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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

ORI BRAFMAN, Plaintiff and Appellant, v. WILSON SONSONI GOODRICH & ROSATI P.C., PAUL YANOSY, AND RACHEL PROFFITT, Defendants and Respondents.	A153595 (San Francisco City & County Super. Ct. No. CGC16550401)

The trial court granted a motion for summary judgment brought by Wilson Sonsini Goodrich & Rosati (WSGR), Paul Yanosy, and Rachel Proffitt. Contending that triable issues of fact remain and that the trial court incorrectly declined to order certain discovery, plaintiff Ori Brafman appeals the resulting judgment dismissing his case. Brafman also contends the trial court abused its discretion by denying him leave to file a second amended complaint. We affirm.

BACKGROUND

In 2008, Ori Brafman and Peter Sims started "an informal network of business authors to share advice and best practices around publishing and paid speaking." In December 2014, they turned the informal network into a start-up business named "Silicon Guild" and hired a law firm to form a limited liability company (LLC). Brafman and Sims agreed to split the ownership interest evenly.

Six months later, Brafman and Sims decided they instead needed to form a C corporation in anticipation of fundraising. Sims, who was charged with handling legal matters for Silicon Guild, contacted WSGR, a corporate law firm, to assist with incorporating Silicon Guild. On May 26, 2015, Sims signed an engagement agreement with WSGR on behalf of Silicon Guild. The engagement agreement explained that WSGR had been "retained to advise Silicon Guild (the 'Company') with respect to formation and general corporate matters." Although the engagement agreement did not specify that Silicon Guild was already an LLC, it limited the scope of representation to "the Company, and *not* any of its affiliates, owners, or agents, or any of the individuals associated with the Company." (Italics added.) It further advised that WSGR's representation of Silicon Guild did not mean that it "represent[ed] any of the Company's parents, subsidiaries, employees, officers, directors, shareholders, or founders." Sims emailed a copy of the engagement agreement to Brafman later that day.

Soon after the engagement agreement was executed, WSGR learned that Sims and Brafman had already formed Silicon Guild LLC and realized that it needed to convert Silicon Guild LLC to a C corporation.

Throughout the incorporation process, WSGR primarily communicated with Sims and rarely communicated with Brafman. WSGR only communicated with Brafman about Silicon Guild's incorporation and never worked for Brafman in any other capacity.

During the next few months, Silicon Guild signed up seven customers who paid $50,000 each for membership in Silicon Guild, which Brafman refers to as Silicon Guild's "lucrative" corporate membership line. Approximately three months later, the relationship between Sims and Brafman deteriorated after Sims said he would no longer agree to equal ownership of the soon-to-be incorporated Silicon Guild. Instead, with the help of WSGR, Sims drafted a proposal in which Sims would keep 90 percent of the corporation, Brafman would keep 5 percent, and two other individuals would split the remaining 5 percent.

Within a couple of weeks, Sims and Brafman entered into mediation to resolve their ownership dispute. During that mediation, Sims hired WSGR to incorporate

Parliament, a new company with the same purpose as Silicon Guild. Sims signed an engagement agreement with WSGR to incorporate Parliament, which was similar to the engagement agreement he had signed on behalf of Silicon Guild. Although it was assisting with Parliament's incorporation, WSGR states it did not know or believe, and had no reason to know or believe, that Parliament was intended to compete with Silicon Guild. Rather, WSGR claims it took only "ministerial steps to incorporate Parliament."

Soon after it agreed to incorporate Parliament and during Brafman's and Sims' mediation, WSGR sent Brafman and Sims an email in which it wrote that it understood "that Silicon Guild is now ending its relationship with WSGR, and WSGR will be engaged by [P]arliament, [I]nc. going forward . . . If one of you would please reply to this email with 'confirmed' or similar, we will use this as confirmation of the termination." Although by this point, Brafman had learned of Sims' efforts to form Parliament, he did not seek a temporary restraining order or injunction to stop Sims or WSGR's actions with respect to Parliament.

Three months after mediation began, Brafman sold his interest in Silicon Guild to Sims, and mediation ended with a release covering Sims, Silicon Guild LLC, and Parliament.

Less than two months after settling the dispute, Brafman filed his initial complaint against WSGR. Approximately a year and a half later, Brafman filed a first amended complaint (FAC) asserting the following causes of action: (1) breach of fiduciary duty, (2) conspiracy to breach a fiduciary duty, (3) legal malpractice, (4) constructive fraud, (5) intentional fraud, (6) fraudulent concealment of conflicts of interest, and (7) conspiracy to commit fraud.[1] WSGR requested to file a motion based on its lack of duty to Brafman in

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[1] Each of these causes of action alleges that WSGR owed a duty to Brafman arising out of their purported attorney-client relationship. The First through Fourth as well as the Sixth and Seventh Causes of Action all allege that WSGR owed a duty to Brafman based on an attorney-client relationship. The Fifth Cause of Action is phrased differently but similarly alleges a duty based on an attorney-client relationship, stating: "By virtue of the relationship between Defendants [WSGR; Paul Lionel Yanosy, Esq.; Rachel Proffitt, Esq.; and Does 2 through 20] and Plaintiff established by Plaintiff's co-

June 2017. WSGR moved for summary judgment on the FAC two months later. The trial court heard oral argument on November 16, 2017. The following day, the trial court issued an order granting WSGR's motion for summary judgment, finding that WSGR owed Brafman no duty and that WSGR was entitled to judgment because Brafman's claims required proof of such a duty. Soon after, Brafman filed a motion for leave to file a second amended complaint (SAC), which the trial court denied. This appeal followed.

DISCUSSION

I. Summary Judgment

Brafman claims the trial court should have denied WSGR's motion for summary judgment because triable issues of material fact remained. We review a trial court's grant of summary judgment de novo, "considering 'all of the evidence set forth in the [supporting and opposition] papers, except that to which objections have been made and sustained by the court, and all [uncontradicted] inferences reasonably deducible from the evidence.' " (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612.) We must also consider all evidence in the light most favorable to the nonmoving party. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) "In independently reviewing a motion for summary judgment, we apply the same three-step analysis used by the superior court. We identify the issues framed by the pleadings, determine whether the moving party has negated the opponent's claims, and determine whether the opposition has demonstrated the existence of a triable, material factual issue." (*Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261.)

Brafman claims the following triable issues of fact remain: whether WSGR owed him a fiduciary duty; whether Brafman had standing to sue; whether the FAC stated causes of action ; whether the engagement agreement was enforceable; and whether Brafman was provided an opportunity for meaningful oral argument.

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ownership of [Silicon Guild] LLC and Defendants' legal work pertaining to the conversion of [Silicon Guild] LLC to a C corporation, Defendants owed Plaintiff a duty to disclose all material facts relating to [Silicon Guild] LLC."

A. WSGR Owed Brafman No Duty

Brafman maintains that he had an attorney-client relationship with WSGR by virtue of WSGR's work regarding Silicon Guild, that WSGR owed him a fiduciary duty, and that WSGR breached that duty as alleged in each of the FAC's causes of action. Brafman alternatively claims WSGR owed him a duty as a non-client and breached that duty.

"[A]n attorney's duty to his or her client depends on the existence of an attorney-client relationship. If that relationship does not exist, the fiduciary duty to a client does not arise." (*Fox v. Pollack* (1986) 181 Cal.App.3d 954, 959.) An attorney-client relationship and its attendant duties can arise by inference from the conduct of the parties, even without payment or a formal agreement. (*Lister v. State Bar* (1990) 51 Cal.3d 1117, 1126.) However, an attorney-client relationship cannot be declared unilaterally; a purported client's mere belief that an attorney-client relationship existed is not sufficient to create such a relationship, as that belief must have been reasonably induced by representations or conduct by the attorney. (*Fox*, supra, 181 Cal.App.3d at 959.) An implied attorney-client relationship is based on the circumstances of each case, including the parties' conduct and intentions. (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1732–1733 (*Responsible Citizens*); *Miller v. Metzinger* (1979) 91 Cal.App.3d 31, 39.) Accordingly, analyzing the intent and conduct of the parties is critical to determining whether an implied attorney-client relationship exists. (*Lasky, Haas, Cohler & Munter v. Superior Court*, 172 Cal.App.3d 264, 285.)

As WSGR never agreed to represent Brafman as an individual, he argues that an implied relationship was created based on WSGR's conduct. We disagree. WSGR drafted an engagement agreement outlining the scope of representation in which it agreed to incorporate Silicon Guild. The engagement agreement limited the scope of representation to formation and corporate matters and expressly disclaimed representation of any person or entity other than the company Silicon Guild. Brafman received a copy of this engagement agreement, in which WSGR limited its representation to Silicon Guild. Brafman continued working on matters related to Silicon Guild for

more than three months after receiving the engagement agreement. During this time, WSGR communicated primarily with Sims and rarely with Brafman. Brafman's contact with WSGR related solely to WSGR's work on Silicon Guild. WSGR did not perform any other work for Brafman or have any interactions with Brafman that would have led him to reasonably believe WSGR represented him personally in any capacity. The parties' conduct here does not suggest that an implied attorney-client relationship existed.

Relying on *Responsible Citizens, supra,* 16 Cal.App.4th 1717, Brafman contends that his relationship with WSGR should be analyzed as if (1) Silicon Guild LLC was the client and (2) Silicon Guild LLC was a partnership with him as a partner, because LLCs are viewed as more akin to partnerships than corporations. Even assuming these two necessary predicates to Brafman's theory, his assertion that WSGR owed him a duty would still fail. To analyze whether an implied attorney-client relationship was created between a partner and a partnership's counsel, the court must consider: (1) the size of the partnership; (2) the nature and scope of the attorney's engagement; (3) the kind and extent of contacts between the attorney and the individual partners; (4) the attorney's access to financial information of the individual partner; and (5) whether the totality of the circumstances, including the parties' conduct, implies an agreement by the partnership's counsel not to accept other representations adverse to the individual partner's personal interests. (*Johnson v. Superior Court* (1995) 38 Cal.App.4th 463, 476–477 (*Johnson*).) Applying each of these factors to his case, Brafman contends: (1) the partnership only included Sims and himself; (2) the engagement agreement was for the conversion of the LLC into a corporation for the benefit of Sims and Brafman; (3) WSGR had extensive contact with Brafman; (4) Brafman gave WSGR detailed information about his personal finances; and (5) WSGR failed to expressly tell Brafman that it only represented Silicon Guild and not his interests. But Brafman's analysis is either strained or incorrect for the last three factors. WSGR rarely communicated with Brafman. WSGR never received or reviewed Brafman's personal financial information. At best, Brafman appears to have disclosed limited personal financial information during a lunch meeting about Silicon Guild's business model as well as his and Sims' financial

needs, expectations, and goals regarding Silicon Guild. WSGR never performed any legal work for Brafman in his individual capacity. And regardless of whether he read it, Brafman received the engagement agreement detailing WSGR's express intent to limit the scope of its representation to Silicon Guild, the business entity. Thus, even applying the analysis from the partnership cases cited by Brafman, Brafman's claim that he formed an implied attorney-client relationship with WSGR fails.

Brafman alternatively contends that he and Sims were WSGR's clients because WSGR could only contract with them and not a party that did not yet exist. To support this argument, Brafman relies on Civil Code section 1558, which provides that the validity of contracts requires "not only that parties should exist, but that it also be possible to identify them." Brafman cites no case applying Civil Code section 1558 to engagement agreements to incorporate yet-to-be-formed corporations.[2]

There are several problems with Brafman's contention that Civil Code section 1558 applies and entitles him to reversal of the summary judgment. First, Silicon Guild unquestionably existed as a business entity (specifically, an LLC) when the engagement agreement was signed. Alternatively, even assuming the client was the not-yet-existent C corporation and that Civil Code section 1558 renders the agreement invalid, that consequence would simply render the engagement agreement unenforceable as between Silicon Guild and WSGR. (*Cf. R.M. Sherman Co. v. W.R. Thomason, Inc.* (1987) 191 Cal.App.3d 559, 563 [a void contract "create[s] no right or claim whatsoever" and " 'binds no one' "].) It would not establish that WSGR owed a duty to Brafman as an individual; as previously discussed, the facts belie Brafman's contention that he had an implied attorney-client relationship with WSGR under *Johnson*.

In addition, the engagement agreement's description of Silicon Guild as a company was sufficiently specific under Civil Code section 1558 to identify it as the

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[2] In fact, at least one case has limited the application of Civil Code section 1558 to executory contracts. (*People v. Bradford* (1955) 130 Cal.App.2d 606, 608.) The evidence is undisputed that the engagement agreement was an executed contract.

contracting party. Although the engagement agreement could have provided more detail, "[t]here is an important distinction . . . between a description of a party that is inherently uncertain and indeterminate and one that is merely imperfect and capable of different applications. The former cannot be corrected, but in the latter case there may be a resort to extraneous facts to ascertain . . . to whom the description was intended to apply; and a greater or lesser probability of ascertaining such identification does not affect the validity of the [contract]." (14 Cal.Jur.3d Contracts § 105, citing *Woodward v. McAdam* (1894) 101 Cal. 438.) Here, given the context of *who* signed the agreement—Silicon Guild co-founder Peter Sims as the "point person for the legal stuff"—and *when* it was signed—May 26, 2015, after Sims and Brafman agreed they needed to form a C corporation to raise funds—it is clear that the client is the existing business entity, Silicon Guild (regardless of its precise status vis à vis California Corporations law), and not Brafman.

Indeed, defining the client as Silicon Guild, "the 'Company,' " rather than specifying its exact corporate form, was beneficial because it allowed the engagement agreement to remain in place, even when the company's form changed—for example, from an LLC to a C corporation. It also permitted WSGR to proceed under the same engagement agreement after learning that Silicon Guild had already been formed as an LLC. As WSGR explained, the conversion from LLC to a C corporation was already "the type of work the [engagement agreement] contemplated might be necessary[ ] and . . . was subject to the terms of the [engagement agreement]."

The attorney-client relationship formed between Silicon Guild and WSGR is also consistent with Corporations Code section 15911.09, which provides that a converted entity is normally deemed to be the same entity that existed before the conversion. (Corp. Code § 15911.09, subd. (a).) Accordingly, a converted entity is vested with all

property and rights as the pre-conversion entity. (Corp. Code § 15911.09, subd. (b).)[3] Moreover, public policy favors allowing attorneys to represent only the entity being incorporated, to avoid potential conflicts that could arise with continued representation of the newly-incorporated company and its founders after incorporation. (Vapnek, et al., California Practice Guide: Professional Responsibility (2016), Representing "start-up" corporations, § 3:107.3 (Vapnek Treatise).)

Brafman claims that the trial court failed to fully address the Vapnek Treatise on which it based its public policy justifications. Specifically, Brafman argues that Vapnek warned that "appl[ying] a 'retroactive incorporation' concept" would be problematic if the incorporation was not consummated or if the "incorporating attorney gives advice to one of the future owner's about . . . [that] owner's personal interest." However, Brafman's concerns about failure to incorporate are inapplicable because Silicon Guild was incorporated in January 2016. Moreover, Brafman has not shown that WSGR gave advice to any future owner about their personal interests, because he has not cited to anything in the record supporting such a claim. Accordingly, we exercise our discretion to disregard contentions unsupported by proper page cites to the record. (*Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 970.)

Brafman's argument also ignores the import of the out-of-state case law cited in the Vapnek Treatise. The Vapnek Treatise relies on *Jesse v. Danforth* (1992) 485 N.W.2d 63, in which the Wisconsin Supreme Court held that where (1) a person

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[3] This conclusion is also consistent with case law holding that a corporation may be bound by an attorney-services contract entered into prior to its incorporation, where it impliedly adopted the agreement "by knowledge and acquiescence" after it was incorporated. (*Abbott v. Limited Mutual Compensation Ins. Co.* (1938) 30 Cal.App.2d 157, 162–163; *cf. David v. Southern Import Wine Co.* (1936) 171 So. 180, 182 [pre-incorporation agreement for attorney to incorporate the company ratified by subsequent receipt of benefits, specifically, "the actual creation of the corporation itself"].) Here, Silicon Guild was incorporated in January 2016, and it thereafter adopted and continued to accept the benefits of its engagement agreement with WSGR by later having WSGR file papers to dissolve Silicon Guild, Inc. This sequence of events supports WSGR's position at oral argument that the attorney-client relationship between Silicon Guild and WSGR was "paused" in October 2015, but not terminated.

retains a lawyer for the purpose of organizing an entity, (2) the lawyer's involvement with that person is directly related to that incorporation, and (3) such entity is eventually incorporated, the entity rule applies retroactively such that "the lawyer's pre-incorporation involvement with the person is deemed to be representation of the entity, not the person." (*Id.* at p. 67.)[4] WSGR's representation of Silicon Guild complied with these factors because (1) WSGR was retained to incorporate Silicon Guild, (2) WSGR's involvement with Brafman and Sims concerned corporate matters for Silicon Guild, and (3) Silicon Guild was eventually incorporated. The circumstances of this case are thus consistent with the Vapnek Treatise.

Perhaps recognizing that no evidence supports his claim that he had an attorney-client relationship with WSGR, Brafman claims that he was WSGR's client pursuant to rule 3-310(C)[5] of the Rules of Professional Conduct. Citing that rule, Brafman asserts that WSGR represented Silicon Guild as well as Sims and Brafman during the incorporation process. However, Brafman mischaracterizes rule 3-310(C) of the Rules of Professional Conduct. To the extent that rule has any applicability in this case, it would not *establish* a relationship with Brafman, but would in fact *prevent* WSGR from

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[4] The Wisconsin State Supreme Court based its decision on its rules of professional conduct, specifically Wisconsin Supreme Court rules 20:1.6, 20:1.7, and 20.13, which in turn are based on the American Bar Association's (ABA) Model Rules of Professional Conduct (Model Rules), rules 1.6, 1.7, and 1.13. We recognize that "California has not adopted the ABA Model Rules [citation], [but note that] they may serve as guidelines absent on-point California authority or a conflicting state public policy [citation]." (*Walker v. Apple, Inc.*, (2016) 4 Cal.App.5th 1098, 1109, fn. 4, citing *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 852.)

[5] Former rule 3-310(C), of the Rules of Professional Conduct provides: "A member shall not, without the informed written consent of each client: [¶] (1) [a]ccept representation of more than one client in a matter in which the interests of the clients potentially conflict; or [¶] (2) [a]ccept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or [¶] (3) [r]epresent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter." (Rules Prof. Conduct, rule 3-310(C).) Effective, November 1, 2018, the principles set forth in rule 3-310(C) were incorporated into rule 1.7 of the Rules of Professional Conduct.

representing both Silicon Guild and the individuals involved without their informed written consent–consent that was never obtained because the engagement agreement demonstrates WSGR's express intent to represent only "the 'Company.' " (See Rules Prof. Conduct, former rule 3-310(C).)

Finally, Brafman contends that WSGR owed him a legal duty as a non-client. But Brafman cites no case law supporting his theory that attorneys have duties to non-clients in situations similar to this case. He has therefore forfeited this argument because his assertion is conclusory. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 [reviewing courts may disregard points missing cogent legal argument].)[6]

In sum, Brafman never formed an attorney-client relationship with WSGR, and WSGR therefore owed him no duty. The only attorney-client relationship was between WSGR and Silicon Guild. The trial court did not err in granting summary judgment based on a lack of duty to Brafman.

B. WSGR Was Entitled to Summary Judgment Based on Lack of Standing

Even if the trial court erred in its analysis of WSGR's duty, summary judgment was nonetheless appropriate due to lack of standing. Summary judgment as to a cause of action was properly granted if WSGR showed either that one or more essential elements of that cause of action could not be separately established or that an affirmative defense barred recovery; if WSGR met that burden, Brafman could only defeat summary judgment by setting forth specific facts showing a triable issue of material fact. (Code Civ. Proc., § 437c, subds. (o), (p)(2).)

First, Brafman asserts that he has standing to sue WSGR because Silicon Guild's value diminished when WSGR incorporated Parliament, which in turn assumed control of Silicon Guild's only asset: its corporate membership line. Brafman further alleges that he would have received a portion of Silicon Guild's profits had Silicon Guild maintained

[6] Moreover, even his intentional fraud case of action, as pled, was based on an attorney-client relationship between WSGR and Brafman purportedly giving rise to a "duty to disclose [to Brafman] all material facts relating to [the] LLC."

control of its corporate membership. Brafman claims he was directly injured and can therefore sue WSGR in his individual capacity. We disagree.

A corporation is a legal entity that is distinct from its shareholders. (*Merco Constr. Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 729.) "Because a corporation exists as a separate legal entity, the shareholders have no direct cause of action or right of recovery against those who have harmed it. The shareholders may, however, bring a derivative suit to enforce the corporation's rights and redress its injuries when the board of directors fails or refuses to do so." (*Grosset v. Wenaas* (2008) 42 Cal. 4th 1100, 1108.) However, shareholders may still sue in their individual capacity when the injury is not incidental to an injury to the corporation. (*Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 107 (*Jones*).)

Here, Brafman alleges that his individual interests were harmed when Sims incorporated Parliament with WSGR's help and transferred Silicon Guild's successful corporate membership line to Parliament. This harm is akin to the harm alleged in *PacLink Communications International v. Sup. Ct.* (*PacLink*) (2001) 90 Cal.App.4th 958, in which three members of the eight-member PacLink LLC sued both the companies that had received PacLink LLC's assets without consideration as well as the individuals associated with those companies. (*Id.* at p. 961.) The *PacLink* plaintiffs sued in their individual capacities, because they claimed that the defendants' actions directly caused them financial injury. (*Id.* at p. 962.) The court disagreed and concluded that plaintiffs could only maintain a derivative action, not an individual action, because "[t]he injury was essentially a diminution in the value of [plaintiffs'] membership interest in the LLC occasioned by the loss of the company's assets. Consequently, any injury to plaintiffs was incidental to the injury suffered by the company." (*Id.* at p. 964.)

Like *PacLink*, the harm alleged here was transfer of Silicon Guild's main asset, its corporate membership line, from Silicon Guild to Parliament purportedly without consideration. Any harm to Brafman resulted only from Silicon Guild's diminished value. As the alleged direct harm was to Silicon Guild, Brafman should have brought his claims in a derivative suit before selling his interest in Silicon Guild. (*Grosset v.*

Wenaas, *supra*, 42 Cal.4th at p. 1108.) However, Brafman cannot bring a derivative suit on behalf of Silicon Guild because he no longer owns any interest in Silicon Guild. (*Id.* at pp. 1110–1114.)

Brafman cites several cases in support of his claim that he can sue in his individual capacity. (*Jones*, *supra*, 1 Cal.3d 93; *Sutter v. Gen. Petroleum Corp.* (1946) 28 Cal.2d 525 (*Sutter*); *Crain v. Electronic Memories and Magnetics Corp., et al.* (1975) 50 Cal.App.3d 509 (*Crain*).) *Jones* and *Crain*, however, concern harm suffered by current minority shareholders as a result of actions taken by majority shareholders. (*Jones*, *supra*, 1 Cal.3d at pp. 101, 107; *Crain*, *supra*, 50 Cal.App.3d at p. 521.) In contrast, Brafman was an equal owner of Silicon Guild, whose interest was allegedly diminished by Sims' and WSGR's actions. *Sutter* is similarly distinguishable. The plaintiff in *Sutter* was permitted to bring an individual suit because the defendants' fraud "was practiced on Sutter in the first instance and he was induced to form a corporation . . . and invest his money by reason of that fraud." (*Sutter*, 29 Cal.2d at pp. 531–532; see also *Hilliard v. Harbour* (2017) 12 Cal.App.5th 1006, 1014 [discussing *Sutter* and explaining that "[t]he point of the Supreme Court opinion is that while Sutter lost his investment, which was represented by the value of the stock, and its reduction in value was the measure of his loss, the damages all flowed from the defendants' tort that preceded and induced the investment".]) Here, in contrast to *Sutter*, there is no allegation that Brafman was induced to form and invest in Silicon Guild by reason of any fraud by WSGR. Moreover, the cases cited by Brafman are inapplicable because none of them address whether *former* shareholders can sue in their individual capacities. Accordingly, the harm alleged could only be addressed by a derivative suit, which Brafman indisputably lacks standing to file because he no longer owns any interest in Silicon Guild.

In sum, summary judgment was appropriate not only based on WSGR's lack of duty but also because Brafman lacked standing.

C. The Engagement Agreement Was Enforceable

Brafman also claims that WSGR's engagement agreement was unenforceable because no one from WSGR signed and sent an executed copy to Silicon Guild. This claim is belied by the record he provided to the court, which contains a copy of the engagement agreement signed by WSGR's Rachel Proffitt.

Brafman alternatively argues that the engagement agreement is invalid because he did not personally sign it, even though he concedes that Sims signed it on behalf of Silicon Guild. A contract may bind a company if it was made by someone who was expressly authorized to bind the company or had implied authority incidental to his position to bind that company. (*Snukal v. Flightways Manufacturing., Inc.* (2000) 23 Cal.4th 754, 780). In light of the fact that Sims signed the engagement agreement and Brafman's testimony that Sims was the "point person for the legal stuff," the trial court correctly concluded that Brafman had "authorized Sims to handle Silicon Guild's legal affairs." Using his implied authority, Sims signed an engagement agreement with WSGR and bound Silicon Guild. Brafman's separate signature was thus unnecessary.

And again, whether there was an enforceable engagement agreement binding Silicon Guild has no impact on Brafman's inability to establish that he, as an individual, had an attorney-client relationship with WSGR. Accordingly, the alleged lack of signatures on the engagement agreement does not present a triable issue of material fact warranting reversal.

D. Brafman Received Meaningful Oral Argument

Finally, Brafman claims that summary judgment must be reversed because the trial court deprived him of an opportunity to have meaningful oral argument. Brafman contends that the argument was insufficient because it lasted only 11 minutes and because the court declined to provide guidance as to any particular issues or concerns on which counsel should focus. In so arguing, Brafman relies on *Mediterranean Construction Co. v. State Farm Fire & Casulty Co.* (1998) 66 Cal.App.4th 257 (*Mediterranean*), an insurance case in which State Farm moved for and was granted summary judgment after the trial court declined to hear oral argument. (*Id.* at pp. 260,

264–265.) The court reversed, explaining that "[t]rial judges may not elevate judicial expediency over Code of Civil Procedure section 437c's mandate for hearings on summary judgment motions." (*Id.* at p. 265.) But the Court of Appeal added that its decision did not affect the trial court's "extensive discretion regarding how the hearing is to be conducted, including imposing time limits and adopting tentative ruling procedures . . . ." (*Ibid.*)

Mediterranean is distinguishable, however, because the trial court in this case heard oral argument. (*Mediterranean*, *supra*, 66 Cal.App.4th at pp. 260, 264–265.) In fact, the trial court placed no limitations on oral argument and asked three times whether the parties had anything further they wished to address. Brafman's counsel took the opportunity to address Silicon Guild's valuation but declined to address other issues when given additional opportunities to raise them. We therefore reject Brafman's claim that he was not provided with meaningful oral argument.

II. Discovery

In addition to his arguments regarding the grant of summary judgment, Brafman claims the trial court erroneously refused to order WSGR to produce communications relating to Silicon Guild, Sims, and Parliament. "A trial court's determination of a motion to compel discovery is reviewed for abuse of discretion." (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733 (*Costco*).) " 'The trial court's determination will be set aside only when it has been demonstrated that there was "no legal justification" for the order granting or denying the discovery in question.' " (*Maldonado v. Superior Court* (2002) 94 Cal.App.4th 1390, 1396–1397.)

A. Privileged Documents

WSGR asserted that much of Brafman's requested discovery was protected by the attorney-client privilege and submitted a privilege log listing the documents over which it was asserting the privilege. Brafman claims that WSGR's privilege log provided insufficient information to show the attorney-client privilege applied to each document listed and that the trial court should have ordered WSGR to supplement the information in the privilege log. Brafman relies on Code of Civil Procedure section 2031.240,

subdivision (c)(1), which requires the party claiming a privilege to "provide sufficient factual information to evaluate the merits of [the privilege] claim, including, if necessary, a privilege log." But the purpose of privilege logs is to provide "a specific factual description of documents . . . to permit a *judicial* evaluation of the claim of privilege." (*Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 292, italics added.) We have reviewed the privilege log and find that the trial court was properly satisfied that these documents were privileged. Brafman's claim that the privilege log lacked sufficient information to determine privilege fails.

B. Burden-Shifting as to Proof of Privilege

Brafman also asserts that the trial court erroneously placed on him the burden of showing that certain communications with third parties were not privileged. That contention mischaracterizes the trial court's order that WSGR had made a prima facie showing of privilege, which therefore shifted the burden back to Brafman to show the requested disclosures were not privileged. (*Costco, supra,* 47 Cal.4th at p. 733, citing Evid. Code §917.) As Brafman has failed to show that the disclosures were not privileged after WSGR met its initial burden to establish a privilege applied, we conclude there is no merit to Brafman's claim that the trial court improperly shifted the burden regarding privilege.

C. Production of Privilege-Log Entries

Brafman also contends the trial court should have ordered WSGR to produce the documents listed in privilege log entries that were created after WSGR stopped working on Silicon Guild's incorporation in September 2015. But Brafman fails to recognize that while WSGR temporarily stopped working to incorporate Silicon Guild, it eventually resumed its work and incorporated Silicon Guild in January 2016. And although WSGR established a prima facie showing of privilege, Brafman failed to make a showing that communications after September 13, 2015 between WSGR and Silicon Guild, Sims, or Parliament were not privileged. We therefore cannot conclude that the trial court abused its discretion.

D. Exceptions to Attorney-Client Privilege

Brafman further argues that the otherwise privileged attorney-client communications are discoverable because the joint-client, breach, and crime-fraud exceptions to the attorney-client privilege apply. As we have already rejected Brafman's claim that he, too, was WSGR's client, we reject Brafman's claim that the joint-client exception applies. We similarly reject his claim that the breach exception applies, because WSGR did not owe any duty to Brafman and therefore could not breach that nonexistent duty.

The only previously unaddressed exception is the crime-fraud exception. To invoke the crime-fraud exception to the attorney-client privilege, "the proponent must make a prima facie showing that the services of the lawyer 'were sought or obtained' to enable or to aid anyone to commit or plan to commit a crime or fraud." (*BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1262.) Brafman asserts the crime-fraud exception applies because "Sims formed a business [Parliament] that competed with [Silicon Guild] and he and WSGR concealed this information to prevent Brafman from taking action to stop it." Yet the uncontroverted evidence shows that WSGR was unaware that Parliament would compete with Silicon Guild. Moreover, WSGR did not conceal its involvement with Parliament and even sent an email to Brafman *and* Sims indicating that it would be working on "[P]arliament [I]nc." two months before Brafman sold his interest in Silicon Guild. Brafman therefore cannot establish that the crime-fraud exception to the attorney-client privilege applies and has accordingly failed to pierce WSGR's assertion of the attorney-client privilege.

E. Sanctions

Brafman contends that the trial court should have imposed sanctions after WSGR refused to meet and confer about discovery requests. He then argues that Code of Civil Procedure § 2023.020 requires the imposition of sanctions for failure to make a good faith attempt to meet and confer.

" ' "[A] reasonable and good faith attempt at informal resolution [as necessary to avoid discovery sanctions] entails something more than bickering with [opposing]

counsel . . . . Rather, the law requires that counsel attempt to talk the matter over, compare their views, consult, and deliberate." ' " (*Ellis v. Toshiba America Information Systems, Inc*. (2013) 218 Cal.App.4th 853, 880, citing *Clement v. Alegre* (2009) 177 Cal.App.4th 1277, 1294.)

Brafman requested sanctions after he sent a letter requesting discovery to WSGR's counsel, dated February 9, 2017. In that letter, Brafman requested (1) all documents reflecting communications between Duane Morris LLP (the law firm representing WSGR in this case) and Peter Sims after December 29, 2015, concerning the subject matter of this litigation; (2) all documents reflecting communications between Duane Morris LLP and Mark Parnes, general counsel to WSGR, after December 29, 2015, concerning the subject matter of this litigation; (3) all documents reflecting communications between WSGR and Peter Sims after December 29, 2015, concerning the subject matter of this litigation; (4) all documents reflecting communications between WSGR's Paul Yanosy[7] and Parnes after December 29, 2015, concerning the subject matter of this litigation; (5) all documents reflecting communications between WSGR's Rachel Proffitt[8] and Sims after December 29, 2015, concerning the subject matter of this litigation; (6) all documents reflecting communications between Duane Morris LLP and Sims after December 29, 2015, concerning the subject matter of this litigation; (7) identification of all documents, including emails reviewed by Parnes in preparation for the letter sent to Brafman's counsel on January 26, 2016, because the privilege was purportedly waived as Parnes "did not represent WSGR's clients" but still "view[ed] privileged documents." Each request included WSGR's responses, which asserted that the requests were overbroad, vague, and ambiguous and that either the attorney-client privilege or the joint-defense privilege and common interest doctrines applied. The letter further requests

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[7] Paul Yanosy was one of the WSGR attorneys who worked on incorporating Silicon Guild and Parliament. He has since left WSGR.

[8] Rachel Proffitt was one of the WSGR attorneys who worked on incorporating Silicon Guild and Parliament.

additional information from two WSGR attorneys following their depositions, including their assertions of privilege, and a deposition of WSGR's general counsel, Mark Parnes.

Brafman's requests ignored the trial court's earlier attempts to explain to Brafman that the attorney-client privilege protected much of the discovery he requested. For example, at a December 16, 2016 hearing, the trial court and Brafman's counsel extensively discussed the attorney-client privilege as it applied to Brafman's requested discovery. Specifically, the trial court explained that the attorney-client privilege extended to Sims' communications with WSGR because "[a]ny entity can only act through human beings. Sims is one of those human beings that falls within the privilege." The trial court even expressed its frustration with Brafman's counsel's blanket assertions that the attorney-client privilege did not apply, describing his argument as "more ipse dixit," meaning, "it is because I say it is."

That discussion about applicable privilege continued at a February 17, 2017 hearing, which took place shortly after Brafman sent the discovery letter, as to which he now seeks sanctions. At this hearing, WSGR's counsel again addressed the applicable privilege, explaining, "There are documents requested here as to which the Court has already ruled privileges apply." The trial court again discussed how the attorney-client privilege protected much of requested discovery and expressed concern about Brafman's understanding of that privilege. It concluded that Brafman's counsel appeared to be suggesting that, "whenever somebody . . . talks to their client before filing a complaint or talks to their client before making a statement, all privilege is waived in those entire conversations because they filed the complaint or made the statement. [¶] . . . I just don't think that's the law, and the case [Brafman's counsel] cited . . . talks about disclosing something to the government tax authorities." The court then noted that Brafman's counsel had cited only that one case.

During that same February 2017 hearing, the trial court directly discussed two of Brafman's requests and whether the common interest doctrine applied. WSGR's counsel explained that Duane Morris LLP and Sims had only exchanged a few emails and that the joint-defense privilege and common interest doctrine applied to these communications.

WSGR's counsel further explained that no other responsive documents existed. At the end of the February 2017 hearing, the trial court requested that Brafman's counsel file a motion, so it could address whether the attorney-client or other privileges protected the discovery he was seeking. The parties then met and conferred again outside the courtroom for 10 minutes.

In sum, it appears that Brafman's counsel and WSGR's counsel communicated sufficiently, given the history and context of the arguments as to privilege. WSGR communicated in prior proceedings about the privilege applicable to Brafman's discovery requests, in prior written correspondence as evidenced in the February 9, 2017 letter and outside the courtroom after the February 2017 hearing. Although Brafman did not like WSGR's responses to his numerous and repeated discovery requests, communication between the parties was sufficient in these circumstances, and sanctions were therefore inappropriate.

III. Disqualifying Counsel

Brafman contends that Duane Morris LLP should have been disqualified because it assisted WSGR with reviewing attorney-client privileged documents and drafting a privilege log. The only support Brafman cites is inapposite, as it concerns an attorney who inadvertently obtained a document that he quickly recognized was his opposing counsel's work product, and who thereafter violated his ethical duties by copying, distributing, and making use of the work product while deposing the opposing party's experts. (*Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 812, 816–819.) No similar allegation exists here. Having been presented with no applicable law, we decline to hold that Duane Morris LLP should have been disqualified.

IV. Leave to Amend

Finally, Brafman contends he should have been granted leave to file a SAC even after the court granted WSGR's motion for summary judgment. We review for abuse of discretion the trial court's denial of Brafman's motion for leave to amend. (*Hulsey v. Koehler* (1990) 218 Cal.App.3d 1150, 1159.)

Leave may be granted after summary judgment only if (a) the complaint was found to be "legally insufficient" on summary judgment rather than having been resolved on the merits, and (b) the amendment does not state a different theory of recovery. (*Van v. Target Corp*. (2007) 155 Cal.App.4th 1375, 1387–1388, fn. 2.) Such leave is rarely granted because it is " 'patently unfair to allow plaintiffs to defeat . . . [a] summary judgment motion by allowing them to present a "moving target" unbounded by the pleadings.' " (*Falcon v. Long Beach Genetics, Inc.* (2014) 224 Cal.App.4th 1263, 1280.)

In this case, Brafman sought leave to file a SAC that included two new causes of action in addition to the seven claims on which the trial court had granted summary judgment. The first additional cause of action was for legal malpractice and alleged that WSGR owed Brafman a duty because he provided WSGR with personal financial information. Brafman's other new cause of action was for conspiracy to commit fraud and alleged that WSGR and one of its attorneys had a financial interest associated with the competing corporation, Parliament, creating a conflict with its representation of Silicon Guild LLC and requiring it to disclose that conflict.

Neither theory of recovery was alleged in the first amended complaint. The trial court correctly concluded that it could not grant Brafman leave to add those causes of action, because they constituted different theories of recovery. (*Van v. Target Corp*., *supra*, 155 Cal.App.4th at pp. 1387–1388, fn. 2.) Furthermore, the trial correctly considered an unwarranted delay in seeking leave to amend when ruling on a motion for leave to file a SAC. (*Huff v. Wilkins* (2006) 138 Cal.App.4th 732, 746.) Here, Brafman knew that WSGR intended to move for summary judgment based on a lack of duty to Brafman as early as June 2017. Brafman could have amended his complaint well before the trial court granted summary judgment nearly five months later, but he failed to do so.

Finally, we note that the rest of the SAC states substantially the same claims as the FAC, which was resolved on the merits against Brafman. We agree with the trial court that "summary judgment proceedings would have little meaning if [the court] were to exercise [its] discretion to grant Brafman's motion." We therefore conclude that the trial court did not abuse its discretion when it denied Brafman leave to file a SAC.

DISPOSITION

The judgment is affirmed.

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BROWN, J.

WE CONCUR:

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POLLAK, P. J.

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TUCHER, J.