,205.00.” Dillon Decl. ¶ 50 & Ex. 22. However, after the Court issued the
9 TRO and granted Plaintiff limited expedited discovery, Defendants produced bank statements for
10 the Wells Fargo Account from January 1, 2010 through August 31, 2011 and alleged that the
11 Account was closed in August 2011 with a closing balance of \$0.00. By Plaintiff’s own admission,
12 “[i]t is unclear what funds remain or were deposited/withdrawn from the account since August 31,
13 2011.” Reply Br. ISO PI at 5.⁷

14 II. LEGAL STANDARDS

15 A. Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction

16 Where a defendant moves to dismiss a suit for lack of personal jurisdiction pursuant to
17 Federal Rule of Civil Procedure 12(b)(2), the plaintiff bears the burden of establishing that
18 jurisdiction is proper. *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008). Where, as here,
19 the defendant’s motion is based on written materials rather than an evidentiary hearing, the plaintiff
20 need only make a prima facie showing of jurisdictional facts to withstand a motion to dismiss for

21 ⁷ Plaintiff argues that his inability to acquire more information regarding “the relationship between
22 FNBPay Corp. and FNB Mexico, the relationship between S. Cohen and M. Cohen, as well as S.
23 Cohen’s involvement in the origination of funds that pass through the Wells Fargo Account,” was
24 due to the fact that S. Cohen attended M. Cohen’s deposition on December 13, 2011 and refused to
25 leave. Declaration of Timothy P. Dillon in Support of Reply Brief in Support of OSC Re:
26 Preliminary Injunction (“Dillon Reply Decl.”) ¶¶ 4-12, ECF No. 24-1. To that end, he has filed an
27 “*Ex Parte* Application for a Protective Order to Exclude Stephen Michael Cohen from Defendants’
28 Pretrial Depositions and to Seal Defendants’ Pre-Trial Depositions or, Alternatively, for an Order
Shortening Time on Motion.” See ECF No. 23. Plaintiff’s *ex parte* motion does not comply with
Civil Local Rule 7-10 and therefore is DENIED without prejudice. He may renew this motion in
accordance with the Civil Local Rules.

1 lack of personal jurisdiction. *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th
2 Cir. 2011) (citing *Brayton Purcell LLP v. Recordon & Recordon*, 606 F.3d 1124, 1127 (9th Cir.
3 2010)). At this stage of the proceeding, “uncontroverted allegations in plaintiff’s complaint must
4 be taken as true, and conflicts between the facts contained in the parties’ affidavits must be
5 resolved in plaintiff’s favor.” *Brayton Purcell*, 606 F.3d at 1127 (internal quotation marks,
6 citations, and alterations omitted).

7 **B. Rule 12(b)(3) Motion to Dismiss for Improper Venue**

8 Where a defendant moves to dismiss for improper venue pursuant to Federal Rule of Civil
9 Procedure 12(b)(3), the plaintiff bears the burden of showing that venue is proper. *Piedmont Label*
10 *Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 496 (9th Cir. 1979). When considering a motion to
11 dismiss pursuant to Rule 12(b)(3), a court need not accept the pleadings as true and may consider
12 facts outside of the pleadings. *Murphy v. Schneider Nat’l, Inc.*, 362 F.3d 1133, 1138 (9th Cir.
13 2004). Pursuant to 28 U.S.C. § 1406(a), if the Court determines that venue is improper, the Court
14 must either dismiss the action or, if it is in the interests of justice, transfer the case to a district or
15 division in which it could have been brought. Whether to dismiss for improper venue, or
16 alternatively to transfer venue to a proper court, is within the discretion of the district court. *See*
17 *King v. Russell*, 963 F.2d 1301, 1304 (9th Cir. 1992).

18 **C. Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a)**

19 28 U.S.C. § 1404(a) authorizes the transfer of a case to another district in which the case
20 would be properly brought, for the convenience of parties and witnesses or in the interests of
21 justice. For a court to transfer venue pursuant to § 1404(a), the moving party bears the burden of
22 showing that: (1) the transferee court is one in which the original action could have been brought,
23 and (2) the convenience of the parties and witnesses in the interest of justice favor transfer. *See*
24 *Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 414 (9th Cir. 1985). The decision to transfer pursuant to
25 § 1404(a) is within the court’s discretion. *See Ventress v. Japan Airlines*, 486 F.3d 1111, 1118 (9th
26 Cir. 2007).

27 **D. Motion for Preliminary Injunction**

1 The issuance of a preliminary injunction is at the discretion of the district court. *Indep.*
2 *Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 651 (9th Cir. 2009). To obtain a
3 preliminary injunction, a plaintiff generally must show that (1) he is likely to succeed on the
4 merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the
5 balance of equities tips in his favor; and (4) an injunction is in the public interest. *Winter v.*
6 *Natural Res. Def. Council*, 555 U.S. 7, 24-25 (2008); *accord Stormans, Inc. v. Selecky*, 586 F.3d
7 1109, 1126-27 (9th Cir. 2009). An injunction may also be appropriate where the plaintiff shows
8 “serious questions going to the merits and a balance of hardships that tips sharply towards the
9 plaintiff . . . so long as the plaintiff also shows that there is a likelihood of irreparable injury and
10 that the injunction is in the public interest.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d
11 1127, 1135 (9th Cir. 2011). To succeed on its motion for a preliminary injunction, Plaintiff must
12 satisfy his burden of proving all four elements of the *Winter* test. *Id.* In determining whether to
13 issue a preliminary injunction, a district court may consider hearsay and other evidence otherwise
14 inadmissible. *See Johnson v. Couturier*, 572 F.3d 1067, 1083 (9th Cir. 2009); *see also Republic of*
15 *the Philippines v. Marcos*, 862 F.2d 1355, 1363 (9th Cir. 1988) (en banc); *Flynt Distrib. Co. v.*
16 *Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984) (“The trial court may give even inadmissible
17 evidence some weight, when to do so serves the purpose of preventing irreparable harm before
18 trial.”).

19 **III. DISCUSSION**

20 **A. Motion to Dismiss for Lack of Personal Jurisdiction**

21 To determine the propriety of asserting personal jurisdiction over a nonresident defendant,
22 the Court examines whether such jurisdiction is permitted by the applicable state’s long-arm statute
23 and comports with the demands of federal due process. *Bauman v. DaimlerChrysler Corp.*, 644
24 F.3d 909, 919 (9th Cir. 2011). Because California’s long-arm statute, Cal. Civ. Proc. Code §
25 410.10, is coextensive with federal due process requirements, the jurisdictional analyses under state
26 law and federal due process are the same. *See* Cal. Civ. Proc. Code § 410.10 (“[A] court of this
27 state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of

1 the United States.”); *Mavrix Photo*, 647 F.3d at 1223. For a court to exercise personal jurisdiction
2 over a nonresident defendant consistent with due process, that defendant must have “certain
3 minimum contacts” with the relevant forum “such that the maintenance of the suit does not offend
4 ‘traditional notions of fair play and substantial justice.’” *Int’l Shoe Co. v. Washington*, 326 U.S.
5 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). In addition, “the
6 defendant’s ‘conduct and connection with the forum State’ must be such that the defendant ‘should
7 reasonably anticipate being haled into court there.’” *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th
8 Cir. 1990) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

9 A court may exercise either general or specific jurisdiction over a nonresident defendant.
10 *Ziegler v. Indian River Cnty.*, 64 F.3d 470, 473 (9th Cir. 1995). General jurisdiction exists where a
11 nonresident defendant’s activities in the state are “continuous and systematic” such that said
12 contacts approximate physical presence in the forum state. See *Schwarzenegger v. Fred Martin*
13 *Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004) (internal quotation marks and citation omitted).
14 Where general jurisdiction is inappropriate, a court may still exercise specific jurisdiction where
15 the nonresident defendant’s “contacts with the forum give rise to the cause of action before the
16 court.” *Doe v. Unocal Corp.*, 248 F.3d 915, 923 (9th Cir. 2001).

17 Plaintiff does not claim that the Court has general jurisdiction over Defendants; rather, he
18 argues only for specific jurisdiction. To determine whether a defendant’s contacts with the forum
19 state are sufficient to establish specific jurisdiction, the Ninth Circuit employs a three-part test:

- 20 (1) The non-resident defendant must purposefully direct his activities or
21 consummate some transaction with the forum or resident thereof; or perform some
22 act by which he purposefully avails himself of the privilege of conducting activities
23 in the forum, thereby invoking the benefits and protections of its laws;
- 24 (2) the claim must be one which arises out of or relates to the defendant’s forum-
25 related activities; and
- 26 (3) the exercise of jurisdiction must comport with fair play and substantial justice,
27 i.e. it must be reasonable.

28 *Schwarzenegger*, 374 F.3d at 802 (quoting *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987)).

Plaintiff bears the burden of satisfying the first two prongs. *Sher*, 911 F.2d at 1361. If Plaintiff

1 does so, then the burden shifts to Defendants to “set forth a ‘compelling case’ that the exercise of
2 jurisdiction would not be reasonable.” *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066,
3 1076 (9th Cir. 2011) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78 (1985)).

4 **1. Purposeful Availment/Purposeful Direction**

5 The first prong is satisfied by either purposeful availment or purposeful direction. *Brayton*
6 *Purcell*, 606 F.3d at 1128. For suits sounding in contract, courts typically apply the “purposeful
7 availment” test, which asks whether the defendant has “performed some type of affirmative
8 conduct which allows or promotes the transaction of business within the forum state.” *Sher*, 911
9 F.2d at 1361 (quoting *Sinatra v. Nat’l Enquirer, Inc.*, 854 F.2d 1191, 1195 (9th Cir. 1988)). By
10 contrast, for cases involving tortious conduct, courts most often employ a purposeful direction
11 analysis, which asks whether the defendant has “‘purposefully direct[ed] his activities at the forum
12 state, applying an “effects” test that focuses on the forum in which the defendant’s actions were
13 felt, whether or not the actions themselves occurred within the forum.’” *CollegeSource*, 653 F.3d
14 at 1077 (quoting *Yahoo! Inc. v. La Ligue Contre Le Racisme*, 433 F.3d 1199, 1206 (9th Cir. 2006)
15 (en banc)). Here, Plaintiff claims a type of intentional tort, alleging that Defendants knowingly
16 received transfers from S. Cohen, a Judgment-Debtor, for the express purpose of preventing
17 Plaintiff from being able to enforce his valid Judgment, in violation of the UFTA, and thus
18 purposeful direction analysis is applicable.

19 The Ninth Circuit evaluates purposeful direction using the three-part “*Calder-effects*” test.
20 *See Schwarzenegger*, 374 F.3d at 803; *see also Calder v. Jones*, 465 U.S. 783 (1984). Under this
21 test, “the defendant allegedly must have (1) committed an intentional act, (2) expressly aimed at
22 the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum
23 state.” *Yahoo! Inc.*, 433 F.3d at 1206 (internal quotation marks omitted).

24 All three elements are satisfied here because Plaintiff has alleged that Defendants’
25 intentional act of receiving fraudulently conveyed assets from S. Cohen to M. Cohen via FNBPay
26 was done for the express purpose of frustrating Plaintiff’s ability to enforce his judgment, obtained
27 here in the Northern District of California. *See State Farm Mut. Auto. Ins. Co. v. Tz’doko*

1 *V'CHESED of Klausenberg*, 543 F. Supp. 2d 424, 431 (E.D. Pa. 2008) (asserting jurisdiction over
2 nonresident defendants who were alleged to be fraudulent transferees of judgment debtor, because
3 effect of alleged fraudulent conveyance was to interfere with enforcement of a judgment in the
4 forum state); *Gutierrez v. Givens*, 1 F. Supp. 2d 1077, 1082-83 (S.D. Cal. 1998) (asserting
5 jurisdiction over nonresident bank defendant who was alleged to have knowingly engaged in
6 fraudulent transactions “in furtherance of an illegal conspiracy to purposefully defraud 29,000
7 Californians of a judgment duly awarded by a California state court”). As alleged by Plaintiff,
8 Defendants’ conduct, as they knew it likely would, had the effect of injuring Plaintiff in California,
9 where he resides and where he seeks to enforce his Renewed Judgment. Thus, under the “effects
10 test,” the purposeful direction requirement necessary for specific jurisdiction is satisfied.⁸

11 2. Arising Out of or Relating to Forum-Related Activities

12 The second prong of the test for specific jurisdiction requires that “the claim asserted in the
13 litigation arises out of the defendant’s forum related activities.” *Panavision Int’l, L.P. v. Toeppen*,

14 _____
15 ⁸ Moreover, even if this Court were to apply the purposeful availment test, Plaintiff has provided
16 adequate documentary evidence supporting his allegation that Defendants have “purposefully
17 avail[ed] [themselves] of the privilege of conducting activities in the forum, thereby invoking the
18 benefits and protections of its laws.” *Schwarzenegger*, 374 F.3d at 802 (internal quotations
19 omitted). For example, the www.fnbpay.com website is hosted by Pacnet, whose business address
20 is in San Diego, California, and the FNBPay.com IP address location is San Ysidro, California.
21 Declaration of Timothy P. Dillon in Support of Opposition to Defendants’ Motion to Dismiss
22 (“Dillon Opp’n Decl.”) ¶¶ 4-5 & Exs. 2-3. Furthermore, the address listed on the affiliated
23 websites, www.newmerchantnow.com, www.fnbprocessing.com, and www.rxpillnet, is located in
24 San Ysidro, California, and M. Cohen is listed as the contact person. Dillon Decl. ¶¶ 61-62 & Ex.
25 18. Defendants insist in their opposition to Plaintiff’s Brief Regarding Personal Jurisdiction and
26 Venue that they have “[n]ever rented the post office box at 4492 Camino de la Plaza in San Ysidro,
27 California,” ECF No. 40 at 3, but in their motion to dismiss, they concede that “FNBPay did have
28 use of a small mail box at private postal center located at 4492 Camino de la Plaza, in San Ysidro,
California,” between May 2010 and July 30, 2010, ECF No. 32 at 2. In any event, at this early
stage, the Court construes all factual disputes regarding jurisdiction in favor of Plaintiff. *See*
Brayton Purcell, 606 F.3d at 1127. Finally, S. Cohen, on behalf of FNB Mexico, appointed M.
Cohen as FNB Mexico’s “sole representative in the United States” and authorized him “to open
and maintain a bank account with Wells Fargo Bank on behalf of First National Bank, S.A. de
C.V.,” arguably for purposes of doing business in the State of California. *See* Declaration of
Timothy P. Dillon in Support of Reply Brief Regarding Personal Jurisdiction and Venue, Ex. 1.
Thus, Defendants’ contacts with California appear sufficient to establish specific jurisdiction even
under a purposeful availment analysis.

1 141 F.3d 1316, 1322 (9th Cir. 1998). This requires a showing of “but for” causation. *Id.* Here, the
2 Court finds that “but for” Defendant’s alleged forum-related activities of fraudulently transferring
3 assets from S. Cohen to M. Cohen for the purpose of frustrating Plaintiff’s ability to enforce his
4 Renewed Judgment in the Northern District of California, Plaintiff would not have been injured as
5 alleged. Accordingly, Plaintiff’s claim arises out of Defendants’ forum-related activities, and the
6 second requirement for specific jurisdiction is satisfied. Plaintiff has therefore established a prima
7 facie case of personal jurisdiction over Defendants.

8 **3. Reasonableness**

9 Finally, the Court must consider whether it is reasonable to exercise personal jurisdiction
10 over Defendants. An otherwise valid exercise of specific jurisdiction is presumed reasonable,
11 unless defendants ““present a *compelling case* that the presence of some other considerations
12 would render jurisdiction unreasonable.”” *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995)
13 (quoting *Burger King*, 471 U.S. at 477). Courts often consider the following seven factors: (1) the
14 extent of the defendant’s purposeful interjection into the forum state’s affairs; (2) the burden on the
15 defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the
16 defendant’s state; (4) the forum state’s interest in adjudicating the dispute; (5) the most efficient
17 judicial resolution of the controversy; (6) the importance of the forum to the plaintiff’s interest in
18 convenient and effective relief; and (7) the existence of an alternative forum. *Core-Vent Corp. v.*
19 *Nobel Indus. AB*, 11 F.3d 1482, 1487-88 (9th Cir. 1993); *see also Burger King*, 471 U.S. at 476-77.

20 Defendants have failed to meet their high burden to overcome the presumption of
21 reasonableness. Although Defendants’ contacts with the forum state are not particularly extensive,
22 nor are they insignificant, and the other factors are either neutral or favor exercising jurisdiction.
23 First, Defendants’ burden of defending this suit in California is no greater than would be the
24 burden on Plaintiff, who resides in the Northern District of California, of litigating in Arizona.
25 Second, maintaining the suit would not interfere with Arizona’s sovereignty, since the only claim
26 at issue is brought under the UFTA, which both Arizona and California have adopted. Third,
27 California has a very strong interest in the enforcement of judgments of its courts, and in providing

1 a forum for its residents to protect their judgments won in a California district court. Finally,
2 judicial efficiency is best served by maintaining this suit in this district, where the underlying
3 proceedings giving rise to Plaintiff's claim for fraudulent conveyance occurred.

4 Balancing these seven factors, the Court concludes that the exercise of jurisdiction over
5 Defendants is not unreasonable. The requirements of due process being satisfied, the Court finds
6 that it has specific jurisdiction over Defendants, and accordingly DENIES Defendants' motion to
7 dismiss for lack of personal jurisdiction.

8 **B. Motion to Dismiss or Transfer for Improper Venue**

9 Defendants argue that venue is not proper under 28 U.S.C. § 1391(a) and, alternatively, that
10 the Court should exercise its discretion and transfer venue pursuant to 28 U.S.C. § 1404(a).

11 **1. Motion to Dismiss**

12 Under 28 U.S.C. § 1391(a), a civil action may be brought

13 only in (1) a judicial district where any defendant resides, if all defendants reside in
14 the same State, (2) a judicial district in which a substantial part of the events or
15 omissions giving rise to the claim occurred, or a substantial part of property that is
16 the subject of the action is situated, or (3) a judicial district in which any defendant
is subject to personal jurisdiction at the time the action is commenced, if there is no
district in which the action may otherwise be brought.

17 28 U.S.C. § 1391(a). Venue may be proper in multiple districts so long as a "substantial part" of
18 the underlying events took place in each of those districts. *See Gulf Ins. Co. v. Glasbrenner*, 417
19 F.3d 353, 356 (2d Cir. 2005) (citing cases from various circuits).

20 Plaintiff claims that venue is proper because "a substantial part of the events or omissions
21 giving rise to the claim occurred, or a substantial part of property that is the subject of the action is
22 situated" in this District. 28 U.S.C. § 1391(a)(2). Plaintiff makes two arguments. First, Plaintiff
23 argues that the events giving rise to the alleged claims include the issuance of the original
24 Judgment in the Northern District of California and the recently Renewed Judgment by the same
25 court, which Defendants' alleged unlawful conduct has prevented Plaintiff from being able to
26 enforce. Second, Plaintiff argues that a substantial part of property that is the subject of the action
27 is situated in the Northern District of California because the subject of this action is a Wells Fargo

1 Account, and Wells Fargo is headquartered and maintains its principal place of business in San
2 Francisco, California. *See Pac. Decision Sciences Corp. v. Superior Court*, 121 Cal. App. 4th
3 1100, 1108 (2004) (“When . . . the issue, as in this case, involves jurisdiction to compel the obligor
4 to pay one claimant and not a competing claimant, the debt or claim is usually regarded as having a
5 situs in any state in which personal jurisdiction of the debtor can be obtained.” (internal quotation
6 marks and citations omitted)).

7 Plaintiff’s arguments are well-taken, and Defendants have offered no convincing arguments
8 in rebuttal. Defendants’ arguments are directed more at transferring pursuant to 28 U.S.C. § 1404,
9 and will therefore be addressed in the following section. The Court concludes that venue in this
10 district is proper, and therefore Defendants’ motion to dismiss for improper venue is DENIED.

11 **2. Motion to Transfer**

12 Defendants also move, in the alternative, to transfer pursuant to 28 U.S.C. § 1404(a).
13 Under 28 U.S.C. § 1404(a), a district court may, in its discretion, transfer any civil action to any
14 other district or division where the action may have originally been brought, based on “the
15 convenience of parties and witnesses, in the interest of justice.” 28 U.S.C. § 1404(a); *accord*
16 *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988). However, a party seeking transfer must
17 make “a strong showing of inconvenience to warrant upsetting the plaintiff’s choice of forum.”
18 *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986).

19 “Section 1404(a) is intended to place discretion in the district court to adjudicate motions
20 for transfer according to an individualized, case-by-case consideration of convenience and
21 fairness.” *Stewart Org.*, 487 U.S. at 29 (internal quotation marks and citation omitted). Before
22 transferring pursuant to § 1404(a), the Court should consider public factors relating to “the interest
23 of justice” and private factors relating to “the convenience of the parties and witnesses.” *Decker*
24 *Coal*, 805 F.2d at 843. Such factors may include: (1) the location where relevant agreements were
25 negotiated and executed; (2) the state that is most familiar with the governing law; (3) the plaintiff’s
26 choice of forum; (4) the parties’ respective contacts with the forum; (5) the contacts relating to the
27 plaintiff’s cause of action in the chosen forum; (6) the differences in the costs of litigation in the

1 two forums; (7) the availability of compulsory process to compel attendance of unwilling non-party
2 witnesses; (8) the ease of access to sources of proof; (9) the presence of a forum selection clause;
3 and (10) the relevant public policy of the forum state, if any. *Jones v. GNC Franchising, Inc.*, 211
4 F.3d 495, 498-99 (9th Cir. 2000).

5 Although Defendants argue that the convenience of witnesses and Defendants favors
6 transferring this case to the District of Arizona, the Court is not persuaded that these factors
7 outweigh both the private and public interest factors that favor maintaining the case in this District.
8 First, although Defendants are located in Arizona, Plaintiff is located in California, and thus the
9 convenience to the parties is a neutral factor. It would be equally burdensome for Plaintiff to
10 litigate this case in Arizona as it would be for Defendants to litigate in California.

11 Second, Defendants assert that all of the relevant documents and records are located at
12 Defendant FNBPay's principal place of business, which is located in the District of Arizona.
13 However, M. Cohen concedes that FNBPay used a mailbox in San Ysidro, California from May
14 2010 to July 30, 2010. *See* Mot. to Dismiss at 2. Moreover, four websites allegedly affiliated with
15 FNBPay – www.fnbpay.net, www.newmerchantnow.com, www.fnbprocessing.com, and
16 www.rxpill.com – list the same FNBPay address in San Ysidro, California as their contact address.
17 Dillon Decl. ¶¶ 52-62 & Ex. 18. Clearly, at least some of the evidence is located in California.

18 Third, although Defendants claim that all of their witnesses are located in Arizona,
19 Defendants have failed to identify which witnesses – apart from Defendants themselves – would be
20 inconvenienced by litigating this case in California. *See* Mot. to Dismiss at 6-7. For example, the
21 factual allegations suggest that S. Cohen, the Judgment-Debtor, will be a key witness, and that he is
22 presently located in Mexico. Thus, there is only a minimal difference in burden between requiring
23 S. Cohen to appear in this case in Arizona or California. Furthermore, as discussed previously,
24 Wells Fargo is domiciled in California and would therefore not be inconvenienced if called as a
25 witness in this case. It is therefore unclear that transferring this case to Arizona would, in fact, be a
26 greater convenience to the parties and witnesses.

1 Meanwhile, several factors favor retaining the case in the Northern District of California.
2 As previously discussed, the underlying events giving rise to Plaintiff’s current claims occurred in
3 this district. S. Cohen, the Judgment-Debtor, has already been found in contempt by the Northern
4 District for actions related to those alleged in the Complaint, and the district is already familiar
5 with the background of the case. Therefore, it would not serve the interests of judicial economy to
6 transfer this case, nor would it serve the interests of justice to require Plaintiff, a Northern District
7 of California resident, to travel to Arizona to prosecute his claims. *See Allen v. Scribner*, 812 F.2d
8 426, 436-37 (9th Cir. 1987) (holding that where the court is familiar with the case and transfer may
9 lead to delay, the court is justified in refusing to transfer). Furthermore, California has a strong
10 public policy interest in providing a forum for its residents to litigate to enforce judgments obtained
11 in this state. *See Gutierrez*, 1 F. Supp. 2d at 1084 (declining to transfer upon making similar
12 findings).

13 Defendants have not met their burden of showing that litigating this action in this District
14 will cause great inconvenience or unfairness as would justify transfer. In the absence of such a
15 showing, the plaintiff’s choice of forum is generally treated with great deference. *See Creative*
16 *Tech., Ltd. v. Aztech Sys. Pte, Ltd.*, 61 F.3d 696, 703 (9th Cir. 1995). Accordingly, Defendants’
17 motion to transfer venue is DENIED.

18 **C. Preliminary Injunction**

19 A plaintiff may not obtain a preliminary injunction unless he shows that “irreparable injury
20 is *likely* in the absence of an injunction.” *Winter*, 129 S. Ct. at 375 (emphasis in original). A mere
21 possibility that irreparable injury will result is insufficient to warrant the extraordinary relief of a
22 preliminary injunction. *See Enyart v. Nat’l Conference of Bar Exam’rs, Inc.*, 630 F.3d 1153, 1165
23 (9th Cir. 2011).

24 In its order granting a TRO, the Court previously found that Plaintiff had shown (1) S.
25 Cohen has a history of dishonest behavior and of making fraudulent conveyances through the
26 assistance of his family and associates to avoid execution of Plaintiff’s Judgment; (2) it is likely
27 that M. Cohen has assisted S. Cohen in channeling funds through the FNBPay Wells Fargo

1 Account with intent to defraud Plaintiff, a creditor; and (3) *ex parte* temporary injunctive relief was
2 necessary “to prevent the dissipation of more than \$109,000 that is currently being held [in the
3 Wells Fargo Account . . . under the name FNBPay.” TRO Mot. at 2; *see* TRO Order at 6-10.

4 Based on these findings, the Court granted Plaintiff limited expedited discovery so that he could
5 substantiate his claims in support of his motion for a preliminary injunction.

6 Although it appeared at the time of Plaintiff’s TRO application that he was likely to
7 succeed on the merits of at least some of his claims and that he was likely to suffer irreparable
8 injury in the absence of *ex parte* TRO relief, there now appear to be substantial questions
9 concerning whether the subject Wells Fargo Account is still open, and if so, what funds remain. As
10 previously noted, Plaintiff concedes “[i]t is unclear what funds remain or were
11 deposited/withdrawn from the account since August 31, 2011.” Reply Br. ISO PI.

12 Defendants produced bank statements for the Wells Fargo Account from January 1, 2010
13 through August 31, 2011, which show an ending balance of zero in August 2011, a negative ending
14 balance in June and July 2011, and ending balances of \$100 or less in February through May 2011.
15 Dillon Reply Decl. ¶ 15 & Ex. 3. Admittedly, Defendants’ bank statements reflect some curious
16 activity. For example, the bank statement for the period July 1 through July 30, 2010 shows that
17 \$47,371.81 was deposited and \$48,913.93 withdrawn during that month. *Id.*⁹ The bank statement
18 for the period August 1 through August 31, 2010 shows that \$110,833.09 was withdrawn on
19 August 2, 2010, and then deposited back on August 3, 2010. *See id.* The Court agrees with
20 Plaintiff that this pattern of transactions appears suspect and creates at least an inference of
21 misconduct, when considered in the context of S. Cohen’s past pattern and practice of fraudulently
22 conveying funds through his relatives’ bank accounts. Nevertheless, according to the bank
23

24 ⁹ The second page of the bank statement exhibit is missing from the Dillon Reply Declaration but
25 is reproduced in full in Exhibit A attached to the Declaration of Michael J. Cohen in Support of his
26 Opposition to Plaintiff Gary Kremen’s Reply in Support of Order to Show Cause Re: Preliminary
27 Injunction (“Cohen Opp’n Decl.”). The second page of the bank statement for the month of July
28 2010 shows more specifically that, among other transactions, \$5,997.00 was withdrawn on July 23,
2010 and then deposited on July 26, 2010, and \$15,129.45 was deposited on July 26, 2010 and then
withdrawn the following day. Cohen Opp’n Decl. Ex. A at 21.

1 statements produced and submitted as evidence to the Court, it appears that the last period of major
2 activity in the Wells Fargo Account was February 2011. *See id.* From February 2011 to August
3 2011, there appear to be no significant transactions into or out of the Account, and Defendants
4 assert that the Account has been closed since August 2011. *See id.* In light of this evidence that
5 the Account may no longer be open or hold any funds, Plaintiff has not demonstrated that it is
6 likely, as opposed to merely possible, that he will suffer irreparable harm in the absence of
7 preliminary injunctive relief. *See Stormans*, 586 F.3d at 1127 (explaining that “[i]n *Winter*, the
8 Supreme Court definitively refuted our ‘possibility of irreparable injury’ standard”).

9 At the hearing, Plaintiff articulated a theory of what he believes is Defendants’ and S.
10 Cohen’s “whack-a-mole” practice of opening and then closing various bank accounts under
11 FNBPay’s name, all with intent to defraud Plaintiff. While Plaintiff may ultimately be able to
12 prove his theory, “[s]peculative injury does not constitute irreparable injury sufficient to warrant
13 granting a preliminary injunction.” *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674
14 (9th Cir. 1988). At this time, Plaintiff has produced no evidence regarding these potential other
15 accounts, merely hypothesizing that Defendants have other, as yet unidentified accounts containing
16 fraudulently conveyed funds. Plaintiff’s allegations of irreparable harm do not rise above the level
17 of speculation.

18 A preliminary injunction is “an extraordinary remedy that may only be awarded upon a
19 clear showing that the plaintiff is entitled to such relief.” *Winter*, 129 S. Ct. at 375-76 (internal
20 citations omitted). Because it is no longer clear that Plaintiff is likely to suffer irreparable harm, no
21 preliminary injunction can issue at this time. Therefore, the Court will not now revisit whether
22 Plaintiff has shown a likelihood of success on the merits or whether the balance of equities and the
23 public interest favor granting or denying a preliminary injunction.

24 **IV. CONCLUSION**

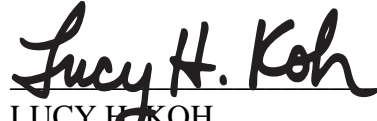
25 For the reasons discussed herein, the Court DENIES Defendants’ filed a Motion to Dismiss
26 for Lack of Jurisdiction and Improper Venue, and DENIES Defendants’ Motion to Transfer to the
27 District of Arizona pursuant to 28 U.S.C. § 1404. At this time, the Court also DENIES Plaintiff’s

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motion for a preliminary injunction, without prejudice. The TRO previously granted expires effective upon the date of this Order.

IT IS SO ORDERED.

Dated: January 7, 2012



LUCY H. KOH
United States District Judge