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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

SCOTT SMITH et al., Cross-Complainants and Appellants, v. SCOTT BUOY, Cross-Defendant and Respondent.	A131351 (San Francisco City & County Super. Ct. No. CGC-09-494425)
SCOTT SMITH et al., Cross-Complainants and Appellants, v. WENDELL BROWN, Cross-Defendant and Respondent.	A131352 (San Francisco City & County Super. Ct. No. CGC-09-494425)

This litigation arises from the failure of a start up company, Demeter Energy Corporation (Demeter), and a falling out between the members of its board of directors. Demeter commenced litigation against appellant Scott Smith, one of the three directors, and other entities not involved with this appeal. Smith and a related entity, Mix Sonoma, filed a first amended cross-complaint against the other two directors, respondents Scott Buoy and Wendell Brown, and Demeter, which is also not a party to this appeal. Buoy and Brown successfully demurred to the first amended cross-complaint. Brown

successfully demurred to a single cause of action in Smith’s second amended cross-complaint. The trial court denied leave to amend and entered judgments of dismissal for Buoy and Brown. Smith and Mix Sonoma claim they have successfully pleaded causes of action for breach of fiduciary duty and violation of Corporations Code section 25401. We agree and reverse.

I. FACTS & PROCEDURAL BACKGROUND

A. Facts

1. Introduction

In reviewing the sufficiency of a complaint challenged by demurrer, we must provisionally accept as true all properly pleaded material facts alleged in the complaint. (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1125; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*)). When a demurrer is sustained without leave to amend, “we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.]” (*Blank, supra*, at p. 318.) The burden of showing a reasonable possibility of curing the defect “is squarely on the plaintiff. [Citation.]” (*Ibid.*)

As a reviewing court viewing a complaint at the demurrer stage, we are obligated to give the complaint “a reasonable interpretation, reading it as a whole and its parts in context.” (*Blank, supra*, 39 Cal.3d at p. 318.) We must examine the complaint’s factual allegations to determine whether they state a cause of action *on any available legal theory*—even if that theory was not explicitly advanced or properly labeled in the pleading. (See, e.g., *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 103; *Saunders v. Cariss* (1990) 224 Cal.App.3d 905, 908.)

The primary operative pleading in the appellate record, from which we take the provisionally admitted facts, is Smith’s first amended cross-complaint (FACC). Before we discuss the factual allegations of the FACC, we must provide some factual background by describing the beginning of this litigation—the complaint filed by

Demeter—with the understanding that the factual allegations of that complaint have been tested neither by demurrer nor by a trier of fact.¹

On November 13, 2009, Demeter filed a complaint against Smith, Viant Group LLC (a company owned by Smith) and DLA Piper LLP and Scott (Demeter’s former counsel). Demeter alleged that Smith, with the help of former counsel, attempted to take over or destroy Demeter. The complaint alleged causes of action for breach of contract, breach of fiduciary duty, conspiracy, and breach of oral contract against Smith.

On March 12, 2010, Demeter filed a first amended complaint, adding as defendants two other companies owned by Smith: Viant Asset Management LLC and Viant Capital LLC. The new pleading alleged eight new causes of action against Smith and his three companies, including fraud, concealment, conspiracy, aiding and abetting fraud, breach of the implied duty of good faith and fair dealing, and intentional interference with prospective economic advantage. The three companies owned by Smith successfully demurred to the first amended complaint. Demeter filed a second amended complaint on June 7, 2010, alleging many of the same causes of action against Smith and two of his companies—who proceeded to file an answer to the second amended complaint.

On April 22, 2010, Smith filed a cross-complaint naming Demeter, Buoy, and Brown as cross-defendants. It set forth causes of action arising from Smith’s alleged wrongful ouster from Demeter and other alleged wrongs. We need not discuss this pleading in detail because it was soon superseded by the FACC, the primary operative pleading in this matter.

2. The Factual Allegations of the FACC

Smith filed the FACC on June 9, 2010. Respondents’ demurrers provisionally admit the material facts adequately pleaded, which are the principal facts of this case. We set them forth as follows.

¹ We also take the description of Demeter’s complaint from the briefs for background purposes.

In or near the Fall of 2007, Smith introduced Buoy and Brown to the idea of forming a corporation to explore growing the *Jatropha* plant, which can be converted to biodiesel fuel, in Central and South America.² Both Buoy and Brown were eager to participate in the project. Buoy offered to write the business plan and be the “labor” behind the project. Brown offered to provide the necessary capital. It was understood by all three men that Smith was the “idea man.”

The three men formed Demeter as the corporate vehicle for the *Jatropha* project. Demeter was founded in January 2008 as a Delaware corporation by Smith, Buoy, and Brown. These three founders became Demeter’s Board of Directors: Smith was CEO, Buoy was President, and Brown was Chairman of the Board. The three men executed a Founder Stock Purchase Agreement (Founders Agreement), whereby each man received one-third of the founder shares in Demeter.

The parties contemplated an initial round of financing called “Series A.” Apparently, Brown was supposed to provide the initial \$300,000 to be raised by Series A, so Smith suggested each of the three founders be responsible for contributing \$100,000 to Series A. By Spring 2008, Smith had raised his portion from Mix Sonoma LLC (Mix Sonoma), an investment fund established by Smith and two other investors to invest in various projects, plus \$20,000 from an individual donor.

In March 2008, Smith and Demeter executed an Investor Rights Agreement with regard to Smith’s investment in Demeter through his investment fund, Mix Sonoma. Brown raised or invested \$100,000, and Buoy raised \$75,000, for Series A, which closed in June 2008.

In the late spring and early summer of 2008, Brown and Buoy “wasted corporate resources” by making “numerous fruitless trips” to Mexico to look for land “while Smith successfully continued courting investors.” By the summer of 2008, Smith concluded the

² The *Jatropha* plant is a drought-resistant perennial thought to be native to Mexico and Central America. It produces seed with an oil content of 37 percent, and that oil can be used as fuel for diesel engines.

(<<http://www.jatrophabiodiesel.org/aboutJatrophaPlant.php>> [as of Oct. 19, 2012].)

two had “grossly overstated the ease with which Demeter could acquire land in Mexico.” The three agreed to shift Demeter’s primary focus to Brazil.

In June 2008, the three directors flew to Washington D.C. to meet with the founder of Hampden Kent Group, LLC (HKG), a “purported” project development, financing, and management company. Buoy and Brown developed a relationship with HKG, and Smith trusted they had performed due diligence on the company. HKG, through a German utility, could secure a 20-year off-take agreement for oil made from the *Jatropha* plant. With this agreement, HKG could secure \$200 million or more in bonds to fund the development of Demeter’s *Jatropha* plantations.

Demeter needed to pay HKG \$140,000 up front as a retainer, and an additional \$250,000 or more as milestones were met. Demeter also needed to raise about \$3 million to secure options on the land. To obtain funding, Demeter had to identify actual tracts of land and secure the tracts under binding contracts—thus, there was “tremendous pressure to raise \$3 million in equity and secure tracts of land.”

When the time came to pay HKG’s retainer, Demeter had only \$80,000. Smith agreed to invest \$50,000 in Demeter through Mix Sonoma; Brown agreed to match it so they could pay the retainer, which was sent to HKG in August or September 2008. The money was advanced to Demeter as part of a proposed \$3 million Series B financing, which was never secured or closed due to Buoy and Brown allegedly terminating Smith’s role with Demeter.

As of the time of filing the FACC, “Demeter, under the mismanagement of Buoy and Brown, has yet to raise the necessary capital to continue with any transactions or business, including the HKG [d]eal.”

Buoy and Brown again “wasted corporate resources on numerous fruitless trips to . . . looking for land,” this time in Brazil. Smith introduced Buoy and Brown to two businessmen who wanted to help Demeter find land in Brazil. Buoy and Brown aggravated the businessmen, who told Smith they would never work with Smith or Demeter again “because of Buoy’s ethics.”

In August 2008, Smith brought two investors from Sustainable Palm Resources (SPR) to Demeter, who were interested in joining forces with the company to grow *Jatropha* in Nicaragua. The investors would provide land that was “identified, secured, and shovel-ready.” They would provide “C-level officers” and “in-country infrastructure” so the Nicaragua project could be immediately financed. They would also provide additional capital for Demeter; under one proposal SPR would invest \$600,000 in Demeter, and Smith \$300,000. In all, the investors “brought money and good land, but most important they brought financeable management.”

Buoy and Brown initially refused to meet with SPR. Buoy then met “reluctantly” with SPR after Smith reminded him Demeter had no money. The SPR deal fell through “after Buoy and Brown refused to proceed with discussions with SPR.”

Smith concluded Buoy and Brown “were completely unable to raise capital, unreferenceable in the investment community, and incapable of securing land” Accordingly, he hired Jay Fudenberg to run Demeter. Fudenberg promised to invest \$75,000 in the company. Fudenberg summarily quit within weeks, citing purported financial regularities involving Buoy and forming a negative view of Buoy’s honesty. Fudenberg refused to invest the \$75,000.

In August or September 2008, Brown hired private counsel to draft a “side agreement letter,” clarifying points regarding his relationship with Demeter and limiting Demeter’s areas of business operations to Mexico and Brazil. Brown sent the letter to Robb Scott, Demeter’s attorney, who advised Smith to sign it even though Scott thought the letter was unnecessary because its contents were generally understood by all parties. Brown’s purpose was to limit the area of operations to Mexico and Brazil, confirm that he was not being paid by Demeter and confirm Brown could work on energy projects outside of the scope of Demeter’s business. Buoy was informed of the letter and approved of its contents.

Smith signed the side agreement letter September 4, 2008.³ Within six weeks, Brown reversed his position and demanded to be provided with what he called the “secret” letter when *Smith* supposedly unilaterally limited the scope of business operations to Mexico and Brazil. Scott provided Brown with copies of Brown’s attorney’s original draft of the letter. “Brown continued to feign ignorance and continued to point to the letter as evidence of Smith’s wrongdoing.”

Smith formulated proposals by which he would invest heavily in Demeter along with some of his friends, and thereby “salvage” the company. Smith was reluctant to invest with Demeter so long as Buoy and Brown remained as officers and retained control of Demeter’s board, and Smith believed no financing could go forward with Buoy and Brown still controlling the company. “Smith concluded the only basis upon which he would invest was to have them resign and forfeit some of their stock in the event they failed to raise an equal third of the money.”

Accordingly, Smith proposed two plans in September 2008, which he describes as “favorable to every constituent of Demeter, including its creditors and stockholders, and only unfavorable to Buoy and Brown if they failed to assist raising capital for Demeter.”

Smith sent the first proposal to Buoy and Brown on September 17, 2008. It provided Buoy and Brown would immediately resign from the board and forfeit to Smith a fraction of their Demeter shares if they failed to successfully raise capital for Demeter. “Given Brown and Buoy’s mismanagement and inability to independently find investors, this plan was entirely favorable to Demeter.” Buoy and Brown refused the proposal and did not make a counter proposal.

Smith sent the second proposal to Buoy on September 20, 2008. Smith describes this proposal as favorable to Demeter, and favorable to Buoy if he succeeded in raising capital for the company. “Smith insisted that the company and its officers come to grips with the financial reality of Demeter.” Buoy refused the proposal and did not make a counter proposal.

³ The FACC says “2009,” but in the factual context of preceding and subsequent dated allegations this is clearly a typographical error.

In September or October of 2008, Demeter's counsel, DLA Piper, terminated its attorney-client relationship with Demeter for nonpayment, failure of the board of directors to heed advice, and failure to provide complete and honest information. DLA Piper's termination decision was based on a "disingenuous" e-mail from Brown denying his knowledge of the side agreement letter, and on harassing calls from a woman, claiming to be Demeter's attorney, who was purportedly hired by Buoy and Brown to investigate Smith's actions and conclude there was cause to remove Smith as a director.

Demeter, Buoy and Brown drafted a Written Consent of Majority Shareholders (Written Consent) dated October 10, 2008 approving Smith's removal as a director for cause. The Written Consent was sent to selected, but not all, shareholders. The allegations of the Written Consent were based on Smith's alleged breaches of the Founders Agreement and the Employee Non-Disclosure and Assignment Invention Agreement; Smith's two proposals of September 2008 regarding Buoy's and Brown's resignation; an "independent" report prepared by Buoy and Brown—which they have purportedly refused to produce—and an opinion from a law firm hired by Buoy and Brown "to advance their own interests in the dispute."

The allegations of the Written Consent "are that Smith wrongfully threatened to bankrupt [Demeter], solicited Buoy to abandon [Demeter], demanded an additional 5 % post-Series B ownership, and signed a letter limiting the business of Demeter to Mexico and Brazil." Smith "denies any wrongdoing."

On the basis of these allegations, the Written Consent states that directors Buoy and Brown: "determined that (A) Smith amongst other wrongful acts (i) engaged in actions to harm and injure [Demeter]; (ii) engaged in acts of self-dealing; (iii) failed to obtain board approval before signing a letter that purported to limit the scope of [Demeter's] business; (B) Smith is in material violation of his obligations under the Founder's [*sic*] Agreement; (C) Smith has materially failed and continued to fail to perform his duties of a director of [Demeter] with the diligence and care required by applicable law; (D) Smith materially and continually failed to perform the functions of director and officer of [Demeter] and he failed to exercise the diligence and attention of a

reasonable director and officer in his position; (E) Smith wrongfully, solicited, encouraged and attempted to cause Buoy to terminate his employment with [Demeter]; and (F) Smith failed to devote his best efforts to the interests of [Demeter] and engaged in conduct that was a direct conflict with [Demeter's] interests and resulted in a material and substantial disruption to [Demeter.]”

“[T]he key bases for terminating Smith were his alleged execution of agreements not authorized by the board and his alleged transfer of shares in violation of [Demeter's] agreements. These allegations were false and manufactured by Brown and Buoy to justify their actions. They were shown to other stockholders. Buoy and Brown were acting out of complete self-interest. Smith's proposals—had they been approved—would have saved Demeter. Brown and Buoy contrived false reasons for terminating Smith so that they preserved their positions and ownership.” They also demanded Smith pay a large sum of cash to Demeter.

Under the Founders Agreement, Demeter had a “declining right” to purchase shares of stock in the event a founder was terminated, resigned, or was not reappointed. After Smith was removed from the board, Demeter sent notice to Smith that the company was exercising its repurchase rights since Smith was removed for cause. Demeter exercised its repurchase rights for \$562. Demeter also refused Smith's request to inspect Demeter's records.

The FACC alleges Buoy and Brown “dominated and controlled” Demeter and rejected opportunities Smith brought to the company to further their own interests. The FACC also alleges Buoy and Brown used their “complete control of Demeter” to destroy the company. It also alleged that the Nicaragua deal which Smith brought to the company was a “potential godsend for Demeter,” which was virtually out of money, but Buoy and Brown “allowed their own personal interest to blind them” because the deal was a threat to their control of the company.

3. Procedural Background

The FACC, with Smith and Mix Sonoma as cross-complainants, set forth three causes of action against Buoy and Brown: unjust enrichment on behalf of Mix Sonoma,

based on Mix Sonoma’s September 2008 investment of \$50,000 for which it never received corresponding shares of stock (fourth cause of action); defamation on behalf of Smith, based on the allegation of the Written Consent that damaged Smith’s reputation “as a trustworthy and ethical businessman” (fifth cause of action); and violation of Delaware common law on behalf of Smith, for removing Smith without “service of specific charges, adequate notice, and a full opportunity to defend himself against the charges” (sixth cause of action). The FACC set forth an additional cause of action on Smith’s behalf against Brown for equitable indemnity based on negligent misrepresentation, claiming the side letter misrepresented a managerial desire to limit business operations to Mexico and Brazil, causing the Nicaragua deal to fall through (third cause of action).⁴

Buoy and Brown filed separate demurrers to the FACC, apparently in late July 2010.

On August 13, 2010, Smith and Mix Sonoma opposed the demurrers of Buoy and Brown, but only to the third cause of action (negligent representation against Brown only) and the fourth cause of action (unjust enrichment against Buoy and Brown). Smith and Mix Sonoma explicitly did not oppose the demurrers as to the fifth and sixth causes of action, thus effectively conceding the demurrers’ merit as to those claims against both cross-defendants.

The trial court issued tentative rulings on August 26, 2010. The tentative rulings sustained the demurrers without leave to amend as to the fourth, fifth, and sixth causes of action as to both defendants, and sustained the demurrer with leave to amend as to Brown regarding the third cause of action.

The procedural history of this case following the tentative rulings is somewhat convoluted. We first describe the history as to Buoy, and then as to Brown.

⁴ The FACC also joined Demeter to the fourth cause of action and set forth two causes of action, the first cause of action for breach of the Founders Agreement and the second cause of action for breach of the Investor Rights Agreement, against Demeter alone. As noted in the lead paragraph, Demeter is not a party to this appeal.

On September 14, 2010, Buoy served and submitted to the court two proposed orders: one sustaining Buoy's demurrer without leave to amend and the other dismissing Buoy and entering judgment in his favor.

On November 4, 2010, the trial court entered an order sustaining Buoy's demurrer without leave to amend. The court did not enter a judgment of dismissal concurrently with the demurrer order. Thus, Buoy filed a motion for dismissal and entry of judgment. The court granted the motion December 22, 2010.

On January 21, 2011, the trial court entered judgment of dismissal in favor of Buoy and against Smith and Mix Sonoma. Smith and Mix Sonoma appeal from this judgment of dismissal.

Meanwhile, the trial court filed an order as to Brown on September 21, 2010, sustaining his demurrer without leave to amend on the fourth, fifth, and sixth causes of action, but granting leave to amend on the third cause of action.

On September 23, 2010, Smith—not joined by Mix Sonoma—filed a second amended cross-complaint (SACC) against Demeter and Brown. The only allegation against Brown was the third cause of action for negligent misrepresentation.

Brown demurred to the SACC on October 8, 2010. Smith did not oppose Brown's demurrer to the SACC. On December 2, 2010, the trial court entered an order sustaining Brown's demurrer to the SACC without leave to amend.

The court granted Brown's motion for dismissal on the ground that his demurrers to both the FACC and the SACC had been sustained without leave to amend.

The trial court entered judgment for Brown on February 7, 2011. Smith and Mix Sonoma appeal from this judgment.⁵

⁵ While these demurrer proceedings were pending, there was a flurry of procedural activity which is not directly relevant to our concerns in resolving this appeal, but set forth here for a complete picture of what was transpiring.

On October 8, 2010, the same day Brown demurred to the SACC, Smith and Mix Sonoma filed a motion under Code of Civil Procedure section 473, supported by a declaration of counsel, for leave to file a third amended cross-complaint (TACC) against both Brown and Buoy. (Despite the tentative ruling on Buoy's demurrer to the FACC,

II. DISCUSSION

Smith and Mix Sonoma argue they adequately pleaded causes of action for breach of fiduciary duty and violation of Corporations Code section 25401.⁶ The parties engage in a considerable round of detailed briefing, but as we untangle the pleadings, we find the issue straightforward under demurrer law. A fair reading of the FACC leads us to conclude that Smith and Mix Sonoma have adequately pleaded a cause of action for breach of fiduciary duty under California law—and, as we have noted, even if they failed to explicitly label such a cause of action in the FACC.

“[M]ajority shareholders, either singly or acting in concert to accomplish a joint purpose, have a fiduciary responsibility to the minority and to the corporation to use their

the trial court had yet to file its order sustaining the demurrer without leave to amend (November 4, 2010) or enter judgment of dismissal for Buoy (January 21, 2011).) The proposed TACC realleged the cause of action for negligent misrepresentation against Brown, and added new causes of action against Brown and Buoy for fraud and deceit, alter ego liability, and conspiracy.

Just four days later, on October 12, 2010, Smith and Mix Sonoma filed an amended declaration of counsel and submitted a new version of their proposed TACC. This new pleading contained additional factual allegations, but set forth the same causes of action as the first version of the TACC.

On or about October 22, 2010, Smith and Mix Sonoma submitted a third version of their TACC. This pleading dropped the cause of action of negligent misrepresentation against Brown, but realleged the new causes of action against Brown and Buoy for fraud and deceit, alter ego liability, and conspiracy.

On November 4, 2010, the trial court entered an order sustaining Buoy’s demurrer to the FACC without leave to amend. But the court had yet to enter a judgment of dismissal.

On November 9, 2010, the trial court denied Smith’s and Mix Sonoma’s motion for leave to file a TACC without prejudice.

On November 12, 2010, Smith and Mix Sonoma filed a new motion for leave to file a TACC. On December 22, 2010, the trial court denied the motion to amend.

As noted, Smith and Mix Sonoma appeal from the judgments of dismissal as to Buoy (following his successful demurrer to the FACC) and Brown (following his successful demurrers to the FACC and the SACC). The various versions of the TACC play little meaningful role in this appeal.

⁶ Smith and Mix Sonoma have apparently abandoned any contention regarding their third cause of action against Brown for negligent misrepresentation in the SACC.

ability to control the corporation in a fair, just, and equitable manner. Majority shareholders may not use their power to control corporate activities to benefit themselves alone or in a manner detrimental to the minority. Any use to which they put the corporation or their power to control the corporation must benefit all shareholders proportionately and must not conflict with the proper conduct of the corporation's business. [Citations.]” (*Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 108 (*Jones*.) “[T]he comprehensive rule of good faith and inherent fairness to the minority in any transaction where control of the corporation is material properly governs controlling shareholders in this state.” (*Id.* at p. 112 [fn. omitted].)⁷

The California Supreme Court reaffirmed these principles in *Stephenson v. Drever* (1997) 16 Cal.4th 1167, 1178. The Courts of Appeal have followed suit. (See, e.g., *Jara v. Suprema Meats, Inc.* (2004) 121 Cal.App.4th 1238, 1254–1256; *Smith v. Tele-Communication, Inc.* (1982) 134 Cal.App.3d 338, 345 [breach of fiduciary duty when majority deprives a minority shareholder of a proportionate share of the corporation's value]; *Crain v. Electronic Memories & Magnetics Corp.* (1975) 50 Cal.App.3d 509, 524.)

In our view, Smith and Mix Sonoma have adequately pleaded a breach of fiduciary duty under these authorities. According to the FACC, Buoy and Brown took control of Demeter; ignored its precarious financial situation; failed to raise adequate capital; wasted corporate funds on fruitless trips to Mexico and Brazil; refused to consider the Nicaragua deal which could have made Demeter a successful and profitable venture; failed to give Mix Sonoma the stock it deserved for its \$50,000 investment; and forced Smith from his directorship. These allegations show a breach of fiduciary duty by the majority in control of the corporation, depriving the minority of their potential share in corporate profits.

⁷ For instance, the majority cannot dissolve a corporation except under limited circumstances, because their statutory power of dissolution is subject to “equitable limitations in favor of the minority.” (*Jones, supra*, 1 Cal.3d at p. 110.)

Mix Sonoma also claims it has properly pleaded a cause of action for violation of Corporations Code section 25401. That statute states: “It is unlawful for any person to offer or sell a security in this state or buy or offer to buy a security in this state by means of any written or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.” Corporations Code section 25504 makes officers and directors of a corporation liable for violations of Corporations Code section 25401.

Mix Sonoma alleges that Demeter offered to sell it Series B stock for Mix Sonoma’s investment of \$50,000; that by terminating Smith, Buoy and Brown made it impossible for the Series B financing to occur; and that Mix Sonoma paid Demeter the \$50,000, but did not receive the promised stock. At the demurrer stage of a lawsuit, these allegations on their face are sufficient to state a cause of action under Corporations Code section 25401 for misrepresentation.⁸

Buoy and Brown’s main argument is they did not garner any pecuniary gain because Demeter was broke and its stock worthless. Apart from the fact they are alleged to have been the architects of Demeter’s financial demise, an actionable breach of fiduciary duty does not require pecuniary gain to the majority. “A breach of a fiduciary relationship does not depend upon the certainty of profits and the fact that losses may result instead of profits in no way changes the fact that there was such a breach.” (*Bank of America v. Ryan* (1962) 207 Cal.App.2d 698, 708, fn. 5, 715, fn. 5.) The argument about lack of pecuniary gain is for a later stage and not by way of a demurrer.

III. DISPOSITION

The judgment of dismissal entered January 21, 2011, in favor of Buoy, and the judgment of dismissal entered February 7, 2011, in favor of Brown, are reversed. The

⁸ Buoy and Brown claim there must be an “agreement” as a prerequisite to a cause of action under Corporations Code section 25401. They cite authority that does not support that proposition. And the plain words of the statute specify a cause of action may lie for misrepresentations in an offer to sell securities.

cause is remanded to the trial court with instructions to overrule the demurrers of Buoy and Brown to the FACC, and for further proceedings consistent with this opinion.

Marchiano, P.J.

We concur:

Dondero, J.

Banke, J.