United States Court of Appeals for the Fifth Circuit

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Fifth Circuit
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Thomas B. Plunkett, III
Clerk

No. 26-10136

SHAWN THOMAS; THE TABLETOP ADVENTURE, L.L.C., *An Iowa Liability Company*,

Plaintiffs—Appellants,

versus

LEYLINE PUBLISHING, L.L.C., *A Texas Limited Liability Company*, *doing business as* GEEK THERAPEUTICS; LEYLINE EDUCATION, P.L.L.C., *A Texas Professional Limited Liability Company*; ANTHONY BEAN, PHD; ALICIA FIGLIUOLO,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:24-CV-3061

Before ELROD, *Chief Judge*, and KING and STEWART, *Circuit Judges*.

CARL E. STEWART, *Circuit Judge*:

Plaintiffs-Appellants filed this suit against Defendants-Appellees after a dispute arose between the parties related to their contractual agreement to jointly develop and market a therapeutic tabletop game. The district court granted summary judgment in favor of Defendants-Appellees and dismissed the suit. For the following reasons, we AFFIRM.

I. FACTUAL & PROCEDURAL BACKGROUND

Plaintiff-Appellant Shawn Thomas is an avid enthusiast of tabletop role playing games ("TTRPG").[1] TTRPGs are board games that are played in private settings, often around a table with a limited number of participants. Thomas is also an advocate of using TTRPGs as therapeutic tools to help individuals who struggle with anxiety or other psychological disorders. In 2018, Thomas began creating fictional characters and stories for a therapeutic TTRPG game that he would continue to develop for the next few years.

Defendant-Appellee Anthony Bean, Ph.D., is a licensed Clinical Depth Psychologist and the sole owner of Leyline Education, P.L.L.C., d/b/a Geek Therapeutics, and Geek Therapeutics' publishing house, Leyline Publishing, L.L.C. (collectively, "Leyline"). According to Dr. Bean, Geek Therapeutics uses "Geek Therapy," which is the practice of using the psychology of geek cultural interests like video games, comic books, movies, TV shows, and anime to improve mental health. Geek Therapeutics also provides Continuing Education, certification programs, and training to licensed clinicians as well as unlicensed individuals who use "Geek Therapy." Defendant-Appellee Alicia Figliuolo is a licensed therapist who serves as Director of Education and Training for Geek Therapeutics. In her capacity as Director, Figliuolo helped develop and oversee a "Therapeutic Game Master Course" for Geek Therapeutics.

In 2021, Thomas obtained a Therapeutic Game Master Certification from Geek Therapeutics to become qualified to host TTRPGs in a therapeutic environment. That year, Thomas formally adopted the name

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[1] A well-known example of a TTRPG is "Dungeons & Dragons," often referred to as "D&D."

Realms of Kymoria ("RoK") for the TTRPG that he began creating in 2018. He also established The TableTop Adventure, L.L.C., for which he is the sole founder, member, and manager, to market and distribute the intellectual property associated with RoK. In early 2022, Thomas participated in a Geek Therapeutics Podcast hosted by Figliuolo where he discussed his plans to further develop RoK. After the podcast, Figliuolo arranged a meeting between Thomas, Dr. Bean, and herself to discuss a joint venture to market, develop, and publish RoK through Leyline and its resources.

During their meeting, Thomas and The TableTop Adventure, L.L.C. (collectively, "TableTop") entered into two licensing agreements with Leyline. In the parties' first agreement, Leyline agreed to pay TableTop $50,000 in exchange for all of the content associated with its business model. The parties agreed in the underlying proceedings, and continue to agree on appeal, that the first licensing agreement is no longer operable.

The second licensing agreement ("SLA") forms the basis of the dispute between the parties in this appeal. TableTop drafted the SLA and the parties executed it in March 2022. The terms of the SLA assigned Thomas the role of "Creative Director" and authorized Leyline to sell, lease, or use the RoK gaming content that it purchased from TableTop for its own users and clients as needed. Additionally, TableTop agreed to provide numerous services to Leyline that were associated with the development and marketing of RoK in exchange for the parties' "agreed-upon" fees, including "[h]igh-level writing, editing, and proofreading" of "core rulebooks," "written modules," "written full-length modules," and "training modules to be used in Leyline Publishing courses." The SLA further provided that:

> Leyline Publishing will own the rights to produce, market, and sell the content shared with their own branding. A discussion in the future to purchase the entirety of the Kymoria IP will occur at a later date and will have some language that may

> supersede the language in this document. Until that document is produced and signed then the Kymoria IP and all related content is owned by me, Shawn Thomas (The Tabletop Adventure) and I am producing specific content and authorizing the commercial use of this content (and sales of it) by Leyline Publishing. **The content that is allowed to be used will be limited to what is purchased by Leyline Publishing.**
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> (The spirit of the above paragraph is intended to allow Shawn Thomas to own the setting and IP of Kymoria as a whole, including the logo, website content, business model, and so on until a formal decision to sell the IP along with the business model and website format to Leyline Publishing is made or not. **Each of the modules, training, and so on that is purchased from Shawn by paying the agreed upon fees will be owned by Leyline Publishing and I cannot ask them to stop selling/using them in their business model.** The exception being if they refuse to honor the royalty payout described below or they sell the content to no longer be used by Leyline Publishing but instead be used by another individual, group, or business).

The SLA also provided per-word rates to be billed by TableTop to Leyline for writing, editing, and proofreading; hourly rates for "collaboration, consultation, DM training, and representing Leyline Publishing at events;" and royalty payouts. As for products intended for the "Kickstarter campaign," the SLA provided that payments to TableTop "will start from when Kickstarter deposits funds into the Leyline Publishing bank account after a successful Kickstarter" to be staggered over a 10-month period with 10% paid to TableTop each month. The SLA provided that the purpose of the staggered payments was so Leyline would "not have to pay a significant cost up front but also [to] allow [TableTop] the opportunity to be paid for [its] work and effort if the Kickstarter does not go through."

After finalizing the SLA in March 2022, Thomas, Figliuolo, and Dr. Bean began working toward the production of TTRPG content that incorporated the RoK setting, resulting in an "RoK QuickStart Kit." Thomas and Dr. Bean agreed that the RoK QuickStart Kit needed trademark protection. But because Thomas did not have the financial ability to trademark RoK himself, he authorized Dr. Bean to trademark RoK on his behalf. Thomas agreed to reimburse Dr. Bean for the expense of doing so at a later date if he desired to take full ownership of the trademark. Dr. Bean then filed a "Trademark/Service Mark Application" for the name "Realms of Kymoria."[2]

In developing and marketing the RoK gaming content, the parties planned to use the Open Game License ("OGL") created by Wizards of the Coast, Inc. ("WotC").[3] In December 2022, however, the parties learned through a purported Internet leak that WotC intended to make large-scale changes to its OGL. Prior to the speculated change, WotC's OGL permitted third parties to create gaming content using rules compatible with Dungeons and Dragons, which is owned and distributed by WotC. This meant that third parties could use the components created by WotC, and licensed under the OGL, to create their own games while still allowing for the interoperability between different games. The anticipated change to the OGL would require

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[2] U.S. Trademark Application Serial No. 97627742 (filed Oct. 11, 2022). According to Leyline, TableTop never reimbursed Dr. Bean or took ownership of the trademark. TableTop counters that Leyline ultimately abandoned the trademark application. The United States Patent and Trademark Office's website confirms that the trademark application that Dr. Bean filed in October 2022 was subsequently withdrawn and the application is no longer active. *See* https://tsdr.uspto.gov/#caseNumber=97627742&caseSearchType=US_APPLICATION&caseType=DEFAULT&searchType=statusSearch.

[3] An Open Game License is a public copyright license that permits TTRPG developers to use and distribute gaming content.

third-party developers such as TableTop to register their games with WotC and grant it a "non[-]exclusive, perpetual, irrevocable, worldwide, sub-licensable, royalty-free license to use th[e] content for any purpose."

In response to the speculated OGL change, TableTop expressed concern to Leyline that because the RoK gaming content in its current form would be dependent on and subject to the OGL, TableTop would be required to grant a perpetual license of the RoK content to WotC if the parties proceeded as planned under the terms of the SLA. In an attempt to circumvent the projected problematic OGL change, TableTop proposed to overhaul the RoK game to remove its compatibility with Dungeons and Dragons's game system and independently develop a new system. But Leyline objected on grounds that other TTRPGs that have tried to implement their own mechanics in lieu of the widely used Dungeons and Dragons system generally failed in the market. Leyline also feared that TableTop's proposed system was too complicated and would not be well received by the game's target market. Leyline speculated that the work involved with overhauling the system would entail significant time and expense, setting back the RoK project launch by many months.

According to Leyline, once the parties disagreed on how to proceed with respect to the OGL, TableTop ceased communicating with Leyline. Consequently, in March 2023, Leyline notified TableTop that it planned to move forward under the terms of the SLA regardless of TableTop's opposition. In April 2023, TableTop issued a cease-and-desist letter to Leyline through its counsel "requiring an immediate cease of all efforts to reproduce, distribute, modify, publish, or display any part of the RoK product, to delete or destroy all copies of the RoK IP in [Leyline's] possession, and to assign the trademark application that [Leyline] filed in 2022 to [TableTop]." Leyline declined to comply with the terms of TableTop's cease-and-desist letter, and in December 2024, TableTop filed

this suit in the United States District Court for the Northern District of Texas.

In the district court proceedings, TableTop argued that: (1) Leyline infringed its intellectual property rights by continuing to market the RoK game after the parties reached an impasse; and (2) Leyline used Thomas's name and image in its promotion of RoK without TableTop's authorization.[4] Leyline moved for summary judgment on all of TableTop's claims, contending that its intellectual property infringement claims were barred by the SLA. Leyline further argued that TableTop's remaining claims failed because TableTop had authorized Leyline to use Thomas's name and image and Leyline never profited from the use. In its response to Leyline's summary judgment motion, TableTop countered that the SLA was no longer valid and that even if it was, it did not cover the content that Leyline was using. The district court agreed with Leyline, determining that it had established the absence of a genuine dispute of material fact and that TableTop had failed to respond with competent summary judgment evidence in support of its contrary claims. The district court then issued summary judgment in Leyline's favor.

In its memorandum opinion, the district court determined that the SLA constituted a valid, binding agreement between the parties that authorized Leyline to distribute the RoK content. It then rejected TableTop's argument that Leyline had breached the SLA by failing to pay for "over 3,000 hours" of unbilled work. The court reasoned that because

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[4] During the pendency of the underlying district court proceedings, TableTop moved for a temporary restraining order and preliminary injunction. The district court denied the motion on grounds that TableTop had not developed a sufficient record to be awarded preliminary injunctive relief, and it was unlikely to ultimately succeed on the merits of its claims.

TableTop had never billed Leyline for the work, there could be no material breach of the contract and the SLA remained in effect. The court then concluded that the SLA covered Leyline's use of the RoK trademark in marketing and selling the RoK game content based on the written terms of the SLA. The court rejected TableTop's claim that "Leyline induced the creation of derivative works based on [TableTop]'s content" because TableTop was unable to identify the purported derivative-work content. It further reasoned that the terms of the SLA did not prohibit Leyline from developing marketing material that was derivative of TableTop's original work. Additionally, the court determined that the SLA conferred a broad right to Leyline to market, sell, and use the RoK content provided by TableTop.

The district court further determined that Leyline had established, as a matter of undisputed fact, that it was authorized to use the RoK content provided by TableTop under the express terms of the SLA. The court rejected TableTop's argument that "some of the rights [Leyline] argue[d] [it] possess[ed] were only to be granted as part of the first, non-operative, agreement." The court reasoned that "[w]ithout any substantiation of what precise content was provided solely under the first licensing agreement and not covered by the [SLA], [TableTop's] argument amount[ed] to no more than an unsatisfactory assertion of 'metaphysical doubt.'" *See Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (explaining that the summary judgment burden is not satisfied with "some metaphysical doubt as to the material facts," "conclusory allegations," "unsubstantiated assertions," or a mere "scintilla of evidence" (citations omitted)). The court then granted summary judgment in favor of Leyline on TableTop's three intellectual property claims.

The district court similarly rejected TableTop's name-and-image claims on grounds that Leyline's portrayal of Thomas as the creator of RoK

was true, authorized, and governed by the SLA which was a valid, binding contract. The court disagreed with TableTop's argument that its cease-and-desist letter revoked Leyline's authorization to use Thomas's name and image, explaining that TableTop could not have unilaterally revoked the valid, binding SLA that granted those permissions. The district court then determined that Leyline had established as a matter of undisputed material fact that TableTop could not prove that publicly describing Thomas as the creator of RoK was false or unauthorized. And because TableTop failed to point to competent summary judgment evidence in support of its counter arguments, summary judgment in favor of Leyline on TableTop's name-and-image claims was warranted.

This appeal ensued.

II. STANDARD OF REVIEW

We conduct a de novo review of a district court's grant of summary judgment. *Sanders v. Christwood*, 970 F.3d 558, 561 (5th Cir. 2020). "Summary judgment is proper 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting FED. R. CIV. P. 56(a)). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A plaintiff's subjective beliefs, conclusory allegations, speculation, or unsubstantiated assertions are insufficient to survive summary judgment. *See Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011); *Clark v. Am.'s Favorite Chicken Co.*, 110 F.3d 295, 297 (5th Cir. 1997); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). "The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or her claim." *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458

(5th Cir. 1998). "A panel may affirm summary judgment on any ground supported by the record, even if it is different from that relied on by the district court." *Reed v. Neopost USA, Inc.*, 701 F.3d 434, 438 (5th Cir. 2012) (citation modified).

III. Discussion

TableTop urges the following five general arguments on appeal: (1) the district court erred by holding that the SLA was a valid contract that authorized Leyline to distribute the RoK game materials; (2) the district court erred by granting summary judgment on its derivative-works claim despite admitted factual uncertainty; (3) the district court impermissibly inferred a trademark license contrary to the express reservation in the SLA; (4) the district court erred by treating time-limited contractual authorization as perpetual despite TableTop's withdrawal from the project; and (5) the district court erred in dismissing TableTop's unjust enrichment claim where the SLA's coverage was in dispute. Leyline contends that all of TableTop's arguments on appeal have been forfeited for failure to raise them before the district court. *See Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021) ("A party forfeits an argument by failing to raise it in the first instance in the district court—thus raising it for the first time on appeal. . . .").

However, our review of the record indicates that, in its response to Leyline's summary judgment motion, TableTop did raise to some extent four of the five general arguments it now presses on appeal—the exception being its argument related to its derivative-works claim. TableTop rightly concedes that it failed to advance an argument related to its derivative-works claim in its response. But it further states, incorrectly, that "the derivative-works count received no separate argument below from either side, and the district court decided it solely by construing the [SLA] to 'confer[] a broad right.'" An examination of Leyline's summary judgment motion and brief in support

reveals that it did in fact raise the issue of derivative works multiple times, thus putting TableTop on notice.

Nonetheless, as this court has held, the forfeiture rule's purpose is "to prevent an appellate court from analyzing the facts of a particular issue without the benefit of a full record or lower court determination." *Lampton v. Diaz*, 639 F.3d 223, 227 n.14 (5th Cir. 2011) (citation modified). In other words, forfeiture "generally will not apply when an issue fairly appears in the record as having been raised or decided." *Id.* (citation modified). Moreover, TableTop raised the derivative-works issue multiple times in its complaint, which is presumably why Leyline addressed it in its summary judgment motion in the first place. Thus, because the district court addressed the derivative-works claim in the proceedings below, and Leyline is not prejudiced because it has had an opportunity to respond to the issue on appeal, we proceed to address it on the merits along with TableTop's remaining general appellate arguments. *Id.*; *see also JMI Contractors, L.L.C. v. Medellin*, 738 S.W.3d 775, 792 (Tex. 2026) ("[F]ederal appellate courts have long endorsed the oft-invoked principle that they may review any issue presented to them that was pressed *or passed on* below." (emphasis in original)). Nevertheless, because it appears that TableTop advances many new, substantive arguments on appeal in support of its original arguments before the district court, we limit our discussion to its original arguments and consider any new supporting arguments forfeited. *See Rollins*, 8 F.4th at 397 ("A party forfeits an argument by failing to raise it in the first instance in the district court—thus raising it for the first time on appeal. . . ."); *see also Shambaugh & Son, L.P. v. Steadfast Ins. Co.*, 91 F.4th 364, 371 (5th Cir. 2024) ("[A]llowing forfeited arguments to be cured by appellate briefing would contradict our well-established precedent on issue preservation, and it would undermine the core purpose of our forfeiture rules by opening the door for appellate review of un- or underdeveloped records.").

The district court divided TableTop's claims as set forth in his nine-count complaint into two broad categorical arguments: (1) that Leyline allegedly infringed its intellectual property rights by continuing to market the RoK game after TableTop attempted to withdraw from the terms of the SLA; and (2) that Leyline allegedly used Thomas's name and image to promote the RoK content without authorization. Because TableTop urges on appeal most of the arguments that it raised before the district court in its nine-count complaint, we analyze them in a similar fashion herein.

A. Intellectual Property Claims

TableTop's arguments related to its intellectual property claims are that: (1) the district court erred by holding that the SLA was a valid contract that authorized Leyline to distribute the RoK game materials; (2) the district court erred by granting summary judgment on its derivative-works claim despite admitted factual uncertainty; and (3) the district court impermissibly inferred a trademark license contrary to the express reservation in the SLA. We address each in turn.

(1) The Validity of the SLA

With respect to its argument regarding the validity of the SLA, TableTop contends that the threshold question is not whether Leyline breached the terms of the SLA, but whether it "ever obtained a license to the unpaid content in the first place." According to TableTop, the district court's conclusion that the SLA was a valid, binding contract that authorized Leyline to distribute the RoK game materials was "wrong as a matter of federal copyright law and Texas contract law, and, [was] in any event, not the only reasonable reading of the agreement." Thus, TableTop avers, the district court erroneously resolved the SLA's contractual ambiguities in favor of Leyline which lead to its incorrect interpretation of the SLA. We are not persuaded.

The parties agree that Texas law governs the SLA. "To the extent that it is not inconsistent with the Copyright Act and its policies, Texas law governs our analysis of whether the parties contractually created a . . . license." *Lulirama Ltd., Inc. v. Axcess Broad. Servs., Inc.*, 128 F.3d 872, 880 n.7 (5th Cir. 1997). Under Texas law, "[t]he elements of a valid contract include: (1) an offer; (2) acceptance; (3) meeting of the minds; (4) each party's consent to the terms; and (5) execution and delivery of the contract with the intent that it be mutual and binding." *Cessna Aircraft Co. v. Aircraft Network, L.L.C.*, 213 S.W.3d 455, 465 (Tex. App. 2006) (quoting *Prime Prods., Inc. v. S.S.I. Plastics, Inc.*, 97 S.W.3d 631, 636 (Tex. App. 2002)).

We agree with the district court that Leyline established that the SLA was a valid and enforceable contract. As an initial matter, TableTop drafted the detailed and specific terms of the SLA, submitted it to Leyline, and Dr. Bean signed and dated it on March 7, 2022.[5] Thus, there was an offer, acceptance, a meeting of the minds, and both parties consented to the terms. *Id.* Further, TableTop began performing under the SLA by producing content under its terms, and billing Leyline in accordance with the payment parameters set forth therein. Indeed, TableTop explicitly concedes in its brief on appeal that it "performed services under the [SLA] from March 2022 through March 2023." Thus, there was execution of the terms of the SLA by both parties for at least one year before this dispute arose. *Id.* Given our conclusion that the SLA was a binding contract between the parties, the

[5] Although TableTop does not appear to reassert this argument on appeal, we agree with the district court that under Texas law, "a contract need not be signed by the parties to be executed, and hence binding, unless the parties explicitly require signatures as a condition of their mutual assent." *Chubb Lloyds Ins. Co. of Tex. v. Buster & Cogdell Builders, LLC*, 668 S.W.3d 145, 151 (Tex. App. 2023). Here, because the SLA does not expressly require that both parties sign it, we consider it valid even though it does not contain Thomas's signature.

question becomes whether the SLA authorized Leyline to distribute the RoK game materials. We conclude that it did.

The express terms of the SLA state that "[t]he content that is allowed to be used will be limited to what is purchased by Leyline Publishing." The SLA further states that "[e]ach of the modules, training, and so on that is purchased from [TableTop] by paying the agreed upon fees will be owned by Leyline Publishing and [TableTop] cannot ask [it] to stop selling/using them in their business model." Additionally, the SLA provides that "[h]igh-level writing, editing, and proofreading of services will be billed at a rate of $0.12 per word ($0.10 for writing and $0.02 for editing/proofreading)." Finally, the SLA terms require Leyline to "send payment within 10 days of mutual agreement and acceptance on the finalized product and/or within agreed upon payment schedules for collaboration/consultation/training."

TableTop concedes that it submitted invoices to Leyline in accordance with the terms of the SLA and that every invoice that it submitted was paid in full in accordance with the SLA's terms. But it further contends that it performed additional services for which it had not yet billed Leyline because "the project was still in development" and certain services such as "high-level writing, editing, [and] proofreading" would be "accounted for upon project completion." Thus, TableTop's position on appeal is that because it had not yet billed Leyline for certain content that it produced under the terms of the SLA, the SLA did not authorize Leyline to use that content.

In the proceedings below, TableTop claimed that Leyline materially breached the terms of the SLA by failing to pay TableTop for its unbilled work, and for that reason, TableTop was permitted to terminate the SLA. In support of its argument, and in response to Leyline's motion for summary judgment, TableTop produced an affidavit and "summary" claiming the

"existence of 'over 3,000 hours of billable work' that was 'unbilled and unpaid by' [Leyline]." TableTop contended that "[a]ny authorization to use content under the terms of [the SLA] was conditioned on [Leyline] honoring contract terms, especially payment and development obligations." TableTop thus avers that because Leyline used content that TableTop had submitted without first paying for that content, it breached the terms of the SLA, even though TableTop never sent Leyline an invoice for that content.

Quoting *Bunting v. State Farm Lloyds*, the district court rejected TableTop's argument, reasoning that "[t]he failure to pay a claim that was never made cannot constitute a breach of contract."[6] *See* No. 3-98-CV-2490-BD, 2000 WL 191672, at *4 (N.D. Tex. Feb. 14, 2000). It then concluded that, under the terms of the SLA, Leyline's promise to pay TableTop's invoices as they were submitted constituted its consideration under the agreement.

TableTop appears to have abandoned its breach-of-contract argument on appeal, thus we focus our analysis on its argument that the SLA only authorized Leyline to distribute the RoK game content that it had purchased, *i.e.*, for which it had paid an invoice.[7] According to TableTop, the SLA's

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[6] The district court declined to reach the issue of whether TableTop's summary of unbilled hours constituted competent summary judgment evidence because TableTop's concession that it never billed Leyline for the content at issue disposed of its claim.

[7] In its appellate brief, TableTop states that "[w]hether Leyline materially breached the agreement by failing to pay is a separate question from whether the license attached in the first place. The [d]istrict [c]ourt conflated the two." The record reveals, however, that TableTop expressly argued in its response to Leyline's summary judgment motion that: (1) "the [SLA] [was] likely invalid, or was breached by defendants," and also that (2) Leyline's "failure to pay the promised amounts is an undisputed material breach that voids or suspends any alleged license." Thus, the district court did not "conflate" his arguments—it addressed them as they were presented. Moreover, because TableTop no longer meaningfully advances his breach-of-contract argument on appeal, we decline to analyze it herein. *Rollins*, 8 F.4th at 397 ("A party forfeits an argument by . . . failing to

"license-grant clauses are scope-limiting conditions tied to specific payment scenarios [and] none of those scenarios was triggered for the disputed work." This argument fails for several reasons.

We first note the district court's observation during the summary judgment proceedings that when it denied TableTop's motion for a preliminary injunction, TableTop had not yet established that Leyline had distributed, or planned to distribute, unpurchased content created by TableTop. The court further stated that, in response to Leyline's summary judgment motion, TableTop still had "not specified what copyrighted content Leyline is using or plans to use without license." Accordingly, TableTop failed to carry its summary judgment burden by "identify[ing] specific evidence in the record" and "articulat[ing] the precise manner in which that evidence support[ed] his . . . claim" that Leyline distributed TableTop's content in contravention of the SLA's terms. *Ragas*, 136 F.3d at 458. We can affirm the district court's summary judgment on this issue solely on this basis. *Id.*

But even if we were to accept TableTop's reading of the SLA, Leyline's authorization to use the content that TableTop had provided to it would become conditional on its pre-payment of the invoices associated with that content. This would hold true even though TableTop had submitted content to Leyline but temporarily withheld the invoice or planned to bill for it later, as the terms of the SLA permitted it to do. TableTop's reading of the SLA, however, is inconsistent with the terms of the SLA as a whole. *See In re Ford Motor Co.*, 211 S.W.3d 295, 298 (Tex. 2006) ("[C]ontract provision[s] cannot be read in isolation; all the provisions must be considered with reference to the whole."). This is because, as the district court observed, in

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adequately brief the argument on appeal.").

many circumstances, payment under the SLA was contemplated to occur *after* Leyline used the content produced by TableTop to generate revenue. To be sure, the SLA specified exactly how, and on what schedule, Leyline was to use that generated revenue to pay TableTop at later dates. The SLA expressly provides that:

> If the products are intended for a Kickstarter then an alternative payment plan can be leveraged. Payment (original fee of $0.12 per word and any additional illustrations) will start from when Kickstarter deposits funds into the Leyline Publishing bank account after a successful Kickstarter. Payment to me will be staggered out over the course of 10 months (10% paid each month). Royalties, based on the same sales goals as noted in the third bullet point above will be paid separately in Ql following the same logic. The option to pay more than 10% per month is allowed and up to Leyline Publishing and their flexibility. Paying faster will not shorten the overall 10-month window to complete payment.
>
> In the event the Kickstarter fails or anything else then the current completed content will be handed over as-is and will need to be paid over the course of 4 months (25% per month).
>
> (The spirit of the Kickstarter content is to allow Leyline Publishing the opportunity to stagger their payments to me and not have to pay a significant cost up front but also allow me the opportunity to be paid for my work and effort if the Kickstarter does not go through.)

TableTop argues that the language appearing earlier in the SLA that "[t]he content that is allowed to be used will be limited to what is purchased by Leyline" requires Leyline to make advance payment before using any of TableTop's content. On appeal, TableTop still fails to identify the content that it alleges Leyline has used without authorization under the terms of the SLA, purportedly implying that it is any and all content for which it does not have a paid invoice from Leyline. But this directly conflicts with the SLA's

terms authorizing Leyline to use TableTop's content to generate revenue and then use that revenue to pay TableTop at a later date. *Id.* We thus agree with the district court that, under the plain terms of the SLA, Leyline's agreement to pay for TableTop's content—not its ultimate payment—triggers its license to use and sell the content. TableTop's alternative reading is not reasonable. We therefore hold as a matter of law that the SLA "is not ambiguous and will be enforced as written." *Evergreen Nat'l Indem. Co. v. Tan It All, Inc.* 111 S.W.3d 669, 676 (Tex. App. 2003) (citation omitted). Accordingly, we conclude based on the terms of the valid, binding SLA between the parties that Leyline was authorized to use the content that TableTop submitted to it, including the content for which TableTop had not yet billed Leyline.

(2) Derivative-Works Claim

TableTop's next argument is that the district court erred by granting summary judgment on its derivative works claim despite the court's admitted factual uncertainty on what constituted TableTop's derivative works. Its argument falls short once again.

As this court has explained, a "derivative work" is one that is "based upon one or more preexisting works." *Nola Spice Designs, L.L.C. v. Haydel Enters., Inc.*, 783 F.3d 527, 551 (5th Cir. 2015) (citing 17 U.S.C. § 101). "[T]he owner of [the] copyright . . . has the exclusive rights to . . . prepare derivative works based upon the copyrighted work[.]" 17 U.S.C. § 106(2).

In addressing this issue during the summary judgment proceedings, the district court explained that:

> It is unclear to the [c]ourt what content distributed by Leyline is purportedly derivative of [TableTop]'s copyrighted content, and [TableTop] do[es] not identify any such content. In any event, however, the [SLA] confers a broad right to market, sell,

> and use RoK content provided by [TableTop] and does not prohibit developing marketing material that is derivative of [TableTop's]'s original work in marketing efforts.

On appeal, TableTop continues to challenge the district court's determination that the SLA does not prohibit Leyline from developing marketing material that is derivative of TableTop's original work. It further takes issue with the district court's statement that "[i]t is unclear . . . what content distributed by Leyline is purportedly derivative of [TableTop's]'s copyrighted content." According to TableTop, because the district court "conceded that it could not identify the [derivative-work] content at issue . . . [t]hat admission alone forecloses summary judgment."

But TableTop misconstrues its own summary judgment burden. As this court has long held, "[t]he party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or her claim." *Ragas*, 136 F.3d at 458. And as the district court observed in the summary judgment proceedings, TableTop failed to explain what derivative-work content Leyline allegedly used without authorization. Even on appeal, TableTop *still* fails to explain what derivative-work content Leyline has allegedly used without its authorization. We can affirm the district court's summary judgment on this issue for that reason alone. *Id.*

Moreover, as Leyline points out on appeal, the SLA expressly provides "[a]uthorization for Leyline Publishing to incorporate [the TTRPG RoK content provided by TableTop] into a business model that enables [it] to sell the content, lease the content, or use the content for [its] own users/clients as needed." Although the SLA further states that "[a]dditional clarity around some limitations with selling/leasing the content is provided below," it does not include any "[a]dditional clarity" as to Leyline's purported limitations to use TableTop's derivative-work content. TableTop,

as drafter of the SLA, could have included language to that effect. But it did not. In fact, the SLA makes no mention of TableTop's derivative works at all. This further supports the district court's conclusion that the SLA "does not prohibit [Leyline from] developing marketing material that is derivative of [TableTop]'s original work in marketing efforts." For these reasons, we affirm the district court's summary judgment in favor of Leyline on TableTop's derivative-works claim.

(3) Trademark License

TableTop next argues that the district court impermissibly inferred a trademark license contrary to the express reservation in the agreement. It further contends that the SLA "reserves the Kymoria trademark to [Thomas/TableTop] and contemplates that any future transfer of that mark will require a separate document." Its arguments are belied by the record.

In TableTop's response to Leyline's summary judgment motion, it argued that the SLA did not confer the right to Leyline to use the RoK trademark. In support, TableTop pointed to language in the SLA that "the content purchased may be shared with [Leyline's] own branding." It further contended that "the spirit" of this language was intended to allow TableTop "to own the setting and IP of Kymoria as a whole, including the logo, website content, business model, and so on until a formal decision to sell the IP… is made."

In addressing this argument, the district court reasoned that the branding reference TableTop pointed to merely "appeared to permit Leyline to sell the content under its 'Geek Therapeutics' brand name, not to require that Leyline abstain from marketing and selling the game as 'Realms of Kymoria.'" The district court further opined that TableTop's interpretation of the SLA "would frustrate the terms of the agreement allowing Leyline to produce, market, and sell the content created by [TableTop]—all of which is

'associated with the setting "Realms of Kymoria."'"

We agree with the district court's interpretation of the SLA. The SLA's language that "the content purchased may be shared with [Leyline's] own branding" does nothing to prevent Leyline from marketing and selling the RoK content. If anything, this language simply permits Leyline to sell the RoK content under its own brand name, Geek Therapeutics. Moreover, as Leyline contends, the ownership of "the setting and IP of Kymoria as a whole" was specifically postponed in the SLA which expressly stated that "[a] discussion in the future to purchase the entirety of the Kymoria IP will occur at a later date and will have some language that may supersede the language in [the SLA]." Thus, it was not the (non-existent) RoK trademark that authorized Leyline to use, sell, and incorporate TableTop's RoK content into its business model—it was the SLA. Accordingly, we reject TableTop's argument that "the district court impermissibly inferred a trademark license contrary to the express reservation in the agreement" and affirm the district court's summary judgment in favor of Leyline on this issue.

B. Name-and-Image Claims

On its name-and-image claims, TableTop contends that the district court erred by reading the SLA to perpetually authorize Leyline to use Thomas's name and image in marketing communications, despite TableTop's "withdrawal from the project." In support of its argument, TableTop alleges claims of defamation and misappropriation, as well as claims for false endorsement and unfair competition under the Lanham Act.[8]

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[8] We note that, although TableTop also asserted arguments regarding libel, slander, and invasion of privacy in conjunction with its name-and-image claims in the underlying proceedings, it does not brief an argument related to those issues on appeal. Accordingly, we do not address them herein. *Rollins*, 8 F.4th at 397 ("A party forfeits an argument by . . . failing to adequately brief the argument on appeal.").

It further alleges that Leyline has been unjustly enriched because TableTop was not compensated when Leyline used Thomas's name and image without its authorization. It also contends that the SLA does not bar its unjust enrichment claim because it disputes the SLA's coverage.

TableTop's name-and-image claims are based on actions that TableTop alleges Leyline took after it withdrew from the project. These actions include sending 2024 marketing communications that refer to Thomas as RoK's "Creative Director," circulating emails that refer to Thomas as a "founder" and "co-creator" of RoK, and posting a headshot of Thomas on a webpage that identifies him as a "co-creator" of RoK. According to TableTop, the SLA's "Creative Director" designation was tied to the "partnership" that ended when TableTop withdrew from the project. Thus, TableTop contends that because it ended the partnership, Leyline was no longer authorized to publicly refer to Thomas's previous role as the "Creative Director" or "co-creator" of RoK its marketing emails. It further contends that "the contract by its own terms ceased to authorize the disputed uses no later than April 2023" so "[t]he 2024 marketing communications using Thomas's name and title [] exceeded the contract's scope."

With respect to its defamation argument, TableTop contends that Leyline's describing Thomas as co-creator of RoK in its 2024 marketing without disclosing that TableTop had withdrawn from the project constituted a "literally-true-but-misleadingly-presented statement" that amounted to defamation under Texas law. As to the issue of misappropriation, TableTop argues that Leyline's "2024 commercial uses of [Thomas's] name and image, regardless of whether they accurately described his historical role, were unauthorized commercial appropriations made after [TableTop's] consent was withdrawn." And on the issues of false endorsement and unfair competition under the Lanham Act, TableTop

alleges that reasonable consumers receiving Leyline's 2024 marketing email would interpret its credit to Thomas as co-creator as falsely implying his current support for the project. We are unpersuaded by these arguments.

"[A]n allegedly defamatory publication should be construed as a whole in light of the surrounding circumstances based upon how a person of ordinary intelligence would perceive it." *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 114 (Tex. 2000). Texas courts have held that "a publication can convey a false and defamatory meaning by omitting or juxtaposing facts, even though all the story's individual statements considered in isolation were literally true or non-defamatory." *Id.*

"[T]he tort of misappropriation provides protection from the unauthorized appropriation of one's name, image or likeness." *See Brown v. Ames*, 201 F.3d 654, 657 (5th Cir. 2000) (citation omitted). To succeed on a claim of misappropriation, "a plaintiff must prove that (1) the defendant misappropriated the plaintiff's name or likeness for the value associated with it and not in an incidental manner or for a newsworthy purpose; (2) the plaintiff can be identified from the publication; and (3) the defendant derived some advantage or benefit." *Id.* at 657–58 (citing *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994)).

The Lanham Act supplies a cause of action against any person who:

> [W]ithout the consent of the registrant[,] use[s] in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive.

15 U.S.C. § 1114(1)(a).

As an initial matter, we reject TableTop's argument that its withdrawal from the project, *i.e.*, its cease-and-desist letter, revoked the valid

contractual agreement between the parties as detailed in the terms of the SLA. Under Texas law, once the parties enter into a binding contract, the offer can no longer be revoked. *Cf. Morgan v. Bronze Queen Mgmt. Co.*, *LLC*, 474 S.W.3d 701, 706 (Tex. App. 2014) ("It is also established that an offer may be revoked *before* acceptance." (emphasis added)).

We also reject TableTop's remaining arguments related to defamation, misappropriation, and false endorsement and unfair competition under the Lanham Act. These arguments fail because the record supports the district court's determination that Leyline's portrayal of Thomas as a founder and co-creator of RoK was true, authorized, and governed by the valid and binding terms of the SLA. First and foremost, TableTop described Thomas in its complaint and throughout the district court proceedings as a "creator" and "founder" of the RoK game. Its complaint expressly states that "Thomas is the sole founder, member, and manager of The TableTop Adventure, LLC," and that "The TableTop Adventure, is the creator and rightful owner of all intellectual property rights associated with the tabletop game RoK, including copyrighted materials, designs, and related assets." Thus, Leyline's representations that Thomas was a founder and co-creator of RoK were not false or defamatory because (1) they were true; and (2) TableTop made the exact same representations in his publicly-available complaint. *See Turner*, 38 S.W.3d at 114. Nor could Leyline's representations have amounted to misappropriation since Thomas himself authorized Leyline's use of these labels for much of the parties' relationship and that authorization did not disappear simply because TableTop attempted to back out of SLA. *See Brown*, 201 F.3d at 657–58. Moreover, Leyline's representations that Thomas was a creator and co-founder of RoK were not deceptive or likely to induce confusion or mistake under the Lanham Act because they were true when Leyline made them and they remain true to this day. 15 U.S.C. § 1114(1)(a). In other words, TableTop cannot re-write history

simply because its relationship with Leyline has soured.

Second, the SLA itself states that Thomas "will be provided with the role of Creative Director" and that credit to Thomas as the artist should be provided. Thus, TableTop cannot dispute Leyline's purported use of this designation as it is part of the parties' binding contractual terms as set forth in the SLA. But as Leyline points out on appeal, TableTop has not yet identified an instance where Leyline has actually referred to Thomas as "Creative Director." Indeed, as the record confirms, Thomas is the only person who has ever referred to himself as "Creative Director." TableTop does not rebut this argument on appeal. For these reasons, we affirm the district court's summary judgment in favor of Leyline on TableTop's name-and-image claims.

TableTop's final argument is that the district court erred in dismissing its unjust enrichment claim where the SLA's coverage was in dispute. Again, its argument misconstrues the applicable legal standard. This court has held that:

> To adequately plead an unjust enrichment claim, [a party] must allege that: (1) valuable services were rendered or materials furnished; (2) those services were for the person sought to be charged; (3) those services and materials were accepted by the person sought to be charged, and were used and enjoyed by him; and (4) the person sought to be charged was reasonably notified that the plaintiff performing such services or furnishing such materials was expecting to be paid by the person sought to be charged.

Molzan v. Bellagreen Holdings, L.L.C., 112 F.4th 323, 335–36 (5th Cir. 2024). We have further held that "a party cannot recover on an unjust enrichment claim when there is a valid contract which governs the services or materials furnished." *Id.* at 336 (citation modified).

On this issue, the district court held that "[b]ecause a valid contract governs the ways in which Thomas's portrayal as the 'public face' of RoK will be compensated, [TableTop's] claim for unjust enrichment cannot proceed." We agree. The SLA, which we have determined is a binding, valid contract, provides "[a]uthorization for Leyline Publishing to incorporate [TableTop's RoK] content into a business model that enables [it] to sell the content, lease the content, or use the content for [its] own users/clients as needed." TableTop's decision to withdraw from the project did not invalidate the SLA, nor did its failure to bill Leyline for some of the work it performed under the SLA. As TableTop concedes on appeal, it never invoiced Leyline for the content that it allegedly produced after it attempted to withdraw from the SLA. But TableTop's failure to bill Leyline was its decision—not Leyline's. And TableTop's decision to withhold invoices from Leyline did not create a genuine factual dispute as to the SLA's coverage. *See Anderson*, 477 U.S. at 248 ("[A] dispute about a material fact is 'genuine,' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."). Accordingly, we affirm the district court's summary judgment in favor of Leyline on TableTop's unjust enrichment claim on grounds that it is barred by the terms of the SLA. *Molzan*, 112 F.4th at 336.

IV. Conclusion

For the foregoing reasons, we AFFIRM the district court's summary judgment in favor of Defendants-Appellees.