

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 22 2026

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LANCE M. BENEDICT,

Plaintiff-Appellant,

v.

GOOGLE LLC,

Defendant-Appellee.

No. 24-6966

D.C. No.

2:23-cv-02392-JJT

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
John J. Tuchi, District Judge, Presiding

Submitted September 17, 2026**
Phoenix, Arizona

Before: M. SMITH and TUNG, Circuit Judges, and DIMKE, District Judge.***

Plaintiff Lance Benedict appeals from the dismissal of his lawsuit claiming
Defendant Google LLC violated his rights under federal trademark law and state tort

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Mary K. Dimke, United States District Judge for the Eastern District of Washington, sitting by designation.

law. According to Plaintiff, the district court erred (1) by ruling that he failed to allege a “commercial use” of his trademark, (2) by exercising jurisdiction over his claims under state law, and (3) by denying as futile Plaintiff’s request for leave to amend. With jurisdiction under 28 U.S.C. § 1291, we reject his arguments and affirm.

The parties are familiar with the facts, so we do not recount them here except where necessary for context. We review each issue de novo. *See Burgert v. Lokelani Bernice Pauahi Bishop Tr.*, 200 F.3d 661, 663 (9th Cir. 2000) (dismissal for failure to state a claim reviewed de novo); *Demarest v. HSBC Bank USA, N.A.*, 920 F.3d 1223, 1225 (9th Cir. 2019) (same for diversity determinations); *Cohen v. ConAgra Brands, Inc.*, 16 F.4th 1283, 1287 (9th Cir. 2021) (same for futility determinations).

1. We affirm the district court’s conclusion that Plaintiff failed to plead facts showing that Google used his trademark—*i.e.*, his name, “Lance Benedict”—in commerce. According to the operative first amended complaint (FAC), a third-party “felon and [] stalker” published defamatory content about Plaintiff online, which Google then “broadcast[]” on its “search engine results.” The FAC repeatedly challenges Google’s display of third-party content in its generic search results. The district court held that such allegations fall short of alleging any commercial use of Plaintiff’s trademark. *See Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 676, 679 (9th Cir. 2005) (rather than prohibiting “all unauthorized uses,”

the law of trademark infringement “prevents only unauthorized uses . . . in connection with a commercial transaction”).

Plaintiff abandons this theory on appeal. Despite acknowledging that the district court rebuffed his search-results theory, Plaintiff fails to defend it. On the contrary, he now claims his theory all along was that Google “extensively used [his] trademark in its [own] Ad[W]ords advertising.”¹ “It is well established in this Circuit that claims which are not addressed in the appellant’s brief are deemed abandoned.” *Paracor Fin., Inc. v. Gen. Elec. Cap. Corp.*, 96 F.3d 1151, 1168 (9th Cir. 1996) (citation omitted). Because Plaintiff did not “specifically and distinctly” challenge the district court’s rationale, we deem the issue abandoned and decline to consider it. *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1176 (9th Cir. 1996) (citation omitted).

Similarly, Plaintiff failed to plead the theory he now asserts—that Google “used” his trademark in its own “Ad[W]ords advertising.” At most, the FAC contains a handful of scattered and disconnected references to AdWords, devoid of context. These passing references are insufficient to show that Google used

¹ Google AdWords is a program through which Google “sells ‘keywords,’ or search terms that trigger the display of a sponsor’s advertisement.” *Network Automation, Inc. v. Advanced Sys. Concepts, Inc.*, 638 F.3d 1137, 1142 (9th Cir. 2011). “When a user enters a keyword, Google displays the links generated by its own algorithm in the main part of the page, along with the advertisements in a separate ‘sponsored links’ section next to or above the objective results.” *Id.*

Plaintiff's mark "in connection with a commercial transaction." *Bosley Med. Inst.*, 403 F.3d at 676.²

Plaintiff attempts to fill the void in his appellate briefing by insinuating—but still not clearly alleging—that Google indeed used the "Lance Benedict" mark in its own sponsored advertisements. Yet Plaintiff can neither "raise an entirely new legal theory for the first time on appeal," *Vincent v. Trend W. Tech. Corp.*, 828 F.2d 563, 570 (9th Cir. 1987), nor "try to amend [his] complaint through [] arguments on appeal," *Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 511 (9th Cir. 2013) (citation omitted). To the extent Plaintiff now asserts this theory, it is not before us.³

2. Plaintiff's challenge to diversity jurisdiction fails as a matter of law.⁴

² The FAC's citation of *Rescuecom Corp. v. Google Inc.*, 562 F.3d 123 (2d Cir. 2009) does not bridge the gap. In that case, Google allegedly sold a trademark holder's mark as an AdWords "keyword" to the holder's competitor so the competitor's ad would appear when third parties searched for the holder's mark. *Id.* at 126–27. Nowhere does Plaintiff assert that Google *actually sold* his mark as a "keyword" to the third-party "felon and [] stalker" who published offensive content about him online. The most Plaintiff could say is that Google "allows" unspecified third parties "to use" his mark through AdWords. That is a far cry from the conduct at issue in *Rescuecom*.

³ Though Plaintiff received counsel prior to filing his FAC, we acknowledge that his counsel had withdrawn by the filing date, and that pro se pleadings receive a liberal construction. *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). Yet that principle does not empower us to convert untimely equivocations into timely allegations.

⁴ Because we uphold the exercise of diversity jurisdiction, we need not

For the first time on appeal, he argues that diversity is lacking because he and Google share California citizenship. *See* 28 U.S.C. § 1332(a). Despite his delay, Plaintiff did not forfeit the issue, for “challenges to subject-matter jurisdiction premised upon diversity of citizenship” can be brought “for the first time on appeal.” *Grupo Dataflux v. Atlas Glob. Grp., L.P.*, 541 U.S. 567, 571 (2004). But under binding precedent, his attack on diversity jurisdiction falters all the same.

The applicable inquiry is whether “the pleadings at the time of removal” raise a “substantial question” of diversity. *Albrecht v. Lund*, 845 F.2d 193, 194 (9th Cir. 1988) (quoting *Miller v. Grgurich*, 763 F.2d 372 (9th Cir. 1985)); *accord Schnabel v. Lui*, 302 F.3d 1023, 1032 (9th Cir. 2002). In *Albrecht*, we held that the applicable pleadings raised no “substantial question” where the complaint failed to allege the parties held diverse residency or citizenship, and the plaintiff failed to contest removal or move to remand the case back to state court. 845 F.2d at 194–95. At most, the pleadings alleged that the defendant did business in the plaintiff’s state of citizenship and served in a partnership there, which we held insufficient. *See id.*

The same goes for this case. At the time of removal, Plaintiff’s operative complaint admitted that he resides in Arizona. And “[t]he place where a person lives is taken to be his domicile until facts adduced establish the contrary.” *NewGen, LLC v. Safe Cig, LLC*, 840 F.3d 606, 614 (9th Cir. 2016) (quoting *Anderson v. Watts*, 138

address Plaintiff’s objections to supplemental jurisdiction.

U.S. 694, 706 (1891)). When Google removed on that basis, Plaintiff did not contest diversity jurisdiction or seek a remand, just as in *Albrecht*. See 845 F.2d at 195. And while his pleadings disclose modest business ties to California, they contain no “allegation that [he] was a citizen of California” and therefore “failed to raise a substantial question of diversity of citizenship at the time of removal.” *Id.* at 195.⁵

3. The district court correctly held that granting Plaintiff a second replying opportunity would be futile. In evaluating a denial of leave to amend, we consider such factors as undue delay, repeated failures to cure, and futility of amendment. *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir. 1989). “Futility of amendment can, by itself, justify the denial of . . . leave to amend.” *Kroessler v. CVS Health Corp.*, 977 F.3d 803, 815 (9th Cir. 2020) (citation omitted).

Contrary to Plaintiff’s claim that he was “[n]ever afforded” an opportunity to address his pleading defects, the district court provided him a chance to do just that by directing the parties to meet and confer before Google could move to dismiss. During that process, Google articulated the commercial-use defect infecting his

⁵ We deny Plaintiff’s motion to supplement the record with a declaration purporting to demonstrate his citizenship. The declaration does not bear on the state of his pleadings “at the time of removal,” *Albrecht*, 845 F.2d at 194, and so is “not relevant” to our inquiry, *Whisper Lake Devs., Inc. v. Mahaffie*, 2026 WL 1122243, at *3 (9th Cir. Apr. 24, 2026). See also *Vargas v. Howell*, 949 F.3d 1188, 1198 (9th Cir. 2020) (observing a “general rule” against supplementing the appellate record with “documents not filed with the district court” (citation omitted)).

initial complaint. Yet, despite having counsel present in one of those discussions, Plaintiff failed to cure the defect in his FAC, and the district court then dismissed on that basis. Now, Plaintiff abandons the search-results theory at the heart of his case, all but confirming it has no legs.⁶

In his final request for leave to amend, Plaintiff offered to plead “more detail” on “how Google structures and runs its ‘Ad Words.’” But adding details on Google’s general practices would ameliorate none of the flaws described in the dismissal order. It would bring Plaintiff no closer, for instance, to pleading facts establishing that Google used his mark in commerce. We therefore agree with the district court that granting him another chance to amend would be futile.

Even were we to construe Plaintiff’s new, conclusory theory that Google “extensively used” his mark in its own advertising as a proffered hook for repleading, that would not change the outcome. If Plaintiff had “unpleaded allegations” relating to Google’s advertising “that might save [his] case,” it was incumbent upon him “to say so [] before the district court with discretion to grant [him] leave to replead.” *G.B. by and through G.P. v. EPA*, 172 F.4th 1042, 1065 n.15 (9th Cir. 2026). In the usual course, he cannot allege those facts for the first time on appeal. *See id.* We see no reason to depart from that course here.

⁶ We focus here on the shortcomings of Plaintiff’s federal trademark claims because he failed to defend his state-law claims on appeal (beyond challenging the district court’s jurisdiction to adjudicate them).

* * *

The district court's order dismissing Plaintiff's complaint with prejudice is
AFFIRMED.