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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MAGIC LEAP, INC.,

Plaintiff,

v.

CHI XU, an individual; HANGZHOU TAIRUO TECHNOLOGY CO., LTD., d/b/a NREAL,

Defendants.

Case No. 5:19-cv-03445-LHK

DEFENDANTS CHI XU AND HANGZHOU TAIRUO TECHNOLOGY CO., LTD., D/B/A NREAL'S NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES

Date: April 30, 2020
Time: 1:30 p.m.
Courtroom: 8
Judge: Hon. Lucy H. Koh

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that defendants Chi Xu ("Xu") and Hangzhou Tairuo Technology Co., Ltd.,[1] d/b/a Nreal's ("Nreal") Motion to Dismiss ("Motion") will be heard on April 30, 2020, at 1:30 p.m., or as soon thereafter as counsel may be heard, in the United States District Court for the Northern District of California, San Jose Courthouse, Courtroom 8, Fourth Floor, located at 280 South First Street, San Jose, California, before the Honorable Lucy H. Koh.

Defendants Xu and Nreal hereby move this Court to dismiss the Complaint of plaintiff Magic Leap, Inc. ("Magic Leap") with prejudice and without leave to amend pursuant to Federal Rules of Civil Procedure 12(b)(6) because the Complaint fails to state a claim upon which relief can be granted and any amendment would be futile. Nreal further requests that the Court dismiss all claims asserted in the Complaint against Nreal under Rule 12(b)(2) on the grounds that this Court lacks personal jurisdiction over Nreal.

This Motion is based on this Notice of Motion and Motion, the following Memorandum of Points and Authorities, the accompanying Declaration of Chi Xu, the record in this matter, any other and further papers, evidence, and argument as may be submitted in connection with this Motion, and all matters of which this Court may take judicial notice.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

With its combination of advanced optics and computing power, augmented reality ("AR") superimposes images, data, and media onto a user's view of the physical world to create a larger than life experience. Since 2010, plaintiff Magic Leap has been trying to establish itself as the AR market leader. But Magic Leap has failed to deliver. Indeed, after years of product delays, Magic Leap finally released its bulky, heavy, and high-priced AR headset in 2018 to decidedly mixed reviews.

[1] After the defendants waived service of the Complaint, defendant Hangzhou Tairuo Technology Co., Ltd. was officially succeeded by a different entity, Shenzhen Tairuo Technology Co., Ltd. Declaration of Chi Xu ("Xu Decl.") ¶ 16. All arguments made herein are applicable to the named defendant and its successor company Shenzhen Tairuo Technology Co., Ltd. *Id.*

Rather than focus on developing a superior product, Magic Leap has resorted to filing lawsuits to slow down new entrants in the AR market. In 2016, Magic Leap filed a trade secret case against two former employees who had attempted to start a new company in the AR field. After the Court found that Magic Leap's "disclosures in totality fail to disclose the asserted trade secrets with 'reasonable particularity,'" the parties settled, and the case was dismissed. Now, in 2019, Magic Leap is at it again, this time filing vague and unsubstantiated claims against Nreal and its co-founder, Chi Xu, apparently because Nreal is developing exciting new AR glasses technology that is a fraction of the weight and a fraction of the price of Magic Leap's headset.

Though surrounded by a colorful narrative, Magic Leap's breach of contract claim against Xu fails to satisfy Rule 8's requirements both because it fails to plead a valid contract—the underlying agreement is void as an unlawful restraint on trade—and because it never pleads facts that plausibly suggest that a breach has occurred. The purported causes of action for interference with contract (against Nreal), constructive fraud (against both defendants), and violation of California's Unfair Competition Law ("UCL") (also against both) are based on erroneous legal theories and threadbare and conclusory allegations that fail to satisfy the applicable heightened pleading standards under Rule 9(b) or even the notice pleading standards under Rule 8.

Magic Leap's claims against Nreal also should be dismissed for lack of personal jurisdiction. Nreal is a Chinese company with its principal place of business in Beijing. It has no employees, property, or product development activities in California. And Magic Leap failed to plead any facts suggesting that any conduct giving rise to the claims against Nreal was directed at California or occurred in California.

Magic Leap's Complaint should be dismissed in its entirety. And the dismissal should be with prejudice, because giving Magic Leap leave to amend would be futile. Nothing that Magic Leap could plead would overcome the legal deficiencies in its purported claims.

II. STATEMENT OF ISSUES TO BE DECIDED

1. Has Magic Leap failed to state claim for breach of contract because (i) the contract on which the claim is based is an unlawful restraint on trade and is void under California Business and Professions Code Section 16600, and/or (ii) Magic Leap failed to plead factual allegations

that plausibly state a claim for breach?

2. Has Magic Leap failed to plead a cognizable legal theory and sufficient factual allegations under Fed. R. Civ. P. 8(a) and 9(b) to state a claim for: (i) interference with contract, (ii) constructive fraud, and (iii) violation of California's UCL?

3. Has Magic Leap failed to meet its burden to show that this Court has jurisdiction over defendant Nreal, a Chinese company with its principal place of business in Beijing?

III. FACTUAL BACKGROUND

A. Magic Leap

Plaintiff Magic Leap is based in Florida. Complaint ¶ 4. Although founded in 2010, Magic Leap did not release its first AR headset product until August 2018. That product, the Magic Leap One, has received decidedly mixed reviews.[2] Magic Leap continues to sputter according to press accounts reporting slow sales, steep losses, and layoffs.[3]

Along the way, Magic Leap has used trade secret litigation against new entrants in the AR field. In 2016, Magic Leap filed a trade secret lawsuit against some employees who had left the company.[4] Like the Complaint in this case, that lawsuit's complaint was thin on details, but Magic Leap similarly accused the former employees of taking Magic Leap's confidential and trade secret information to compete with it.[5] The former employees argued that the lawsuit was an attempt to prevent them from using their experience and know-how and publicly available

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[2] *See, e.g.*, Ben Gilbert, *People finally got to try Magic Leap, the futuristic device that Google and others invested over $2 billion into — and the results aren't very positive*, BUSINESS INSIDER (Aug. 8, 2018), https://www.businessinsider.com/magic-leap-one-hands-on-first-reviews-impressions-2018-8; Magic Leap is a Tragic Heap, THE BLOG OF PALMER LUCKY (Aug. 27, 2018), https://palmerluckey.com/magic-leap-is-a-tragic-heap/; Brian Merchant, *The Magic Leap Con*, GIZMODO (Oct. 12, 2018), https://gizmodo.com/the-magic-leap-con-1829716266.

[3] *See*, Alex Heath, *Dented Reality: Magic Leap Sees Slow Sales, Steep Losses*¸ THE INFORMATION (Dec. 6, 2019), https://www.theinformation.com/articles/dented-reality-magic-leap-sees-slow-sales-steep-losses; Mike Dano, *Magic Leap's Reported Stumbles Cast Shadow Over 5G*, LIGHT READING (Dec. 9, 2019), https://www.lightreading.com/mobile/5g/magic-leaps-reported-stumbles-cast-shadow-over-5g/d/d-id/756170?_mc=RSS_LR_EDT; *Magic Leap reportedly laid off dozens amid slow sales*, PITCHBOOK (Dec. 9, 2019), https://pitchbook.com/newsletter/magic-leap-reportedly-laid-off-dozens-amid-slow-sales.

[4] *See Magic Leap, Inc. v. Bradski, et al.*, Case No. 16-cv-2852 (N.D. Cal. May 26, 2016).

[5] Amended Complaint (ECF No. 11), *Magic Leap, Inc. v. Bradski, et al.*, Case No. 16-cv-2852 (N.D. Cal. Jun. 5, 2016).

technologies.[6] The Court struck Magic Leap's trade secret disclosure for failing to provide a definite statement, after which the parties settled and the case was dismissed.[7]

B. Nreal, Its Founders, And Its Product

Defendant Chi Xu worked at Magic Leap for just over one year, from mid-2015 to mid-2016. Xu Decl. ¶¶ 5, 9. In July 2015, he signed a Magic Leap document called a "Proprietary Information and Inventions Agreement" ("PIIA"). Complaint ¶ 3. He worked as a software engineer, programming software for a component of Magic Leap's AR headset called a Movidius Myriad 2 chip. Xu Decl. ¶ 7. He earned awards from Magic Leap for his work. *Id.* ¶ 8.

After leaving Magic Leap in August 2016, Xu joined xPerception, a software company in the computer vision and AR space for a few months. *Id.* ¶ 10. Ultimately, Xu decided he wanted to start his own company to develop AR glasses. *Id.* ¶ 11. He was intrigued by AR and its potentially wide-reaching applications in fields from healthcare, to education, to communications, to retail. *Id.* And he wanted to make AR applications accessible to as many people as possible by developing an affordable product. *Id.* ¶ 14. The result was Nreal.

Nreal's founders include Xu and Bing Xiao. Xu and Xiao met as students at Zhejiang University. *Id.* ¶ 12. Xu earned his Ph.D. in Electrical Computer Engineering from the University of Minnesota. *Id.* ¶ 3. Xiao completed graduate studies in Optical Engineering in China, and he subsequently worked in the field of AR technology. *Id.* ¶ 12, 13.

Nreal was founded and incorporated in China in January 2017. *Id.* ¶¶ 12, 15, 16. Its principal place of business is in Beijing, China, and it conducts product development in China through its team of engineers, software developers, and artists. *Id.* ¶¶ 16, 20. It is not registered to do business in the United States, nor does it have any officers, directors, or employees who reside in the United States. *Id.* ¶¶ 18, 19. Nreal does not own or lease any property in the United States. *Id.* ¶ 17.

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[6] Defendants' Motion to Dismiss (ECF No. 41), *Magic Leap, Inc. v. Bradski, et al.*, Case No. 16-cv-2852 (N.D. Cal. Aug. 15, 2016).

[7] Order granting motion to strike amended trade secret disclosures (ECF No. 289), *Magic Leap, Inc. v. Bradski, et al.* (June 9, 2017) and Joint Stipulation and Order of Dismissal (ECF No. 362), *Magic Leap, Inc. v. Bradski, et al.*, Case No. 16-cv-2852 (N.D. Cal. Aug. 21, 2017).

Nreal is focused on making user-friendly, lightweight AR glasses. Its product is called the Nreal Light. *Id.* ¶ 21. The Nreal Light is designed to look and feel like regular sunglasses. *Id.* Since Nreal showed the product in January 2019 at the Consumer Electronics Show ("CES") in Las Vegas, the Nreal Light has received praise for its high-quality visual capabilities and lightweight, user-friendly design.[8] In fact, Nreal and Nreal Light won Engadget's "Best of CES 2019" award for "Best Startup"—the editors "were impressed by the crisp, vivid images the headset could produce… Nreal managed to squeeze some incredibly complex components into a headset that could pass for an (almost) normal, comfortable pair of sunglasses."[9]

Nreal's product is very different than Magic Leap's.

Nreal Light

Magic Leap 1

The Nreal Light weighs roughly 88 grams while the Magic Leap One is nearly four times heavier at about 325 grams for the headset, plus an additional 415 grams for the computing pack.[10] The

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[8] *nReal AR glasses hands-on preview*, THE GHOST HOWLS (Jul. 8, 2019), https://skarredghost.com/2019/07/08/nreal-ar-glasses-hands-on-review/; Adi Robertson, *Nreal's AR sunglasses cost $499 and should ship in 'limited quantities' this year*, THE VERGE (May 30, 2019), https://www.theverge.com/2019/5/30/18646160/nreal-light-ar-xr-qualcomm-snapdragon-sunglasses-consumer-price-shipping-release-5g; Nick Statt, *These slick new AR glasses project shockingly high-quality visuals*, THE VERGE (Jan. 9, 2019), https://www.theverge.com/circuitbreaker/2019/1/9/18176083/nreal-augmented-reality-ar-smart-glasses-features-pricing-release-date-ces-2019.

[9] *Presenting the Best of CES 2019 winners!*, ENGADGET (Jan. 10, 2019) https://www.engadget.com/2019/01/10/best-of-ces-2019-winners/.

[10] Scott Stein, *Magic Leap One AR headset is out now for $2,295, but only in six specific cities*, C|NET (Aug. 8, 2018), https://www.cnet.com/news/magic-leap-one-ar-headset-is-now-out-for-2295-but-only-in-six-specific-cities-comic-book/.

Magic Leap One headset includes a Movidius Myriad 2 chip that is capable of processing visual data.[11] The Nreal Light does not use the Myriad 2 chip. Xu Decl. ¶ 25. Also, unlike the Magic Leap One,[12] the Nreal Light gives users the option to connect to a smartphone or computer. *Id.* ¶ 22. Based on its different design, Nreal plans to offer its product for $499 and its developer kit for $1,199. *Id.* ¶ 23. In contrast, the Magic Leap One lists for $2,295, with a "Professional Development Edition" for an extra $495.[13]

C. Magic Leap Files This Lawsuit

Although Nreal demonstrated the Nreal Light at the CES show in January 2019, Magic Leap delayed ***five months*** before filing this lawsuit. Complaint ¶¶ 21–22. The Complaint does not state any claims alleging that Nreal or Xu violated any of Magic Leap's intellectual property rights. Instead, Magic Leap recites four claims alleging: (1) Xu breached the "Confidential Information" provision of the PIIA, (2) Nreal interfered with Xu's PIIA, (3) Xu and Nreal committed constructive fraud against Magic Leap, and (4) Xu and Nreal violated California's UCL. None of these purported claims rests on cognizable legal grounds. Moreover, the allegations in the Complaint are threadbare and conclusory, relying extensively on "information and belief." The Complaint never identifies with any specificity the confidential information or conduct that Magic Leap asserts is at issue. As discussed below, the legal deficiencies and the

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[11] *Magic Leap One Teardown*, IFIXIT (Aug. 23, 2018), https://www.ifixit.com/Teardown/Magic+Leap+One+Teardown/112245; https://www.movidius.com/myriad2; Myriad 2 MA2x5x Vision Processor, VPU Product Brief, MOVIDIUS, https://movidius-uploads.s3.amazonaws.com/1532512604-1503680554-2016-12-12_VPU_ProductBrief.pdf (last visited Dec. 13, 2019).

[12] *Magic Leap One Specs (August 31, 2019 Internet Archive Web Capture)*, https://web.archive.org/web/20190831003554/https://www.magicleap.com/magic-leap-one (listing only the Lightpack as a computing option for the Magic Leap One) (last visited Dec. 13, 2019); *Magic Leap One Creator Edition*, https://usermanual.wiki/Magic-Leap/M1000.M1000-Quick-Start-Guide (providing setup instruction for only the Lightpack as a computing option for the Magic Leap One) (last visited Dec. 13, 2019).

[13] Stein, *supra* note [10]; Ben Sin, *How A Former Magic Leap Engineer Built A Pair Of Lighter, More Affordable AR Glasses*, FORBES (Jan. 7, 2019), https://www.forbes.com/sites/bensin/2019/01/07/how-a-former-magic-leap-engineer-built-a-lighter-more-affordable-ar-lens-alternative/#43786b04505d. Magic Leap renamed the Magic Leap One to "Magic Leap 1" in December 2019, also $2,295 or the "Enterprise Suite" for $2,995. Adi Robertson, *Magic Leap is renaming its AR headset to attract business customers*, THE VERGE (Dec. 10, 2019) https://www.theverge.com/2019/12/10/21003361/magic-leap-1-ar-headset-update-professional-business-customer-pivot.

lack of factual allegations are fatal to these claims. The Court also lacks personal jurisdiction over Nreal, a Chinese company with no property or employees in California.

IV. ARGUMENT

Magic Leap's bare allegations fail to meet even the notice pleading standard of Rule 8(a). Magic Leap's breach of contract claim fails to plead a valid contract or even facts sufficient to plausibly allege a breach. With respect to its interference with contract, constructive fraud, and violation of UCL claims, Magic Leap must meet the heightened pleading standard of Rule 9(b) because they sound in fraud. Yet Magic Leap fails to plead with the required particularity any facts supporting these claims. Moreover, each claim suffers a legal infirmity that cannot be corrected. Finally, Magic Leap makes no attempt to meet its burden to establish that this Court has personal jurisdiction over defendant Nreal, a Chinese company with no employees, property, or operations in California. The Court should dismiss all claims.

A. Magic Leap's Complaint Fails To State Any Claims

1. Magic Leap Fails to State a Claim for Breach of Contract

To state a claim for breach of contract under California law, a plaintiff must plead facts that plausibly suggest the following elements: "(1) the existence of a valid contract between the parties, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's unjustified or unexcused failure to perform, and (4) damages to plaintiff caused by the breach." *Jordan v. Paul Fin., LLC*, 644 F. Supp. 2d 1156, 1166-67 (N.D. Cal. 2009) (citing *Lortz v. Connell*, 273 Cal. App. 2d 286, 290 (1969)). Here, Magic Leap's contract claim fails for two reasons. First, Magic Leap does not plead a valid contract because the PIIA is void as an unlawful restraint of trade under California Business and Professions Code Section 16600. Second, Magic Leap fails to plead facts that plausibly suggest that Xu breached the PIIA.

a. The PIIA Is Void as an Unlawful Restraint of Trade

Magic Leap has not pleaded, and cannot plead, the existence of a valid contract. California Business and Professions Code Section 16600 states that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." California courts "have consistently affirmed that section 16600 evinces a settled

legislative policy in favor of open competition and employee mobility." *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937, 946 (2008) (citing *D'Sa v. Playhut, Inc.*, 85 Cal. App. 4th 927, 933 (2000)). Following *Edwards*, cases are clear that contracts that are not tailored to trade secret protection are unenforceable. *See Dowell v. Biosense Webster, Inc.*, 179 Cal. App. 4th 564, 576 (2009); *see also Richmond Techs., Inc. v. Aumtech Bus. Solutions*, No. 11-CV-2460-LHK, 2011 WL 2607158, at *18 (N.D. Cal. July 1, 2011) (noting that broad employment agreements not targeted at protecting employer trade secrets "are likely to be found unenforceable under California law.").[14]

Dowell is particularly instructive. There, the plaintiff sued its former employees for breach of a broadly worded "Employee Secrecy, Non-Competition and Non-Solicitation Agreement." 179 Cal. App. 4th at 567-68. That agreement purported to restrict the former employees' use of "CONFIDENTIAL INFORMATION," a term defined to include "information disclosed to [the employee] or known by [her] as a result of [her] employment by the COMPANY… about products, processes, technologies, machines, customers, clients, employees, services and strategies of the COMPANY." *Id.* at 568. The Court held that this agreement was void and unenforceable as an unlawful restraint of trade under Section 16600. *Id.* at 574–75. Specifically, the *Dowell* court held that whether or not a "trade secret exception" exists to Section 16600, the agreement at issue was "not narrowly tailored or carefully limited to the protection of trade secrets, but [] so broadly worded as to restrain competition." *Id.* at 577–78.

Here, as in *Dowell*, the PIIA is void under Section 16600. Magic Leap alleges that Xu breached Section 2 of the PIIA, which purports to restrict use of Magic Leap's "Confidential Information," a broad umbrella term defined to include more than just trade secrets. Indeed, just like in *Dowell*, the PIIA defined "Confidential Information" to include "products," "processes," "technology," "customer lists and customers," and "services," as well as even broader concepts

[14] Even as to trade secrets, there is considerable debate about whether there exists a "so-called trade secret" exception to Section 16600 that allows limited restraints on trade in employee agreements as "necessary to protect the employer's trade secrets." *Dowell*, 179 Cal. App. 4th at 576. The Supreme Court declined to address the so-called trade secrets exception in *Edwards*, 44 Cal. 4th at 946 n.4.

such as "know-how," "business information," "processes," and "ideas." *See, e.g.*, Complaint ¶ 40, Exhibit A § 11. "Confidential Information" in the PIIA is as broad as, if not broader than, the same term used in the unenforceable employee agreement in *Dowell*. 179 Cal. App. 4th at 578. Indeed, Magic Leap attempts to use this unenforceable provision to restrict Xu's pursuit of a career in the AR industry—an overbroad restraint on Xu's livelihood.

Further, as in *Dowell*, the Court does not need to determine whether a "trade secret exception" to Section 16600 exists to find the PIIA void. Magic Leap's Complaint makes clear that the PIIA is ***not*** narrowly tailored to protect Magic Leap's trade secrets. Indeed, the PIIA states that it protects not only "trade secrets," but also information in categories other than trade secrets, such as "business information." Complaint ¶ 40, Exhibit A § 11.

b. Magic Leap Does Not Adequately Plead a Breach of the PIIA

A complaint is deficient "if it tenders 'naked assertion[s]' devoid of "further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). Yet conclusory allegations and naked assertions are all that Magic Leap includes in its contract claim.

The *SriCom, Inc. v. EbisLogi, Inc.* case is analogous and informative on a plaintiff's burden to plead breach. No. 12-cv-904-LHK, 2012 WL 4051222 (N.D. Cal. Sept. 13, 2012). There, the plaintiff alleged breach of a confidentiality clause in a contract between the parties. 2012 WL 4051222 at *5–6. The complaint alleged that defendants "revealed" vague categories of information—"customer information, employee information, and pricing information"—but failed to "allege any facts concerning what ***specific information*** was revealed, when, how, or to whom it was revealed, or whether or how [the defendants] used this information." *Id.* at *6 (emphasis added). This Court dismissed the breach of contract claim based on the confidentiality clause because the allegations amounted to a "conclusory assertion that there [had] been a breach, with no factual support." *Id; see also Sensible Foods, LLC v. World Gourmet, Inc.*, No. 11-2819 SC, 2011 WL 5244716, at *5 (N.D. Cal. Nov. 3, 2011) (finding "the Complaint states 'Defendants failed to perform … under the confidentiality agreements [sic], including, but not limited to disclosing all or a portion of Plaintiff's Confidential Information' … Such '[t]hreadbare

recitals of the elements of a cause of action' are insufficient to state a claim under *Iqbal*").

Similar to the plaintiff in *SriCom*, Magic Leap alleges that Xu breached the PIIA "through his unauthorized use of Magic Leap's Confidential Information in starting Nreal as a business and in creating and promoting Nreal and Nreal Light products." Complaint ¶ 40. The closest Magic Leap comes to identifying Confidential Information is its discussion of "Confidential Designs" in paragraph 17. But this is insufficient for at least two reasons. First, Magic Leap never actually says that Xu knew any confidential information about the Confidential Designs—all it says is that "Mr. Xu was aware that Magic Leap had produced multiple conceptual designs for spatial computing products …" *Id.* ¶ 17. Second, Magic Leap's allegations in paragraph 20—"[o]n information and belief, Mr. Xu used his knowledge of Magic Leap's Confidential Information, including but not limited to the Confidential Designs…"—fare no better. *Id.* ¶ 20. This allegation is fatally vague and does not "allege any facts concerning what ***specific information*** was revealed, when, how, or to whom it was revealed, or whether or how [the defendants] used this information." *See SriCom*, 2012 WL 4051222, at *6. The Complaint never pleads what Confidential Information (or even Confidential Designs) Xu allegedly used. It is not enough to say, as Magic Leap does, that Xu was exposed to Confidential Information and used it at Nreal. Those are conclusions, not factual allegations.

2. Magic Leap Fails to State a Claim for Interference with Contract

To state a claim for interference with contract, a plaintiff must plead facts showing "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." *United Nat'l Maintenance, Inc. v. San Diego Convention Ctr., Inc.*, 766 F.3d 1002, 1006 (9th Cir. 2014). Magic Leap asserts that its interference with contract claim is based on an alleged course of fraudulent conduct. Complaint ¶ 49 ("Pursuant to California Civil Code section 3294, Nrreal's [sic] conduct was fraudulent, malicious, and oppressive, and therefore constitutes the basis for punitive damages."). Therefore, the interference with contract claim is subject to Rule 9(b)'s heightened pleading standard. *AlterG, Inc. v. Boost Treadmills LLC*, No. 18-cv-

07568-EMC, 2019 WL 4221599, at *12–13 (N.D. Cal. Sept. 5, 2019) (interference with contract claim was subject to Rule 9(b) because the complaint alleged that defendants "committed the aforementioned acts maliciously, fraudulently, and oppressively, with the wrongful intention of injuring AlterG"); *United States v. Agbayani Constr. Corp.*, No. 14-cv-02503-MEJ, 2014 WL 3866095, at *3 (N.D. Cal. Aug. 5, 2014) (same).

This claim fails out of the gate because Magic Leap fails to allege a valid contract. As discussed in Section IV.A.1.a, the PIIA is an unlawful restraint on trade and is void. Thus, Magic Leap's interference claim must also fail. *United Nat'l Maintenance, Inc.*, 766 F.3d at 1006.

Magic Leap also fails to adequately plead the actions allegedly constituting interference. Under Rule 9(b), the circumstances constituting the alleged fraud must be "specific enough to give defendants notice of the particular misconduct … so that they can defend against the charge and not just deny that they have done anything wrong." *Kearns v. Ford Motor Co*, 567 F.3d 1120, 1124 (9th Cir. 2009) (internal quotations omitted). In other words, allegations of fraud must set forth "the who, what, when, where, and how of the misconduct charged." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal quotations omitted).

Here, Magic Leap's Complaint fails to meet the Rule 9(b) standard because it does not allege any facts regarding the who, what, when, where, or how of Nreal's alleged interference with Xu's PIIA. *See Vess*, 317 F.3d at 1106. Magic Leap fails to allege ***what*** actions Nreal took that were aimed at inducing Xu to breach the PIIA, ***who*** at Nreal took such actions, ***when*** and ***where*** the alleged interference occurred, or ***how*** Nreal's conduct was aimed at inducing Xu to breach the PIIA. Magic Leap's only attempt at describing the basis for this claim is the vague, conclusory allegation that "Nreal on its own behalf or through it [sic] agents, undertook intentional actions aimed at inducing [Xu] to breach the PIIA, or otherwise disrupt [Xu's] performance of his obligations under the PIIA." Complaint ¶ 46. This mere recitation of elements of the cause of action does not satisfy Rule 9(b) because it fails to give Nreal specific notice of its alleged misconduct. *Kearns*, 567 F.3d at 1124.

Magic Leap's interference claim fails even under the notice pleading standard. Under the notice pleading standard of Rule 8(a), "a complaint must contain sufficient factual matter,

accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678; Fed. R. Civ. P. 8(a). A plaintiff must plead the "grounds of his entitlement to relief" by offering "more than labels and conclusions [or] a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555 (citations omitted). Although a court must accept well-pleaded factual allegations as true, it is not "required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *see also Iqbal*, 556 U.S. at 678 ("[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not entitled to a presumption of truth). A complaint that merely recites the elements of an interference claim is insufficient under Rule 8(a). *See, e.g., Seaman v. Valley Health Care Med. Grp., Inc.*, No. CV 09–8532 DOC (RNBx), 2011 WL 13213625, at *3-4 (C.D. Cal. Apr. 25, 2011) (allegation that "Cross–Defendants, and each of them, intended to disrupt, and did in fact disrupt, the performance of contracts" was insufficient to plead interference with contract under Rule 8(a)) (citing *Iqbal*, 556 U.S. at 677); *Qingdao Tang-Buy Int'l Imp. & Exp. Co., Ltd. v. Preferred Secured Agents, Inc.*, No. 15-CV-00624-LB, 2016 WL 6524396, at *5 (N.D. Cal. Nov. 3, 2016) (plaintiff failed to state interference with contract claim because its "allegations say nothing about what Mr. Kule allegedly did to force the payment of his commission").

Here, Magic Leap pleads no facts regarding what Nreal allegedly did to interfere with the PIIA. It merely alleges that Nreal or its agents took unspecified "intentional actions." Complaint ¶ 46. But such conclusory allegations are plainly deficient under Rule 8(a).

3. Magic Leap Fails to State a Claim for Constructive Fraud

Magic Leap's allegations of constructive fraud cannot meet the applicable heightened pleading standard of Rule 9(b). *Sonoma Foods, Inc. v. Sonoma Cheese Factory, LLC*, 634 F. Supp. 2d 1009, 1021 (N.D. Cal. 2007) (constructive fraud claim is subject to Rule 9(b)). Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship. *Prakashpalan v. Engstrom, Lipscomb & Lack*, 223 Cal. App. 4th 1105, 1131 (2014). A constructive fraud claim requires that facts be pled to show the following elements: (1) a fiduciary or confidential relationship, and (2) an act, omission, or concealment involving a

breach of duty by one in the fiduciary or confidential relationship to another, (3) which induces justifiable reliance by the latter to his prejudice. *Id.*; *see* Cal. Civ. Code § 1573. Magic Leap alleges that defendants are each directly liable for constructive fraud and also liable as accessories to each other's constructive fraud (under both "aiding and abetting" and "conspiracy" theories). Complaint ¶¶ 50–56. Each of these theories fail because they are unsupported by sufficient factual allegations under Rule 9(b).

Direct Liability. Magic Leap fails to state a claim that Nreal committed constructive fraud because Magic Leap does not—and cannot—allege that it was in a fiduciary or confidential relationship with Nreal.

With respect to Xu, Magic Leap alleges that he had a relationship of confidence with Magic Leap because he executed the PIIA and that Xu breached this relationship by "***failing to disclose*** that he was assisting and enabling his company, Nreal and others, to violate Magic Leap's exclusive rights to its Confidential Information and the technological innovations …" Complaint ¶¶ 51–52 (emphasis added). Magic Leap's allegations against Xu are legally deficient.

First, the PIIA is an unlawful restraint on trade and is void, as discussed in Section IV.A.1.a. Magic Leap cannot show a valid fiduciary or contractual relationship.

Second, the Complaint fails to allege, let alone plead with particularity, any facts showing that Xu had a duty to disclose his purported assistance of Nreal. *See Wahl v. Am. Sec. Ins. Co.*, No. C 08-00555 RS, 2010 WL 1881126, at *4 (N.D. Cal. May 10, 2010) (dismissing constructive fraud claim because plaintiff failed to plead adequately that defendant breached a statutory duty to disclose information and failed to offer any other theory on which a constructive fraud claim could be based). The PIIA, even if valid, does not contain such a disclosure requirement—the only disclosure requirement in the PIIA is a provision regarding Xu's disclosure of prior intellectual property that he created before working at Magic Leap, which is unrelated to Magic Leap's claims. Complaint ¶¶ 51–53; Exhibit A § 3(d). Magic Leap's constructive fraud claim should be dismissed because it cannot allege facts showing that Xu had a duty to disclose his purported assistance of Nreal.

Third, the Complaint fails to meet the particularity standard—it fails to identify with any

specificity the nature or identity of the allegedly confidential information. *See, e.g.*, *Brooks v. GMAC Mortg. Servicing LLC*, No. CV 11-3135 GAF (SSx), 2011 WL 13220320, at *3 (C.D. Cal. May 12, 2011) (allegation that defendants "omitted material terms, conditions and policies of the loan" was insufficient because it did not "specify what precise terms were omitted, who made the misleading representations, or when and where they were made"); *Mahurin v. Lehman Bros.*, No. C 99-5128 CRB, 2000 WL 356377, at *3 (N.D. Cal. Mar. 30, 2000) (allegation that defendant "refused to disclose information concerning the Liquid Audio IPO" was insufficient). Magic Leap's circuitous allegations beg the questions of ***what*** information Xu failed to disclose and ***what*** "exclusive rights to its Confidential Information and the technological innovations" were allegedly violated. Similarly, the Complaint is devoid of facts regarding ***when*** and ***where*** Xu allegedly "assist[ed] and enable[ed] his company, Nreal and others, to violate Magic Leap's exclusive rights to its Confidential Information and the technological innovations."[15]

Accomplice Liability. Magic Leap asserts that both defendants are liable for constructive fraud under two alternative theories: (a) aiding and abetting, and (b) conspiracy. Complaint ¶ 56. Here, Magic Leap appears to be pleading that Nreal and Xu aided and abetted one another, or conspired, to prevent Xu from disclosing his assistance to Nreal alleged in paragraphs 51 to 53. These circular arguments fail as detailed below.

Under California law, one "aids and abets the commission of an intentional tort if the person … knows the other's conduct constitutes a breach of a duty and gives substantial assistance or encouragement to the other to so act." *In re First Alliance Mortg. Co.*, 471 F.3d 977, 993 (9th Cir. 2006) (internal quotations omitted) (citing *Casey v. U.S. Bank Nat'l Ass'n*, 127 Cal. App. 4th 1138, 1144 (2005)). The elements of civil conspiracy are "(1) the formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant thereto; and (3) the damage resulting." *Mosier v. S. California Physicians Ins. Exch.*, 63 Cal. App. 4th 1022, 1048

[15] Magic Leap alleges that Xu established "a directly competing company founded to develop and exploit Confidential Information, including the Confidential Designs," and that he took typical actions to develop the company, such as creating a social media presence and brand, obtaining funding from investors, and promoting a product. Complaint ¶ 53. These allegations are insufficient to state a claim for constructive fraud, at least because Magic Leap has not pled with particularity what Confidential Information was allegedly exploited.

(1998) (internal citations omitted). Both allegations of aiding and abetting fraud and conspiracy to commit fraud must be plead with particularity. *Neilson v. Union Bank of California, N.A.*, 290 F. Supp. 2d 1101, 1130 n.81 (C.D. Cal. 2003) (aiding and abetting); *Lachapelle v. Kim*, No. 15-CV-02195-JSC, 2015 WL 5461542, at *7 (N.D. Cal. Sept. 16, 2015) (conspiracy). The Complaint fails to state a claim under either theory for multiple reasons.

First, under either an aiding and abetting or conspiracy theory, Magic Leap must adequately plead the underlying tort or wrongful act—constructive fraud. *See Richard B. LeVine, Inc. v. Higashi*, 131 Cal. App. 4th 566, 574 (2005) ("The unifying principle under either theory of recovery, civil conspiracy or aiding and abetting, is that [defendant's] liability depends upon the actual commission of a tort."). Because Magic Leap fails to state a direct liability claim for constructive fraud, *see* above, its aiding and abetting and conspiracy theories also fail.

Moreover, a conspiracy theory cannot be used as an "end run" to create a tort where one does not exist in the first place—"conspiracy presupposes that the coconspirator is legally capable of committing the tort, i.e., that he or she owes a duty to plaintiff recognized by law and is potentially subject to liability for breach of that duty." *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 511, 519 (1994). Magic Leap cannot plead conspiracy because Nreal does not have a fiduciary or confidential relationship with it. And because Nreal cannot legally commit the underlying tort of constructive fraud, it cannot commit conspiracy to do so. *Id.* at 514 (conspiracy "allows tort recovery only against a party who already owes the duty and is not immune from liability based on applicable substantive tort law principles"). With respect to Xu, Magic Leap alleges a contractual duty, *see* Complaint ¶ 51, but conspiracy cannot be used to create a tort duty out of what is fundamentally a contractual obligation (not to mention the contract is invalid and contains no duty to disclose). *Applied Equip. Corp.*, 7 Cal. 4th at 514 ("Because a party to a contract owes no tort duty… he or she cannot be bootstrapped into tort liability by the pejorative plea of conspiracy."). Magic Leap cannot use conspiracy to plead constructive fraud against either defendant.

Finally, Magic Leap fails to plead either aiding and abetting or conspiracy with particularity. Magic Leap fails to meet the heightened pleading standard by failing to allege that

either defendant knew the other had breached a duty to Magic Leap. Magic Leap also fails to allege ***what*** Nreal or Xu did to aid and abet each other's alleged conduct or in furtherance of a conspiracy. Allegations that defendants "aided and abetted each other" or "conspired to commit such wrongful conduct," Complaint ¶ 56, are conclusory and insufficient to state a claim.

For each of these reasons, Magic Leap fails to state a claim for constructive fraud.

4. Magic Leap Fails to State a UCL Claim

The UCL prohibits "any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. The only purported conduct by defendants that Magic Leap uses to support its UCL claim relates to constructive fraud. Complaint ¶ 59.[16] When a complaint bases a UCL claim on purportedly fraudulent conduct, Rule 9(b) applies. *Kearns*, 567 F.3d at 1124–27 (Rule 9(b) pleading standard applies to all UCL claims under the "fraudulent" prong and claims under the "unlawful" and "unfair" prongs where a plaintiff "allege[s] a unified course of fraudulent conduct and rel[ies] entirely on that course of conduct as the basis of" a UCL claim). Here, Magic Leap relies on its allegations that Xu and Nreal's conduct constitutes constructive fraud, thereby invoking the particularity requirements of Rule 9(b). Although Magic Leap's Complaint mentions all three prongs of the UCL statute, its factual allegations are grounded in fraud, so we address that prong first.

Fraudulent Business Act or Practice. The "fraudulent" prong prohibits business practices that are likely to deceive members of the public, and a plaintiff must allege that it actually relied on the purported misrepresentation. *Comm. on Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 221 (1983); *I.B. v. Facebook, Inc.*, 905 F. Supp. 2d 989,

[16] Breach of contract is not actionable under the UCL in the Ninth Circuit. *Shroyer v. New Cingular Wireless Servs.*, 622 F.3d 1035, 1044 (9th Cir. 2010) (the unlawful prong of the UCL requires a business practice to be "forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made" and, thus, a common law violation, such as breach of contract, is insufficient); *S. Cal. Inst. of Law v. TCS Educ. Sys.*, No. CV 10-8026 PSG (AJWx), 2011 WL 1296602, at *11 (C.D. Cal. Apr. 5, 2011) (a breach of contract claim alone is insufficient to state an "unlawful" claim because a "breach of contract claim 'may only form the basis of a section 17200 claim if the breach itself is "unlawful, unfair, or fraudulent'") (citations omitted); *Smith v. Wells Fargo Bank, N.A.*, 135 Cal. App. 4th 1463, 1484 (2005) ("[c]ontractual duties are voluntarily undertaken by the parties to the contract, not imposed by state [or federal] law").

1012 (N.D. Cal. 2012) (citing *In re Tobacco II Cases*, 46 Cal. 4th 298, 328 (2009)). The "fraudulent" prong is subject to the Rule 9(b) pleading standard. *Burke v. JPMorgan Chase Bank, N.A.*, No. 13-4249 SC, 2015 WL 2198319, at *6 (N.D. Cal. May 11, 2015).

Magic Leap tries to ground its UCL claim in fraud, alleging: "As set forth in Paragraphs 35–57 above, [Xu], assisted by Nreal and others, constructively ***defrauded*** Magic Leap by ***failing to disclose*** that he had built a business based on ***false premises, false representations*** to the public, and ***unlawful reliance*** on Magic Leap Confidential Information." Complaint ¶ 59 (emphasis added). First, as discussed above, Magic Leap cannot allege any duty to disclose owed by either Nreal (there is no duty owed between Nreal and Magic Leap) or by Xu (the PIIA is invalid under Section 16600 and, in any event, contains no duty to disclose). There can be no fraud absent a duty, which presents a legal obstacle Magic Leap cannot overcome.

Further, Magic Leap has not pleaded the "who, what, when, where, and how" of the alleged failure to disclose, including the alleged "false premises" upon which Nreal was supposedly built, the alleged "false representations" made by Xu and Nreal, or the alleged "unlawful reliance" on Magic Leap's purported confidential information. Magic Leap fails to specifically identify any false statements. Similarly, the Complaint does not allege that Magic Leap relied on any misrepresentation, let alone any specific misrepresentation. Nor does the Complaint identify any Confidential Information with specificity. A complaint that "alleges no facts showing that any misrepresentation was made to [plaintiff] by any particular defendant, or that [plaintiff] relied to [its] detriment on any such misrepresentation," lacks the specificity required to plead a UCL claim under the Rule 9(b) standard. *Harris-Scott v. Immelt*, No. C 12-3509 PJH, 2013 WL 369013, at *4 (N.D. Cal. Jan. 29, 2013).

Unlawful Business Act or Practice. The "unlawful" prong treats violations of other laws as independently actionable unlawful business practices. *Chabner v. United Omaha Life Ins. Co.*, 225 F.3d 1042, 1048 (9th Cir. 2000). To survive a Rule 12(b)(6) motion to dismiss a UCL claim under the "unlawful" prong, a plaintiff must adequately state a claim under the predicate law. *Hadley v. Kellogg Sales Co.*, 243 F. Supp. 3d 1074, 1094–95 (N.D. Cal. 2017). Magic Leap does not allege a violation of any specific state or federal statute or other law to support its "unlawful"

UCL claim. To the extent Magic Leap relies on its breach of contract, interference, or constructive fraud claims, those cannot be the basis for a UCL claim because, as detailed above: (i) they are not legally cognizable because they rely on a duty that does not exist (Nreal has no duty to Magic Leap, and Xu's contract is void under Section 16600 and contains no duty to disclose), and (ii) they are inadequately pleaded under Rules 8(a) and 9(b). *See* Sections IV.A.1–3. In any event, breach of contract is not actionable under the UCL's "unlawful" prong. *Arce v. Kaiser Found. Health Plan, Inc.*, 181 Cal. App. 4th 471, 489 (2010).

Unfair Business Act or Practice. In competitor cases, a business practice is "unfair" only if it "threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999).[17] "Competition" in this context is guided by principles of antitrust law and is for "the protection of competition, not competitors." *Id.* at 186–87 (citations omitted) (such laws "do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws."). In other words, damage to a competitor's commercial interest is not enough—the harm alleged must be to competition. *See also Global Plastic Sheeting v. Raven Indus.*, No. 17-CV-1670 DMS (KSC), 2018 WL 3078724, at *6 (S.D. Cal. Mar. 14, 2018) (allegations that "merely indicate Defendant's conduct resulted in harm to its commercial interests rather than harm to competition" are insufficient) (quoting *Cel-Tech*, 20 Cal. 4th at 187).

Magic Leap alleges that Nreal is a competitor, Complaint ¶¶ 18, 32–33, but fails to allege any violation of competition law or harm to competition. Magic Leap only alleges harm to one entity—itself. Complaint ¶ 61. This is insufficient to show that the alleged conduct "significantly threatens or harms ***competition***." In fact, as pled by Magic Leap, the alleged conduct benefits competition because Nreal is developing a new AR glasses product for the AR

[17] Courts apply different tests to determine whether a business practice is "unfair" depending on whether the plaintiff is a competitor of the defendant or a consumer. *Drum v. San Fernando Valley Bar Ass'n*, 182 Cal. App. 4th 247, 253 (2010).

market. Promoting development of alternative suppliers benefits, not harms, competition. *See In re Qualcomm Litig.*, No. 17-cv-00108-GPC-MDD, 2017 WL 5985598, at *8 (S.D. Cal. Nov. 8, 2017) (plaintiff failed to state a UCL claim under the "unfair" prong by alleging that it suffered "commercial harm" as a result of Apple's attempt to cover up the performance differences between plaintiff's chips and Intel's chips because "if anything, Apple's actions have ***benefitted*** competition by promoting the development of Intel as an alternative chip supplier" (emphasis in original)).

Thus, Magic Leap fails to state an "unfair" UCL claim. *San Miguel v. HP Inc.*, 317 F. Supp. 3d 1075, 1092 (N.D. Cal. 2018) (plaintiff failed to state a UCL claim under the "unfair" prong based on alleged anticompetitive behavior because it failed to "identify which constitutional, regulatory or statutory provision to which the allegations are tethered").

B. <u>This Court Lacks Personal Jurisdiction Over Nreal</u>

The claims against Nreal fail for another independent reason—this Court lacks personal jurisdiction. Magic Leap, as the party seeking to invoke the jurisdiction of the Court over Nreal, has the burden of establishing jurisdiction. *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). At this stage, Magic Leap must plead facts sufficient to make a *prima facie* showing of either general or specific jurisdiction over each defendant. *Ziegler v. Indian River Cty.*, 64 F.3d 470, 473 (9th Cir. 1995); *Caruth v. Int'l Psychoanalytical Ass'n*, 59 F.3d 126, 128 (9th Cir. 1995). Here, the Complaint does not even attempt to plead that this Court has general jurisdiction over Nreal. Nor could it—Nreal is a Chinese company that is headquartered in Beijing and that has no officers, directors, employees, or facilities in California. Nor does the Complaint identify any facts related to Magic Leap's causes of action that could give rise to specific jurisdiction over Nreal. Because there is no basis for this Court to exercise either general or specific jurisdiction, Nreal should be dismissed. Fed. R. Civ. P. 12(b)(2).

1. <u>Nreal Is Not Subject to This Court's General Jurisdiction</u>

A court may only exercise general jurisdiction over a defendant whose contacts with the forum state are "so continuous and systematic as to render them essentially at home in the forum state." *BNSF Ry. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017) (internal quotations and citation

omitted). The standard for general jurisdiction is "exacting" because "a finding of general jurisdiction permits a defendant to be haled into court in the forum state to answer for any of its activities anywhere in the world." *Schwarzenegger*, 374 F.3d at 801 (citation omitted). For a corporation, the "paradigm[] bases for the exercise of general jurisdiction" are the place of incorporation and principal place of business. *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011).

Magic Leap's Complaint contains no allegations that give rise to a *prima facie* case of general jurisdiction over Nreal in California. Magic Leap has not pleaded that Nreal has "continuous and systematic" contacts with California. *BNSF Ry.*, 137 S. Ct. at 1558. Nor could it. Nreal is not incorporated in California, is not headquartered in California, has no place of business in California, and is not registered to do business in California. Xu Decl. ¶¶ 16–20. Nor does Nreal have any officers, directors, employees, or property in California. *Id.* ¶¶ 17, 18. Thus, the Complaint fails to allege, and cannot allege, general jurisdiction over Nreal.

2. Nreal Is Not Subject to This Court's Specific Jurisdiction

To establish specific jurisdiction, the Ninth Circuit uses a three-prong test that requires the plaintiff to show that: (1) the defendant purposefully directed its activities at residents of the forum or purposefully availed itself of the privilege of doing business in the forum; (2) the plaintiff's claim arises out of or relates to those activities; and (3) the assertion of personal jurisdiction is reasonable and fair. *Schwarzenegger*, 374 F.3d at 802. It is the plaintiff's burden to satisfy the first two prongs. *Id.* If the plaintiff does so, the burden shifts to the defendant to show why the exercise of personal jurisdiction would not be reasonable and fair. *Id.*

Here, Magic Leap's Complaint fails to plead sufficient facts to show that this Court has specific personal jurisdiction over Nreal.

a. Nreal Has Not Purposefully Directed Activities at California

The Court cannot exercise specific jurisdiction over Nreal because Magic Leap has not pled that Nreal purposefully directed an intentional act toward California. *Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064, 1068 (9th Cir. 2017). To establish purposeful direction, a plaintiff must satisfy a three-prong test from the United States Supreme Court in *Calder v. Jones*:

(1) the defendant must have committed an intentional act; (2) the defendant's act was expressly aimed at the forum state; and (3) the defendant knew the brunt of the harm was likely to be suffered in the forum state. *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002) (citing *Calder v. Jones*, 465 U.S. 783, 788–89 (1984)). "Failing to sufficiently plead any one of these three elements [from *Calder*] is fatal to Plaintiff's attempt to show personal jurisdiction." *Rupert v. Bond*, 68 F. Supp. 3d 1142, 1163 (N.D. Cal. 2014).

Intentional Act. To establish purposeful direction, Magic Leap must allege "an external manifestation of the actor's intent to perform an actual, physical act in the real world." *AirWair Int'l Ltd. v. Schultz*, 73 F. Supp. 3d 1225, 1233 (N.D. Cal. 2014) (citing *Schwarzenegger*, 374 F.3d at 806). Here, Magic Leap's Complaint is devoid of any allegations of intentional acts by Nreal and contains, at best, conclusory statements that the Court should disregard. *See, e.g.*, Complaint ¶ 46 (Nreal "undertook intentional actions aimed at inducing [Xu] to breach the PIIA"); *Iqbal*, 556 U.S. at 678; *China Tech. Glob. Corp. v. Fuller, Tubb, Pomeroy & Stokes*, No. C 05-01793 JW, 2005 WL 1513153, at *9–10 (N.D. Cal. June 27, 2005).

Expressly Aimed at the Forum State. Nor does Magic Leap attempt to allege that Nreal's actions, if any, were directed at California. The specific jurisdiction test requires a defendant's suit-related conduct to create a "substantial connection" with the forum. *Walden v. Fiore*, 571 U.S. 277, 284 (2014); *Picot v. Weston*, 780 F.3d 1206, 1214-15 (9th Cir. 2015) (finding that express aiming "depends, to a significant degree, on the specific type of tort or other wrongful conduct at issue" and alleged tortious conduct that took place entirely in Michigan "did not connect [defendant] with California in a way sufficient to support the assertion of personal jurisdiction"). The wrongful conduct alleged here is interference with contract and constructive fraud—all of which, even if true, would have taken place at Nreal's place of business in China. Magic Leap's failure to allege any California connection between Nreal and the claims here is controlling and precludes the Court from exercising specific jurisdiction.

Harm Likely Suffered in the Forum State. Magic Leap also fails to allege any facts showing that Nreal knew that any harm was likely to be suffered *in California*. *Schwarzenegger*, 374 F.3d at 803 (citing *Dole Food*, 303 F.3d at 1111). The Complaint only alleges generalized

harm and makes no reference to California. *See* Complaint ¶¶ 41, 48, 55, 61. Moreover, when considering a corporation's alleged economic harm for jurisdictional purposes (as a necessary, but not sufficient, factor), the Ninth Circuit attributes such harm to the plaintiff's principal place of business—which is not California. *CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1079 (9th Cir. 2011) ("We have repeatedly held that a corporation incurs economic loss, for jurisdictional purposes, in the forum of its principal place of business."); Complaint ¶ 4 (Magic Leap is a Delaware corporation with its principal place of business in Florida).

Magic Leap fails to satisfy any of the prongs required to establish purposeful direction.

b. Magic Leap's Complaint Does Not Arise from Nreal's Contacts with California

Magic Leap also fails to meet its burden because this suit does not arise from Nreal's contacts with California. *See Axiom Foods*, 874 F.3d at 1068 (quoting *Dole Food*, 303 F.3d at 1111) (for a court to exercise specific jurisdiction, "the claim must be one which arises out of or relates to the defendant's forum-related activities"). The "Jurisdiction and Venue" Section of the Complaint does not mention Nreal. *See* Complaint ¶¶ 7–8. From there, the Complaint fails to allege facts that could give rise to specific jurisdiction. At best, the Complaint makes vague statements about Nreal's conduct. *See, e.g.*, *id.* ¶¶ 23, 46. Critically, Magic Leap does not allege that any of this alleged conduct occurred in California or that it arises out of Nreal's contacts with California. Nor could it. It is undisputed that Nreal does not have employees in California and that Nreal developed the Nreal Light in China. Xu Decl. ¶¶ 18, 20. Nreal does not own or lease property in California. *Id.* ¶ 17. It is not registered to do business in California. *Id.* ¶ 19.

The United States Supreme Court has repeatedly stated that it is "the defendant's *suit-related* conduct [that] must create a substantial connection with the forum State." *Walden*, 571 U.S. at 284 (emphasis added). "When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State." *Bristol-Myers Squibb Co. v. Super. Ct.*, 137 S. Ct. 1773, 1781 (2017); *see also Goodyear*, 564 U.S. at 931 n.6 ("[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales."). Magic Leap's failure to plead any Nreal conduct in

California related to Magic Leap's claims prevents this Court from exercising specific personal jurisdiction.

c. This Court's Exercise of Jurisdiction over Nreal Would Not Comport with Fair Play and Substantial Justice

Independently, the Court should decline to exercise personal jurisdiction over Nreal because doing so would not be compatible with "fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)). When assessing the fairness of exercising personal jurisdiction, "the primary concern is the burden on the defendant." *Bristol-Myers Squibb*, 137 S. Ct. at 1780 (internal quotations omitted). In particular, courts give "significant weight" to the "unique burdens" on a foreign-country corporation when it must defend itself in the United States legal system. *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 114 (1987).

The Ninth Circuit identified seven factors that courts may consider in evaluating fair play and substantial justice. *See Caruth*, 59 F.3d at 128. ***First***, "the extent of the defendants' purposeful interjection into the forum state's affairs." This factor weighs against jurisdiction because Nreal's conduct is centered in China, not California. Xu Decl. ¶¶ 16–20. ***Second***, "the burden on the defendant of defending in the forum." This factor weighs heavily against jurisdiction, as it would require a Chinese company to travel repeatedly to the United States to defend this action in the United States legal system. *Id.* ¶¶ 16–20; *see also Asahi*, 480 U.S. at 114 ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."). ***Third***, "the extent of conflict with the sovereignty of the defendants' state." Litigating against a foreign defendant "creates a higher jurisdictional barrier than litigation against a citizen from a sister state because important sovereignty concerns exist." *Sinatra v. National Enquirer*, 854 F.2d 1191, 1199 (9th Cir. 1988). Furthermore, "the presence or absence of connections to the United States in general, not just to the forum state," cautions against finding jurisdiction. *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1489 (9th Cir. 1993). None of the ***Fourth*** ("the forum state's interest in adjudicating the dispute"), ***Fifth*** ("the

most efficient judicial resolution of the controversy"), or ***Sixth*** ("the importance of the forum to the plaintiff's interest in convenient and effective relief") factors support jurisdiction because none of the parties is headquartered in California and none of Nreal's evidence of its product development is in California. Xu Decl. ¶¶ 16, 17, 18, 20; Complaint ¶ 4; *Asahi*, 480 U.S. at 118–19 (weak state interest in adjudicating claim because plaintiff is non-resident of California); *Core-Vent*, 11 F.3d at 1489 (efficiency is determined by location of witnesses and evidence). ***Seventh***, "the existence of an alternative forum." It is Magic Leap's burden to prove that it could not bring its claims against Nreal somewhere else and it has not done so. *FDIC v. British-Am. Ins. Co.*, 828 F.2d 1439, 1445 (9th Cir. 1987). Indeed, Magic Leap has not met its burden of proving that it would be precluded from bringing claims against Nreal in China. *Core-Vent*, 11 F.3d at 1490 ("Core-Vent has not met its burden of proving that it would be precluded from suing the doctors in Sweden. 'Doubtless [it] would prefer not to, but that is not the test.'").

The *Caruth* factors make clear that it would be fundamentally unfair—and incompatible with traditional notions of fair play and substantial justice—to subject Nreal to specific personal jurisdiction. All claims against Nreal should be dismissed.

V. AMENDMENT AND JURISDICTIONAL DISCOVERY WOULD BE FUTILE

The Court should dismiss Magic Leap's Complaint with prejudice and without leave to amend because the claims suffer legal deficiencies that cannot be cured by amendment. *Steckman v. Hart Brewing*, 143 F.3d 1293, 1298 (9th Cir. 1998) (dismissal with prejudice is appropriate where amendment would be futile). The breach of contract and interference with contract claims are premised on a contract that is invalid under Section 16600. *See* Sections IV.A.1–2. This cannot be cured. Similarly, the constructive fraud claim against Nreal cannot survive because Nreal owed no duty to Magic Leap, nor can it survive against Xu because it is based either on a contractual duty that is invalid under Section 16600 or a duty to disclose that does not exist under the PIIA. *See* Section IV.A.3. These legal obstacles are also fatal to the UCL claim. The "fraudulent business act" and "unlawful" prongs cannot survive because they depend on a contract that is void and/or duty to disclose that does not exist. *See* Section IV.A.4. The "unfair" prong cannot be met because there can be no alleged harm to "competition." *See id.* Such

obstacles are incurable through an amended pleading.

A request for jurisdictional discovery should similarly be denied. Jurisdictional discovery is only available where "pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary." *Butcher's Union Local No. 498, United Food & Commercial Workers v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986) (internal quotations and citations omitted). To obtain jurisdictional discovery, Magic Leap must present a "colorable basis" for personal jurisdiction over Nreal. *Adobe Sys. v. NA Tech Direct, Inc.*, No. 17-cv-05226-YGR, 2018 WL 3304633, at *2 (N.D. Cal. July 5, 2018) (citation omitted). A court should deny a request for jurisdictional discovery that is "based on little more than a hunch that it might yield jurisdictionally relevant facts." *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008).

Here, Magic Leap has not alleged any theory of personal jurisdiction over Nreal or any facts regarding Nreal's contacts with California. In contrast, Nreal provided a declaration establishing it does not have sufficient contacts to California to justify the exercise of personal jurisdiction. Xu Decl. ¶¶ 16–20. Because there are no disputed jurisdictional facts and Magic Leap has failed to present a colorable basis for jurisdiction over Nreal, the Court should deny any request for jurisdictional discovery. *See Boschetto*, 539 F.3d at 1020.

VI. CONCLUSION

For the reasons set forth above, the Court should dismiss the Complaint in its entirety with prejudice and without leave to amend.

Dated: December 16, 2019

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