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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 arrivia Incorporated, et al.,

10 Plaintiffs,

11 v.

12 John Rowley, et al.,

13 Defendants.
14

No. CV-23-01039-PHX-DLR

ORDER

15
16 Plaintiffs arrivia, Inc. (“arrivia”) and Panda Holdco LLC (“Panda”) are suing
17 Defendants John Rowley, Marcia Rowley, and Open Network Exchange, Inc. (“ONE”) for
18 (1) violation of the Defend Trade Secrets Act (“DTSA”), 18 U.S.C. § 1836 et seq.,
19 (2) violation of the Arizona Uniform Trade Secrets Act (“AUTSA”), A.R.S. § 44-401 et
20 seq., and (3) unjust enrichment. (Doc. 8.) Plaintiffs are also suing the Rowleys for two
21 claims of breach of contract. Pending before the Court are two motions: Defendants’
22 motion to dismiss Plaintiffs’ complaint pursuant to Federal Rules of Civil Procedure
23 12(b)(6) and 12(b)(3), which is fully briefed (Docs. 24, 29, 35), and Defendants’ motion
24 for Rule 11 sanctions, also fully briefed (Docs. 30, 34, 36).¹

25 For the reasons set forth below, the Court (1) grants Defendants’ Rule 12(b)(6)
26 motion to dismiss Plaintiffs’ DTSA, AUTSA, and unjust enrichment claims; (2) construes

27
28 ¹ Oral argument is denied for both motions because the issues are adequately briefed, and oral argument will not assist the Court in reaching its decision. *See* Fed. R. Civ. P. 78(b); LRCiv. 7.2(f).

1 Defendants’ Rule 12(b)(3) motion as a *forum non conveniens* motion and grants the motion
2 to dismiss the remainder of Plaintiffs’ complaint (Doc. 8) without prejudice; (3) denies
3 Defendants’ motion for sanctions; and (4) denies without prejudice the parties’ respective
4 requests for reasonable attorneys’ fees and costs.

5 **I. BACKGROUND²**

6 **A. The Delaware Lawsuit**

7 The Rowleys are the former majority owners and executives of arrivia, a travel-
8 loyalty provider specializing in the distribution and servicing of travel and leisure products.
9 (Doc. 8 ¶¶ 1, 28.) In 2018, the Rowleys sold arrivia to Panda and entered into a Restrictive
10 Covenant Agreement containing non-compete, non-solicitation, and confidentiality
11 obligations. (¶ 34.) In 2020, the Rowleys formed ONE. (¶ 22.) In early 2021, Plaintiffs
12 accused the Rowleys of violating their non-compete obligations. (¶¶ 45–47.) In April 2021,
13 the Rowleys initiated a lawsuit in the Delaware Court of Chancery, seeking a declaratory
14 judgment that ONE’s business did not violate the Restrictive Covenant Agreement. (*Id.*)
15 Plaintiffs filed an answer and counterclaims in response.³ (¶ 47.)

16 **B. The Settlement Agreement & Release**

17 On September 1, 2021, Plaintiffs and the Rowleys executed a Settlement Agreement
18 (“Settlement”) resolving the parties’ claims in the Delaware litigation. (¶ 48; *see also*
19 Doc. 8-4.) The Rowleys, arrivia, and Panda were all parties to the Settlement. (*See*
20 Doc. 8-4.) ONE was included in the Settlement as an affiliate of the Rowleys but was not
21 a signatory to the Settlement. (*Id.*) The Settlement included: a Mutual Release of Claims,
22 Counterclaims, and Demands (“Release”); an Amended and Restated Restrictive Covenant
23 Agreement; and a Confidentiality Agreement. (*Id.* §§ 2, 5, 24.) The Release provided the
24 following:

25 _____
26 ² This section draws from the allegations in the complaint, which are accepted as
true for the purposes of this order.

27 ³ The Court takes judicial notice of the Rowleys’ complaint (Doc. 25-2) and arrivia
28 and Panda’s answer and counterclaims (Doc. 25-3) filed in *Rowley v. Panda Holdco LLC*,
C.A. No. 2021-0351-JRS (Ch. Del. 2021) in the Delaware Court of Chancery. *See Reyn’s
Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (“[The Court]
may take judicial notice of court filings and other matters of public record.”).

1 Upon the Effective Date [of September 1, 2021], each of the
2 Settling Parties, on behalf of themselves and each of their
3 affiliates . . . hereby unconditionally and irrevocably releases
4 and forever discharges each of the other Settling Parties and
5 their respective affiliates . . . from any and all . . . claims . . . ,
6 whether state or federal, . . . whether . . . known or unknown to
7 the parties as of the Effective Date, including but not limited to
8 those in connection with or arising from the dispute over the
9 Rowleys’ non-compete obligations under the Restrictive
10 Covenant Agreement . . . and/ or subject matters outlined in the
11 Litigation; except no party is releasing any claims arising out
12 of the performance or non-performance of the obligations set
13 forth in this Settlement Agreement (including claims to enforce
14 any provisions of this Settlement Agreement) and any claims
15 expressly preserved herein.

9 Each Settling Party acknowledges and understands that there
10 is a risk that subsequent to the Effective Date of this Settlement
11 Agreement, each Settling Party may discover, incur or suffer
12 released claims that were unknown or unanticipated at the time
13 of the Effective Date of this Settlement Agreement, and which,
14 if known on the Effective Date . . . , might have materially
15 affected each Settling Party’s decision to enter into and execute
16 this Settlement Agreement. Each Settling Party . . . is assuming
17 the risk of such unknown released claims and agrees that this
18 Agreement applies thereto.

15 Without in any way limiting any other provisions of this
16 Settlement Agreement, each Settling Party hereby covenants
17 not to sue or to assert, prosecute, or maintain, directly or
18 indirectly, in any form, any claims released by it pursuant to
19 the releases included herein.

18 (*Id.* § 2.) The Settlement also contained a Governing Law provision, stating that claims
19 “arising out of or relating to this Settlement Agreement” would be brought in the Court of
20 Chancery of the State of Delaware. (*Id.* § 21.) The parties further agreed “not to bring any
21 action or proceeding arising out of or relating to this Settlement Agreement or any of the
22 transactions contemplated by this Settlement Agreement in any other court.” (*Id.*)

23 **C. The Instant Lawsuit**

24 In June 2023, Plaintiffs brought this action, asserting the following counts:
25 (I) violation of the DTSA; (II) violation of the AUTSA; (III) breach of contract (non-
26 solicitation); (IV) breach of contract (confidentiality); and (V) unjust enrichment. Counts
27 I, II, and V—misappropriation of trade secrets and unjust enrichment—are alleged against
28 both the Rowleys and ONE. Counts III and IV—breach of contract—are alleged only

1 against the Rowleys. (Doc. 8.)

2 Plaintiffs allege the following facts in their complaint: In the months following the
3 Settlement, the Rowleys stole Plaintiffs' employees and used Plaintiffs' trade secret
4 information to build ONE, which now directly competes with arrivia. (Doc. 8 ¶¶ 110–29.)
5 In describing the “Rowleys’ wrongful procurement” of confidential and trade secret
6 information, Plaintiffs allege:

7 Knowing they were leaving arrivia and scheming to create a
8 competitive travel and technology company, the Rowleys took
arrivia’s trade secrets and confidential information. . . .

9 First, on February 13, 2020—after she resigned her officer
10 position at arrivia and reaffirmed her confidentiality
11 obligations, but shortly before her arrivia email account was
12 disabled—Mrs. Rowley sent herself approximately 640
13 documents in a zip folder . . . many of which contained
14 arrivia’s confidential and trade secret information. . . . Mrs.
Rowley [also] retained her entire arrivia Outlook email
collection on the laptop she kept, ensuring herself ready access
to client, supplier, and employee contact information, in
addition to an abundance of other trade secret information. . . .

15 Second, in mid-2020, after he resigned from his officer
16 position within arrivia, Mr. Rowley solicited and received
several communications to his personal email address
containing trade secrets and confidential information.

17 (¶¶ 68, 69, 73, 75.) Then, in describing ONE’s “improper theft” of arrivia’s trade secret
18 information, Plaintiffs allege:

19 In 2021, former arrivia employees emailed several of arrivia’s
20 highly confidential documents either directly to their [ONE
21 company] email addresses or to their personal email addresses
22 before forwarding them to ONE. For instance, arrivia’s now-
former Executive Director . . . sent an email to his ONE email
address right before he left his arrivia employment on
February 1, 2021 to work for ONE.

23 (¶¶ 78–79.) Plaintiffs also allege that Mr. Rowley sent emails to arrivia employees in
24 February of 2021, “encourag[ing] arrivia employees to violate their own confidentiality
25 obligations and send arrivia’s protected competitive information to ONE.” (¶¶ 81–82.)
26 Plaintiffs further assert that Defendants continue to possess and refuse to return arrivia’s
27 trade secrets and that, with such trade secrets and confidential information in hand, the
28 Rowleys have launched ONE as a competitor to arrivia. (¶¶ 85–99.)

1 For Plaintiffs’ misappropriation of trade secrets claims under the DTSA and
2 AUTSA, respectively, Plaintiffs allege that Defendants improperly acquired, continue to
3 possess, and fail to return Plaintiffs’ trade secrets and confidential information. (¶¶ 135–
4 37, 153–55.) Further, Plaintiffs allege that Defendants have used and/or disclosed such
5 trade secrets and confidential information, thereby violating the DTSA and AUTSA.
6 (¶¶ 139–40, 145, 157–58, 163.) For Plaintiffs’ breach of contract claims, Plaintiffs allege
7 the Rowleys have breached the non-solicitation covenant of their 2018 Restrictive
8 Covenant with Panda, which was reaffirmed by the September 1, 2021 Settlement.
9 (¶¶ 166–81.) Plaintiffs also allege the Rowleys have breached the confidentiality covenant
10 of the 2018 Restrictive Covenant with Panda, also reaffirmed by the Settlement. (¶¶ 182–
11 92.) And finally, for their unjust enrichment claim, Plaintiffs allege “Defendants are in
12 possession of and have used arrivia’s valuable confidential information and trade secrets
13 to launch ONE as a competitive business and unfairly compete with Plaintiffs.” (¶¶ 193–
14 98.)

15 Plaintiffs assert that their claims are timely because a tolling period must be added
16 to the original claim accrual date. (¶ 127.) Though Plaintiffs do not expressly acknowledge
17 what that claim accrual date is, Plaintiffs state:

18 In order to allow for the potential return of arrivia’s trade
19 secrets and a business resolution to this matter, the parties
20 entered into a tolling agreement, which was in place from
21 November 22, 2022 to April 10, 2023. After business
22 discussions broke down, the Rowleys and ONE terminated the
23 tolling agreement. arrivia and Panda’s claims are timely when
24 the tolling period is added to the original claim accrual date.

25 (*Id.*)

26 **II. DISCUSSION**

27 **A. Motion to Dismiss**

28 Defendants raise two bases for dismissal. First, Defendants argue Plaintiffs’
misappropriation of trade secrets and unjust enrichment claims must be dismissed pursuant
to Rule 12(b)(6) because Plaintiffs released these claims in their 2021 Settlement. Second,
Plaintiffs’ complaint must be dismissed pursuant to Rule 12(b)(3) because the parties

1 agreed in their Settlement not to bring any action arising out of or relating to the Settlement
2 in any court other than the Court of Chancery of the State of Delaware and therefore
3 Arizona is the wrong forum. The Court addresses each basis for dismissal in turn.

4 1. Rule 12(b)(6)

5 Rule 12(b)(6) permits the Court to dismiss a complaint for “failure to state a claim
6 upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Dismissal of a complaint, or
7 any claim within it, is appropriate under Rule 12(b)(6) where there is either a “lack of a
8 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal
9 claim.” *Balistreri v. Pacifica Police Dep’t.*, 901 F.2d 696, 699 (9th Cir. 1990). To survive
10 a 12(b)(6) motion to dismiss, a claim must be “plausible on its face.” *Ashcroft v. Iqbal*, 556
11 U.S. 662, 678 (2009). “A claim has facial plausibility when the plaintiff pleads factual
12 content that allows the court to draw the reasonable inference that the defendant is liable
13 for the misconduct alleged.” *Id.* In deciding a Rule 12(b)(6) motion, the Court “generally
14 consider[s] only allegations contained in the pleadings, exhibits attached to the complaint,
15 and matters properly subject to judicial notice.” *Swartz v. KPMG LLP*, 476 F.3d 756, 763
16 (9th Cir. 2007). The Court accepts all factual allegations in the complaint as true and
17 construes the pleadings in the light most favorable to the nonmoving party. *See Outdoor*
18 *Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007).

19 **a. Misappropriation of Trade Secrets**

20 Defendants argue that because the Release in the Settlement bars any and all claims
21 known or unknown as of September 1, 2021, and because Plaintiffs’ misappropriation of
22 trade secrets claims accrued prior to September 1, 2021, Plaintiffs’ claims are barred.
23 (Doc. 24 at 8–13.) Defendants contend that under the DTSA and AUTSA, a claim for the
24 misappropriation of trade secrets arises only once: when the initial misappropriation
25 occurs. (*Id.*) Any subsequent use or disclosure of such trade secrets is not a distinct and
26 separate claim for misappropriation of trade secrets; rather, each subsequent use or
27 disclosure merely “augments” the initial claim. (*Id.*) Defendants argue that despite alleging
28 Defendants’ “continued use” of trade secrets *after* the Release, Plaintiffs’ claims under the

1 DTSA and AUTSA arose *prior* to the Release because that is when the alleged initial
2 misappropriation occurred. Therefore, Plaintiffs’ DTSA and AUTSA claims are barred.
3 (*Id.*)

4 Plaintiffs do not dispute that their DTSA and AUTSA claims accrued prior to the
5 Release. (Doc. 29 at 10.) Instead, Plaintiffs argue that accrual date has “no bearing on
6 whether . . . a continuing violation is actionable.” (*Id.*) Plaintiffs note that both the DTSA
7 and AUTSA define “misappropriation” as the initial acquisition of a trade secret as well as
8 the disclosure or use of a trade secret. (Doc. 29 at 7.) Plaintiffs contend that their claims
9 are based on the latter definition—that they seek to recover for Defendants’ continued
10 possession and use of arrivia’s trade secrets. (Doc. 29 at 6–11.) Plaintiffs argue this type
11 of misappropriation occurred after the Settlement and therefore the Plaintiffs did not
12 release such claims. The Court is not persuaded.

13 Arizona has adopted the Uniform Trade Secrets Act (“UTSA”), and the DTSA is
14 largely modeled on it. 1990 Ariz. Sess. Laws. ch. 37; *Deerpont Grp., Inc. v. Agrigenix,*
15 *LLC*, 345 F. Supp. 3d 1207, 1227 (E.D. Cal. 2018). Both the AUTSA and DTSA define
16 “misappropriation” as either (1) “the acquisition of a trade secret of another by a person
17 who knows or has reason to know that the trade secret was acquired by improper means”
18 or (2) “the disclosure or use of a trade secret of another without express or implied consent
19 by a person.” A.R.S. § 44-401(2); 18 U.S.C. § 1839(5). Both statutes have a three-year
20 statute of limitations, accruing on the date the misappropriation is discovered or, by the
21 exercise of reasonable diligence, should have been discovered. A.R.S. § 44-406; 18 U.S.C.
22 § 1836(d). Furthermore, both the AUTSA and DTSA state that “[f]or the purposes of [the
23 statute of limitations], a continuing misappropriation constitutes a single claim.” A.R.S.
24 § 44-406; 18 U.S.C. § 1836(d).

25 Contrary to Plaintiffs’ argument, although the initial acquisition of trade secrets and
26 the subsequent continued use of those same trade secrets may be multiple
27 “misappropriations,” they constitute a single claim. As the California Supreme Court
28 explained in *Cadence Design Sys., Inc. v. Avant! Corp.*, 57 P.3d 647, 652 (Cal. 2002):

1 A *misappropriation* within the meaning of the UTSA occurs
2 not only at the time of the initial acquisition of the trade secret
3 by wrongful means, but also with each misuse or wrongful
4 disclosure of the secret. But a *claim* for misappropriation of a
5 trade secret arises for a given plaintiff against a given
6 defendant only once, at the time of the initial
7 misappropriation Each new misuse or wrongful
8 disclosure is viewed as augmenting a single claim of
9 continuing misappropriation rather than giving rise to a
10 separate claim. . . .

11 If “continuing misappropriation” is viewed as a single claim
12 for statute of limitations purposes [only], then it is difficult to
13 fathom how it could be treated as more than one claim for
14 purposes of litigation generally. For example, a plaintiff could
15 not legitimately plead separate claims of misappropriation for
16 each misuse of a trade secret, for to do so would impermissibly
17 evade the statute of limitations.

18 57 P.3d at 651–52. *Cadence* further notes that the drafters of the UTSA “explicitly
19 . . . rejected the contrary view that misappropriation gives rise to multiple claims each time
20 the trade secret is misused or improperly disclosed.” *Id.* at 651.

21 The Court agrees with the reasoning in *Cadence* that an initial misappropriation of
22 trade secrets and a subsequent continuing misappropriation constitute a single claim. *See*
23 *also Deerpoint*, 345 F. Supp. 3d at 1228 (“Based on *Cadence* . . . , for the purposes of
24 [UTSA], a separate future misappropriation claim against a single defendant and involving
25 the same previously misappropriated trade secret is a legal impossibility.”). The Court is
26 also persuaded by the fact that states that have adopted the UTSA “consistently apply a
27 single claim theory to misappropriation of trade secrets.” *Id.* at 1227 (citing *Allied Erecting*
28 *& Dismantling Co. v. Genesis Equip & Mfg.*, 805 F.3d 701, 705 (6th Cir. 2015)); *see also*
Adcor Indus., Inc. v. Bevcorp, LLC, 252 Fed. Appx. 55, 62 (6th Cir. Oct. 23, 2007); *Nw.*
Osteoscreening, Inc. v. Mountain View Hosp., LLC, No. 4:13-cv-00414-BLW, 2014 WL
4955673, at *6 (D. Idaho Oct. 2, 2014) (“Under [the UTSA], a continuing misappropriation
constitutes a single claim, with only the potential [for] damages encompassed by a
continuing misappropriation claim . . . expand[ing] with each illicit use or disclosure of the
trade secret.”) (internal citations and quotations omitted).

Plaintiffs contend that *Cadence* is inapplicable in this case because, unlike in

1 *Cadence*, the Settlement here contains a reaffirmation of Defendants’ confidentiality
2 obligations. (Doc. 29 at 10.) Plaintiffs argue that the Court should instead rely on the
3 reasoning in *Junction Sols., LLC v. MBS DEV, Inc.*, No. 06-C-163, 2007 WL 4233995 (N.
4 D. Ill. Nov. 21, 2007). In *Junction*, the parties had—like in this case—agreed to release
5 any and all claims known or unknown as of the settlement agreement’s effective date and
6 further reaffirmed their confidentiality obligations. *Id.* at *6. Later, the plaintiff filed suit,
7 alleging misappropriation of trade secrets based on the defendants’ continued use of those
8 secrets. *Id.* at 7. The district court found that the parties’ settlement agreement did not
9 release plaintiff’s “continued use” claims against the defendants. *Id.* The court reasoned
10 that based on the parties’ reaffirmation of their confidentiality obligations in their
11 settlement agreement, “it [was] not clear that [the plaintiff] intended to release claims
12 arising from defendants’ *future use* of trade secrets.” *Id.* Furthermore, the court reasoned
13 that if the agreement had released such claims against the defendant, “the logical extension
14 of this argument is that [the plaintiff] agreed to grant defendants complete immunity from
15 all claims relating their use of [the plaintiff’s] trade secrets.” *Id.* Relying on *Junction*,
16 Plaintiffs now contend that “to dismiss Plaintiffs’ suit entirely because some of
17 Defendants’ initial theft occurred before the Effective Date would fully insulate all of
18 Defendants’ misappropriation and continuing misuse.” (Doc. 29 at 9.)

19 The Court disagrees. As an initial matter, it is not clear how the reaffirmation of
20 confidentiality obligations in the Settlement has a bearing on whether Plaintiffs’ trade
21 secrets claims were released. Aside from pointing out the fact the settlement in *Cadence*
22 lacked a confidentiality reaffirmation, Plaintiffs do not elaborate on why this distinction
23 matters. (Doc. 29 at 10.) Furthermore, for the same reasons stated in *Deerpoint*, the Court
24 here finds that *Junction* is not persuasive. *See* 345 F. Supp. at 1225–26. First, no other court
25 has adopted *Junction*’s above-mentioned reasoning. *Id.* Second, the Court disagrees that
26 dismissing Plaintiffs’ misappropriation claims would fully insulate Defendants’ continuing
27 misappropriation given that Plaintiffs can sue Defendants for breaching their contractual
28 confidentiality obligations—which is what Plaintiffs have done in the instant case in

1 Count IV. *Id.* (“It is possible for plaintiffs . . . to obtain monetary damages and injunctive
2 relief for the subsequent use or disclosure of a trade secret as part of a breach of
3 contract/settlement claim.”); *see also* A.R.S. 44-407 (stating that the AUTSA does not
4 displace or affect “contractual remedies, whether or not based on misappropriation of a
5 trade secret”).

6 Plaintiffs also argue that in *Attia v. Google, LLC*, the Ninth Circuit held that the
7 “continuing misappropriation” language of the DTSA is not relevant to whether the DTSA
8 allows for claims of continued use, but rather is only relevant to when a claim accrues for
9 statute of limitations purposes. 983 F.3d 420, 425 (9th Cir. 2020). But the issue in *Attia* is
10 not the same issue as in this case. In *Attia*, the Ninth Circuit was examining whether a claim
11 of misappropriation that accrued *prior to the enactment of the DTSA* foreclosed the
12 possibility of a DTSA claim arising from the continued use of the trade secret *after DTSA’s*
13 *enactment. Id.* at 425. So, the holding there concerned misappropriation before and after
14 the statute’s enactment—not before and after a release of claims. *Attia* is inapposite.

15 In sum, the Court finds that under both the DTSA and AUTSA the continued
16 improper use or disclosure of a trade secret after a defendant’s initial misappropriation of
17 that trade secret constitutes a “single claim of misappropriation” accruing at the time of the
18 initial misappropriation.⁴ Turning to the pleadings, Plaintiffs’ claims under the DTSA and
19 AUTSA are that Defendants, after improperly procuring trade secrets in 2020 and 2021,
20 continued to possess and use Plaintiffs’ trade secrets after the effective date of the
21 Settlement.⁵ The Court finds that Defendants’ initial misappropriation before the
22 Settlement and their continued misappropriation after the Settlement constitute a single

23 ⁴ The scope of the Settlement, including the parties’ release of claims, is governed
24 by Delaware law. (Doc. 8-4 § 21.) Delaware also follows the “single claim” approach
25 regarding continuing misappropriations of trade secrets. *See Ocimum Biosolutions (India)*
26 *Ltd. V. AstraZeneca UK Ltd.*, No. N15C-08-168 AML CCLD, 2019 WL 6726836, at *16
27 (Del. Dec. 5, 2019) (“Under 6 Del. C. § 2006, a ‘continuing misappropriation constitutes a
28 single claim’ that accrues when the misappropriation reasonably could be discovered. That
‘single claim’ rule means a plaintiff may not bring separate trade secret claims for each use
of the same trade secret, and the single claim [accrues] when the misappropriation was or
could have been discovered.”).

⁵ Plaintiffs do not dispute that their claims for continuing misappropriation are
premised on the allegation that Defendants improperly acquired those trade secrets in 2020
and 2021 *before* the Release. (Doc. 29 at 7; *see e.g.*, Doc. 8 ¶¶ 4–6 8–15, 68–99.)

1 claim. In turn, because these were claims known or unknown as of the effective date of the
2 Settlement, Plaintiffs released these claims. Accordingly, the Court grants Defendants’
3 Rule 12(b)(6) motion to dismiss Plaintiffs’ DTSA and AUTSA claims.

4 **b. Unjust Enrichment**

5 Plaintiffs plead in the alternative a claim for unjust enrichment. Specifically,
6 Plaintiffs allege,

7 Defendants are in possession of and have used arrivia’s
8 valuable confidential information and trade secrets to launch
9 ONE as a competitive business and unfairly compete with
10 Plaintiffs. Through the use of Plaintiffs’ valuable information,
11 Defendants have avoided significant costs and gained a head
12 start. Defendants have retained and continued to use arrivia’s
13 valuable confidential information at Plaintiffs’ expense to gain
14 a competitive advantage and unfairly compete with Plaintiffs.

12 (Doc. 8 ¶¶ 195–96.) Defendants make two arguments for why Plaintiffs’ unjust enrichment
13 claim should be dismissed: (1) Plaintiffs’ unjust enrichment claim based on Defendants’
14 alleged misappropriation of trade secrets is preempted by the AUTSA and (2) Plaintiffs
15 released this claim. (Doc. 24 at 10, 13; Doc. 35 at 8–9.) Plaintiffs respond that the AUTSA
16 does not preempt their claim because the statute “does not displace common-law claims
17 based on the alleged misappropriation of confidential information that is not a trade secret.”
18 Plaintiffs also argue that their unjust enrichment claim was not released, pointing to the
19 same arguments they made for why their misappropriation of trade secrets claims were not
20 released. (Doc. 29 at 12.)

21 The Court need not reach Defendants’ first argument because the Court finds that
22 Plaintiffs released their unjust enrichment claim. As discussed, Plaintiffs released all claims
23 “known or unknown to the parties as of the Effective Date, including but not limited to
24 those in connection with or arising from . . . the subject matters outlined in the [Delaware]
25 Litigation.” In that litigation, Plaintiffs claimed that the Rowleys breached their Restrictive
26 Covenant Agreement with Panda by using confidential information for their personal
27 benefit. (Doc. 25-3 at ¶¶ 96–107.) Plaintiffs alleged the Rowleys were using Plaintiffs’
28 confidential and proprietary information for their own benefit and to unfairly establish their

1 competing business venture, ONE. (Doc. 25-3 ¶¶ 64–70.) Plaintiffs’ unjust enrichment
2 claim in the instant action appears identical to Plaintiffs’ allegations and claims in the
3 Delaware litigation.

4 Moreover, as with their misappropriation of trade secrets claims, Plaintiffs’ claim
5 that Defendants are using and benefiting from Plaintiffs’ confidential information is
6 premised on the allegation that the Defendants improperly acquired that confidential
7 information *prior* to the Settlement. (*See e.g.*, Doc. 8 ¶¶ 68–79.) Yet Plaintiffs expressly
8 agreed in their Settlement that “there is a risk that subsequent to the Effective Date . . . ,
9 each Settling Party may discover, incur or suffer released claims that were unknown or
10 unanticipated at the time of the Effective Date” and that “each Settling Party is assuming
11 the risk of such unknown released claims.” Thus, even if Defendants’ subsequent use of
12 the confidential information was unanticipated at the time of the Settlement, the Plaintiffs
13 were clearly aware at the time of the Settlement of the facts giving rise to this claim.

14 Plaintiffs’ only argument concerning the release of this claim is that their “unjust
15 enrichment claim may proceed like their trade secret claims.” (Doc. 29 at 12.) However,
16 given the Court’s finding that Plaintiffs released their trade secret claims, Plaintiffs’
17 argument fails. Plaintiffs provide no other argument as to why their unjust enrichment
18 claim falls outside the scope of the Release. As such, the Court grants Defendants’
19 Rule 12(b)(6) motion to dismiss Plaintiffs’ unjust enrichment claim.

20 2. Forum-Selection Clause

21 The remaining two claims in Plaintiffs’ complaint are for breach of contract, and
22 these claims are brought only against the Rowleys. The Rowleys contend that pursuant to
23 the Settlement’s forum-selection clause, which requires that any claims arising out of the
24 Settlement be brought in the Delaware Court of Chancery, Plaintiffs’ breach of contract
25 claims are in the wrong forum and therefore should be dismissed under Rule 12(b)(3).
26 (Doc. 24 at 13–14.) Plaintiffs acknowledge that the forum-selection clause applies to their
27 breach of contract claims but argue that to avoid claim splitting between their breach of
28 contract claims and their misappropriation of trade secrets and unjust enrichment claims,

1 the Court should not enforce the forum-selection clause. (Doc. 29 at 14–15.) This argument
2 necessarily fails because the breach of contract claims against the Rowleys are the only
3 claims that remain, and so there is no risk of claim splitting.

4 Plaintiffs also argue that Rule 12(b)(3) is an improper mechanism for enforcing a
5 forum-selection clause and that the appropriate way to enforce such a clause is either
6 through a motion to transfer under 28 U.S.C. § 1404(a) or, for instances in which a forum-
7 selection clause points to a non-federal forum, through the doctrine of *forum*
8 *nonconveniens*. (Doc. 29 at 16–17.) They urge the Court to deny Defendants’ motion or,
9 in the alternative, transfer the case to Delaware. (*Id.*)

10 Plaintiffs are correct that a forum-selection clause cannot be enforced by a motion
11 to dismiss under Rule 12(b)(3). *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of*
12 *Texas*, 571 U.S. 49, 55 (2013). However, the Court disagrees that transfer is appropriate
13 here given that a transfer pursuant to § 1404(a) would send the case to federal court in
14 Delaware, which is still the wrong forum. Plaintiffs even acknowledge that where a forum-
15 selection clause points to a non-federal forum—as in this case—the doctrine of *forum non*
16 *conveniens* is the appropriate mechanism of enforcing the clause.

17 The Court also disagrees that it should deny Defendants’ motion to dismiss merely
18 for a technical deficiency. Rather, in the interest of judicial efficiency and given that
19 Defendants’ motion is in substance a motion to dismiss for *forum non conveniens*, the Court
20 will evaluate whether to dismiss the case based on those grounds. *See Mogannam v. First*
21 *Fin. Merch. Servs.*, No. 15-CV-00827-TLN-CKD, 2016 WL 561813, at *2 (E.D. Cal. Fed.
22 12, 2016); *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) (noting that federal
23 courts have inherent power to dismiss an action on grounds of *forum non conveniens*).
24 Furthermore, Plaintiffs are not prejudiced by the Court construing Defendants’ motion this
25 way given that the Plaintiffs themselves requested transfer to Delaware under § 1404(a),
26 and the standard for granting transfer under § 1404 and dismissing a case on the grounds
27 of *forum non conveniens* are the same. *Atl. Marine Const. Co.*, 571 U.S. at 61 (“[B]ecause
28 both § 1404(a) and the *forum non conveniens* doctrine from which it derives entail the same

1 balancing-of-interests standard, courts should evaluate a forum-selection clause pointing
2 to a nonfederal forum in the same way they evaluate a forum-selection clause pointing to
3 a federal forum.”).

4 In evaluating whether to dismiss for *forum non conveniens*, a court will typically
5 consider private and public interests. *Id.* at 62–63. If, however, the parties’ contract
6 contains a valid forum-selection clause, a plaintiff’s choice of forum merits no weight,
7 arguments about the parties’ private interests are not considered, and only public interests
8 are considered. *Id.* at 63–64. Because public interests “will rarely defeat a [*forum non*
9 *conveniens*] motion, the practical result is that forum-selection clauses should control
10 except in unusual cases.” *Id.* at 64. A forum-selection clause should be enforced unless the
11 resisting party makes a showing that enforcement of the clause is “unreasonable under the
12 circumstances.” *M/S Bremen v. Zapata Off-Short Co.*, 407 U.S. 1, 10 (1972) (internal
13 quotation omitted).

14 The Court finds the forum-selection clause here is enforceable. The only argument
15 Plaintiffs raise as to why enforcing the clause may be unreasonable is that doing so would
16 require Plaintiffs to split their misappropriation of trade secrets and unjust enrichment
17 claims and their breach of contract claims across forums, forcing Plaintiffs to proceed
18 piecemeal. (Doc. 29 at 14–15.) Again, given the Court’s dismissal of the former claims,
19 Plaintiffs’ argument necessarily fails. Plaintiffs make no other arguments for why
20 enforcing the clause is unreasonable under the circumstances. The Court finds that
21 Plaintiffs have not “carried their heavy burden of showing the sort of exceptional
22 circumstances that would justify disregarding a forum-selection clause.” *See Yei A Sun v.*
23 *Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1087–88 (9th Cir. 2018).

24 The Court next evaluates whether public interest considerations weigh against
25 enforcing the forum-selection clause. They do not. “Public-interest factors may include the
26 administrative difficulties flowing from court congestion; the local interest in having
27 localized controversies decided at home; [and] the interest in having the trial of a diversity
28 case in a forum that is at home with the law.” *Atl. Marine Const. Co.*, 571 U.S. at 62 n.6

1 (internal quotation omitted). There is no evidence that any of these factors justifies refusing
2 to enforce the forum-selection clause. Nor do Plaintiffs argue that public interest factors
3 weigh against enforcement of the clause. Thus, given that the forum-selection clause is
4 valid and public interest factors do not weigh against its enforcement, the Court dismisses
5 the remainder of Plaintiffs' complaint without prejudice under *forum non conveniens*.

6 **B. Motion for Sanctions**

7 In addition to their motion to dismiss, Defendants also move for sanctions against
8 Plaintiffs and their counsel for "bringing frivolous claims and initiating this action in bad
9 faith." (Doc. 34.) For the following reasons, the Court denies Defendants' motion.

10 Under Federal Rule of Civil Procedure 11, courts may impose sanctions "when a
11 filing is frivolous, legally unreasonable or without factual foundation, or is brought for an
12 improper purpose." *Estate of Blue v. Cnty. of Los Angeles*, 120 F.3d 982, 985 (9th Cir.
13 1997); Fed. R. Civ. P. 11(b). In those cases, a court may impose sanctions on one or more
14 attorneys, law firms, or parties. *Air Separation, Inc. v. Underwriters at Lloyd's of London*,
15 45 F.3d 288, 291 (9th Cir. 1995); Fed. R. Civ. P. 11(c). However, courts "must exercise
16 extreme caution" when imposing Rule 11 sanctions. *Larez v. Holcomb*, 16 F.3d 1513, 1522
17 (9th Cir. 1994). A complaint is frivolous if it is both legally and factually baseless and is
18 made without reasonable and competent inquiry. *Townsend v. Holman*, 929 F.2d 1358,
19 1362 (9th Cir. 1991). To constitute a frivolous legal position for Rule 11 sanctions, "it must
20 be clear under existing precedents that there is no chance of success and no reasonable
21 argument to extend, modify, or reverse the law as it stands." *Strom v. United States*, 641
22 F.3d 1051, 1059 (9th Cir. 2011) (quoting *Simon DeBartolo Grp., L.P. v. Richard E. Jacobs*
23 *Grp., Inc.*, 186 F.3d 157, 167 (2d Cir. 1999)). A court "should *not* impose Rule 11 sanctions
24 in response to a pleading that makes a 'good faith argument for the extension, modification,
25 or reversal of existing law, and that is not interposed for any improper purpose.'" *Id.*
26 (emphasis added).

27 Separate from Rule 11, a court, under its inherent powers, may impose sanctions for
28 bad faith. Before doing so, however, a "court must make an explicit finding that counsel's

1 conduct constituted or was tantamount to bad faith.” *Primus Auto. Fin. Servs., Inc. v.*
2 *Batarse*, 115 F.3d 644, 648 (9th Cir. 1997) (internal quotations omitted). “A finding of bad
3 faith is warranted where an attorney knowingly or recklessly raises a frivolous argument[]
4 or argues a meritorious claim for the purposes of harassing an opponent.” *Id.* at 649
5 (internal quotations omitted). As with ordering Rule 11 sanctions, imposing sanctions for
6 bad faith is “an extraordinary remedy, one to be exercised with extreme caution.” *In re*
7 *Keegan Mgmt Co, Sec. Litig.*, 78 F.3d 431, 436–37 (9th Cir. 1996).

8 Here, Defendants assert that Plaintiffs’ claims are frivolous because they were either
9 released or brought in the wrong forum. (Doc. 34 at 9.) Defendants argue that “Plaintiffs
10 ran afoul their Rule 11 obligations when they brought [trade secret] claims before this
11 Court that they knew were already released” and that even a “cursory review of the basic
12 statutory provisions of the AUTSA and DTSA” would have revealed to Plaintiffs that their
13 claims were released. (*Id.* at 14.) Not so. Although the Court finds that Plaintiffs released
14 their misappropriation of trade secrets and unjust enrichment claims, the law in this area is
15 not clearly settled. This is evidenced by the fact that both Plaintiffs and Defendants directed
16 the Court’s attention to persuasive—but not binding—authority that supported their
17 respective positions. (*See e.g.*, Doc. 24 at 8–9, Doc. 29 at 8–9.) Just as Defendants urged
18 the Court to adopt the reasoning used in *Cadence*, Plaintiffs made a good faith argument
19 for why the Court should instead adopt the reasoning in *Junction*. As it stands, there is no
20 Ninth Circuit precedent that speaks to this issue of released misappropriation of trade
21 secrets claims—that is whether a party that releases past claims of misappropriated trade
22 secrets also releases claims for the continued misappropriation of those secrets. Thus, it
23 was not clear under existing precedent that Plaintiffs’ claims of misappropriated trade
24 secrets and unjust enrichment stood no chance of success, and so the Court does not find
25 these claims frivolous.

26 Defendants also assert that “Plaintiffs’ claims for breach of the Settlement
27 Agreement were frivolously brought in this Court” given the Settlement’s forum-selection
28 clause. (Doc. 34 at 15–16.) The Court disagrees. Plaintiffs’ forum selection was not, as

1 Defendants argue, “objectively baseless.” Plaintiffs provided a reasonable and legally
2 sound argument, though ultimately unsuccessful, for bringing their breach of contract
3 claims in this Court rather than Delaware. Although Plaintiffs acknowledged that the
4 forum-selection clause covered their breach of contract claims against the Rowleys,
5 Plaintiffs asserted in their complaint that the forum-selection clause did not “govern ONE
6 or the trade secret claims to which the contract issues are closely connected and which
7 involve similar conduct.” (Doc. 8 § 27n.1.) It was reasonable for Plaintiffs to institute their
8 action in Arizona to avoid claim splitting and proceeding piecemeal in their litigation.

9 Finally, Defendants argue that Plaintiffs brought this suit in bad faith—that
10 Plaintiffs knew their trade secrets claims were barred, made false representations of fact to
11 “manipulate their way” into this Court, and knowingly chose to bring their suit in an
12 improper forum. Again, the Court disagrees. As discussed, the Court does not find
13 Plaintiffs’ claims frivolous. Nor is there any evidence that Plaintiffs brought their claims
14 to harass Defendants. Furthermore, though Defendants accuse Plaintiffs of making “false
15 representations,” Defendants do not point to any specific evidence of this, and the Court,
16 upon its own review of the record, finds none.

17 In sum, there is no evidence that Plaintiffs filed their complaint frivolously or for an
18 improper purpose. The Court concludes that Plaintiffs and their counsel neither violated
19 Rule 11 nor engaged in bad faith conduct. Accordingly, the Court denies Defendants’
20 motion for sanctions.

21 C. Attorneys’ Fees

22 Lastly, Defendants seek an award of their reasonable attorneys’ fees and costs
23 pursuant to A.R.S. §§ 12-341.01, 12-341, 12-349, 44-404 and 18 U.S.C. § 1836(b)(3)(D),
24 and Plaintiffs seek an award pursuant to Federal Rule of Civil Procedure 11(C)(2). (*See*
25 Doc. 24 at 14, Doc. 30 at 17.) The parties’ requests are denied without prejudice because
26 neither complies with LRCiv 54.2.

27 **IT IS ORDERED** that Defendants’ Motion to Dismiss (Doc. 24) is **GRANTED** as
28 follows:

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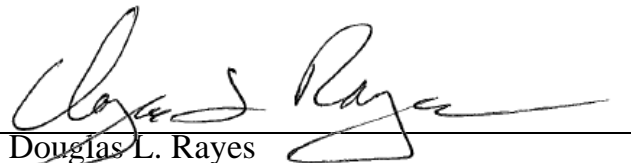
- Plaintiffs’ DTSA claim (Count I), AUTSA claim (Count II), and Unjust Enrichment claim (Count V) are dismissed pursuant to Rule 12(b)(6);
- The Court construes Defendants’ motion to dismiss the remainder of Plaintiffs’ complaint pursuant to Rule 12(b)(3) as a motion to dismiss under *forum non conveniens* and dismisses the remainder of Plaintiffs’ complaint without prejudice to the remaining claims being refiled in the Delaware Court of Chancery.

IT IS FURTHER ORDERED that Defendants’ Motion for Sanctions (Doc. 34) is **DENIED**.

IT IS FURTHER ORDERED that the parties’ respective requests for attorneys’ fees (Docs. 24, 34) are denied without prejudice to the parties moving for those fees in a manner that complies with LRCiv 54.2, if appropriate in light of this disposition.

IT IS FURTHER ORDERED that the Clerk of the Court is directed to terminate the case.

Dated this 8th day of November, 2023.



Douglas L. Rayes
United States District Judge