No. 17-15668

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TOTAL RECALL TECHNOLOGIES,
Plaintiff-Appellant,

v.

PALMER LUCKEY AND OCULUS VR, LLC,
Defendants-Appellees.

On Appeal from a Final Judgment of the
United States District Court for the Northern District of California
Honorable William Alsup
Case No. 3:15-cv-02281-WHA

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, appellee Palmer Luckey states that he is an individual. Appellee Oculus VR, LLC is a limited liability company that is wholly owned by Facebook, Inc.

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INTRODUCTION

This case is nothing more than a failed get-rich-quick scheme. In 2010, Thomas Seidl and Ron Igra formed a general partnership named Total Recall Technologies ("TRT") for the purpose of developing three-dimensional cameras. Seidl provided the technological expertise, and Igra supplied the financing. Seidl then entered into an agreement with defendant Palmer Luckey to develop a prototype for a head-mounted virtual-reality display that could be used to view footage from TRT's 3D video camera. After receiving $798 from Igra to buy parts, Luckey built and sent Seidl prototypes in August 2011 and May 2012. TRT never commercialized any headset.

Around the same time, Luckey invented an entirely separate product called the Rift, a state-of-the-art headset that uses a head-mounted display panel, innovative optics technology, and tracking systems designed to completely immerse the user into a video game or other virtual-reality content. In June 2012, Luckey co-founded defendant Oculus VR, LLC to commercialize the Rift. Oculus was sold to Facebook for more than $2 billion in March 2014.

Igra wanted to "get rich" (his words) off the Rift's success by suing Luckey. But Igra's scheme faced a serious obstacle: The TRT partnership

agreement required that both partners "agree on any action," and Seidl—the partner with the technological know-how, and the only person who had ever interacted with Luckey on behalf of TRT—believed that Igra's proposed lawsuit was frivolous. He repeatedly told Igra: "don't sue Palmer"; "[d]on't go messing things up"; "he does not owe us on a legal level"; "[d]o not take any legal action against [P]almer."

Frustrated, Igra sued Seidl in Hawaii state court in December 2014, alleging that Seidl had wrongfully "asserted his right to 'veto' any legal action by [TRT] to pursue claims against Luckey" and "continue[d] to refuse to authorize" the suit. While that case was pending, Igra filed *this* suit, purportedly on behalf of the TRT partnership, in May 2015. He claimed that the development of the Rift was a "breach of contract and wrongful exploitation of TRT property." In June 2016, the district court granted defendants' motion for summary judgment on all claims, finding the record "clear" that "Seidl did not agree to commence this action," and that "Igra lacked authority" to commence or maintain it on his own. Instead of dismissing the case, however, the court gave Igra an opportunity to cure: The case could proceed if (1) "*both* [partners] authorize and agree to the maintenance of this civil action in the name of [TRT]"; and (2) "*both* ratify all actions taken herein so far."

Igra admitted that he could not satisfy either condition. Instead, he concocted a new scheme that, he asserted, enabled him to authorize the suit unilaterally on behalf of TRT. The TRT partners agreed that Seidl would withdraw from the partnership (but retain all of its assets) and relinquish control over the action (but retain a 30 percent stake in any recovery). The district court concluded that this approach did not "come close" to "cur[ing] the authorization problem" and dismissed the case in March 2017. The court found that Seidl had "studiously refused" to approve the suit—on either a forward- or backward-looking basis—and had thus done nothing to "breathe life into a complaint that had been dead on arrival." As the court explained, Igra's plan "[wa]s a clever smoke-and-mirrors work-around to protect Seidl from ratifying anything while creating an appearance that Igra now controls the partnership."

On appeal, plaintiff raises three challenges to the district court's holding that the suit was unauthorized. Each fails.

First, Igra argues that defendants lack "standing" to contest TRT's authority. There is no such "standing" requirement: Federal Rule of Civil Procedure 9(a) expressly permits a defendant to challenge a plaintiff's authority; this Court has repeatedly recognized a defendant's right to do so; and California courts treat an unauthorized complaint as a legal

nullity that *must* be challenged by the defendant at the risk of waiver. Were the rule otherwise, a partner could sit back and await the outcome of a lawsuit before deciding whether to contest the partnership's authority to sue in the first place—and defendants would have no corresponding opportunity to raise that same challenge.

Second, focusing myopically on a few statements Seidl made during the months preceding this lawsuit, Igra argues that Seidl *did* in fact agree to sue. Igra grossly mischaracterizes Seidl's comments, but it ultimately does not matter: Seidl's undisputed final word on the subject was an unequivocal "no." In February 2015—after all of the statements highlighted in Igra's brief—Seidl told Igra: "*Do not take any legal action against [P]almer*." That was Seidl's last word on the subject before Igra filed this suit. And despite many opportunities in the two years of litigation that followed, Seidl never wavered from that position.

Third, Igra argues that he retroactively ratified the lawsuit after becoming the sole TRT partner. By then it was too late: The statutes of limitation had run on all claims, so the defect in the complaint *could not be cured* under well-settled California law. And Igra's purported ratification was ineffective in any event: Only Seidl, the dissenting partner, could

have cured the defect in the *original* invalid filing and the invalid proceedings that followed. This case remains unauthorized.

Igra's brief is most notable for what it does *not* say. Igra does not mention Rule 9(a); he never quotes Seidl's final communication objecting to any lawsuit; and he disregards the statutes of limitation. The Court should affirm the judgment below.

JURISDICTIONAL STATEMENT

Defendants agree with plaintiff's jurisdictional statement.

STATEMENT OF THE CASE

A. Total Recall Technologies

In 2010, Seidl and Igra formed TRT in Hawaii for the purpose of developing 3D video technology. ER225-26.[1] Seidl had invented a camera designed to make video footage appear three-dimensional, and Igra agreed to invest $19,000 in this technology in exchange for an equal share in its profits. ER7, 142-43, 155. As Igra conceded below, the partnership agreement required both partners to agree on any action undertaken by the partnership:

[1] "ER__" refers to plaintiff's Excerpts of Record. "SER__" refers to defendants' Supplemental Excerpts of Record. "Dkt. __" refers to entries on the district court docket. "PB__" is plaintiff's opening brief.

> Thomas Seidl or Ron Igra has the right to Vito [sic]. This means that ***for any decision regarding the company Ron Igra and Thomas Seidl have to agree on any action*** with the exception of an event laid out in point 20.[2]

ER160 (emphasis added); *see also* SER80 (Igra testifying that "[w]ith the exception of a buy-out, we need to agree on decisions").

B. Palmer Luckey And The Prototype Displays

Shortly after TRT was formed, Seidl contacted defendant Palmer Luckey about developing a prototype head-mounted virtual-reality display that could be used to view footage from Seidl's 3D camera. ER226. Seidl and Luckey later entered into a written contract under which Luckey agreed to build a prototype. ER203-04.[3] The contract's confidentiality provision required Luckey to maintain "Confidential Information" about the prototype in the "strictest confidence for the sole and exclusive benefit of [Seidl]," and to "return to [Seidl] any and all records, notes, and other written, printed, or tangible materials in [Luckey's] possession pertaining to Confidential Information immediately if [Seidl] requests it in writing." ER203. An exclusivity clause provided that Luckey "shall not aid any

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[2] Paragraph 20 relates to partner buy-outs, which are irrelevant here.

[3] The district court assumed without deciding that Seidl made the agreement on behalf of TRT. ER8, 17. Defendants preserve their contrary position. *See* Dkt. 48 at 9-11.

other person or entity in the design of a Head Mounted Display[4] other than [Seidl]. Unless within a twelve month period from 1st July 2011 [Luckey] has not received a minimum payment in royalties of 10,000 US dollars by [Seidl]." ER204.

In August 2011, Luckey shipped a prototype to Seidl with a single display panel. Seidl sent it back, telling Luckey that a single-panel headset was of "no use to [him]." SER68; *see also* ER228. Seidl instructed Luckey to use parts from the initial prototype to make a new, multi-panel headset. Luckey built that headset and sent it to Seidl in May 2012; and Seidl acknowledged receipt. SER68 (Seidl: "[L]ets get the panel out of the [initial prototype] . . . [W]ill need a dual panel [head-mounted display]."); ER100 (Seidl: "Wow just got the [second head-mounted display] from you looks pretty fierce. Nice one."). TRT never launched a head-mounted display using either design. ER34. And Luckey never received any royalty payments under the contract. ER38-39.

C. The Oculus Rift

Luckey designed his own head-mounted virtual-reality display, called the Rift. ER240. The Rift featured, among other things, a single

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4 This term is not defined, and is un-capitalized in other parts of the agreement. *See, e.g.*, ER204.

head-mounted display panel, sensors, and distortion-correction software designed for immersive video gaming. ER240-42. Luckey sent a prototype of the Rift to a videogame developer named John Carmack, who presented it at a public showcase. ER229-30. Luckey then registered Oculus LLC, which was later incorporated as Oculus VR, Inc. and ultimately re-registered as defendant Oculus VR, LLC ("Oculus"). ER17.

D. Seidl's Refusal To Sue Luckey And Oculus

In December 2013, after the Rift's substantial financing became public (ER17), Igra sensed an opportunity and asked Seidl for a copy of his agreement with Luckey. Seidl complied via the following email:

> Here is the [P]almer [Luckey] contract.
>
> DO NOT CONTACT HIM OR START ANY LEGAL ACTION WITHOUT TALKING TO ME FIRST.
>
> We need him. Much more useful as an ally.

SER108.

Two months later, Seidl repeated this admonition over Skype:

> [Igra]: Hi Tom. As I mentioned on Friday, I need to talk to you about our case with Palmer Luckey. . . . I'm going to give you until 5 pm tomorrow to respond to me and if I don't get your cooperation, I will take legal action against you as well.
>
> [Seidl]: Sure take legal action aghainst [sic] me and see what happens. [W]hat are you going to sue me for? . . . *[A]s I told you don't sue [P]almer*.

SER112 (emphasis added).

In March 2014, Facebook announced that it would acquire Oculus for over $2 billion. ER230-31. Igra sent Seidl a Skype message: "I want to go after [Luckey] right away. . . . If you cooperate . . . we can both get rich." SER113. Seidl responded: "[M]y views on taking [P]almer to court are the s[a]me as before"; "it makes bad financial sense for you and me." SER114.

Igra nevertheless retained Robert Stone of Quinn Emanuel Urquhart & Sullivan LLP to advise him on a potential lawsuit against Luckey. ER18. In July 2014, Igra emailed Seidl again:

> I hope you will cooperate with me on this and *withdraw your veto* and give us your support . . . .
>
> The way I see it is that you have . . . 2 options:
>
> 1. If you cooperate with us on this case against Palmer we can get rich from a damage settlement and I promise to make it worthwhile for you in the future business we will be doing together.
>
> 2. You choose not to cooperate—in which case I will go to great effort to get what I feel belongs to me and we will both waste time and money fighting against each other in court and veto actions.

SER125 (emphasis added). Unmoved by Igra's "get rich" proposal, and dubious about the basis for any suit, Seidl responded:

> My thoughts on the vito [sic] have not changed. . . .

> *You said Palmer breached the contract, where was that? You said Palmer stole our ideas, which ideas were those?*

SER124 (emphasis added).

The next month, Seidl reiterated his position over Skype:

> [Igra]: Don't you think you should have heard all the facts about our case before making a decision to veto it?
>
> [Seidl]: I already heard all the facts from the many conference calls I did with your attorney. They have two claims . . . A) We had an exclusivity contract, *which your own attorney says we did not* when I talked to him, B) Gave them confidential information, *which we did not*, be specific. If that's the best you got, then *we have nothing* and have to work using Palmer as a friend not someone we can s[ue]. . . . You carry on th[is] way with threatening Palmer you will burn the one advantage we have from dealing with Palmer, that he feels he owes on a moral level. ***Because he does not owe us on a legal level.*** *Don't go messing things up*.

SER128 (emphases added).

In December 2014, Igra sued Seidl in Hawaii state court, seeking either specific performance compelling Seidl to authorize a suit against Luckey or divestment of Seidl's veto power.[5] ER141-52. Igra alleged that

[5] This was Igra's second suit against Seidl in Hawaii. He had filed an action in April 2014 seeking certain documents related to Seidl's agreement with Luckey. SER115-21. Seidl provided the documents, and Igra dismissed the action. SER143. All references to the "Hawaii action" refer to the second action.

Seidl had "*asserted his right to 'veto'* any legal action by [TRT] to pursue claims against Luckey," and that he "ha[d] and continue[d] to *refuse to authorize* [Igra] . . . to pursue [TRT's] legal claims." ER145-46 ¶¶ 31, 37 (emphases added). Seidl filed an answer with generalized denials of these allegations. *See* ER136 ¶¶ 20, 25 ("Answering the allegations contained in [these] paragraphs . . . of the Complaint, Seidl denies the allegations.").

The partners met again on January 18. ER19-20. Igra wanted to sue Luckey and Oculus unless Facebook made an offer to acquire TRT within two weeks. Seidl—continuing to believe that any lawsuit would be baseless—wanted to see whether Luckey would arrange a meeting in which the partners could demonstrate TRT's camera technology to Facebook. *Id.* That night, Seidl sent Igra "minutes" of the meeting stating that Seidl would write a letter to Luckey seeking to arrange a demonstration while preserving TRT's "legal rights." ER130.

Igra responded the following morning with a correction to Seidl's minutes: "If we do not receive a significant offer [to acquire TRT] within 2 weeks you agreed to cooperate with the lawsuit against Palmer/Oculus." ER129. Seidl immediately disputed Igra's characterization:

> About the 2 weeks, let's see how fast we get to [Facebook CEO Mark Z]uckerberg. . . . We can play by ear. But I assure you. If we get[] *nothing* from

> Palmer *prior to the end date to file*. I will file. I cant believe you think I am that stupid. Is all about how [P]almer responds. If we get *zero feedback* from Palmer after 2 weeks we go there lawyered up to [F]acebook. We have to see how fast to [Z]uckerberg. *That is the goal.*

ER128 (emphases added).

Later that day, Igra emailed back: "We agreed to wait 2 weeks for a response and there will be no extensions unless there is an offer or a very positive sign of getting one. Let us not forget that we can still negotiate a buyout after the complaint has been filed and our leverage will also be much better." *Id.* Seidl replied: "Happy with that. If *no positive signs* in 2 weeks of contacting [Luckey]." ER127 (emphasis added). Seidl also noted that Igra had "agreed to go see an independent attorney to evaluate the case." SER45. "You should do that," Seidl said, "before making any legal play towards [P]almer." *Id.*

Two days later, after Seidl admonished Igra for discussing the lawsuit with one of Igra's friends, Igra emailed Seidl that he was "[v]ery disappointed to see that [Seidl had] zero intention of cooperating with . . . the lawsuit." SER55. The next day, he wrote Seidl that he had "spent all last night awake in bed thinking about [the] meeting" and "concluded that there [was] no intent on [Seidl's] part to cooperate in the case against Palmer." SER54.

Sometime in February 2015, both Igra and Seidl contacted Luckey about arranging a demonstration of TRT's camera technology. ER21. On February 22, Seidl reiterated to Igra that Seidl's priority was a business deal with Luckey: "We don't need legal action against [P]almer for a deal. . . . Stop wasting my time." SER63. Seidl then wrote: "Again. ***Do not take any legal action against [P]almer***." SER61. Igra acknowledged Seidl's veto: "[Y]our refusal to cooperate in making our legal claims against Luckey [is] stopping the partnership from getting what it is rightfully due." SER62. That was the partners' last discussion about the lawsuit before Igra filed it.

On February 24, 2015, Seidl asked Luckey to sign a letter—which Igra had demanded—about the planned camera demonstration that would acknowledge TRT's reservation of its right to sue under the 2011 contract between Seidl and Luckey. SER34-38. Luckey instead sent Igra and Seidl the standard form Oculus nondisclosure agreement. SER39. Igra insisted that Luckey sign a rider stating that the planned demonstration would not waive TRT's right to any claim against Luckey or Oculus. SER39-41. Luckey declined, ending the discussions. SER42, ER22.

E. Igra's Complaint And Defendants' Motion to Dismiss

In May 2015, Igra commenced this action in TRT's name. ER271-74.[6] The complaint alleged that Luckey breached his contract with Seidl, and committed various torts, by disclosing unspecified details about the original prototype display to third parties, "design[ing] and commercializ[ing]" the prototype, and failing to return it to TRT. ER228, 240. As first amended, the complaint asserted six claims: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) conversion; (4) constructive fraud; (5) common law unfair competition; and (6) violation of California's Unfair Competition Law. ER243-47.

Shortly after learning about the lawsuit, Seidl told Luckey that the suit was filed "without my knowledge or permission . . . . What [Igra] has done seems to be illegal to me. I have not signed anything or let him take action against you." SER131. Seidl reiterated at his deposition in this case that Igra filed the suit without his consent. SER96 ("Q. Did you ever tell Ron Igra that you agreed [TRT] could file a complaint against Palmer Luckey and Oculus VR? . . . [A]. No."); SER97 ("I believed [the lawsuit] to

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[6] Because Seidl never authorized the lawsuit on behalf of TRT, we refer to Igra when discussing the plaintiff here—as the district court did below. *See, e.g.*, ER6, 12, 14.

be illegal, and I stand by that."); SER98 ("there was a veto against Igra at the time, preventing him from filing the case").

Defendants moved to dismiss under Rule 12(b)(6). ER278. The district court found Igra's contract claim "barely" "plausible" but permitted it to move past the pleading stage. ER38-39.[7] The court dismissed the implied-covenant claim as duplicative of the contract claim. ER40-41. It dismissed the conversion claim—which was based on Luckey's alleged retention of the first prototype—because Seidl "*voluntarily* dispossessed himself . . . of the prototype by returning it to Luckey," and never "demanded its return." ER43. And the court dismissed the claims for constructive fraud and unfair competition as insufficiently pleaded. ER44, 46-47. By leave of the court (ER47), Igra filed a second amended complaint that included the contract, constructive-fraud, and unfair-competition claims (ER224-35).

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[7] Igra claimed that Luckey breached the contract's exclusivity provision. ER243. As discussed above (at 6-7), this provision imposed duties on Luckey "*[u]nless* within a twelve month period from 1st July 2011 [Luckey] ha[d] not received" a $10,000 royalty payment. ER204 (emphasis added). The court found it "clear that zero payment was ever made." ER39. And it explained that "[t]he use of the word 'unless' tend[ed] to support Luckey's" argument that the "payment . . . was a contingent event that had to occur before the exclusivity and nondisclosure obligations could take effect." ER38. The court concluded, however, that a "grammatical defect in the provision render[ed] it ambiguous," and that a contrary reading was "plausible (if barely so) at the Rule 12 stage." ER39.

Defendants answered the second amended complaint, asserting that "the TRT Partnership Agreement requires the agreement of both partners as to all actions of the Partnership, including the filing and advancement of this lawsuit, and Seidl has not agreed to TRT's filing or advancement of this lawsuit." ER267-68.

F. The District Court's Grant Of Summary Judgment Based On TRT's Lack Of Authorization

In April 2016, the district court issued an order to show cause ("First OSC") expressing "concerns that [TRT] lacks standing to assert any claims in this case" because of Seidl's refusal to authorize the action. SER138.[8] The court ordered the parties to show cause why the case should not be stayed "until such time as Seidl files herein an executed ratification of the complaint and all actions taken by counsel herein (as if approved from the outset)." SER139.

Defendants then moved for summary judgment, arguing that TRT lacked authority to commence this action. Dkt. 174. Igra conceded that he was "unable to obtain a declaration from Mr. Seidl" ratifying the suit

[8] The parties had advised the district court that the Hawaii action would go to trial in May 2016. The court permitted this suit to progress, "thinking that the authorization issue would be resolved before an inordinate investment of time was made." ER22. But Seidl and Igra then stipulated to postpone the Hawaii trial until December—beyond the scheduled date of the trial for this action—prompting the First OSC. *Id.*

(SER136), but contended that (a) Seidl agreed to sue during his emails with Igra in January 2015; and (b) defendants lacked "standing" to challenge TRT's authority (Dkt. 178 at 10-17). The court stayed the case except for proceedings related to the summary judgment motion. SER133.

On June 6, 2016, the district court conditionally granted summary judgment to defendants, rejecting Igra's "standing" argument (ER27) and finding the evidence "clear" that "Seidl did not agree to commence this action" and "maintains his objection today" (ER23). Thus, "Igra lacked authority to cause TRT to commence or to continue this litigation." ER25.

Instead of dismissing the case immediately, the court gave plaintiff "an opportunity to cure the authorization problem":

> [T]he stay . . . will remain in effect (i) until such time as Ron Igra and Thomas Seidl . . . file [ ] sworn declarations herein *affirmatively and without qualification stating that both authorize and agree to the maintenance of this civil action in the name of [TRT] against [defendants], that both ratify all actions taken herein so far on behalf of [TRT], and that both consent to continued prosecution of the case by [Quinn]*, or (ii) until such time as a final order arrives from the Hawaii courts to the same legal effect.

ER29-30 (emphasis added).

G. Seidl's Failure To Ratify And The Court's Dismissal Of The Suit

The Hawaii action settled. Seidl's settlement conference statement reiterated his opposition to this lawsuit, explaining (a) Seidl's "concerns about the likelihood of success of a case against Mr. Luckey"; (b) that Seidl also "had reasonable business reasons for not agreeing to file suit"; and (c) that Igra had retained Quinn "without Mr. Seidl's authorization." SER5-6. On October 14, 2016, Igra and Seidl attended a settlement conference in Hawaii court and reached a resolution in principle, which was reduced to writing on November 28. ER82; SER15. On December 5, the parties stipulated to dismissal of the Hawaii action. SER1-2.

The settlement provided that Seidl would "withdraw from the TRT partnership," effective October 14, 2016, and consequently would "have no control over TRT or any decision-making rights with respect to TRT." ER50. The instant "California Lawsuit" against Luckey and Oculus would "remain the property of TRT" and Seidl would "have no right to control any aspect of [this suit]." *Id.* The agreement also required Seidl to testify in this case in a manner "generally [ ] consistent with his [deposition] testimony," to "reasonably cooperate with counsel for TRT," and to refrain from "communicat[ing] with or otherwise cooperat[ing] with counsel for Luckey or Oculus." ER51. In return, Igra agreed (1) to pay Seidl 30

percent of any "recovery as a result of the California Lawsuit"; (2) "to convey to Seidl all [intellectual property] . . . relating in any way . . . to TRT"; (3) to "assign to Seidl all other tangible and intangible assets of TRT" (except for the rights to this lawsuit and the TRT name); and (4) to "defend and indemnify Seidl for fees, costs, monetary penalty or other liability arising out of the California Lawsuit." ER51, 53.

Seidl concurrently executed a declaration noting his prior withdrawal from TRT and his "understanding" that he was therefore unable to control this suit. ER84. But he provided no ratification of the suit, either on a backward- or forward-looking basis. Nor did he mention his ongoing financial stake in the case or his ownership of virtually *all* of TRT's assets.

In December 2016, upon learning of the stipulated dismissal of the Hawaii action, the district court issued a second order to show cause requiring the parties to submit sworn declarations why the case should not be dismissed. SER32-33. In response, Igra filed Seidl's declaration and one of his own. ER82.[9] Finding that Seidl "didn't stand by a thing"

[9] Igra's declaration used the exact ratification language that the district court had demanded (ER82)—underscoring that Igra understood what was needed but failed to secure the required declaration from Seidl.

(SER27), in January 2017 the district court issued a third order to show cause why the case should not be dismissed (SER31).

Igra conceded that Seidl never ratified the lawsuit and that TRT never complied with the court's summary judgment ruling, but argued that the settlement rendered "unfounded" the court's "concerns about Seidl's ratification." Dkt. 204 at 1, 11-12. The defendants responded that TRT lacked authority because Seidl failed to ratify the suit and that Igra's claims were now time-barred in any event. Dkt. 206.

The court dismissed the action in March 2017, concluding that because Seidl had not "come close" to ratifying the case, the suit "remained improper from the outset." ER12. The court found Igra's approach to be nothing more than "a clever smoke-and-mirrors work-around to protect Seidl from ratifying anything while creating an appearance that Igra now controls the partnership." ER13. It "d[id] nothing to carry us back to the moment of time of the filing of the original complaint to fix the defect that plagued the action from the start." ER14. And Igra's approach created additional problems because "Seidl retain[ed] a thirty percent stake in any recovery" while avoiding any exposure "to the risk of liability for costs and possible sanctions." ER12-13. Because "Seidl ha[d] ***followed one fixed***

star—give no blessing whatsoever to this lawsuit"—the action could not proceed further. ER14 (emphasis added).

STANDARD OF REVIEW

This Court "review[s] a district court's grant of summary judgment de novo," "asking whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Crowley v. Nevada*, 678 F.3d 730, 733 (9th Cir. 2012). The Court "review[s] de novo a district court's dismissal for failure to state a claim upon which relief can be granted," *Puri v. Khalsa*, 844 F.3d 1152, 1157 (9th Cir. 2017), asking whether the complaint "contain[s] sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This Court may affirm the judgment below on any ground supported by the record, "even one not relied upon by the district court." *Democratic Party of Haw. v. Nago*, 833 F.3d 1119, 1122 (9th Cir. 2016).

SUMMARY OF ARGUMENT

I

The district court correctly entered judgment in defendants' favor because plaintiff was not authorized to bring this lawsuit.

A

Igra's lead argument on appeal is that defendants lacked "standing" to contest TRT's authority to sue. His argument fails as a matter of federal law, California law, and fundamental principles of fairness.

1. Federal Rule of Civil Procedure 9(a) is dispositive: It specifically permits a defendant to challenge "a party's authority to sue" by making a "specific denial" of such authority. This Court has repeatedly recognized a defendant's right to mount such a challenge at either the pleading stage or the summary judgment stage. Defendants did so at *both* stages, yet Igra ignores Rule 9(a) entirely, as he did below.

2. To the extent California law bears on this issue, it yields the same outcome. For more than 100 years, the California Supreme Court has recognized a defendant's right to challenge a plaintiff's authority to sue. That is no surprise, because California law treats a complaint filed by an unauthorized party as a legal nullity.

3. It would be grossly unfair to preclude a defendant from challenging a plaintiff's authority. As the district court observed, a defendant has a compelling interest in determining "who can act for and bind [a] partnership." ER26. If a defendant were unable to mount such a challenge, a plaintiff could wait and see how the litigation turned out

before deciding whether to be bound by the outcome—and the defendant would be powerless to prevent it from doing so.

B

Igra does not (and cannot) dispute that Seidl objected to the lawsuit at the outset and steadfastly maintained his objection for months afterward. But he argues that Seidl agreed to sue during a two-day email exchange with Igra in January 2015. That is both wrong and irrelevant.

1. It is wrong because even Igra acknowledged immediately after the exchange that Seidl had "zero intention of cooperating with . . . the lawsuit." SER55. At most, Seidl was willing to consider suing only if there were "no positive signs" within two weeks of contacting Luckey. ER127. Those signs *did* occur: Luckey responded, and the parties began arranging a demonstration of their camera technology to Facebook.

2. The January 2015 exchange is irrelevant. Under California law, an agent (including a partnership) must be authorized to act at the time the action takes place. And the TRT partnership agreement—which is worded in the present tense—required the partners to "agree" on "any action" at the time it was taken. There was no such agreement when the suit was filed. Seidl's last word on the subject to Igra—on February 22, 2015—was unequivocal: "Do not take any legal action against [Luckey]."

SER61. Igra never quotes this statement or Seidl's testimony at his deposition that he thought the lawsuit was filed illegally.

C

Igra argues in the alternative that Seidl ratified the lawsuit by relinquishing his control over the partnership in connection with the Hawaii settlement. This argument, too, is meritless.

1. By the time of the Hawaii settlement, Igra's claims could not be revived. Under California law, a complaint filed by an unauthorized plaintiff does not toll the statute of limitations; if the limitations period runs before the action is revived, the action is time-barred. Igra conceded below that he and Seidl learned of defendants' alleged breaches "no later than September 7, 2012." SER20. Because the longest limitations period for any of Igra's claims is four years, the latest date that the statute of limitations would have run was September 7, 2016—well before the settlement. Igra's brief does not address this issue.

2. Even if the complaint could have been retroactively ratified, Igra's attempt to do so was ineffective. As the district court ruled, only Seidl's ratification could address the problem that all prior proceedings were conducted without a legally cognizable plaintiff. Indeed, the Hawaii settlement does not even truly solve the authorization problem going

forward, because it indemnifies Seidl from any liability stemming from the litigation, while simultaneously transferring all of TRT's asserts to him and giving him a substantial stake in the outcome. That arrangement is highly prejudicial to defendants—foreclosing revival of the suit under California law—because it effectively deprives them of any ability to seek costs and sanctions from a solvent party. This suit remains a nullity.

II

A

The district court correctly dismissed Igra's conversion claim because Igra failed to establish that Luckey "wrongfully dispossessed" TRT of the initial prototype headset. Luckey's contract with Seidl required him to return "tangible materials" related to the agreement only if Seidl "*request[ed]*" such materials "*in writing*." Seidl voluntarily sent the prototype to Luckey, and never requested its return.

In any event, the record now makes clear that after Seidl sent the original prototype to Luckey, Luckey *did* send Seidl a second multi-panel prototype that was built using parts from the first prototype; and Seidl *acknowledged receipt* of that headset. Any amendment to the complaint would be futile.

B

The district court also correctly dismissed Igra's claim based on the implied duty of good faith and fair dealing. Under California law, an implied-covenant claim cannot serve as an independent basis for liability if it is founded on a breach of the underlying contract terms. The sole basis for Igra's claim was that Luckey "frustrated" his written agreement with Seidl by "falsely promising" to perform the very duties that he supposedly undertook through the express terms of the contract.

ARGUMENT

I. THE DISTRICT COURT PROPERLY ENTERED JUDGMENT IN DEFENDANTS' FAVOR BECAUSE PLAINTIFF LACKED THE AUTHORITY TO BRING THIS LAWSUIT.

The district court entered judgment in defendants' favor because, under the agreement governing the partnership, TRT lacked the authority to bring this case. Hawaii law, California law, and federal law each plays a separate role in the Court's review of this decision.

The parties and the district court agreed below "that the law of Hawaii—the place of formation for TRT and its home—controls" the internal governance of the TRT partnership. ER25. "Partnership liability is rooted in agency principles." *Fujimoto v. Au*, 95 Haw. 116, 158 (2001). Hawaii law normally empowers a partner to act as an agent of the

partnership for business purposes, without seeking unanimous approval of all partners. *See* Haw. Rev. Stat. § 425-112. A partnership may, however, set aside these default rules by written agreement. *See id.* § 425-103(a).

TRT did just that: The parties agree "that the partnership agreement, not the default rules [of Hawaii law], controls the governance of the [TRT] partnership." ER25. Most pertinently, the agreement provides that "for any decision regarding the company Ron Igra and Thomas Seidl have to agree on any action." ER160; *see* ER25. And Igra conceded below that this provision means exactly what it says. *See* SER80 (Igra: "With the exception of a buy-out, we need to agree on decisions.").

The parties further agree that the law of California—the forum State—controls the effect of the partnership agreement on TRT's ability to sue. *See* ER24-25 ("Both sides . . . agree that California law controls the threshold capacity and authority issues."); Fed. R. Civ. P. 17(b)(3). Under California law, two closely related concepts bear on a party's power to sue: authority and capacity. "Authority . . . is the right to exercise power on behalf of [a] represented entity"; "capacity . . . refers to the qualification of a party to litigate in court." 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1292 (3d ed. 2017). California courts commonly use these terms interchangeably, and their legal effect is

identical: A complaint filed by a plaintiff lacking authority or capacity is "a legal nullity." *Wilson v. Del Norte Cty. Local Agency Formation Comm'n*, 2011 WL 1376594, at *5 n.4 (Cal. Ct. App. Apr. 12, 2011).[10] As the district court explained, "a partner can only act within the scope of his or her authority as allowed by the partnership agreement." ER25-26.[11]

Finally, in this diversity case, a defendant's procedural right to challenge a plaintiff's authority or capacity is governed by the Federal Rules of Civil Procedure. *See De Saracho v. Custom Food Mach., Inc.*, 206 F.3d 874, 878 (9th Cir. 2000) ("A defendant must challenge a plaintiff's authority to sue by making a 'specific negative averment' [under Rule 9(a)]."); *see also Cuprite Mine Partners LLC v. Anderson*, 809 F.3d 548, 554 (9th Cir. 2015) ("Under the *Erie* doctrine, federal courts sitting in diversity

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[10] *See, e.g.*, *Smith v. Cimmet*, 199 Cal. App. 4th 1381, 1387 (2011) ("[Plaintiff] lacks capacity to sue in California because his authority does not extend beyond Oregon." (internal quotation marks omitted)); *Paradise v. Nowlin*, 86 Cal. App. 2d 897, 898 (1948) (filing by corporation was "void by reason of the corporation's lack of power to represent itself"); *Davis v. Rudolph*, 80 Cal. App. 2d 397, 410 (1947); *see also CLD Constr., Inc. v. City of San Ramon*, 120 Cal. App. 4th 1141, 1150 (2004) ("[A] corporation . . . has the capacity, or legal authority, to sue.").

[11] We agree with Igra (PB18 n.5) that the term "authority" fits better here because partnerships generally have the capacity to sue. But the distinction is immaterial: Whether the case turns on Igra's "authority" to sue in TRT's name or TRT's "capacity" to sue, the complaint was a nullity because it was filed without Seidl's agreement.

apply . . . federal procedural rules."). "[I]f a litigant properly raises [the] issue, . . . the party-opponent must offer facts establishing its capacity [or authority] to sue." FEDERAL PRACTICE & PROCEDURE § 1292.

In accordance with these principles, the district court's decision should be affirmed for three reasons. First, defendants had every right to challenge TRT's authority to sue. Second, TRT lacked authority to commence the suit because Seidl did not agree to it. Third, Igra's attempt to retroactively ratify the suit was untimely and ineffectual.

A. Defendants Had The Legal Right To Challenge TRT's Authority To Bring This Lawsuit.

Igra argues that defendants lacked "standing" to challenge TRT's authority. PB13-19. Before turning to that argument, we address a red herring in Igra's brief. He repeatedly asserts that the relevant question is whether defendants had standing to *exercise Seidl's veto*, relying on cases holding that third parties have no standing to enforce a contract.[12] The district court rightly rejected this obfuscation: "[D]efendants . . . do not seek to assert rights under the partnership agreement, so Igra's

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[12] *See, e.g.*, PB1 ("The threshold error committed by the district court was allowing Defendants to step into the shoes of one partner and assert that partner's veto rights."); PB14 ("Defendants . . . lack standing to assert [ ] a veto. . . . [I]t is generally presumed that third parties do not have the right to step into the shoes of one partner and assert his or her rights.").

authorities are inapposite. Defendants instead challenge the capacity and authority of TRT to sue them." ER29. In other words, defendants have never attempted to assert Seidl's veto; they challenged TRT's authority to sue in light of that veto.

If Igra's argument is that defendants lacked "standing" to mount *that* challenge, he is wrong: Under the federal rules, California state law, and basic fairness principles, a defendant has a clear right to challenge a plaintiff's authority to sue.

1. Rule 9(a) Disposes Of This Issue.

The "standing" issue begins and ends with Rule 9(a)—which goes unmentioned in Igra's brief. Rule 9(a) expressly permits a defendant to challenge "a party's authority to sue or be sued," or "a party's capacity to sue or be sued," by making a "specific denial" of such authority or capacity. Defendants' answer asserted that "the TRT Partnership Agreement requires the agreement of both partners as to all actions of the Partnership, including the filing and advancement of this lawsuit, and Seidl has not agreed to TRT's filing or advancement of this lawsuit." ER267-68. Defendants then challenged TRT's authority again in their motion for summary judgment. Dkt. 174. Nothing more was required; once defendants "properly rais[ed]" the issue, TRT had to "offer facts"

establishing its authority, FEDERAL PRACTICE & PROCEDURE § 1292, and the district court had to evaluate those facts and resolve the question.

This Court has repeatedly recognized a defendant's right to challenge a plaintiff's authority to sue under Rule 9(a). In *De Saracho*, the Court explained that "[a] defendant m[ay] challenge a plaintiff's authority to sue by making a 'specific negative averment'" in either an answer or a motion for summary judgment. 206 F.3d at 878. And in *In re Raffin*, 284 F. App'x 405 (9th Cir. 2008), this Court affirmed a grant of a defendant's "motion for summary judgment asserting [the plaintiff's] lack of authority to initiate th[e] suit" under Rule 9(a). *Id.* at 406-07.[13]

Igra offers a single federal case in support of his position: *Delbon Radiology v. Turlock Diagnostic Center*, 839 F. Supp. 1388 (E.D. Cal. 1993). PB15-16. There, the defendants argued that a partnership lacked authority to bring a suit because one of the partners had objected to it. 839 F. Supp. at 1391. The plaintiffs attacked the defendants' "standing" to

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[13] *See also, e.g.*, *Farina Focaccia & Cucina Italiano, LLC v. 700 Valencia St. LLC*, 2015 WL 4932640, at *5 (N.D. Cal. Aug. 18, 2015) (acknowledging defendant's ability to "raise the issue of capacity to sue . . . 'by a specific denial,'" but holding that plaintiff had capacity under state law); *Deirmenjian v. Deutsche Bank, A.G.*, 2006 WL 4749756, at *30 (C.D. Cal. Sept. 25, 2006) ("The complaint alleges that the plaintiff was and still is a limited partnership. . . . If defendant wishes to controvert plaintiff's . . . capacity to sue . . . , he may do so . . . as provided by Rule 9(a).").

raise this challenge, relying solely on a treatise stating that a defendant's "only properly cognizable concern [about a partnership's lack of authority] is avoiding multiple suits on the same claim." *Id.* at 1392 (quoting *Bromberg & Ribstein on Partnership* § 5.01(d) at 5:7 (1991)). After quoting from the treatise, the district court found that there was "no risk of multiple suits" because the dissenting partner had been named as a necessary party in the action and had released any separate claims of liability. *Id.*

Delbon does not help Igra. It neither addressed Rule 9(a) nor cited any authority other than the *Bromberg* treatise (which itself cited no authority at that time, and now cites only *Delbon*). To the extent *Delbon* was ever good law, it has been abrogated by *De Saracho*.[14]

2. California Law Likewise Entitled Defendants To Challenge Plaintiff's Authority.

Defendants invoked Rule 9(a) below (Dkt. 174 at 9), but the district court did not apply it, apparently treating the "standing" question as one of California state law. *See* ER26. It found that although no California case had "directly addressed" this issue in the context of a "partnership's

[14] In any event, as the district court explained, *Delbon* is distinguishable: "Unlike the dissenting partners in *Delbon*, Seidl has not been named as a party herein and he has not released claims against [the] defendants." ER28 (emphasis omitted)

. . . lack of authority," California cases "in other contexts [we]re instructive" and consistently favored defendants' position. *Id.* While application of California law appears to have been unnecessary, given Federal Rule 9(a)'s explicit assurance of a defendant's right to challenge a plaintiff's authority, it yields the same result.

California courts have long recognized "[t]he right of a defendant to move to dismiss a suit for lack of authority." *People v. Madden*, 133 Cal. 347, 348 (1901). Indeed, such a challenge "*must* be raised by defendant at the earliest opportunity or it is waived." *Cal-Western Bus. Servs., Inc. v. Corning Capital Grp.*, 221 Cal. App. 4th 304, 312 (2014) (emphasis added); *see also Smith v. Cimmet*, 199 Cal. App. 4th 1381, 1390 (2011) (same).

This principle is one of broad and general applicability. Over a hundred years ago, the California Supreme Court held in *Madden* that the rule applies to all "kinds of agency." 133 Cal. at 348. The California courts of appeal have since applied it in many contexts. In *Pillsbury v. Karmgard*, 22 Cal. App. 4th 743 (1994), for example, the court affirmed the dismissal of a case because the plaintiff, a trust beneficiary, lacked the authority to sue on the trust's behalf—rejecting the plaintiff's argument

that the "defendants lacked any standing to litigate" this "internal trust affair." *Id.* at 757, 763-64.[15]

The district court also relied on *Anmaco, Inc. v. Bohlken*, 13 Cal. App. 4th 891 (1993), a suit brought in the name of a corporation by one of its shareholder-directors against the other. The court permitted the defendant to challenge the plaintiff's authority: "Pressing the corporation into litigation as a plaintiff is inappropriate where the other shareholder-director could claim equal authority to bring suit in the corporate name." *Id.* at 900.[16]

Most recently, in *V&P Trading Co. v. United Charter, LLC*, 212 Cal. App. 4th 126 (2012), the court permitted the defendant to challenge a plaintiff corporation's capacity to sue when its corporate status had been suspended. *Id.* at 129. Igra argues that "*V&P*—unlike the present case—concerns 'capacity' to sue" rather than authority to sue, and "[i]t is

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[15] Igra contends that "[t]he issue in *Pillsbury* had nothing to do with contractual relationships between partners" (PB17), but fails to explain why that distinction would have made any difference to the outcome.

[16] Igra seeks to distinguish *Anmaco* on the ground that the party challenging the plaintiff's authority was part of the corporation rather than a "third party." PB18. But the court did not rely on that fact in reaching its decision, and a similar rationale applies here: Igra's insertion of TRT "into litigation as a plaintiff is inappropriate where [Seidl] could claim equal authority to [settle] in [TRT's] name." 13 Cal. App. 4th at 900.

hornbook law that a partnership may sue or be sued in the name of the partnership." PB18 & n.5. This argument is frivolous for several reasons. First, Rule 9(a) allows a defendant to challenge *either* "a party's capacity to sue" *or* its "authority to sue." Second, as discussed above (at 27-28), the effect of these doctrines is identical under California law: any complaint is a nullity. Third, the argument is not that TRT is *per se* forbidden to sue; it is that *Igra* lacks the authority to sue in TRT's name because he did not obtain the unanimity required by his partnership agreement.

3. Defendants Have A Compelling Interest In Testing A Plaintiff's Authority To Sue.

It is unsurprising that federal and state law are in accord: It would be grossly unfair to preclude a defendant from challenging a plaintiff's authority to sue. For one thing, as the district court observed, "parties being sued have a legitimate need to determine if a suit has been properly authorized by a plaintiff entity"; otherwise, "one partner could cause a partnership to sue while another partner could cause it to settle and release the very same claim." ER27. That result "would be absurd": In crafting their litigation strategy and engaging in settlement negotiations, a defendant "need[s] to be able to know who can act for and bind the partnership," and "who has authority to settle a case." ER26-27.

Even worse, if Igra were right about the law, a partner would be able to sit back and see how a suit turns out before deciding whether to be bound by the outcome. The district court suspected that Seidl was engaging in that very tactic, and found it "unacceptable":

> It seems clear to the Court that Seidl has not approved our pending litigation and is waiting to see how it plays out. If [TRT's] case is a winner, then we can likely expect Seidl to ratify our lawsuit and join in. Conversely, if the instant lawsuit turns out to be a loser, Seidl can avoid costs, Rule 11 sanctions, and any other sanctions that may be imposed on the losing party by saying he never agreed to this action. . . . It is most concerning that so many resources are being poured into this case which may have zero merit because Seidl did not agree on this action.

SER139 (internal quotation marks omitted); *see also Alvarado Cmty. Hosp. v. Super. Ct.*, 173 Cal. App. 3d 476, 481 (1981) ("[W]here [a] principal knows he would not be entitled to [certain] benefits unless he affirmed the transaction, it would be unfair to allow him . . . both to accept the benefits and also repudiate the transaction.").

Indeed, under Igra's rule, a *partnership* would be able to await the outcome and then attack any unfavorable judgment on the ground that it had lacked authority to sue in the first place. The Supreme Court has recognized the injustice of this state of affairs in a different context: "[I]t [i]s unfair to allow [plaintiffs] to benefit from a favorable judgment

without subjecting themselves to the binding effect of an unfavorable one." *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 547 (1974) (describing a similar problem of "one-way intervention" in the context of class actions).

In short: Defendants had the right under both federal and state law to challenge TRT's authority; and they timely did so in both their answer and their summary judgment motion. The issue was properly adjudicated.

B. TRT Lacked Authority To Commence And Maintain This Lawsuit Because Seidl Never Agreed To Sue.

Igra argues in the alternative that TRT had the authority to commence this lawsuit because Seidl agreed to it. PB 20-31. As the district court held (ER23), that argument is squarely refuted by the record.

Igra does not dispute that Seidl actively and consistently objected to the suit until at least January 2015. *See* PB20-21; pp. 8-11 *supra*. Indeed, Igra *sued* Seidl in Hawaii in December 2014 precisely because Seidl had "asserted his right to 'veto' the [instant] lawsuit" and "continue[d] to refuse to authorize" the suit. ER145-46 ¶¶ 31, 37.[17]

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[17] Although Igra does not argue that Seidl agreed to the lawsuit before January 2015, he repeatedly misrepresents Seidl's position during this period—without any citations. *See, e.g.*, PB8 ("After Seidl indicated he *might* not cooperate with a lawsuit against Luckey or Oculus, Igra filed [the Hawaii action]." (emphasis added)); PB21 ("In late 2014, with Seidl continuing to *express concerns* about filing a lawsuit against [defendants], Igra filed [the Hawaii action]." (emphasis added)).

Igra argues, however, that Seidl agreed to sue during the partners' two-day email exchange in January 2015. PB20-31; *see* pp. 11-12 *supra*. That argument fails both factually and legally. Factually, as the district court found, and as Igra's own contemporaneous statements confirm, "[t]he evidence is clear" that "Seidl did *not* agree to commence th[e] action" during that exchange. ER23 (emphasis added). And legally, the January exchange is irrelevant because Seidl later told Igra, unambiguously and indisputably, not to sue—his final word on the subject before Igra filed the complaint. Accordingly, Seidl did not agree to the lawsuit *at the time it was filed*—and that is the only time that is pertinent under California law and the terms of the partnership agreement.

1. Seidl Did Not Agree To Sue In January 2015 (Or At Any Other Time).

When Igra and Seidl met on January 18, 2015, they had strikingly different views on what should happen if they had no immediate success in pursuing a business relationship with Facebook. *See* pp. 11-12 *supra*. Igra insisted that if they did not get an offer to acquire TRT within two weeks, they should sue Luckey. ER129. Seidl disagreed with that deadline; he wanted to "play by ear" unless they got "zero feedback from

[Luckey]." ER127-28.[18] Igra nevertheless cherry-picks three statements by Seidl in support of his position that Seidl agreed to sue in January 2015. None comes close to raising a genuine dispute of fact.

"No positive signs." Igra relies on the fact that when he said the partners should sue if Facebook failed to make a "significant offer" to acquire TRT, Seidl responded: "Happy with that. If no positive signs in 2 weeks of contacting [Luckey]." ER127; *see* PB 28-29. Igra knew full well that this was not an agreement to sue. Two days later, he expressed his "disappoint[ment]" that Seidl had "zero intention of cooperating with . . . the lawsuit." SER55. The next day, after "spend[ing] all last night in bed" thinking about it, Igra reiterated "that there [was] no intent on [Seidl's] part to cooperate in the case." SER54.

And even if Seidl's comment could be interpreted as an intent to *potentially* sue (a notion belied by Igra's own statements), it was subject to a precondition that never materialized. As the district court explained, it is undisputed that "Luckey *did* respond to Seidl and Igra, and the parties began the process of arranging a demonstration of TRT's video-capture technology, meaning 'positive signs' appeared." ER24. Because Seidl's

[18] Seidl also reminded Igra that "before making any legal play towards [Luckey]," Igra had to get a recommendation from an "independent attorney." SER45.

precondition was never satisfied, no agreement was formed. *See Handley v. Ching*, 2 Haw. App. 166, 169 (1981) (where "a condition precedent to any . . . agreement" is "never fulfilled," "the agreement [is not] binding").

Igra contends that there were "no positive signs" because "Luckey refused to acknowledge [TRT's] potential claims, rejected the partners' proposed non-disclosure agreement and reservation of rights, and neither Luckey nor Oculus made any efforts to resolve their dispute with [TRT]." PB28. These are non-sequiturs. Seidl was not looking for "positive signs" that Luckey would recognize any *legal claims* that the partnership might have; he was looking for "positive" *business* signs—*i.e.*, a potential deal with Facebook. *See, e.g.*, ER127 ("[L]et's see how fast we get to [Mark Zuckerberg]. . . . That is the goal."); SER63 ("We don't need legal action against [P]almer for a deal.").

"End date to file." Igra also places great emphasis on Seidl's email stating that if TRT was "getting nothing from Palmer prior to the end date to file[,] I will file." ER128; *see* PB23. But there is no evidence that Seidl ever believed TRT *was* "getting nothing from Palmer"—*Igra* was the one who sabotaged the discussions by insisting on a reservation of rights under an unrelated contract. SER39-41. And Igra does not (because he cannot) contend that the "end date to file"—*i.e.*, the end of the

statute-of-limitations period—was even approaching. As discussed in Part I.C.1 below, Igra's own allegations indicate that the statute of limitations did not run on any of TRT's claims until September 2015—eight months after the parties' January discussions and four months after Igra unilaterally filed the complaint over Seidl's objection.

Seidl's Hawaii answer. Igra argues that when Seidl filed his answer to the Hawaii complaint in January 2015—two days before the partners met and had the exchange described above—he "denied that he vetoed this lawsuit." PB25; *see* PB21. Igra's reliance on this assertion is unavailing for three reasons. First, as the district court held, the statements in Seidl's answer are plainly inadmissible hearsay (ER14) and therefore cannot defeat summary judgment. *See In re Sunset Bay Assocs.*, 944 F.2d 1503, 1514 (9th Cir. 1991) (party "cannot introduce hearsay to defeat a summary judgment motion"). Second, Seidl's unsworn, blanket denials of multiple paragraphs in Igra's complaint (ER136-37 ¶¶ 20, 25) cannot trump his sworn deposition testimony that he did *not* agree to the action. *See Gibbs v. Hernandez*, 2015 WL 135885, at *8 n.6 (C.D. Cal. Jan. 8, 2015) ("unsworn statements in [a pleading] cannot create an issue of fact"). Third, if anything, the Hawaii pleadings further confirm *Igra's* understanding that Seidl had exercised his veto—he alleged as much

(ER145-46 ¶¶ 31, 37), and continued to pursue the Hawaii action even after receiving Seidl's answer (rather than dismissing the case as moot).

2. Seidl Did Not Agree To Sue At The Time The Complaint Was Filed.

Even if Seidl had agreed to sue in January 2015 (which he did not), it would not matter. Under California law (which governs the question of whether the suit is authorized, *see* p. 27 *supra*), an agent's authority to act depends on whether the agent was "acting . . . within the scope of [its] authority[] *at the time of the [relevant] events*." *Leming v. Oilfields Trucking Co.*, 44 Cal. 2d 343, 352 (1955) (emphasis added). "[A] principal has the power to revoke an agent's authority at any time before the agent has completed performance." *Roth v. Moeller*, 185 Cal. 415, 418 (1921) (emphasis omitted).

The scope of TRT's authority was delineated by the partnership agreement, which required the partners to "*agree* on any action." ER160 (emphasis added). The word "agree" is in the present tense, meaning that the partners had to be in agreement *at the time the "action" was taken*.[19]

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[19] *Cf. United States v. Leon H.*, 365 F.3d 750, 753 (9th Cir. 2004) ("Congress used the present tense to indicate that a juvenile should be placed into [a particular age group] based on the juvenile's age *at the time* of sentencing." (emphasis added)); *In re Aaron S.*, 228 Cal. App. 3d 202, 208 (1991) ("The use of the present tense . . . indicates that the [relevant] circumstance . . . must exist at the time of the hearing.").

Thus, the question is whether Seidl agreed to the suit—the relevant "action" (ER160)—"at the time" it was filed. *Leming*, 44 Cal. 2d at 352.[20] He did not, and Igra does not suggest otherwise.

On February 22, 2015, *after* the communications discussed above and *after* Seidl filed his answer in the Hawaii action, Seidl sent the following email to Igra: "*Do not take any legal action against [P]almer*." SER61 (emphasis added). Igra correctly deemed this statement a veto: "Unfortunately, your refusal to cooperate in making our legal claims against Luckey [is] stopping the partnership from getting what [it] is rightfully due." SER62. As the district court explained, "[t]his veto was Seidl's last word to Igra before Igra filed the instant claim." ER24. And when Igra did file that claim, Seidl told Luckey by email that it "[w]as without [his] knowledge or permission," that it "seem[ed] to be illegal," and that he had not "let [Igra] take action." SER131. Seidl later confirmed at his deposition that he never "agreed" that TRT "could file a complaint against Palmer Luckey and Oculus"; he explained that "there was a veto against Igra at the time" the suit was filed. SER96, 98. Because Seidl did not agree to the suit when it was filed, it was unauthorized

[20] Igra is therefore wrong that "the partners' January 2015 agreement to file suit was made unanimously and needed to be rescinded unanimously." PB30.

notwithstanding any prior supposed agreement. *See Leming*, 44 Cal. 2d at 352; *Roth*, 185 Cal. at 418.

Remarkably, Igra's brief asserts that "Seidl asserted no veto after the January 2015 agreement." PB26. *He never quotes the actual language of the February 2015 exchange.* Instead, he grossly mischaracterizes it: "The district court . . . impermissibly drew inferences in favor of Defendants when it considered a February 2015 email from Seidl to Igra *suggesting* that he *delay* filing suit in order to give [TRT] more time to make a deal." PB29 (emphases added). There was no need for the district court to draw any "inferences," and Seidl's email was a far cry from a "suggest[ion]"; it was an unqualified imperative: "*Do not take any legal action against [P]almer*."

In a final Hail Mary, Igra contends that "Seidl took *no* steps to stop th[is] lawsuit"—he did not "seek to intervene" or file any "counterclaims against Igra in the Hawaii Action seeking to enjoin [TRT's] lawsuit." PB26. But Seidl had no obligation to actively *contest* the lawsuit; the question under the partnership agreement was whether he affirmatively "agree[d]" to it. ER160. As the district court explained, "Igra's position that [ ] defendants must face an unauthorized lawsuit because Seidl failed to affirmatively seek legal remedies by countersuing in Hawaii or

intervening here . . . is entirely without support." ER14. What really matters is that Seidl, after two years of litigation, never *joined* the suit.

Because Seidl never agreed to commence this lawsuit, TRT had no authority to bring it under the partnership agreement and California law.

C. The Lawsuit Was Not Ratified After The Fact.

The district court gave TRT "an opportunity to cure the authorization problem" by satisfying two specific conditions: Igra and Seidl had to declare that (1) "both authorize and agree to the maintenance of this civil action in the name of [TRT]"; and (2) "both ratify all actions taken herein so far on behalf of [TRT]." ER29-30.[21]

Igra concedes that TRT did not meet the "conditions set by the district court." PB34 (emphasis omitted). Seidl has never supplied a sworn statement agreeing to this suit—either to its original filing, to its "maintenance" going forward, or to the "actions taken herein so far." But Igra argues that he "exceeded" the court's conditions by settling the

[21] Although this issue is not before this Court on appeal, defendants preserve their argument that the district court should have granted summary judgment outright, with no opportunity to cure. *See* Dkt. 174. As discussed below (pp. 49-50 *infra*), the statute of limitations had already run on Igra's fraud claim, and although California courts permit revival of an improperly filed suit in early stages of the litigation, they would be unlikely to do so where, as here, months of discovery and litigation had already occurred without any attempt by the plaintiff to cure the defect.

Hawaii action, gaining full control over TRT, and then purporting to authorize and ratify the suit himself on TRT's behalf. PB32-33.

This argument fails for two independent reasons. First, by the time of the settlement, the statutes of limitation had run on each of Igra's claims; the defect in the complaint was therefore incurable under California law. Second, even if the complaint could have been revived at the time of settlement, TRT failed to revive it; it did not comply with the district court's ruling and took no other action that could breathe life into the original defective complaint or the proceedings that followed.

1. The Complaint Could Not Be Revived By The Settlement Because All Of Plaintiff's Claims Were Time-Barred By That Time.

a. The Statute Of Limitations Is Not Tolled During A Period When The Plaintiff Lacks Authority Or Capacity To Sue.

When a plaintiff files a lawsuit without authority, California courts may permit it an opportunity to cure the defect. *See Smith*, 199 Cal. App. 4th at 1387, 1394 (plaintiff improperly sued because his "authority did not extend beyond Oregon," but "should be given an opportunity to cure the deficiency").[22]

[22] A defense based on a lack of authority or capacity to sue "is a plea in abatement," *Cal-Western*, 221 Cal. App. 4th at 312—*i.e.*, a defense that does not dispute the merits of a plaintiff's claim but rather "objects to the

There is, however, an important exception to this rule: A defective complaint cannot be cured once the statute of limitations has passed. The "filing of a complaint at a time when [a corporation lacks capacity] does not operate to toll the running of the statute of limitations." *V&P*, 212 Cal. App. 4th at 150 (citing *Welco Constr., Inc. v. Modulux, Inc.*, 47 Cal. App. 3d 69, 73-74 (1975)). Accordingly, "if the statute runs prior to revival, the action is time barred." *Ctr. for Self-Improvement v. Lennar Corp.*, 173 Cal. App. 4th 1543, 1554 (2009). Agency law provides the same rule: A "purported principal can ratify the bringing of an action . . . if the affirmance comes *before the statute of limitations has run on the claim*." RESTATEMENT (SECOND) OF AGENCY § 90 cmt. c (1958) (emphasis added).

The California courts have uniformly and strictly applied this rule. For example, in *Friends of Shingle Springs Interchange, Inc. v. County of El Dorado*, 200 Cal. App. 4th 1470 (2011), the plaintiff corporation filed an action at a time when it "did not have [ ] legal capacity" because it had failed to pay taxes. *Id.* at 1474, 1495. Although the plaintiff's "corporate powers were [later] revived," that did not occur "until after the applicable

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place, mode, or time of asserting it," *V&P*, 212 Cal. App. 4th at 133. "The traditional remedy [for a plea in abatement] was to dismiss the complaint without prejudice. However, it is now settled that the correct remedy is to abate (stay) the action pending the resolution of the condition giving rise to the plea." *Drummond v. Desmarais*, 176 Cal. App. 4th 439, 458 (2009).

statute of limitations had run." *Id.* at 1474. The court held that because "the statute of limitations r[an] out prior to revival of [the] corporation's powers, the corporation's actions [were] time barred even [though] the complaint would otherwise have been timely." *Id.* at 1487 (quoting *Leasequip, Inc. v. Dapeer*, 103 Cal. App. 4th 394, 403 (2002)). The court upheld the dismissal of the action. *Id.* at 1498.

In *V&P*, the court affirmed a grant of summary judgment to the defendants "because the [statute of] limitations period had run while [the plaintiff's corporate status] was suspended." 212 Cal. App. 4th at 129. The court explained that although "procedural acts in the prosecution . . . of a lawsuit may be validated retroactively by corporate revival," "[t]he statute of limitations is not a procedural right"; it is "substantive." *Id.* at 132 (quoting *Welco*, 47 Cal. App. 3d at 73).

Although this doctrine originated in the corporate-tax context, the principle has been applied outside that context. In *Friends of Shingle*, the Court of Appeal interpreted *Leasequip* to hold that "[t]he same rule applies when a corporation fails to file the required statement of information." *Friends of Shingle*, 200 Cal. App. 4th at 639 (citing *Leasequip*, 103 Cal. App. 4th at 402-03). In *Raffin*, this Court upheld a grant of summary judgment based on the plaintiff's "lack of authority to initiate th[e] suit" on

behalf of a trust. 284 F. App'x at 406-07. It found that the decision below was "neither unreasonable nor prejudicial to the plaintiffs who could have cured the defect . . . *before the statute of limitations ran*." *Id.* (emphasis added); *see also Genutec Bus. Sols., Inc. v. Weiss*, 2013 WL 3455731, at *7, *13 (Cal. Ct. App. July 9, 2013) (rejecting argument that statute of limitations was tolled while corporation was "under the control of 'ro[gu]e executives and directors'" and lacked the "ability to commence legal action," relying on the "settled" principle that "the statute of limitations is not tolled" during a period of incapacity (citing *Leasequip*, 103 Cal. App. 4th at 402-03)).

b. The Statutes Of Limitation On All Claims Ran Prior To The Hawaii Settlement.

TRT conceded below that "Ron Igra and Thomas Seidl learned of Palmer Luckey's breach of the . . . agreement no later than September 7, 2012." SER20; *see Align Tech., Inc. v. Bao Tran*, 179 Cal. App. 4th 949, 969 (2009) (claim accrues when plaintiff discovers relevant conduct). The limitations period is three years for Igra's fraud claim, and four years for his contract and unfair-competition claims. *See Bank of New York Mellon v. Citibank, N.A.*, 8 Cal. App. 5th 935, 956 (2017); *Falk v. Children's Hosp. of Los Angeles*, 237 Cal. App. 4th 1454, 1462 & n.12 (2015); *Snyder v. Cal. Ins. Guar. Ass'n*, 229 Cal. App. 4th 1196, 1213 (2014).

Thus, the *latest* date that the statute of limitations would have run on any of Igra's claims was September 7, 2016. That was over a month before Igra and Seidl reached a settlement of the Hawaii action in principle (October 14, 2016); more than two months before they reduced the settlement to writing (November 28, 2016); almost three months before they stipulated to dismiss the Hawaii action (December 6, 2016); and almost four months before Igra purported to ratify the instant action on TRT's behalf (January 5, 2017). *See* pp. 18-19 *supra*. Regardless of which of these dates is determinative, Igra's attempted ratification came too late.

Igra does not mention the statute of limitations in his brief, even though both parties addressed it below. *See* Dkts. 204, 206, 209. Because this problem is fundamental to Igra's ratification theory, he has waived any argument in response by failing to address it. *See Mont. Pole & Treating Plant v. I.F. Laucks & Co.*, 993 F.2d 676, 676 (9th Cir. 1993) (appellant's argument "that the statute of limitations should be tolled" was "waived" because it was not "raised in appellant's opening brief").

In any event, Igra's principal argument below was meritless: that defendants waived any statute-of-limitations "defense" by failing to raise it in their answer. Dkt. 204 at 15. Defendants have raised no such "defense"; the statute of limitations matters only because it renders the

authority defect in Igra's complaint incurable under California's "revival" jurisprudence. Defendants also had no basis for raising the statute of limitations at the pleading stage, because the complaint would have been timely if TRT had authority to sue; the statute became relevant only when the district court concluded that TRT lacked such authority, and Igra then attempted to cure that problem retroactively (and belatedly). Defendants had every right to raise the issue at that time.

Moreover, this Court "ha[s] liberalized the requirement that defendants must raise affirmative defenses in their initial pleadings"; they may be raised at any time so long as "the delay does not prejudice the plaintiff." *Magana v. Commonwealth of N. Mariana Islands*, 107 F.3d 1436, 1446 (9th Cir. 1997). Igra has never claimed any such prejudice—nor could he, because he had every opportunity to address the statute of limitations below. *See Foothills of Fernley, LLC v. City of Fernley*, 355 F. App'x 109, 111 (9th Cir. 2009) (where a statute-of-limitations "issue was fully addressed by the parties in supplemental briefs and in argument before the court[,] . . . [plaintiff] suffered no prejudice" when the district court raised the issue *sua sponte*).[23]

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[23] Nor does the running of the statute of limitations *itself* constitute prejudice to Igra; the defendants obviously had no duty to warn Igra about

2. Even If The Defect In The Complaint Could Have Been Cured, Igra's Attempt Was Ineffective.

Even if the complaint could have been retroactively ratified despite the expiration of the limitations period, no effective ratification occurred.

a. Only Seidl Could Have Ratified The Proceedings On A Retroactive Basis.

The most that the Hawaii settlement could have accomplished was to instill TRT with authority *going forward*—in Igra's words, to remove "any impediment to this lawsuit *proceeding*." PB33 (emphasis added). Neither the settlement agreement nor Seidl's declaration purported to ratify any *past* actions taken in this suit; to the contrary, Igra concedes that "[b]ecause Seidl is no longer a partner, he cannot authorize the . . . lawsuit." PB34.[24] And Igra's own attempted ratification was insufficient.

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the approaching end of the limitations period. In *Magana* and this Court's other decisions liberalizing the requirement to raise affirmative defenses in pleadings, the statutes of limitation had already run, and the question was whether the plaintiff had been prejudiced by the defendant's failure to raise the *expired* limitations period in its answer.

[24] Igra makes a contradictory assertion two pages later, arguing that "with full knowledge of the existence of the lawsuit, Seidl took no action to stop it"; "[t]hat is classic ratification." PB36 (citing *Hager v. Gibson*, 108 F.3d 35 (4th Cir. 1997)). In *Hager*, the Fourth Circuit held that a corporate shareholder had ratified another shareholder's bankruptcy petition by failing to take any action after receiving demands related to the petition. 108 F.3d at 40. As the district court explained, "*Hager* is inapposite" because Seidl had to *affirmatively* agree on any TRT action, and has given "no blessings whatsoever to this lawsuit." ER14.

Revival is permissible when the "defective complaint [ ] can be readily and easily cured without prejudice to either [the opposing party] or the court." *CLD Constr., Inc. v. City of San Ramon*, 120 Cal. App. 4th 1141, 1150 (2004) (finding that a lack of legal representation "at the threshold step of a lawsuit—filing the complaint—rarely prejudices the opposing party"). The district court properly held that the Hawaii settlement did not cure the prejudice to defendants from Igra's unauthorized complaint, because it did not address the fact that all of the prior proceedings—including the complaint, the motion-to-dismiss briefing, and the years of discovery that took place—were conducted without a legally cognizable plaintiff.

Only strict compliance with the district court's conditions could possibly cure that problem. As the court explained, its order was designed to "allow, *nunc pro tunc*, TRT to vivify the original complaint"—"to breathe life into a complaint that had been dead on arrival." ER12-13. "Absent Seidl's unequivocal authorization and ratification, this lawsuit remained improper from the outset." ER12. Igra's unsanctioned approach "d[id]

nothing to carry us back to the moment in time of the filing of the original complaint to fix the defect that plagued the action from the start." ER13.[25]

b. The Settlement Does Not Even Solve The Authorization Problem Going Forward.

The settlement does not even truly solve the authorization problem on a forward-looking basis. It permitted Seidl to "retain[] a thirty percent stake in any recovery" while avoiding any "risk of liability for costs and possible sanctions." ER12-13. At the same time, by transferring TRT's assets to Seidl, the agreement may very well make Igra and TRT judgment-proof. ER51, 53. Defendants would now face the prospect of seeking recovery from an empty shell should they obtain an order for costs and sanctions. The district court long suspected that the parties' intent was to create "a clever smoke-and-mirrors work-around to protect Seidl from ratifying anything while creating an appearance that Igra now controls the partnership." ER13; *see also, e.g.*, First OSC at 2. The court was right.

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[25] Igra is therefore wrong that the district court's "conditions presumed that the partnership would remain in the same form as before" (PB34); they were necessary regardless of TRT's form. Nor is Igra correct that the district court's dismissal of the case "is tantamount to a claim that it can order [TRT to] remain as a two person partnership." PB34-35. TRT was certainly free to change its structure, but it could not revive *this lawsuit* unless both partners ratified the actions taken by the *original* partnership before Seidl withdrew.

To make matters worse, the settlement was calculated to deprive defendants of a fair trial: It precludes Seidl from communicating with defendants; requires him to "cooperate with counsel for TRT"; and requires him to testify in a manner "consistent with his [deposition] testimony." ER51. Taken together, these provisions effectively buy Seidl's silence and deprive defendants of access to the only TRT partner with personal knowledge of the contract with Luckey. This prejudice alone is sufficient to bar revival. *See CLD*, 120 Cal. App. 4th at 1152.[26] The district court properly granted judgment in defendants' favor.

II. THE DISTRICT COURT COMMITTED NO ERROR AT THE MOTION-TO-DISMISS STAGE.

Before dismissing the entire action based on TRT's lack of authority, the district court dismissed two of Igra's claims under Rule 12(b)(6). Igra challenges these decisions. *See* PB37-47. The Court need not reach these issues, but if it does, it should affirm the district court's rulings.

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[26] *Cf. Smith v. Super. Ct.*, 41 Cal. App. 4th 1014, 1019, 1026 (1996) (settlement that prevented a GM employee "from 'testifying without the prior written consent of GM, . . . , and from consulting with attorneys' . . . effectively blockad[ed] a litigant's search for the truth and for redress"); *Patel v. 7-Eleven, Inc.*, 2015 WL 9701133, at *5 (C.D. Cal. Apr. 14, 2015) ("[P]ayment of a sum of money to a witness to 'tell the truth' is [ ] clearly subversive of the proper administration of justice.").

A. The District Court Properly Dismissed Plaintiff's Conversion Claim.

Igra's first amended complaint alleged that defendants "converted . . . [TRT]'s tangible property" because Luckey did not return the single-panel prototype he designed for Seidl. ER240 ¶ 20, ER244 ¶ 46.

It is puzzling that Igra has appealed the dismissal of this claim: The evidence introduced after the motion-to-dismiss phase conclusively establishes its falsity. Luckey *did* send the single-panel prototype to Seidl in August 2011. SER68. Seidl returned it to Luckey, saying that it was of "no use to" him and telling Luckey to disassemble it and use the parts to make the second, multi-panel prototype (*id.*)—which Seidl received and kept, saying that it "look[ed] pretty fierce" (ER100). *See* p. 7 *supra*. Thus, the only reason why Seidl never got back the first prototype was that, per his own instructions, it no longer existed. Igra does not dispute any of these events; he misleadingly omits them from both his complaint and his appellate brief. Any amendment to the complaint would be futile.

In any event, even taking the pleadings as given, the district court correctly dismissed the claim. It reasoned as follows:

> To state a claim for conversion, [TRT] must allege [that] . . . defendants wrongfully dispossessed it of th[e] property. . . . [TRT] concedes that Seidl returned the prototype to Luckey for further improvements based on Seidl's feedback . . . [and]

> no one requested its return. . . . Seidl's agreement with Luckey only entitled him to return of "tangible items in [Luckey's] possession . . . *if [Seidl] requests it in writing*." . . . Seidl *voluntarily* dispossessed himself . . . of the prototype by returning it to Luckey, and because neither Seidl nor [TRT] ever demanded its return, Luckey's possession and use of the prototype never became wrongful.

ER43 (citations omitted).

Igra argues that "[t]he district court erred in requiring as an element of conversion that [TRT] formally demand the return of its head mounted display." PB37-38; *see* PB41. But that is not what the court held; it held that Igra could not satisfy the element of "*wrongful* dispossession" because the Seidl/Luckey agreement expressly permitted Luckey to keep any "tangible materials" unless Seidl "request[ed them] in writing" (ER203), and because Seidl undisputedly never made such a request. It is not that the conversion tort generally requires an "aggrieved party to formally request the return of the property" (PB41 & n.11); the point is that no dispossession can be "wrongful" if it was voluntary. *See* ER43, 240.

Igra argues next that "a formal request would have been futile—by the time [TRT] realized that the Head Mounted Display had been misused it had already been shipped to [John] Carmack and presented at [a] trade show as belonging to Palmer Luckey." PB42. This assertion is irrelevant to whether Luckey "wrongfully dispossessed" TRT of the prototype in the

first place. And again, it is flatly false: As discussed above (*see* pp. 7-8 *supra*), Luckey *did* send both prototypes to Seidl; what Luckey sent Carmack was the Oculus Rift, an entirely separate head-mounted display.

Finally, Igra argues that "the portion of the contract cited by the district court has to do with 'Confidential Information,'" and "has nothing to do with the conversion of personal property." PB43. That is wrong. The provision applies to "*tangible materials* in [Luckey's] possession" relating to the discussions between Luckey and Seidl. ER203. Neither Seidl nor TRT ever requested a return of those materials.

B. The District Court Correctly Dismissed Plaintiff's Claim Based On The Duty Of Good Faith And Fair Dealing.

Apart from claiming breach of the express provisions in Luckey's contract with Seidl, Igra alleged that "Luckey ha[d] breached the duty of good faith and fair dealing inherent in every contract"—specifically, that he had "frustrat[ed] the purpose of the Agreement by falsely promising, among other things, (1) to keep all details . . . of the Head Mounted Display confidential, and (2) to refrain from aiding any other person or entity in the design of a Head Mounted Display." ER244. In other words, Igra claimed that Luckey had "frustrated" the agreement's purpose by "falsely promising" to perform the duties set forth in the agreement itself.

As the district court held, this claim is "duplicative of [TRT]'s breach-of-contract claim" and cannot provide an independent basis for liability. ER40. "If the allegations [in a breach of implied covenant claim] do not go beyond the statement of a mere contract breach . . . they may be disregarded as superfluous as no additional claim is actually stated." *Careau & Co. v. Sec. Pac Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1395 (1990). Because Igra's "claim relies solely on Luckey's alleged false promise to perform under the contract," and "does not allege that Luckey had any [other] duty . . . pursuant to which [TRT] could seek a separate tort recovery," the claim is "subsumed under [the contract] claim." ER40.

Igra argues that "[t]he district court erred because the duty of good faith and fair dealing exists as a separate cause of action," and has been recognized in cases involving contract claims. PB44. The two claims can indeed coexist, but not when—as here—the sole basis for the implied-duty claim is an alleged failure to perform express contractual duties. *See Careau*, 222 Cal. App. 3d at 1394-95.

Igra also contends that his implied-duty claim is distinct because it alleges that Luckey "intentionally frustrat[ed] th[e] two purposes of the Agreement"—"not by *honest mistake*, but by *deliberate act*." PB45. But again, the purpose of the implied-duty claim is to impose liability on actors

who intentionally "frustrate[] the agreed common purposes" of the agreement *without* breaching an express "contract term." *Careau*, 222 Cal. App. 3d at 1394-95. Igra has not identified any contractual "purpose" that Luckey has "frustrated" apart from what is covered by the express terms of the contract. The implied-duty claim was properly dismissed.

CONCLUSION

Ron Igra tried to "get rich" by suing the inventors of a groundbreaking technology that he played no role in creating. His business partner—who, unlike Igra, understood the technology—knew that Igra's legal theory was meritless, and declined to authorize the suit. Igra sued anyway, resulting in the expenditure of extensive party and judicial resources. The district court gave Igra multiple chances to cure the fundamental defect in his case by persuading Seidl to sign on to it, but Igra categorically and repeatedly failed to do so. The court then properly dismissed the case once and for all. That judgment should be affirmed.

Respectfully submitted,

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Dated: September 14, 2017

STATEMENT OF RELATED CASES

Counsel for appellees does not know of any case pending in this Court related to this one.

/s/ Lauren R. Goldman

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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2017, the foregoing brief was served electronically via the Court's CM/ECF system upon all counsel of record.

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