IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

James J. Aboltin,

Plaintiff,

vs.

Jeunesse, LLC, et al.,

Defendants.

No. CV-16-02574-PHX-SPL

ORDER

On July 29, 2016, Plaintiff James J. Aboltin filed a complaint in the District of Arizona against Jeunesse, LLC and its alleged agents, officers, managers, and/or directors Wendy Lewis, Randy Ray, Scott Lewis, Jason Caramanis, and Alex Morton.[1] Plaintiff claims that Jeunesse is a racketeering enterprise consisting of groups of individuals who conspire and agree to defraud people using a pyramid scheme. He alleges that he "was deceived by Jeunesse's misleading business opportunity, falsely believing that it was a legitimate way to earn money, and did lose money as a result of Defendants' unfair, unlawful, and fraudulent business practices." (Doc. 1 ¶ 3.)

In the complaint, Plaintiff seeks relief on behalf of himself, "a nationwide class of all persons who were Jeunesse Distributors from September 9, 2009, until the present, and who suffered damages as a result of Defendants' illegal pyramid scheme" (Doc. 1 ¶ 134), and "a subclass… which includes all persons who are members of the [nationwide class] and who were or are residents of Arizona" (Doc. 1 ¶ 135). Plaintiff brings one

[1] The complaint also named Defendant Kim Hui, who has since been dismissed from this case. (Doc. 83.)

claim for declaratory judgment on behalf of the nationwide class, four claims on behalf of the nationwide class under the Racketeer Influenced Corrupt Organizations Act ("RICO"), and one claim for consumer fraud under Arizona law on behalf of the subclass.

Presently at issue are several motions filed by the parties. (Docs. 24, 39, 40, 52, 78.) The Court addresses them in turn below.

I. Defendant Morton's Motion to Dismiss

Defendant Morton moves to be dismissed for insufficient service of process pursuant to Federal Rule of Civil Procedure 12(b)(5). (Doc. 39.)

A federal court lacks jurisdiction over a defendant who has not been properly served in accordance with Rule 4. *S.E.C. v. Ross*, 504 F.3d 1130, 1138 (9th Cir. 2007); *Direct Mail Specialists, Inc. v. Eclat Computerized Techs., Inc.*, 840 F.2d 685, 688 (9th Cir. 1988). The serving party bears the burden of establishing its validity. *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004). "Rule 4 is a flexible rule that should be liberally construed so long as a party receives sufficient notice of the complaint." *United Food & Commercial Workers Union v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir. 1984) (citations omitted). However, absent substantial compliance with Rule 4, neither actual notice nor naming the defendant in the pleading will provide personal jurisdiction. *Direct Mail Specialists, Inc.*, 840 F.2d at 688.

On August 28, 2016, a process server left a copy of the summons and complaint for Defendant Morton inside a locked gate of his parents' Nevada residence. (Docs. 19, 36, 43 at 3.) Defendant argues that such service was insufficient within the meaning of Rule 4.[2] The Court agrees.

Here, Plaintiff did not deliver a copy of the summons and complaint to Defendant Morton personally or to an agent who was authorized to receive service of process on his behalf. *See* Fed. R. Civ. P. 4(e)(2)(A), (C). Nor did Plaintiff leave a copy of the summons

[2] Because Defendant Morton's motion was filed prior to the deadline for filing an answer or response as provide by Rule 12, Plaintiff's argument that Defendant waived his objection is rejected.

and complaint at Defendant Morton's "dwelling or usual place of abode." *See* Fed. R. Civ. P. 4(e)(2)(B).

The evidence presented by the parties as a whole demonstrates that Defendant Morton was not residing at his parents' home in Nevada at the time service was attempted. *See U.S. v. Wen-Bing Soong*, 650 Fed. Appx. 425, 428 (9th Cir. 2016); *The Stars' Desert Inn Hotel & Country Club, Inc. v. Hwang*, 105 F.3d 521, 524 (9th Cir. 1997); *Melton v. Superior Court In and For Gila County*, 739 P.2d 1357, 1359 (Ariz. Ct. App. 1987) ("The terms 'dwelling house' and 'usual place of abode' are 'generally construed to mean the place where the person is living when service is attempted.'"); *Bowen v. Graham*, 684 P.2d 165, 168 (Ariz. Ct. App. 1984) (stating that "constitutional due process notice requires that . . . service of process at the defendant's 'usual place of abode' must be at the place where that person actually resides"). Defendant Morton states that he has not lived in Nevada since 2015, and has submitted a copy of a residential lease, dated July 12, 2016, for an apartment where he resides in Scottsdale, Arizona. (Doc. 57.) This evidence, which is consistent with the allegation in the complaint and the process server's declaration, makes a sufficient showing that Defendant Morton was actually residing in Arizona at the time service was attempted. (*See* Doc. 1 ¶ 3 (alleging "Alex Morton is an Arizona resident"); Doc. 43-2 at 1-3, 9 ("based on [the process server's] viewing and monitoring of Alex Morton's social media accounts, [he] concluded that Alex Morton maintains a residence in Arizona, but [he] was unable to identify an address" and had "identified a gym at which Alex Morton purports to regularly work out" in Scottsdale, Arizona).)

Plaintiff responds that any deficiency in service is excusable because he substantially complied with Rule 4. (Doc. 43.) This is not, however, one of those instances where a good faith effort to comply with the Rule 4(e)(2) resulted in placement of the summons and complaint within the "defendant's immediate proximity" and service was prevented by the defendant's efforts to evade service. *See Travelers Cas. and Sur. Co. of America v. Brenneke*, 551 F.3d 1132, 1136 (9th Cir. 2009). Rather, Plaintiff

attempted to serve Defendant at a home in another state where he did not reside or was located at the time. Defendant Morton's mother was not authorized to receive summons on his behalf. And although Defendant's mother informed the process server that he did not live there, the process server did not inquire further to determine the truth of that assertion, and proceeded to leave the documents outside at the residence. Thus, Plaintiff did not substantially comply with Rule 4, and eventual notice of this lawsuit is not sufficient for the Court to exercise personal jurisdiction over Defendant Morton.

Finding service was insufficient, the Court has broad discretion to dismiss the action against Defendant Morton for failure to effect service or to quash the defective service and permit re-service. *See Jones v. Automobile Club of Southern California*, 26 Fed. Appx. 740, 742 (9th Cir. 2002); *see also e.g., SHJ v. Issaquah School District No. 411*, 470 F.3d 1288, 1293 (9th Cir. 2006) (citing *Stevens v. Security Pac. Nat'l Bank*, 538 F.2d 1387, 1389 (9th Cir. 1976)) ("the choice between dismissal and quashing service of process is in the district court's discretion."). The Court will quash service and authorize an extension of time to reattempt service.[3] Plaintiff timely filed proof of his attempted service, and Defendant Morton received actual notice of the litigation and is aware of Plaintiff's claims. While notice is insufficient to uphold insufficient service, it weighs against dismissal. The Court finds no prejudice will result to Defendant if Plaintiff is afforded an additional opportunity to effectuate service.

II. Defendants' Motion to Change Venue

Defendants move the Court to change venue and transfer this action to the Middle District of Florida pursuant to 28 U.S.C. § 1404(a).[4]

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[3] Attorneys' fees and costs will not be awarded. (*See* Doc. 43 at 11.)

[4] Plaintiff's moves to strike supporting certain declarations and the reply submitted by Defendants in support their motion for transfer. (Doc. 40.) The motion will be denied. Defendants' filings are not prohibited by statute, rule, or court order, nor are they "pleadings" or discovery materials that may be stricken as permitted under the local and federal rules. *See* LRCiv 7.2(m)(1); Fed. R. Civ. P. 7(a), 12(f), 26(g)(2) and 37(b)(2)(A)(iii). To the extent Plaintiff's motion relies on the Court's authority under Rule 11, it does not find that Defendants' filings are frivolous, legally unreasonable, lacking foundation, or brought for an improper purpose. *See Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir. 2002); *Estate of Blue v. County of L.A.*, 120 F.3d 982, 985 (9th Cir. 1997); *Newton v. Thomason*, 22 F.3d 1455, 1463 (9th Cir.1994); *Operating*

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." 28 U.S.C. § 1404(a). When determining whether transfer is proper, the court first looks to whether the action initially could have been commenced in the alternative venue. *See Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 414 (9th Cir. 1985). Once such a showing has been made, the court has discretion to consider whether transfer is appropriate "according to an 'individualized, case-by-case consideration of convenience and fairness.'" *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964)).

> For example, the court may consider: (1) the location where the relevant agreements were negotiated and executed, (2) the state that is most familiar with the governing law, (3) the plaintiff's choice of forum, (4) the respective parties' contacts with the forum, (5) the contacts relating to the plaintiff's cause of action in the chosen forum, (6) the differences in the costs of litigation in the two forums, (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses, and (8) the ease of access to sources of proof.

Jones v. GNC Franchising, Inc., 211 F.3d 495, 498-99 (9th Cir. 2000). The movant has the burden of showing that transfer is appropriate, *see Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-256 (1981), and "must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum," *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir. 1986).

Because Defendants Jeunesse, Wendy Lewis, Randy Ray, and Scott Lewis are residents of Florida, this action could have been instituted in the Middle District of Florida. *See* 18 U.S.C. § 1965(a) ("Any civil action or proceeding under [RICO] against any person may be instituted in the district court of the United States for any district in

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Engineers Pension Trust v. A-C Co., 859 F.2d 1336, 1344 (9th Cir. 1988). Because it was believed that the distributor agreement terms and conditions was correctly linked to the sign-up page, the belief that Plaintiff had electronically received and/or reviewed it was not unreasonable or without foundation. Upon notice by Plaintiff, Defendants took prompt and clear remedial action to correct the record. Defendants' actions bolster the credibility of their filings, it does not undermine them.

which such person resides, is found, has an agent, or transacts his affairs"); *see also* 28 U.S.C. § 1391(b)(3) ("if there is no district in which an action may otherwise be brought as provided in this section, [a civil action may be brought in] any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action"); *but see Southmark Prime Plus, L.P. v. Falzone*, 768 F. Supp. 487, 491 (D. Del. 1991) (concluding that when it was unlikely that all RICO defendants would be subject to venue in one district under §§ 1965(a) and 1391, "the ends of justice" was significantly advanced by the exercise of discretion under § 1965(b) and brought all defendants in the same district). Having carefully considered the relevant factors, the Court finds that Defendants have demonstrated that transfer of this action to the Middle District of Florida would serve "the interest of justice." 28 U.S.C. § 1404(a).

Considering the factors above, the Court finds the first and second are neutral. There are no allegations that Jeunesse agents personally negotiated the agreement with Plaintiff or other class members, which was accessed and executed over the internet. The district courts in the two venues are equally familiar with federal RICO claims. While one of Plaintiff's claims is brought under Arizona state law, the disputed agreement between the parties contains a Florida choice of law clause. (Doc. 1-4 at 35.) Because the enforceability of the agreement and that provision has yet to be decided, adjudication of the state law claim does not favor either venue.

The third factor weighs against transfer, but only slightly. While a plaintiff's choice of forum is normally given substantial deference where he or she is a resident of the district where the action is brought, the choice is given less deference where it is a class action that implicates many different class members of different states. *See Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987) ("Although great weight is generally accorded plaintiff's choice of forum[,] ... when an individual ... represents a class, the named plaintiff's choice of forum is given less weight."); *Hawkins v. Gerber Prod. Co.*, 924 F. Supp. 2d 1208, 1214 (S.D. Cal. 2013). Here, Plaintiff brings claims on behalf of nationwide class members, of which the alleged subclass of Arizona resident distributors

accounts only for a small percentage. (*See* Docs. 24-1 at 5; 34-1 at 6.) Thus, Plaintiff's choice of forum is entitled only to minimal weight.

The fourth and fifth factors favor transfer. Jeunesse is headquartered in Florida, with no physical presence and no employees in Arizona. (*See* Docs. 24-1 at 5; 34-1 at 5; 37-1 at 4.) With the exception of Defendant Morton, who has yet to be served in this forum, and Defendant Caramanis, who resides in California, the individual defendants all work and reside in Florida. While some of the unnamed plaintiffs would be from Arizona, as previously noted, the majority of unnamed plaintiffs are likely to be from other states. Further, while Florida has a significant connection to the facts alleged in the complaint, the chosen forum - Arizona - does not. *See Ventress v. Japan Airlines*, 486 F.3d 1111, 1118–19 (9th Cir. 2007) (upholding a district court's decision to transfer a case from California where the court "found no significant connection between California and the facts alleged in the complaint"). Plaintiff alleges a nationwide conspiracy by Defendants to carry out a pyramid scheme of which Jeunesse, a Florida-based company, is at the center. No actual specific contacts with Arizona are alleged. Rather, the complaint alleges only that Defendants engaged in conduct in unknown locations that caused harm to individuals nationwide, including individuals residing in Arizona. (*See e.g.*, Doc. 1 ¶ 116.) While Plaintiff was located in Arizona when he entered into an agreement with Jeunesse, that contact occurred over the internet. In this regard, Arizona has no more of a connection to the facts alleged in the complaint than any state in which one of the nationwide class members is located. While the agreement envisioned that Plaintiff would fulfill its terms in the place where he was located – Arizona, in this instance, there are no allegations that Plaintiff did so between the time he entered into the agreement on July 10, 2016 and the commencement of this action on July 29, 2016.

The sixth factor also favors transfer. Because the majority of parties in this action are located in Florida, this is not an instance where transferring venue will merely shift the cost of litigation from one party to another. The individuals likely to have knowledge of the Jeunesse's marketing and compensation structure, presumably its officers and

employees, are located in Florida. The presence of the witnesses in Florida indicates that it would be less expensive to litigate this action in Florida rather than Arizona. *See Italian Colors Rest. v. Am. Express Co.*, No. C 03-3719 SI, 2003 WL 22682482, at *5 (N.D. Cal. Nov. 10, 2003) ("Generally, litigation costs are reduced when venue is located near most of the witnesses expected to testify or give depositions."). Thus, the relative costs between the two venues tips in favor of transfer.

The seventh factor is neutral. Neither side has identified an unwilling nonparty witness it intends to subpoena.

The eighth factor also favors transfer. In addition to the vast number of witnesses, the corporate documents and other written records in dispute are located at Jeunesse in Florida. Thus, the location of the evidence makes the Middle District of Florida the "center of discovery" in this suit. *See Bratton v. Schering-Plough Corp.*, No. CV07-0653-PHX-JAT, 2007 WL 2023482, at *5 (D. Ariz. July 12, 2007) (transferring a case from the District of Arizona to the "center of discovery" in a nationwide lawsuit).

Having considered the relevant factors, the Court finds Defendants have made the "strong showing" required for transfer under § 1404(a). *Decker Coal*, 805 F.2d at 843.

III. Defendant Caramanis's Motion to Dismiss

Defendant Caramanis moves to be dismissed for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). (Doc. 52.) Because this action will be transferred to an alternative forum - the Middle District of Florida - the motion to dismiss, and the corresponding motion to strike, will be denied as moot. *See Goldlawr, Inc. v. Heiman,* 369 U.S. 463, 465-66 (1962) (transferring court need not establish personal jurisdiction prior to the transfer). Accordingly,

IT IS ORDERED:

1. That Defendant Morton's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(5) (Doc. 39) is **granted in part** and **denied is part**. The motion is granted to the extent that service on Defendant Alex Morton is **quashed**;

2. That Plaintiff shall have **twenty-one (21) days** from the date of this Order to

accomplish service on Defendant Alex Morton and file proof of service;

3. That Plaintiff's Motion to Strike (Doc. 40) is **denied**;

4. That Defendants' Motion to Change Venue/Transfer Case to Middle District of Florida pursuant to 28 U.S.C. § 1404(a) (Doc. 24) is **granted**;

5. That Defendant Caramanis's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(2) (Doc. 52) and Motion to Strike (Doc. 78) are **denied as moot**; and

6. That the Clerk of Court shall **transfer** this action to the Middle District of Florida and **terminate** the case in this district.

Dated this 11th day of September, 2017.

Honorable Steven P. Logan
United States District Judge