**NOT FOR PUBLICATION**

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| DREAMSTIME.COM, LLC, A Florida LLC,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>GOOGLE LLC,<br><br>Defendant-Appellee. | No. 20-16472<br><br>D.C. No. 3:18-cv-01910-WHA<br><br>MEMORANDUM[*] |

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Argued and Submitted February 16, 2022
San Francisco, California

Before: GOULD and RAWLINSON, Circuit Judges, and ZIPPS,[**] District Judge.
Concurrence by Judge RAWLINSON.

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The Honorable Jennifer G. Zipps, United States District Judge for the District of Arizona, sitting by designation.

In this antitrust case,[1] Appellant Dreamstime.com ("Dreamstime") appeals the district court's grant of summary judgment on its claims that Appellee Google LLC violated (1) the implied covenant of good faith and fair dealing and (2) California's Unfair Competition Law ("UCL"). We have jurisdiction under 28 U.S.C. § 1291. We review a grant of summary judgment *de novo*. *Glen Holly Ent., Inc. v. Tektronix, Inc.*, 352 F.3d 367, 368 (9th Cir. 2003). We affirm.

**I**

Dreamstime argues on appeal that "misrepresentations and other misconduct" by Google's advertising support representatives violated the implied covenant of good faith and fair dealing arising from Google's contractual discretion to offer advertising support services to Dreamstime.

"Under California law, *every* contract includes a covenant of good faith and fair dealing, which requires that neither party do anything which will deprive the other of the benefits of the agreement." *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 777 (9th Cir. 1990) (citation and internal quotation marks omitted). The scope of the implied covenant is "circumscribed by the purposes and express terms of the contract." *Carma Devs., Inc. v. Marathon Dev.*, 826 P.2d 710, 727 (Cal. 1992).

[1] We set forth in detail the procedural and factual background of this case in a separate published opinion filed simultaneously with this memorandum disposition. We do not repeat it here.

We conclude that the district court did not err in granting summary judgment on this claim for two independent reasons. First, the district court need not even have considered the implied covenant theory Dreamstime asserts on appeal because it was not pled in Dreamstime's complaint. Dreamstime raised that theory for the first time in its summary judgment briefing.[2] District courts do "not err when" they do "not allow [plaintiffs] to proceed on" claims raised "for the first time at summary judgment." *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000).

Second, summary judgment was proper on the merits. Google's discretion under the contract was not the kind of "absolute discretion" that California courts identify as giving rise to an implied duty of good faith and fair dealing. *See Storek & Storek, Inc. v. Citicorp Real Estate, Inc.*, 122 Cal. Rptr. 2d 267, 281 (Cal. Ct. App. 2002). The contractual provision on which Dreamstime relies provides that Dreamstime "is not required to authorize use of" Google's advertising support services and that Dreamstime "may opt -in to or opt -out of usage of these features." Moreover, the contractual provision provides that if Dreamstime elected to authorize Google's additional services, Dreamstime would "be *solely*

[2] Dreamstime did not, in its briefing before us, contest Google's assertion that Dreamstime raised this implied covenant theory for the first time in its summary judgment briefing.

*responsible*." We conclude that there is no error in the district court's conclusion that Google did not breach the implied covenant.

**II**

We turn next to Dreamstime's claims under the UCL. Dreamstime argues that it raised triable issues of fact under the "fraud" and "unfair" prongs of the UCL. Cal. Bus. & Prof. Code § 17200. We disagree.

**A**

California courts apply at least two different tests under the UCL's unfair prong. *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 735 (9th Cir. 2007). The *South Bay* test asks whether a practice is "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 85 Cal. Rptr. 2d 301, 316 (Ct. App. 1999) (citation omitted). The *Cel-Tech* test asks whether the "conduct [] threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws . . . or otherwise significantly threatens or harms competition." *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 544 (Cal. 1999).

The district court properly granted summary judgment on Dreamstime's UCL unfair claim under either test.[3] Dreamstime has not raised a genuine dispute of material fact that Google's conduct was "immoral, unethical, oppressive,

[3] We need not and do not decide which test applies.

unscrupulous, or substantially injurious to consumers" as is required under the *South Bay* test. 85 Cal. Rptr. 2d. at 316. And, for the reasons set forth in the opinion accompanying this memorandum disposition, Dreamstime's claim fails the *Cel-Tech* test because it has not shown an antitrust violation. We hold that summary judgment was proper on Dreamstime's claim under the UCL's unfair prong.

**B**

Finally, the UCL's fraud prong bars business practices that are "likely to deceive the reasonable consumer to whom the practice[s] w[ere] directed." *S. Bay*, 85 Cal. Rptr. 2d. at 310 (internal citation and quotation marks omitted). A "few isolated examples" of deception are insufficient because the plaintiff needs to submit evidence showing a likelihood of confusing an "appreciable number of reasonably prudent purchasers." *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1026 (9th Cir. 2008).

We hold summary judgment was correct on this claim. Dreamstime alleges that Google violated the UCL's fraud prong by (1) not disclosing its algorithmic revision; and (2) misrepresenting certain aspects of its advertising service. Neither allegation is sufficient. Google had no affirmative duty under the parties' agreement to disclose its confidential algorithmic revision. Moreover, there is no evidence suggesting that the Google employees with whom Dreamstime interacted

(1) knew about the algorithmic revision, and/or (2) believed that the algorithmic revision caused Dreamstime harm.[4] Parties have no legal duty to disclose facts that they do not know or believe to be true. *Wilson v. Hewlett-Packard Co.*, 668 F.3d 1136, 1145 n.5 (9th Cir. 2012). Dreamstime has not shown more than, at most, a "few isolated examples" of misrepresentation, and that evidence falls short of demonstrating that an "appreciable number of reasonably prudent purchasers" would likely be misled by Google's misconduct. *Clemens*, 534 F.3d at 1026. Summary judgment was thus properly granted on Dreamstime's UCL fraud claim.

**III**

For the reasons provided above, we conclude that the district court did not err in granting summary judgment for Google on Dreamstime's implied covenant of good faith and UCL claims. The district court's judgment is **AFFIRMED**.

[4] Absent other evidence, Dreamstime's assertion that the algorithmic revision caused it harm boils down to *post hoc ergo propter hoc*, a common logical fallacy that states that if event *x* followed event *y*, then *y* must have been caused by *x*. Here, because expert opinions were conflicted, as set forth in the accompanying published opinion, the record does not unequivocally disclose whether Google's revision of its algorithms in fact was the cause of declines in search ranking.

***Dreamstime.com, LLC v. Google LLC*, Case No. 20-16472**
**Rawlinson, Circuit Judge, concurring in the result:**

I concur in the result.