Jack Russo (Cal. Bar No. 96068)
Christopher Sargent (Cal. Bar No. 246285)
COMPUTERLAW GROUP LLP
401 Florence Street
Palo Alto, CA 94301
(650) 327-9800 office
(650) 618-1863 fax
jrusso@computerlaw.com
csargent@computerlaw.com

Attorneys for Defendants
GARY BRADSKI, ADRIAN KAEHLER & ROBOTICS ACTUAL, INC.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MAGIC LEAP, INC., a Delaware corporation,

Plaintiff,

v.

GARY BRADSKI, an individual, ADRIAN KAEHLER, an individual, ROBOTICS ACTUAL, INC., a Delaware Corporation and OPENCV.AI, a Delaware Corporation,

Defendants.

Case No. 5:16-cv-02852-NC

DEFENDANTS DR. GARY BRADSKI, ADRIAN KAEHLER, AND ROBOTICS ACTUAL, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM (RULE 12(B)(6)); ALTERNATIVELY, MOTION FOR A MORE DEFINITE STATEMENT (RULE 12(E)); AND/OR MOTION FOR SUMMARY JUDGMENT (RULE 56) AS TO CLAIMS 1–4; MOTION FOR SUMMARY JUDGMENT AS TO CLAIMS 5–10; MEMORANDUM OF POINTS AND AUTHORITIES

Date: September 28, 2016
Time: 1:00 p.m.
Before: Magistrate Judge Nathanael Cousins
Courthouse: 450 Golden Gate Ave., San Francisco

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE STATUTES & RULES

OTHER AUTHORITIES

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL: PLEASE TAKE NOTICE THAT on September 28, 2016, or as soon as the matter may be heard, Defendants Gary Bradski, Adrian Kaehler, and Robotics Actual, Inc. ("Defendants") will move for an order dismissing Magic Leap, Inc.'s Claims 1–4 with prejudice for failure to state a claim. Fed. R. Civ. P. 12(b)(6). This Motion is based on this Notice and Motion, the Memorandum, the Request for Judicial Notice, the pleadings, records, and files, and matters as may be considered before or at the hearing (collectively the "Record").

PLEASE TAKE FURTHER NOTICE THAT Defendants will alternatively will move for summary judgment in their favor on Claims 1–4, on the grounds that material facts cannot be genuinely disputed, Fed. R. Civ. P. 56(c)(1)(A), and that Magic Leap cannot produce admissible evidence to support material facts on which it has the burden of proof, *id*., 56(c)(1)(B). This Motion is based on this Record, the Abbeel, Russo, Kaehler, and Bradski Declarations, and such matters as may be considered by in all briefing or at the hearing.

PLEASE TAKE NOTICE THAT on the same date and time, Defendants will move for summary judgment in their favor on Magic Leap's Claims 5–10 against them, on the grounds that there are no material facts in dispute and the Court may decide the issue as a matter of law. This Motion is based on this same Record and such matters as may be considered in briefing or at the hearing.

PLEASE TAKE NOTICE THAT alternatively, Defendants will move for an Order under Rule 12(e) requiring a more definite statement on Claims 1–4 based on this same Record on this Motion.

INTRODUCTION

An employer in California expressly promises two very well-educated, very experienced individuals: "**you will be free to pursue ongoing consulting work** . . . ." How then can these two California employees, lauded in March 2016, become villainized fewer than 30 work days later — without a review, without an exit interview, and without any explanation? Simple: this retaliatory lawsuit, in fact, cannot survive scrutiny under Rules 12(b)(6), 12(e), or 56. The claims, made two days after declaratory relief was sought, are reactive, punitive, facially implausible, and impossible with no protectable trade secrets identified as misappropriated; no specific or well-pleaded fact allegations; and nothing permitting any plausible inference of wrongdoing. Beyond factual

baselessness, the claims are all meritless under federal and/or California law on incontrovertible material facts, with no misappropriation possible, and no wrongdoing alleged after the enactment of the Defend Trade Secrets Act of 2016 ("DTSA"). **This suit violates Dr. Bradski and Dr. Kaehler's freedom to pursue independent consulting; in addition, California law prohibits restraints on employee mobility and "protects Californians and ensures 'that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice.'"** *Edwards v. Arthur Andersen LLP*, 44 Cal. 4th 937, 945–46 (2008). The latter right exists to the extent of working for a competitor or planning even a competitive business while employed, let alone what is the case here.

STATEMENT OF ISSUES TO BE DECIDED

I. Must Claims 1–4 be dismissed because Magic Leap fails to allege any protectable trade secret misappropriated by any Defendant?

II. Is summary judgment on Claims 1–2 required because they arise out of events or transactions that occurred before the enactment or effective date of the DTSA?

III. Should the Court alternatively grant summary judgment on Claims 1–4 because Magic Leap fails to identify any actual or even threatened misappropriation of any trade secret and cannot raise any triable issue with respect to damages because none exist or can exist here?

IV. Should summary judgment be granted on all common law claims (Claims 5–10) because they are preempted as arising out of the same operative facts as the California Uniform Trade Secrets Act ("CUTSA") claim?

V. Is summary judgment also appropriate on Claims 5–10 because the signed Magic Leap contracts protect the Moving Defendants and Magic Leap cannot show breach or damages?

STATEMENT OF RELEVANT, PUBLICLY KNOWN, OR UNDISPUTED FACTS

Defendants' Education, Experience, and Expertise in Computer Vision and Robotics

1. Dr. Bradski has a Cognitive and Neural Systems Ph.D., and was considered an expert in machine learning and perception robotics when Magic Leap hired him. Previously, he was senior scientist for Willow Garage; a robotics research institute/incubator; and developed robotics technology for Industrial Perception, Inc. ("IPI") RJN, Exs. 2 at p. 4, 9, 12. From 2012–

2017, he taught Stanford Computer Vision and Robotics courses. RJN, Exs. 4, 12–17. He co-founded the Stanford Artificial Intelligence Robot project. *Id*., Exs. 12; Russo Decl., Ex. X at p. 2. In 2005, he was part of the winning team for the robotics DARPA Grand Challenge, with Stanley the self-driving car. RJN, Exs. 3, 6 at pp. 3, 9–10.

2. Dr. Kaehler, a Physics Ph.D., was also an expert in machine learning and perception robotics when hired. *Id*., Exs. 3, 6. He was an Applied Minds Corp. senior scientist, conducting "research in machine learning, statistical modeling, computer vision, and robotics," Russo Decl., Ex. H, and also part of the 2005 winning DARPA team. *Id*., Ex. I; RJN, Exs. 3, 6 at pp. 4, 9–10; 11.

3. Dr. Kaehler and Dr. Bradski's collaboration goes back over a decade, to Intel and Stanley, and including 2008's LEARNING OPENCV: COMPUTER VISION WITH THE OPENCV LIBRARY. Russo Decl., Exs. Q–V; *RJN*, Ex. 6 at p. 3; Exs. 28; 35, 39 (Forthcoming 2016 ed.)

4. Computer vision is a "vast field," dealing with "the transformation of data from a still or video camera into either a decision or a new representation," Russo Decl., Ex. U p.2, to Ex. U, pp. 3–5.

> [I]t is easy to be fooled into thinking that computer vision tasks are easy. . . . The human brain divides the vision signal into many channels that stream different kinds of information into your brain. Your brain has an attention system that identifies, in a task-dependent way, important parts of an image to examine while suppressing examination of other areas. . . . There are widespread associative inputs from muscle control sensors and all of the other senses that allow the brain to draw on cross-associations made from years of living in the world." *Id.*, at. pp. 2–3.

"In a machine vision system, however, a computer receives a grid of numbers from the camera or from disk, and that's it." *Id.* It is an intricate problem, a challenge of "Perception Robotics" [1] *Id.*

5. One tool for solving machine vision problems is OpenCV. *Id*., Ex. U at p. 1, founded by Dr. Bradski in 1999, while at Intel. Russo Decl., Ex. Y; RJN, Ex. 6 at p.3; 12. It was later supported by Willow Garage, "a robotics research institute and incubator." Russo Decl.,

[1] RJN, Ex. 27: "Machines still have a very long way to go to match human proficiency even at basic sensorimotor skills like grasping. . . . What makes robot behavior so distinctly robotic compared to human behavior? . . . [C]urrent robots typically follow a sense-plan-act paradigm, where the robot observes the world around it, formulates an internal model, constructs a plan of action, and then executes this plan. This approach . . . tends to break down in the kinds of cluttered natural environments that are typical of the real world. Here, perception is imprecise, all models are wrong in some way, and no plan survives first contact with reality."

Ex. X; RJN Ex. 12. All this was published and pre-existed Magic Leap by years. The California public benefit corporation was incorporated June 27, 2012. RJN, Exs. 37–39.

6. As noted, both Dr. Kaehler and Dr. Bradski were considered experts on computer vision and machine learning, including OpenCV, and applications to robotics when hired. *See* RJN Ex. 4 (Dr. Kaehler described as "a senior computer scientist specializing in machine learning and statistical modeling); Exs. 24–26. On December 4, 2013, it was front page news that Google acquired Dr. Bradski's company, IPI, that "developed computer vision systems and robot arms for loading and unloading trucks." RJN, Ex. 5, 7; *see also id.*, Ex. 2 at p. 4; *id.*, Exs. 3 at p.1 (Referring to Dr. Bradski as "a machine vision expert."); Ex. 6 at p. 4 (describing Dr. Kaehler's winning implementation on an intra-team competition for Stanley's computer vision software); Ex. 9 (IPI founders, including Dr. Bradski ("who founded Open CV) happen to be two of the foremost authorities on vision technology in robotics."). They have been incubating concepts for a robotics project since 2008. Kaehler Decl., ¶7; Bradski Decl., ¶18. In 2008 they wrote, "One of OpenCV's goals is to provide a simple-to-use computer vision infrastructure that helps people build fairly sophisticated vision applications quickly." Russo Decl., Ex. U, p. 1 They wrote, "the intent is to jump-start civilian robotics by developing open and supported hardware and software infrastructure that now includes but goes beyond OpenCV." *Id.*, Ex. V, p. 521. In 2012, before joining Magic Leap, they discussed starting a robotics company. Kaehler Decl., ¶¶11, 27; Bradski Decl., ¶12. They reconsidered their ideas based on new published research in Deep Reinforcement Learning applications to robotics. Kaehler Decl., ¶¶9, 30; Bradski Decl., ¶11–14; Abbeel Decl., ¶15(A)–(E).

Deep Reinforcement Learning Applications to Robotics Are Published and Public

7. Dr. Pieter Abbeel leads a UC Berkeley robotics group researching using Deep Learning neural networks to control sensor-guided robot arms. Abbeel Decl., Ex. A. His group has published its work. *Id.*, ¶¶ 10, 13. Its Guided Policy Search Algorithm has been publicly disclosed at least since May 2015. *Id.*, ¶ 13. Dr. Abbeel explains the clear link between published work in Deep Reinforcement Learning and the Robotics Actual ideas. Abbeel Decl., ¶¶13–15; *see also* Bradski Decl. ¶¶46–49; Kaehler Decl. ¶¶9, 30, 42–43.

Magic Leap is a Consumer Electronics Company with a Yet-to-Be-Released First Product

8. On July 12, 2016, CEO Abovitz told FORTUNE that Magic Leap is developing "a computing platform that enables people to combine a digital experience in their physical lives through mixed reality lightfield technology." RJN, Ex. 32 at 2:7–11. He stated, "the goal of the company was to turn your brain and to display – to build new personal computing . . ." *Id*. at 4:19–21; *see id*., Ex. 1 at p. 3 ("'Ours is a journey of inner space. We are building the internet of presence and experience.'")

9. Magic Leap is not designing a robot with its technology. It is a consumer electronics company working on the commercial release of its first product, AR eyewear for human users. RJN, Ex. 1 at pp. 12–13; Ex. 32 at 5:8–20; FAC ¶12. Its CEO claims the company will deliver head-mounted virtual retinal product "soonish." *Id.*, Ex. 32 at 10:19–11:9. The CEO and CMO also claim that the field of use for its product is media: delivering games and entertainment to [human] users, *id*., at 19:15–25, who will, according to the FAC, be able to "wear these mixed-reality viewers for extended periods without discomfort because they circumvent visual and neurological problems," FAC, ¶12. One reporter described an engineering prototype she viewed in April 2016, as suggestive of "a chunky pair of sports-like glasses with a connected battery pack." RJN, Ex. 10 at p. 1. Another reporter described, "magical googles," writing "The goggles are semitransparent, allowing you to see your actual surroundings."[2] *Id*., Ex. 1 p.1.

10. On July 12, 2016, the CEO stated the first "use case" targeted is "games and entertainment." RJN, Ex. 32 at 19:15–17. He listed other potential uses: media, communications, healthcare, but not robotics. *Id*. at 19:15–23. The CMO gave an example of an ecommerce application, "Look Buy," *id*. at 20:9–15, and described the consumer electronics

[2] *Compare* RJN Ex. 1 at p.1; Ex. 10, at p. 1, two reporters described using the demo googles to view animations of robots superimposed on the viewscape, but, a picture of a thing is not the thing itself. Peopling a virtual or mixed reality landscape with virtual robots does not a robot make. Additionally, Magic Leap is a consumer of robots, having purchased "a pair of [Kuka] robots named Click and Clack to test and calibrate its prototype hardware." RJN, Ex. 1 at p. 6.

product, *id*. at 21:2–10; *see* Ex. 10 at p. 1 (Announcing pricing "in the range of consumer mobile devices.")

11. The FAC alludes to "robotics," among the "many different applications and devices" to which its AR eyewear technologies purportedly "extend," FAC, ¶12, but apart from one unsupported allegation, that Dr. Bradski "was aware of and involved in projects and plans that involved deep learning techniques for robotics," FAC, ¶20, it is silent on the subject. It must be more specific, amidst the well-established digital revolution in machine learning and the "new generation of machines that are changing the labor market worldwide." RJN Ex. 2; *see also id*., Ex. 5 (Describing the 2012 IPI acquisition as part of Google's "moonshot" efforts in robotic vision); Ex. 5 (Apple's acquisition of "a machine learning and artificial intelligence startup Turi. . . reflects a larger push by Apple."); Ex. 9 (IPI announced, "3D vision is what's new and next for robot perception. ***The technology has been available for a while (at considerable expense),*** but without advanced programming for many commercial applications." [emphasis added]); *see also* Anthony Goldbloom, *The jobs we'll lose to Machines – and the ones we won*'t, TED2016 (Feb. 2016), *available at* https://www.ted.com/talks/, search "anthony goldbloom".

12. Magic Leap claims proprietary technologies in using computers to amplify human abilities, specifically, its proposed AR[3] eyeglasses. FAC ¶ 12 (For "project[ing] a digital light filed into the user's eye.") The CEO has claimed that its "magic" lies in recreating the biological light field as digital light field, and piggybacking or supplementing the biological light field with the digital one for its human users. RJN, Ex. 32 at 7:2–10. WIRED reported the CEO claimed that what potentially distinguishes Magic Leap from its competitors in augmented-reality consumer headsets, is "how it shines light in your eye." RJN., Ex. 10; *see* Ex. 1 at p.2; Ex. 32 at 3:25–5:5.

13. "All the major players—Facebook, Google, Apple, Amazon, Microsoft, Sony, Samsung—have whole groups dedicated to artificial reality. . . . Then there are some 230 other

[3]It calls AR "a new type of virtual reality or mixed reality." FAC ¶11; RJN., Ex. 32 at 6:9–25.

companies, such as Meta, the Void, Atheer, Lytro, and 8i, working furiously on hardware and content for this new platform." RJN, Ex. 1; see *id*. at Ex. 10.

Defendants' Contractual "Freedom to Consult" and Disclosure of Independent Projects

14. Dr. Bradski's and Dr. Kaehler's employment agreements with Magic Leap provides each that he will be free to pursue independent consulting work. ECF No. 1, Exs. 1, 2.

15. One independent consulting project included returning to their pre-Magic Leap ideas for a perception robotics company, incubating since at least 2008. They had put this project on the back-burner when they joined Magic Leap. Kaehler Decl., ¶12.; Bradski Decl., ¶55.

16. By mid-Summer 2015, Dr. Kaehler and Dr. Bradski disclosed their plans to depart to work on independent robotics project ideas to Director Scott Hassan. Kaehler Decl., ¶14.; Bradski Decl., ¶36. At a March 2016 in-person meeting, Dr. Bradski disclosed the independent project plans to the CEO, then flew to China for a teaching trip. Bradski Decl., ¶43. He was in China when Magic Leap constructively terminated him. Russo Decl., ¶H.

17. In late 2015, Magic Leap told Dr. Kaehler it had allocated no 2016 budget for his only project. Kaehler Decl., ¶16.; Bradski Decl., ¶30. For Dr. Bradski's part, he had been increasingly ostracized. In early 2015, he presented his ideas to Abovitz, and wound up assigned to a skeleton team, with no hiring tokens to do the work he was assigned. He had to fight for authority to hire, and maneuver to allocate contractors to allow Dr. Kaehler to work. *Id*., ¶24; Bradski Decl., ¶¶29, 30, 31. Inspired by cutting edge research in Deep Reinforcement Learning, published outside of Magic Leap, Defendants decided to dust off the idea for a potential project on perception robotics. Kaehler Decl., ¶¶15, 17. The corporate name was reserved, as was a bank account, whose balance was and remains $800. Bradski Decl., ¶58, Ex. H.

18. In March and April 2016, Dr. Kaehler disclosed his plans to leave to work on a noncompetitive project to his supervisor, as well as the VP of HR. On April 5, 2016, Dr. Kaehler wrote to the CEO, offering a post-employment transition with a noncompetition agreement. He resigned and took his two-weeks accrued PTO on May 4, leaving his company computer in the office. Scheduled to return on May 20, he was instead constructively terminated. Kaehler Decl. ¶¶28–29. He returned his three Magic Leap notebooks to his attorneys on May 27, 2016, and

those were returned to Magic Leap on June 15, 2016 (the date the FAC was filed). Kaehler Decl., ¶21. Dr. Bradski also returned his computer within days. Bradski Decl., ¶65. This also included his notebooks, security badges, wireless mouse, and web cam to his attorneys on May 27 and June 3, 2016. Russo Decl., ¶¶7, 10, Exs. E, H. Those, along with Dr. Kaehler's notebooks, were delivered on June 15, 2016 (the date the FAC was filed). *Id*., Exs. J.

19. No employee left Magic Leap to work with Defendants. Bradski Decl., ¶68–70; Kaehler Decl. ¶27. None ever disparaged or defamed Magic Leap. Bradski Decl., ¶69 – 70; Kaehler Decl. ¶27.

20. General Counsel telephoned Defendants' counsel on May 20, 2016, claiming instead of performing any work for Magic Leap, they had been working on a competing project. Russo Decl., ¶6. Defendants requested exit interviews at the teleconference, making additional requests on May 29, June 1, June 14, June 24 and July 2, 2016. *Id*., ¶¶6, 8, Ex. F.

PROCEDURAL HISTORY

21. Dr. Bradski and Dr. Kaehler filed a state court declaratory relief case on May 23, 2016, just two business days prior to this suit being filed. RJN, Ex. 31.

22. Magic Leap filed suit on May 26, 2016. *Id*., Ex B. Magic Leap and its attorneys had been sent letters documenting all property being returned and disclosed; requesting an exit interview; and confirming Defendants did not even have access to their personal ESI. *Id*., Ex. E, H, N. Magic Leap filed its FAC on June 15, 2016 after such letters. *Id*., Ex. C.

ARGUMENT

Legal Standard on This Motion

A dismissal is proper when a claim is legally or factually implausible. *See* Fed. R. Civ. P. 12(b)(6). The claims are examined for facial plausibility, which requires well-pleaded allegations permitting "more than a sheer possibility that a defendant acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 556 (2007); *Doe I v. Wal-Mart Stores, Inc*., 572 F.3d 677, 681 (9th Cir. 2009).

Summary judgment is appropriate where the moving party establishes that "there is no genuine issue as to any material fact and that [it] is entitled to judgment as a matter of law." Fed.

R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

I. MAGIC LEAP CANNOT "OWN" DEFENDANTS' EXPERTISE AS A MATTER OF LAW.

None of Magic Leap's claims against Defendants can withstand scrutiny on motion to dismiss, in the face of Dr. Bradski and Dr. Kaehler's pre-existing and publicly established expertise from long experience, education, and employment in robotics, perception and computer vision (including the OpenCV open source computer vision library) and artificial intelligence**.** ***First***, Magic Leap cannot own Defendants expertise or pre-existing or independent work, as trade secrets or confidential information. ***Second***, it cannot preclude them from using that expertise in future employment or pre-existing or independent work, as a matter of law. ***Third***, there is simply no non-conclusory 'factual content,' about Magic Leap's alleged "trade secrets" in those fields that permits any reasonable inference that Magic Leap is alleging it owns protectable IP "separate it from matters of general knowledge in the trade or of special knowledge of those persons who are skilled in the trade." *Mattel, Inc. v. MGA Entm't, Inc.*, 782 F. Supp. 2d 911, 989 (C.D. Cal. 2011). Accordingly, the Court must dismiss with prejudice, or grant summary judgment against Magic Leap on all claims relying on misconduct related to "trade secrets" or "confidential information."

A. Defendants' Expertise is Not Trade Secret.

The law is clear on what cannot be trade secret, and the FAC fatally fails to identify anything that is outside the realm of general and special knowledge of Dr. Kaehler or Dr. Bradski. A party seeking to protect trade secrets must "describe the subject matter of the trade secret with sufficient particularity to separate it from" these matters of general or special knowledge. Cal. Civ. Proc. Code § 2019.2010. Courts guard against "vague hand waiving" by a plaintiff who cannot "clearly define what it claims to own." *Silvaco Data Sys. v. Intel Corp.*, 184 Cal. App. 4th 210, 221 (2010).

> California requires that a party seeking to protect trade secrets [ ] describe the subject matter of the trade secret with sufficient particularity to separate it from matters of general knowledge in the trade or of special knowledge of those persons who are skilled in the trade, and to permit defendant to ascertain at least the boundaries within which the secret lies.

Mattel, 782 F. Supp. 2d at 989; see *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 522 (9th Cir. 1993).

Public information, or that which does not provide plaintiff with economic value from not being generally known, is not a protectable trade secret. Cal. Civ. Proc. Code § 3426.1(b). Defendants' preexisting education, experience, and expertise, including published work, in these fields, and given that these fields are broad and fertile areas of published, cross-disciplinary study and industry. ¶¶1–7, *above*. Dr. Bradski's and Dr. Kaehler's skills and expertise, pre-dating employment, and their prior work combining machine vision, deep nets, and robotics cannot be any Magic Leap trade secret, or "derived from" Magic Leap's trade secrets, or "owned" by Magic Leap. Dr. Bradski's award-winning, pre-Magic Leap work and expertise in deep learning techniques for robotics is displayed in the Smithsonian; contributed to Willow Garage, and IPI; and is available to students of Computer Science and Computer Systems Engineering through courses at Stanford University. ¶¶1–2, *above*. Dr. Kaehler has published work and employment history in these fields, co-designed Stanley, and is widely considered an expert. RJN, Ex. 25; ¶2, above. As authors of the OpenCV book on which the FAC relies, in 2008 they openly identified their interest in developing machine vision technology for robotic perception. Russo Decl. Ex. V at p.521–25. The FAC does not plausible differentiate claims for "robotics ventures" from this cross-disciplinary and pre-existing expertise and skills or prior work, which it cannot claim. *Mattel*, 782 F. Supp. 2d at 989.

B. Machine Learning in Robotics is Not Magic Leap's Trade Secret.

Use of neural nets in robotics is publicly known and studied, as is machine vision technology for robotic perception and accordingly cannot be any Magic Leap "trade secret." RJN, Exs. 2–9, 27–29; Russo Decl., Exs. A–F; *see also* Abbeel Decl., ¶15; Kaehler Decl. ¶¶30–41; Bradski Decl. ¶66. Further fatal to Magic Leap's claim is the public knowledge that work on Deep Learning and machine vision techniques for robotics are being published at UC Berkeley, and pursued at other companies. RJN, Ex. 12. In the face of this published information, Magic Leap makes no plausible allegation that the idea for Deep Learning techniques in the field

robotics is protectable, nor that it has protectable, identifiable trade secrets in "plans and projects" that "involved deep learning techniques for robotics." FAC ¶ 20.

C. Magic Leap Fails to Identify Protectable Trade Secrets.

Magic Leap's supposed state law "trade secrets" in Claims 3–4 are fatally vague and generic. The trade secrets are not identified as any "thing," still less supportable by any showing such things are secret and valuable to the company. The FAC uses the conclusory term "Magic Leap's confidential and trade secret information" in its claims allegations to describe the information at issue. FAC ¶¶59–60. In its general allegations, Magic Leap uses the term "Magic Leap's Proprietary Technologies," which it circularly defines as "Magic Leap's many proprietary innovations, which also cover its confidential and trade secret information." FAC ¶12. Magic Leap's allegations of wrongdoing against Defendants focus on its suspicion of "ventures related to robotics," but there is no description of any different from Dr. Bradski' or Dr. Kaehler's pre-existing and publicly established expertise, skills, experience, and publications in many areas of study that encompass "robotics" or machine learning. ¶¶1–7, *above*.

Instead, Magic Leap merely inserts in a conclusory claim that "Magic Leap's Proprietary Technologies are not limited to its head-mounted virtual retinal display and extend to many different applications and devices, including, but not limited to, robotics." FAC, ¶12. But the only other reference to the trade secrets that appear to be at issue is Magic Leap's claim that "Dr. Bradksi was aware of and involved in projects and plans that involved deep-learning techniques for robotics." FAC ¶20. This is not sufficient to state a claim for a protectable trade secret as a matter of law.[4] *Imax Corp. v. Cinema Techs., Inc.*, 152 F.3d 1161, 1166–67 (9th Cir. 1998); *Farhang v. Indian Inst. of Tech., Kharagpur*, 2010 U.S. Dist. LEXIS 53975, at *42 (N.D. Cal. Jun. 1, 2010) (allegation that former employee misappropriated "business models and implementations" is insufficient to describe a trade secret with particularity).

[4] Nor can Magic Leap produce any evidence supporting its claims to have "robotics" products and plans of which Defendants were aware. Bradski Decl. ¶¶50–51,57; Kaehler Decl. ¶¶16, 42 - 45.

Magic Leap's Defend Trade Secrets Act claims 1–2 fair no better for the same reasons. Under the new Federal Act, as with the CUTSA, information is only trade secret that is "generally known to," and "readily ascertainable through proper means by [] another person who can obtain economic value from the disclosure or use of the information." 18 U.S.C. § 1893(3). "'Improper means' . . . does not include reverse engineering, independent derivation, or any other lawful means of acquisition." 18 U.S.C. § 1839(6). Magic Leap's claims are within the exclusions of the federal statute, entitling Defendants to dismissal or, alternatively, summary judgment.

II. ALL CLAIMS ALLEGING BREACH OF CONTRACTUAL DUTY OR COVENANT FAIL.

A. Defendants' Expertise is Not Magic Leap Confidential Information.

For the same reasons that Magic Leap's trade secret claims fail, because of Dr. Bradski's and Dr. Kaehler's established expertise and preexisting work in robotics, deep nets, machine learning and the OpenCV machine learning library, computer vision, and artificial intelligence, Magic Leap cannot make out any claims premised on breach of contract. An "employee's skill and knowledge of a particular business constitute the means by which he earns a living, and the courts should not hastily brand them as confidential where this will deprive him of employment opportunities." *Rigging Int'l Maint. Co. v. Gwin*, 128 Cal. App. 3d 594, 612 (1982).

B. Defendants' "Freedom to Consult" Clause Protects Independent Work.

Likewise, all claims which rely on a breach of an assignment or ownership obligation also fail as a matter of law in the face of Dr. Bradski and Dr. Kaehler's "freedom to consult" clauses, combined with their respective, established expertise in robotics machine learning, including the OpenCV machine learning library, deep nets, computer vision, and artificial intelligence. Both has an explicit term in his Agreement that permitted each to pursue separate, ongoing consulting work while employed at Magic Leap. FAC ¶¶19, 21, *compare* Exs. 1, 2. All of the FAC allegations are within the contract protections that permit them to pursue independent consulting activities that are unrelated to Magic Leap's actual or demonstrated business, and while Defendants were at Magic Leap, this was the not robotics, but the head-mounted virtual retinal display. RJN, Exs. 1 and 10. "Magic Leap has not released a beta version of its product,

not even to developers." *Id.*, Ex. 1 at p. 4. It has no release date. *Id.*, Ex. 32 at 10:19 – 11:9. Magic Leap has not and cannot establish any breach.

The law also holds that an enforceable assignment agreement only reaches an invention "within the scope of the employer's business (actual or demonstrably anticipated)" or which "resulted from work the employee did for the employer." *Cubic Corp.*, 185 Cal. App. 3d at 452. Magic Leap is not entitled to an assignment of an employee's invention, even when there is an employment agreement to the contrary, if (1) the employee did not use any "equipment, supplies, facility, or trade secret information of the employer;" and (2) the invention" was developed entirely on the employee's own time"; and (3) the invention does not relate to the employer's business, or to the employer's "actual or demonstrably anticipated research or development;" or "does not result from any work performed by the employee for the employer." Cal. Labor Code § 2870. Magic Leap is in consumer electronics, still working towards its first product, AR "goggles." ¶9, *above*. All FAC allegations concerning breach of assignment or disclosure obligations fall within the contracts' and Labor Code and Business and Professions Code protections, permitting dismissal with prejudice or alternatively, summary judgment.

1. No Inferences of Misconduct Are Reasonable.

According to Magic Leap, Robotics Actual is a company developed from misappropriation of unidentified Magic Leap trade secrets or confidential information in "robotics," yet there are no well-pleaded factual allegations to plausibly suggest that this is so; nor, as explained above, that Dr. Bradski's or Dr. Kaehler's independent work on idea for what might become the "Robotics Actual" was either unsanctioned by the "freedom to consult clause;" within Magic Leap's demonstrated field of business; or competitive to Magic Leap.. *See*, *e.g.*, FAC ¶¶30–35, 44, 54, 60–62, 86–88; 93, 96–98; 108, 112, 117–118.

First, as noted, Magic Leap utterly fails to meet the standard for identifying (and the standard for proving) any protectable trade secrets or confidential information, and therefore, the Court must dismiss all allegations of misconduct that rely on the inference that Robotics Actual used or disclosed trade secrets or confidential information where none has been alleged to exist.

Second, there are no facts bolstering "information and belief" allegations that are "sufficient to nudge the claims 'across the line from conceivable to plausible.'" *Twombly*, 550 U.S. at 547., Dr. Kaehler, or Robotics Actual, a single third party with whom Magic Leap had a relationship that was cut off, a single false or disparaging statement to any investor or third party about Magic Leap; or a single relationship with any investor or third party that has been lost as a result. There are no well-pleaded factual allegations on which the FAC relies.

Third, the required inference of misconduct is doubly implausible in the face of Dr. Bradski and Kaehler's publicly established and pre-existing robotics expertise and projects, and in the face of their contracts with "freedom to consult." Magic Leap agreed that each had the additional contractual rights: "**you will be free to pursue ongoing consulting work consistent with your past practice**" while employed at Magic Leap. FAC, Ex. 1, 2.

Fourth, the allegations remain impermissibly conclusory and speculative in the face of California law that protects and permits the categories of activity complained about as a matter of public policy. Cal. Bus. & Prof. Code § 16600; *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1446 (2002). Mere speculation that employees "must have" misappropriated trade secrets because they decided to change employers was not evidence of misappropriation cannot be the basis for any trade secret claim. *SASCO v. Rosendin,* 207 Cal. App. 4th 837, 848-49 (2012); Bradski Decl. ¶¶21−34; Kaehler Decl. ¶¶46–47.

Fifth, Magic Leap cannot avail itself of the doctrine of corporate opportunity without well-pleaded factual allegations of a demonstrated interest or prior claim in the accused line of activities. "This doctrine does not exclude the fiduciary from all business activity of his own in the field in which he works for others." *Indus Indem. Co. v. Golden State Co*., 117 Cal. App. 2d 519, 533 (1953). It only constrains an officer from "seiz[ing] for himself or to the detriment his company business opportunities in the company's line of activities which the company has an interest and prior claim to obtain." *Id.; Bancroft-Whitney*, 64 Cal. 2d at 346. An opportunity not in line with a company's business activities is not usurped. A speculative business venture with uncertain success is not usurped. An idea not identified as a competing venture is not usurped. A new business venture that does not cripple, injure, or divert business is not usurped.

There are no plausible allegations of wrongdoing as to "robotics ventures" or Robotics Actual sufficient to survive this Motion to Dismiss.

2. The FAC Does Not Permit Any Inference of Misconduct.

Magic Leap also relies on "information and belief" allegations of misconduct as to OpenCV.ai, FAC ¶¶37–40, but in contrast to those vague allegations, it is quite specifically alleged that "prior to being hired by Magic Leap, Dr. Bradski "had developed in a machine vision technology that allows machines to identify 3D objects and established a non-profit organization called OpenCV that promote [*sic*] this technology." FAC ¶36. It admits that Dr. Brasdki and Dr. Kaehler were co-authors of a publication called LEARNING OPENCV, Russo Decl., Ex. U at p.1 about this technology. The book also predates Magic Leap, *id.*, Ex. Q, and OpenCV is licensable under the 3-clause BSD license, RJN, Ex. 35. This was publicly known both while Defendants worked for Magic Leap, and when this suit and FAC were filed, *id*., Ex. 28. Magic Leap also attaches and relies upon its own contracts with both Dr. Bradski and Dr. Kaehler with clauses expressly protecting their rights to independent projects. FAC, Exs. 1–2. These allegations and facts bolster the inference ***against*** ownership by Magic Leap, and ***against*** any wrongdoing related to the machine vision library. It is implausible that Magic Leap "owns" the open source OpenCV or that Magic Leap has any related claims of actionable misconduct. There are no well-pleaded claims permitting the inference of wrongdoing premised on either pre-existing relationships and published work about the OpenCV Machine Learning Library.

C. All Other Claims Are Likewise Groundless and Speculative.

Allegations of wrongdoing by Dr. Bradski as to OpenCv.ai are bare speculation. The FAC infers that because the company has "OpenCV" in its name, it must be based on work for the eponymous, preexisting machine vision library, and makes on the further fantastic leap that this pre-existing independent work should "belong" to Magic Leap. The problem with Magic Leap's muddle chain of logic about OpenCv.ai is fourfold.

First, as noted above, even if first inference were true, that is not enough to give rise to a Magic Leap claim for relief, since the machine vision library was and is open source, pre-exists and is independent from Magic Leap, is noncompetitive to Magic Leap, and had a preexisting,

publicly disclosed relationship with Dr. Bradski. RJN, Exs. 37 – 41. ***Second***, as stated above, Magic Leap cannot rely on the doctrine of inevitable disclosure to impute wrongdoing by Dr. Bradski to any machine vision or machine learning context. The mere possibility "that defendant[] could misuse plaintiff's secrets, and plaintiff[] fear[s] they will . . . is not enough." *FLIR Sys. Inc. v. Parrish*, 174 Cal. App. 4th 1270, 1280 (2009)848–49. ***Third***, "California law does not impose liability on corporate officers merely for their role in the corporation, but only for wrongful acts in which they have been personally involved," and there are no such allegations about Dr. Bradski and Kaehler and OpenCV.ai. *O'Connor v. Uber Techs., Inc*., 2013 U.S. Dist. LEXIS 171813, *63 (N.D. Cal. Dec. 5, 2013); *Frances T. v. Vill. Green Owners Ass'n*, 42 Cal. 3d 490, 507–508 (1986). ***Fourth,*** Magic Leap asks the Court to indulge another, more speculative set of inferences, that Dr. Bradski or (Dr. Kaehler) should have delivered OpenCV.ai to Magic Leap, yet it is well settled in California that a plaintiff must establish an existing economic relationship or a protected expectancy with a third person, not merely a hope of future transactions." *Halton Co. v. Streivor, Inc.*, 2010 U.S. Dist. LEXIS 50649, *13-14 (N.D. Cal. May 21, 2010). There are no factual allegations (or facts) that Mr. Rublee was or is interested in any relationship with Magic Leap. *See* Bradski Decl., ¶¶62, 68 Such an *existing* relationship must be pleaded and proved. The Court should dismiss the claims without leave to amend, or alternatively, should grant summary judgment as to all claims related to OpenCV.ai, because there can be no well-pleaded facts that Magic Leap owns OpenCV.ai, or that any harm has been caused to Magic Leap related to OpenCV.ai.

III. TORTIOUS INTERFERENCE AND UNFAIR COMPETITION CLAIMS ARE FATALLY FLAWED.

The hastily appended and preempted[5] supplemental claims fail along with the contract, fiduciary/loyalty, and trade secret claims, and the entire suit falls like a house of cards, with numerous additional deficiencies.

Tortious interference plaintiffs must also show that conduct that was "wrongful by some legal measure other than the fact of interference itself." *Song Fi Inc. v. Google, Inc.*, 108 F. Supp.

[5] § VI, *below*.

3d 876, 887 (N.D. Cal. 2015) (1995). Where the FAC also does not make a plausible suggestion of claims of any independently wrongful misconduct, whether trade secret use or disclosure; breach of contract, fiduciary duty, or loyalty, there can be no tortious interference claim. *Iqbal*, at 678; *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (2009). Moreover, there must be allegations permitting the conclusion that "the 'relationship' that forms the basis of the intentional interference tort must have existed at the time of the allegedly tortious conduct," which it is impossible to ascertain from the FAC. *O'Connor*, 58 F. Supp. 3d at 997; *see also Roth v. Rhodes*, 25 Cal. App. 4th 530 (1994) .

The unfair competition claim also fails relying on it does of incorporation by reference, all exclusively "information and belief" wherever it alleges any misconduct, and as it does not plead any facts underlying those claims, this is not enough to withstand a motion to dismiss. FAC ¶ 24–26, 30–37, 39–40. "In the post-*Twombly* and *Iqbal* era, pleading on information and belief, without more, is insufficient to survive a motion to dismiss for failure to state a claim." *Solis v. Fresno*, 2012 U.S. Dist. LEXIS 33548 at *22 (E.D. Cal. Mar. 13, 2012); *Vess v. Ciba-Geigy Corp.*, 317 F.3d 1097, 1103 (9th Cir. 2003). Magic Leap's allegations of "false statements concerning the Business of Magic Leap, including but not limited to the ownership of certain [of] Magic Leap's Proprietary Technologies," FAC, ¶ 92, sound in fraud. *Vess*, at 1105; *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009). It is therefore subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b): "the who, what, when, where, and how" relating to the alleged deceitful misconduct. *Kearns*, at 1126. The FAC does not do so, and "[t]his lack of specificity, as well as plaintiff's failure to allege a plausible theory of reliance on these supposed misrepresentations, makes it impossible for defendant to respond to these allegations." *Halton Co. v. Streivor, Inc.*, 2010 U.S. Dist. LEXIS 50649, *13–14 (N.D. Cal. May 21, 2010). This preempted claim is not enough to withstand a motion to dismiss.

Finally, again, "California law does not impose liability on corporate officers merely for their role in the corporation, but only for wrongful acts in which they have been personally involved." *O'Connor*, at *6. Allegations of wrongdoing against Dr. Kaehler and Dr. Bradski as to involvement in unfair competition as to Robotics Actual, do not allege how, when, where, and as

to whom they "actively and directly participate[d] in [any] unfair business practice[s]." *Bradstreet v. Wong*, 161 Cal. App. 4th 1440, 1458 (2008), *abrogated on other grounds by Martinez v. Combs*, 49 Cal. 4th 35 (2010).

Rife with deficiencies, these claims cannot be rescued because allegations of independent wrongdoing on which they rely are fatally precluded. The tortious interference and unfair competitions claims fail as a matter of law and must be dismissed with prejudice.

IV. KNOWN EXPERTISE AND PRIOR WORK REQUIRES SUMMARY JUDGMENT.

In the alternative, the Court must grant summary judgment as a matter of law on Magic Leaps' trade secret misappropriation, breach of contract, and breach of fiduciary duty or loyalty.

Dr. Bradski's expertise, prior work, and interest in machine learning, computer vision, OpenCV, robotics, and artificial intelligence was disclosed to Magic Leap and to the public. Bradski Decl. ¶¶2–20, Ex. D. Neither published research on Deep Learning tools in robotics, nor Dr. Bradski or Dr. Kaehler's existing expertise in perception and robotics, can be Magic Leap's property as a matter of law. *Mattel*, 782 F. Supp. 2d at 989.

Also, there are no facts that a perception robotics idea is competitive to anything Magic Leap was or is doing in the field of augmented virtual reality eyewear. Rather, the facts are counter. The published and well-known idea of using deep nets (Deep Learning in neural networks) with sensor-guided robot arms (the entire technical content of the draft slide deck co-authored by the Defendants as their independent project) is hardly any type of secret or anything not already well known to those who have skill in the field. Abbeel Decl., ¶¶13–15, Ex. B–E.

Further, there is no evidence that any "Magic Leap" Deep Learning methods, procedures, systems and specialized techniques are implicated. Bradski Decl. ¶¶54−55; Kaehler Decl., ¶44. Deep Learning principles are readily accessible to competitors, matters of general knowledge in the industry, fully capable of being independently developed. Bradski Decl., ¶¶45−49, Kaehler Decl., ¶¶36−41. Abbeel Decl., ¶¶15. Both have decades of expertise in machine learning and perception robotics. Bradski Decl., ¶¶4−20; Kaehler Decl., ¶2, RJN Exs. 11–12, 25–26.

As experts, they identified this problem as an area of interest over a decade ago. In 2011, the NSF declined to fund their proposal for on possible solution, but they continued to explore it.

The current iteration when the development of deep neural nets made a new approach feasible, disclosed in third party published work Magic Leap connection. Kaehler Decl. ¶¶7, 9; Bradski Decl. ¶¶18, 54; Abbeel Decl., ¶15, Ex. G. Magic Leap cannot produce evidence at it "owns" its former employees' expertise, their (or third party) published research or an independent, pre-existing business idea for combining deep neural nets, perception, and robotics.

V. SUMMARY JUDGMENT IS NECESSARY ON ALL TRADE SECRET CLAIMS.

In the alternative, Defendants are entitled to summary judgment on Magic Leap's state and federal misappropriation claims, because they are based on the false allegations that Magic Leap had "ongoing projects and plans . . . that involved deep learning techniques for robotics," that Dr. Bradski knew about these "projects and plans," and that therefore, Defendants must have used or disclosed them to Magic Leap's detriment. Magic Leap has not met, and cannot meet, its burden of proving its claims. "To state a prima facie claim for trade secret misappropriation, a plaintiff must demonstrate: '(1) the plaintiff owned a trade secret, (2) the defendant acquired, disclosed, or used the plaintiff's trade secret through improper means, and (3) the defendant's actions damaged the plaintiff.'" *Agency Solutions.Com, LLC v. TriZetto Group, Inc.*, 819 F. Supp. 2d 1001, 1015 (E.D. Cal. 2011). the existence of any trade secret at issue; and (2) Magic Leap has no evidence of damages causally linked to any misappropriation. *Sci. of Skincare, LLC v. Phytoceuticals, Inc.*, No. CV-08-4470, 2009 U.S. Dist. LEXIS 58241, *13–14 (C.D. Cal. July 8, 2009) (reciting elements of trade secret claim).

A. Magic Leap Identifies No Protectable Trade Secret, Nor Any Misappropriation.

The Court should alternatively grant summary judgment of Magic Leap's CUTSA misappropriation claims and breach of contract, tort, or unfair competition claims because, as argued, it failed to carry its burden to "identify the trade secrets and carry the burden of showing that they exist." *MAI Sys.*, 991 F.2d at 522; *Agency Solutions.com*, 819 F. Supp. 2d at 101; Cal. Civ. Code § 3426.1(d); 18 U.S.C. § 1893(3). Plaintiff cannot, and Defendants are entitled to judgment in their favor.

B. The Federal Claims Are Barred.

In the alternative to his Motion to Dismiss, Defendants are each entitled to summary judgment on Magic Leap's Claims 1–2 because all acts complained of occurred, were disclosed, and ceased prior to the Defense of Trade Secrets Act going into effect on May 11, 2016. Magic Leap alleges no specific acts of use or disclosure, and none of its conclusory statements of misconduct could have occurred after May 11, 2016. 130 Stat. 376, 114 Pub. L. 153. Dr. Bradski spoke in person about his post-Magic Leap plans with Magic Leap's CEO in March 2016. Dr. Bradski informed Magic Leap's CEO in person that he wanted to leave to pursue other opportunities, including specifically a business idea in perception robotics. Abovitz did not state that this was an idea or direction Magic Leap wanted to pursue, nor that it was competitive to any Magic Leap business activity; rather, he stated that Magic Leap might want to invest in the new business. *Id*., ¶¶41–43. Dr. Bradski then left for China for a scheduled trip, and his employment was terminated before his return. Bradski Decl., ¶43. Likewise, Dr. Kaehler's last day, after resigning, was on May 4, 2016, when he took his paid time off to negotiate a post-employment transition. Kaehler Decl. ¶29. He had discussed his post-Magic Leap plans with his supervisor and the head of HR, and written to the CEO. *Id*., ¶29. All this occurred before May 11, 2016, the date the Defend Trade Secrets Act was enacted. It was in force for eight days before the accusations began, while there was no misappropriation before or after that date. Russo Decl. ¶24; Kaehler Decl. ¶¶25–27, 47; Bradski Decl. ¶¶66–67. The Federal Defend Trade Secrets Act was not in effect at any relevant time, and those claims are barred.

C. Magic Leap Cannot Show Any Plausible Harm.

The Court should grant summary judgment of the federal and state trade secret claims for the additional reason that Magic Leap has no evidence of damages (a required element of this claim) causally related to any trade secret misappropriation. *Sci. of Skincare, at* *13–14 *FormFactor, Inc. v. Micro-Probe, Inc.*, 2012 U.S. Dist. LEXIS 79359, at *37–38 (N.D. Cal. Jun. 7, 2012); *Goldie's Bookstore, Inc. v. Super. Ct., 73*9 F.2d 466, 472 (9th Cir. 1984) ("Speculative injury cannot be the basis for a finding of irreparable harm."). Defendants are therefore entitled to summary judgment on Claims 1–4.

VI. SUMMARY JUDGMENT IS APPROPRIATE ON PREEMPTED COMMON LAW CLAIMS.

Magic Leap's Fifth (breach of contract), Sixth (breach of fiduciary duty and duty of loyalty), Seventh (tortious interference with prospective economic relations); Eighth (common law and § 17200 unfair competition); Ninth (breach of covenant of good faith and fair dealing); and Tenth (conversion) claims are preempted by the CUTSA and fail as a matter of law, making summary judgment against Magic Leap on each of those claims appropriate. "Common law remedies based on misappropriation of trade secrets are superseded" because the CUTSA "occupies the field in California." *AccuImage Diagnostics Corp. v. Terarecon, Inc.*, 260 F. Supp. 2d 941 (N.D. Cal. 2003); *K.C. Multimedia, Inc. v. Bank of Am. Tech. & Operations, Inc.*, 171 Cal. App. 4th 939, 954 (2009); *Audio Solns, Inc. v. Vintage King Audio, Inc.*, 2013 U.S. Dist. LEXIS 37210, at *10 (C.D. Cal. Mar. 18, 2013) ("where a plaintiff includes only vague allegations regarding the nature of purportedly non-trade secret proprietary information, a determination of CUTSA preemption may be possible on a motion to dismiss.").

As the above has shown, each of Magic Leap's common law tort claims is preempted because each is based on the same set of operative facts as the CUTSA claim—the allegations that Defendants misappropriated trade secrets and caused it harm by misusing its proprietary information. *See, e.g.*, FAC ¶¶ 82, 84, 92, 98. This is just another way to allege trade secret misappropriation. *See Mattel*, 782 F. Supp. 2d at 989 (Plaintiff's attempt to "re-characterize the thefts [of misappropriated confidential information] as 'working for a competitor' and 'acting with disloyalty'" merely "attach[ed] new labels to the same nucleus of facts" of the misappropriation claim); *Lifeline Food Co. v. Gilman Cheese Corp.*, 2015 U.S. Dist. LEXIS 64155, at *11 (N.D. Cal. May 15, 2015) (preempted conversion claim where "the only basis for any property right is trade secret[] law"); *Heller v. Cepia, L.L.C.*, 2012 U.S. Dist. LEXIS 660, 2012 WL 13572, at *7 (N.D. Cal. Jan. 4, 2012) ("[T]he wrongful taking and use of confidential business and proprietary information, regardless of whether such information constitutes trade secrets, are superseded by the CUTSA"); *RSPE Audio Solns*, at *10 (preempted claim for intentional interference with prospective economic advantage).

Magic Leap's breach of contract and breach of implied covenant of good faith and fair dealing claims are likewise preempted. Although the CUTSA does not limit contractual remedies, Cal. Civ. Code § 3426.7(b), Magic Leap only claims Defendants breached their Employment and Proprietary Information Agreements "by failing to adhere to the express confidentiality provisions" and "failing to adhere to the provisions that they will not use Magic Leap's Proprietary Technologies other than for the benefit of Magic Leap." FAC ¶¶ 78–79. These allegations are "identical to those it offered in support of its misappropriation claim." *First Adv. Background Servs. Corp. v. Private Eyes, Inc.*, 569 F. Supp. 2d 929, 936–37 (N.D. Cal. 2008); *Angelica Textile Servs, Inc. v. Park*, 220 Cal. App. 4th 495 (2013). The breach allegations are one and the same as the misappropriation allegations.

That Magic Leap's contract claims are from the same nexus as its misappropriation claim is evident also in the allegations charging breach of non-compete and non-solicitation clauses in the Proprietary Information Agreements. FAC ¶¶ 80–81. Such terms are illegal and unenforceable in California, but where they were formerly enforceable, it was only to the extent necessary to protect trade secrets. *Edwards*, 44 Cal. 4th at 945–46 (rejecting any contractual non-compete term that did not fall under the explicit § 16660 exceptions); *Gatan, Inc. v. Nion Co.*, 2016 U.S. Dist. LEXIS 42764 (N.D. Cal. Mar. 30, 2016) (Dismissing without leave to amend, breach of contract and good faith and fair dealing claims on the basis of a non-compete it determined to be void under § 16600, because it was redundant to other provisions restricting information use, disclosure, and development "which provide[] protection for [the employer's] trade secrets." *Id*. at *7–9, 11); *but see Asset Mktg. Sys. v. Gagnon*, 542 F.3d 748, 958 (9th Cir. 2008)). Magic Leap's claims are not only redundant and preempted, but they plead unenforceable non-compete and non-solicitation terms, requiring summary judgment.

By the same reasoning, the good faith and fair dealing claim is preempted, as it repeats the same breaches of the same obligations in the Employment and Proprietary Information Agreements, FAC ¶106, claiming Defendants' "us[ed] Magic Leap's equipment, resources, time, intellectual property, confidential information and trade secrets, and funds." FAC ¶108. It restates CUTSA allegations for "misappropriating Magic Leap's confidential and trade secret

information by disclosing and/or using such information for the advancement and benefits of ventures related to robotics, including Robotics Actual, in violation of their respective agreements with Magic Leap." *Id.* ¶62. Thus, the CUTSA preempts the claims for breach of these Agreements or the good faith and fair dealing covenant.

VII. SUMMARY JUDGMENT IS OTHERWISE APPROPRIATE ON THE COMMON LAW CLAIMS APPROPRIATE BECAUSE MAGIC LEAP CANNOT SHOW ANY PLAUSIBLE HARM.

As noted above, all common law claims must be dismissed as preempted, but the Court may alternatively grant summary judgment as to each claim because Magic Leap has no evidence that it suffered any resulting damages. Magic Leap has no evidence linking any alleged wrongdoing to its claim for damages in any amount. Magic Leap has no evidence of damages from been a single: (1) item of Magic Leap technology or information identified as used or disclosed; (2) item of Magic Leap property identified as converted; (3) Magic Leap employee who resigned to work with Defendants; (4) relationship with OpenCV.ai or Ethan Rublee that was usurped, interfered with, or destroyed; (5) relationship with OpenCV, Inc. that was usurped, interfered with, or destroyed; (6) third party relationship, whether investor or otherwise, that was usurped, interfered with, or destroyed or harmed; (7) false or disparaging statement identified as made to any investor or third party about Magic Leap; or (8) lost sale, lost prospective sale, lost customer, lost prospective customer, lost investor, lost prospective investment, or injury. *See, e.g.*, *Ruiz v. Gap, Inc.*, 622 F. Supp. 2d 908, 917 (N.D. Cal. 2009)). Thus, Defendants are entitled to summary judgment on each of Magic Leap's Claims 5–10.

VIII. ALTERNATIVELY, MAGIC LEAP MUST FILE A MORE DEFINITE STATEMENT.

In the alternative, on all claims Court should order Magic Leap to file a more definite statement under Rule 12(e). For the reasons stated above, a more definite statement is required because the FAC's description of the alleged misappropriated trade secrets is "so vague or ambiguous" that Defendant "cannot reasonably prepare a response." Fed. R. Civ. P. 12(e) Magic Leap's FAC is so indefinite and unintelligible as to the specific trade secrets it claims were misappropriated by two individuals who took nothing, returned everything, and never used or disclosed anything — other than their own pre-existing ideas about a well-known problem in

robotics for which every person with knowledge of the field knows or can readily ascertain from published literature. If the Court does not dismiss or dispose of the FAC, it should compel Magic Leap to file a more definite statement identifying the specific trade secrets being misappropriated including, what was not returned or was taken by Defendants and specifying how, if at all, any misappropriation or misconduct has occurred or is continuing in any respect.[6]

CONCLUSION

All claims by Magic Leap are implausible and unsupported by well-pleaded factual allegations. There are no trade secrets or confidential information identified supporting bare claims of "robotics application," "robotics devices," for its augmented reality technology, or deep learning and robotics "projects and plans" that at all approach the allegations lavished on its augmented reality eyewear. The contract and trade secret claims are foreclosed by Business & Professions Code § 16600, Labor Code § 2870, and the clause in each of Dr. Kaehler and Bradski's contracts permitting independent consulting, and the federal trade secret claims are further barred by the Defend Trade Secrets Act not being in effect. In all events, the Moving Defendants request that their motions be heard before deposition or other discovery occurs in this case given the lack of any actual misappropriation of any trade secrets (never described anywhere including to the two individuals who requested but were never given exit interviews) and the fact that the pending motions also include a request for sanctions under Rule 11. Further, the Court should dismiss with prejudice or grant summary judgment on all Magic Leap's common law claims, all of which are based on alleged misappropriation of trade secrets, and preempted by its CUTSA claims. Finally, the Court should grant summary judgment of Magic Leaps' trade secret and common law claims for the additional reason that Magic Leap has no evidence of damages causally related to any misconduct.

//

//

//

[6] Rule 11 will prevent any such description because the truth is that everything has been returned, nothing has been retained, and nothing has been or is being misappropriated.

Dated: August 15, 2016

Respectfully submitted,
COMPUTERLAW GROUP LLP

By: ____*/s/ Jack Russo*_____
Jack Russo
Christopher Sargent

Attorneys for Defendants
GARY BRADSKI, ADRIAN KAEHLER, AND
ROBOTICS ACTUAL, INC.