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

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9 Medbox Incorporated, a Nevada
corporation,

10 Plaintiff,

11 v.

12 Darryl B. Kaplan; Claudio Tartaglia; and
13 Eric Kovan;

14 Defendants.

No. CV-13-00949-PHX-GMS

ORDER

15
16 Pending before the Court is Defendants' Motion to Dismiss for Lack of Personal
17 Jurisdiction and Improper Venue. (Doc. 11.) For the following reasons the motion is
18 granted in part and the action is transferred to the Eastern District of Michigan.¹

19 **BACKGROUND**

20 This action arises out of an Agreement by Plaintiff Medbox, Inc. to purchase a
21 50% interest in Medvend Holdings, LLC ("Medvend") from the Defendants Darryl B.
22 Kaplan, Claudio Tartaglia, and Eric Kovan.² (Doc. 1, Ex. 1.) After making payments of
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24 ¹ Medbox's request for oral argument (Doc. 12) is denied because the Parties have
25 had an adequate opportunity to discuss the law and evidence and oral argument will not
26 aid the Court's decision. *See Lake at Las Vegas Investors Group v. Pac. Malibu Dev.*,
933 F.2d 724, 729 (9th Cir. 1991).

27 ² When considering a challenge to venue, a court must "draw all reasonable
28 inferences in favor of the non-moving party and resolve all factual conflicts in favor of
the non-moving party." *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1138-39 (9th

1 \$600,000, Medbox learned of an action brought by a third party against the Defendants.
2 (Doc. 10 at 4–5.) As a result, Medbox filed this action seeking a return of its payment and
3 rescission of the Agreement. (*Id.* at 23.)

4 Medbox is incorporated in Nevada but has offices in Arizona and California. (*Id.*
5 at 2.) Medbox’s CEO, Dr. Bruce Bedrick, lives and maintains his office in Arizona. (Doc.
6 12, Ex. 1.) Medbox’s founder, Vincent Mehdizadeh, lives and maintains his office in
7 California. (Doc. 11 at 3.)

8 The Defendants are all residents of Michigan who have never lived in Arizona or
9 owned property here. (*Id.* at Ex. A–C.) None of them has been to Arizona in over a
10 decade, and they made no visit to Arizona in connection with this or any other business
11 transaction. (*Id.*) Defendant Kaplan primarily negotiated the Agreement from Michigan
12 over the phone and email with Mehdizadeh in California. (*Id.*) Defendant Tartaglia was
13 also involved with the negotiation, and Tartaglia and Kaplan met with Mehdizadeh in
14 California and Nevada. (*Id.*) Defendant Kovan was not directly involved in the
15 negotiations. (*Id.*)

16 Defendants did have some contacts with Arizona in connection with this
17 Agreement. In December 2012, Defendant Kaplan communicated with Bedrick in
18 Arizona through several phone calls and emails. (Doc. 12 at 13–52.) They entered into a
19 Non-Disclosure Agreement which listed Medbox’s principal place of business as being in
20 Arizona. (*Id.* at 15–17.) These early negotiations included discussions about the price of
21 the deal and an exchange of information about Medvend’s business. (*Id.* at 13–52.)
22 Kaplan made these communications at least partly in his capacity as CEO of Medvend,
23 and Tartaglia also received many of these emails as the COO. (*Id.*)

24
25 Cir. 2004). When considering a challenge to personal jurisdiction, where conflicts exist
26 between the facts contained in the parties’ affidavits, depositions, and other discovery
27 materials, conflicts must resolved in the non-movant’s favor. *See Rio Props. Inc. v. Rio*
28 *Int’l. Interlink*, 284 F.3d 1007, 1019 (9th Cir. 2002). To the extent they are
uncontroverted by Defendants’ affidavit and exhibits, the Court has accepted the
allegations in Medbox’s Amended Complaint and other filings as true and made all
reasonable inferences from them.

1 After these initial negotiations, Kaplan and Tartaglia met with Mehdizadeh, who
2 became the primary point of contact for the negotiations. (*Id.* at 33; Doc 11, Ex. A.)
3 Those meetings and communications did not involve Arizona. (Doc 11, Ex. A.) In March
4 2012, after the Agreement had been signed but apparently before it had formally closed,
5 Kaplan again began to have phone calls and emails with Bedrick in Arizona. (Doc. 12 at
6 53–103.) Kaplan asked Bedrick, in Arizona, to wire \$300,000 and provided him with the
7 bank routing number. (*Id.* at 53–57.) Bedrick told Kaplan that he was “not directly
8 overseeing this transaction” and that he would forward the request to Mehdizadeh. (*Id.* at
9 58.) The \$600,000 payments were eventually sent from the California office under
10 Mehdizadeh’s direction. (Doc 11, Ex. A.)

11 Kaplan’s later communications with Bedrick in Arizona also involved changes to
12 Medvend’s website and a discussion about handling referrals. (Doc. 12 at 53–103.)
13 Bedrick introduced Kaplan to another person in Arizona who was part of a team that was
14 going to be helping to improve the website. (*Id.*) That team was also located in Arizona
15 and Kaplan had communications with a member of that team. (*Id.*) There were also
16 communications about a press release and about meetings with reporters to publicize their
17 new deal. (*Id.*) Finally, there were communications involving Bedrick, Mehdizadeh,
18 Kaplan, and Tartaglia about winding down Medvend, LLC as part of the transition to
19 Medvend, Inc. (*Id.*) Again, in all of these communications Kaplan was at least partly
20 acting in his capacity as CEO of Medvend and Tartaglia received many of these emails as
21 the COO. (*Id.*)

22 In May, after hearing about the deal from the press release and news coverage, the
23 third parties filed their lawsuit against the Defendants. (Doc. 1, Ex. 2.) As a result of the
24 lawsuit, Medbox sent a letter to the Defendants seeking to end the Agreement. (Doc. 1,
25 Ex. 3.) This letter noted that the closing of the Agreement had never occurred. (*Id.*)
26 Defendants had hired Arizona legal counsel to draft the Agreement, and the Agreement
27 specified that the closing would occur at the counsel’s office in Arizona or at another
28 place mutually agreed upon. (*Id.*, Exs. 1, 3.) The letter also laid out the issues now

1 presented in this action, which is a dispute over whether the Agreement was ever binding
2 and whether it, and the payments made under it, should be unwound.

3 Defendants filed their Motion to Dismiss arguing first that venue is improper and
4 additionally that this Court has no personal jurisdiction over them. Defendants ask that
5 the action be dismissed or transferred to the District Court for the Eastern District of
6 Michigan. Defendants also seek attorney's fees and other costs for their motion.

7 DISCUSSION

8 I. Legal Standard

9 Medbox argues that venue is proper under 28 U.S.C. § 1391(b)(2), (Doc. 10 ¶ 6),
10 which provides venue in a diversity action in “a judicial district in which a substantial
11 part of the events or omissions giving rise to the claim occurred, or a substantial part of
12 property that is the subject of the action is situated.” In applying this statute, the adjective
13 “substantial” must be taken seriously. “[S]ignificant events or omissions material to the
14 plaintiff’s claim must have occurred” here. *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353,
15 357 (2d Cir. 2005).

16 “Plaintiff has the burden of proving that venue is proper in the district in which the
17 suit was initiated.” *Hope v. Otis Elevator Co.*, 389 F. Supp. 2d 1235, 1243 (E.D. Cal.
18 2005) (citing *Airola v. King*, 505 F. Supp. 30, 31 (D. Ariz. 1980)); *see also Piedmont*
19 *Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 496 (9th Cir. 1979). When deciding
20 a challenge to venue, the pleadings need not be accepted as true, and the district court
21 may consider facts outside of the pleadings. *Argueta v. Banco Mexicano, S.A.*, 87 F.3d
22 320, 324 (9th Cir. 1996).

23 II. Venue Is Not Proper in the District of Arizona

24 Venue in this Court is improper because neither a substantial part of the property
25 at issue nor a substantial portion of the events or omissions occurred in this state. The
26 property at issue in the Agreement is the purchased membership interest in Medvend and
27 the \$600,000 transferred pursuant to the Agreement. Medvend does business in Michigan
28 and none of its assets or property is in Arizona. The money paid was transferred from

1 California to Michigan. Medbox has not demonstrated that any of the property at issue,
2 let alone a substantial portion of it, is located in Arizona.

3 Instead Medbox argues that a substantial portion of the events or omission
4 occurred here in Arizona. The primary events are the entering into of the Agreement and
5 the transfer and retention of the money. The alleged omissions are the Defendants' failure
6 to inform Medbox about the claims that the third parties raised in the other action. The
7 communications between Defendants and Medbox or others in Arizona that occurred
8 after the signing of the agreement and transfer of the money are not relevant because they
9 did not give rise to the complaint.

10 None of the events or omissions involved the Defendants being physically present
11 in Arizona. Some of the early negotiations occurred by phone and email with the CEO in
12 Arizona, but the finalization of the agreement involved communications with
13 Mehdizadeh in California and meetings in Nevada and California. Defendant Kaplan led
14 these communications but Defendant Tartaglia also received some of the emails and
15 attended the meetings as well. Defendant Kovan was not directly involved with any of
16 the negotiations. The only action or omission by Kovan appears to have been the signing
17 of the Agreement in Michigan. The other Defendants also signed in Michigan, and it was
18 in Michigan that they have retained or spent the money received. Some of that money
19 was originally requested from the CEO in Arizona, but it was actually sent by
20 Mehdizadeh from California. The Agreement was drafted by counsel in Arizona, but it
21 was based on negotiations that primarily occurred outside of Arizona, and it was signed
22 by both sides outside of Arizona. The formal closing of the Agreement was schedule to
23 occur in Arizona, but the time and place was subject to change and it never occurred. The
24 fact that one end of some of the phone calls and emails was in Arizona is not enough to
25 establish that a substantial part of the events or omissions occurred in Arizona.

26 Finally, Medbox argues that the effects of the omissions were clearly felt in
27 Arizona. However, the statute directs the Court to consider "events or omissions" and not
28 impact. It is true that "the locus of the injury [i]s a relevant factor" in deciding proper

1 venue. *Myers v. Bennett Law Offices*, 238 F.3d 1068, 1076 (9th Cir. 2001); *see also Fiore*
2 *v. Walden*, 688 F.3d 558, 587–88 (9th Cir. 2011) *cert granted*, 133 S.Ct. 1493 (2013).
3 But only as one factor or one event. Again, if the locus of the injury was the sole and
4 decisive factor, then the personal jurisdiction and venue inquiries would meld into one
5 minimum-contacts test. *Jenkins Brick Co. v. Bremer*, 321 F.3d 1366, 1372 (11th Cir.
6 2003); *but see Astro–Med, Inc. v. Nihon Kohden Am., Inc.*, 591 F.3d 1, 12 (1st Cir. 2009)
7 (focusing on where the harm was felt rather than where the actions occurred). Plaintiff’s
8 home forum would always win, and that is not the law. The law specifies a different line
9 of inquiry for personal jurisdiction (minimum contacts) and venue (whether “a substantial
10 part of the events or omissions” occurred in the forum state).

11 It is worth noting that the Supreme Court heard arguments earlier this month in an
12 appeal of *Fiore v. Walden* and one of the issues in that case is the question of whether
13 venue is proper in a state where the effects are felt. Whether or not the Supreme Court
14 adopts a test requiring greater consideration of effects, the outcome in this case will not
15 change. Even if venue could be legally established by the impact or injury, it is not clear
16 factually in this case what portion of the injury was felt in Arizona and what portion in
17 California. The money came from the California office of Medbox and there is no
18 explanation of why the effect from the loss of that money would have been substantially
19 felt in Arizona.

20 Based on the allegations of the Amended Complaint, the affidavits, and the other
21 exhibits submitted, the Court cannot conclude that a substantial part of the events or
22 omissions occurred in Arizona. Venue in Arizona is improper because neither the
23 property nor the events and omissions requirements from 28 U.S.C. § 1391(b)(2) is met.

24 **III. Transfer.**

25 Given the lack of venue, the Court has discretion to dismiss this case or, in the
26 interest of justice, transfer it to a district where it could have been brought. 28 U.S.C. §
27 1406(a). The Court will exercise its discretion to transfer this case to the Eastern District
28 of Michigan, where most of the events and omissions giving rise to these claims

1 occurred. Although both sides would prefer a different outcome, neither objects to the
2 propriety of this transfer.

3 **IV. Costs**

4 Defendants also ask for attorney’s fees and related expenses, and costs under 28
5 U.S.C. §§ 1919–1920, Federal Rule of Civil Procedure 54(d), and Ariz. Rev. Stat. § 12-
6 341.01. 28 U.S.C. § 1919 authorizes courts to order the payment of costs when an action
7 is dismissed. Here, the action is being transferred and not dismissed, and this Court
8 chooses not to award costs under § 1919.

9 Rule 54(d)(1) contains a presumption that costs other than attorney’s fees will be
10 awarded to the prevailing party. “[A] defendant is not a “prevailing party” for Rule 54(d)
11 purposes when an action is dismissed for jurisdictional reasons” *Harris v. Stonecrest*
12 *Care Auto Ctr., LLC*, 559 F. Supp. 2d 1088, 1090 (S.D. Cal. 2008) (citing *Miles v.*
13 *California*, 320 F.3d 986, 988 (9th Cir. 2003)). Here, the matter is simply being
14 transferred for jurisdictional reasons to an appropriate venue. There is no prevailing party
15 and costs will not be awarded under Rule 54(d).

16 Rule 54(d)(2) provides the procedure for requesting attorney’s fees. Arizona law
17 authorizes a discretionary award of attorneys’ fees in contract actions, but only to
18 successful parties. Ariz. Rev. Stat. § 12–341.01(A). Medbox has not succeeded in any
19 contract action and no attorney’s fees will be awarded.

20 **IT IS THEREFORE ORDERED** that Defendant Medbox, Inc.’s Motion to
21 Dismiss for Lack of Personal Jurisdiction and Improper Venue (Doc. 11) is **granted in**
22 **part.**

23 **IT IS FURTHER ORDERED** that the Clerk of Court is directed to transfer this
24 action to the Eastern District of Michigan.

25 Dated this 19th day of November, 2013.

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27 _____
28 G. Murray Snow
United States District Judge