UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

TODD MATOSIAN, *et al.*, Plaintiffs, v. OTTO BERGES, *et al.*, Defendants.	CASE NO. 14-CV-2978-W (JMA) **ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS [DOC. 9]**

Pending before the Court is Defendants' motion to dismiss Plaintiffs' Complaint for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2), improper venue under Rule 12(b)(3) or transfer in the alternative, and for failure to state a claim under Rule 12(b)(6). (*Defs.' MTD* [Doc. 9].) Plaintiffs oppose. (*Pls.' Opp'n* [Doc. 10].) The Court decides the matter on the papers submitted and without oral argument. See Civ. L.R. 7.1(d.1). For the following reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Defendants' motion. (Doc. 9).

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I. BACKGROUND

Plaintiffs Todd Matosian and Concetta Matosian ("Plaintiffs") are individuals who reside in San Diego, California. (*Compl.* ¶¶ 7–8.) Defendant Otto Bergés ("Bergés") is an individual who owns, and is the registered agent for, Defendant Bergés Law Group, P.A. ("BLG"), a Florida corporation with its principal place of business in Fort Lauderdale, Florida. (*Id.* ¶¶ 9, 11.) According to the Complaint, BLG is a "credit repair organization." (*Id.* ¶¶ 10–12.)

In October 2011, Plaintiffs retained the Law Office of Wites & Kapetan, P.A. ("Wites & Kapetan"). (*Compl.* ¶ 13.) The scope of the representation was debt settlement. (*Id.* ¶ 14.) Under the agreement, Plaintiffs made payments to Wites & Kapetan that were placed into a "Client Debt Settlement Payment Fund." (*Id.* ¶ 15.) Plaintiffs made payments until they were informed that Wites & Kapetan "would no longer be representing them, that they were now transferred to new representation with Otto Bergés and the Bergés Law Group, P.A., and that Otto Bergés and the Bergés Law Group, P.A. would 'step in to provide legal representation on [their] behalf.'" (*Id.* ¶ 16.)

A BLG representative later contacted Plaintiffs. BLG also sent Plaintiffs an email containing a contract, an "agreement for assignment of retainer agreement to" BLG, an "agreement with RAM (related to ACH withdrawals)," power of attorney, an affidavit, and a "compliance" questionnaire. (*Compl.* ¶¶ 17, 28.) In addition to debt settlement services, the Complaint alleges that BLG offered Plaintiffs debt repair services. (*Id.* ¶ 18.) Plaintiffs "believed of the implied purposes and benefits of the services offered by . . . Defendants would be the improvement of their credit scores." (*Id.* ¶ 25.) The BLG contract required Plaintiffs to: (1) pay a $199.00 fee "'deemed earned upon receipt'"; (2) pay a non-refundable fee of $16,146.80 in exchange for services, which, under the payment schedule, was to be paid in monthly installments of varying amounts until April 2016; and (3) pay a $50.00 monthly account maintenance fee. (*Id.* ¶¶ 29–32.)

Plaintiffs later returned the contract. (*Compl.* ¶ 33.) Thereafter, BLG began to automatically deduct the monthly fee from Plaintiffs' checking account "regardless if any

services [had been rendered]." (*Id.* ¶ 34.) Defendants collected the fees before "fully perform[ing] any alleged credit repair services." (*Id.* ¶ 35.) Furthermore, Plaintiffs allege that the contract does not contain a guarantee of performance, does not estimate the amount of time needed to complete performance, fails to state BLG's principal business address, and omits the statutory language as to the consumer's right to cancel the contract. (*Id.* ¶ 36.) Plaintiffs also allege that the data sought from them in BLG's questionnaire does not give Defendants "enough data to attempt to perform its duties and obligations under the terms of the contract." (*Id.* ¶ 37.) Plaintiffs sought answers from BLG regarding their concerns about their account to little or no avail. (*Id.* ¶ 38.)

On December 19, 2014, Plaintiffs filed the Complaint asserting a single cause of action for violations of the Credit Repair Organizations Act ("CROA"), 15 U.S.C. § 1679 *et seq.*, based on Defendants' alleged acts and omissions. (*Compl.* ¶¶ 39–58.) Plaintiffs have stopped making payments on certain bills in reliance on Defendants' guidance and guarantees, and, as a result, have been negatively impacted. (*Id.* ¶¶ 56–57.) Plaintiffs also claim to have suffered emotional and mental distress, and they seek actual damages, punitive damages, and reasonable attorney's fees and costs. (*Id.* ¶¶ 55, 58.)

II. LEGAL STANDARDS

A. Lack of Personal Jurisdiction - Rule 12(b)(2)

Under Rule 12(b)(2), a court may dismiss a claim upon a motion to dismiss for "lack of personal jurisdiction." Fed. R. Civ. P. 12(b)(2). Where a defendant moves to dismiss for lack of personal jurisdiction, it is the plaintiff's burden "to establish the court's personal jurisdiction over a defendant." Doe v. Unocal Corp., 248 F.3d 915, 922 (9th Cir. 2001) (citing Cubbage v. Merchent, 744 F.2d 665, 667 (9th Cir. 1984)). If a motion to dismiss is based on written materials rather than an evidentiary hearing, the plaintiff need only make a *prima facie* showing of jurisdictional facts to withstand a motion to dismiss. Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797, 800 (9th Cir. 2004).

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In this context, a "*prima facie*" showing means that plaintiff need only demonstrate facts that, if true, would be sufficient to establish the existence of personal jurisdiction over the defendant. See Am. Tel. & Tel. Co. v. Compagnie Bruxelles Lambert, 94 F.3d 586, 588 (9th Cir. 1996). "Although the plaintiff cannot 'simply rest on the bare allegations of its complaint,' uncontroverted allegations in the complaint must be taken as true." Schwarzenegger, 374 F.3d at 800 (internal and external citations omitted). "Conflicts between parties over statements contained in affidavits must be resolved in the plaintiff's favor." Id. (citations omitted).

A district court has personal jurisdiction over a defendant only if a statute authorizes jurisdiction and the assertion of jurisdiction does not offend due process. Unocal, 248 F.3d at 922. "Where . . . there is no applicable federal statute governing personal jurisdiction, the district court applies the law of the state in which the district court sits." Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1205 (9th Cir. 2006); see Fed. R. Civ. P. 4(k)(1)(A). "Because California's long-arm jurisdictional statute is coextensive with federal due process requirements, the jurisdictional analyses under state and federal law are the same." Yahoo! Inc., 433 F.3d at 1205; see Cal. Civ. Proc. Code § 410.10.

B. Improper Venue - Rule 12(b)(3)

Rule 12(b)(3) provides that a court may dismiss a claim for improper venue. See Fed. R. Civ P. 12(b)(3). Once venue is challenged, the burden is on the plaintiff to show that venue is properly laid. Piedmont Label Co. v. Sun Garden Packing Co., 598 F.2d 491, 496 (9th Cir. 1979); Bohara v. Backus Hosp. Medical Benefit Plan, 390 F. Supp. 2d 957, 960 (C.D. Cal. 2005). Facts supporting venue may be established through evidence outside of the pleadings, such as affidavits or declarations. See Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 324 (9th Cir. 1996).

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C. Failure to State a Claim - Rule 12(b)(6)

The Court must dismiss a cause of action that fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss under Rule 12(b)(6) tests the complaint's sufficiency. N. Star Int'l v. Ariz. Corp. Comm'n, 720 F.2d 578, 581 (9th Cir. 1983). All material allegations in the complaint, "even if doubtful in fact," are assumed to be true, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007), and the court must "construe them in the light most favorable to [the non-moving party]." Gompper v. VISX, Inc., 298 F.3d 893, 895–96 (9th Cir. 2002).

As the Supreme Court explained, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (citations omitted). Instead, the allegations in the complaint "must be enough to raise a right to relief above the speculative level." Id. A complaint may be dismissed as a matter of law either for lack of a cognizable legal theory or for insufficient facts under a cognizable theory. Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984).

Generally, the court may not consider material outside the complaint when ruling on a motion to dismiss. Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). However, the court may consider any documents specifically identified in the complaint whose authenticity is not questioned by the parties. Fecht v. Price Co., 70 F.3d 1078, 1080 n.1 (9th Cir. 1995). "[I]f a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim." United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003) (citations omitted).

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III. DISCUSSION

Defendants move to dismiss Plaintiffs' Complaint on three separate grounds: lack of personal jurisdiction, improper venue—or, in the alternative, transfer—and failure to state a claim. The Court addresses each of these grounds in turn below.

A. Specific Jurisdiction as to Bergés Law Group

BLG argues that Plaintiffs have failed to meet their burden of establishing sufficient minimum contacts between it and California for personal jurisdiction to exist. (*Defs.' MTD* 5:25–27.) Plaintiffs counter that the they have met their burden.[1] The Court agrees with Plaintiffs.

Absent traditional bases for personal jurisdiction (e.g. physical presence, domicile, and consent), the Due Process Clause requires that a nonresident defendant have certain minimum contacts with the forum state such that the exercise of personal jurisdiction does not offend traditional notions of fair play and substantial justice. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). "Unless a defendant's contacts with a forum are so substantial, continuous, and systematic that the defendant can be deemed to be 'present' in that forum for all purposes, a forum may exercise only 'specific' jurisdiction—that is, jurisdiction based on the relationship between the defendant's forum contacts and the plaintiff's claim." Yahoo! Inc., 433 F.3d at 1205. Thus, specific jurisdiction "depends on an 'affiliatio[n] between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011) (alteration in original) (citations omitted).

Specific jurisdiction exists where: (1) the defendant purposefully availed himself of the privileges of conducting activities in the forum; (2) the claim arises out of the

[1] Defendants contend they are not subject to general jurisdiction. (*Defs.' MTD* 2:18–3:17.) Plaintiffs concede this point. (*See Pls.' Opp'n* 2:25–10:2.) Thus, the Court limits its analysis of the personal jurisdiction issue to the parties' contentions on specific jurisdiction.

defendant's forum related activities; and (3) the exercise of jurisdiction comports with fair play and substantial justice, and is thereby reasonable. See Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1086 (9th Cir. 2000) (citing Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 416 (9th Cir. 1997)). Plaintiff bears the burden of satisfying the first two prongs of the test. Schwarzenegger, 374 F.3d at 802. If plaintiff succeeds in satisfying both prongs, the burden shifts to the defendant to "present a compelling case" that the exercise of jurisdiction would not be reasonable. Id.

1. Purposeful Availment

A purposeful availment analysis "'examines whether the defendant's contacts with the forum are attributable to his own actions or are solely the actions of the plaintiff.'" Roth v. Garcia Marquez, 942 F.2d 617, 621 (9th Cir. 1991) (quoting Sinatra v. Nat'l Enquirer, Inc., 854 F.2d 1191, 1195 (9th Cir. 1988)). "In order to have purposefully availed oneself of conducting activities in the forum, the defendant must have performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state." Id. (internal quotation marks omitted). Thus, the proper focus is on "the relationship among the defendant, the forum, and the litigation." Walden v. Fiore,134 S. Ct. 1115, 1121 (2014) (citation and internal quotation marks omitted).

In contract cases, the analysis focuses on "whether a defendant 'purposefully avails itself of the privilege of conducting activities' or 'consummates[s] [a] transaction' in the forum." Yahoo! Inc., 433 F.3d at 1206 (quoting Schwarzenegger, 374 F.3d at 802). Although an individual's contract with an out-of-state party, by itself, is insufficient to automatically establish sufficient minimum contacts in the other party's home forum, Burger King v. Rudzewicz, 471 U.S. 462, 478 (1985), "with respect to interstate contractual obligations . . . parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." Id. at 473 (quoting Travelers Health Ass'n v. Virginia, 339 U.S. 643, 647 (1950).

Here, BLG's contacts with California are attributable to its own actions, not solely the actions of Plaintiffs or a third party. Initially, a BLG representative reached out to Plaintiffs in California. (*Compl.* ¶ 17.) BLG then sent Plaintiffs an email containing various documents, one of which was a *new* contract. (*Id.* ¶¶17–20, 28.) The Complaint also alleges that both the BLG representative's communication and BLG's follow-up email offered Plaintiffs a chance to repair their credit—a service Wites & Kapetan had not provided. (*Id.*) These contacts bear the markings of solicitations.[2]

Moreover, the emailed materials attached to BLG's motion reinforce the notion that BLG's actions rise to the level of purposeful availment, and they cast doubt upon Defendants' contention that the shifting of Plaintiffs from Wites & Kapetan to BLG was a passive transfer. First, the contract's terms created an ongoing obligation on the part of BLG to provide Plaintiffs with various services. (*Contract* [Doc. 9-4] ¶ 2.) Second, the contract also imposed continuing obligations upon Plaintiffs. (*Id.* ¶¶ 7–8.) Third, Exhibit B to BLG's declaration demonstrates that Plaintiffs' checking account, from which BLG deducted payment, was located in California. (*RAM Agreement* [Doc. 9-4].) Finally, while the Court recognizes that many of the services BLG provided to Plaintiffs under the contract involved communications and acts external to California, the contract contemplated that those services would have an impact in California—specifically, the settlement of Plaintiffs' debts and melioration of their creditworthiness.

Accordingly, BLG's contacts with California in relation to the instant litigation support a finding that it purposefully availed itself of conducting activities in this forum.

2. Arising Out of Forum-Related Activities

"To determine whether a claim arises out of forum-related activities, courts apply a 'but for' test." Unocal, 248 F.3d at 924 (citing Ballard v. Savage, 65 F.3d 1495, 1500 (9th Cir. 1995)). Here, BLG contacted Plaintiffs in California through a representative

[2] A "solicitation" is "the act or instance of requesting or seeking to obtain something," or "an attempt or effort to gain business." Black's Law Dictionary 1427 (8th ed. 2004).

and subsequent email communication. (*Compl.* ¶¶ 17–21, 28.) Plaintiffs, apparently satisfied with the contract's terms, executed the agreement in California and returned it to BLG. (*Id.* ¶ 33; *see Contract* ¶ 9.) BLG then periodically withdrew funds from Plaintiffs' California bank account, which it did in a manner that allegedly violated federal law. (*Compl.* ¶¶ 32–35, 46–47.) It follows that but for BLG's forum-related activities, Plaintiffs' claims would not have arisen.

3. Fair Play and Substantial Justice

The last prong of the test evaluates whether the exercise of specific jurisdiction is reasonable. Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1322 (9th Cir. 1998). Because Plaintiffs have succeeded in satisfying the first two prongs, the burden shifts to BLG to "present a compelling case" that the exercise of jurisdiction would not be reasonable. Schwarzenegger, 374 F.3d at 802. In the Ninth Circuit, the following factors are considered in evaluating reasonableness: (1) the extent of the defendant's purposeful interjection into the forum state's affairs; (2) the burden on the defendant; (3) conflicts of law between the forum and defendant's home jurisdiction; (4) the forum's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the dispute; (6) the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum. Roth, 942 F.2d at 623 (citations omitted).

i. Extent of purposeful interjection

"Even if there is sufficient interjection into the state to satisfy the purposeful availment prong, the degree of interjection is a factor to be weighed in assessing the overall reasonableness of jurisdiction under the reasonableness prong." Panavision, 141 F.3d at 1323 (quoting Core–Vent Corp. v. Nobel Indus. AB, 11 F.3d 1482, 1488 (9th Cir. 1993)). "The smaller the element of purposeful interjection, the less is jurisdiction to be anticipated and the less reasonable is its exercise." Ins. Co. of N. Am. v. Marina Salina Cruz, 649 F.2d 1266, 1271 (9th Cir. 1981) (citation omitted).

Here, BLG's degree of purposeful interjection into California falls toward the lower end of the spectrum. Thus, this factor weighs in BLG's favor; however, it cannot be said that it weighs *heavily* in BLG's favor, given that its contacts with this forum were sufficient to satisfy the purposeful availment prong. See Core–Vent, 11 F.3d at 1488.

ii. Burden on BLG

The second factor to consider is BLG's burden in litigating in this forum. As numerous courts have noted, "[i]mprovements in communication and transportation have reduced much of the historical burden of litigating in a distant forum." Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834, 841 (9th Cir. 1986); see Panavision, 141 F.3d at 1323 (recognizing that requiring Illinois defendant to litigate in California was not constitutionally unreasonable in light of modern technological advances). Furthermore, "unless the 'inconvenience is so great as to constitute a deprivation of due process, [a defendant] will not overcome clear justifications for the exercise of jurisdiction.'" Panavision, 141 F.3d at 1323 (quoting Caruth v. Int'l Psychoanalytical Ass'n, 59 F.3d 126, 128–29 (9th Cir. 1995)).

BLG contends that this factor weighs heavily in its favor given that it is "a Florida Corporation, owned by a Florida resident, and operated exclusively out of Florida." (*Defs.' MTD* 7:10–14 (citing *Defs.' SOF* [Doc. 9-2] ¶¶ 1–4, 7).) BLG also contends that it will incur additional costs in the event that it will need to engage California counsel. (*Id.* 7:19 –23 (citing *Defs.' SOF* ¶ 10).) The Court recognizes that these considerations evince some burden to BLG if it were required to litigate this case in California; however, in light of the relevant improvements in communication and transportation, it cannot be said that any such burden would be so great as to offend the Constitution.

iii. Sovereignty

This factor considers the degree to which this Court's exercise of jurisdiction would conflict with the sovereignty of Florida. Panavision, 141 F.3d at 1323 (citing

Core–Vent, 11 F.3d at 1489)). According to BLG, this Court's exercise of jurisdiction over it would interfere with Florida's power to regulate its attorneys and corporations. (*Defs.' MTD* 7:24–8:2; *Defs.' Reply* [Doc. 11] 4:20–5:3.) Plaintiffs counter that the Complaint's sole cause of action arises under a federal consumer protection statute, and that such federal statute will govern the case whether it is heard in this Court or in a Florida district court. (*Pls.' Opp'n* 7:12–19.) Plaintiffs have the better of the argument.

Plaintiffs' Complaint brings a single claim based on alleged violations of CROA. (*See Compl.* ¶¶ 39–58.) Thus, the threshold issue in this case will be whether BLG qualifies as a "credit repair organization" under CROA. If it does, the second issue will be whether BLG violated the statute. Florida's sovereignty is not implicated in this case.

iv. Forum State's interest

BLG contends that California's sole interest is protecting Plaintiffs from purported violations of CROA. (*Defs.' MTD* 7:27–8.) Plaintiffs argue that California has a bona fide interest in adjudicating this case based on its strong interest in protecting its citizens. (*Pls.' Opp'n* 7:21–27.) Neither party cites any authority in support of its position.

A review of the relevant case law reveals that California's interest in providing an effective means of redress for its residents is strongest in circumstances involving tortious injury. See Caruth, 59 F.3d at 129; Core–Vent, 11 F.3d at 1489; Roth, 942 F.2d at 624. However, California may have a strong interest in adjudicating cases falling outside the tort context. See, e.g., Wyle Labs., Inc. v. Lewis Mach. Co., 29 F.3d 638 (9th Cir. 1994) (noting California's strong interest in "promoting commercial stability ")

Plaintiffs' claim arises out of alleged violations of CROA, which regulates the business practices of credit repair organizations. Adjudicating Plaintiffs' claim would, in some measure, further California's interest in commercial stability. While California's interest in adjudicating this case may not be as strong as Plaintiffs aver, that interest is stronger than BLG would have the Court believe. This factor cuts in Plaintiffs' favor.

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v. Most efficient judicial resolution

The fifth factor considers the efficiency of the forum. Ziegler v. Indian River Cnty., 64 F.3d 470, 475–76 (9th Cir. 1995). In evaluating this factor, courts look "primarily at where the witnesses and the evidence are likely to be located." Core–Vent, 11 F.3d at 1489. This consideration, however, "is no longer weighed heavily given the modern advances in communication and transportation." Panavision, 141 F.3d at 1323.

The witnesses and evidence in this case are largely split between California and Florida, although there is some indication that relevant evidence may exist elsewhere. (*See Defs.' MTD* 6:5–7; *Pls.' Opp'n* 12:5–8.) While a larger number of the potential witnesses are located in Florida (*see, e.g.*, *Defs.' Reply* 6:18–7:2), that fact carries little weight "given the modern advances in communication." Panavision, 141 F.3d at 1323.[3] The Court finds this factor to be neutral.

vi. Plaintiffs' interest in convenient and effective relief

"Although the importance of the forum to the plaintiff nominally remains part of this test," cases have expressed doubt as to its relevance. Caruth, 59 F.3d at 129 (citing cases). It would doubtless be more convenient for Plaintiffs to have their case heard in California. Nevertheless, in light of the this factor's waning significance, its weight in favor of Plaintiffs is modest at best.

vii. Existence of alternative forum

The Ninth Circuit has held that a plaintiff bears the burden of proving the unavailability of an alternative forum. See, e.g., FDIC v. British–American Ins. Co., 828 F.2d 1439, 1445 (9th Cir. 1987). At the same time, however, "[w]hether another reasonable forum exists becomes an issue only when the forum state is shown to be

[3] In discussing this factor, BLG emphasizes the fact that there is a similar case pending in the Southern District of Florida, and the parties joust over how that fact plays into the Court's consideration of this factor. Although it would certainly be efficient for this forum to have a court in a different forum adjudicate this case, that does not appear to be the proper focus here.

unreasonable." See, e.g., Sinatra, 854 F.2d at 1201 (citation and internal quotation marks omitted). BLG has not, up to this point, made the requisite showing of unreasonableness. Thus, BLG cannot avail itself of this factor.

viii. Conclusion

In light of the foregoing, the question of reasonableness is a close call. Yet, in order for BLG to surmount this forum's presumptively reasonable exercise of jurisdiction that necessarily follows from a finding of purposeful availment, it must present a *compelling* case that the exercise of jurisdiction would be unreasonable. See Roth, 942 F.2d at 625. That it has failed to do. The Court therefore **DENIES** Defendants' motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2) as to BLG.

B. Specific Jurisdiction over Otto Bergés

The next point of contention is whether Bergés the individual is subject to personal jurisdiction. In setting out their arguments, Plaintiffs and Bergés invoke distinct legal rationales in support of their respective positions.

According to Bergés, the issue is one of corporate veil-piercing. Bergés avers that contrary to the allegations in the Complaint, he did not personally (1) enter into a contractual relationship with Plaintiffs; (2) collect money from Plaintiffs; or (3) communicate with Plaintiffs. (*Defs.' MTD* 8:20–10:2.) In support of his position, Bergés has submitted a declaration wherein he attests to his lack of direct involvement with Plaintiffs. (*Bergés Decl.* [Doc. 9-3] ¶ 8.) Bergés also refers to BLG's declaration, which distinguishes between BLG the entity and Bergés the individual, and attests to some of the corporate formalities to which BLG adheres. (*See BLG Decl.* [Doc. 9-4] ¶¶ 3, 6, 13.)

Additionally, Bergés cites to the contract in support of the idea that such agreement "was entered between only [BLG] on the one side and Plaintiffs on the other." (*Defs.' MTD* 9:1–3 (citing *Contract*).) Thus, it is Bergés's position that there is an "absence of facts supporting personal jurisdiction over [him] individually," which is

"made all the more pointed" given Plaintiffs' unsupported accusations as to his personal involvement with them. (*Id.* at 9:22–10:1 (citing *Compl.* ¶¶ 6, 33, 35, 45, 47).)

Plaintiffs contend that "'attorneys are credit repair organizations if they qualify under the CROA.'" (*Pls.' Opp'n* 9:21–24 (quoting Rannis v. Recchia, 380 F. App'x 646, 649 (9th Cir. 2010) (citing FTC v. Gill, 265 F.3d 944, 950 (9th Cir. 2001)))). Thus, Plaintiffs argue that "the question is not one of piercing the corporate veil, but if Defendant Bergés acted in a manner to provide services that improve a 'consumer's credit record, credit history, or credit rating.'" (*Pls.' Opp'n* 9:25–10:1 (quoting 15 U.S.C. 1679a(3)(A)).) Plaintiffs' argument falls short of the mark.

Most damaging to Plaintiffs' position is the lack of support for the allegations in the Complaint. Plaintiffs allege that Bergés—along with BLG—entered into a contract with them (*see Compl.* ¶ 6), was personally involved in offering them a chance to settle their debt and repair their credit (*see id.* ¶¶ 18, 25), and was directly involved in collecting fees from them (*see id.* ¶¶ 33–35). As noted above, Bergés has controverted those allegations with affidavits. Plaintiffs, however, have not proffered evidence to support their allegations. While the Court must take uncontroverted allegations in the complaint as true, Plaintiffs may not now simply rest on the Complaint's allegations in the face of Bergés's affidavits. See Schwarzenegger, 374 F.3d at 800.

Moreover, the Court recognizes that an attorney can qualify as a credit repair organization under CROA. Still, Plaintiffs fail to develop their argument as to why that principle applies to Bergés in his individual capacity. As it stands, the Complaint alleges that Bergés himself took certain actions *vis-a-vis* Plaintiffs. His sworn declaration states that he did not. The Complaint also alleges, and the record reflects, that BLG is a corporate entity that adheres to various corporate formalities. (*See Compl.* ¶ 5; *BLG Decl.* ¶¶ 3, 6, 13.) Accordingly, Plaintiffs have failed to make a *prima facie* showing of jurisdictional facts that establish this Court's personal jurisdiction over Bergés. If some alternate theory exists as to why jurisdiction over Bergés exists, Plaintiffs have thus far failed to develop it.

Therefore, the Court **GRANTS** Defendants' motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2) as to Defendant Bergés.[4]

C. Venue

Next, BLG contends that venue does not lie in this District, and the Complaint should therefore be dismissed. (*Defs.' MTD* 10:9–12, 10:22–12:17.) Specifically, BLG contends that Plaintiffs' proffered basis for establishing venue—28 U.S.C. § 1391(b)(2)—is inapposite because the relevant events or omissions in this case do not have a sufficiently close nexus California. (*Id.* at 12:7–9.)

Under 28 U.S.C. § 1391(b)(2), venue is proper in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." In Daniel v. American Board of Emergency Medicine—upon which both BLG and Plaintiffs rely—the Second Circuit provided a two-step inquiry for determining whether § 1391(b)(2)'s "substantiality" requirement has been met. 428 F.3d 408 (2d Cir. 2005). "First, a court should identify the nature of the claims and the acts or omissions that the plaintiff alleges give rise to those claims." Id. at 432 (citing Gulf Ins. Co. v. Glasbrenner, 417 F.3d 353, 357 (2d Cir. 2005)). "Second, the court should determine whether a substantial part of those acts or omissions occurred in the district where suit was filed, that is, whether 'significant events or omissions material to [those] claim[s] . . . have occurred in the district in question.'" Id. (alterations in original) (quoting Gulf Ins., 417 F.3d at 357).

The court in Daniel counseled further that "substantiality" in the context of § 1391(b)(2) "is more a qualitative than a quantitative inquiry," whereby a court should assess "the overall nature of the plaintiff's claims and the nature of the specific events or omissions in the forum, and not . . . simply add[] up the number of contacts." Daniel, 428 F.3d at 432–33 (citations omitted). "When material acts or omissions within the

[4] Because the Court has granted Defendants' motion to dismiss for lack of personal jurisdiction as to Bergés, the remainder of this Order will refer only to BLG.

forum bear a close nexus to the claims, they are properly deemed 'significant' and, thus, substantial, but when a close nexus is lacking, so too is the substantiality necessary to support venue." Id. at 433 (citation omitted).

Here, the Court finds that § 1391(b)(2) supports venue in this District. Plaintiffs' single cause of action alleges various CROA violations. (*See Compl.*) Specifically, the Complaint alleges that BLG solicited Plaintiffs in California by offering them certain services, and then emailing them a contract. (*Id.* ¶¶ 17–21, 28.) The Complaint then alleges that the contract omitted certain items of information required under CROA, and that BLG deducted money from Plaintiffs' California checking account before performing services in violation of CROA. (*Id.* ¶¶ 35, 46–54.)

According to BLG, the purported omissions are merely "technical" alleged CROA violations. (*See, e.g.*, *Defs.' MTD* 1:15–18, 7:27–8:1, 9:1–2.) BLG appears to contend that such "technical" omissions occurred in Florida (i.e. where the contract was drafted), and therefore have no connection to California. (*See id.* at 12:3–8.) That may be, and Plaintiffs do not refute that point. Nevertheless, as Plaintiffs point out, the Court must also consider other relevant events. (*See Pls.' Opp'n* 10:18–26.) In light of all the CROA violations alleged in the Complaint, the least "technical" one is that involving BLG prematurely deducting money from Plaintiffs' account in California. The nature of that alleged violation is central to Plaintiffs' claim, given that the agreement between the parties was one involving payment in exchange for services. (*Id.*) Thus, the deductions bear a sufficiently close nexus to Plaintiffs' claim and can be deemed "significant" and "substantial" for the purposes of venue under § 1391(b)(2). Daniel, 428 F.3d at 433.

Accordingly, the Court **DENIES** BLG's motion to dismiss the Complaint under Rule 12(b)(3) for improper venue.

D. Transfer Under 28 U.S.C. § 1404(a)

BLG argues in the alternative that, under 28 U.S.C. § 1404(a), this case should be transferred to the Southern District of Florida. (*See Defs.' MTD* 12:19–16:2; *Defs.'*

Reply 6:11–7:17.) BLG avers that transfer to the Southern District of Florida would serve the convenience of the parties and witnesses, and would be in the interests of justice. (*See, e.g.*, *Defs.' MTD* 12:19–16:2.) Plaintiffs counter that the balance of the relevant considerations weighs against transfer. (*See Pls.' Opp'n* 11:1–13:7.)

Section 1404(a) provides as follows: "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 . . . ." 28 U.S.C. § 1404(a). Accordingly, the district court has broad discretion "to adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness." Jones v. GNC Franchising, Inc., 211 F.3d 495, 498 (9th Cir. 2000) (citation and internal quotation marks omitted). "The defendant must make a strong showing of inconvenience to warrant upsetting the plaintiff's choice of forum." Decker Coal Co., 805 F.2d at 843.

In determining whether transfer is proper, district courts in this Circuit weigh the following factors: (1) plaintiff's choice of forum; (2) convenience of the parties; (3) convenience of the witnesses and availability of compulsory process; (4) ease of access to the evidence; (5) feasibility of consolidation of other claims; (6) familiarity of each forum with the applicable law; (7) any local interest in the controversy; and (8) the relative court congestion and time to trial in each forum. Nilon v. Natural–Immunogenics Corp., 2012 WL 2871658, at *2 (S.D. Cal. July 12, 2012) (citations omitted).

1. Plaintiffs' Choice of Forum and Convenience of the Parties

Plaintiffs and BLG acknowledge the strong presumption in favor of a plaintiff's choice of forum. See, e.g., Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981); VAVi, Inc. v. Newton, 2013 WL 4499125, at *3 (S.D. Cal. Aug. 19, 2013). Plaintiffs in this case are—and at the relevant times were—San Diego residents. They chose to file this case in this District because they received the purported solicitations here, and the alleged improper removal of funds from their checking account occurred here. This factor weighs considerably in Plaintiffs' favor.

Insofar as the convenience of the parties is concerned, BLG contends that "[i]t will cost more to litigate in this forum because of the locations of the parties' respective counsel." (*Defs.' MTD* 15:14–15.) More specifically, BLG states that if this case proceeds in California, it will have to incur substantial sums on travel to California and retention of local counsel. (*BLG Decl.* ¶ 28.) Plaintiffs acknowledge that some travel may be necessary, but argue that "[s]hifting the burden of travel to the aggrieved party is hardly reasonable." (*Pls.' Opp'n* 11:14–20.) The Court agrees with Plaintiffs.

Regardless of where this case is heard, one side will inevitably be inconvenienced. Shifting the burden of the inconvenience as it relates to travel-related expenses and association with local counsel from BLG to Plaintiffs would be unreasonable. Moreover, in light of Civil Local Rule 7.1(d.1), BLG's argument that it will incur substantial costs having to travel to California for oral argument leading up to trial is unconvincing. Thus, given the strong presumption of Plaintiffs' choice of forum, and bearing in mind the relative inconvenience to the parties, this factor weighs slightly in favor of Plaintiffs.

2. Convenience of the Witnesses and Ease of Access to the Evidence

As BLG points out, the convenience of the witnesses is of considerable import. See Hawkins v. Gerber Prods. Co., 924 F. Supp. 2d 1208, 1215 (S.D. Cal. 2013). What BLG neglects to mention, however, is that "[i]n balancing the convenience of the witnesses, primary consideration is given to third part[ies], as opposed to employee witnesses." Id. (alterations in original) (citations and internal quotation marks omitted); see Brandon Apparel Grp., Inc. v. Quitman Mfg. Co., 42 F. Supp. 2d 821, 834 (N.D. Ill. 1999) ("[T]he convenience of employee-witnesses is generally assigned little weight."). In addition, to demonstrate inconvenience, the party seeking transfer

> should produce information regarding the identity and location of the witnesses, the content of their testimony, and why such testimony is relevant to the action. The court will consider not only the number of

> witnesses located in the respective districts, but also the nature and quality of their testimony in relationship to the issues in the case.

Nilon, 2012 WL 2871658, at *3 (quoting Steelcase, Inc. v. Haworth, Inc., 1996 WL 806026, at *3 (C.D. Cal. May 15, 1996)).

Here, BLG contends that its declaration identifies witnesses relevant to the matters raised in the Complaint, all of whom appear to reside in Florida. (*See Defs.' MTD* 14:9–12; *Defs.' Reply* 6:18–7:1; *see also Ex. C to BLG Decl.* [Doc. 9-4].) Plaintiff counters that BLG has not met its burden because its list pertains to "deposition testimony stemming from a Florida case, with no indication if those witnesses have any testimony related to this case." (*Pls.' Opp'n* 11:27–12:1.) The Court again agrees with Plaintiffs.

As an initial matter, most of the witnesses that BLG lists appear to be employee-witnesses, not third-party witnesses. (*See Defs.' Reply* 6:18–7:1; *Ex. C to BLG Decl.*) Additionally, Exhibit C to BLG's declaration is a motion for leave to take additional depositions in a Florida case. (*See Ex. C to BLG Decl.*) Although the persons listed in Exhibit C may inevitably testify in the instant case, the information BLG has supplied fails to identify anticipated witnesses and the content and relevance of their testimony with respect to *this* case. (*See Pls.' Opp'n* 11:23–12:1; *Defs.' Reply* 6:18–7:1; *Ex. C to BLG Decl.*) Moreover, BLG identifies the Wites & Kapetan firm as a potential third-party witness, yet fails to explain the content or relevance of the firm's testimony. (*See Defs.' Reply* 6:26–7:1.) Thus, this factor weighs only slightly in favor of transfer.

As to ease of access to the evidence, Plaintiffs contend that the evidence is relatively limited and can be easily produced in electronic format. BLG does not contest this point, and the case law reveals that modern technology has diminished the import of this consideration. Thus, this factor is of little significance.

3. Interest of Justice

"The question of which forum will better serve the interest of justice is of predominant importance on the question of transfer, and factors involving convenience

of parties and witnesses are in fact subordinate." Wireless Consumers Alliance, Inc. v. T-Mobile USA, Inc., 2003 WL 22387598, at *4 (N.D. Cal. Oct. 14, 2003).

BLG contends that the pendency of a related case in the Southern District of Florida weighs in favor of transfer. (*Defs.' MTD* 14:14–15:3 (citing Hawkins, 924 F. Supp. 2d at 1214).) BLG argues that even if the two cases cannot be consolidated, transfer in this instance would have positive effects on convenience because it would result in an immense conservation of time, energy, and money. (*Id.*) Plaintiffs argue that considerations of judicial economy would not be served if the cases were consolidated because the Florida case has reached a more advanced stage, and consolidation would work to prejudice the plaintiffs in that case. (*Pls.' Opp'n* 12:23–28.) This is a close call.

The Court recognizes the level of similarity between the two cases. However, Plaintiffs' contention regarding the negative impact of consolidation is well-taken. Since BLG's filing of the instant motion, the trial date in the Florida case has been pushed back. See Paperless Order Granting Unopposed Motion to Reset Case Deadlines, Bryson v. Otto Berges et al., No. 14-cv-62323-JIC (S.D. Fla. Mar. 31, 2015), ECF No. 62. Consolidation would likely result in additional delay. Furthermore, even if the cases were not consolidated, it is not clear that an "immense" amount time, energy, and money would be saved if this case were transferred. As Plaintiffs note, the Florida case involves a number of other entities that are not before this Court, and BLG has not provided adequate information to determine the level of overlap between the witnesses in the two cases. (*Pls.' Opp'n* 13:10–17.)

On the whole, the interest of justice factors do not "tip strongly in favor of transfer." Nilon, 2012 WL 2871658, at *4 (citation and internal quotation marks omitted). In addition to the foregoing, it is important to bear in mind that (1) California has an interest in protecting its citizens, and (2) there is no Florida-centric interest in the controversy, seeing that Plaintiffs' single cause of action arises under CROA, a federal statute. Thus, in light of the above, the Court will not disturb Plaintiffs' choice of forum, which is to be afforded substantial deference. See, e.g., id.

Accordingly, the Court **DENIES** BLG's motion to transfer under § 1404(a).

E. Adequacy of the Complaint

Finally, BLG moves to dismiss Plaintiffs' Complaint under Rule 12(b)(6) for failure to state a claim. BLG contends that the Complaint fails to adequately allege facts to bring BLG within CROA's definition of "credit repair organization."

In enacting CROA, Congress intended to both "ensure that prospective buyers of the services of credit repair organizations are provided with the information necessary to make an informed decision regarding the purchase of such services," and "to protect the public from unfair or deceptive advertising and business practices by credit repair organizations." 15 U.S.C. § 1679(b). Under CROA, "credit repair organization"

> (A) means any person who uses any instrumentality of interstate commerce or the mails to sell, provide, or perform (or represent that such person can or will sell, provide, or perform) any service, in return for the payment of money or other valuable consideration, for the express or implied purpose of–
>
> > (i) improving any consumer's credit record, credit history, or credit rating; or
> >
> > (ii) providing advice or assistance to any consumer with regard to any activity or service described in clause (i) . . . .

§ 1679a(3).

The scope of the statute is broad. As the Ninth Circuit has recognized, "[i]n enacting the Consumer Credit Protection Act, of which the CROA is a part, Congress intended for courts to broadly construe its provisions in accordance with its remedial purpose." Stout v. Freescore, LLC, 743 F.3d 680, 684 (9th Cir. 2014) (citing Brothers v. First Leasing, 724 F.2d 789, 793 (9th Cir. 1984)). Under this broad interpretation, and given the language of the statute, "a person need not actually provide credit repair services to fall within the statutory definition," but rather "need only *represent* that it can or will sell, provide, or perform a service for the purpose of providing advice or assistance

to a consumer with regard to improving a consumer's credit record, credit history, or credit rating." Id. (emphasis in original) (citing 15 U.S.C. § 1679a(3)(A)).

The second section of the subject contract lists various services that BLG agreed to provide to Plaintiffs. (*Contract* ¶ 2(a)) That section states that BLG "will also remit a letter to any third party debt collection agency requesting verification of the debt pursuant to common law and the Fair Debt Collection Practices Act, with copies forward to the three major credit reporting agencies." (*Id.*). The subsequent paragraph states:

> Review of Response. Attorney shall audit the response to the letter(s) described in paragraph 2(a) and reply in kind. Attorney shall then remit a letter to the three major credit reporting agencies indicating that the Client desires that the credit reporting agencies reinvestigate any inaccurate or derogatory information contained in the Client's consumer credit report.

(*Id.* ¶ 2(b).)

First, BLG contends that Plaintiffs "must show that 'the'—not 'a' purpose of [the defendant] was to improve a consumer's credit record." (*Defs.' MTD* 16:21–24 (citation omitted).) In support of that contention, BLG relies on Hillis v. Equifax Consumer Services, Inc., 237 F.R.D. 491 (N.D. Ga. 2006) and Plattner v. Edge Solutions, Inc., 422 F. Supp. 2d 969 (N.D. Ill. 2006), two decisions which appear to have narrowly interpreted § 1679a(3). As Plaintiffs point out, however, the Ninth Circuit in Stout explicitly declined to follow Hillis and Plattner because "the plain language of the CROA is at odds with those decisions." Stout, 743 F.3d at 687 (citing cases). Because Stout is binding on this Court, BLG cannot avail itself of whatever interpretative limitations Hillis and Plattner may place on § 1679a(3).

Second, BLG contends that "[a]lthough courts interpret the CROA broadly, courts typically find that entities are credit repair organizations under the statute where they have affirmatively held themselves out as providing credit repair." (*Defs.' MTD* 17:7–9.) Notwithstanding that contention, the Court finds that CROA's language is sufficiently broad to reach BLG here. As an initial matter, there is no dispute that BLG emailed the subject contract to Plaintiffs, and the parties do not dispute the contract's contents.

Furthermore, some of the services listed under the "Review of Response" section of the contract appear, at least impliedly, to be geared towards improving Plaintiffs' credit record, history, or rating. As Plaintiffs point out, the reinvestigation of purportedly inaccurate or derogatory information on a consumer credit report is one way of removing information from the report. (*See Pls.' Opp'n* 18:8–28.) The removal of such information, in turn, would have the ultimate effect of improving (i.e. repairing) one's credit record, credit history, or credit rating. (*See id.* at 18:8–19:9 (citing 15 U.S.C. § 1681i(a)(1)); *see also Compl.* ¶¶ 20–23.) That BLG claims the contract was only for the purposes of debt settlement does not mean that it cannot be held liable under CROA. See, .e.g, Baker v. Family Credit Counseling Corp., 440 F. Supp. 2d 392, 404 (E.D. Pa. 2006) ("Simply because an organization purports to offer a 'debt management plan' to reduce a consumer's credit rates and payments does not mean that the organization cannot be held liable under the CROA.")

Accordingly, the Court finds that Plaintiffs have pled sufficient facts to allege that BLG falls within the meaning of "credit repair organization" under CROA.

IV. CONCLUSION & ORDER

In light of the foregoing, the Court **GRANTS IN PART** and **DENIES IN PART** Defendants' motion to dismiss. (Doc. 9.) Specifically, the Court **GRANTS** Defendants' motion to dismiss for lack of personal jurisdiction as to Bergés **WITH LEAVE TO AMEND**. The remainder of Defendants' motion is **DENIED**.

IT IS SO ORDERED.

DATED: May 29, 2015

Hon. Thomas J. Whelan
United States District Judge