2019 WL 1744845
Only the Westlaw citation
is currently available.
United States District Court, C.D. California.

Justice LAUB
v.
Nicholas HORBACZEWSKI, et al.

Case No. LA CV17-06210 JAK (KS)
|
Filed 01/02/2019

Attorneys and Law Firms

Patrick M. Ryan, Stephen C. Steinberg, Gabriella A. Wilkins, Joseph John Fraresso, Bartko Zankel Bunzel and Miller PC, San Francisco, CA, for Justice Laub.

Kenneth A. Kuwayti, Morrison and Foerster LLP, Paolo Alto, CA, Nicholas Rylan Fung, Morrison and Foerster LLP, Los Angeles, CA, Brian M. Burnovski, Pro Hac Vice, Polk and Wardwell LLP, Andrew Ditchfield, Pro Hac Vice, Peter M. Bozzo, Pro Hac Vice, Andrew Ditchfield, Pro Hac Vice, Brian M. Burnovski, Pro Hac Vice, Cindy S. McNair, Pro Hac Vice, Peter M. Bozzo, Pro Hac Vice, Davis Polk and Wardwell LLP, New York, NY, for Nicholas Horbaczewski

Proceedings: (IN CHAMBERS) ORDER RE DEFENDANTS' MOTION TO DISMISS THIRD AMENDED COMPLAINT (DKT. 70)

JOHN A. KRONSTADT, UNITED STATES DISTRICT JUDGE

I. Introduction

***1** On July 10, 2017, Justice Laub ("Laub") brought this action against Nicholas Horbaczewski ("Horbaczewski") and Drone Racing League, Inc. ("DRL, Inc.") (collectively, "Defendants") in the Los Angeles Superior Court. Dkt. 1-1. The Complaint advanced claims for brLach of contract, common count, fraud and breach of fiduciary duty. On August 22, 2017, Defendants removed the action. Dkt. 1.

On September 27, 2017, Daniel Kanes ("Kanes") and Laub (collectively, "Plaintiffs") filed an amended complaint ("FAC"). Dkt. 13. It advanced claims against Horbaczewski for breach of oral contract, breach of written contract, fraud, breach of fiduciary duty and intentional interference with prospective economic advantage. *Id.* It also brought claims for breach of implied contract and common count against all Defendants. *Id.* Defendants filed a motion to dismiss the FAC, which was granted in part. Dkt. 39.

On April 13, 2018, Plaintiffs filed a second amended complaint ("SAC"). Dkt. 42. It advanced claims for breach of oral, written and implied-in-fact contract and quantum meruit against both Defendants, and claims for fraud, breach of fiduciary duty, intentional interference with prospective economic advantage and promissory estoppel against Horbaczewski. Defendants filed a motion to dismiss the SAC, which was granted in part. Dkt. 60. The motion to dismiss the SAC was granted, without prejudice, as to the claims

WESTLAW © 2024 Thomson Reuters. No claim to original U.S. Government Works.

for breach of written contract and breach of implied contract. *Id.* It was denied as to all other claims. *Id.*

On July 19, 2018, Plaintiffs filed a third amended complaint ("TAC"). Dkt. 62. It presents the same causes of action as the SAC. On August 24, 2018, Defendants filed a motion to dismiss the TAC ("Motion"). Dkt. 70. Plaintiffs filed an opposition, and Defendants filed a reply. Dkts. 74, 80. The Motion challenges the sufficiency of the causes of action for breach of written contract and breach of implied-in-fact contract. Dkt. 70-1 at 4.

A hearing on the Motion was held on December 3, 2018, and the matter was taken under submission. For the reasons stated in this Order, the Motion is **DENIED**.

II. Factual Background

A. The Parties

Both Laub and Kanes reside in California. TAC ¶¶ 6, 7. Horbaczewski resides in New York. *Id.* ¶ 8. DRL, Inc. is a Delaware corporation. *Id.* ¶ 9.

B. Allegations in the TAC

The TAC alleges that in 2014, Plaintiffs conceived the idea of a televised drone racing league ("DRL"), and agreed to be partners in the venture. *Id.* ¶ 16. It also alleges that, in order to proceed with this project, they began meeting with prospective partners and investors in early 2015. *Id.* ¶ 17. The TAC alleges that, in January 2015, Plaintiffs presented their idea to Blank Paige Productions ("Blank Paige"), a television production company located in Los Angeles. *Id.* It also alleges that, on January 22, 2015, Matthew Mazzeo ("Mazzeo"), a venture capitalist who resides in California, introduced Plaintiffs to Horbaczewski, and identified him as a potential investor. *Id.* ¶ 18.

***2** The TAC next alleges that Plaintiffs and Horbaczewski "corresponded and talked on the phone numerous times" over the following weeks and conducted additional in-person meetings in Los Angeles on March 11-12, 2015. *Id.* ¶ 19. It also alleges that during these meetings Plaintiffs and Horbaczewski "orally agreed to be partners in and co-founders of the DRL, with each owning a third of the company." *Id.* ¶ 20.

During February and March 2015, Plaintiffs and Horbaczewski allegedly jointly drafted and agreed to a "Business Plan."[1] *Id.* ¶ 21. To facilitate this process, Horbaczewski uploaded a draft of the Business Plan to the "Google Docs" platform, which allowed each of them to access and make written comments and proposed changes to it. *Id.* Through that process, in February 2015, Plaintiffs added the following language about the shared ownership of the planned operation: "At this Time [sic] we are thinking 33% Dan [Kanes], 33% Justice [Laub], and 33% Nick [Horbaczewski]. We want to give Matt [Mazzeo] the additional 1% for introducing us." *Id.* This language remained in the Business Plan. *Id.* ¶ 22.

The TAC alleges that, during their meetings in March 2015, Plaintiffs and Horbaczewski "discussed the Business Plan and orally agreed to the material terms contained [there]in." *Id.* ¶ 23. It alleges that they "discussed that the

language describing the material terms set forth in the Business Plan was intended by the Parties to mean that each of them would own 33% of the DRL and they would work together as co-founders." *Id.* ¶ 24. It alleges that "[t]he Parties further discussed that this language was intended to mean that they would have the option of granting Matt Mazzeo 1% of the DRL for introducing Dan and Justice to Horbaczewski," but "[t]he Parties did not exercise the option to grant Matt Mazzeo 1% of the DRL within a reasonable period of time." *Id.* It alleges further that "[t]he Business Plan includes an implied term that the 1% of the DRL which was available to be granted to Matt Mazzeo would be divided equally between Dan [Kanes], Justice [Laub], and Horbaczewski if the option to grant Matt Mazzeo 1% was not exercised." *Id.* The TAC also alleges that "[i]mmediately after the March 11-12, 2015 meetings, Dan [Kanes], Justice [Laub], and Horbaczewski proceeded to act together as partners and co-founders to continue the development of their drone racing venture." *Id.* ¶ 25.

***3** The TAC next alleges that, during the March meetings, Horbaczewski stated his intention to serve as CEO of the operation, invest $250,000 as seed money and work on business development. *Id.* ¶ 26. Laub and Kanes were to provide ideas for the DRL, and assist with technical issues and logistics, community outreach, marketing, strategy, location scouting, and competitor and fan interaction and experience. *Id.* Kanes allegedly offered to invest $250,000 in the venture, but Horbaczewski declined to require it, stating that "Plaintiffs did not need to contribute capital because they had contributed their ideas, concepts, and existing work product to the venture." *Id.* It is also alleged that, between January and the fall of 2015, Plaintiffs "performed substantial work for Horbaczewski and the yet-to-be-formed DRL to help get it off the ground." *Id.* ¶¶ 30, 51; *see id.* ¶¶ 31-40.

It is alleged that on February 9, 2015, Plaintiffs received an offer from Blank Paige to develop and televise a program featuring drone racing. *Id.* ¶ 28. Plaintiffs allegedly sought advice from Horbaczewski about the offer. *Id.* On February 16, 2015, Horbaczewski allegedly urged them to reject the offer because the three of them would get better financial returns from DRL by retaining television rights. *Id.*

Horbaczewski then allegedly requested that Plaintiffs provide him with written biographies and other personal information about themselves. *Id.* ¶ 41. It is next alleged that after they did so, he used this information "to identify Plaintiffs as co-founders of the DRL in pitch decks shown to one or more potential investors." *Id.* It is alleged that, between April and June 2015, Plaintiffs and Horbaczewski met in Los Angeles two to three times on their planned operation. *Id.* ¶ 43. It is alleged that, during these meetings, Plaintiffs "repeatedly asked ... for more formal documentation of their co-ownership of the DRL," but that "Horbaczewski repeatedly dodged the issue, claiming that it could not be done until the company was formed." *Id.*

The TAC next alleges that Horbaczewski incorporated DRL, Inc. in Delaware on April 17, 2015. *Id.* ¶ 44. It is also alleged that he did so without providing any advanced notice to Plaintiffs and without providing them with any

ownership interests in this entity. *Id.* On May 27, 2015, Horbaczewski allegedly informed Laub and Kanes that he was actively seeking funding, but had not yet secured any. *Id.* ¶ 45. The TAC then alleges that he next said that the three of them should invest funds in DRL "on the same terms." *Id.* The TAC then alleges that, on or about August 19, 2015, Horbaczewski sent Kanes documents that offered him the opportunity to invest in DRL, Inc. on the same terms as outside investors. *Id.* ¶ 46. However, these documents did not acknowledge their existing agreement that each of them would own one-third of the company. *Id.* Those documents allegedly stated that Horbaczewski and three others already had invested in DRL, Inc. *Id.* ¶ 47. The TAC alleges that, prior to seeing these documents, neither Laub nor Kanes was aware of either the corporate structure or the shareholders of DRL, Inc. *Id.* ¶ 48. It also alleges that they could not have discovered this information through the exercise of reasonable diligence. *Id.* On August 24, 2015, Kanes allegedly declined to invest in DRL, Inc. on the same terms as the existing investors because the investment documents failed to recognize that he already owned one-third of the entity. *Id.* ¶ 49. The next day, DRL, Inc. allegedly completed the sale of shares to certain outside investors. *Id.* ¶ 50.

Finally, the TAC alleges that Plaintiffs continued to provide valuable services to Horbaczewski and DRL, Inc. until the fall of 2015. *Id.* ¶¶ 51-53. In late 2015, Horbaczewski ceased communications with the Plaintiffs. *Id.* ¶ 52.

III. Analysis

A. Legal Standards

1. Motion to Dismiss

***4** Fed. R. Civ. P. 8(a) provides that a "pleading that states a claim for relief must contain ... a short and plain statement of the claim showing that the pleader is entitled to relief." The complaint must state facts sufficient to show that a claim for relief is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The complaint need not include detailed factual allegations, but must provide more than a "formulaic recitation of the elements of a cause of action." *Id.* at 555. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citations omitted).

Pursuant to Fed. R. Civ. P. 12(b)(6), a party may bring a motion to dismiss a cause of action that fails to state a claim. It is appropriate to grant such a motion only where the complaint lacks a cognizable legal theory or sufficient facts to support one. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). In considering a motion to dismiss, the allegations in the challenged complaint are deemed true and must be construed in the light most favorable to the non-moving

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). However, a court need not "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citing *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)). In considering a motion brought pursuant to Rule 12(b)(6), a court may consider the complaint, documents attached to, or incorporated by reference in the complaint, and matters that are properly the subject of judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

2. Breach of Contract

"The essential elements of a claim of breach of contract, whether express or implied, are the contract, the plaintiff's performance or excuse for nonperformance, the defendant's breach, and the resulting damages to the plaintiff." *Green Valley Landowners Ass'n v. City of Vallejo*, 241 Cal. App. 4th 425, 433 (2015). "A contract is either express or implied. The terms of an express contract are stated in words.

The existence and terms of an implied contract are manifested by conduct. The distinction reflects no difference in legal effect but merely in the mode of manifesting assent." *Retired Employees Ass'n of Orange Cty., Inc. v. County of Orange*, 52 Cal. 4th 1171, 1178 (2011) (citing Cal. Civ. Code §§ 1619-1621). Such a contract "must be founded upon an ascertained agreement of the parties to perform it," and such agreement "may be inferred from the conduct ... of the parties." *Friedman v. Friedman*, 20 Cal. App. 4th 876, 887 (1993). In general, California law does not apply different standards as to written and oral contracts, or those that may be hybrids, unless the agreement is one that must be in writing. Cal. Civ. Code § 1622 ("All contracts may be oral, except such as are specially required by statute to be in writing.").

"A written contract may be pleaded either by its terms — set out verbatim in the complaint or a copy of the contract attached to the complaint and incorporated therein by reference — or by its legal effect," which also requires allegations as to "the substance of its relevant terms." *Haskins v. Symantec Corp.*, No. 13-CV-1834-JST, 2013 WL 6234610, at *10 (N.D. Cal. Dec. 2, 2013) (internal quotation marks and citations omitted). "[I]t is unnecessary for a plaintiff to allege the terms of the alleged contract with precision," but "the Court must be able generally to discern at least what material obligation of the contract the defendant allegedly breached." *Langan v. United Servs. Auto. Ass'n*, 69 F. Supp. 3d 965, 979 (N.D. Cal. 2014).

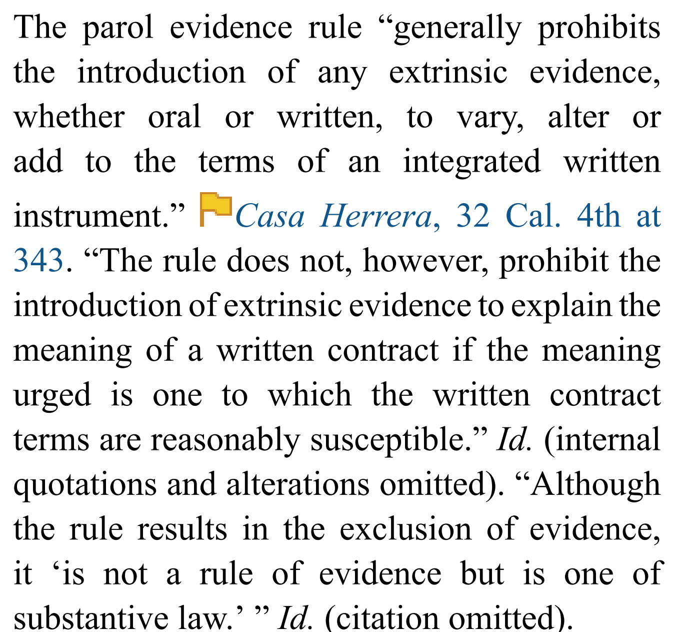
3. Parol Evidence Rule

***5** "The parol evidence rule is codified in [California] Civil Code section 1625 and Code of Civil Procedure section 1856." *Casa Herrera, Inc. v. Beydoun*, 32 Cal. 4th 336, 343 (2004) (footnotes removed). Cal. Civ. Code §

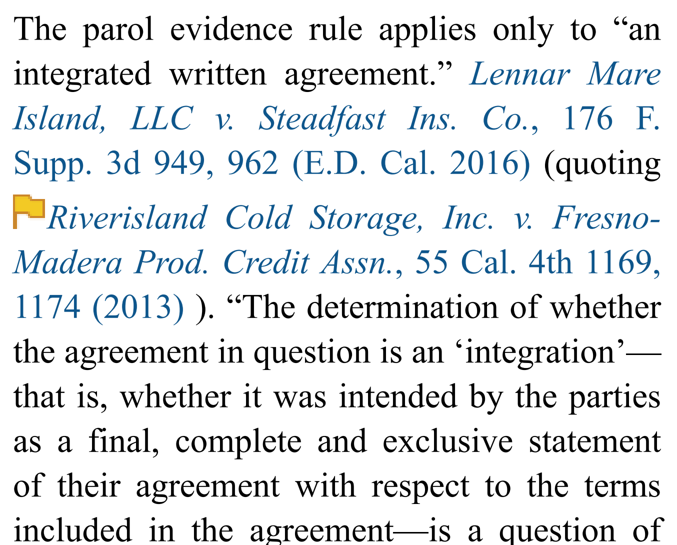
 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

1625 provides: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument." CCP § 1856 provides:

> (a) Terms set forth in a writing intended by the parties as a final expression of their agreement with respect to the terms included therein may not be contradicted by evidence of a prior agreement or of a contemporaneous oral agreement.
>
> (b) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by evidence of consistent additional terms unless the writing is intended also as a complete and exclusive statement of the terms of the agreement.
>
> (c) The terms set forth in a writing described in subdivision (a) may be explained or supplemented by course of dealing or usage of trade or by course of performance.
>
> (d) The court shall determine whether the writing is intended by the parties as a final expression of their agreement with respect to the terms included therein and whether the writing is intended also as a complete and exclusive statement of the terms of the agreement.
>
> (e) Where a mistake or imperfection of the writing is put in issue by the pleadings, this section does not exclude evidence relevant to that issue.
>
> (f) Where the validity of the agreement is the fact in dispute, this section does not exclude evidence relevant to that issue.
>
> (g) This section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in Section 1860, or to explain an extrinsic ambiguity or otherwise interpret the terms of the agreement, or to establish illegality or fraud.
>
> (h) As used in this section, "agreement" includes trust instruments, deeds, wills, and contracts between parties.



The parol evidence rule "generally prohibits the introduction of any extrinsic evidence, whether oral or written, to vary, alter or add to the terms of an integrated written instrument." *Casa Herrera*, 32 Cal. 4th at 343. "The rule does not, however, prohibit the introduction of extrinsic evidence to explain the meaning of a written contract if the meaning urged is one to which the written contract terms are reasonably susceptible." *Id.* (internal quotations and alterations omitted). "Although the rule results in the exclusion of evidence, it 'is not a rule of evidence but is one of substantive law.' " *Id.* (citation omitted).



The parol evidence rule applies only to "an integrated written agreement." *Lennar Mare Island, LLC v. Steadfast Ins. Co.*, 176 F. Supp. 3d 949, 962 (E.D. Cal. 2016) (quoting *Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Assn.*, 55 Cal. 4th 1169, 1174 (2013)). "The determination of whether the agreement in question is an 'integration'—that is, whether it was intended by the parties as a final, complete and exclusive statement of their agreement with respect to the terms included in the agreement—is a question of

law to be determined by the court." *Alling v. Universal Mfg. Corp.*, 5 Cal. App. 4th 1412, 1434 (1992). "A court considers several factors when determining whether an agreement is an integration: (1) the presence of an integration clause; (2) the contract's language and apparent completeness or incompleteness; (3) if a party argues another contract exists, whether that agreement's terms contradict those of the written contract; (4) whether the alleged additional agreement would naturally be made as a separate agreement; and (5) whether extrinsic evidence might confuse the jury." *Lennar*, 176 F. Supp. 3d at 962-63. "If integration of the writing is not established as a matter of law, and the parol evidence is admitted, then the related questions of credibility of witnesses, and the parties' intent, ordinarily become questions of fact for the jury." *Brawthen v. H & R Block, Inc.*, 28 Cal. App. 3d 131, 138 (1972).

B. Application

1. Breach of Written Contract by Horbaczewski

***6** With respect to the claim for breach of written contract, the TAC alleges that "[t]he Business Plan ... constitutes the Parties['] written agreement." TAC ¶ 66. It alleges that "[t]he material[ ] terms of the Business Plan specify that the company's cap structure would be: 'Cap Structure: [ ] At this Time we are thinking 33% Dan [Kanes], 33% Justice [Laub], and 33% Nick [Horbaczewski]. We want to give Matt [Mazzeo] the additional 1% for introducing us.' " *Id.* The TAC alleges that "[t]his language ... constituted [Plaintiffs'] offer to contract with Horbaczewski." *Id.* It further alleges that, "[a]t their March 11-12, 2015 meetings, Horbaczewski orally accepted Dan [Kanes]'s and Justice [Laub]'s offer contained [in] the Business Plan forming a written contract." *Id.* ¶ 68.

The prior Order determined that:

> the Business Plan has sufficient material terms as required by California law. The Business Plan does include certain terms that are vague or that were to be refined based on the outcome of future discussions among the parties or research. However, none of these terms was essential to the Business Plan. A contract will not be deemed vague and unenforceable because it is missing terms that are not essential. *City of Los Angeles v. Superior Court*, 51 Cal. 2d 423, 433 (1959) ("Where the matters left for future agreement are unessential, each party will be forced to accept a reasonable determination of the unsettled point or if possible the unsettled point may be left unperformed and the remainder of the contract be enforced."). The essential terms of the Business Plan are alleged. Thus, each of the Plaintiffs and Horbaczewski would own 33% of DRL, and the three of them would work to build a profitable enterprise.

Dkt. 60 at 6. However, the prior Order noted that the SAC had alleged that the parties agreed orally that each would own a one-third stake in the DRL, which did not mirror the ownership terms stated in the Business Plan. *Id.* at 7. The prior Order stated that there could be a plausible explanation for "how the parties transitioned from 33% to 33.33%," but none was alleged. *Id.* Thus, the prior Order granted the motion to

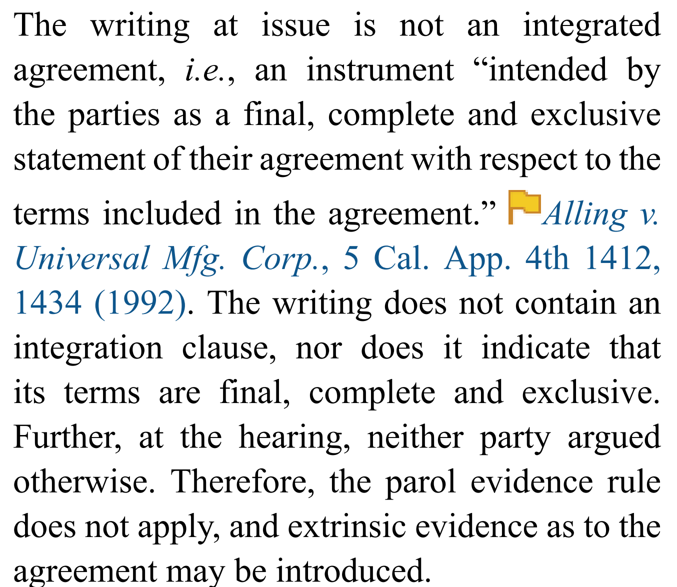
 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

dismiss the SAC, without prejudice, as to the claim for breach of written contract. *Id.*

The TAC reflects amendments to the SAC, which Plaintiffs claim “overcome this deficiency.” Dkt. 74 at 8. As to the capital structure terms of the Business Plan, the SAC alleged that “[a]t their March 11-12, 2015 meetings, Dan [Kanes], Justice [Laub], and Horbaczewski discussed that this language in the Business Plan was intended by the Parties to mean that each of them would own 1/3 of the DRL and they would work together as co-founders to commercialize Dan [Kanes] and Justice [Laub]'s ideas for a televised drone racing league.” SAC ¶ 21; *see also* SAC ¶ 58. The TAC amends this allegation as follows:

> The Parties discussed that the language describing the material terms set forth in the Business Plan was intended by the Parties to mean that each of them would own 33% of the DRL and they would work together as co-founders to commercialize Dan [Kanes] and Justice [Laub]'s ideas for a televised drone racing league. The Parties further discussed that this language was intended to mean that they would have the option of granting Matt Mazzeo 1% of the DRL for introducing Dan [Kanes] and Justice [Laub] to Horbaczewski. The Parties did not exercise the option to grant Matt Mazzeo 1% of the DRL within a reasonable period of time. The Business Plan includes an implied term that the 1% of the DRL which was available to be granted to Matt Mazzeo would be divided equally between Dan [Kanes], Justice [Laub], and Horbaczewski if the option to grant Matt Mazzeo 1% was not exercised.

TAC ¶ 24; *see also* TAC ¶ 68.

The writing at issue is not an integrated agreement, *i.e.*, an instrument “intended by the parties as a final, complete and exclusive statement of their agreement with respect to the terms included in the agreement.” *Alling v. Universal Mfg. Corp.*, 5 Cal. App. 4th 1412, 1434 (1992). The writing does not contain an integration clause, nor does it indicate that its terms are final, complete and exclusive. Further, at the hearing, neither party argued otherwise. Therefore, the parol evidence rule does not apply, and extrinsic evidence as to the agreement may be introduced.

***7** The TAC alleges that Kanes, Laub and Horbaczewski discussed that the language of the Business Plan “was intended by the Parties to mean that each of them would own 33% of the DRL and they would work together as co-founders to commercialize Dan [Kanes] and Justice [Laub]'s ideas for a televised drone racing league.” TAC ¶¶ 24, 68. The TAC also alleges that they also discussed that the

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

language of the Business Plan about Matt Mazzeo "was intended to mean that they would have the option of granting Matt Mazzeo 1% of the DRL for introducing Dan [Kanes] and Justice [Laub] to Horbaczewski." *Id.* The TAC alleges that Horbaczewski orally accepted the terms of the Business Plan. *Id.* ¶ 68. It is further alleged that each of these communications took place during a set of meetings in March 2015. On a motion to dismiss, these factual allegations are deemed true.

The allegations of the TAC are sufficient to state that the parties agreed to the material terms of a written instrument, the meaning of which was discussed in previous or contemporaneous negotiations. These allegations are sufficient to state a claim based on a written contract. Thus, the TAC addresses adequately the issues identified in the prior Order because it now sufficiently alleges a "mirror image" oral acceptance of a written offer. The precise meaning of the terms of that agreement may be determined by the language of the instrument in connection with extrinsic evidence as to the parties' understanding of those terms. The TAC, as well as previous versions of the complaint, also alleges adequately the remaining elements of a breach of contract claim, which Defendants have not contested.

Several terms of the alleged option are not stated in the Business Plan or in the parties' contemporaneous discussions. They include how the option would be exercised. However, in light of the claims at issue in this case, those terms are not "essential" terms of the contract. "Where the matters left for future agreement are unessential, each party will be forced to accept a reasonable determination of the unsettled point or if possible the unsettled point may be left unperformed and the remainder of the contract be enforced." *City of Los Angeles v. Superior Court of Los Angeles Cty.*, 51 Cal. 2d 423, 433 (1959).

On a motion to dismiss, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.' " *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). That there may have been prior inconsistent allegations in earlier pleadings, does not change this rule. Instead, the factual allegations of the TAC are accepted as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' "). This is not, of course, a determination of the outcome of a future motion that calls for the consideration of evidence as to these allegations.

Finally, Defendants argue that the new allegations make the TAC internally inconsistent and at odds with the prior versions. However, "there is nothing in the Federal Rules of Civil Procedure to prevent a party from filing successive pleadings that make inconsistent or even contradictory allegations," *PAE Gov't Servs., Inc. v. MPRI, Inc.*, 514 F.3d 856, 860 (9th Cir. 2007), or statements in the alternative within a pleading, *see* Fed. R. Civ. P. 8(d). *See also* *Shirley v. Univ. of Idaho, Coll. of Law*, 800 F.3d 1193, 1194 (9th Cir. 2015) (Kozinski, J., concurring) ("Inconsistency—even direct contradiction—

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

between a current complaint and an earlier one is not a basis for dismissal.... The fact that the earlier complaint is inconsistent may have collateral consequences in the litigation, ... but it does not render the current complaint legally insufficient under Rule 12(b).”). Accordingly, the claimed inconsistencies in the pleadings do not warrant granting the Motion.

***8** For the foregoing reasons, the Motion is **DENIED**, as to the claim for breach of written contract as to Horbaczewski.

2. Breach of Implied Contract by Horbaczewski

With respect to the claim for breach of implied-in-fact contract, the TAC alleges “[i]n the alternative, [that] Justice [Laub], Dan [Kanes], and Horbaczewski entered into an implied-in-fact contract that was formed on or about March 11-12, 2015, whereby the three individuals acted together as equal partners and co-founders of the DRL with each of them owning 1/3 of the DRL.” TAC ¶ 77. The TAC alleges that they “manifested their agreement to an implied contract to be partners and co-founders of the DRL with each of them owning 1/3 of the DRL by their conduct working together as partners and co-founders and accepting the contributions to the DRL made by each of Justice [Laub], Dan [Kanes], and Horbaczewski to further the business of the DRL during this period.” *Id.* It also alleges that Plaintiffs continued to perform until they were prevented from doing so in late 2015. *Id.* ¶¶ 93-94.

The prior Order found the allegations of the SAC deficient as to this claim:

> Many of the allegations offered to support this claim do not include relevant dates. *See* SAC ¶¶ 65-68. For example, the SAC alleges that, based on their understanding that an implied contract was in place, “Plaintiffs provided ideas and services to Horbaczewski and the DRL, rejected an earlier TV production deal, and assigned their rights to a drone racing league TV show to the yet-to-be-formed DRL, among other things.” *Id.* ¶ 66. However, the SAC also alleges that Plaintiffs rejected a television production proposal made on February 16, 2015. That is prior to the alleged agreement that each would hold a one-third interest. *Id.* ¶ 24. The SAC does allege that Plaintiffs provided services to Horbaczewski and DRL, Inc. through July 2015, and that they continued to do so during the summer and fall of 2015. *Id.* ¶¶ 25, 43. These allegations are not sufficient to support a claim that the parties manifested their assent to a contract through performing or accepting these services.

Dkt. 60 at 8.

The TAC amends several allegations in the SAC by adding relevant dates. These place some of the alleged events prior to the claimed formation of the contract, but others around the time of or after its formation. For example, it is alleged that, “[i]n or about March/April 2015, Horbaczewski asked Justice [Laub] and Dan [Kanes] for their biographies, headshots, and logos from their previous companies, which he then used to identify Plaintiffs as co-founders of the DRL in pitch decks shown to one or more potential investors.” TAC ¶ 84. It is

further alleged that "Horbaczewski followed up with Plaintiffs seeking this information on multiple occasions in April 2015." *Id.* It is also alleged that "[o]n or about May 3, 2015, Dan [Kanes] introduced the concept of a network-connected drone simulator which would serve as a marketing platform, recruitment tool for league pilots, and reduce the barriers to entry for people who were new to drone racing by alleviating much of the expense and risk involved for novices," and that "[t]he DRL accepted Dan [Kanes]'s contribution and currently offers a drone racing simulator to promote the DRL on its website." *Id.* ¶ 85.

***9** The TAC also contains certain new allegations as to the parties' manifestation of agreement to a contract. The new allegations include: Horbaczewski requesting input from Kanes on a request for proposal to be sent to video production companies; Horbaczewski asking Plaintiffs to "provide a 'call sign' as a code name to identify themselves within the DRL"; the DRL inviting Kanes to join DRL's slack channel, and Kanes' active participation on that slack channel; Horbaczewski requesting Laub's input regarding desirable cinematic techniques and marketing and video production agencies; Horbaczewski requesting that Laub be "involved in the 'creative development' of the video production for the DRL"; and Kanes' attendance at a meeting, pursuant to a request from the DRL, with the DRL's external intellectual property counsel. *Id.* ¶¶ 83-88. The TAC alleges that each of these events occurred in April 2015 or later, *i.e.*, after the alleged formation of the contract.

Defendants argue that the amended allegations of the TAC are insufficient because "Plaintiffs continue to rely on conduct before the alleged agreement was formed, and the allegations still do not demonstrate that the parties manifested their assent to a contract through performing or accepting these services." Dkt. 70-1 at 11-12 (quotations omitted). Plaintiffs respond that the TAC was amended to add specific dates and other supporting details that are sufficient to cure the deficiencies identified in the prior Order. Dkt. 74 at 13-16. Plaintiffs also refer to the allegation in the TAC that "Justice, Dan, and Horbaczewski manifested their agreement to an implied contract to be partners and co-founders of the DRL with each of them owning 1/3 of the DRL by their conduct working together as partners and co-founders and accepting the contributions to the DRL made by each of Justice, Dan, and Horbaczewski to further the business of the DRL during this period," and contend that "[t]hese are factual allegations that must be accepted as true." *Id.* at 14 (emphasis in original). However, this allegation is only a legal conclusion and is not entitled to a presumption of truth. Therefore, the sufficiency of the supporting factual allegations must be evaluated.

The supporting factual allegations of the TAC are more specific and thorough than those of the SAC. A substantial amount of the conduct that allegedly shows an implied-in-fact contract is said to have occurred around or after the time of the contract formation. Construing the allegations in the light most favorable to Plaintiffs, the cumulative weight of the conduct alleged is sufficient to support an inference that the parties manifested their assent to a contract through performing or accepting these services. The TAC also contains factual allegations that, when assumed to be true, are

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

sufficient to support the claimed breach of contract by Horbaczewski. Defendants do not contest the breach element of this cause of action. Accordingly, the FAC states a plausible claim as to the formation of an implied-in-fact contract with Horbaczewski and its breach by Defendants.

For the foregoing reasons the Motion is **DENIED** as to the claim for breach of an implied contract as to Horbaczewski.

IV. Conclusion

For the reasons stated in this Order, the Motion is **DENIED.**

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2019 WL 1744845

Footnotes

1 Defendants seek judicial notice of several versions of the Business Plan ("RJN") on the ground that it is integral to the claims alleged in the TAC. Dkt. 70-2. One version of the document was sent by Plaintiffs' counsel to Defendants' counsel on July 13, 2017. Kuwayti Decl., Dkt. 70-7 ¶ 3; Ex. A to Kuwayti Decl. A prior Order determined that the document was appropriate for consideration in connection with the motion to dismiss the SAC. Dkt. 60 at 2 n.2. Because the Business Plan is incorporated by reference by the TAC, is a basis of Plaintiffs' claims, and was received from Plaintiffs' counsel, it is considered again in connection with this Motion. *See* *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). However, this consideration does not constitute a determination of what version of the Business Plan, if any, is the "final" version. Defendants seek judicial notice of several other versions of the Business Plan, to which Plaintiffs object. *See* Dkt. 74 at 17-18. These documents do not meet the criterion for judicial notice that they "not [be] subject to reasonable dispute." Fed. R. Civ. P. 201(b). Therefore, Defendants' RJN is **DENIED.**

End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.