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3
4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
6 SAN JOSE DIVISION

7
8 JOSEPH NORTH,
9 Plaintiff,

10 v.

11 SAMSUNG SDI AMERICA, INC., et al.,
12 Defendants.

Case No. [5:19-cv-05621-EJD](#)

**ORDER DENYING MOTION TO
REMAND; GRANTING MOTION TO
TRANSFER**

Re: Dkt. Nos. 7, 20

13 This is a product liability action. Plaintiff Joseph North (“Plaintiff”) claims he was
14 seriously injured when the lithium-ion batteries for electronic cigarettes (“E-cigarettes”) he was
15 carrying in his pocket suddenly exploded. Presently before the Court are Plaintiff’s motion to
16 remand and for attorneys’ fees, and Defendants’ motion to dismiss for improper venue or to
17 transfer the action to the Eastern District of Texas, Sherman Division. The Court finds it
18 appropriate to take the matters under submission for decision without oral argument pursuant to
19 Civil Local Rule 7-1(b). For the reasons stated below, Plaintiff’s motion to remand will be denied
20 and Defendants’ motion to transfer will be granted.

21 **I. BACKGROUND**

22 Plaintiff is currently a resident of Oregon. Comp. ¶ 1. At the time of the incident giving
23 rise to this lawsuit, Plaintiff was a resident of Texas. Id. Plaintiff alleges on information and
24 belief that Defendant Samsung SDI America, Inc. (“SDIA”) is a California corporation with its
25 principal place of business in San Jose, California, and is in the business of designing,
26 manufacturing, marketing, testing, promoting, selling, importing, exporting, and/or distributing
27 Samsung lithium-ion 18650 batteries. Id. ¶¶ 2-3. Defendant Samsung SDI Co. Ltd. (“Samsung”)

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1 is a Korean entity that manufactures and distributes lithium-ion 18650 batteries worldwide. Id. ¶
2 4. Samsung allegedly works in concert with SDIA to export, import, and distribute lithium-ion
3 batteries throughout California and the United States more broadly. Id.

4 On May 16, 2017, Plaintiff had e-cigarette batteries manufactured and distributed by
5 Defendants in his pants pocket. Id. ¶ 30. He was holding his child. Id. The batteries suddenly
6 and without warning exploded in his pocket. Id. Plaintiff immediately set down his child as his
7 clothes caught fire. Id. Plaintiff called 911 and was transported via ambulance to the Emergency
8 Department at Medical City Denton in Texas, where he was diagnosed with first and second
9 degree burns to his thigh and arm. Id. ¶ 31. Plaintiff has suffered an excruciating healing process
10 and has been physically and emotionally scarred. Id. ¶¶ 32- 33. Plaintiff has also lost wages. Id.
11 ¶ 32. Based on the foregoing, Plaintiff filed suit in the Superior Court of California, County of
12 Santa Clara, asserting claims for (1) strict liability, (2) negligence, (3) breach of implied warrant,
13 (4) negligent misrepresentation and (5) violation of unfair competition law. Id. ¶¶ 34-80.

14 Defendants removed the action pursuant to 28 U.S.C. §§1332, 1441, and 1446, reasoning
15 that this Court has subject matter jurisdiction because SDIA is a sham defendant whose citizenship
16 should be disregarded, the remaining parties (Plaintiff and Samsung) are citizens of different
17 States, and the amount in controversy exceeds the sum of \$75,000. SDIA contends that there is no
18 reasonable basis in law or fact by which any court could hold SDIA liable for Plaintiff’s asserted
19 injuries because SDIA did not place the 18650 lithium-ion batteries referenced in the Complaint in
20 the stream of commerce or play any role in the process of bringing those batteries to consumers.
21 According to Jikwang Kim (“Kim”), who is employed as SDIA’s Controller, SDIA (1) does not
22 design and has never designed 18650 lithium-ion batteries; (2) does not fabricate and has never
23 fabricated 18650 lithium-ion batteries; (3) does not assemble and has never assembled 18650
24 lithium-ion batteries; (4) does not manufacture and has never manufactured 18650 lithium-ion
25 batteries; (5) does not package and has never packaged 18650 lithium-ion batteries; (6) does not
26 label and has never labeled 18650 lithium-ion batteries; (7) does not test and has never tested
27 18650 lithium-ion batteries; (8) does not modify and has never modified 18650 lithium-ion

1 batteries; (9) does not warranty and has never warrantied 18650 lithium-ion batteries; (10) is not
2 and has never been a distributor, wholesaler, or supplier of 18650 lithium-ion batteries; (11) does
3 not distribute and has never distributed 18650 lithium-ion batteries; (12) does not supply and has
4 never supplied 18650 lithium-ion batteries; (13) does not import and has never imported 18650
5 lithium-ion batteries; (14) does not export and has never exported 18650 lithium-ion batteries; (15)
6 does not advertise and has never advertised 18650 lithium-ion batteries; (16) does not market and
7 has never marketed 18650 lithium-ion batteries; (17) does not sell and has never sold 18650
8 lithium-ion batteries; and (18) does not make and has never made any representations concerning
9 the safety of 18650 lithium-ion batteries. Decl. of Jikwang Kim in Support of Defendants’ Notice
10 of Removal ¶¶ 2-22 (Dkt. No. 1-2). Kim represents that SDIA did not design, fabricate, assemble,
11 manufacture, package, label, test, modify, warranty, distribute, wholesale, supply, import, export,
12 advertise, market, sell, or make any representations concerning the safety of the 18650 lithium-ion
13 batteries referenced in the Complaint. Id. Kim also represents that SDIA does not place and has
14 never placed 18650 lithium-ion batteries in the stream of commerce or play any role in the process
15 of bringing 18650 lithium-ion batteries to consumers. Id. ¶ 21.

16 Beyond the representations summarized above, Kim states that SDIA did not receive any
17 direct financial benefit from the sale of 18650 lithium-ion batteries by Samsung; that SDIA’s
18 conduct is not a necessary factor in bringing 18650 lithium-ion batteries to the initial consumer
19 market; and that SDIA does not have any control over, or a substantial ability to influence, the
20 manufacturing or distribution of 18650 lithium-ion batteries. Id. ¶ 23. SDIA is not a merchant
21 with respect to and “does not deal in” 18650 lithium-ion batteries “or its kind.” Id. ¶ 24. SDIA
22 does not hold itself out as having knowledge or skill peculiar to 18650 lithium-ion batteries. Id. ¶
23 25. Kim also represents that SDIA did not contract with Plaintiff or any consumers who
24 purchased 18650 lithium-ion batteries. Id. SDIA does not conduct any business act related to
25 18650 lithium-ion batteries. Id. ¶ 26. Kim also represents that SDIA does not advertise 18650
26 lithium-ion batteries and does not conceal any safety hazards or risks posed by 18650 lithium-ion
27

1 batteries. Id.¹

2 **II. DISCUSSION**

3 **A. MOTION TO REMAND**

4 Title 28 United States Code section 1441(a) states: “Except as otherwise expressly
5 provided by Act of Congress, any civil action brought in a State court of which the district courts
6 of the United States have original jurisdiction, may be removed by the defendant or the
7 defendants, to the district court of the United States for the district and division embracing the
8 place where such action is pending.” A civil action founded on Title 28 United States Code
9 section 1332(a), i.e. diversity jurisdiction, is thus removable. Jurisdiction founded on section
10 1332(a) requires that the parties be in complete diversity and the amount in controversy exceed
11 \$75,000. Complete diversity means that the citizenship of each plaintiff is diverse from the
12 citizenship of each defendant. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 62 (1996). A civil action
13 otherwise removable solely on the basis of diversity jurisdiction, however, “may not be removed if
14 any of the parties in interest properly joined and served as defendants is a citizen of the State in
15 which such action is brought.” 28 U.S.C. § 1441(b)(2). Section 1441(b)(2) embodies what is
16 commonly known as the “no local defendant” rule.

17 There is a “strong presumption against removal jurisdiction,” and a defendant “always has
18 the burden of establishing that removal is proper.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th
19 Cir. 1992); see also *Harris v. Bankers Life and Cas. Co.*, 425 F.3d 689, 698 (9th Cir. 2005)
20 (“removal statutes should be construed narrowly in favor of remand to protect the jurisdiction of
21 state courts”). After removal, a case can be remanded for lack of subject matter jurisdiction or for
22 a defect in removal procedure. 28 U.S.C. § 1447(c). Federal jurisdiction must be rejected if there
23 is any doubt as to the right of removal in the first instance. *Matheson v. Progressive Specialty Ins.*
24 *Co.*, 319 F.3d 1089, 1091 (9th Cir. 2003); *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062,

26 ¹ SDIA, however, has a factory in Michigan that researches and develops midsize lithium-ion
27 batteries and manufactures auto battery packs for electric vehicles. Supplemental Decl. of
28 Jikwang Kim ¶ 10.

1 1064 (9th Cir. 1979).

2 In assessing diversity of citizenship, fraudulently joined defendants are not considered and
3 will not defeat removal. *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th 1998); see also
4 *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921) (the “right of removal cannot be
5 defeated by a fraudulent joinder of a resident defendant having no real connection with the
6 controversy”). A defendant is considered to be fraudulently joined, or a sham defendant, when the
7 plaintiff fails to state a viable cause of action against the alleged sham defendant and when a
8 defendant shows that there is no possibility the alleged sham defendant could be held liable for
9 any claim. *Ritchey*, 139 F.3d at 1318; see also *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061,
10 1067 (9th Cir. 2001) (defendant’s presence in lawsuit is ignored “[i]f the plaintiff fails to state a
11 cause of action against a resident defendant, and the failure is obvious according to the settled
12 rules of the state”) (quoting *McCabe v. Gen. Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir. 1987)).

13 As a matter of general principle, courts presume that a defendant is not fraudulently joined.
14 *Diaz v. Allstate Ins. Grp.*, 185 F.R.D. 581, 586 (C.D. Cal. 1998). Indeed, a defendant who asserts
15 fraudulent joinder carries a heavy burden of persuasion to show that there has been fraudulent
16 joinder. *Id.* Fraudulent joinder must be proven by “clear and convincing evidence.” *Hamilton*
17 *Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1206 (9th Cir. 2007). Stated differently, it
18 must appear to a “near certainty” that the joinder was fraudulent. *Alexander v. Select Comfort*
19 *Retail Corp.*, No. 18-6446 YGR, 2018 WL 6726639, at *2 & n.4 (N.D. Cal. Dec. 21, 2018) (citing
20 *Diaz*, 185 F.R.D. at 586). Merely showing that an action is “likely to be dismissed” against that
21 defendant does not demonstrate fraudulent joinder. *Diaz*, 185 F.R.D. at 586; *Lieberman v.*
22 *Meshkin, Mazandarani*, No 96-3344 SI, 1996 WL 732506, at *2 (N.D. Cal. Dec. 11, 1996) (“The
23 standard is not whether plaintiffs will actually or even probably prevail on the merits, but whether
24 there is a possibility that they may do so.”). The defendant must be able to show that the
25 individuals joined in the action cannot be liable under any theory. *Calero v. Unisys Corp.*, 271 F.
26 *Supp. 2d* 1172, 1176 (N.D. Cal. 2003). In resolving the issue, the court must resolve all
27 ambiguities in state law in favor of the plaintiff. *Diaz*, 185 F.R.D. at 586. “If there is a non-

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1 fanciful possibility that plaintiff can state a claim under California law against the non-diverse
2 defendant[] the court must remand.” Macey v. Allstate Property and Cas. Ins. Co., 220 F. Supp.
3 2d 1116, 1117 (N.D. Cal. 2002).

4 The test for fraudulent joinder resembles a Rule 12(b)(6) analysis in that the court “accepts
5 non-conclusory factual allegations in the complaint as true and does not consider the merits
6 defenses (other than procedural bars) claimed by the resident defendant.” TPS Utilicom Services,
7 Inc. v. AT&T Corp., 223 F. Supp. 2d 1089, 1102 (C.D. Cal. 2002). The court’s inquiry into
8 fraudulent joinder, however, is broader than Rule 12(b)(6). A claim of fraudulent joinder may be
9 resolved by “piercing the pleadings” and “considering summary judgment-type evidence such as
10 affidavits and deposition testimony.” Morris v. Princess Cruises, Inc., 236 F.3d at 1068 (quoting
11 Cavallini v. State Farm Mutual Auto Ins. Co., 44 F.3d 256, 263 (5th Cir. 1995)); see also Soo v.
12 United Parcel Service, Inc., 73 F. Supp. 2d 1126, 1128 (N.D. Cal. 1999) (“Where fraudulent
13 joinder is an issue, the court may go outside the pleadings, and the defendant may present facts
14 showing that the joinder is fraudulent.”).

15 Plaintiff argues that SDIA is not a sham defendant because, as alleged in the Complaint,
16 SDIA is within the chain of distribution and is, therefore, strictly liable for the allegedly defective
17 batteries under California law. See e.g. Bostick v. Flex Equip. Co., Inc., 147 Cal. App. 4th 80, 88
18 (2007) (“The doctrine of strict products liability imposes strict liability in tort on all of the
19 participants in the chain of distribution of a defective product.”). Plaintiff alleges on information
20 and belief that “each of the Defendants . . . was the agent, servant, employee and/or joint venture
21 of the other defendants, and each of them, and at all said times . . . was acting in the full course
22 and scope of said agency, service, employment and/or joint venture.” Comp. ¶ 7. Plaintiff alleges
23 that “[c]ertain defendants agreed and conspired among themselves, and with certain other
24 individuals and/or entities, to act, or not to act, in such a manner that resulted in the injury to
25 Plaintiff.” Id. Plaintiff further alleges on information and belief that “each of the Defendants was
26 the successor, successor in business, successor in product line or a portion thereof, alter-ego,
27 parent, subsidiary, wholly or partially owned by, or the whole or partial owner of or member in an

1 entity designing, manufacturing, assembling, packaging, modifying, selling, supplying,
2 distributing, marketing, advertising and/or warranting e-cigarettes and e-cigarette related products
3 and component parts.” Id. ¶ 8. Plaintiff contends that the allegations in the Complaint are
4 sufficient to raise “a non-fanciful possibility” that he can state a claim against SDIA, and
5 accordingly the Court must remand the case state court.

6 The Court disagrees. Plaintiff’s allegations are based entirely on information and belief
7 and consist of nothing more than boilerplate legal terms and phrases. Plaintiff does not allege
8 even a single fact to support the broad allegations of agency, servitude, employment or joint
9 venture. Plaintiff allegations of conspiracy, successor liability, alter-ego, parent-subsiary, and
10 ownership are similarly all legal conclusions unsupported by facts. Nor does Plaintiff plead any
11 facts to support the allegation that SDIA participated in the chain of distribution for the batteries at
12 issue. Therefore, the Court need not accept any of these allegations as true. See *Sprewell v.*
13 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (providing that for a Rule 12(b)(6)
14 motion, the court need not accept as true allegations that are “conclusory, unwarranted deductions
15 of fact, or unreasonable inferences”).

16 Moreover, Plaintiff’s allegations on information and belief are contradicted by SDIA’s
17 clear and convincing evidence that there is absolutely no connection between SDIA and the
18 batteries at issue in this case. SDIA’s Controller, Kim, represents that SDIA did not design,
19 fabricate, assemble, manufacture, package, label, test, modify, warranty, distribute, wholesale,
20 supply, import, export, advertise, market, sell, or make any representations concerning the safety
21 of the 18650 lithium-ion batteries referenced in the Complaint. SDIA was not a participant in the
22 chain of distribution for the batteries at issue, and therefore there is no legal basis for holding
23 SDIA liable for any of the claims asserted in the Complaint. See *O’Neil v. Crane Co.*, 53 Cal.4th
24 335, 348-49 (2012) (recognizing that there is no product liability outside a defective product’s
25 chain of distribution).

26 Faced with SDIA’s evidence, Plaintiff nonetheless argues that remand is warranted
27 because (1) SDIA’s representations are unsubstantiated; (2) SDIA has “taken a different approach”

1 in other, similar cases involving lithium-ion batteries; (3) publicly available information suggests
2 SDIA plays a role in the distribution and sale of lithium-ion batteries in the United States and
3 California. None of Plaintiff’s arguments are persuasive.

4 First, Plaintiff contends that Kim’s declaration should be disregarded because the
5 declaration is not based upon personal knowledge, lacks foundation and contains hearsay. The
6 objections are overruled. Kim is the Controller at SDIA’s office in Auburn Hills, Michigan and is
7 “familiar with SDIA’s procedures and operations.” Decl. of Jikwang Kim ¶ 2 (Dkt. No. 1-2).
8 Kim began employment at SDIA in September of 2008 as a Staff Accountant, was promoted to
9 Accountant Manager in 2015, and became Controller in 2019. Supplemental Decl. of Jikwang
10 Kim ¶¶ 3-4 (Dkt. No. 24-1). Kim’s duties and responsibilities as Controller include the review of
11 SDIA’s business records. Id. ¶ 5. Further, Kim has personal knowledge of SDIA’s day-to-day
12 business operations. Id. Thus, Kim’s assertion that SDIA did not design, fabricate, assemble,
13 manufacture, package, label, test, modify, warranty, distribute, wholesale, supply, import, export,
14 advertise, market, sell, or make any representations concerning the safety of the 18650 lithium-ion
15 batteries referenced in the Complaint is well substantiated. See *Self-Realization Fellowship*
16 *Church v. Ananda Church of Self-Realization*, 206 F.3d 1322, 1330 (9th Cir. 2000) (“Personal
17 knowledge can be inferred from an affiant’s position.”); *Barthelemy v. Air Lines Pilots Ass’n*, 897
18 F.2d 999, 1018 (9th Cir. 1990) (declarants’ personal knowledge and competence to testify were
19 “reasonably inferred from their positions and the nature of their participation in the matters to
20 which they swore”).

21 Second, Plaintiff asserts that every counsel representing SDIA has taken a “different
22 approach” in other similar cases involving lithium-ion batteries. According to Plaintiff’s counsel,
23 in some cases, counsel for SDIA is “actively litigating the case without any contention that SDIA
24 plays no role in battery distribution, or are litigating the same and not seeking dismissal despite
25 said assertion. [citation] Others, in exchange for dismissal of SDIA will accept service on behalf
26 of SDIA without plaintiff having to go through the Hague [Convention].” Pl.’s Motion at 3.
27 Those cases are: (1) *Flowers v. SDIA*, No. 18-231, filed in the District Court of Bowie County,

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1 Texas; (2) Hernandez v. Cloud 9 Vape et al., No. 19-1031, filed in the 35th Judicial District Court,
2 Brown County, Texas; (3) Henry v. Smoke Free Planet, No. 18-505, filed in the Circuit Court for
3 Carroll County, Maryland; (4) Kurtz v. Drive Thru Vape and Smoke Outlet LLC, No. 18-00351,
4 filed in the Circuit Court of Accomack County, Virginia; and (5) Lipski v. Notorious Vapors et al.,
5 No. 1980-46, filed in the Superior Court for Hampshire County, Massachusetts. Id. According to
6 Defendants, counsel for Plaintiff has filed at least two other cases against SDIA: Hicks v. SDIA,
7 No. 19-3464349 in the Superior Court of California, Santa Clara County; and Foote v. SDIA, No.
8 19-347040 also in the Superior Court of California, Santa Clara County. Defs.’ Opp’n at 7.²

9 That SDIA’s various counsel may have taken different approaches in similar cases is
10 unremarkable in and of itself. Plaintiff has not shown that SDIA has taken a position in this case
11 that is directly contrary to or irreconcilably inconsistent with a position SDIA took in any of the
12 other lawsuits referenced above. Moreover, although the pleadings for each of the cases cited
13 above are not part of the record in this case, Kim represents under penalty of perjury that SDIA
14 denied liability in every lawsuit involving 18650 lithium-ion batteries in which it was named as a
15 defendant, and has defended on the basis that it never designed, manufactured, assembled, tested,
16 distributed, advertised, marketed, or sold 18650 lithium-ion batteries. Supplemental Decl. of
17 Jikwang Kim, ¶ 7. Tellingly, SDIA was voluntarily dismissed in Flowers, Henry, Hicks, and
18 Foote. Id. ¶ 6. SDIA’s “different approach” in the cases reference above in no way negates
19 SDIA’s clear and convincing evidence that it did not design, fabricate, assemble, manufacture,
20 package, label, test, modify, warranty, distribute, wholesale, supply, import, export, advertise,
21 market, sell, or make any representations concerning the safety of the 18650 lithium-ion batteries
22 referenced in the Complaint.

23 Third, Plaintiff argues that publicly available information suggests SDIA plays a role in the
24

25 ² The Flowers, Henry, Hernandez, Kurtz, and Foote lawsuits were filed in the state where
26 the plaintiff resided, bought the product, and was injured. Supplemental Decl. of Jikwang Kim ¶
27 6. The Lipski case was filed in the state where plaintiff lived and purchased the lithium-ion
28 battery. Id. The Hicks case was filed in the home forum of the manufacturer of the e-cigarette
device. Id.

1 distribution and sale of lithium-ion batteries in the United States and California. Plaintiff relies on
2 a Bloomberg profile of SDIA which describes the company as providing “distribution and sales
3 support services for electronics components.” Nehmens Decl., Ex. C. Li-ion batteries (another
4 term for lithium-ion batteries) are listed among the electronic components SDIA offers. Id. SDIA
5 objects to and moves to strike the Bloomberg profile as hearsay and because there is no evidence
6 regarding the source of the information contained therein. The motion is well taken. The
7 Bloomberg profile is inadmissible hearsay. In any event, even if the Bloomberg profile is
8 accurate, it does not contradict SDIA’s representation that it did not design, fabricate, assemble,
9 manufacture, package, label, test, modify, warranty, distribute, wholesale, supply, import, export,
10 advertise, market, sell, or make any representations concerning the safety of the 18650 lithium-ion
11 batteries referenced in the Complaint.

12 Plaintiff also relies on documents from the U.S. Customs that purport to show SDIA’s
13 import data for April 26, 2018 to April 26, 2019. See Nehmens Decl., Ex. D. These documents,
14 however, are illegible and will not be considered. Plaintiff also relies on a news article appearing
15 on www.craigslist.com regarding SDIA’s future operation of an automotive battery pack
16 manufacturing facility in Michigan. See Nehmens Decl., Ex. E. This article might have some
17 relevance if SDIA’s automotive battery pack is comprised of an 18650 lithium-ion battery or
18 batteries, but there is no evidence that it is. In fact, SDIA represents that its automotive battery
19 pack uses midsize lithium-ion batteries that are entirely different from the 18650 batteries used in
20 an e-cigarette. Defs.’ Opp’n at 10; Supplemental Decl. of Jikwang Kim ¶ 10. Like the Bloomberg
21 profile, the online article on www.craigslist.com is inadmissible hearsay and does not
22 contradict SDIA’s representation that it did not design, fabricate, assemble, manufacture, package,
23 label, test, modify, warranty, distribute, wholesale, supply, import, export, advertise, market, sell,
24 or make any representations concerning the safety of the 18650 lithium-ion batteries referenced in
25 the Complaint.

26 In sum, SDIA has presented clear, convincing, and uncontroverted evidence that there is no
27 connection between SDIA and the 18650 lithium-ion batteries at issue in this case. Based upon

1 this evidence, there is no legal basis for holding SDIA liable for any of the claims asserted in the
2 Complaint. *O'Neil*, 53 Cal.4th at 348-49. SDIA is not in the chain of distribution, and therefore
3 Plaintiff's reliance on Bostick is unavailing. Accordingly, SDIA is a sham defendant whose
4 citizenship is disregarded for purposes of assessing diversity of citizenship. *Ritchey*, 139 F.3d at
5 131. When SDIA's citizenship is disregarded, there exists complete diversity.

6 Nevertheless, Plaintiff argues that removal "was improper until and unless the non-diverse
7 defendant has been formally dismissed from the action." Pl's Reply at 3. The argument borders
8 on frivolous. None of the cases relied upon by Plaintiff involves a fraudulent joinder like the one
9 presented here. Rather, in nearly all of the cases relied upon by Plaintiff, a defendant attempted to
10 remove an action to federal court after the claims against the non-diverse co-defendant had been
11 resolved, but before the non-diverse co-defendant had been dismissed as a party to the suit.
12 Because the non-diverse co-defendant was still a party to the suit, each court remanded the suit to
13 state court for lack of complete diversity. *Tyler v. American Optical Corp.*, No. 16-2337 JAK,
14 2016 WL 1383459, at *4 (C.D. Cal. Apr. 7, 2016) (stating that a settlement with a non-diverse
15 party does not establish diversity unless and until that party is dismissed from the action);
16 *Unterleitner v. Basf Catalysts LLC*, No. 16-818 JSC, 2016 WL 805167, at *3 (N.D. Cal. Mar. 2,
17 2016) (holding that removal was improper because even though the diversity-destroying
18 defendants had settled, they had not been formally dismissed); *Moody v. Armstrong Int'l Inc.*, No.
19 15-9491 GHK, 2016 U.S. Dist. LEXIS 783, at *5-6 (C.D. Cal. Jan. 4, 2016) (noting that district
20 courts in the Ninth Circuit have concluded that the citizenship of a defendant who has
21 settled a California action, but has not yet been formally dismissed from that action, can defeat
22 removal jurisdiction); *Garcia v. Allstate Ins. Co.*, No. 14-6478 CAS, 2014 WL 12708964, at *1
23 (C.D. Cal. Oct. 24, 2014) (remanding case because a settlement with the non-diverse party does
24 not establish diversity jurisdiction unless and until that party is dismissed from the action); *Clark*
25 *v. BHP Copper, Inc.*, No. 10-1058 TEH, 2010 WL 1266392, at *2 (N.D. Cal. Mar. 30, 2010)
26 (rejecting argument that a settlement with a defendant rendered that defendant a sham defendant
27 for purposes of removal); *Dunkin v. A.W. Chesterton Co.*, No. 10-458 SBA, 2010 WL 1038200, at
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1 *3 (N.D. Cal. Mar. 19, 2010) (“[S]ettlement is insufficient to confer removal jurisdiction where
2 the formal dismissal of the non-diverse defendant has not yet been entered.”) (citations omitted));
3 but see *Self v. General Motors Corp.*, 588 F.2d 655 (1978) (reversing and remanding with
4 direction to trial court to remand the case because even though final judgment had been entered
5 against non-diverse defendant, the plaintiff had not voluntarily dismissed or discontinued the case
6 against that defendant) and *Moore v. Goodyear Tire & Rubber Co.*, No. 11-1174 PHX, 2011 WL
7 3684508, at *2-3 (D. Ariz. Aug. 23, 2011) (holding that notice of settlement was sufficient to
8 make the case removable under §1446(b)).

9 Defendants’ removal was proper. SDIA is a sham defendant and will be dismissed.
10 Plaintiff’s motion to remand and request for attorneys’ fees are denied.

11 **B. MOTION TO DISMISS OR TO TRANSFER**

12 With SDIA dismissed as a sham defendant, the only Defendant is Samsung. Samsung
13 moves to dismiss the action for improper venue, or in the alternative, to transfer the action to the
14 Eastern District of Texas, Sherman Division because Plaintiff was injured and received medical
15 treatment for his injuries in Texas. Samsung contends that a transfer is appropriate pursuant to 28
16 U.S.C. section 1406(a) for improper venue and pursuant to section 1404(a) for the convenience of
17 the parties, witnesses and in the interest of justice. Plaintiff counters that even if SDIA is
18 dismissed, venue is proper in this court as to Samsung pursuant to 28 U.S.C. § 1391(c)(3).
19 Plaintiff also contends that Samsung has not carried its burden of showing that a transfer is
20 justified under 28 U.S.C. § 1404(a).

21 Federal Rule of Civil Procedure 12(b)(3) allows a party to bring a motion to dismiss for
22 improper venue. If venue is challenged, the plaintiff bears the burden of establishing that venue is
23 proper. See *Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 469 (9th Cir. 1979)
24 (“Plaintiff had the burden of showing that venue was properly laid in the Northern District of
25 California.”). When ruling on a Rule 12(b)(3) motion, a court need not accept as true the
26 allegations in the complaint, and may consider facts outside the pleadings. *Murphy v. Schneider*
27 *Nat’l, Inc.*, 362 F.3d 1133, 1137 (9th Cir. 2004). Nevertheless, the court must draw all reasonable

1 inferences and resolve all factual conflicts in favor of the non-moving party. *Id.* at 1138. If venue
2 is improper, the court must either dismiss the action or, if it is in the interests of justice, transfer
3 the case to a district or division in which it could have been brought. 28 U.S.C. § 1406(a); *King v.*
4 *Russell*, 963 F.2d 1301, 1304 (9th Cir. 1992).

5 “Venue against an alien corporation is a function of whether the court has personal
6 jurisdiction over that corporation.” *Sharp Corp. v. Hisense Electric, Co. Ltd.*, No. 17-5404 CM,
7 2017 WL 9325873, at *3 (S.D.N.Y. Dec. 22, 2017). For purposes of venue, a corporation
8 “resides” in “any judicial district in which such defendant is subject to the court’s personal
9 jurisdiction with respect to the civil action in question.” 28 U.S.C. § 1391(c)(2). A defendant that
10 does not reside in the United States may be sued in any judicial district. 28 U.S.C. § 1391(c)(3).

11 Here, both sides address in some detail whether this Court has personal jurisdiction over
12 Samsung such that venue is proper pursuant to section 1391(c)(2). That issue, however, is an
13 academic one which need not be decided by this Court. This is because even if Plaintiff is correct
14 that venue is proper, the Court must necessarily decide Defendants’ motion to transfer under
15 section 1404(a). Alternatively, if Defendants are correct that venue is improper, the Court must
16 necessarily decide Defendants’ motion to dismiss or transfer under section 1406(a).³

17 Defendants would prefer that the Court apply section 1406(a) and exercise its discretion to
18 dismiss rather than transfer because Plaintiff has purportedly acted in bad faith. Specifically,
19 Defendants contend that Plaintiff filed suit here even after SDIA told Plaintiff’s counsel in no
20 uncertain terms that SDIA does not manufacture, distribute, sell, and/or otherwise introduce e-
21 cigarette batteries into the chain of commerce. Indeed, based upon SDIA’s representations,
22 counsel voluntarily dismissed one of the many suits filed against SDIA. See *Flowers v. SDIA*, No.
23 13-231 (Dist. Ct. Tex. filed Apr. 25, 2018). Defendants argue that it is not in the “interests of
24 justice” to transfer this action under section 1406(a) because Plaintiff “obviously” or
25

26 ³ This Court need not have personal jurisdiction over Samsung to order a change of venue.
27 *Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466-67 (1962); *SongByrd, Inc. v. Estate of Grossman*,
206 F.3d 172, 177 n. 9 (2nd Cir. 2000).

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1 “deliberately” filed this action in the wrong court. See King, 963 F.2d at 1304 (affirming
2 dismissal on grounds of improper venue based on evidence that plaintiff’s actions “smack[ed] of
3 harassment and bad faith”).

4 The Court finds that dismissal is not warranted. The record indicates that Plaintiff’s
5 counsel, not Plaintiff, filed several other lawsuits against SDIA. Because of counsel’s
6 involvement in these other lawsuits, counsel learned and should have anticipated that SDIA would
7 argue that it was a sham defendant in this case. There has been no showing that Plaintiff himself
8 “obviously” and “deliberately” filed his suit in the wrong court. Therefore, Defendants’ motion to
9 dismiss is denied.

10 Turning next to the issue of transfer, this Court will assume without deciding that venue is
11 proper in this district and proceed with a section 1404(a) analysis. As a threshold matter, it is
12 undisputed that Defendants’ proposed venue, the Eastern District of Texas, Sherman Division, is a
13 district or division in which the case could have been brought.⁴ In determining whether to transfer
14 an action pursuant to section 1404(a), the Court considers the following factors: (1) the plaintiff’s
15 choice of forum, (2) the convenience of the parties, (3) the convenience of the witnesses, (4) ease
16 of access to the evidence, (5) familiarity of each forum with the applicable law, (6) feasibility of
17 consideration of other claims, (7) any local interest in the controversy, and (8) the relative court
18 congestion and time of trial in each forum. *Wellens v. Daiichi Sankyo Co.*, No. 13-581 CW, 2013
19 WL 3242294, at * 2 (N.D. Cal. June 25, 2013); *Barnes & Noble v. LSI Corp.*, 823 F. Supp. 2d
20 980, 993 (N.D. Cal. 2011). “The burden is on the party seeking transfer to show that when these
21 factors are applied, the balance of convenience clearly favors transfer.” *Alul v. American Honda*
22 *Motor Company, Inc.*, No. 16-04384 JST, 2016 WL 9116934 (N.D. Cal. Dec. 7, 2016) (citing
23 *Commodity Futures Trading Comm’n v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979)). A transfer is
24 not appropriate if the result is merely to shift the inconvenience from one party to another. *Van*
25 *Dusen v. Barrack*, 376 U.S. 612, 645–46 (1964).

26 _____
27 ⁴ Samsung does not contest personal jurisdiction in the Eastern District of Texas. Defs.’ Motion at
28 9.
Case No.: [5:19-cv-05621-EJD](#)
ORDER DENYING MOTION TO REMAND; GRANTING MOTION TO TRANSFER

1 The Court finds that Plaintiff’s choice of forum deserves little weight because Plaintiff
2 does not reside in California and this forum lacks any connection to the activities alleged in the
3 Complaint. *Williams v. Bowman*, 157 F. Supp. 2d 1103, 1106 (N.D. Cal. 2001). The site of
4 Plaintiff’s alleged injuries, the ease of access to evidence and the convenience and location of
5 witnesses all weigh in favor of a transfer. As Plaintiff recognizes, his medical records and treating
6 physician are in Texas. Although technological advances have made it less inconvenient to obtain
7 evidence and testimony from remote locations, it is often preferable and more efficient when
8 evidence and witnesses are located nearer to the district where the case is pending. Samsung will
9 inevitably need to depose fact witnesses and medical providers, and potentially call witnesses to
10 testify at trial. The unavailability of process to compel the attendance of non-party witnesses for
11 trial in California weighs in favor of a transfer to the Eastern District of Texas, Sherman Division.

12 The “familiarity of each forum with applicable law” also weighs in favor of a transfer.
13 Texas has a far greater interest in applying its law than California does because Plaintiff was
14 injured in Texas while he was a resident of Texas. See *Reich v. Purcell*, 67 Cal.2d 551, 555-556
15 (1967) (holding that California had no interest in applying its laws to suit involving automobile
16 accident that occurred in Missouri when plaintiffs were domiciled in Ohio, not California); *Holt v.*
17 *Globalinx Pet, LLC*, No. 13-41 DOC, 2013 WL 3947169, at *14 (C.D. Cal. July 30, 2013)
18 (holding that Texas had a greater interest in applying its laws because plaintiff’s dog died in Texas
19 while plaintiff was a resident of Texas, allegedly from food purchased in Texas). For similar
20 reasons, Texas has a local interest in the controversy while California does not. *Garcia v. 3M Co.*,
21 No. 09-1943 RMW, 2009 WL 3837243, at *4 (N.D. Cal. Nov. 16, 2009) (“When an action
22 involves an incident occurring in a particular locale, there is a public interest in having the
23 controversy adjudicated in that locale, rather than in a remote forum.”). The remaining factors—
24 feasibility of consideration of other claims and the relative court congestion and time of trial in
25 each forum—are neutral.

26 Defendants have met their burden of showing that when the §1404(a) factors are applied,
27 the balance of convenience clearly favors transfer.


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III. CONCLUSION

For the reasons discussed above, Plaintiff’s motion to remand and request for attorneys’ fees are DENIED. SDIA is dismissed as a sham defendant. Defendant Samsung’s motion to transfer is GRANTED. The Clerk of Court is directed to transfer this action to the Eastern District of Texas, Sherman Division.

IT IS SO ORDERED.

Dated: April 27, 2020



EDWARD J. DAVILA
United States District Judge