**NOT FOR PUBLICATION**

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| JOHN ARNOLD, an individual; MICHAEL JOHNSTON, an individual,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>MICHAEL MITTMAN,<br><br>Defendant-Appellee. | No. 23−55653<br><br>D.C. No.<br>8:21-cv-01664-DOC-JDE<br><br><br><br>MEMORANDUM* |

Appeal from the United States District Court
for the Central District of California
David O. Carter, District Judge

Argued and Submitted June 13, 2024
Pasadena, California

Before: MURGUIA, CHRISTEN, and VANDYKE, Circuit Judges.

Plaintiffs John Arnold and Michael Johnston appeal the district court's order granting Defendant Michael Mittman's motion to dismiss Plaintiffs' First Amended Complaint (FAC) with prejudice. Because the parties are familiar with the facts, we do not recount them here. We have jurisdiction under 28 U.S.C. § 1291. We review de novo dismissals for failure to state a claim

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

pursuant to Rule 12(b)(6), *see Benavidez v. County of San Diego*, 993 F.3d 1134, 1141 (9th Cir. 2021), and we review for abuse of discretion a district court's decision to dismiss a complaint with prejudice, *id.* at 1141–42. We affirm in part and reverse in part.

1. We reverse the dismissal of the claim for breach of oral contract. The FAC adequately alleges that the parties entered into an oral contract that was breached when Mittman filed a separate whistleblower application. Under notice pleading, Plaintiffs are not required to allege details regarding the precise circumstances and date of the formation of an oral contract. *See* Cal. Civ. Code § 1550 (identifying the requirements for any contract as parties capable of contracting, consent, a lawful object, and a sufficient cause or consideration); *see also Khoury v. Maly's of Cal., Inc.*, 17 Cal. Rptr. 2d 708, 710 (Ct. App. 1993) ("An oral contract may be pleaded generally as to its effect, because it is rarely possible to allege the exact words."). In dismissing this claim, the district court implicitly relied on its assessment of Plaintiffs' credibility, rather than the plausibility of the claim pleaded. The FAC plausibly alleges that the parties formed an enforceable contract.

We also conclude that this claim is not time-barred. Because the claim for breach of an oral contract arose out of the same conduct set out in the original

complaint, the amendment relates back to the date of the original pleading. *See* Fed. R. Civ. P. 15(c)(1)(B).

2. We also reverse the dismissal of the claim for breach of implied-in-fact contract. The FAC adequately alleges that the parties agreed that any whistleblower award would be equitably distributed according to the "get out what you put in" principle, with specific values to be determined at a later time. The FAC also adequately alleges that the parties had a history of operating pursuant to this agreement. The absence of a formula for splitting the legal fees in case of no award does not undermine that inference. In dismissing this claim, the district court relied on its assessment that the existence of an implied-in-fact contract on these terms was unlikely because of the complexity of the formula. Given the allegations that the parties had a history of successfully employing this formula, a reasonable factfinder could conclude that they had impliedly agreed to use it to divide any whistleblower award.

3. We affirm the dismissal of the claim for breach of the implied covenant of good faith and fair dealing. Under California law, dismissal of a claim for breach of the implied covenant is proper where the conduct giving rise to the breach of the covenant is the same as that alleged in the breach-of-contract claim. *See Guz v. Bechtel Nat. Inc.*, 8 P.3d 1089, 1112 (Cal. 2000). We conclude that the FAC adequately states a claim for breach of contract, but the FAC does not state a

separate claim for breach of the implied covenant because that claim is premised on the existence of the same contract, alleges the same breaching conduct, and seeks the same damages.

4. We reverse the dismissal of the claim for breach of fiduciary duty. The FAC adequately alleges that the parties were involved in a joint venture under California law and that they owed each other fiduciary duties as a result. *See, e.g.*, *Ramirez v. Long Beach Unified Sch. Dist.*, 129 Cal. Rptr. 2d 128, 137 (Ct. App. 2002) (defining elements of a joint venture as "(1) a joint interest in a common business, (2) an understanding that profits and losses will be shared, and (3) a right to joint control"). The FAC adequately alleges that Mittman delegated his right to control to Johnston. The district court's conclusion to the contrary constitutes an impermissible finding of fact about whether joint control actually existed based on its interpretation of the December 2015 email exchange.

Mittman suggests that we should invoke the doctrine of judicial estoppel to preclude Plaintiffs from alleging the existence of a joint venture in this case. We decline to do so. Because Plaintiffs did not succeed on this claim before the D.C. Circuit, *see Johnston v. SEC*, 49 F.4th 569, 575 (D.C. Cir. 2022) (deciding the court lacked jurisdiction to consider Johnston's argument that the law of joint ventures barred Mittman from receiving an equal award), there would be no "judicial acceptance of an inconsistent position in a later proceeding [that] would

create the perception that either the first or the second court was misled," *United States v. Paulson*, 68 F.4th 528, 547 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 1029 (2024). Nor would Plaintiffs "derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped" in this case, where the facts alleged in support of both theories were known to Mittman throughout this dispute. *See Paulson*, 68 F.4th at 547.

5. We reverse the dismissal of the claims for fraudulent concealment and intentional misrepresentation. Because we conclude that the FAC adequately alleges both the existence of a contract and a fiduciary relationship on account of a joint venture, the FAC adequately alleges facts that would impose upon Mittman a duty to disclose his intention to file a separate whistleblower application. *See Bigler-Engler v. Breg, Inc.*, 213 Cal. Rptr. 3d 82, 113 (Ct. App. 2017) (noting that a contractual arrangement can give rise to a duty to disclose); *LiMandri v. Judkins*, 60 Cal. Rptr. 2d 539, 543 (Ct. App. 1997) (identifying the existence of a fiduciary relationship as a circumstance in which nondisclosure may constitute actionable fraud).

The district court erred in finding no causal connection between Mittman's alleged fraud and Plaintiffs' damages. The district court reasoned that the SEC's determination that Johnston and Mittman were joint whistleblowers did not depend on Mittman having access to information in Johnston's possession. This overlooks

Plaintiffs' contention that the SEC assumed that Mittman independently submitted a timely and complete whistleblower application. The FAC adequately alleges that Mittman's application would have been deficient had he not incorporated the information provided by Plaintiffs. In dismissing this claim, the district court improperly made a determination on the merits, rather than on the pleadings. *See In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1057 (9th Cir. 2008) ("[A] district court ruling on a motion to dismiss is not sitting as a trier of fact.").

The economic loss rule does not preclude Plaintiffs from stating claims for fraud as alternatives to claims for breach of contract at the pleading stage. *See* Fed. R. Civ. P. 8(d)(2).

6. We affirm the dismissal of the claim for money had and received. Although the FAC alleges an entitlement to the whistleblower award money Mittman received, it does not allege that the SEC intended Mittman's share of the award money to be for the use of Plaintiffs. *See Avidor v. Sutter's Place, Inc.*, 151 Cal. Rptr. 3d 804, 816 (Ct. App. 2013) (explaining that claims for money had and received require plaintiffs to allege that the defendant received money intended to be used for the benefit of the plaintiffs).

7. We reverse the dismissal of the claim for goods and services rendered. The FAC adequately alleges that Mittman requested and benefited from Johnston's services by using the materials Johnston had prepared for the joint whistleblower

application. *See* Judicial Council of Cal. Civ. Jury Instr. 371. In dismissing this claim, the district court erred by making inferences favoring Mittman, rather than Plaintiffs. *See Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1014 (9th Cir. 2012). Viewing the allegations in the light most favorable to Plaintiffs, Johnston "took the lead" in preparing the joint whistleblower application with the expectation of an increased percentage of the joint award, consistent with the "get out what you put in" principle.

8. We affirm the dismissal of the claim for intentional interference with prospective economic advantage. Plaintiffs' relationship with the SEC concerns an award for past assistance with a fraud investigation rather than a "relationship . . . containing the probability of future economic benefit to the plaintiff" arising from "commercial dealings." *Blank v. Kirwan*, 703 P.2d 58, 70 (Cal. 1985) ("The tort has traditionally protected the expectancies involved in ordinary commercial dealings[.]"). We are aware of no authority recognizing the type of relationship Plaintiffs had with the SEC as a basis for this tort, and Plaintiffs cite none.

**AFFIRMED IN PART AND REVERSED IN PART.**[1]

[1] The parties shall bear their own costs on appeal.