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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

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Steve Hillis and Diane Hillis, husband
and wife,

No. CV-09-73-PHX-DGC

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Plaintiffs,

ORDER

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vs.

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Ronald E. Heineman and Barbara L.
Heineman, husband and wife; Barbara L.
Heineman, Trustee of the Year 2002
Revocable Trust Dated August 16, 2002;
and Gregory Bartko,

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Defendants.

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Ronald E. Heineman and Barbara L.
Heineman, husband and wife; and
Gregory Bartko,

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Counter-Plaintiffs and
Third-Party Plaintiffs,

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vs.

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Steve Hillis and Diane Hillis, husband
and wife; and John Raymond Fox,

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Counter-Defendants and
Third-Party Defendant.

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Resolve Staffing, Inc. provided employment staffing and outsourcing services to
various companies. Ronald Heineman is the former president and chief executive officer of
Resolve Staffing. Gregory Bartko was the corporation's securities counsel.

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1 On September 26, 2006, Steve Hillis and Resolve Staffing entered into a securities
2 Subscription Agreement and a Warrant Agreement. Pursuant to the terms of the Subscription
3 Agreement, Hillis paid a total of \$135,000 for 90,000 shares of Resolve Staffing common
4 stock. The Warrant Agreement entitled Hillis to purchase an additional 90,000 shares at a
5 price of \$2.00 each. On September 30, 2007, Hillis and Resolve Staffing executed an
6 Amended Warrant Agreement which lowered the price of additional shares to \$1.25. Hillis
7 lost his \$135,000 investment when Resolve Staffing went out of business in early 2008 due
8 to the involuntary foreclosure and sale of its assets by its primary lender.

9 The Hillises filed suit against Resolve Staffing and others in Arizona state court in
10 October 2008. The state court entered default judgment against Resolve Staffing in the
11 amount of \$810,050. The Hillises cannot collect on that judgment given Resolve Staffing's
12 insolvency.

13 The Hillises filed a complaint against the Heinemans and Bartko in this Court on
14 January 12, 2009, alleging that Defendants engaged in a conspiracy to sell Resolve Staffing
15 stock in violation of Arizona law. The complaint asserts claims for fraudulent conveyance,
16 racketeering, and conversion against the Heinemans and a claim for civil conspiracy
17 against Bartko. Dkt. #1. Defendants filed counterclaims against the Hillises (Dkt. ##20, 52)
18 and a third-party complaint against John Fox (Dkt. #29).

19 Defendants have filed a motion to dismiss (Dkt. #65) and a motion for sanctions
20 (Dkt. #74). The motions have been fully briefed. Dkt. ##71, 75, 79, 81, 83. For reasons that
21 follow, the Court will grant the motion to dismiss in part and deny the motion for sanctions.

22 **I. Motion to Dismiss.**

23 Defendants argue that the complaint should be dismissed for lack of subject matter
24 jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, for improper
25 venue pursuant to Rule 12(b)(3), and for failure to state a claim for relief pursuant to
26 Rule 12(b)(6). Dkt. #65 at 2.

27 **A. Subject Matter Jurisdiction.**

28 Defendants seek dismissal for lack of subject matter jurisdiction based on forum

1 selection clauses contained in the Subscription Agreement and Amended Warrant
2 Agreement. Dkt. #65 at 12-16. “A motion to dismiss based on a forum selection clause is
3 treated as a motion to dismiss for improper venue and [must be] brought under
4 Rule 12(b)(3)[.]” *Whipple Indus., Inc. v. Opcon AB*, No. CV-F-05-0902 REC SMS, 2005
5 WL 2175871, at *1 (E.D. Cal. Sept. 7, 2005) (citing *Argueta v. Banco Mexicano*, 87 F.3d
6 320, 324 (9th Cir. 1996)); see *Kukje Hwajae Ins. Co. v. M/V Hyundai Liberty*, 408 F.3d 1250,
7 1254 (9th Cir. 2005). Defendants do not dispute the existence of diversity jurisdiction in this
8 case. See 28 U.S.C. § 1332(a)(1). The Court will therefore deny the motion to dismiss to
9 the extent it is brought under Rule 12(b)(1) for lack of subject matter jurisdiction.¹

10 **B. Venue.**

11 Defendants’ argument that the complaint should be dismissed for improper venue is
12 also based on forum selection clauses contained in the Subscription Agreement and Amended
13 Warrant Agreement. Dkt. #65 at 12-16. The parties consented in the Subscription
14 Agreement “to exclusive jurisdiction and venue in the courts of the State of Ohio.” Dkt. #1
15 at 31, ¶ 8(c). The Amended Warrant Agreement provides that “[i]f any action is brought
16 among the parties with respect to this Agreement or otherwise,” the “[e]xclusive jurisdiction
17 and venue for any such action shall be the State or Federal Courts serving the State of Ohio.”
18 Dkt. #24-3 at 7, ¶ 6.3. Defendants argue that these forum selection clauses are enforceable
19 and binding on the parties and venue therefore lies not in this Court, but in the state or federal
20 courts of Ohio.

21 “A forum selection clause is presumptively valid; the party seeking to avoid a forum
22 selection clause bears a ‘heavy burden’ to establish a ground upon which [the court] will
23 conclude the clause is unenforceable.” *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1083 (9th Cir.
24 2009) (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17 (1972)). In *Bremen*, the
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26 ¹Plaintiffs’ response to the motion under Rule 12(b)(1) focuses on an arbitration
27 provision contained in the Subscription Agreement. Dkt. #71 at 3-8. Defendants have made
28 clear, however, that they are not seeking dismissal based on the arbitration provision.
Dkt. ##65 at 13, 79 at 2-3.

1 Supreme Court identified three circumstances where enforcement of a forum selection clause
2 would be unreasonable: the clause was the product of fraud or overreaching, enforcement
3 would deprive a party of his day in court, or enforcement would contravene a strong policy
4 of the forum where the suit was brought. 407 U.S. at 12-18; *see Argueta*, 87 F.3d at 324-25;
5 *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1140 (9th Cir. 2004).

6 Plaintiffs do not attempt to establish any of these circumstances. Nor do Plaintiffs
7 argue that their claims are outside the scope of the forum selection clauses. Instead, Plaintiffs
8 assert that Defendants waived any right to enforce the clauses when they filed counterclaims
9 and a third-party complaint (Dkt. #71 at 9), but Plaintiffs cite no legal authority in support
10 of this assertion. Defendants specifically asserted in their answers the affirmative defense
11 of improper venue based on the forum selection clauses (Dkt. ##19, 51 ¶¶ 44), and courts
12 have made clear that “a defendant does not waive a venue defense by simultaneously filing
13 a counterclaim.” *Hoffman v. Burroughs Corp.*, 571 F. Supp. 545, 547 (N.D. Tex. 1982); *see*
14 *Rogen v. Memry Corp.*, 886 F. Supp. 393, 396 (S.D.N.Y. 1995) (counterclaim “does not
15 render [a defendant’s] objections to venue abandoned”); *CAO Group, Inc. v. Discus Dental,*
16 *LLC*, No. 2:07-CV-909, 2008 WL 314559, at *2 (D. Utah Feb. 4, 2008) (counterclaim “does
17 not constitute a waiver of the forum selection clause agreed upon by the parties”).

18 Plaintiffs note that Defendants and Mrs. Hillis are not parties to the Subscription
19 Agreement and Amended Warrant Agreement. Dkt. #71 at 5. “It is well established that
20 ‘a range of transaction participants, parties and non-parties, should benefit from and be
21 subject to forum selection clauses.’” *Xantrex Tech., Inc. v. Advanced Energy Indus., Inc.*,
22 No. 07-cv-02324-WYD-MEH, 2008 WL 2185882, at *8 (D. Colo. May 23, 2008) (quoting
23 *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514 n.5 (9th Cir. 1988)). This Circuit
24 has “recognized that a nonparty may enforce a forum selection clause if the non-party’s
25 alleged conduct is ‘so closely related to the contractual relationship’ that the clause should
26 apply to it, as well.” *Laurel Village Bakery, LLC v. Global Payments Direct, Inc.*, No. C06-
27 01332 MJJ, 2006 WL 2792431, at *6 (N.D. Cal. Sept. 25, 2006) (quoting *Manetti-Farrow*,
28 858 F.2d at 514 n.5); *see also Hugel v. Corp. of Lloyd’s*, 999 F.2d 206, 209 (7th Cir. 1993);

1 *Lipcon v. Underwriters at Lloyd's*, 148 F.3d 1285, 1299 (11th Cir. 1998); *Marano Enters.*
2 *of Kan. v. Z-Teca Rests., L.P.*, 254 F.3d 753, 757 (8th Cir. 2001).

3 The Court is satisfied that Mr. Heineman is entitled to enforce the forum selection
4 clauses because he is so closely related to the transactions between Resolve Staffing and
5 Mr. Hillis that it was reasonably foreseeable the clauses would apply to him. Mr. Heineman
6 was the president and chief executive officer of Resolve Staffing, signed the agreements on
7 behalf of Resolve Staffing, and, according to Plaintiffs, was an “insider” and “person in
8 control” of the corporation and was “actively engaged” in the sale of corporate securities to
9 Plaintiffs. Dkt. #1 ¶¶ 1, 2(b), 8(b), 21(a). Courts have made clear that “shareholders,
10 officers, and directors of a corporation may be bound by a forum selection clause in a
11 corporate contract.” *Highway Commercial Servs., Inc. v. Zitis*, No. 2:07-cv-1252, 2008 WL
12 1809117, at *4 (S.D. Ohio Apr. 21, 2008); *see Marano Enters.*, 254 F.3d at 757 (“[Plaintiff]
13 is a shareholder, officer, and director of Marano Enterprises, which was a party to the
14 agreements. As such, he is, without question, ‘closely related’ to the disputes arising out of
15 the agreements and properly bound by the forum-selection provisions.”) (emphasis in
16 original).² Mrs. Heineman may enforce the forum selection provisions because her interest
17 in the dispute is merely derivative of her husband’s interest. *See Lipcon*, 148 F.3d at 1299.
18 With respect to Mrs. Hillis, to the extent she has standing to bring the claims asserted in the
19 complaint, “she is similarly subject to the forum selection provisions.” *Beck v. CIT*
20 *Group/Credit Fin., Inc.*, No. CIV.A. 94-5513, WL 394067, at *6 (E.D. Pa. June 29, 1995).
21 The Court will grant the motion to dismiss under Rule 12(b)(3) for improper venue with
22 respect to the claims asserted against the Heinemans: fraudulent conveyance, racketeering,

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24 ²*See also Farmers & Merchants Savings Bank v. Core Funding Group, L.P.*, No. C06-
25 2006, 2008 WL 178252, at *2 (N.D. Iowa Jan. 18, 2008) (managing member of corporation
26 entitled to enforce forum selection clauses contained in corporate agreements); *Nanopierce*
27 *Techs., Inc. v. Southridge Capital Mgmt. LLC*, No. 02 Civ. 0767(LBS), 2003 WL 22882137,
28 at *6 (S.D.N.Y. Dec. 4, 2003) (forum selection clause contained in stock purchase agreement
applied to CFO of corporation); *Vessel Sys., Inc. v. Sambucks, LLC*, No. 05-CV-1028-LRR,
2007 WL 715773, at *10 (N.D. Iowa Mar. 6, 2007) (founder and president of corporation
entitled to enforce forum selection clauses contained in corporate agreements).

1 and conversion (Dkt. #1 ¶¶ 16-31). *See Farmers & Merchants*, 2008 WL 178252, at *2
2 (dismissing claims pursuant to Rule 12(b)(3)); *Laurel Village Bakery*, 2006 WL 2792431,
3 at *6 (same).

4 Bartko generally would be entitled to enforce the forum selection clauses because he
5 prepared the Subscription Agreement as securities counsel for Resolve Staffing and, like
6 Mr. Heineman, is alleged to have actively engaged in the sale of corporate securities to
7 Plaintiffs. Dkt. #1 ¶¶ 1, 2(d), 34; *see Laurel Village Bakery*, 2006 WL 2792431, at *6 (agent
8 of signatory to agreement who allegedly participated in fraudulent scheme had standing to
9 enforce forum selection clause). Plaintiffs argue that Bartko has waived the defense of
10 improper venue by failing to include it in his initial motion to dismiss. Dkt. #71 at 9 (citing
11 Fed. R. Civ. P. 12(g), (h)(1)). While Bartko’s initial motion sought dismissal under Rule
12 12(b)(2) for lack of personal jurisdiction, it explicitly raised the defense of improper venue
13 by arguing that dismissal is appropriate because “Plaintiffs agreed to resolve any dispute
14 between the parties to the Subscription Documents in the exclusive jurisdiction and venue
15 of the courts of the State of Ohio.” Dkt. #31 at 12 (citing Dkt. #1 at 31, ¶ 8(c)). The Federal
16 Rules of Civil Procedure “emphasize substance over form,” *Vessel Sys.*, 2007 WL 715773,
17 at *2, and must “be construed and administered to secure the just, speedy, and inexpensive
18 determination of every action.” Fed. R. Civ. P. 1. Concluding that Bartko has waived the
19 defense of improper venue would not serve these goals, particularly in light of the Court’s
20 dismissal of the tort claims against the Heinemans and the fact that the civil conspiracy claim
21 against Bartko “requires an underlying tort which the alleged conspirators agreed to commit.”
22 *Baker v. Stewart Title & Trust of Phoenix, Inc.*, 5 P.3d 249, 259 (Ariz. Ct. App. 2000). The
23 Court will grant the motion to dismiss for improper venue with respect to the civil conspiracy
24 claim asserted against Bartko. *See Vessel Sys.*, 2007 WL 715773, at *2 (finding no waiver
25 and dismissing claims for improper venue).

26 The Court also will dismiss for improper venue the counterclaims asserted against the
27 Hillises (Dkt. ##20, 52) and the third-party complaint against John Fox (Dkt. #29) as these
28 claims are closely related to the contractual relationship between Mr. Hillis and Resolve

1 Staffing. *See Manetti-Farrow*, 858 F.2d at 514 n.5.

2 **C. Failure to State a Claim for Relief.**

3 Even if Bartko was deemed to have waived the defense of improper venue, dismissal
4 would be appropriate under Rule 12(b)(6) because the complaint fails to state a plausible
5 civil conspiracy claim. A conspiracy claim requires an agreement between two or more
6 persons to accomplish an unlawful purpose or a lawful purpose by unlawful means. *See*
7 *Dawson v. Withycombe*, 163 P.3d 1034, 1053 (Ariz. Ct. App. 2007). The complaint alleges
8 only that “Bartko, as securities counsel, actively prepared the Subscription Agreements
9 which, with Bartko’s knowledge, were targeted to Arizona residents, including the
10 Plaintiffs[.]” Dkt. #1 ¶ 34. Assistance to the tortfeasor by itself, however, is insufficient to
11 show an actual conspiratorial agreement “because there is a qualitative difference between
12 showing an agreement to participate in a tort (conspiracy) and a knowing action which might
13 substantially aid the tortfeasor to commit a tort.” *Dawson*, 163 P.3d at 1053. The civil
14 conspiracy claim must be dismissed because it alleges no facts showing that Bartko actually
15 *agreed* with Mr. Heineman to cause unregistered and nonexempt securities to be sold to
16 Plaintiffs.

17 This particularly is true in light of current pleading law that “only a complaint that
18 states a plausible claim for relief survives a motion to dismiss.” *Ashcroft v. Iqbal* --- U.S ---,
19 129 S. Ct. 1937, 1950 (2009). If the facts alleged in the complaint “do not permit the court
20 to infer more than the mere possibility of misconduct, the complaint has alleged – but it has
21 not ‘shown’ – ‘that the pleader is entitled to relief.’” *Id.* (quoting Fed. R. Civ. P. 8(a)(2))
22 (brackets omitted). Such a complaint must be dismissed. *Id.*

23 **II. Motion for Sanctions.**

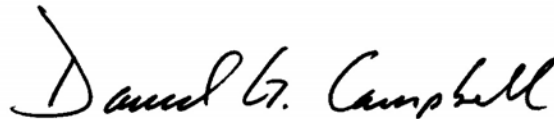
24 Defendants seek an award of sanctions under Rule 11 on the ground that Plaintiffs’
25 claims have insufficient evidentiary support and Plaintiffs and their counsel failed to conduct
26 an adequate pre-filing investigation. “Rule 11 is an extraordinary remedy, one to be
27 exercised with extreme caution.” *In re Keegan Mgmt. Co.*, 78 F.3d 431, 437 (9th Cir. 1996)
28 (quoting *Operating Eng’rs Pension Trust v. A-C Co.*, 859 F.2d 1336, 1345 (9th Cir. 1988)).

1 Having reviewed the parties' briefs, and having considered the record as a whole, the Court
2 finds that Rule 11 sanctions are not warranted. The Court will therefore exercise its
3 discretion and deny Defendants' motion.

4 **IT IS ORDERED:**

- 5 1. Defendants' motion to dismiss (Dkt. #65) is **granted in part** and **denied in**
6 **part** as set forth in this order.
- 7 2. The complaint (Dkt. #1), counterclaims (Dkt. ##20, 52), and third-party
8 complaint (Dkt. #29) are **dismissed without prejudice**.
- 9 3. Defendants' motion for sanctions (Dkt. #74) is **denied**.
- 10 4. The Clerk is directed to **terminate** this action.

11 DATED this 23rd day of July, 2009.

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14 David G. Campbell
15 United States District Judge
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