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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

WOOD RIVER CAPITAL RESOURCES,
LLC, et al.,

Plaintiffs and Appellants,

v.

STEWART TITLE GUARANTY
COMPANY,

Defendant and Respondent.

A131736

(J.C.C.P. No. 4579)

(Shasta County
Super. Ct. No. 09-168055)

This appeal arises out of one of a series of related complaints by investors who purchased ownership interests in senior housing facilities. The appellants in this appeal are investors who purchased ownership interests in Wood River Village, a senior housing facility located in Pennsylvania. Appellants claim they were defrauded and sued various parties associated with the transaction, including defendant and respondent Stewart Title Guaranty Company (Stewart). In its role as title insurer, Stewart allegedly performed certain escrow functions in the individual transactions in which appellants purchased their interests. Although Stewart was not a party to the escrow instructions and had no contact with appellants, appellants nonetheless sued Stewart for breach of fiduciary duty, negligence, fraud, and fraudulent nondisclosure. The trial court entered a judgment of dismissal after granting Stewart's demurrer without leave to amend. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Because this appeal is from an order sustaining a demurrer, we take the facts from the operative second amended complaint (hereafter, complaint), the allegations of which are deemed true for the limited purpose of determining whether plaintiffs have stated a viable cause of action. (See *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 885.) We also consider matters that are properly the subject of judicial notice. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591.)

As set forth in the complaint, James Koenig founded Asset & Real Estate Investment Company (AREI), which promoted senior housing and assisted living facilities to potential investors as secure and profitable investment opportunities. AREI was in operation for about 10 years starting in 1997. Before founding AREI, Koenig had been sentenced to serve two years in prison after suffering a conviction for fraud in a gold-selling scam.

Working through AREI and affiliated companies, Koenig would purchase an assisted living facility and market ownership shares in the property as an investment opportunity. As revealed by an investigation pursued by California's Attorney General, AREI was a criminal operation that purchased and operated properties through Ponzi schemes and other types of investor fraud. In June 2008, the California Attorney General raided AREI's offices and shut them down. After identifying more than 1,000 victims of AREI with losses totaling \$200 million, the California Attorney General filed 79 criminal charges against Koenig and others in May 2009.

Wood River Village (Wood River), a senior housing facility located in Pennsylvania, was one of the properties AREI marketed to potential investors. The plaintiffs in the action below (appellants herein) were investors in Wood River. AREI circulated a Private Placement Memorandum (PPM) in November 2004 in which it sought investors to purchase \$8.235 million in tenant-in-common (TIC) interests to purchase the Wood River property. The balance of the purchase price was to be financed by a \$15.7 million loan from defendant CapitalSource Finance, LLC (CapSource). In January 2005, AREI circulated a First Supplement to the PPM in which it represented

that Wood River would be purchased with a maximum of \$12,250,00 in equity and a loan of \$12 million.¹ AREI also circulated an Addendum to the PPM soliciting a maximum of \$12,250,000 in TIC interests and membership interests in Wood River Capital Resources, LLC, a limited liability company that was formed to allow investors to purchase interests in Wood River.

Appellants relied on the PPM to purchase TIC interests in Wood River or membership interests in Wood River Capital Resources, LLC. According to the complaint, the PPM failed to disclose a number of material facts, including the fact that AREI's founder, James Koenig, was a convicted felon.

Appellants entered into a term loan agreement with CapSource in February 2005. At around the same time, defendant Meecorp Capital Markets, LLC (Meecorp) provided an additional \$3.2 million loan to fund the purchase of Wood River and took a preferred equity position in Wood River Capital Resources, LLC. Appellants allege the Meecorp loan was not disclosed to them. There are no allegations the Meecorp loan was secured by Wood River or that it was recorded.

From March through October 2005, AREI and CapSource entered into a series of unauthorized joinder agreements on behalf of subsequent investors in order to make them borrowers under the term loan agreement. The execution of the joinder agreements resulted in the oversubscription of the offering by more than \$3.2 million and the dilution of appellants' ownership interests in Wood River.

According to the complaint, Koenig and AREI failed to service the CapSource loan or maintain the Wood River property. Instead, Koenig embezzled the loan proceeds, investor capital, and revenue from Wood River for his own personal use or to fund other projects. As a result, the CapSource loan went into default and Wood River fell into disrepair.

The PPM contemplated that investors would acquire their interests in Wood River by means of a series of agreements entitled, "Purchase Agreement and Escrow

¹ Unless otherwise indicated, the PPM, the First Supplement, and the Addendum are collectively referred to in this opinion as the PPM.

Instructions” (hereafter, escrow instructions), by and among each appellant, as buyer, Wood River Capital Resources, LLC, as seller, and Placer Title Company (Placer), as escrow agent. Attached to the complaint is a standard set of form escrow instructions that omits the name of the buyer, the purchase price, and the percentage interest in Wood River that the buyer was purchasing. The form escrow instructions designate Placer as escrow agent *and* title company, although seller Wood River Capital Resources, LLC, in its sole discretion, could select any other qualified title insurance company. Under the terms of the escrow instructions, Placer was responsible for performing the title search, preparing and issuing one or more preliminary reports, and issuing title insurance policies. The escrow instructions also required that Placer, as escrow agent, deliver at the close of escrow copies of unrecorded documents received by it to the person or payee acquiring rights under the document.

Notably, the escrow instructions do not mention Stewart. Appellants have not identified any other escrow instructions applicable to the Wood River transaction. The escrow instructions did not expressly contemplate that the named escrow agent, Placer, would prepare deeds for the transactions. Instead, the escrow instructions anticipated that the seller—plaintiff and appellant Wood River Capital Resources, LLC—would “execute, acknowledge (where appropriate) and deposit into Escrow . . . a grant deed . . . in the appropriate form conveying the Interest to Buyer and . . . any other document required by Escrow Agent.” Further, nothing in the escrow instructions explicitly required Placer (or Stewart) to confirm that the deeds conveyed the correct percentage interests in Wood River, to monitor the transaction for compliance with the PPM, or to alert appellants to the possibility of fraud.

Appellants filed suit against Koenig, AREI, CapSource, Meecorp, and numerous other individuals and entities associated with the Wood River transaction, including both Placer and Stewart. Appellants allege that defendants oversold the investment in Wood River and purchased the property with not one, but two loans, including a disclosed \$12 million loan from CapSource and an undisclosed \$3.2 million loan from Meecorp.

Appellants further allege that undisclosed fees were charged at closing without their knowledge and at their expense.

Appellants assert four causes of action against Stewart, including the sixth cause of action for fraud (conspiracy), the tenth cause of action for fraudulent nondisclosure, the eleventh cause of action for breach of fiduciary duty, and the eighteenth cause of action for negligence. Reduced to their essence, the allegations against Stewart are as follows: (1) Stewart assumed fiduciary duties to appellants as a “joint escrow” or “co-escrow” with Placer; and (2) Stewart breached those fiduciary duties by (a) failing to timely deliver copies of one or more preliminary reports and a title policy; and (b) failing to disclose material information to appellants, such as the Meecorp loan, the additional closing fees, Meecorp’s preferred equity position in the Wood River investment, Koenig’s status as a convicted felon, that Wood River was oversold, that appellants’ ownership interests had been diluted, and that material changes had been made to the loan documents and loan terms. The allegations against Stewart hinge upon appellants’ characterization of Stewart as a “joint escrow holder” and fiduciary.

The complaint seeks to cast Stewart as an escrow holder in two ways. First, appellants suggest that Stewart assumed fiduciary duties pursuant to the escrow instructions, alleging that Stewart, “in addition to insuring the title of the Wood River Property, acted through its office in Pennsylvania as a joint escrow company with Placer Title Company pursuant to the Purchase Agreement and Escrow Instructions governing the Wood River purchase.” Bearing in mind that the escrow instructions do not mention Stewart, appellants also allege the escrow instructions “required co-escrow companies Placer Title Company and Stewart Title Guaranty Company to provide the preliminary report and title insurance policy to the Investors.”

Appellants also allege that Stewart assumed the role of “co-escrow” by performing certain escrow functions. According to the complaint: “On information and belief, Stewart Title was responsible for preparing the Wood River deeds. Stewart Title also recorded the mortgage and deeds and used escrowed funds to pay property and transfer taxes in connection with the transaction, and processed documents tendered by the selling

party in Pennsylvania. After recording, the recorder returned the deeds to Stewart Title, who then forwarded them to AREI; Stewart Title was identified as the ‘customer’ for purposes of the recording.” Thus, in essence, appellants contend Stewart became an escrow holder by virtue of processing documents, preparing and recording deeds, and paying property and transfer taxes from its office in Pennsylvania.

Stewart demurred to the complaint on the following grounds, among others: (1) appellants failed to allege the existence of an escrow relationship with Stewart—and the escrow instructions affirmatively disproved the existence of such a relationship; (2) appellants failed to allege Stewart breached the escrow instructions or any fiduciary duty that might have been owed to appellants; (3) appellants failed to allege Stewart owed them any duty of disclosure, even assuming Stewart was an escrow holder; and (4) appellants failed to allege Stewart knew or should have known any of the information it allegedly had a duty to disclose. Stewart sought judicial notice of one set of escrow instructions associated with the purchase of an interest in Wood River by appellant AREI Wood River 2, LLC. The completed set of escrow instructions proffered by Stewart was consistent with the form escrow instructions attached to the complaint, except that the buyer was identified and the purchase price and percentage ownership interest was indicated in the instructions.

In their opposition to the demurrer, appellants reiterated the allegation from their complaint that Stewart prepared the Wood River deeds, although they added a new wrinkle to their claim. Specifically, in addition to claiming Stewart assumed a fiduciary duty to appellants by undertaking to prepare the deeds for the Wood River transaction, appellants argued—for the first time—that Stewart breached that duty by understating appellants’ ownership interests in the deeds it prepared. As support for their claim, appellants pointed out that a First Supplement to the PPM contemplated that investors would pay \$242,500 for each undivided one percent (1%) interest in the Wood River

property.² Appellants sought judicial notice of 20 recorded deeds reflecting that 20 of 29 investors in the Wood River property were deeded a lower percentage ownership interest than that contemplated by the First Supplement to the PPM. For example, in one case, an investor-appellant had an investment (equity plus debt) in the Wood River property totaling \$618,066.35, which should have represented a 2.5487 percent interest in the property based upon a calculation of a one percent ownership interest for each \$242,500 invested. Instead, the deed allegedly prepared by Stewart reflected that the investor-appellant's investment amounted to a 2.4096 percent interest in the property, or 0.1391 percent less than the interest the investor should have received according to the First Supplement to the PPM. Of the 20 investors in Wood River who were allegedly deeded a lower percentage ownership interest than contemplated by the First Supplement to the PPM, the deficiencies ranged from 0.0013 percent to 0.3519 percent, according to appellants. Notably, appellants did not seek judicial notice of the escrow instructions associated with any of the 20 transactions in which the recorded deeds allegedly understated the individual appellant's ownership interest. The only escrow instructions before the court were the form instructions attached to the complaint and a set of instructions proffered by Stewart relating to a transaction that was not among the 20 in which the ownership interest was allegedly understated on the deed.

The trial court sustained Stewart's demurrer without leave to amend and took judicial notice of the set of escrow instructions and the recorded deeds proffered by the parties.³ The court also considered the new allegations set forth in appellants' opposition, including the allegation that the deeds prepared by Stewart reflected ownership percentages lower than those contemplated by the First Supplement to the PPM.

² The original PPM as well as the form escrow instructions attached to the complaint contemplated a one percent ownership interest for each \$239,350 invested.

³ The court also took judicial notice of papers filed in a similar, companion action involving another investment property marketed by AREI in which a different trial court judge had sustained Stewart's demurrer without leave to amend. The ruling in the companion action is the subject of an appeal in A131734, *AREI Colonnade 1, LLC v. Stewart Title Guaranty Co.*

In its order sustaining the demurrer, the trial court concluded that Stewart did not owe any fiduciary duties to appellants because it was not a party to the escrow instructions and was merely acting as a sub-escrow on behalf of the escrow agent, Placer. Even assuming Stewart had a fiduciary duty to appellants, the trial court concluded appellants had failed to allege facts establishing that Stewart had breached its duty, which is generally limited to strict compliance with the escrow instructions. Thus, the court reasoned that the complaint failed to state facts constituting a cause of action for breach of fiduciary duty. The court likewise concluded the complaint failed to state facts supporting causes of action for conspiracy, fraudulent nondisclosure, and negligence. Because it did not appear reasonably probable appellants could amend their complaint to state valid causes of action, the court sustained the demurrers without leave to amend. After the trial court entered a judgment of dismissal as to Stewart, appellants filed a timely appeal.

DISCUSSION

1. *Standard of Review*

On review of an order sustaining a demurrer without leave to amend, we exercise independent judgment in assessing whether the complaint states a cause of action as a matter of law. (*Walgreen Co. v. City and County of San Francisco* (2010) 185 Cal.App.4th 424, 433.) “ ‘ “We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.” [Citation.] ’ ” (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) “We affirm if any ground offered in support of the demurrer was well taken but find error if the plaintiff has stated a cause of action under any possible legal theory. [Citations.] We are not bound by the trial court’s stated reasons, if any, supporting its ruling; we review the ruling, not its rationale. [Citation.]” (*Mendoza v. Town of Ross* (2005) 128 Cal.App.4th 625, 631.) When a demurrer is sustained without leave to amend, we reverse if there is a reasonable possibility an amendment could cure the defect. (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.)

2. Breach of Fiduciary Duty

Appellants assert a cause of action against Stewart for breach of fiduciary duty, alleging that Stewart assumed—and then breached—fiduciary duties to appellants as either a “co-escrow” or “joint escrow” along with Placer, the escrow agent named in the escrow instructions. “The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) the breach of that duty; and (3) damage proximately caused by that breach. [Citation.]” (*Mosier v. Southern California Physicians Ins. Exchange* (1998) 63 Cal.App.4th 1022, 1044.) The absence of any element is fatal to the cause of action. (*LaMonte v. Sanwa Bank California* (1996) 45 Cal.App.4th 509, 517.)

Appellants concede that Stewart was not a party to the escrow instructions. Appellants also concede that they did not have any direct contact with Stewart and did not submit any oral or written escrow instructions to Stewart. Nevertheless, appellants claim it is enough for purposes of the breach of fiduciary duty cause of action to allege that Placer retained Stewart to perform tasks Placer had contracted to perform in the escrow instructions, such as handling documents, payments, and the preparation of the deeds. Appellants argue that Stewart was a “co-escrow in the transaction” by virtue of performing tasks set forth in the escrow instructions.

The trial court concluded that the facts as pleaded allowed an inference that Stewart was acting only as a “sub-escrow” on behalf of Placer, in that Stewart was acting only as directed and instructed by Placer. The court then observed that appellants had failed to present any authority holding that a sub-escrow, as opposed to an escrow agent or escrow holder, owes a fiduciary duty to parties to the escrow instructions. Even assuming Stewart owed a fiduciary duty to appellants, the trial court concluded that appellants failed to allege facts establishing a breach of that duty.

a. Existence of Fiduciary Duty

Our first task is to assess whether the facts as pleaded establish that Stewart owed a fiduciary duty to appellants. It is not helpful to label Stewart a “joint escrow” or a “co-escrow,” because those labels are essentially an attempt to plead in a conclusory fashion

that Stewart owed a fiduciary duty to appellants as an escrow holder. The existence of a fiduciary duty is a question of law. (*David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 890.) “The allegation of a fiduciary relationship must be supported by either a contract, or a relationship that imposes it as a matter of law. [Citation.]” (*Berryman v. Merit Property Management, Inc.* (2007) 152 Cal.App.4th 1544, 1558.) A mere allegation that a party assumed fiduciary duties to another party is a legal conclusion, not a well-pleaded fact. (*Ibid.*) Thus, we will disregard the labels applied by the parties, such as co-escrow, joint escrow, and sub-escrow, and instead focus on whether the facts as pleaded give rise to a fiduciary relationship as a matter of law.

“ ‘An escrow involves the deposit of documents and/or money with a third party to be delivered on the occurrence of some condition.’ [Citations.] An escrow holder is an agent and fiduciary of the parties to the escrow. [Citations.] The agency created by the escrow is limited—limited to the obligation of the escrow holder to carry out the instructions of each of the parties to the escrow. [Citations.]” (*Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705, 711 (*Summit*).)

Under California law, an agent may delegate its powers to a subagent when it is commonplace to designate such powers. (See Civ. Code, § 2349, subd. (3).) To the extent an agent’s powers are lawfully delegated, a subagent “represents the principal in like manner with the original agent.” (Civ. Code, § 2351.) “Because ‘the subagent owes the same duties to the principal as does the agent’ [citation], it follows that the relationship between subagent and principal is a fiduciary one.” (*Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1405.)

Here, the allegations in the complaint support the conclusion that Placer was an escrow holder with fiduciary duties to the parties to the escrow, including appellants. The complaint further establishes that Stewart performed escrow functions otherwise required of the escrow holder, Placer, thus supporting an inference that Stewart was acting as Placer’s subagent. Moreover, insofar as Placer had a limited agency to carry out the escrow instructions, Stewart as a subagent of Placer likewise had a limited obligation to the parties to carry out any escrow instructions it was delegated to perform

by Placer. Thus, the allegations in the complaint arguably support the legal conclusion that Stewart owed a fiduciary duty to appellants to comply with the escrow instructions it was delegated to perform, assuming Stewart was an authorized subagent.

Stewart contends it is improper to rely on general agency principles—including rules applicable to subagents—because escrow holders are dual agents with duties to parties on both sides of a transaction. We agree with the proposition that an escrow does not create a *general* agency, because the interests of the parties to an escrow are conflicting. (See *Blackburn v. McCoy* (1934) 1 Cal.App.2d 648, 654-655.) However, we do not agree that subagency principles are always inapplicable in the escrow context. As noted above, an escrow creates a *limited* agency as to each party to the escrow in which the escrow holder’s agency is restricted to the obligation to carry out the escrow instructions. (*Ibid.*; *Summit, supra*, 27 Cal.4th at p. 711.) Stewart has cited no authority suggesting that a limited agent, such as an escrow holder, cannot lawfully delegate powers to a subagent. The scope of a subagency created by an escrow holder is necessarily limited to carrying out the escrow instructions the escrow holder has lawfully delegated to the subagent.

Stewart also argues that a subagency theory fails because appellants did not allege facts demonstrating that Stewart was an *authorized* subagent. This contention has some merit. An agent cannot lawfully delegate its powers to a subagent unless one or more of the conditions in Civil Code section 2349 is satisfied.⁴ An unauthorized subagent owes no duties to the principal. (See Civ. Code, § 2022 “[a] mere agent of an agent is not responsible as such to the principal of the latter”.) Here, in their opening brief on appeal, appellants contend the subagency was authorized because it is commonplace to designate certain escrow functions to a subagent. (See Civ. Code, § 2349, subd. (3).)

⁴ Civil Code section 2349 provides as follows: “An agent, unless specifically forbidden by his principal to do so, can delegate his powers to another person in any of the following cases, and in no others: [¶] 1. When the act to be done is purely mechanical; [¶] 2. When it is such as the agent cannot himself, and the sub-agent can lawfully perform; [¶] 3. When it is the usage of the place to delegate such powers; or [¶] 4. When such delegation is specially authorized by the principal.”

They contend it “[i]s certainly reasonable and commonplace for Placer, located in California, to employ a title company in Pennsylvania, such as Stewart, to assist with an escrow on property in Pennsylvania.” This allegation, however, does not appear in the complaint. According to Stewart, absent an allegation that it is commonplace for escrow holders to delegate to a subagent the types of escrow functions it performed, Stewart was an unauthorized subagent that owed no duties to appellants as a matter of law.

As a practical matter, appellants could quickly cure the deficiency in their complaint by adding a simple allegation on information and belief that it is commonplace for escrow holders to delegate certain escrow functions to subagents. Further, Stewart effectively concedes the point in its respondent’s brief when it states, “escrow holders routinely delegate rudimentary escrow functions, such as recording documents and paying out funds, to title insurers.” Although appellants’ complaint is technically deficient because it does not plead facts establishing that Stewart’s subagency is authorized, we will assume that appellants could easily overcome this pleading deficiency with a simple amendment. Accordingly, we will proceed to consider the remaining arguments concerning the existence of a fiduciary duty.

Stewart contends that the Supreme Court’s decision in *Summit, supra*, 27 Cal.4th 705, is controlling and establishes that it owed no duty to appellants as a matter of law. We disagree. In *Summit*, the Supreme Court held that an escrow holder does not owe a fiduciary duty to a nonparty to the escrow, even when the escrow holder is aware of the nonparty’s interest in the transaction. (*Summit, supra*, 27 Cal.4th at pp. 712-715.) According to Stewart, because appellants were not parties to any “sub-escrow” between Placer and Stewart, it did not owe any fiduciary duty to appellants.

Stewart’s argument is unpersuasive because it rests on the unsupported factual assumption that Placer established *separate* escrows with Stewart—which it refers to as “sub-escrows”—“for the purpose of preparing and recording deeds, using escrowed funds to pay property and transfer taxes and processing documents tendered by the Seller.” However, the complaint contains no such factual allegation. Instead, appellants allege that Stewart insured title and performed certain escrow functions. The precise nature of

the relationship between Placer and Stewart is unclear. We do not know whether Placer and Stewart had a written agreement governing their relationship, whether they set up a separate escrow with respect to each set of investors, or whether Stewart simply agreed to perform some of the obligations contained in the escrow instructions to which appellants were parties. Although the facts as pleaded may support an inference that Placer set up separate escrows with Stewart, an equally plausible inference is that Stewart acted as Placer's subagent in carrying out the escrow instructions Placer was obligated to perform. Therefore, because we must indulge all inferences in favor of appellants (*Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1238), we cannot assume Placer set up separate escrows with Stewart or that appellants were not parties to any separate escrow involving Placer and Stewart. Thus, *Summit* is inapposite.

Stewart also relies on *Markowitz v. Fidelity National Title Co.* (2006) 142 Cal.App.4th 508 (*Markowitz*), for the proposition that it did not assume fiduciary duties to appellants by virtue of preparing deeds. In *Markowitz*, a bank agreed to extend a line of credit to a homeowner whose home was encumbered by a deed of trust securing a promissory note. To complete the transaction for the line of credit, the bank required that the promissory note be repaid in full and that the existing deed of trust be reconveyed. The bank retained Fidelity National Title Company (Fidelity) "to provide a policy of title insurance" and to "act as a sub-escrow to hold and exchange money and documents." (*Id.* at pp. 512-513.) Fidelity paid the promissory note in full but failed to record the reconveyance of the existing deed of trust. Nevertheless, the new line of credit was made available to the homeowner and a new deed of trust was recorded in the bank's favor. Even though the promissory note had been fully satisfied, the holders of the promissory note subsequently caused a notice of default to be recorded and sought to foreclose on the deed of trust that Fidelity had failed to reconvey. (*Id.* at pp. 514-515.) The homeowner sued Fidelity, alleging that he had sustained damages by having to defend multiple wrongful foreclosure actions as a result of Fidelity's failure to properly reconvey the deed of trust. The homeowner alleged that a fiduciary relationship was formed between

himself and Fidelity because Fidelity had agreed to assume certain duties as sub-escrow. (*Id.* at p. 515.)

The appellate court in *Markowitz* affirmed a nonsuit in favor of Fidelity and against the homeowner. (*Markowitz, supra*, 142 Cal.App.4th at p. 512.) Although the court concluded that an escrow existed, with Fidelity functioning as a sub-escrow holder, the court also concluded that the homeowner was not a party to the separate escrow instructions between the bank and Fidelity. The homeowner did not submit any instructions to Fidelity or have any contact with Fidelity. (*Id.* at p. 526.) The objective of the escrow instructions to which the bank and Fidelity were parties was to complete the refinance transaction, with the intent to serve the bank's interest and secure a policy of title insurance to protect the bank from the existence of defects in title. (*Id.* at p. 527.) Although the homeowner would have benefitted from the performance of the instructions, he was no more than "an incidental beneficiary of the [escrow] instruction[s]" between the bank and Fidelity. Thus, "[t]here were no instructions submitted by [the homeowner], or to which he was a signatory, with which Fidelity was obligated to comply" (*Id.* at p. 528.) Accordingly, Fidelity owed no duty to the homeowner.

The facts of *Markowitz* bear some obvious similarities to the facts alleged here. Among other things, like the homeowner in *Markowitz* who had no contact with the title insurer that acted as a sub-escrow, appellants had no contact with Stewart and did not submit any instructions directly to Stewart. Nevertheless, *Markowitz* is distinguishable. The homeowner in *Markowitz* was not a party to the escrow instructions. Rather, the bank retained Fidelity to act as its escrow holder for purposes of completing the refinance transaction and issuing a policy of title insurance with the bank as beneficiary. The *Markowitz* court held that the duty Fidelity allegedly breached was owed to the bank, not the homeowner. (*Markowitz, supra*, 142 Cal.App.4th at p. 527.) Here, by contrast, appellants were parties to the escrow instructions, which Stewart is alleged to have carried out on Placer's behalf. To the extent Stewart may have failed to comply with escrow instructions delegated to it by Placer, any duty allegedly breached was owed to

the parties to the escrow instructions, including appellants. Further, as mentioned above, there is no allegation that Placer created a series of separate sub-escrows for different investor groups, similar to the separate sub-escrow created by the bank and Fidelity in *Markowitz*.

Appellants and Stewart each cite and attempt to distinguish *Siegel v. Fidelity Nat. Title Ins. Co.* (1996) 46 Cal.App.4th 1181 (*Siegel*). There, the court reversed a judgment in favor of property owners who had sued a title insurance company for providing a preliminary title report that failed to disclose a lien recorded against the property. (*Id.* at pp. 1185, 1196.) The court held the fact the title insurance company agreed with the escrow company to serve as sub-escrow and undertake rudimentary escrow functions, such as paying out funds and recording documents, did not transform it into a “fiduciary of the purchasers for purposes of searching the records or transmitting information regarding title.” (*Id.* at p. 1194.) According to the court, because “the agency and fiduciary responsibilities owed by [the escrow holder] to [the property owners] were limited by the terms of the escrow instructions, the responsibilities of [the title insurance company] acting as sub-escrow were even more limited. [Citation.]” (*Ibid.*) Appellants claim that *Siegel* is distinguishable because in this case Stewart did more than just perform rudimentary escrow functions—they take the position that preparing deeds is more than a rudimentary escrow function. Stewart disputes the significance of *Siegel*, arguing that the case cannot be construed to suggest that anyone who prepares or reviews documents in connection with an escrowed transaction automatically assumes fiduciary duties to the parties to the escrow.

We do not suggest that anyone who prepares or reviews documents associated with an escrowed transaction necessarily has a fiduciary relationship with the parties to the escrow. However, if the person or entity who prepares or reviews documents is an authorized subagent of the escrow holder, who has lawfully delegated the performance of those escrow functions to the subagent, then the subagent owes a limited duty to the

parties to the escrow to carry out the escrow functions lawfully delegated to it.⁵ (See *Mendoza v. Continental Sales Co.*, *supra*, 140 Cal.App.4th at p. 1405.)

This conclusion is consistent with the analysis and outcome in *Siegel*. In *Siegel*, the court did not hold that the title insurance company owed no fiduciary duty to the property owners by virtue of performing certain escrow functions. Rather, it held that any fiduciary responsibilities to the property owners were “even more limited” than those owed by the escrow holder and did not extend to searching records or transmitting information regarding title. (*Siegel*, *supra*, 46 Cal.App.4th at p. 1194.) Thus, the court seemed to accept that the title insurance company may have had some limited duty to the property owners. However, that limited duty did not extend to searching records for the benefit of the property owners. As the evidence in *Siegel* established, the title insurance company was not given a copy of the written escrow instructions but was instead given oral directions by the escrow holder to hold the loan proceeds, pay them at the escrow holder’s command, and ensure the deeds were recorded. (*Id.* at p. 1193.) The title insurance company properly carried out the instructions it was directed to perform.

⁵ Although Stewart acknowledges it is common for title insurance companies to act as sub-escrows by performing certain escrow functions, it also argues that these sub-escrow arrangements “do not transform the title insurer into an escrow holder with fiduciary duties to the parties to the escrow.” The problem with Stewart’s argument is that there is no established and fixed legal definition of the term “sub-escrow,” which appears to encompass various types of functions and relationships. In *Markowitz*, the court described a sub-escrow arrangement in which there was a separate escrow with separate instructions to which the property owner was not a party. (*Markowitz*, *supra*, 142 Cal.App.4th at pp. 526-527.) By contrast, in *Siegel*, the court described an arrangement as a sub-escrow in which the title insurance company simply performed certain rudimentary escrow functions at the direction of the escrow holder, without any indication there was a separate escrow or separate set of instructions. (*Siegel*, *supra*, 46 Cal.App.4th at pp. 1193-1194.) In other words, simply because someone is acting as a “sub-escrow” does not necessarily mean that person owes no duties to the parties to the escrow. Whether the sub-escrow may owe certain limited duties to the parties to the escrow depends upon the structure of the transaction and the actual relationship among the parties. In *Siegel* and *Markowitz*, unlike here, the court had a full trial record from which to make that factual and legal determination.

(*Ibid.*) By doing so it did not become a fiduciary of the property owners for purposes beyond the limited tasks it carried out.

We conclude appellants could, if given the opportunity to add allegations demonstrating that Stewart was an authorized subagent of Placer, allege facts sufficient to establish that Stewart owed at least limited fiduciary responsibilities to appellants as a consequence of performing certain escrow functions as a subagent for Placer.

b. Breach of Fiduciary Duty

In assessing whether Stewart breached fiduciary duties owed to appellants, we begin by recognizing the limitations on the duties an escrow holder owes to the parties to the escrow. “ ‘[A]n escrow holder must comply strictly with the instructions of the parties. [Citations.]’ [Citation.] On the other hand, an escrow holder ‘has no general duty to police the affairs of its depositors’; rather, an escrow holder’s obligations are ‘limited to faithful compliance with [the depositors’] instructions.’ [Citations.] *Absent clear evidence of fraud, an escrow holder’s obligations are limited to compliance with the parties’ instructions.* [Citations.]” (*Summit, supra*, 27 Cal.4th at p. 711, italics added.)

In their opening brief on appeal, appellants’ contention that they adequately alleged a breach of fiduciary duties is focused almost exclusively on the allegation that Stewart failed to properly prepare the deeds. Appellants claim that Stewart “took on the role of preparing deeds” and failed to prepare those deeds consistent with the escrow instructions. More specifically, their contention is that 20 of the 29 investors were deeded a lower percentage ownership interest in the Wood River property than that contemplated by the First Supplement to the PPM, which specified that an investor would receive a one percent interest for each \$242,500 invested. The deficiencies ranged from 0.0013 to 0.3519 percent lower than that contemplated by the First Supplement to the PPM.

As Stewart correctly points out, while the complaint contains an allegation that Stewart prepared the deeds, it does not include an allegation that Stewart prepared any of the deeds incorrectly. Although we are empowered to disregard allegations not contained

in the complaint (*Melikian v. Truck Ins. Exch.* (1955) 133 Cal.App.2d 113, 114), it would be shortsighted to do so under the circumstances presented here. If we were to disregard the allegation, we would simply delay, rather than avoid, a resolution of the issue because appellants could amend their complaint to include the allegation. Further, the allegation has already been presented to and considered by the trial court, albeit not as a properly pleaded allegation in the complaint. Therefore, we will proceed to consider appellants' allegation that Stewart incorrectly prepared the deeds.

The fundamental problem with the allegation is that appellants have failed to identify a single escrow instruction that Stewart is alleged to have breached, bearing in mind that an escrow holder generally “ ‘incurs no liability for failing to do something not required by the terms of the escrow’ ” (*Summit, supra*, 27 Cal.4th at p. 715.) The escrow instructions do not require Placer, the escrow holder—much less Stewart, its purported subagent—to prepare the deeds.

Even assuming Stewart had a duty to prepare the deeds in accordance with the escrow instructions, appellants still have failed to explain which instruction Stewart breached. The escrow instructions state the total amount of the buyer's investment (including both equity and assumed debt) and specify the buyer's “undivided tenant in common interest” as a percentage. The escrow instructions further include in parentheses a formula that purportedly yielded the percentage interest being purchased.⁶ However,

⁶ In the one set of completed escrow instructions provided to the court (as opposed to the blank form of escrow instructions attached to the complaint), the relevant section of the instructions provides as follows: “In consideration of the covenants herein contained, Seller hereby agrees to sell, and Buyer hereby agrees to purchase, a 3.2653% undivided tenant in common interest in the Property (the “Interest”) at a purchase price (“Purchase Price”) equal to \$791,836, of which \$400,000 shall be Cash paid into Escrow and \$391,836 shall be assumption of the Loan on a joint and several basis (based on a total Purchase Price of \$239,350.00, being \$82,350.00 of equity and \$157,000 of assumed debt for each one percent (1%) undivided interest in the Property to be acquired) above.” Notably, the formula contained in the escrow instructions does not correspond with the percentage interest conveyed. If each \$239,350.00 invested purchased a one percent interest, then an investment of \$791,836 would yield an ownership interest of 3.3083 percent, not 3.2653 percent. The actual ownership interest conveyed is based on the

that formula does not appear on the face of the deed. Rather, the deed reflects the total amount of the buyer's investment and the buyer's undivided interest in the property expressed as a percentage. A party charged with preparing the deeds simply had to record the total value of the investment and the percentage ownership interest as reflected in the escrow instructions. The escrow instructions do not require the party preparing the deed to confirm the calculation or to compare the ownership formula in the escrow instructions to the ownership formula reflected in the First Supplement to the PPM. The escrow instructions also do not require the escrow holder to confirm that the transaction complies with the PPM or any other transactional documents. For that matter, there is no indication in the escrow instructions that the escrow holder was even provided with a copy of the PPM, much less that the escrow holder was required to ensure compliance with its terms. Therefore, a general allegation that certain deeds understate the proper ownership percentage as contemplated by the First Supplement to the PPM does not establish that Stewart failed to comply with the escrow instructions.

Appellants further allege in their complaint that Stewart breached a fiduciary duty by failing to provide them with a copy of the preliminary report and a title insurance policy. In their opening brief on appeal, appellants do not address the allegation or challenge the trial court's conclusion that any such requirement "was an express obligation of Placer Title, as set forth in the . . . escrow instructions, and Stewart Title Guaranty was not a party to that document." Because appellants did not raise the issue in their opening brief, they are deemed to have waived it.⁷ (*Tiernan v. Trustees of Cal. State*

formula contained in the First Supplement to the PPM—i.e., a \$242,500 investment represents a one percent ownership interest. Under appellants' view, Stewart would apparently have had an obligation to point out this discrepancy to the parties to the escrow (even though any error favored the buyer). In our view, Stewart had no such duty, absent an instruction requiring it to confirm that the buyer's interest was properly calculated under the formula provided in the instructions.

⁷ In any event, the allegation that Stewart failed to supply a preliminary report and policy of title insurance fails to support a cause of action for breach of fiduciary duty. There is no allegation that a preliminary report or policy of title insurance contained—or should have contained—information that would have alerted appellants to the possibility of a

University & Colleges (1982) 33 Cal.3d 211, 216, fn. 4; *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 761, fn. 4.)

Stewart also supposedly breached a fiduciary duty by failing to disclose (1) the Meecorp loan and associated fees, and (2) the oversubscription of the offering and the corresponding dilution of appellants' ownership interests. Appellants' theory fails as a matter of law. As a limited agent, "an escrow holder 'has no general duty to police the affairs of its depositors' " (*Summit, supra*, 27 Cal.4th at p. 711) or advise them of the business risks or propriety of their transactions. (Cf. *Hannon v. Western Title Ins. Co.* (1989) 211 Cal.App.3d 1122, 1128-1129.) Likewise, an escrow holder has no duty to "go beyond the escrow instructions and to notify each party to the escrow of any suspicious fact or circumstance which has come to his attention before or during the life of the escrow which could conceivably affect such party even though the fact or circumstance is not related to his specific escrow instructions." (*Lee v. Title Ins. & Trust Co.* (1968) 264 Cal.App.2d 160, 162.) An escrow holder's obligation is limited to compliance with the escrow instructions, "[a]bsent clear evidence of fraud." (*Summit, supra*, 27 Cal.4th at p. 711.)

The escrow instructions required the escrow holder to disclose recorded encumbrances and provide the buyer with copies of all recorded documents described in the preliminary report. Because there is no allegation the Meecorp loan was recorded against, or otherwise secured by, the Wood River property, Stewart had no duty to disclose it. Further, appellants have failed to explain how the existence of the Meecorp loan and any associated fees constituted clear evidence of fraud triggering a duty to disclose.

As for the contention that Stewart had a duty to disclose the oversubscription of the offering, the claim fails because it presupposes Stewart had a duty to police the

fraud. It is therefore unclear what injury appellants suffered as a consequence of a purported failure to receive a preliminary report and a title insurance policy. Put another way, the complaint does not support a conclusion that appellants would have declined to purchase an interest in Wood River if they had timely received either a preliminary report or a policy of title insurance.

overall transaction. Appellants contend the “deeds themselves” constitute evidence of a fraud triggering a duty to disclose under *Summit*. We disagree. The deeds themselves establish nothing without copies of the PPM and its addenda and supplements. Stewart had no duty to evaluate the entire transaction for compliance with the PPM and other transactional documents.

Moreover, Stewart had no duty to report information gleaned from successive escrows. “An escrow holder does not have a duty to disclose to a principal of an escrow any information that the escrow holder acquired in another escrow where that principal was not a party.” (3 Miller & Starr, Cal. Real Estate (3d ed. 2012) § 6:13, p. 6-45, fns. omitted.) Thus, Stewart had no duty to monitor a series of separate escrows to ensure that AREI did not convey more than 100 percent of the property or exceed the limits on the offering. In *Lee v. Title Ins. & Trust Co.*, *supra*, 264 Cal.App.2d at p. 163, the court explained why an escrow holder generally has no duty to disclose merely suspicious circumstances to the parties to the escrow: “[U]nder [the appellants’] proposed rule, once an escrow holder received information (from whatever source) he would be forced to decide independently whether to believe the information and disclose it or disbelieve it and conceal his knowledge. If he concealed his knowledge he would risk suit. If he discloses and the information is inaccurate, he may be sued by all parties to the escrow for interfering with their contract. Establishing a rule which would create such a dilemma and subject the escrow holder to a high risk of litigation would damage a valuable business procedure.” (Fn. omitted.)

The circumstances that supposedly triggered a duty to disclose by Stewart do not constitute clear evidence of fraud. At most, the circumstances may be considered suspicious when considered together. Public policy considerations dictate that Stewart had no fiduciary duty to disclose such merely suspicious circumstances. (*Lee v. Title Ins. & Trust Co.*, *supra*, 264 Cal.App.2d at p. 163.)

In sum, appellants have failed to allege that Stewart breached a specific escrow instruction or that there was clear evidence of fraud sufficient to impose a duty of

disclosure upon Stewart. Accordingly, we conclude appellants' breach of fiduciary duty cause of action fails as a matter of law.

3. Negligence

The eighteenth cause of action in the complaint is one for negligence against Stewart and Placer. The allegations supporting the cause of action for negligence are effectively the same as those supporting the breach of fiduciary duty cause of action.⁸

“A complaint in an action for negligence must allege (1) the defendant’s legal duty of care towards the plaintiff, (2) the defendant’s breach of that duty, (3) injury to the plaintiff as a proximate result of the breach, and (4) damage to the plaintiff. [Citation.] A complaint which lacks facts to show that a duty of care was owed is fatally defective. [Citation.]” (*Jones v. Grewe* (1987) 189 Cal.App.3d 950, 954.) “[T]he threshold question in an action for negligence is whether the defendant owed the plaintiff a duty to use care [citation], and the ‘[r]ecognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions is the exception, not the rule, in negligence law’ [citation].” (*Summit, supra*, 27 Cal.4th at p. 715.) “Whether a duty of care exists is a question of law for the court. [Citations.]” (*Jones v. Grewe, supra*, at p. 954.)

Appellant’s negligence cause of action is deficient for the same reason the breach of fiduciary duty claim fails to state a cause of action. Even if Stewart owed a duty of due care to appellants by virtue of undertaking escrow functions, that duty was necessarily limited to the duty an escrow holder owes to the parties to the escrow—i.e.,

⁸ In the negligence cause of action, appellants allege that Stewart and Placer had duties “as co-escrow companies handling the Wood River escrow” to use due care in discharging their obligations. Among other things, appellants contend that Placer and Stewart did or failed to do the following: (1) “failed to notify [appellants] of material changes to their loan and to their title”; (2) did not notify appellants of the additional Meecorp loan, the Meecorp preferred equity position in Wood River Capital Resources, or the additional fees and costs associated with the Meecorp loan; (3) failed to timely provide appellants with either the preliminary report or their title insurance policies; (4) failed to disclose that the Wood River investment was oversold; and (5) failed “to strictly and faithfully perform the [escrow] instructions”

compliance with specific escrow instructions, absent clear evidence of fraud. (See *Summit, supra*, 27 Cal.4th at p. 711.) For us to conclude that Stewart owed a greater duty of due care to appellants under a negligence theory than under a breach of fiduciary duty theory would render meaningless the limitations on the scope of an escrow holder's duties to the parties to the escrow. An escrow holder's fiduciary duties to the parties to the escrow are limited, in part, because the escrow holder is a dual agent that represents parties with competing interests on opposite sides of a transaction. (See *Lee v. Title Ins. & Trust Co., supra*, 264 Cal.App.2d at pp. 162-163.) A party cannot circumvent the limitations on the scope of an escrow holder's duty by pleading a negligence theory instead of a breach of fiduciary duty theory, at least in the absence of facts suggesting that the duties arise from something other than simply a party's status as an escrow holder or the performance of escrow functions.

Appellants' reliance on *Biakanja v. Irving* (1958) 49 Cal.2d 647 (*Biakanja*) is unavailing. There, the Supreme Court set forth factors to balance in determining whether to impose liability for negligence on a defendant who is not in privity of contract with the injured party. (*Id.* at p. 650.) The factors include: "the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm. [Citations.]" (*Ibid.*)

Biakanja and its progeny cannot be read to expand an escrow holder's duty to the parties to the escrow beyond the requirement of complying with specific escrow instructions, absent clear evidence of fraud. In *Summit*, the Supreme Court was faced with a claim that an escrow holder owed a duty of due care to a third party who was allegedly injured by the escrow holder's negligent conduct. (*Summit, supra*, 27 Cal.4th at p. 715.) The court concluded that application of the *Biakanja* test did not justify departing "from 'the general rule that an escrow holder incurs no liability for failing to do something not required by the terms of the escrow or for a loss caused by following the escrow instructions.'" (*Ibid.*) Here, likewise, application of the *Biakanja*

factors does not expand the limited scope of the duty owed by an escrow holder to the parties to the escrow. Although the escrow transaction was intended to affect appellants, Stewart could not have foreseen that the interests conveyed by the deeds it was alleged to have prepared would be inconsistent with appellants' expectations, barring an investigation and detailed analysis that Stewart was not required to perform. Moreover, the connection between Stewart's conduct and appellants' claimed injury is tenuous, at best. Appellants were harmed by AREI, not Stewart. As the court acknowledged in *Summit*, an escrow holder is not morally blameworthy as a result of following the escrow instructions. (*Summit, supra*, 27 Cal.4th at p. 716.) Finally, the policy of preventing future harm does not support imposing a more expansive tort duty upon escrow holders with limited fiduciary obligations to the parties to the escrow—doing so would subject “an escrow holder to conflicting obligations, [and] undermine a valuable business procedure” (*Ibid.*)

Even assuming Stewart owed appellants a limited duty of care, appellants failed to allege Stewart breached that limited duty for the same reason appellants failed to allege a breach of fiduciary duty. As discussed above, there is no allegation that Stewart failed to comply with specific escrow instructions or to inform appellants of facts constituting clear evidence of fraud. Accordingly, as a matter of law, appellants cannot establish a breach of any duty of due care owed to appellants.

4. *Fraudulent Nondisclosure/Concealment*

In their tenth cause of action, appellants allege a cause of action for fraudulent nondisclosure against Placer and Stewart. They assert that Stewart, as a “co-escrow agent[,]” had superior knowledge of material facts neither known by nor readily accessible to appellants. They further contend that Stewart had a duty—by virtue of the fiduciary relationship with appellants—to disclose these material facts, including the existence of the Meecorp loan, Meecorp's preferred equity ownership position, that excessive fees were being paid to Meecorp, that Koenig was a convicted felon, that the investment in Wood River was oversold, that appellants' ownership interest was diluted

by the excess investment, and that material changes had been made to the loan terms and documents.

The elements of fraud are well established: “(1) a misrepresentation, which includes a concealment or nondisclosure; (2) knowledge of the falsity of the misrepresentation, i.e., scienter; (3) intent to induce reliance on the misrepresentation; (4) justifiable reliance; and (5) resulting damages. [Citation.]” (*Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519.) When concealment is the basis for the claim, the plaintiff must establish the defendant had a duty to disclose the concealed fact.⁹ “ ‘In California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations].’ ” (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 184.) Because “[c]oncealment is a species of fraud . . . , [it] must be pleaded with specificity.” (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 878.)

The cause of action for fraudulent nondisclosure or concealment fails at the threshold because there is no viable allegation that Stewart owed a duty to disclose. The purported duty to disclose is based entirely on Stewart’s fiduciary relationship with appellants as a consequence of its role as a “co-escrow.” As previously discussed, an escrow holder has no duty to disclose suspicious facts absent clear evidence of fraud or a

⁹ It is unclear whether appellants intend to state a cause of action for fraudulent nondisclosure, fraudulent concealment, or both. Although their cause of action is nominally one for fraudulent nondisclosure, they rely on case law addressing fraudulent concealment. “The elements of a cause of action for damages for fraud based on mere nondisclosure and involving no confidential relationship” are: “(1) Nondisclosure by the defendant of facts materially affecting the value or desirability of the property; (2) Defendant’s knowledge of such facts and of their being unknown to or beyond the reach of the plaintiff; (3) Defendant’s intention to induce action by the plaintiff; (4) Inducement of the plaintiff to act by reason of the nondisclosure and (5) Resulting damages. [Citations.]” (*Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 738.) A cause of action for fraudulent concealment requires an allegation that the defendant owed a duty to disclose the concealed fact. (*Levine v. Blue Shield of California* (2010) 189 Cal.App.4th 1117, 1126-1127.) Our analysis does not turn on whether appellants intended to state a cause of action for fraudulent nondisclosure or fraudulent concealment. As we explain, under either theory, they have failed to state a viable cause of action.

specific escrow instruction requiring such a disclosure. We have already concluded that any limited fiduciary obligations Stewart owed to appellants did not trigger a duty to disclose under the circumstances described in the complaint. That same conclusion applies with equal force to the fraud claims.

Appellants have also failed to plead the scienter requirement with specificity, i.e., that Stewart had actual knowledge of the facts it was supposedly concealing from appellants. Because appellants do not discuss their contention that Stewart had a duty to disclose Koenig's status as a convicted felon, we will consider that claim abandoned. With regard to the remaining allegations that Stewart concealed or failed to disclose material information—such as the Meecorp loan and fees, the oversubscription of the investment, and the dilution of appellants' ownership interests—the complaint does not contain specific allegations establishing Stewart's knowledge of the concealed facts. Appellants take the position that we can infer the scienter component as a consequence of Stewart's knowledge of the escrow instructions and the overall structure of the Wood River transaction. We are not persuaded.

Even if Stewart did prepare the deeds and comply with certain escrow instructions, there is no allegation that Stewart was given or had access to the PPM and other transactional documents. Therefore, the specific allegations of the complaint do not support an inference that Stewart was aware of the overall structure of the transaction. Further, any alleged errors in the deeds would not automatically give rise to an inference of scienter. The mere preparation of a deed would not alert an escrow holder to the possibility of fraud, particularly in the absence of any opportunity or obligation to evaluate the transaction for compliance with the PPM and other transactional documents.

In essence, appellants' theory presupposes that Stewart (1) received and reviewed copies of the escrow instructions for each successive escrow, (2) scrutinized each individual deed for compliance with the overall structure of the transaction, (3) examined all the deeds, in the aggregate, to determine whether they suggested a suspicious pattern, (4) identified a suspicious pattern and investigated further, (5) evaluated the entire transaction for compliance with the PPM and other transactional documents, and

(6) discovered the Meecorp loan and oversubscription of the offering. Appellants do not even attempt to explain why Stewart would undertake such an extensive investigation, particularly in the absence of any escrow instruction directing Stewart to do so. Further, appellants cannot credibly contend Stewart was faced with clear evidence of fraud when a comprehensive—and entirely nonobligatory—investigation would have been necessary to uncover the alleged fraud.

We conclude appellants have not alleged that Stewart had actual or constructive knowledge of any facts or circumstances constituting clear evidence of fraud and giving rise to a duty to disclose. The cause of action for fraudulent nondisclosure or concealment therefore fails as a matter of law.

5. *Fraud and Conspiracy*

In the sixth cause of action, appellants allege a cause of action for fraud and conspiracy against AREI, Koenig, Meecorp, and over 30 other defendants, including Stewart. Conspiracy is not a separate cause of action, but instead is a doctrine that imposes liability on persons who participate in a conspiracy with tortfeasors. (See *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511.) Appellants concede they have not adequately pleaded that Stewart was involved in a conspiracy with any other defendant to defraud appellants. Nonetheless, appellants contend the trial court erred in sustaining the demurrer to their fraud and conspiracy cause of action because it failed to consider whether appellants stated a cause of action for fraud independent of the conspiracy allegations.

Appellants' argument lacks merit because the cause of action for fraud and conspiracy as it relates to Stewart adds nothing that is not already contained in the cause of action for fraudulent nondisclosure. The cause of action for fraud and conspiracy devotes a single paragraph to Placer and Stewart's allegedly fraudulent actions. The same paragraph is repeated nearly verbatim in the cause of action for fraudulent nondisclosure. Thus, the fraud and conspiracy cause of action provides no basis for imposing liability against Stewart beyond that contained in the fraudulent disclosure cause of action. Because we have already concluded that the cause of action for

fraudulent nondisclosure fails to state a claim against Stewart, we likewise conclude that the cause of action for fraud and conspiracy against Stewart is insufficient as a matter of law.

6. *Leave to Amend*

The remaining question is whether the trial court properly sustained the demurrer without leave to amend. As explained in *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 44 (*Rakestraw*), “[t]he burden of showing that a reasonable possibility exists that amendment can cure the defects remains with the plaintiff; neither the trial court nor this court will rewrite a complaint. [Citation.] Where the appellant offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend. [Citations.]”

Appellants did not submit any proposed amended pleading articulating either their current theory of liability—based on Stewart’s alleged failure to prepare the deeds in accordance with the escrow instructions—or any other theory that might support a cause of action against Stewart. As explained in this opinion, even if appellants amended their complaint to assert a purported failure by Stewart to prepare deeds in accordance with the escrow instructions, the complaint would still fail to state a viable cause of action against Stewart. Further, appellants neglected to “clearly and specifically set forth the ‘applicable substantive law’ [citation] and the legal basis for amendment, i.e., the elements of the cause of action and authority for it.” (*Rakestraw, supra*, 81 Cal.App.4th at p. 43.)

Appellants’ burden is not satisfied simply by asserting an abstract right to amend the complaint. (*Rakestraw, supra*, 81 Cal.App.4th at p. 43.) Nor can they carry their burden by suggesting that discovery might produce some facts capable of supporting a cause of action against Stewart. Because the escrow instructions constitute the full measure of Stewart’s obligation to appellants, there is no reasonable possibility that the

defects in the complaint could be cured by any fact learned in discovery. Accordingly, we discern no abuse of discretion in denying leave to amend.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

McGuiness, P.J.

We concur:

Pollak, J.

Siggins, J.